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Robert Allen Sedler
Wayne State University

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The Collateral Source Rule and Personal Injury Damages: The Irrelevant Principle and the Functional Approach

by ROBERT ALLEN SEDLER*

PART I**

Damages law is often thought of as static and uninteresting. It is part of the "minutiae"¹ that makes up the law of remedies. Notwithstanding that every litigated case involves a potential question of remedies,² most frequently damages, this area of the law plods its way, ignored by the academicians³ and "accepted" by the courts. The "winds of change" sweeping over other areas of law rarely stir the law of damages. There are a few ripples here and there, to be sure,⁴ but no one gets too excited. Our interest stops when questions of liability have been determined.

An exception is damages for personal injuries, perhaps because suits for personal injuries comprise the great majority of litigated cases. But here too, there is little academic interest in the question of damages. The real debate revolves around the suitability of the existing system of fault based on negligence to deal with the problem of automobile accidents and the matter

* Professor of Law, University of Kentucky College of Law, B.A., 1956, J.D., 1959, University of Pittsburgh.

** Editor's Note: In view of the necessarily unusual length of this article, it is being published in two parts. Part II will appear in the next issue of the *Kentucky Law Journal* (Vol. 58, No. 2).

¹ C. WRIGHT, *Preface to CASES ON REMEDIES* (1955).

² See Wright, *The Law of Remedies as a Social Institution*, 17 U. DET. L.J. 376 (1955).

³ It may be significant that the most current text on the subject is C. McCORMICK, *DAMAGES* (1935).

⁴ Professor Harris is trying to create this with respect to seller's damages. See e.g., Harris, *A Radical Restatement of the Law of Seller's Damages*, 34 *FORD. L. REV.* 23 (1965); 18 *STAN. L. REV.* 66 (1965); 61 *MICH. L. REV.* 849 (1963).

of enterprise liability.⁵ The bulk of the writing about damages will be found in the "trade journals" published by the compensation and defense bar. There is a gap between the practitioner's concept of what is important and the academician's, or perhaps the academician's concept of what is interesting.

And so it has been with the venerable collateral source rule, which has received at least some academic commentary.⁶ When the New York Court of Appeals, which had been one of the few courts that refused to give the rule unqualified acceptance, re-affirmed its position in 1962, it appeared that the rule might again be subject to attack. However, any direct attack has fizzled, and the position of the New York court was not followed by other courts when faced with the identical fact situation.⁷ All the while a "silent revolution" has been taking place in the practice. Defense counsel have stopped mounting a direct attack on the rule and have been resorting to a "flanking movement" to get evidence of benefits from a "collateral source" before the jury. As we will see, this evidence may have the same "dynamite potential" as was once attributed to the mention of liability insurance. Today, the number and variety of collateral source benefits are increasing, particularly as regards social insurance. And despite the proposals for statutory solutions to the accident problem, it is likely our present law of tort liability will remain the primary "legal" solution for some time to come.⁸ For these

⁵ See e.g., Blum and Kalven, *Public Law Perspectives on a Private Law Problem—Auto Compensation Plans*, 31 U. CHI. L. REV. 641 (1964); Calabresi, *Fault, Accidents and the Wonderful World of Blum and Kalven*, 75 YALE L.J. 261 (1965); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965); Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959); Keeton and O'Connell, *Basic Protection—A Proposal for Improving Automobile Claims*, 78 HARV. L. REV. 329 (1965).

⁶ Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669 (1962); Schwartz, *The Collateral Source Rule*, 41 B. U. L. REV. 348 (1961). Another study from the academic perspective is West, *The Collateral Source Rule Sans Subrogation: A Plaintiff's Windfall*, 16 OKLA. L. REV. 395 (1963).

⁷ The New York case, to be discussed subsequently, was *Coyne v. Campbell*, 11 N.Y.2d 386, 183 N.E.2d 891 (1962). Cf. *Healy v. Rennert*, 9 N.Y.2d 202, 173 N.E.2d 777 (1961). *Contra*, are *Nelson v. Federal Mogul Service*, 27 Pa. D. & C.2d 222 (1962); *Odde v. Cardi*, 218 A.2d 373 (R.I. 1966).

⁸ However, because of the availability of collateral source benefits, many victims will receive some compensation. As to the adequacy of compensation from "legal" and "non-legal" sources, see e.g., Morris and Paul, *The Financial Impact of Automobile Accidents*, 110 U. PA. L. REV. 913 (1962).

reasons, a further exploration of the collateral source rule may be justified.

THE COLLATERAL SOURCE RULE AND THE SILENT REVOLUTION

The collateral source rule, stated simply, is that the receipt of benefits or mitigation of loss from sources other than the defendant will not operate to diminish the plaintiff's recovery of damages. One way of putting it is that "The defendant will not be permitted to establish that the plaintiff did not actually sustain the amount of injury alleged, if diminution resulted from the conduct of a third person."⁹ It is also possible to analyze the rule as an exception to the principle that benefits to the injured party resulting from the wrongful act are to be credited to the defendant. There is said to be a "judicial refusal to credit to the benefit of the wrongdoer money or services received in reparation of the injury which emanated from sources other than the wrongdoer."¹⁰ If A runs B down with his automobile, but takes him to the hospital and pays the bill, B cannot recover the cost of the hospital bill in a suit for damages against A. Since A paid the bill, he conferred a benefit on B, which is credited against B's judgment. Whereas if C pays B's hospital bills, this does not operate to reduce B's recovery against A, since C is a "collateral source."¹¹ And so this has been the traditional view in the American law of damages.¹² Although the doctrine is occasionally involved in other kinds of cases,¹³ its primary significance is in the personal injury action, and we will discuss it in that context.

The reasons for the rule are not difficult to understand when we consider the social and economic milieu existing at the time that the law of personal injury damages developed. The significant period of development, of course, was the latter part of

⁹ Note, *Unreason in the Law of Damages*, 77 HARV. L. REV. 741 (1964).

¹⁰ Maxwell, *supra* note 6, at 670-71.

¹¹ As we will see, where the government is at the same time the tortfeasor and the payor of the benefit, some courts have seen the government *qua* tortfeasor as A and *qua* payor as C.

¹² See the discussion of the distinction between payments by a tortfeasor and payments by a third party in C. McCORMICK, *supra* note 3, at 324-25.

¹³ Generally regarding insurance proceeds, see the discussion in Maxwell, *supra* note 6, at 672-79.

the nineteenth century, when many suits were brought by victims of the accidents that flowed from the process of industrialization. This was the period when concepts of *laissez faire*, rugged individualism, and private initiative were deeply ingrained in our value structure. People paid their medical bills out of private funds or savings, or a member of the family paid for them. Recovery of such sums from the defendant was justified as recovery for "out-of-pocket" loss, and this phrase was accurate. Those who were unable to pay were treated in the "poor ward" of a hospital or at a "charity" hospital, where such existed. By the same token, a person worked for his wages. When he was injured or disabled, this meant that he lost time from work or was unable to work again, and the concept of recovery for "time lost" or "impairment of future earning opportunity" was realistic. There were no Blue Cross and Blue Shield, health and accident insurance, sick leave, Workmen's Compensation, and other "collateral sources" which would assist the victim or his family in meeting some or all of the loss.¹⁴

So too, it was quite realistic to think of the defendant as a "wrongdoer." He would be held liable only if found to be negligent under the rather strict concepts of negligence that existed at that time, and if the plaintiff was not barred by his own contributory negligence, assumption of risk, the fellow-servant rule, or one of the other liability-limiting devices developed by the courts to protect the new industrial enterprises.¹⁵ Furthermore, liability insurance, as we now know it, was not generally available.¹⁶ This being so, and in light of the prevailing social and economic attitudes of that time, where a benefit was received from a collateral source, it seemed perfectly proper that the plaintiff rather than the wrongdoer should be the beneficiary. It was accurate to say that the donor's intention was to benefit the victim and not the wrongdoer. Poor wards and charity hospitals were society's way of taking care of those who could

¹⁴ For the view that such benefits generally do not meet all the tangible loss in cases of serious injury, see Morris and Paul, *supra* note 8, at 919-20.

¹⁵ The concern of the courts with limiting the liability of the new enterprises is reflected in decisions such as *Beatty v. Central Iowa Ry.*, 58 Iowa 242, 12 N.W. 332 (1882); *Blyth v. Birmingham Waterworks*, [1856] 11 Exch. 781; *Winterbottom v. Wright*, [1842] 10 M. & W. 109, 152 Eng. Rep. 402.

¹⁶ Dean Prosser suggests that liability insurance developed first as a means of indemnifying employers, particularly as to liability under the early Workmen's Compensation acts. W. PROSSER, *TORTS* 563 (3rd ed., 1964).

not pay for medical care, and a wrongdoer should not reap the windfall. If the employer would give the plaintiff his wages despite his incapacity, surely this act of generosity should not result in reduced recovery for the object of the benevolence.¹⁷

Of course, the social and economic setting has changed radically. Liability insurance has long been available not only to enterprises, but to potential individual defendants, so that losses are no longer shifted, but distributed through insurance or in the case of an uninsured enterprise, among the users of the enterprise's product or services. Insurance is also available to potential victims to cover medical expenses, loss of income and the like, and to even make specified payments in case of contingency. Social insurance, which in America usually takes a form analogous to private insurance, has also become more prevalent. Social insurance would include Workmen's Compensation, unemployment compensation, social security, and a variety of other governmental-controlled benefits. Not only does the individual defendant or enterprise not have to bear the loss, but the accident victim himself might receive benefits through private or social insurance.

What is interesting is that the changed economic and social setting did not have any effect on the collateral source rule. Although the rule originated during a much different period of development, the courts have almost uniformly continued to apply it to "benefits" which were unknown at the time of its origin. Whenever a benefit can be classified as "collateral", the trend is to extend the application of the rule so that the receipt of the benefit does not affect tort recovery.¹⁸

We may also consider the method by which recovery for personal injuries is determined. In the United States practically all personal injury actions are tried before a jury. In theory, if the plaintiff proves liability the jury will then award him full recovery for all the damages he has suffered and proved to their satisfaction. The award of damages will not be affected by any doubts as to the defendant's liability. If the jury finds that the defendant is not liable, it will award the plaintiff nothing, no

¹⁷ *Contra*, Drinkwater v. Dinsmore, 80 N.Y. 390 (1880).

¹⁸ The change in "systems of reparation" is effectively summarized in CONRAD, MORGAN, PRATT, VOLTZ and BOMBAUGH, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS*, ch. 1 (1964).

matter how much damage it finds that he has suffered. It will consider each category of damages: so much for medical expenses, past and future; so much for time lost from work prior to the accident; so much for impairment of future earning capacity; so much for pain and suffering.¹⁹ The final verdict represents the sum total of these components.

Of course, we all know that this is not what happens, and perhaps this is not what we want to happen. In most states the jury returns a general verdict in which it resolves liability *and* damages, and if it finds liability, it assesses damages in a lump sum. If we expect the jury to perform as it is supposed to do in theory, it may be asked why the jury does not first hear all the evidence relating to liability, render a decision, and then hear the evidence relating to damages.²⁰ So too, it may be asked why the jury is not required to itemize its verdict, indicating how much it awarded for each item of damage claimed. Every trial lawyer knows that the jury does *not* separate the question of damages from the question of liability and that the more appealing the case from the standpoint of damages, the more likely the jury is to award some recovery. The tendency of the jury to apply a "rough and ready" standard of comparative negligence in cases it feels are appropriate is equally notorious. The fact that the jury usually does pass on the plaintiff's contributory negligence—and we may note the tendency of courts to leave the question to the jury²¹—enables us to avoid making a decision as to the desirability of a comparative negligence approach.²² The judge solemnly instructs that the plaintiff's contributory negligence is to be a complete bar, and we then rely on the jury as the "conscience of the community" to decide whether it should be so in the particular case.

Furthermore, if Professor Kalven and his colleagues in the jury study project are correct,²³ the jury does not compute dam-

¹⁹ Here, of course, no problem of collateral source benefits is presented.

²⁰ Some states have now adopted the "split-verdict" procedure in criminal cases where the jury is to assess the penalty. *See e.g.*, CAL. PEN. CODE § 190.1 (West 1959).

²¹ See the discussion in W. PROSSER, *supra* note 16, at 430, 444.

²² To the extent that courts are extending the "last clear chance" doctrine, the opportunity for the jury to apply its version of comparative negligence is increased.

²³ Three volumes have appeared to date, but the one on the civil jury has
(Continued on next page)

ages by ascertaining a series of component sums. Instead it takes a "gestalt approach," putting a price tag on the particular injury. The person who lost both legs, but made a rapid recovery and returned to work with two artificial legs, incurring only a few thousand dollars in "specials," will, nonetheless, receive a substantial verdict.²⁴ The jury may conceive of this as involving pain and suffering,²⁵ but it is equally probable that they are awarding damages for the "loss of humanity," and it is doubtful if the final amount would be much different if the plaintiff's "specials" were substantial.²⁶ So too, the jury will award substantial damages for the death of "non-productive" persons such as retired people and young children;²⁷ the study indicated that many jurors feel that any human life must be worth at least \$5000.²⁸

It is not only the institution of the jury that impels me to call our system of awarding damages for personal injuries "crude and inefficient." There is little difficulty measuring past medical expenses or loss of wages where the plaintiff is a wage-earner, and such damages are often stipulated. But the court, as well as the jury, will have much more trouble in trying to estimate

(Footnote continued from preceding page)

not. The references to the findings of the jury study project are to Kalven, *The Jury, the Law and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158 (1958).

²⁴ This is the case of *McNulty v. Southern Pacific Co.*, 96 Cal. App. 2d 841, 216 P.2d 543 (1950).

²⁵ M. BELL, *THE MORE ADEQUATE AWARD* 24 (1952).

²⁶ See the discussion in Kalven, *supra* note 23, at 170. However, I would think that where the tangible loss was more significant and the injury was not such that the tangible loss would be "swallowed up" in the loss of humanity, the size of the verdict would be affected by the evidence of tangible loss. This factor becomes significant when we consider the kind of data the jury can "absorb".

²⁷ I do not include housewives in this category, for it is now recognized that damages for the loss of services or wrongful death of a married woman can be "quantified". See Lambert, *How Much Is a Good Wife Worth*, 41 B. U. L. REV. 328 (1961). Courts will sometimes strain to uphold the jury's verdict in the case of non-productive persons. See *e.g.*, *Durkeep v. Mishler*, 233 Ore. 243, 378 P.2d 267 (1963) (in action for wrongful death of 77 year old retiree, jury could consider the value of his services in caring for the wife through maintenance of the home). This does not always happen. See *e.g.*, *Herbertson v. Russell*, 150 Colo. 110, 371 P.2d 422 (1962) (verdict of \$25,000 for death of six year old girl was excessive, where family had little annual income, there were nine surviving children, and the four oldest girls had married in their teens, contributing little, if anything, to the parents' support). For an attempt to "quantify" damages for the wrongful death of a child, see *Wycko v. Gnodtke*, 361 Mich. 331, 105 N.W.2d 118 (1960). Some courts are now coming around to realizing that what is really involved is the loss of society and companionship and are instructing the jury to award damages on that basis. See *Currie v. Fitting* 375 Mich. 440, 134 N.E.2d 611 (1965); *Lockhart v. Besel*, 71 Wash.2d 112, 426 P.2d 605 (1967).

²⁸ Kalven, *supra* note 23, at 162.

future medical expenses or the value of the lost time of a plaintiff who was unemployed²⁹ or who was self-employed in an enterprise involving capital investment.³⁰ A determination of impairment of future earning capacity is even more complicated. This involves predictions as to whether the injury will worsen, what kind of work the plaintiff can do, what kind of work will be available, and the like, plus a guess as to his life expectancy. And I have not even mentioned the damages for pain and suffering. When the presence of the jury is added to all this, the picture is even more complex. Do we permit the lay jury to have access to mortality and annuity tables?³¹ Will they be permitted to consider tax aspects and the inflationary spiral?³² Can they accurately reduce recovery of loss of future earnings and the award in a death case to present worth? And, as we have pointed out, they do not separate the issue of liability from the issue of damages, and probably do not divide the award into its component parts. However, while the system is "more crude and inefficient" because of the jury, it must be remembered that the very method of measuring loss is in no sense scientific. The plaintiff must recover all damages, past and prospective, in a single action, and we are making no more than a guess—only to some extent, an educated guess—as to what they are.

It is in the context of this system that we will be considering the collateral source rule. This needs a word of explanation. Because of the prevalence of collateral source benefits, it is unrealistic to think of tort liability as the only way of shifting or redistributing the loss resulting from accidents. In fact, surveys have concluded that close to half of the compensation received by accident victims comes from sources other than tort liability settlements or judgments.³³ Professor Fleming has proposed that the collateral source rule be reconsidered from

²⁹ See e.g., *Smith v. Triplett*, 83 S.W.2d 1104 (Tex. Civ. App. 1935).

³⁰ See e.g., *Dempsey v. City of Scranton*, 264 Pa. 495, 107 A. 877 (1919).

³¹ See e.g., *Littman v. Bell Telephone Co. of Pa.*, 315 Pa. 370, 172 A. 687 (1934).

³² Compare *McWeeney v. N.Y., N.H. & H Ry. Co.*, 282 F.2d 34 (2d Cir. 1960), with *Floyd v. Fruit Industries*, 144 Conn. 659, 136 A.2d 918 (1957). See also *Hall v. Chicago & N.W. Ry. Co.*, 5 Ill.2d 135, 125 N.E.2d 77 (1955).

³³ See the discussion in Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478, 1481-82 (1966). The most comprehensive study is CONRAD, MORGAN, PRATT, VULTZ, and BOMBAUGH, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS* (1964).

this perspective.³⁴ Rather than permit the victim to "cumulate benefits," it would be decided whether accident losses generally or a particular loss should be absorbed by the tortfeasor or a collateral source, that is, whether the loss would be dealt with by tort law or by private or social insurance.³⁵ He concludes: "It may be that tort liability will become only an excess or a guarantee liability, its function being merely to allot responsibility for compensation to a person (labelled tortfeasor) to the extent that the cost of compensation has not been met by another source."³⁶

Professor Fleming makes his point very persuasively. Clearly tort liability is no longer the sole point of reference in determining how particular accident losses should be absorbed. However, I do not think—nor do I think that Professor Fleming is advocating—that an attempt at a different method of loss allocation should be made within the framework of the present system. We should not be thinking of how to reallocate loss until we have dealt with the more fundamental question of providing adequate compensation to victims of accidents in all cases. This we do not now do. Our present system is based on what has been called vertical splitting, under which "deserving victims" obtain full recovery and "undeserving victims" obtain nothing (unless from a collateral source); this is considered superior to horizontal splitting, under which all victims, "deserving" and "undeserving" obtain something.³⁷ So long as the present system is retained, I question the utility of dealing with the secondary question of loss reallocation.

Moreover, it seems to me that any attempt at comprehensive reallocation,³⁸ under our present system of loss-allocation, which

³⁴ Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478, 1481-82 (1966).

³⁵ He lists the following criteria as significant: (1) the reprehensiveness of the defendant's conduct; (2) the desirability of attributing the cost to the loss-causing enterprise for reasons of accident-prevention, proper cost allocation, etc.; and (3) the function and the economic base of the particular collateral compensation regime. *Id.* at 1546.

³⁶ *Id.* at 1549.

³⁷ Blum and Kalven, *supra* note 5, at 672.

³⁸ This could be accomplished in the following ways: conferring on the collateral source a right to indemnification, by either subrogation, assignment or an independent claim against the tortfeasor; requiring the beneficiary to return the benefit to the collateral source; in the case of continuing benefits, such as periodic payments, by terminating the benefits after tort damages are recovered. Fleming, *supra* note 33, at 1485. We will to some extent discuss loss reallocation in connection with social insurance.

so far as the legal system is concerned is based on tort recovery, requires the kind of empirical data that cannot be developed in the context of litigation. A most important question, for example, is whether it is worth the cost to redistribute a loss once placed in efficient channels of distribution.³⁹ The answer may depend on the sources involved: perhaps there may be a sufficient number of accident victims obtaining medical care at a Veterans Administration Hospital so that the Veterans Administration would wish to recover the cost from the tortfeasor, but there may be so few people receiving Social Security disability pensions due to accidents in which there is third party liability that the Social Security Administration is not interested in indemnification from the tortfeasor. Obviously, these kinds of decisions cannot be made by courts in the context of deciding a litigated case. It is only when we have addressed ourselves to the primary question of comprehensive compensation for the accident victim that we should consider comprehensive re-allocation of losses between tortfeasors and collateral sources.

My guess is that the present system of vertical rather than horizontal splitting will remain with us for some time.⁴⁰ So far as the law is concerned, the primary source of loss-shifting in accident cases will be the enterprise or insured individual held responsible for the harm under the fault principle. We will continue to award all damages in a single action, and practically all cases of consequence will be tried before juries. Therefore, the question with which we will be concerned is the extent to which damages recoverable from the person held responsible under tort law are affected by the plaintiff's receipt of benefits from a collateral source.

We may now consider the "silent revolution" that is taking place with respect to the collateral source rule. We have said that at the time the rule was formulated, it reflected society's attitude toward the receipt of collateral source benefits. Since the defendant was truly a "wrongdoer", and since there was an

³⁹ See the discussion of the "condition of desirable equilibrium" in James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U. L. REV. 537, 557 (1952). We will be alluding to the "condition of equilibrium" in a number of contexts, particularly as regards subrogation.

⁴⁰ This is because neither plaintiff or defense advocates desire any change in the present system. Liability insurance companies are opposed to change, and there is no "pressure group" representing automobile accident victims.

intention to benefit the plaintiff or the class of people to which he belonged, it made perfect sense to say that the plaintiff rather than the defendant should get whatever "windfall" resulted. It makes no sense today, where our concepts of "wrongdoer" and "benefit" have changed appreciably. The ordinary tort defendant is not a moral wrongdoer. It may be an enterprise held liable for manufacturing or distributing a defective product. Its "fault" is in turning out the defective product,⁴¹ and the basis of liability is really that it is an efficient loss distributor. Most likely the defendant will be the driver of an automobile, who is perhaps a morally blameless, accident prone person,⁴² but who has been found to be "negligent," whatever that means as applied to an automobile accident. And his liability will be met by insurance. The "benefits" the plaintiff has received are not likely to be considered a "gift" from a generous soul or a society concerned for needy victims.⁴³ Unless a more satisfactory explanation can be given than "the donor did not intend to benefit the wrongdoer," the jury cannot understand why the plaintiff should recover for medical expenses he never incurred, or for lost earnings when he received the same money he would have received if he had not been injured. As Professor Kalven put it, "Their plaintiff sympathy does not extend to compensating the plaintiff for a loss which some other source has already made good."⁴⁴

Moreover, the study suggests that the jury may have a broader concept of "collateral benefits" as operating to diminish recovery. For example, where the plaintiff was injured while a passenger in his employer's automobile, the jury may assume that somehow the employer will take care of him, and this will affect the size of the verdict. Likewise the jury may assume that adult children will take care of an injured parent.⁴⁵ If this is so, it is clear that they will be most reluctant to award compensation where the loss has already been met from a collateral source. It is said that "the average man finds the plaintiff a more unconscionable beneficiary of windfalls than the de-

⁴¹ For the view that it is "fault", see Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077, 1087-92 (1965).

⁴² See F. HARPER and F. JAMES, 2 THE LAW OF TORTS § 11.4 (1956).

⁴³ See Reich, *The New Property*, 73 YALE L.J. 728, 742-46 (1964).

⁴⁴ Kalven, *supra* note 23, at 169.

⁴⁵ *Id.*

fendant."⁴⁶ I am not sure that the jury treats the question as one of windfall. Rather the jury wants to compensate the plaintiff fully, but does not believe that a person should take advantage of an accident to "come out ahead." It feels that it is adequately compensating the plaintiff by giving him what it thinks he lost and resents what appears to be an attempt to recover twice for a single loss. It seems clear enough that were the jury advised of the receipt of collateral source benefits, it would reduce recovery by that amount.

This, however, is only half of the picture. *The fact that the plaintiff has received benefits from a collateral source may cause the jury to return a verdict for the defendant on the issue of liability as well.* We have come to realize that the presence of insurance or the obvious financial responsibility of the defendant enterprise does not necessarily mean that the jury will return a verdict for the plaintiff. The jury in the particular case may try to follow the judge's instructions to the letter or may be willing to depart from them only within certain limits. If it concludes that the defendant in an automobile accident case was not at fault, it may return a verdict in his favor, although it knows that the judgment will be paid by his insurer. They are likely to be attuned to the "increased insurance rate" argument, and further, they may be unwilling to jeopardize the defendant's chances of keeping his insurance, assuming they are also attuned to the restrictive underwriting practices of liability insurance companies. The significance of the defendant's financial responsibility or insurance may be relevant only in cases of doubt, that is, if the jury is in doubt as to liability, it may resolve the doubts in favor of the plaintiff rather than the financially responsible defendant or the insurance fund.⁴⁷ It is for this reason that the controversy over the existence of insurance may now be academic.⁴⁸

By the same token, where the plaintiff has received benefits from a collateral source, the jury may conclude that doubts as

⁴⁶ Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741, 749 (1964). To the same effect *see*, Peckinpugh, *An Analysis of the Collateral Source Rule*, 1966 INS. L.J. 545, 551.

⁴⁷ See the discussion of this point in Kalven, *supra* note 23, at 171.

⁴⁸ See the discussion in W. PROSSER, *supra* note 16, at 570-71. For a case holding that the mention of liability insurance did not amount to prejudicial error, see *Waid v. Bergschneider*, 94 Ariz. 21, 381 P.2d 568 (1963).

to liability should be resolved in favor of the defendant. The plaintiff will not really be uncompensated, and this may seem a satisfactory compromise to the jury. Defense counsel, at least, is persuaded that evidence of collateral source benefits may tip the scales in their favor, and this is the import of the "silent resolution."⁴⁹ It is not necessary from their standpoint that the courts abolish the collateral source rule, so long as evidence that the plaintiff has received collateral source benefits gets before the jury. Thus, defense attorneys are trying to accomplish the same result with respect to collateral source benefits that plaintiffs attorneys have tried to accomplish with respect to insurance: to get such evidence before the jury by indirection, contending that it is relevant for other purposes such as impeachment. Their hope is that the introduction of such evidence will cause the jury to resolve doubtful issues of liability and damages in the defendant's favor. In cases where they succeeded in introducing such evidence at trial, the result was effective; so effective that most appellate courts which have passed on the question have concluded that such evidence, like evidence that the defendant is insured, necessarily amounts to prejudicial error.⁵⁰ The battleground between plaintiff's counsel and defense counsel is not over whether receipt of benefits from a collateral source should reduce recovery, but over whether the defense may introduce such evidence for a "subsidiary purpose."⁵¹ Let us now consider some of the cases where such evidence was introduced.

In my opinion, the clearest example of a case where evidence of collateral source benefits caused the jury to resolve the liability issue in favor of the defendant is *Stanziale v. Musick*.⁵² The plaintiff was a passenger, along with some other women, in an automobile which collided with the defendant's automobile. The collision appeared to be slight, and the other women said, in response to the defendant's inquiry after the accident, that

⁴⁹ For a warning to plaintiff's counsel on this point, see Lambert, *The Case for The Collateral Source Rule*, 1966 Ins. L.J. 530, 540-42.

⁵⁰ But note the trend toward treating the existence of liability insurance as immaterial. If the jury assumes that the defendant is insured, but would not necessarily assume that the plaintiff has received collateral source benefits, it could well be that the introduction of evidence of liability insurance would amount to harmless error while the introduction of evidence of collateral source benefits would amount to prejudicial error.

⁵¹ See note 49, *supra*.

⁵² 370 S.W.2d 261 (Mo. 1963).

they "weren't hurt." The plaintiff did not reply. She then asked the defendant for his name and address "because one of the women was pregnant." Later the plaintiff sued to recover damages for "back trouble," which she claimed resulted from the accident. There was conflicting evidence on whether she suffered any injury. And the evidence on the issue of liability was also conflicting. The defendant sought to introduce evidence that the plaintiff, who was working, had accumulated four months sick leave, all of which she took after the accident. Defendant also contended the plaintiff claimed "back trouble" for the purpose of using up her sick leave. The court permitted the defendant to introduce the evidence, and the jury returned a verdict for the defendant. On appeal, the judgment was affirmed, the court holding that the evidence "bore on the plaintiff's credibility and was relevant on the issue of whether the accident was the cause of her claimed disability." The appellate court also referred to the "peculiar circumstances of the case," as justifying a departure from the rule that evidence of benefits from a collateral source was not admissible. The defendant had succeeded in his "flanking movement," and the result was a verdict in his favor.

It is not difficult to conceive of the sick leave benefits influencing the jury to find in favor of the defendant. The case was contested both on the grounds of liability and on the existence of any harm. A claim of back injury and nothing more results in minimal jury sympathy; this is not the case of the "battered plaintiff." The fact that the plaintiff alone claimed some injury and that she insisted on getting the defendant's name and address might cause the jury to suspect her of being "litigation-minded." At this point the jury is probably ready to find for the defendant. But then they might ask, "What if she is telling the truth; what if she really was injured?" Now the fact that she received four months of sick leave becomes very significant. The jurors do not have to wrestle with their consciences. As a result of the accident she received a four month vacation with pay, so even if she was injured, she "got something." There is no need for the jury to give her any more, and they may, with a clear conscience, return a verdict for the defendant. The evidence of benefits from a collateral source

may have tipped the scales and caused the jury to resolve considerable doubts in favor of the defendant. The decision permitting the defendant to introduce the evidence also seems correct. There was a genuine dispute as to whether the plaintiff suffered any injury at all, and the availability of sick leave was most relevant on this point. But the evidence may well have affected the jury's decision on the issue of liability, and this case demonstrates why defense counsel are so anxious to get this evidence before the jury.

Another case where evidence of the receipt of collateral benefits may have influenced the jury's decision on the question of liability is *Tipton v. Socony Mobil Oil Company*.⁵³ In a suit under the Jones Act,⁵⁴ an issue was raised as to whether the plaintiff was a "seaman" and therefore entitled to maintain the action. The defendant was permitted to introduce evidence that the plaintiff received compensation under the Longshoremen and Harbor Workers Compensation Act,⁵⁵ which is inapplicable to "seamen" covered by the Jones Act. Throughout the trial counsel for the defendant emphasized this fact, arguing that the plaintiff did not think he was a "seaman" within the meaning of the statute. The jury returned a finding that the plaintiff was not a "seaman" and rendered a verdict for the defendant. It is difficult to see how the question of whether the plaintiff thought he was a "seaman" had anything to do with whether he, in fact, was covered by the statute. The Court of Appeals held that the admission of the evidence was error, but treated it as "harmless error," saying that it could only prejudice the issue of damages and not of liability. Since the jury did not find liability, the evidence could not have been prejudicial. The Supreme Court reversed on the ground that the jury was led to place undue emphasis on the fact that the plaintiff obtained benefits under the Longshoremen and Harbor Workers Compensation Act, and that this had nothing to do with whether he was a "seaman" within the meaning of the Jones Act. Perhaps the jury was influenced by the plaintiff's views as to his status.

⁵³ 375 U.S. 34 (1963).

⁵⁴ 37 Stat. 1158 (1915), as amended, 46 U.S.C. § 680 (1964).

⁵⁵ 44 Stat. 1424 (1927), as amended, 33 U.S.C. §§ 901-950 (1964).

What is equally probable is that the jury was reluctant to award what it thought was double compensation, or at least, if it had doubt about the plaintiff's status, it would resolve that issue against him, knowing that he had already received some compensation. The dangerous impact that such evidence could have was expressly recognized by the Supreme Court, and since the evidence could have slight relevance, if at all, its admission was held to be reversible error.

The efforts of defense counsel to introduce such evidence before the jury have been most ingenious. One line of attack has been to introduce the evidence of collateral benefits ostensibly for the purpose of showing "malingering," that is, because he has received benefits, the plaintiff does not return to work when he is able to do so. The argument is that if the plaintiff has failed to work when able, he has not mitigated damages, and, therefore, he cannot recover for the lost time.⁵⁶ In the same vein it is said that the evidence is relevant to show the absence of permanent injury; the plaintiff has claimed an injury in order to obtain the benefits. In *Eichel v. New York Central Railroad Company*,⁵⁷ an injured railroad employee sued his employer under the Federal Employer's Liability Act.⁵⁸ The railroad sought to show that the plaintiff was receiving disability pension payments under the Railroad Retirement Act.⁵⁹ It was contended that the evidence was relevant to impeach the testimony of the plaintiff as to the permanency and seriousness of his injury, *i.e.*, he was making his injury out to be worse than it was in order to collect the disability pension. The evidence was excluded in the trial court, and the jury returned a verdict of \$51,000. The Court of Appeals reversed on the issue of damages, holding that the evidence of the receipt of the disability pension should have been admitted. The Supreme Court, in turn, reversed the Court of Appeals, stating emphatically that

⁵⁶ Failure to mitigate damages by not accepting employment arises more frequently in cases of breach of employment contracts. *See e.g.*, *Schisler v. Perfection Milker Co.*, 193 Minn. 160, 258 N.W. 17 (1934). However, it would be equally relevant where the plaintiff was trying to recover for the value of his lost time.

⁵⁷ 375 U.S. 253 (1963).

⁵⁸ 35 Stat. 65 (1909), *as amended*, 45 U.S.C. §§ 51-60 (1964).

⁵⁹ 49 Stat. 967 (1935), *as amended*, 45 U.S.C. § 228b(2)4 (1964).

under no circumstances was evidence of disability payments under the Railroad Retirement Act admissible in a FELA case.⁶⁰

In our view the likelihood of misuse by the jury clearly outweighs the value of this evidence. Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of a disability pension. . . . We have recently had occasion to be reminded that evidence of a collateral benefit is readily subject to misuse by a jury [citing *Tipton v. Socony Mobil Oil Company*]. It has long been recognized that evidence showing that the defendant is insured creates a substantial likelihood of misuse. Similarly we must recognize that the petitioner's receipt of collateral social insurance benefits involves a substantial likelihood of prejudicial impact . . .⁶¹

The reference to "evidence of more probative value" demonstrates that the court is aware that the defendant's purpose in introducing the evidence of collateral source benefits is not to prove malingering, but to influence the jury on the issue of liability. The analogy to insurance buttresses this conclusion.

Other courts have also emphasized that the defendant's real purpose in introducing the evidence is not to show malingering. For this reason evidence that the plaintiff's medical expenses were paid by an indemnity insurer⁶² or that he received unemployment compensation⁶³ has been held inadmissible despite the contention that this would show a disposition to malingering. Massachusetts,⁶⁴ however, has held that evidence of income from a collateral source, e.g., sick leave, was admissible to show that

⁶⁰ Justice Harlan took the position that whether to admit such evidence should be within the trial judge's discretion. Since the trial judge disallowed it, he favored reversal in the particular case, but disagreed with the majority's conclusion that the evidence should necessarily be excluded.

⁶¹ 375 U.S. at 255.

⁶² *Vest v. Gay*, 275 Ala. 286, 154 So.2d 297 (1963).

⁶³ *Lobalzo v. Varoli*, 409 Pa. 15, 185 A.2d 557 (1962). In that case the jury returned a finding that the plaintiff was contributorily negligent, and the court concluded that it could have been strongly influenced by this evidence. It cited an earlier case, *Lengle v. North Lebanon Township*, 274 Pa. 51, 117 A. 403 (1922), where the introduction of evidence to the effect that the beneficiaries in a wrongful death action had received some compensation was held to be reversible error. The court in that case observed that "No further suggestion was necessary to convince the jury that the township should not be asked to pay more to the children."

⁶⁴ *McElwain v. Capotosto*, 332 Mass. 1, 122 N.E.2d 901 (1954).

the alleged disability was not the reason that the plaintiff was not working, and a federal court thought itself bound by that case to allow evidence of receipt of income from collateral sources to be admitted on the issue of disability.⁶⁵

Another approach has been to try to introduce evidence of the receipts of pensions or the like as showing an inducement for the plaintiff to retire from his employment. In *Kainer v. Walker*,⁶⁶ where the plaintiff claimed that he was forced to retire because of the accident, the defendant sought to introduce evidence of the fact that the plaintiff was receiving a veteran's disability pension. The contention was that the evidence was relevant to show the plaintiff might have chosen to retire even if he had not been injured. The court stated that evidence of the receipt of benefits from a collateral source should be excluded "unless clearly relevant and with substantial probative value." Since the pension was some \$60 per month and the plaintiff had been earning \$7000 per year, the evidence would have had little, if any, probative value. Obviously the defendant was trying to influence the jury to find in his favor, or at least to reduce the award,⁶⁷ and the court was not deceived. On the other hand, in *Murray v. New York, N.H. & Hartford Railroad Company*,⁶⁸ the court stated that evidence of pension rights was relevant to determine probable loss of future earnings, since the availability of a pension could affect the age at which the plaintiff might decide to retire. In that case the defendant failed to introduce any evidence of what the plaintiff's rights were, so the defendant's requested instruction that the jury take pension rights into account was properly refused. Nonetheless, the fact remains that the jury's determination as to probable loss of future earnings—a difficult process at best—could not help but be influenced by the fact that the plaintiff could retire on a pension before reaching normal retirement age, *i.e.*, 65.⁶⁹ The question is still whether the prejudicial effect of such evidence under

⁶⁵ *Thompson v. Kawasaki Kisen*, 348 F.2d 879 (1st Cir. 1965).

⁶⁶ 377 S.W.2d 613 (Tex. 1964).

⁶⁷ The plaintiff in that case persuaded the court that the evidence should be heard in the absence of the jury because of the prejudicial effect it might have. The court heard the evidence and ruled it inadmissible.

⁶⁸ 255 F.2d 42 (2d Cir. 1958).

⁶⁹ We are assuming that in most cases the jury awards damages for loss of future earning opportunity up to the time the plaintiff would reach the age of 65, since that is when most people retire.

the present collateral source rule is such that it should be excluded, and as we will see, the tendency is to exclude it.⁷⁰

Yet another device to get evidence of Workmen's Compensation benefits before the jury was tried in *Mangan v. Broderick and Bascom Rope Company*.⁷¹ The defendant was able to get the evidence before the jury, which returned a verdict in its favor, but the decision was reversed on appeal. The defendant's counsel first asked the office manager of the company for which the plaintiff worked whether the plaintiff had received Workmen's Compensation benefits. The plaintiff's objection was sustained, and the defendant's counsel was admonished to drop the point. Undaunted, he then questioned the plaintiff's doctor as to who paid the bills, and the doctor replied that the employer's insurance company had done so. This was before the plaintiff's counsel could make his objection, and the court in-

⁷⁰ See e.g., *Capital Products v. Romer*, 252 F.2d 843 (D.C. Cir. 1958); *Hume v. Lacey*, 112 Cal. App.2d 147, 245 P.2d 672 (1952); *Rusk v. Jeffries*, 110 N.J.L. 307, 164 A. 313 (Err. & App., 1933); *Healy v. Rennert*, 9 N.Y.2d 202, 173 N.E.2d 777 (1961). See also the criticism of *Browning* on the ground that the plaintiff "gave value" for the pension. 1963 CAMB. L.J. 37, 39-40.

However, the disability benefit may be in lieu of other benefits that the plaintiff would have received but for the injury. In *Healy v. Rennert*, the plaintiff alleged that if he had not been injured, he could have retired in two years at half-pay. The evidence of the disability pension was introduced by the defendant to counter the plaintiff's claim of loss. Here the jury found for the defendant, and the court concluded that the introduction of the evidence of the disability pension was reversible error. See the discussion, *supra*, note 75. Nonetheless, since the disability pension was, in effect, a substitute for the retirement pension, the plaintiff should not be able to recover the lost retirement pension in addition. Perhaps because of the posture of the case, this fact escaped the court's notice. The same situation was involved in *Cunningham v. Rederiet Vindeggen A/S*, 333 F.2d 308 (2d Cir. 1964). In a wrongful death action the plaintiff sought recovery for half the value of pension payments her deceased husband would have received upon retirement. She had received death benefits, which she would not have received if he had lived. The court correctly reasoned that she was entitled *either* to the death benefits or the loss of retirement benefits, but not both. However, it was applying New York law and read *Healey* to hold that damages for the loss of future benefits were recoverable without regard to the benefits received. In such a case it seems that the claim for the future benefits necessarily opens up the question of the present benefits. Unless the plaintiff can show (and perhaps this could be done at the pre-trial conference) that the loss of future benefits was greater, in which case he should be limited to the excess, he should not be permitted to claim those benefits.

See e.g., *A. H. Bull Steamship Co. v. Ligon*, 285 F.2d 936 (5th Cir. 1960); *McMinn v. Thompson*, 61 N.M. 387, 301 P.2d 326 (1956); *Stone v. City of Seattle*, 64 Wash. 2d 166, 931 P.2d 179 (1964). In all of these cases the defendant claimed that the evidence was relevant for a subsidiary purpose, e.g., to show a reason for the plaintiff to take the benefit rather than work. . . .

⁷¹ 351 F.2d 24 (7th Cir. 1965).

structed the jury to disregard the evidence. It chastised the defendant's counsel, but did not order a mistrial. The judgment in favor of the defendant was reversed on appeal, the court rejecting the argument that the evidence was admissible to show bias on the part of the office manager. The tenor of the argument was that if the plaintiff recovered from the defendant, the employer would be reimbursed for the Workmen's Compensation payments.⁷² This being so, the fact that the plaintiff had received such payments was relevant to show the bias of the office manager. The court doubted whether a low-ranking employee would perjure himself so that the employer could obtain reimbursement from the defendant. The probative value was too slight to outweigh the obvious prejudicial effect, and the evidence was excluded.

Most courts now recognize that the introduction of evidence of collateral source benefits can affect not only the question of damages, but the issue of liability as well. As one court put it, "The smell of insurance or workmen's compensation must be presumed to affect a jury adversely to a plaintiff's cause."⁷³ This being so, at least where the evidence does not have a high degree of relevance,⁷⁴ its introduction necessarily amounts to reversible error.⁷⁵ Some courts still treat this as harmless error, suggesting

⁷² As we will see, this is required in most states.

⁷³ *Mangan v. Broderick and Bascom Rope Co.*, 351 F.2d 24 (7th Cir. 1965).

⁷⁴ As it did in *Stanziale v. Musick*, 370 S.W.2d 261 (Mo. 1963). There the court referred to the "peculiar circumstances of the case."

⁷⁵ See *Ridgeway v. North Star Terminal & Stevedoring Co.*, 378 P.2d 647 (Alas. 1963), where the court expressly stated that the introduction of such evidence would likely influence the jury on the issue of liability as well as damages. See also *Healy v. Rennert*, 9 N.Y.2d 202, 173 N.E.2d 777 (1961), where the court held that evidence that the plaintiff had received a disability pension and health insurance benefits was inadmissible and that the introduction of such evidence amounted to reversible error. The jury had returned a verdict for the defendant, and the court observed:

They may well have considered that the plaintiff had sustained no damage, especially in view of the acceleration and increase in the amount of payments of plaintiff's pension, and may have decided the case on the basis that plaintiff was not harmed rather than on the questions of negligence and contributory negligence. *Id.*

Connare Gladden v. P. Henderson Co., 385 F.2d 480 (3rd Cir. 1967), where the plaintiff, who had testified that he returned to work and failed to see his doctor because he needed money to pay his bills, was asked on cross-examination whether during the period when he was disabled his employer had made it possible for him to receive financial assistance. The court allowed the question, and the plaintiff answered that he had received around \$70 per week, apparently benefits under the Longshoremen and Harbor Workers Act. The admission of this evidence was held to be proper, since it was relevant to refute the contention of the plaintiff that he returned to work and failed to see his doctor due to economic

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that the plaintiff must seek a corrective instruction,⁷⁶ but on the whole, the prejudicial effect of such evidence has been recognized by the courts. The "silent revolution" has not succeeded very much more than has the frontal attack on the rule.

However, the attempts to introduce the evidence by indirection have been thwarted *on the assumption that the plaintiff's recovery is not affected by the receipt of benefits from a collateral source*. The fact that the jury is prejudiced by the knowledge that the plaintiff has received collateral source benefits would indicate that the collateral source rule itself conflicts with the "conscience of the community." As pointed out previously, the concept that the benefit was intended for the plaintiff and not the defendant makes no sense today. It still seems to the jury that the plaintiff is being compensated twice. Perhaps there is a more realistic way to deal with the problem of cumulative recovery. If a more satisfactory rationale for cumulative recovery were advanced, the jury might not be so hostile to the idea; and in those situations where evidence of the receipt of a collateral benefit could be considered by the jury, the jury would not use this to justify to itself a denial of recovery. Certainly this makes more sense than the present pattern, where recovery is said not to be affected by the receipt of benefits from a collateral source, but defense counsel does try to introduce such evidence by indirection for the "dynamite potential" it will have on the jury. Let us first ask whether the collateral source rule as a solution to the problem of cumulative recovery can now be justified.

The collateral source rule is often discussed in terms of the conflict between overcompensating the plaintiff and enabling the defendant to reduce his liability, thereby receiving a "wind-fall." If the plaintiff recovers the value of the benefit he has received from the collateral source, he will have recovered twice for the same loss; but if the defendant avoids liability, he will not have to pay for all the harm he has caused. In the leading case of *Coyne v. Campbell*,⁷⁷ where the New York Court of

(Footnote continued from preceding page)

necessity. The court stressed that it was the plaintiff's testimony on direct examination which opened up the matter.

⁷⁶ *Dewitz v. Columbia River Paper Co.*, 237 Ore. 623, 391 P.2d 613 (1964).

⁷⁷ 11 N.Y.2d 372, 183 N.E.2d 891 (1962).

Appeals rejected the collateral source rule as applied to a physician who had received free treatment from a colleague and from his own nurse, Judge Desmond stated: "Diminution of damages because medical services were furnished gratuitously results in a windfall of sorts to a defendant but allowance of such items although not paid for would unjustly enrich a plaintiff."⁷⁸

The implication is that the unjust enrichment of the plaintiff is worse than the unjust exculpation of the defendant. Judge Fuld, on the other hand, saw it from the plaintiff's perspective. As he observed: "The rationale underlying the rule is that a wrongdoer, responsible for injuring the plaintiff, should not receive a windfall." He went on to point out that "The medical services were supplied to help the plaintiff, not to relieve the defendant from any part of his liability or to benefit him." To deny recovery, he concluded, "would be unfair and illogical."⁷⁹

Commentators also see the conflict between the compensatory principle and the principle that the party responsible should bear the full loss he has caused.⁸⁰ As one writer stated, in analyzing the rule:

It is true, in many cases, that a double recovery is thus permitted by the liberality of the courts in interpreting this rule, but this is consistent with the view of our courts that it is better to permit the claimant to 'accumulate his remedies' than to grant the tortfeasor the benefits of payments that come to the plaintiff from 'collateral sources.' The wrongdoer, the courts feel, is not entitled to such an undeserved windfall.⁸¹

Thus, defense lawyers stress the need to apply the compensatory approach,⁸² while plaintiff's lawyers warn that if the rule is not applied, "the guilty rather than the innocent will benefit from

⁷⁸ *Id.* at 374, 183 N.E.2d at 893.

⁷⁹ *Id.* at 375, 183 N.E.2d at 894-95.

⁸⁰ See Averbach, *The Collateral Source Rule*, 21 OHIO ST. L.J. 231, 240 (1960); West, *The Collateral Source Rule Sans Subrogation: A Plaintiff's Windfall*, 16 OKLA. L. REV. 395, 413-14 (1963); Note, *The Mitigating Effect of Damages on Social Welfare Programs*, 63 HARV. L. REV. 330, 331 (1949); Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 740, 741-42 (1964).

⁸¹ Averbach, *supra* note 80, at 240.

⁸² See Peckinpugh, *An Analysis of the Collateral Source Rule*, 1966 INS. L.J. 545, 555.

a windfall."⁸³ Perhaps the problem is not all that serious, but nonetheless many are troubled by this conflict between ideals.⁸⁴

If the sole question were overcompensation of the plaintiff as opposed to a windfall for the defendant, clearly the defense would have the better of the argument. For, as we pointed out, it is absurd today to think of most tort defendants as some kind of moral wrongdoer. The defendant is simply the individual or enterprise to whom the loss has been shifted on the basis of some notion of "fault," and who will redistribute it either through liability insurance or as a cost of carrying on the enterprise. It is absurd to conceive of "punishing" the insurance fund or the enterprise for the wrong. Even if the award of damages was considered to have accident-detering effect,⁸⁵ it is difficult to see how the award of damages without deducting collateral source benefits enhances the deterrence achieved by the award of damages in the first place.⁸⁶ And to the extent the primary purpose of tort law is compensation, any rule that espouses overcompensation must be rejected.⁸⁷

Of course, the statement of the problem in these terms is not at all realistic, for we have no way of "knowing" whether in a given case the award overcompensates or undercompensates. We have pointed out the difficulties inherent in determining personal injury damages, and the process of adversary litigation that we employ with trial before a jury makes them all the more so. Indeed, plaintiff's lawyers are concerned about the "adequate award,"⁸⁸ while the defense counsel hastens to remind us that the personification of justice is represented by a balancing scale rather than by a cornucopia.⁸⁹ In practical operation, some plaintiff's are overcompensated and others are undercompen-

⁸³ Lambert, *The Case for the Collateral Source Rule*, 1966 *INS. L.J.* 531, 543.

⁸⁴ Professor Kalven says that this is a problem "to which there is no altogether satisfactory solution." Kalven, *The Jury, the Law and the Personal Injury Damage Award*, 19 *OHIO ST. L.J.* 158, 169 (1958).

⁸⁵ See the discussion of the relationship between tort liability and the deterrence of accident-producing conduct in F. HARPER and F. JAMES, 2 *THE LAW OF TORTS*, § 12.4 (1956).

⁸⁶ See the discussion of this point in West, *supra* note 80, at 412.

⁸⁷ See James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 *N.Y.U. L. REV.* 537, 546 (1952).

⁸⁸ M. BELL, *THE MORE ADEQUATE AWARD* (1952).

⁸⁹ I cannot recall where I saw this phrase, but it does seem to succinctly summarize the position of defense advocates.

sated.⁹⁰ To say, therefore, that the plaintiff is to recover "only those damages that he actually sustained, no less than his full damages, but no more,"⁹¹ is clearly to misstate the problem. Our system, both in theory and practice, does not lend itself to that kind of measurement. We do arrive at a conclusion as to what his damages were and try to translate that conclusion into money terms, but this is only a guess. To treat that guess as representing scientific certainty is pure fantasy. The statement of the problem as a conflict between overcompensation and windfall misses the mark if it assumes that absent this problem, there would be accurately-measured compensation.⁹² The most that can be done is to talk in terms of probability and risk. Do we increase the risk of overcompensation (or reduce the extent of undercompensation) by excluding consideration of benefits from a collateral source, or do we increase the risk of undercompensation (or reduce the extent of overcompensation) by allowing such benefits to be considered? Either way the risk of overcompensation or undercompensation remains, because it is the system itself that creates the problem. The question is whether we "feed data" of collateral source benefits into the machine so as to increase the probability of undercompensation or ignore this factor and thereby increase the probability of overcompensation.

Even within this framework, however, proponents and opponents of the rule can find justification for their positions. The opponents would say that the jury should not consider awarding the plaintiff certain damages, "if he did not sustain damage in a particular area."⁹³ This being so, recovery will necessarily be less, and the risk of undercompensation becomes more probable than the risk of overcompensation. The proponents, on the other

⁹⁰ In this connection settlement practices must also be taken into account. Studies indicate that the plaintiff who has sustained relatively little loss is more likely to be overcompensated by a settlement, since it may be less expensive for the insurer or enterprise to settle such claims for more than they are worth than to engage in litigation. See Morris and Paul, *The Financial Impact of Automobile Accidents*, 110 U. P. A. L. Rev. 913, 920-26 (1962). However, a particular plaintiff who has suffered extensive injuries still may be overcompensated when out of pocket loss is considered.

⁹¹ Peckinpaugh, *supra* note 82, at 555.

⁹² But this assumption is made. See *e.g.*, West, *supra* note 80, at 82. "The collateral source rule only involves allowing double recovery for an injury which has been wholly or partially repaired."

⁹³ Peckinpaugh, *supra* note 82, at 551.

hand remind us that no personal injury award really compensates. By definition, something like pain and suffering cannot be quantified. Litigation is an inconvenience for which no compensation is made. Awards are affected by inflation, and the plaintiff does not obtain full recovery, because the attorney's contingent fee must be deducted.⁹⁴ Therefore, they would say, the risk of overcompensation is to be preferred to the risk of undercompensation. While these facts are true, the obvious reply is that this does not furnish a rational justification for the collateral source rule.⁹⁵ If our method of awarding compensation for personal injuries is inadequate, there must be a sounder solution than that of chance recovery in an individual case. If *A* and *B* each suffer loss estimated by the jury at \$50,000, and *A* has received \$10,000 in collateral source benefits, the rule helps to make the award more adequate for *A*, but does not help *B*. Moreover, while such factors do operate to reduce the plaintiff's award, he may have been grossly overcompensated unless we take the position that no amount is ever too much to be awarded an injured person. The question is still whether we increase the risk of overcompensation or increase the risk of undercompensation. The application of the collateral source rule in the cases where such benefits have been received does not represent a rational solution to the problem of the "adequate award."

Some commentators would deal with the problem of what they see to be cumulative recovery by providing for reimbursement or subrogation to the payor of the collateral source benefit.⁹⁶ There would then be no double recovery by the plaintiff nor windfall to the defendant. This is a deceptively simple solution, as subsequent analysis will indicate. In the first place, this assumes that either the plaintiff's damages have been measured accurately, or that the item represented by the collateral source payment has been identified. As we have said, it is absurd to think that the plaintiff's damages have been measured with any degree of scientific accuracy, and under a general verdict procedure the jury does not itemize damages. Suppose that a

⁹⁴ See Lambert, *supra* note 83, at 542.

⁹⁵ See James, *supra* note 87, at 549; West, *supra* note 80, at 411; Note, *Unreason in the Law of Damages*, *supra* note 80, at 750.

⁹⁶ This is the essential thesis of West, *supra* note 80. See also Note, *Unreason in the Law of Damages*, *supra* note 80, at 753.

generous donor has paid the plaintiff's bill at a convalescence home, where he stayed following his injury. The plaintiff introduces the bill, say \$5000, into evidence; the defendant contends that the period of convalescence was unnecessary and that the plaintiff should not recover that sum. The jury returns a verdict for \$30,000. Perhaps the jury awarded the plaintiff that sum and perhaps it did not. Perhaps it found that his damages were \$50,000, but that he was also at fault, and reduced his damages by 40%; thus, he would have only recovered \$3000 of the bill. The possibilities are endless. Moreover, as we will see, there are situations where no double recovery occurs, although the plaintiff retains the collateral source benefit and theoretically recovers full damages. Subrogation is most relevant in the insurance context, and we will discuss it at that time. It is sufficient to point out that subrogation involves a variety of considerations relating to the marketing of insurance and the payment of insurance benefits. If subrogation is to take place, it must be with reference to those considerations; and the nature of the insurance business should not be altered for the sake of theoretical consistency, that is, to avoid the conflict between double recovery and windfall. While we have found wanting the justifications thus far advanced for the collateral source rule as a solution to the problem of cumulative recovery, the reimbursement-subrogation approach needs a much different justification than that it avoids the dilemma between double recovery and windfall.

Dean Maxwell, a proponent of the collateral source rule, has advanced a rationale that avoids the "overcompensation-windfall" dilemma, and this may be called the "orderly administration of justice" approach.⁹⁷ Discussing the rule in a number of contexts, he finds most of the results justified on this basis. For example, as to "gratuities", he observes that: "To open to fruitful investigation by the defense in a personal injury case the question of the economic framework within which the needs of the plaintiff resulting from the injury were furnished is to make recovery depend on how knowledgeably the plaintiff and his benefactors set up their transaction."⁹⁸ He points out, as

⁹⁷ Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669 (1961).

⁹⁸ *Id.* at 688.

we have done, the inadequacy of our present system of compensation, in that it does not limit awards to strict economic loss and at the same time guarantee such recovery.⁹⁹ He says that if a different system were adopted, most of the problems to which the collateral source rule applies a "rough solution" could be eliminated. He concludes:

For the present system, however, the rule seems to perform a needed function. At the very least, it removes some complex issues from the trial scene. At its very best, in some cases, it operates as an instrument of what most of us would be willing to call justice.¹⁰⁰

Perhaps this is true,¹⁰¹ I am impressed by the "orderly administration of justice" argument, and I will have occasion to allude to this idea further. However, I am still faced with the question of what to do about the problem of cumulative recovery within our present system of awarding compensation for personal injuries. Since I am not at all optimistic that this system will be changed in the foreseeable future, the problem is an important one. I cannot accept the collateral source rule as a sound solution.¹⁰² I think we can do better. And this is the thesis of the present writing. It is possible to deal with the question of cumulative recovery *without reference to the collateral source rule*. It is possible to approach the question with reference to functional considerations and to determine whether the fact that the plaintiff received a *particular benefit* should have any effect of his recovery of damages in a suit for personal injuries.¹⁰³ If it is concluded that the receipt of the benefit should affect his recovery, we can then address ourselves to what may be called the "procedural problem," that is, how we bring this factor into

⁹⁹ *Id.* at 695.

¹⁰⁰ *Id.*

¹⁰¹ For the same conclusion, see Schwartz, *The Collateral Source Rule*, 41 B.U. L. REV. 348, 363 (1961); Averbach, *supra* note 80, at 240.

¹⁰² This writing, therefore, will not be a study of the collateral source rule. No attempt has been made to investigate or discuss all the cases that have dealt with the problem of cumulative recovery. A number of cases will be cited and discussed as illustrative, but that is as far as we will go. A rather complete compilation of cases will be found in West, *supra* note 80.

¹⁰³ It has been suggested that "invocation of the 'rule' has too often been a substitute for analysis of the merits of the parties' claims." Note, *Unreason in the Law of Damages*, *supra* note 80, at 753. Although courts have sometimes distinguished between various types of benefits, the problem usually is not approached with reference to the particular benefit involved.

the system under which we award recovery. Perhaps certain facts could be stipulated: if, for example, it is concluded that the plaintiff is not entitled to recover certain medical expenses from the defendant, this could be handled at the pre-trial conference, and the plaintiff would be precluded from introducing such evidence. Where the receipt of the benefit would not be deemed to affect recovery, evidence of such benefits for any purpose would be rigorously excluded. It might also be feasible to deduct certain sums from the judgment in a proper case.¹⁰⁴ Actually, I believe that if such an approach were adopted, and collateral source benefits were not necessarily eliminated, the jury would understand the justification for permitting what may seem like double recovery, and the dynamite potential would be absent.

The collateral source rule does not represent a realistic solution to the problem of cumulative recovery. It is, therefore, an irrelevant principle. It was developed at a time when either the plaintiff paid for medical and hospital expenses or was the recipient of "charity." Generally either the plaintiff worked or he received a true "gratuity" from his employer. In an era of Blue Cross, Medicare, sick leave, Social Security and enterprise liability, some other solution seems necessary. Rather than classify a benefit as "collateral" and say that, therefore, it cannot affect recovery, we must consider the nature of the benefit, and the economic and practical factors involved, and then conclude how receipt of *that* benefit should affect recovery of personal injury damages. We are proposing what may be called for want of a better term, the functional approach.

THE FUNCTIONAL APPROACH

I propose to demonstrate the functional approach by a consideration of three situations involving (1) the damaged doctor, (2) the soldier retired with a disability pension, and (3) the insured accident victim. We will be moving from African villages

¹⁰⁴ See *Chambers v. Pinson*, 6 Ohio App. 2d 66, 216 N.E.2d 394 (1966), where the court held that credit for benefits received under the medical payments provision of an automobile insurance policy could be given by a reduction in the judgment. Therefore, it was erroneous to instruct the jury that the plaintiff had received such benefits. The use of the post-judgment credit avoids the possibility that the jury will "put the evidence of the benefit to improper use."

to modern courts to computers and back again, but the reader can easily follow our flight.

I. *The Damaged Doctor.*

The damaged doctor is the plaintiff in *Coyne v. Campbell*.¹⁰⁵ He was "damaged" in an automobile accident which occurred when his automobile was struck in the rear by the defendant's. Essentially he sustained a whiplash injury. Since he was a physician, he received medical treatment from a fellow physician without charge. Physiotherapy treatments were given by his nurse during regular office hours, without charge. He claimed approximately \$2200 as damages for the medical and nursing care, but the trial court excluded any evidence on this point. The jury returned a verdict for the plaintiff, but he was dissatisfied and appealed, charging error in the exclusion of the evidence as to the reasonable value of the medical and nursing care. The New York Court of Appeals affirmed the judgment. The case reflected the conflict between overcompensation and windfall, the majority rejecting the collateral source rule and taking the position that the plaintiff could not recover the reasonable value of the medical and nursing expenses. The dissenting opinion maintained that the wrongdoer—whom, you will recall was the presumably insured¹⁰⁶ driver of the other automobile, should not receive a windfall. Since that decision two cases involving identical facts have arisen in other jurisdictions, and both courts held that the value of the services was recoverable since "they were given to benefit the plaintiff and not the defendant."¹⁰⁷

These cases were decided under our system of awarding compensation for damages resulting from automobile accidents, which means a suit for negligence tried before a jury. This being so, certain limitations necessarily appear. The suit may be prosecuted only by the accident victim, assuming he is alive, although his injury may have caused others to suffer adverse consequences. We think of an accident in terms of the impact it has on the immediate victim. But, in reality, an accident should

¹⁰⁵ 11 N.Y.2d 372, 183 N.E.2d 891 (1962).

¹⁰⁶ If he had not insured, it is not likely that suit would have been brought.

¹⁰⁷ *Nelson v. Federal Mogul Service*, 27 Pa. D.&C.2d 222 (1962); *Odde v. Cardi*, 218 A.2d 373 CR.I. 1966).

be viewed as a circle with the victim in the center and the effects of the accident radiating outward like ripples in a stream. Suppose all persons who were affected by the accident could present claims for compensation. Generally our law does not allow this to occur. A spouse may have a claim for loss of consortium,¹⁰⁸ a husband for medical expenses incurred on behalf of the wife, and a parent for those incurred on behalf of the child;¹⁰⁹ but others affected by the accident do not possess a cause of action. If an accident results in the closing of a factory, the employee who is thereby out of work cannot recover his lost wages from the tortfeasor.¹¹⁰ A valuable employee may be lost to the employer for months as a result of an automobile accident, but the employer generally cannot recover for the loss.¹¹¹ In our cases the physician and nurse would have no claim against the defendant. All recovery is awarded to the immediate victim of the accident, and any settlement he makes with others is not determined by the court hearing his claim against the tortfeasor.

Suppose we are not in New York. Let us transpose our case to an African village where the court is that of the chief, sitting with elders under a tree.¹¹² The chief is not confronted with problems of "duty," "limitation of liability," "procedure." He does not rely on the "system" to produce a just and sound result. *He* is the system, and the responsibility is on his shoulders. Periodically it might be desirable for us to examine our system and its law from the perspective of the chief trying to administer justice under the tree. Where a rule of our system requires a result different from the decision we would reach if we were sitting under the tree, perhaps the rule—and possibly the system—needs some reconsideration. At least by putting ourselves in the position of the chief, we can strip away that which comprises

¹⁰⁸ See generally, W. PROSSER, TORTS § 119 (3rd. ed. 1964).

¹⁰⁹ *Id.*

¹¹⁰ See e.g., *Stevenson v. East Ohio Gas Co.*, 73 N.E.2d 200 (Ohio App. 1946).

¹¹¹ See *Receiver for the Metropolitan Police District v. Croydon Corp.*, [1957] 2 Q.B. 154 (C.A. 1956); *City of Philadelphia v. Philadelphia Rapid Transit Co.*, 337 Pa. 1, 10 A.2d 434 (1940). Cf. *United States v. Standard Oil Co. of Calif.*, 332 U.S. 301 (1947). See generally the discussion in Maxwell, *supra* note 97, at 682-86; Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478, 1485-98 (1966).

¹¹² For a discussion of the nature of a "court" in a primitive legal system see A. HOEBEL, *THE LAW OF PRIMITIVE MAN* 23-28 (1954). See also T. ELLIS, *THE NATURE OF AFRICAN CUSTOMARY LAW* 212-15 (1962).

the trappings of the system and imposes its limitations. *Coyne v. Campbell* is brought before the chief. Excuse the incongruities that follow from transplanting the New York automobile accident to the African village.

Unencumbered by rules of real party of interest and "those to whom a duty is owed," the chief summons all persons who have been affected by the doctor's accident. The defendant is there, with his insurer, ready to make any payments the chief decrees. The doctor points to his whiplash and the neck brace he is wearing. The chief directs that the defendant shall pay the cost of the neck brace and a sum of money to compensate the doctor for past, present and future pain and suffering. The plaintiff missed a week of work. He is a doctor, and his time is very expensive. Since the tortfeasor "takes his victim as he finds him,"¹¹³ it was unfortunate the defendant is a doctor. The doctor is compensated for the value of *his* lost time. If the plaintiff were less affluent, the lost income could have had an adverse effect on his family. Even so, this can be taken care of by awarding the plaintiff the lost income, and it is assumed that he will take care of his family as he would have done if he had not been injured.

At this point the persons who had appointments with the plaintiff during the period in which he was incapacitated come forward and complain that they were forced to postpone their appointments or consult another doctor. The New York court would say that this interest is not substantial and that, in any event, the defendant owed no "duty" to them. I think our chief could agree that this interest was not important enough to justify awarding damages; "inconvenience" is not the kind of thing for which a legal system would grant compensation.

The doctor then tells about his medical treatment and physiotherapy. The chief gives this claim short shrift by saying, "You didn't pay anything for this treatment, so, of course, you can't recover. You didn't pay the doctor, and your nurse wasn't paid anything above her regular salary. Let me hear from those who rendered the services." Note how the chief's judgment

¹¹³ This is usually thought of in terms of the plaintiff's physical condition, as in the case of the "thin-skulled man." See *Dulieu v. White*, [1901] 2 K.B. 669, 679. But the principle is equally applicable to the plaintiff's economic condition, and it is "cheaper" to hit a rich man than a poor one.

differs from that of the court in *Coyne v. Campbell*. Both the court and the chief agree that the plaintiff should not recover the value of these services, because he did not pay anything for them. But once the court arrived at that decision, the matter of the claim for these services was at an end. The only party who had a "legal right" to make the claim, and who, under the rules of procedure, could bring suit against the defendant, was not entitled to recover. The chief, however, can call the people who actually rendered the services and permit them to make the claim. When he questions the nurse, she answers that she performed the services during her normal working hours. The chief concludes that there is no reason to award her anything, since she was not adversely affected by the accident her employer suffered. She does not have to be paid for treatments she gave her employer during working hours. The physician has treated the plaintiff and argues that the defendant should pay for such treatment, since it was his fault that it was necessary. There appears to be some justice in this claim. But when the chief reflects a moment, he angrily dismisses the physician. "You people have an arrangement by which you treat each other without charge. You treated the plaintiff today; he or someone else will treat you or your family tomorrow. You doctors can't 'suffer' damages for medical services, because by the nature of your profession you get (and give) free services. Just because there's a tort doesn't mean that you should be paid for the services rendered a colleague."

And now we come back to New York, refreshed by our excursion, and perhaps we see *Coyne v. Campbell* in a different light. If the tortfeasor "takes his victim as he finds him," this should work both ways. Where the plaintiff was a physician, the defendant and his insurer will have to pay higher damages for the plaintiff's lost time. But he will not be liable for medical expenses, because his victim gets those services free. No one lost anything by the nurse's giving the physiotherapy treatment. The real question revolves around the services of the other physician. The short answer is that the physician cannot recover for those services, since the system doesn't allow it. We could let the plaintiff recover as his representative, assuming he would then reimburse the physician for the value of his time.

But there is a serious question whether, in accordance with medical ethics, he could accept payment from the plaintiff;¹¹⁴ and, in any event, it is not likely that he would do so. The more telling reason to me is that the doctors treat each other without charge. They are not likely to alter this practice so that there can be occasional recovery against a tortfeasor. Therefore, the doctor plaintiff does not need to recover damages for medical expenses, which, by virtue of his profession, he does not incur. When viewed from the functional approach, the result in *Coyne v. Campbell* is correct.

Let us now vary the facts. An old derelict is run over by an automobile. A crowd gathers, and someone calls out, "Get a doctor." A doctor appears, and the derelict begs, "Doctor, please help me." The doctor does so, and in fact, saves his life. A lawyer also was in the crowd, and when the derelict is released from the hospital, he files suit against the tortfeasor. There is no doubt that as part of his damages he can recover the value of the doctor's services. By requesting (or accepting) the doctor's assistance, he impliedly promised to pay the reasonable value of those services and so became "legally obligated." Since he had an obligation to pay for the services, their reasonable value is treated as an "out-of-pocket" loss.

Suppose, however, that what the derelict says is, "Doctor, don't waste your time with me, I can never pay you anything." The doctor, as I believe most would, brushes this aside, saying sincerely, "I don't care about money now, I want to try and save your life." The doctor succeeds, and again the derelict sues the tortfeasor. This case is different, since the services were rendered "gratuitously." If the court follows the collateral source rule, the plaintiff can recover, because "the services were rendered for his benefit and not for the benefit of the wrongdoer."¹¹⁵ But if it rejects the collateral source rule, and holds that the plaintiff can recover only for "sums expended or obligations incurred," recovery would be denied, as these services were rendered "gratuitously."

¹¹⁴ As I understand it, a physician will not accept compensation from another physician (apart from psychiatrists) for treating him or a member of his family. I do not believe, however, that there is a formal "canon of ethics" to this effect. It is customary to give a substantial gift to the physician who donated his services.

¹¹⁵ See *Dahlin v. Kron*, 232 Minn. 312, 45 N.W.2d 833 (1950).

If these cases came before our African chief, who is not sophisticated in the distinctions between binding obligations and gratuitous services—which, in our examples, depend on whether the injured person cried out, “Doctor, please help me,” or whether, conscious of his poverty, he told the doctor he couldn’t pay—he would see the cases as identical. He would say to the doctor, “My boy, you have performed well, and we are proud of you,” and to the defendant, “Pay the doctor the reasonable value of his services.” Certainly we would agree that the doctor should be paid. But our system does not allow the doctor to make a claim against the tortfeasor.¹¹⁶ If we give recovery to the plaintiff and depend on him to pay the physician, I wonder if he is any more or less likely to pay in the “gratuity” situation than in the “legal obligation” situation. In any event, the only possibility that the physician treating the derelict has of recovering his fee is to allow the plaintiff to recover it from the tortfeasor. The system under which we operate prevents us from making the tortfeasor pay the physician’s fee. So, most courts will allow the plaintiff to recover the value of his services and hope that he will pay the physician. They think that they lack the machinery in the personal injury suit to insure that the physician will receive his fee.

But do they? Any court has the power to issue a conditional decree, whether the action is historically “legal” or “equitable.”¹¹⁷ These decrees have been issued to protect third parties or the public.¹¹⁸ Where medical services have been rendered “gratuitously,” the court can direct the plaintiff to pay the physician a reasonable fee out of the judgment. English courts, which, it must be remembered, assess the damages in personal injury cases, have included a direction to repay in their judgments. In *Dennis v. London Passenger Transport Board*,¹¹⁹ the accident victim had received a pension from the Ministry of Pensions and sick pay from his employer, a municipal council. The defendant argued that the verdict should be reduced by those amounts, since the

¹¹⁶ Cf. *United States v. Standard Oil Co. of Calif.*, 332 U.S. 301 (1947).

¹¹⁷ See Sedler, *Conditional, Experimental and Substitutional Relief*, 16 RUTGERS L. REV. 639, 714-15 (1962).

¹¹⁸ See *Medical Fabrics Co. v. D. C. McLintock Co.*, 12 N.J. Super. 177, 79 A.2d 313 (App. Div. 1951); *Hartman v. Cohen*, 350 Pa. 41, 38 A.2d 22 (1944).

¹¹⁹ [1948] 1 All E.R. 779 (K.B.).

plaintiff was not legally required to reimburse the Ministry and his employer. However, the court found that reimbursement was "expected." It, therefore, permitted full recovery subject to a direction to reimburse. So too, in *Schneider v. Eisovitch*,¹²⁰ the plaintiff was permitted to recover the cost of bringing her husband's body back to England notwithstanding that the expenses were paid by friends. She was required to state that she would pay the money to the donors. A direction to repay would avoid the dilemma of overcompensation versus windfall, and some commentators have advocated this solution for gratuity cases.¹²¹ Even where juries render the verdict, the court could include a direction to repay the sum admittedly expended. It would then be up to the donor to decide whether he wanted to accept it. As a practical matter, if this procedure were followed, defense counsel would not find it advantageous to raise the question. His interest is in reducing recovery and not in the distribution of the judgment.

The point is that where the plaintiff recovers for "gratuitous" services rendered by a physician, the recovery may be justified on the ground that the plaintiff is really recovering as the "representative" of the physician. This may be the only practical way the physician will be paid. If the court were really concerned about protecting the physician, it could issue a direction to repay. Moreover, "gratuitous" is a relative concept. The understanding between the plaintiff and the physician may be that if the plaintiff recovers a judgment from the tortfeasor, he is expected to make payment. Or, suppose that the plaintiff is a relative of the physician, and the physician has always treated him free of charge. If the plaintiff is involved in an accident, it still does not seem unfair to require the tortfeasor to compensate the physician, and this is done by permitting the plaintiff to recover the value of his services. Unlike the physician who rendered the services in *Coyne v. Campbell*, the physician in the last example does not receive free treatment from the plaintiff in return. Where the plaintiff has not suffered out-of-pocket loss, but still seeks recovery, the proper question may

¹²⁰ [1960] 2 W. L.R. 169 (Q.B.).

¹²¹ See West, *supra* note 80, at 414; Ganz, *Mitigation of Damages by Benefits Received*, 25 MOD. L. REV. 559, 568 (1962).

be whether the plaintiff is really recovering on behalf of someone who cannot sue in his own right. If this is so, and the plaintiff is the "appropriate representative" of the person who is really entitled to be compensated, the recovery is justified.

By going to the African village we have succeeded in eliminating the collateral source rule in the case of the damaged doctor. Now let us leave the primitive for the most modern—the world of computers—and consider the case of the soldier who has been retired with a disability pension.

II. *The Retired Soldier and His Disability Pension.*

An American serviceman, stationed in England, was seriously injured in an automobile accident while on duty. His arm had to be amputated, and he ceased to be of value to the military. Since he was injured in the line of duty and forced to retire from the service as a result of those injuries, a grateful government will provide him with a pension for the rest of his life.¹²² When he brought suit against the tortfeasor in England, the defendant contended that his pension should be considered in determining the damages for loss of future earnings. The trial court refused to take the pension into account, and awarded damages of £25,000. In *Browning v. The War Office*,¹²³ the Court of Appeal held that the disability pension had to be considered, and reduced the award to £14,000. English courts rely heavily on precedent,¹²⁴ so it is useful to consider the precedents that faced the Court of Appeal. Traditionally the insurance proceeds would not operate to reduce recovery,¹²⁵ since the plaintiff "had bought the insurance benefits with his own money."¹²⁶ So too, the award in the personal injury action would not be affected by charitable gifts,¹²⁷ nor by the receipt of sums of money which the plaintiff was obligated or had undertaken to

¹²² 70A Stat. 91 (1956), as amended, 10 U.S.C. § 1201 (1964).

¹²³ [1963] 1 Q.B. 750 (C.A. 1962).

¹²⁴ The House of Lords has only recently held that it has the power to depart from prior holdings. See Practice Statement (Judicial Precedent) [1966] 3 All E.R. 77, and Dias, *Precedents in the House of Lords—A Much Needed Reform*, 1966 CAMB. L.J. 153.

¹²⁵ See *Bradburn v. Great Western Railway Co.*, [1874] L.R. 10 Ex. 1 (C.A.).

¹²⁶ *Browning v. The War Office*, [1963] 1 Q.B. 750, 759 (C.A. 1962).

¹²⁷ *Peacock v. Amusement Equipment Co.*, [1954] 2 Q.B. 347 (C.A.). See the discussion in *Browning v. The War Office*, [1963] 1 Q.B. 750, 759 (C.A. 1962).

repay.¹²⁸ On the other hand, where the plaintiff had received pay "as of right," he could not recover for the value of lost time during the period for which he was paid; this would include sick leave and what the English call "half-pay."¹²⁹ English courts do not approach the problem of cumulative recovery via the collateral source rule. Each "benefit" is considered separately, and in accordance with certain criteria, the court decides whether it should affect the recovery of damages. The question was into what category a disability pension fell.

If the plaintiff had died, recovery in the wrongful death action would not have been affected by the pension. This is specifically provided in the Fatal Accidents Act of 1959.¹³⁰ And as will be seen, specific provision is also made for social insurance benefits in the personal injury action.¹³¹ However, the matter of pensions as affecting recovery in a personal injury action is not regulated by statute, and, therefore, will depend on judicial determination. The court in *Browning* was faced with *Payne v. Railway Executive*,¹³² which involved a British serviceman who received a pension following his discharge from service as a result of the accident. The nature of the pension differed substantially from that paid to the American serviceman, since the Minister of Pensions had the power to reduce or withhold the pension where the recipient also recovered damages against a tortfeasor who caused the injury. The Court of Appeal unanimously held that the pension should not be deducted from the award. Cohen, L.J., based his decision on the ground that the accident was not the *causa causans* of the receipt of the pension; the *causa causans* was the plaintiff's service in the Royal Navy, and the accident was the *sine qua non*. Singleton, L.J., discussed the relationship between the pension rights and the pay of the serviceman—to which we will allude shortly—but based his decision on the ground that the Minister could reduce the pension if there was recovery from a tortfeasor. In actual practice,

¹²⁸ See the discussion in *Browning v. The War Office*, [1963] 1 Q.B. 750, 759 (C.A. 1962).

¹²⁹ *Id.* See *Receiver for the Metropolitan Police District v. Croydon Corp.*, [1957] 2 Q.B. 154 (C.A. 1956).

¹³⁰ 7 & 8 Eliz. 2, c. 65.

¹³¹ See also the discussion in Ganz, *Mitigation of Damages by Benefits Received*, 25 MOD. L. REV. 559, 566 (1962).

¹³² [1952] 1 K.B. 26 (C.A. 1951).

the Minister reduced disability pensions by the annuity value of 25% of the total damages recovered from the tortfeasor.

In *Browning*, Denning, M.R., disposed of *Payne* by adopting the rationale in Singleton's opinion. If he had adopted the rationale of Cohen's opinion, *Browning* could not have been distinguished, because here too the accident was not the *causa causans* of the receipt of the disability pension. *Browning* differed from *Payne* because in *Browning* the pension could not be affected by recovery against the tortfeasor, while in *Payne* the pension was reduced by such recovery. As Denning saw it, the plaintiff in *Browning* could not have received the disability pension and his salary if he had remained in service. Since he was seeking recovery for the loss of future earning opportunity, *i.e.*, his pay if he had remained in service, the amount of the disability pension—which he would not have received had he been receiving pay—would have to be deducted from the award. By adopting the rationale of Singleton's opinion in *Payne*, he was able to rid himself of that troublesome precedent.¹³³ Diplock, L.J., agreed with Denning, saying that the matter was one of simple arithmetic: the plaintiff recovers the difference between what he would have received had he not been injured and what he will receive following the injury. If he had not been injured, he would have received his salary for the period in which he remained in service; since he was injured and forced to retire, he receives a disability pension rather than the salary. He, therefore, would be entitled to recover from the tortfeasor the difference between the salary and disability pension he will receive now that he is retired (to be strictly accurate, he recovers the difference between the amount he would have earned, considering possible salary increases, less what he may be expected to earn despite his disability, if anything, and less the disability pension—which is not a matter of simple arithmetic). Donovan, L.J., dissented, saying that the case was indistinguishable from *Payne* and that the rationale of *Payne*, as he saw it, was not affected by Singleton's "additional reason." He also brought in the collateral source doctrine, pointing out that money payable from a collateral source is not "compensation" for the tort.

¹³³ He concluded that it was open to the court to accept that ground as having binding effect and to discard the other. [1963] 1 Q.B. at 760.

And, like Singleton in *Payne*, he discussed the relationship between pension rights and serviceman's pay.

Denning, then, saw the following categories of benefits and their effect on tort recovery:

- (1) proceeds of insurance policies for which the plaintiff had given value—no deduction;
- (2) true gratuities—no deduction;
- (3) sums of money which the plaintiff is under an obligation or has undertaken to repay—no deduction;
- (4) sums which the plaintiff receives as of right such as continuation of wages during disability under sick leave or "half-pay" arrangements,¹³⁴ and disability pensions that would not be reduced because of tort recovery—deduction.

He was also unwilling to rest the decision on the analogies either to insurance, which would argue against a deduction, or sick leave, which would argue in favor of a deduction.¹³⁵ The test was whether the plaintiff was being compensated twice for the same loss: since he would not have received both the disability pension and his salary had he stayed in the service, the disability pension had to be deducted from the award for loss of future earning opportunity.

Now let us consider the problem under the functional approach. Rejecting the collateral source rule, as we do, and certainly rejecting distinctions depending on whether the accident was the *causa causans* of the benefit, is Lord Denning's reasoning persuasive? I think not. Of course, the plaintiff would not have received both his salary and the disability pension. But another question remains to be answered: *why he did receive the pension?* Probably the answer is that our societal values demand that a person injured "in the line of duty" receive a government pension. We are thinking of the person wounded in battle or the like, but one injured in an automobile

¹³⁴ In *Browning* the plaintiff did *not* seek to recover the value of his wages paid during the period of disability. As the subsequent discussion will indicate, the rationale under which we justify the recovery of loss of future earning opportunity without regard to the disability pension would also justify recovery for the value of his lost time during the period of disability notwithstanding that his salary was continued.

¹³⁵ [1963] 1 Q.B. at 760-61.

accident "in the line of duty" is also included in the statute. This reason does not help our analysis. We are looking for a reason translatable into economic terms affecting the question of cumulative recovery.

Suppose a young man contemplating a military career consults the recruiting officer and is told, among other things, that he can retire at half-pay after twenty years, and that if he is ever forced to retire because of disability incurred in the line of duty, he will receive a generous pension. He is told of all the other "fringe benefits." There is no doubt that the availability of these benefits cushions his shock when he is told of the low salary. The assumption may then be made that a serviceman or other public servant exposed to hazardous duty receives the guarantee of a disability pension¹³⁶ as part of his total compensation picture, and that if it were not for the possibility of a pension and other fringe benefits, he would receive a higher salary. In *Payne*, Singleton observed that the fact that a person in the Navy receives a pension is a factor which enters into the question of pay, and in the absence of pension rights, "it is reasonable to assume that the pay would be higher."¹³⁷ In *Browning*, Donovan, dissenting, stressed that the plaintiff "earned" his pension by taking less salary, and drew an analogy to insurance premiums: the difference between the salary as it was with the pension rights included and what it would have been if there were no pension rights was the equivalent of the payment of premiums of insurance.¹³⁸

The insurance analogy may appear more clearly in a case where the employee has actually made a contribution to a fund from which the disability pension is paid. Such a case was *Judd v. Hammersmith, Etc. Hospitals Board*,¹³⁹ decided by Queen's Bench. The plaintiff was employed by a municipal council and was required to make contributions from his salary to a pension fund, which were matched by the employer. He was permanently disabled as a result of an accident and forced to retire on a

¹³⁶ Whereas in the case of private employment, disability pensions are generally absent. The disabled employee may receive Workmen's Compensation benefits, which are properly considered social insurance, and which, therefore, do not form a part of his total compensation picture.

¹³⁷ *Payne v. Railway Executive*, [1952] 1 K.B. 26, 40 (C.A. 1951).

¹³⁸ [1963] 1 Q.B. at 763-64.

¹³⁹ [1960] 1 Weekly L.R. 328 (Q.B.).

pension, seven years before retirement age. In his suit the defendant admitted that there should not be a deduction for the value of the pension represented by the plaintiff's contribution, but argued that that portion representing the employer's contribution should be deducted. The court rejected the contention, although the decision in *Browning* would indicate that in the future a court would have to do this very thing. The court found no distinction between that portion represented by the employee's and employer's contribution because:

As everybody knows, in a contributory pension scheme, whilst the employee makes a contribution and the employer—in this case the council—makes one, the amount which the employer contributes has to come from somewhere, and when there is a scheme of this sort in operation, it would seem, as a matter of common sense, that wages or the salary paid would have to take into account and reflect the contributions made by the employer, at all events in some degree; it is not just a case of the employee paying so much and the employer paying so much, because it is almost bound to be that the actual wages, or salary, paid would be very likely less than the notional sum which the employee might get if there were no such scheme in operation.¹⁴⁰

The court, however, did not base its decision on this ground, but on the authority of *Payne*.

The reasoning that the employee receives less salary because of a pension finds its way into American cases contrary to *Browning*, although the decision rationale is usually the collateral source rule. In *Hume v. Lacey*,¹⁴¹ which involved the same factual situation, a California appellate court held that the disability pension would not affect the recovery of damages. Although basing its decision on the collateral source rule, it went on to say:

It may be observed that there is a valid reason for not giving the wrongdoer any benefit from pension rights with which he had nothing to do. They were previously acquired by the injured party, *were paid for by him in some manner*, and the

¹⁴⁰ *Id.* at 330.

¹⁴¹ 112 Cal. App. 2d 147, 245 P.2d 672 (1952).

fact that he had other property in the nature of a pension right may logically be held immaterial. (Emphasis added.)¹⁴²

In *Beaulieu v. Elliot*,¹⁴³ which involved both a disability pension and wages that were continued from the time of injury to the time of discharge, it was observed:

By entering the military service, Elliot in effect agreed to perform certain duties and functions in exchange for certain benefits to be given him by the government. One of those benefits was that he was to receive military pay and allowances during periods of physical incapacity from performing his duties. This was in the nature of a contractual agreement between Elliot and the government when he became a member of the armed forces, *and which he may have paid for by accepting wages lower than those he might have obtained from the performance of like duties in civilian life.* (Emphasis added.)¹⁴⁴

In the case of a contributory scheme by police and firemen, one court drew the analogy to a system of "forced insurance" and held that the receipt of the disability pension would not affect tort recovery.¹⁴⁵ The fact that the plaintiff "gave value" for the disability pension by taking less salary was completely ignored by the court's majority in *Browning*.

Let us examine the matter of "giving value" more carefully. Ignoring employee contributions—which we may liken to insurance premiums—let us assume that the entire cost of the pension is borne by the employer. In *Judd v. Hammersmith* the court supposed a fixed sum to be available for payment to the employee as part of a "package".¹⁴⁶ Suppose that this sum is \$5,000 and that \$500 per year is allocated to "pension and disability." The employee starts to work at age 30, and we will assume (because our mathematics is weak) that he would re-

¹⁴² *Id.* at 151, 245 P.2d at 675-76.

¹⁴³ 434 P.2d 665 (Alas. 1967).

¹⁴⁴ 434 P.2d at 673-74. *See also* *Young v. Warr*, S.C. , 165 S.E.2d 797 (1969).

¹⁴⁵ *Rusk v. Jeffries*, 110 N.J.L. 307, 164 A. 313 (Ct. Err. & App. 1933). *See also* *Capital Products v. Romer*, 252 F.2d 843 (D.C. Cir. 1958).

¹⁴⁶ That this is realistic is demonstrated by the "package" concept found in collective bargaining agreements.

ceive the same salary until he retired at age 65. At that time, or whenever he is permanently and totally disabled, he will receive a pension of \$100 per month. He has been advised of this at the beginning of his employment. He thus receives a salary of \$4,500 per year, and at the end of twenty years it can be said that his pension rights have "cost" him \$10,000 in gross salary (to determine actual cost, we would have to deduct income taxes and decide whether he would have spent the extra money or kept it, in which case we would have to add interest). As a result of an automobile accident, he is permanently and totally disabled at age 50. In a suit against the tortfeasor, he recovers his salary of \$4,500 for the fifteen years until retirement (it is reduced to present worth, of course, but we will deal only with gross figures), which amounts to \$67,500.¹⁴⁷ He will be receiving a disability pension in lieu of salary for those fifteen years, which comes to \$18,000. The court in *Browning* held that this sum would have to be deducted from his recovery, so if we deducted this amount, that would leave an award of \$49,500. In order to secure this pension of \$18,000, he had to actually relinquish some \$10,000 in salary. His gain from the disability pension, therefore, is \$8,000 rather than \$18,000.

The plaintiff would have had to take less salary even if he had not been injured.¹⁴⁸ But it is the defendant asserting that the pension should operate to reduce recovery and prevent overcompensation. He is not overcompensated if the award is reduced by his "net gain," that is, the difference between the amount of the disability pension and the amount of reduced salary. Since it is the defendant who is seeking the deduction, the plaintiff's salary reduction, even if he did not receive the benefit, is irrelevant. It is equally correct to observe that if the accident had never happened, the plaintiff would not have needed the pension. If we are going to look at the total economic picture in order to determine the plaintiff's actual loss, we must consider (1) lost salary, (2) benefits accruing because of the injury, and (3) what the plaintiff gave up in order to obtain

¹⁴⁷ We are also, for purposes of this example, assuming that income tax savings will not be considered.

¹⁴⁸ Ganz, *supra* note 121, at 565.

those benefits. The award should equal the difference between (1) and the excess of (2) over (3). If this is done, the plaintiff is put in the same position as he would have been if there had never been an accident and he had not received the pension. In *Browning* the court considered factors (1) and (2), awarding the plaintiff the difference between (1) and (2), but completely ignored factor (3).

This may be because the example I posed did not correspond to the state of facts presented in *Browning* and probably represents an impossible factual situation. The problem is how to assign a specific sum of money as the pension "cost" and even more importantly, how to assign a sum of money as the cost of the disability portion. We are familiar with the "packages" in collective bargaining plans: so much for wages, so much for sick leave benefits, so much for retirement, and so on. Even then, it may be asked how effectively we can allocate the value of a disability pension paid only in case of contingency. When applied to military personnel, the matter is much more complex. The pay structure may be such that the value of *all* fringe benefits exceeds the value of the salary. The theory of military service is that the serviceman—historically without dependents—has all his needs supplied and his salary only represents "pocket money". The theory remains the same, but now military men have dependents and American affluence has forced military salaries upward. Where there are dependents, extra allowances are provided, and the dependents are eligible for fringe benefits. The serviceman's salary is planned to reflect early retirement at half-pay, free medical care for himself and his dependents, quarters allowances or free housing, and post exchange privileges. Indeed, if we wanted to be completely scientific, the military plaintiff who is forced to retire should also recover the value of the fringe benefits lost while he is recovering for loss of future earnings. It is accurate to assume that if the military pay structure were organized on the same basis as private industry or even other public employment, salaries would be substantially higher. Perhaps we could determine with a small computer how much higher salaries would be if there were no fringe benefits.¹⁴⁹ It would,

¹⁴⁹ But query, since military pay scales and benefits are determined by Congress, can the question be approached in purely economic terms?

however, take a most sensitive computer to assign a specific value to the disability pension.

It may be contended that the pension's value and cost in terms of reduced pay is very little. On the other hand, the total value of the fringe benefits is very significant. The serviceman accepts less pay because of the security embodied in fringe benefits, *one aspect of which is a disability pension in case of injury*. If we had a very good computer, we might be able to answer questions such as these:

- (1) What would be the difference in pay if the military did not offer fringe benefits?
- (2) What portion of this difference can be assigned to the disability pension?
- (3) What is the economic value of the fringe benefits lost during the years of the plaintiff's premature retirement?

If this information were available, it would be possible to determine how much the plaintiff "gained" through the pension, so as to offset this amount against his recovery for loss of salary caused by his retirement.

We may now leave the world of computers and return to the system used for determining personal injury damages. This system does not have computers, but instead twelve laymen or a judge, who can assimilate only so much data. Nor is recovery based on the economic needs of the injured person and his family. If it were, the fact that he was receiving a pension, regardless of what he "paid" for it, would be relevant to determine actual need.¹⁵⁰ If the injured person can establish a case of liability against the particular defendant under our rules of tort law, we allow him to recover for all economic *loss* sustained. We measure this economic loss with reference to the income he could have earned, but will not because of his disability resulting from the accident. If this amount is to be reduced by pension benefits, it is not because they demonstrate the absence of need—for this is not the basis of compensation—but because they indicate how much was actually lost. This question cannot be

¹⁵⁰ "A system of compensation designed to limit awards to strict economic loss and to guarantee such recovery may someday evolve. Certainly, most of the problems to which the collateral source rule provides a rough solution can be eliminated in such a context." Maxwell, *supra* note 97, at 695.

accurately or even roughly determined unless the cost of the benefit to him, *i.e.*, the reduced salary he took because of the availability of the benefit, is also considered. And we have no way, in the absence of a very special computer, which we don't have, of determining this amount. The necessary data to feed into the system is simply not available, even if the system could absorb it. It should be noted that to the extent the plaintiff was employed for a lengthy period he will be receiving the disability pension for a relatively shorter period of time. Consequently, it is not at all inconceivable (except perhaps in the military situation, where there are so many fringe benefits) that the amount of reduced salary would exceed the value of the benefit.

Therefore, the result reached under the collateral source rule and the functional approach coincide. The court in *Browning* is wrong when it gives the defendant credit without deducting the cost to the plaintiff. It assumed that the lost salary less the pension represented the plaintiff's true economic loss without considering what the plaintiff relinquished in order to get that pension. The pension may represent the equivalent compensation that he would have received earlier if it had not been for the pension arrangement. Since we cannot realistically determine the value of what the plaintiff forfeited to get the pension, we cannot assign value to the pension. Under our law we give the plaintiff what he "lost" rather than what he "needs", so there is no justification for deducting the pension on the ground that it reduces the plaintiff's need for compensation. The defendant is claiming reduced liability, and it seems proper that he substantiate his claim. If he cannot show the plaintiff's actual benefit, which he cannot, since he is unable to show how much the plaintiff gave up in order to obtain the benefit, he should not be able to claim the saving. Even though the defendant may not be a moral wrongdoer, he is, by law, assigned responsibility for the plaintiff's loss. The plaintiff *prima facie* demonstrates loss by showing the salary he would have received if he had not been disabled. The defendant contends that the loss is actually less, because the plaintiff will receive a pension. This is true, in economic terms, only if the value of the pension exceeds the value of what the plaintiff gave up to get it. This the defendant cannot show in the context of our system of awarding damages for per-

sonal injuries. He does not have the data, and there is a serious question as to whether the system could absorb such data if it existed. For this reason, recovery for loss of future earning opportunity should not be reduced by the receipt of a disability pension.

III. *The Insured Accident Victim*

Insurance cases have posed no difficulty for the courts, and the defendant's claim that insurance benefits should operate to reduce recovery has constantly been rejected.¹⁵¹ This is clearly established with life insurance proceeds in a wrongful death action, since the proceeds would have been payable at some time and the only effect of the fatal accident was to accelerate payment.¹⁵² In the case of damage to property, no problem of "over-compensation" arises, because the property insurer subrogates to the plaintiff's claim against the tortfeasor.¹⁵³ However, in personal injury cases a question as to the effect of insurance may properly arise. Subrogation does not generally exist with respect to health, accident and related insurance,¹⁵⁴ unless perhaps it is specifically provided for in the contract.¹⁵⁵ Therefore, the accident victim who has taken out "first person" insurance against various aspects of personal injury damage retains the insurance proceeds notwithstanding recovery against the tortfeasor. The question is whether his recovery should be affected by the insurance proceeds. The courts, applying the collateral source rule, have held not.¹⁵⁶

It is important to consider present societal attitudes toward insurance. At first insurance was considered an aleatory transaction¹⁵⁷ in which the insured "gambled" a small premium against the possibility of substantial recovery if a designated contingency

¹⁵¹ See Maxwell, *supra* note 97, at 673 n. 14.

¹⁵² See West, *supra* note 80, at 409 n. 106. This question was involved in one of the earliest American cases on the subject of collateral source benefits. *Althorf v. Wolfe*, 22 N.Y. 355 (1860).

¹⁵³ See W. VANCE, *INSURANCE* § 134 (3rd ed. 1951).

¹⁵⁴ *Id.* See *Michigan Hospital Service v. Sharpe*, 339 Mich. 357, 63 N.W.2d 638 (1954).

¹⁵⁵ Subrogation on this basis was allowed in *Michigan Hospital Service v. Sharpe*, 339 Mich. 574, 64 N.W.2d 713 (1954). The Blue Cross policy did not provide for subrogation, but the Blue Shield policy did.

¹⁵⁶ See the discussion and citation of cases in Maxwell, *supra* note 97, at 674; West, *supra* note 80, at 409 n. 108.

¹⁵⁷ See *Harding v. Town of Townshend*, 43 Vt. 536 (1870).

occurred. This was rationalized on the ground that the insured was insuring against a "catastrophe", such as his death, the destruction of his home or farm, the loss of goods at sea.¹⁵⁸ While the gambling aspect is never far from our minds, as the law regarding insurable interest and the suicide provisions of a life insurance policy indicate, taking out insurance has become very respectable. The "good family man" will take out insurance to protect his family. First, of course, is the need for adequate life insurance, enough to provide for his family's needs when he is gone. If he earns \$10,000 per year, and his family needs, let us say, \$8,000 per year when he dies, he will need to carry \$200,000 worth of insurance. His wife might die before the children grow up and there will be the expenses of a housekeeper. Some insurance on the wife is also desirable. And it is a good idea to take out a small policy on each child to cover burial expenses in case of death. Since college is expensive, the prudent father who wants to provide an education for his children will also take out an endowment policy. As to health, Blue Cross and Blue Shield represent the minimum protection, with major medical becoming an essential. The traditional fire insurance policy has been replaced by a comprehensive homeowner's policy which costs little more. As a motorist, he will take out the minimum 10/20 coverage, but if he is at all prudent, he will make it 50/100, and since 100/300 costs practically no more, he is advised to insure for the highest amount. This will be part of a comprehensive family automobile policy.

Thus far, we have been talking only about "basic protection", but it is clear that the concept of insurance against catastrophe has changed even here. Blue Cross and Blue Shield meet most expenses of an ordinary hospitalization, and major medical protects against the really serious illness. Gone are the days when the family "saved" to meet medical crises. The modern homeowner's policy protects against all kinds of small losses that in the past any homeowner assumed he would have to bear. The comprehensive automobile policy guarantees that the automobile owner, if he wishes, can have all the expenses of an accident met, save for a \$50 deductible provision. More significantly, the con-

¹⁵⁸ See the discussion in W. VANCE, *supra* note 153, §11.

cept of insurance as protection against loss has changed. Now it is possible to insure against the occurrence of a contingency, and notwithstanding the gambling aspect of this arrangement, it is perfectly respectable. Modern insurance marketing stresses that the insured can cumulate insurance proceeds. Furthermore, benefits are payable without regard to "out-of-pocket" loss or obligation. Consider an individual who anticipates that he may have to go into the hospital at some time. Moreover, let us say he is a hypochondriac. He will take out Blue Cross, Blue Shield and major medical to cover the actual costs. But he may take out any number of health and accident policies in addition. One may pay him a specified sum of money whenever he undergoes an operation, which he may use as he wishes (query, is this insurance against pain and suffering?). Another may pay him so much per day while he is in the hospital. This may be akin to income protection insurance (although income protection insurance is actually marketed differently), but there is no requirement that the purchaser of the insurance has been earning any income. If a person is insured to this extent, is he not insuring against a contingency, with an element of gambling surrounding the transaction? It may be asked whether insurance is not marketed so as to encourage such gambling. It is necessary to recognize the changed societal attitude toward insurance and to distinguish between insurance against loss and insurance against the occurrence of a contingency. The prevalence of first person insurance indicates that many accident victims will have received insurance benefits which have met some of the loss for which they are trying to recover against the tortfeasor.¹⁵⁹ The question remains as to whether the receipt of such benefits should affect their tort recovery.

The courts have refused to allow the receipt of insurance benefits to affect tort recovery, stressing that the plaintiff has paid for the insurance benefits and is recovering them under his contract with the insurer. With disarming candor the Vermont court, in the earlier days of insurance, stated that an accident insurance policy was "in the nature of a wager between

¹⁵⁹ As to how well such insurance and other collateral benefits meet actual loss, see Morris and Paul, *The Financial Impact of Automobile Accidents*, 110 U. PA. L. REV. 913, 920-22 (1962).

the plaintiff and a third person, the insurer, to which the defendant was in no measure privy.¹⁶⁰ The court went on to make two other points. First, recovery should not be reduced because the plaintiff did not acquire the policy in order to benefit the defendant. Secondly, there might be subrogation as between the plaintiff and the insurer, but subrogation would not affect the plaintiff's recovery against the defendant. Around the same time an English case utilized a somewhat different rationale.¹⁶¹ It stressed that the right to be compensated when the event insured against occurred was the equivalent of the premiums paid (presumably that part of the premium apportioned to protection). The court also resorted to the *causa causans* doctrine: the insurance contract rather than the accident was the *causa causans* of the receipt of benefits, so the benefits could not be deducted from the award of compensation for the accident. The view that the plaintiff has paid for the benefits is followed by American courts which hold that the plaintiff can recover for hospital and medical expenses, notwithstanding that they were covered in whole or in part by Blue Cross and Blue Shield¹⁶² or health insurance.¹⁶³

The argument that the plaintiff has paid for the benefits received is also advanced by the proponents of the collateral source rule. The benefits, "being products of the plaintiff's own thrift, foresight and sacrifice, should be immune from mitigation."¹⁶⁴ It is further contended that to allow the plaintiff to recover both the insurance proceeds and full damages may serve as an inducement to insure.¹⁶⁵ Moreover, as a practical matter, the beneficiary of an accident policy is usually willing to settle his claim for less, so to allow him to keep the proceeds may facilitate the chances of settlement.¹⁶⁶

¹⁶⁰ *Harding v. Town of Townshend*, 43 Vt. 536, 537 (1870).

¹⁶¹ *Bradburn v. Great Western Railway Co.*, [1874] L.R. 10 Ex. 1 (C.A.).

¹⁶² See e.g., *Taylor v. Jennison*, 355 S.W.2d 902 (Ky. 1960); *Kirkham v. Carter*, 335 S.W.2d 83 (Mo. 1960). Cf. *Kopp v. Home Mut. Ins. Co.*, 6 Wis.2d 53, 94 N.W.2d 224 (1959), holding that insured who had received Blue Cross benefits could also recover under the medical payments clause of an insurance policy.

¹⁶³ See e.g., *West v. Gay*, 275 Ala. 286, 154 So.2d 297 (1963); *Healy v. Rennert*, 9 N.Y.2d 202, 173 N.E.2d 777 (1961).

¹⁶⁴ See *Lambert, The Case for the Collateral Source Rule*, 1966 Ins. L.J. 531, 544. See also *Jolowicz*, 1963 CAMB. L.J. 37, 40 (1963).

¹⁶⁵ *Lambert*, *supra* note 164, at 544.

¹⁶⁶ See discussion in *James, Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U. L. REV. 537, 555-56 (1952).

The reply to this argument is that by purchasing accident insurance the plaintiff is seeking security rather than possible double recovery.¹⁶⁷ He may be injured in circumstances where no tort recovery is possible, *e.g.*, a one-car accident, or may be unable to make out a case of liability. Even when there is a possibility of tort recovery, he wants to see that his bills are paid without the need for litigation. Certainly the insured is thinking primarily in terms of payment of the bills, whether as a result of the accident or any other occasion for hospitalization. It is doubtful if double recovery will have much to do with an individual's decision to take out health or accident insurance.¹⁶⁸ At least this is so in the case of what I call "loss insurance" as opposed to contingency insurance.

The argument is also made that where there is insurance, the plaintiff should recover less, because he has lost less.¹⁶⁹ In the case of loss insurance, this is correct. If his hospital and medical bills came to \$1,000, \$970 of which was paid by Blue Cross, the plaintiff's out of pocket loss for hospital and medical expenses was only \$30. The question is what to do about the remaining \$970. This is posed in terms of the dilemma between overcompensation and windfall.

One proposal is that the principle of subrogation be extended to health, accident and other forms of loss insurance, as now applied to fire and marine insurance. In our example, the plaintiff's casualty insurer would recover \$970 from the defendant, or more realistically, from his liability insurer, either in a direct action, or from the proceeds of the plaintiff's recovery. Subrogation is often proposed as the perfect solution to overcompensation and windfall, since the defendant will be required to pay full

¹⁶⁷ Swartz, *The Collateral Source Rule*, 41 B.U. L. REV. 348, 354 (1961); James, *supra* note 166, at 553. See also the discussion in Ganz, *Mitigation of Damages by Benefits Received*, 25 MOD. L. REV. 559, 565 (1962). And even if this were not his purpose, it is contended that it is undesirable to permit the insured to wager, to "gamble a very small portion of his premium on the chance of a windfall in excess of recovery." James, *supra* note 166, at 544-45.

¹⁶⁸ "The plaintiff recovers but once for the wrong done him, and he receives the insurance money upon a contract to which the defendant is in no way privy, and in respect to which his own wrongful act can give him no equities." Perrott v. Shearer, 17 Mich. 47, 56 (1868).

See also Althorff v. Wolfe, 22 N.Y. 355 (1860); Ganz, *Mitigation of Damages by Benefits Received*, 25 MOD. L. REV. 559 (1962).

¹⁶⁹ See Ganz, *supra* note 167, at 565.

damages, but the plaintiff will not receive double recovery.¹⁷⁰ Moreover, subrogation might operate to reduce the rates for loss insurance.¹⁷¹

I must confess that I find this solution somewhat incredible. For what is proposed is something no less than the alteration of the health and accident insurance business. Subrogation has been allowed where there is an express provision to this effect in the policy,¹⁷² but the fact remains that most health and accident insurance policies do *not* have such provisions.¹⁷³ Since the courts traditionally allowed subrogation in property claims, the fire and marine insurance business was organized on this basis, and rates reflect the pattern of subrogation. Moreover, it may be that in a significant number of property insurance claims there was a question of tort liability, so that to allow subrogation could materially affect the rates for fire and marine insurance, *i.e.*, a substantial portion of the loss would be shifted from the casualty insurer to the responsible enterprise or liability insurer. But it may be asked whether the number of Blue Cross and Blue Shield claims, for example, in which there might be tort recovery is sufficient so as to affect the rate structure. At least this is doubtful. If health and accident companies wanted subrogation, they would provide for it in the policies.¹⁷⁴ Indeed, automobile liability insurance companies do not seem impressed by the "savings" resulting from subrogation to property damage claims, as evidenced by the widespread "knock for knock" arrangements. As Professor James has said about subrogation, "Altogether it is a far, far thing from the fair-haired boy it is often assumed to be."¹⁷⁵ In theory, insurance companies are in business to insure against loss and to pay such losses when they

¹⁷⁰ West, *supra* note 80, at 414; Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741, 751 (1964); Note, *The Mitigating Effect on Damages of Social Welfare Programs*, 63 HARV. L. REV. 330, 332-33 (1949).

¹⁷¹ This is assumed to follow from the allowance of subrogation. Query, will this necessarily be so, or will the "savings" be disposed of otherwise?

¹⁷² *Michigan Hospital Service v. Sharpe*, 339 Mich. 574, 64 N.W.2d 713 (1954).

¹⁷³ James, *supra* note 166, at 553 n. 60.

¹⁷⁴ We may assume that this would be permitted under state insurance laws, or if such subrogation were desired, the companies would try to obtain favorable legislation.

¹⁷⁵ James, *supra* note 166, at 563.

occur.¹⁷⁶ When the loss has been met by the health and accident insurer, it may be asked whether there is any utility in shifting it again from this efficient distributor to an enterprise or liability insurer, which will then have to distribute it among its consumers, if it can,¹⁷⁷ or among its policyholders.

In any event, if subrogation is to be introduced into the health and accident insurance field, it would seem that there should be a more economically rational justification than that it is necessary to prevent double recovery or to avoid giving the defendant a windfall. The decision to alter the nature of insurance practice should be based upon a consideration of empirical data, rate structures and the like, which would not ordinarily be available in a suit for personal injuries. This requires a legislative judgment made after careful investigation. For a court to hold that the plaintiff could not recover for loss met by insurance, but that the insurer could recover as subrogee, would be to judicially impose subrogation in a new field, and I do not believe that a court should or would do so.

Discarding the subrogation solution, we still have to decide what to do about the \$970. Professor James suggests that since the courts were unwilling to let the accident insurer subrogate to the rights of the insurer,¹⁷⁸ they approached the problem in terms of the overcompensation-windfall dilemma, and resolved the dilemma in favor of the plaintiff.¹⁷⁹ It cannot be argued that if the plaintiff's hospital bills are paid by the health and accident insurer and he also recovers their cost from the defendant, he is recovering twice for an ascertained loss. But, as the advocates of the collateral source rule maintain, the plaintiff has "purchased" one recovery by paying the premiums for the insurance. Granted that this is so, what conclusion follows?

It is not the "wisdom of Solomon" to suggest that the functionally sound solution is what the court in our early Vermont

¹⁷⁶ In practice, however, it seems that much of the automobile liability insurance business is based on restrictive underwriting. The insurance companies try to identify the "good risks". This being so, the insurance companies are then in business to collect premiums and to insure against loss only those who are not likely to incur it.

¹⁷⁷ For the view that it cannot always do so, see Calabresi, *Some Thoughts on Risk Distribution in the Law of Torts*, 70 *YALE L. J.* 499, 521-24 (1961).

¹⁷⁸ James, *supra* note 166, at 555-56.

¹⁷⁹ *Id.*

case¹⁸⁰ was unwilling to say, namely, *that the plaintiff purchased the insurance for the benefit of the defendant*. This was not his intention, of course, but the insurance is available to meet a loss that the defendant would otherwise have had to meet under principles of tort liability. Since that loss was met by insurance, the plaintiff has no need to recover it from the defendant. But since the plaintiff's insurance has rebounded to the benefit of the defendant by relieving him of a portion of his liability, it seems only fair that the defendant pay for the insurance protection. An analogy may be drawn to the case of *Automobile Insurance Company v. Model Family Laundries*.¹⁸¹ Goods in storage were destroyed by fire, and the bailor refused to pay anything for the storage. In a suit by the bailee, recovery was denied because he had breached the contract by failing to return the goods, notwithstanding that he was not responsible for their destruction. He could not recover the reasonable value of his services in storing the goods on a restitutionary theory, because the services were of no value to the bailor when the goods were not returned. However, the bailee did insure the goods, as he was required to do under the contract, and the insurer settled with the bailor. Therefore, the bailee's act of insuring had rebounded to the benefit of the bailor, and on a restitutionary theory, the bailee was entitled to recover the cost of insurance.

In that case the bailee was required to insure the goods under the contract, so he intended to insure for the benefit of the bailor. Nonetheless, the result should be no different where the insurance has benefited the other party. There is no need for the plaintiff to recover the cost of medical services which were met by insurance. But if he is not reimbursed for the cost of the insurance, the insurance did not benefit him, since he could have recovered the loss met by insurance from the defendant as tort damages. It would be unfair to make him, in effect, pay for the insurance which operated to reduce his tort recovery. Since the insurance enabled the defendant to avoid a portion of his liability, he should reimburse the plaintiff for

¹⁸⁰ *Harding v. Town of Townshend*, 43 Vt. 536 (1870).

¹⁸¹ 133 Conn. 433, 52 A.2d 137 (1947).

the cost of the insurance under a restitutionary theory. To this extent, the plaintiff is not overcompensated, and the defendant does not receive a windfall.

If this approach is followed, the question then becomes what are the premiums for which the plaintiff is entitled to be reimbursed. If the insurance policy was in force for ten years at the time of the accident, the defendant would argue that he should be liable only for a portion of the premium due the tenth year, since the plaintiff also had protection against other possible loss unrelated to the accident.¹⁸² Or, he may contend that during the life of the policy the plaintiff made use of his hospital protection on other occasions. Ultimately, he will argue, very little of the premium cost can be attributed to the protection afforded the plaintiff as a result of the accident.

At this point we must stop since we are necessarily limited in the nature and amount of data that we can feed into the machine. The spectacle of the jury totaling the number of the plaintiff's illnesses plus the amount of insurance premiums in an attempt to assign a certain portion to the particular accident is ludicrous. Either the medical expenses were so extensive as to exceed the total amount of premiums paid during the life of the policy, in which case the defendant should be very relieved that the plaintiff carried insurance, or they were relatively small, so as to be less than the total of the premium paid. Moreover, if the plaintiff had insurance for nine years and finally made use of it in the tenth, it would seem that he measures the cost of the premiums for the entire period against the benefits paid. We would, therefore, limit our consideration to the total amount of premiums paid during the life of the policy.

Where insurance meets an ascertained portion of the loss, there is no reason, under our compensatory theory of damages, to permit the plaintiff to recover again for that portion from the defendant. The defendant, who is relieved of a liability that under tort law he would be required to bear, cannot complain if he is made to pay for the insurance that rebounded to his benefit. For practical reasons—again, we do not have a sensitive computer in the jury room—and taking account of society's attitude toward insurance, this would mean the total premiums

¹⁸² See Pecknypaugh, *supra* note 82, at 553.

paid during the life of the policy. The plaintiff would recover either the cost of the medical expenses that were met by insurance or the total premiums paid, whichever was smaller. This could be determined at the pre-trial hearing, since we may assume that the health and accident insurer would have an accurate record of premiums paid and that the medical expenses would be ascertainable. The "damages" for medical services could then be stipulated.

However, not all insurance is loss insurance. As we have pointed out, it is possible for a person to "over-insure", that is, to take out more insurance than is necessary to cover his losses. Fire insurance policies are written so that the insured cannot cumulate, and where the property owner has insured the property in excess of its value, recovery under the policy is on a *pro rata* basis.¹⁸³ Perhaps a fear of arson for the purpose of collecting insurance proceeds has impelled such an approach. But health and accident insurance does not operate in this manner, and indeed is marketed on the basis that the plaintiff can cumulate. Perhaps it is undesirable to permit a person to insure against the contingency of illness to the extent that he can recover a specified sum for a stay in the hospital or for undergoing a particular operation.¹⁸⁴ This is not the concern of a court awarding personal injury damages, where the legislature has permitted the health and accident insurers to carry on their business in this way. Once the plaintiff's actual loss has been measured, insurance recovery beyond actual loss is truly collateral¹⁸⁵ to the tort case, and should not affect the damages award. Therefore, insurance coverage is relevant only insofar as it meets the loss which the defendant would otherwise be required to bear.

Moreover, even as to loss insurance, other considerations may dictate that the plaintiff have full recovery of the insurance proceeds and tort damages rather than be limited to the insurance proceeds and the cost of the premiums. We will discuss this in connection with recovery for loss of earning opportunity. It will be contended that there are sound reasons to ignore the

¹⁸³ W. VANCE, *supra* note 153, § 154.

¹⁸⁴ We do not seem to have considered the economic utility of "over-insuring".

¹⁸⁵ He would recover from the tortfeasor for his actual loss and from the insurer under the contract, which, by definition, has nothing to do with the loss.

plaintiff's income protection insurance, for example, just as there are sound reasons for ignoring the receipt of social insurance benefits in such a case. The point we are trying to make now, however, is that where an identifiable loss has been met by insurance, and there are not countervailing considerations, the plaintiff need not be compensated for that loss by the defendant. Since the insurance has operated to reduce the liability of the defendant, the defendant rather than the plaintiff should bear its cost.

The Collateral Source Rule and Personal Injury Damages: The Irrelevant Principle and the Functional Approach

BY ROBERT ALLEN SEDLER*

PART II**

It is the thesis of this writing that the collateral source rule represents an irrational and unsound way of dealing with the problem of cumulative recovery in personal injury actions. It is, therefore, an irrelevant principle. The plaintiff should be limited to recovery for what he has "lost," to the extent that our system of adjudication can accurately measure loss. Benefits received from a collateral source obviously have something to do with determining what loss actually resulted from the accident. However, the fact that the plaintiff has received benefits from a collateral source does not necessarily mean that the award of damages should be reduced thereby. It may be that realistically the plaintiff is not recovering on his own behalf, but on behalf of another, who is not able to proceed directly against the tortfeasor under our system. It may be that the plaintiff has given up something or "paid" to obtain the collateral benefit, which our system is unable to measure, so that the deduction of the benefit without giving the plaintiff credit for what he has given up or paid would be unfair and would not give proper compensation. Perhaps the plaintiff can be adequately compensated by being awarded the amount paid to obtain the benefits.

* Professor of Law, University of Kentucky College of Law, B.A., 1956, J.D., 1959, University of Pittsburgh.

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The deficiencies and unscientific nature of the system under which we award compensation for personal injuries must be kept in mind. The functional approach, advanced in this writing, represents an attempt to deal with the problem of cumulative recovery and collateral source benefits in a realistic manner, with reference to economic factors and considerations of practicality. This approach would discard the collateral source rule, although frequently the result reached by its application may be reached under this approach.¹⁸⁶ A particular solution—and I would not maintain that everyone would agree with all my solutions—is less important than the approach taken to the problem. In the second half of the writing, we will apply the functional approach to a number of collateral source benefits. The discussion will be divided into the two aspects of “out-of-pocket” loss: medical, hospital and nursing expenses; and loss of earning opportunity.

MEDICAL, HOSPITAL AND NURSING EXPENSES

A. *Gratuitous Medical and Hospital Treatment*

In the United States—seemingly alone among the industrialized nations of the world—adequate medical care is not considered an “inherent right” of every individual. Like any commodity, medical care is to be bought and purchased, and the quality and nature of the care may well depend upon a person’s ability to pay. Medical and hospital treatment, therefore, represents an “out-of-pocket” loss, and the accident victim who has paid or who has become obligated to pay for such treatment and services is entitled to recover from the tortfeasor. In theory, he recovers the reasonable value, but in practice, of course, he recovers the actual cost, and the jury ordinarily will not determine whether the charges were reasonable.¹⁸⁷ But not all people are able to pay for hospital and medical care, and while our society may not believe that there is an “inherent right” to such care, it

¹⁸⁶ Thus, I agree with Dean Maxwell’s conclusion that “in some cases the rule operates as an instrument of what most of us would be willing to call justice.” Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. R51. 669, 595 (1961). However, this does not seem to me as a justification for retaining the rule as the solution to the problem of cumulative recovery.

¹⁸⁷ Such damages are frequently stipulated. *But see* *Begley v. Adaber Realty & Inv. Co.*, 358 S.W.2d 785 (Mo., 1962), where the plaintiff failed to show that the bills were paid and did not introduce evidence as to their “reasonableness.” The court denied recovery.

rejects the view that a poor person should not receive *some* medical attention. Charity is one of the seven virtues, and somehow the poor, if they seek it or are involved in an accident, will get medical care. Doctors have, and perhaps some still do, treated poor patients without charge or at a reduced fee. Most privately-incorporated hospitals are now non-profit institutions, (where doctrine is recognized they are entitled to benefit of charitable immunity) and have charity wards where the poor receive medical care free or in accordance with the administrator's estimate of their "ability to pay." The accident victim will certainly receive medical care. Under the collateral source rule, the accident victim can recover the value of medical and hospital services, for, at the time the question first arose, it was correctly reasoned that the charitable intention was to aid the victim rather than relieve the tortfeasor of his liability.¹⁸⁸ How should this matter be dealt with under the functional approach?

We have already discussed the value of services furnished by a physician. Under our system of private medical care, a doctor who renders services is entitled to be paid. Where the services were necessitated by an accident, the cost should be borne by the person legally liable for the loss. The fact that the doctor rendered services "gratuitously" is irrelevant as regards the doctor's right to be paid. We do not, for reasons of judicial convenience, permit the doctor to sue the tortfeasor. By permitting the victim to recover, we hope that the doctor will be paid. If the cost of such services were paid by a third person, he too should recover the cost from the tortfeasor, but again, our system does not permit him to do so. By allowing the victim to recover their value from the tortfeasor, there is the possibility that the donor will be reimbursed.¹⁸⁹ So, where the plaintiff is recovering the value of medical services rendered "gratuitously" or paid for by a third party, he is really recovering on behalf of the doctor or the donor.¹⁹⁰ If the court is really concerned about

¹⁸⁸ See the discussion, *supra* notes 15-17 and accompanying text.

¹⁸⁹ Recovery is generally permitted. See West, *The Collateral Source Rule Sans Subrogation: A Plaintiff's Windfall*, 18 OKLA. L. REV. 395, at 400 n. 31 (1963). In *Jones v. Keith*, 134 So. 630 (Ala. 1931), the court said by way of dicta that the plaintiff could not recover where his employer paid the costs. Where the employer pays the medical bills of his employee, the payment is analogous to payment of wages as a gratuity.

¹⁹⁰ Except in a case such as *Coyne v. Campbell*, where the party rendering the services should not be entitled to recover their value.

protecting the doctor or donor, it can accomplish this by the use of a decree directing repayment.¹⁹¹ It is simpler to allow the injured party to recover the value of the services from the tortfeasor and let him make arrangements with the benefactor, who, considering the injured person's poverty, may be willing to make him a "gift" of the recovery.

We may now consider hospital services.¹⁹² Following the accident, the victim will be taken to the emergency room of some hospital. The particular hospital will depend on many factors, such as the arrangements the police have with emergency rooms of local hospitals. A number of localities now have public hospitals, supported by taxation, where care is rendered free of charge to specified classes of persons, or where any charge is dependent upon the patient's ability to pay. Our victim may be taken to one of these. Or, he may be taken to a private hospital and given free care in the charity ward. In either case, he either has paid nothing for the hospital services, or has paid substantially less than the "reasonable value," *i.e.* less than what he would have had to pay if he were financially able.

Clearly, there is no reason why he should recover the value of services for which he has not paid and consequently, is not "out-of-pocket." The *Restatement of Torts*¹⁹³ draws a distinction between services rendered by a private charity and those rendered by a "state-supported or other public charity," and would allow the plaintiff to recover the value of the services from the defendant when they were rendered by the former, but not when rendered by the latter. Dean Maxwell contends that there is no sound reason to distinguish between services rendered by a private or public charity, and that if the collateral source rule is to be applied, it should include all such services.¹⁹⁴ While we agree that there is no distinction, unlike Dean Maxwell, we would conclude that recovery should be denied in both cases. The reason is that *for the particular plaintiff* the cost of hospital services does not represent an item of loss, because he was not

¹⁹¹ See the discussion, *supra* notes 117-21 and accompanying text.

¹⁹² We are assuming that the hospital services also include the services of attending physicians. The previous discussion of services rendered "gratuitously" by a physician refers to those rendered by a private physician.

¹⁹³ RESTATEMENT OF TORTS, Explanatory Note § 924, comment *f* at 637 (Expenses, 1939).

¹⁹⁴ Maxwell, *supra* note 185, at 689.

required to pay for them. Again, the principle that the tortfeasor takes his victim as he finds him operates for the defendant's benefit. Because the plaintiff was poor, he received free hospital care, and if our purpose in awarding compensation is to put *him* in as good a position as he would have been if the tort had not occurred, it is not necessary that we award him the cost of hospital services.

If this result is difficult to accept, it is only because in our society free medical and hospital care is available for some, but not all. Suppose that all accident victims, or indeed all persons, were entitled to free hospital and medical care, as under the National Health Service in Great Britain.¹⁹⁵ An accident victim there who obtains free medical and hospital services, as most do, cannot recover the value of those services from the tortfeasor.¹⁹⁶ If all persons obtained free medical and hospital care, we would not consider this a compensable item of damage, for this would not be an expense that an accident victim would be required to undergo. We allow recovery on the theory that the victim is "out-of-pocket," because he has paid for such care, and if he has not had to do so, there is no reason for him to recover.¹⁹⁷ This does not mean that there is discrimination between "rich" and "poor" with respect to the recovery of damages. Just as the high wage-earner recovers more for his lost time than the low wage-earner, because he has lost more, the person who has paid for hospital services recovers their cost because he has lost something as a result of the accident, while the person who has not paid does not recover because he has not lost anything in this regard. While in the United States only a minority of accident victims receive free hospital and medical care, those who do have no need to recover this item of damages, and some courts have denied recovery where the services were furnished by a public hospital¹⁹⁸ or a hospital where the plaintiff

¹⁹⁵ National Health Service Act, 9 & 10 Geo. 6, c. 81 (1946). See the discussion in Friedmann, *Social Insurance and The Principles of Tort Liability*, 63 HARV. L. REV. 241, 242 (1949).

¹⁹⁶ See Ganz, *supra* note 167, at 563.

¹⁹⁷ In Great Britain the plaintiff who has, in fact, obtained private medical care, can recover the cost from the tortfeasor. Law Reform (Personal Injuries) Act, 11 & 12 Geo. 6, c. 41, § 2, sched. 4. (1948).

¹⁹⁸ See *City of Englewood v. Bryant*, 100 Colo. 552, 68 P.2d 913 (1937); *Di Leo v. Dolinsky*, 129 Conn. 203, 27 A.2d 126 (1942).

received the services free of charge.¹⁹⁹ Under the functional approach, the plaintiff could not recover for hospital services rendered without charge whether at a public or private charity hospital.

The real question in such a case is whether the hospital should recover the cost of the services from the tortfeasor. Louisiana provides for such recovery by statute and the hospital is subrogated to any award made to the accident victim.²⁰⁰ Where the hospital requires that the patient pay for the services, if he recovers any compensation from a tortfeasor, the patient has not received "free" services. It has been argued that the plaintiff's recovery should not depend on "how knowledgeable the plaintiff and his benefactors set up the transaction."²⁰¹ Nonetheless, if a particular hospital, whether public or private, enters into such an arrangement with the accident victim, the courts have little choice but to allow him to recover their value from the tortfeasor, since by obtaining the judgment he will become "legally obligated." But this is more than implying a contract to pay in such cases, as some courts have done when allowing the plaintiff to recover from the tortfeasor.²⁰² Where the hospital has not been sufficiently concerned about reimbursement to expressly require it, it may be assumed that they are uninterested. Administratively, it may be questioned whether reimbursement arrangements are sound, particularly in the case of a public hospital. The number of accident cases in which third party liability is possible may not be significant. I think this would also be true for private hospitals. The potential amount recoverable is probably not sufficient to justify the time and record-keeping involved, and the arguments against subrogation are equally applicable here.²⁰³ If we could accept the concept of free hospital care, it would not be necessary to concern ourselves with holding the tortfeasor "responsible" for the cost. Unless it is clear that the plaintiff has paid or is legally obligated to pay for the hospital services he has received, recovery should not be allowed against the tortfeasor.

¹⁹⁹ See *Nelson v. Western Steam Navigation Co.*, 52 Wash. 117, 100 P. 325 (1909).

²⁰⁰ LA. REV. STAT., tit. 46, § 8 (1951).

²⁰¹ Maxwell, *supra* note 185, at 688.

²⁰² See *Reichle v. Hazie*, 22 Cal. App. 2d 543, 71 P.2d 849 (1937).

²⁰³ James, *supra* note 166, at 557-63.

However, the nature of the plaintiff's injuries may be such that he will require medical and hospital care in the future. Irrespective of the fact that the plaintiff is eligible to obtain free care, he should be entitled to recover the reasonable value of future medical and hospital services from the tortfeasor.²⁰⁴ In our society private medical and hospital care is to be preferred to the public or charitable kind. It is more desirable to have a private or semi-private room than to be in a ward with other indigents, and in many localities, faced with a choice between a public and private hospital, most people would prefer the private one. The accident victim, despite his poverty, is entitled to the same choice. In Great Britain, it is specifically provided that in determining the reasonableness of expenses for medical care, "the possibility of avoiding those expenses or part of them by taking advantage of facilities available under the National Health Service Act shall be disregarded."²⁰⁵ Under our system the plaintiff must recover for past and prospective damages in a single action, so there is no way of knowing whether he will actually make use of the free facilities and thereby obtain a windfall. If damages were awarded only after the expenses had been incurred, it would be possible to limit recovery only to those cases where the plaintiff actually made use of private care, but this is not the way it is done. Since there is a single recovery and since the plaintiff has a right to elect private care, he is entitled to recover the value of future medical and hospital services irrespective of his eligibility for free care.

B. *Treatment in Military and Veterans Administration Hospitals.*

If a person in active military service or one of his dependents is injured in an accident, he will be treated at a military hospital or elsewhere at government expense.²⁰⁶ However, others are also entitled to medical and hospital care at the expense of the government or the Veterans Administration. Former members of the military service and their dependents are entitled to care at military facilities.²⁰⁷ Veterans of any war or of service after January 31, 1955, who are unable to pay for necessary hospi-

²⁰⁴ See the cases cited, *infra* note 214.

²⁰⁵ *Supra* note 197.

²⁰⁶ 72 stat. 1445 (1958), as amended, 10 U.S.C. § 1071-1085 (1964).

²⁰⁷ 10 U.S.C. §§ 1074(b), 1076(b) (1958).

talization, are entitled to be admitted to a Veterans Administration hospital, even for a non-service-connected disability.²⁰⁸ Where an accident victim has received free care at a military or Veterans Administration facility, the question is whether he can recover the value of the medical and hospital services from the tortfeasor. The question has arisen both with respect to ordinary tortfeasors and to the United States, sued as a defendant under the Federal Tort Claims Act.²⁰⁹ Let us first consider a person in active military service suing an ordinary tortfeasor, who seeks to recover the reasonable value of the medical and hospital services furnished by the government. A moment's reflection will indicate that this is Sergeant Browning's case again. The accident victim received free medical and hospital care in the sense that he did not have to pay the physician and hospital bills. But, as we have said, this fringe benefit is part of his total compensation picture. We cannot determine how much less compensation he received than would have been the case if this fringe benefit were not available. Therefore, as with the disability pension, the fact that he has received this benefit should not affect his recovery of damages against the tortfeasor; and the person in active military service has uniformly been permitted to recover the value of medical and hospital services from the tortfeasor.²¹⁰ The same would be true of the services furnished his dependents, for these too, are part of his total compensation picture. As to the retired person, the medical and hospital services available after retirement fall into the same category as a disability pension, and he should be able to recover their value.

A different question is presented when the tortfeasor is the United States, and suit is brought under the Federal Tort Claims Act. The dependent or retired person could have been injured by a mail truck, for example, or even a military vehicle. It has also been held that a serviceman who is injured by a government instrumentality while off-duty may maintain a suit under the Act.²¹¹ You will recall that ordinarily recovery is reduced by

²⁰⁸ 72 Stat. 1141 (1958), as amended, 38 U.S.C.A. § 610 (Supp., 1966). See also 38 C.F.R. §§ 17.47, 17.49 (1966).

²⁰⁹ 62 Stat. 933 (1948, as amended), 28 U.S.C. § 1346(b) (1964).

²¹⁰ See, e.g., Gillis v. Farmers Union Oil Co. of Rhame, 186 F. Supp. 331 (D. N.D. 1960); Herrick v. Saylor, 160 F. Supp. 25 (N.D. Ind. 1958).

²¹¹ United States v. Brooks, 337 U.S. 49 (1949).

benefits that were furnished to the victim by the tortfeasor rather than a collateral source. The result should be no different where the tortfeasor is the government; the government has injured a person, and has taken care of his medical and hospital services to a serviceman injured in the line of duty. There is no reason then, to permit the serviceman or his dependents to recover the reasonable value of the services in a suit under the Act.²¹²

However, if future medical and hospital services are necessary, the plaintiff should be entitled to recover their reasonable value in a suit against the government. The same would be true if the plaintiff had, in fact, incurred expenses for private care. As discussed previously, the availability of free medical care does not mean that the plaintiff "fails to mitigate damages" if he does not take advantage of such care. In our society, paid private medical care is still deemed superior to care at public expense.²¹³ Since prospective damages must be recovered in the tort action, there is no way of knowing whether they would make use of the government's facilities, and they are entitled to have the choice. For this reason recovery for future medical care has been permitted by a plaintiff who was eligible for free care at a Veterans Administration hospital,²¹⁴ and this should be equally true for the plaintiff presently in service.

We may now consider the case of a person who is eligible for treatment at a Veterans Administration Hospital. Of course, he can recover for future medical and hospital services in actions against the ordinary tortfeasor as well as the government. The important question is whether he can recover for services that were actually furnished at the Veterans Administration Hospital. In a suit against an ordinary tortfeasor recovery has been permitted. The leading case is *Hudson v. Lazarus*,²¹⁵ where the plaintiff, a veteran, received free care at a military hospital. In permitting full recovery, the court made the following points. First, it said that a collateral source benefit will either work to

²¹² See *United States v. Brooks*, 176 F.2d 482 (4th Cir. 1949); *Jones v. United States*, 236 F. Supp. 756 (E.D.N.C. 1964).

²¹³ Thus, persons in active military service may fail to take advantage of medical care at military facilities. If the plaintiff had employed private care, he should be entitled to recover the cost from the United States.

²¹⁴ *Feeley v. United States*, 337 F.2d 924 (3rd Cir. 1964).

²¹⁵ 217 F.2d 344 (D.C. Cir. 1954).

the advantage of the injured person or the "wrongdoer," and "the purpose of the parties and the interest of society would be better served if the injured party rather than the wrongdoer is benefited." Secondly, the court observed that legal compensation for personal injuries does not fully compensate, since the injury cannot be measured in economic terms. We have discussed these kinds of justifications for the collateral source rule previously, and found them wanting.²¹⁶ However, the court also "borrowed a leaf" from the functional approach, saying that it might well be considered that medical and hospital services supplied by the Government to these members of the United States Navy were part of the compensation to them for services rendered and that, therefore, by their service in the Navy they had paid for them."²¹⁷ It is this point that seems crucial to me. Is this Sergeant Browning's case, so that under the functional approach, recovery would be permitted? Or, is this instead the case of the victim in the public hospital or charity ward, where we would deny recovery on the ground that the services did not cost the victim anything?

In criticizing the view that the free hospitalization was compensation for past services, one commentator observed that it was not available to all veterans, but only those who could not afford to pay for private care.²¹⁸ I do not think that this fact alone is significant, since a fringe benefit may be made available only to those who are in need of it. This is true of medical and hospital care while a person is in service. The point, as I see it, is that it is difficult to think in terms of such care as representing compensation for past services performed by non-career veterans. The great majority of veterans today were draftees or volunteers for a specified period of time or the duration of a war. The draftees had no choice, and the volunteers, even if they considered the economic aspects of military service, could not have been influenced by the availability of this fringe benefit, which at least for older veterans did not exist at the time they entered service. Free hospital care for indigent veterans is but one of the benefits our society provides for those who have served in time of war, "hot" or "cold," and cannot be considered part of

²¹⁶ See the discussion, *supra* notes 85-95 and accompanying text.

²¹⁷ 217 F.2d at 347.

²¹⁸ Note, *Hudson v. Lazarus*, 43 GEO. L. J. 515, 517 (1955).

a total compensation picture in any meaningful sense. Because of their status as veterans, they are, if indigent, entitled to free care in a Veterans Administration Hospital. To this extent they are in a "favored class," as are veterans who attend school under the G.I. Bill of Rights or who receive civil service preference. They have received their medical and hospital care free and cannot be said to have "given up" anything in the economic sense in order to obtain such care. Perhaps it seems "heartless" to deny double recovery to indigent veterans, as it is to indigent plaintiffs who receive free care at a public or charity hospital. But, then, maybe we should add twenty per cent to the award when the plaintiff is an indigent. Facetiousness aside, if we purport to compensate for loss as well as we can measure it, a plaintiff who has received free care at a Veterans Administration Hospital has not suffered a loss in this respect because of the accident, and should not be entitled to recover that amount from the defendant.²¹⁹

The matter is complicated, however, by Veterans Administration regulations, which provide as follows:

Persons hospitalized pursuant to paragraph . . . (b) of §17.47 (the indigency provision), who it is believed may be entitled to hospital care or medical or to surgical treatment or to reimbursement for all or part of the cost thereof by reason of any one or more of the following:

* * * *

(2) By reason of statutory or other relationships with third parties, including those liable for damages because of negligence or other legal wrong, will not be furnished hospital care, medical or surgical treatment, without charge therefor to the extent of the amount for which such parties, referred to in subparagraph (1) or (2) of this paragraph, are, or will become liable. Such patients will be requested to execute an appropriate assignment as prescribed in this paragraph.²²⁰

This is a part of a broader scheme designed to guarantee that the veteran is really indigent, and it includes union or fraternal

²¹⁹ See *Smith v. Foucha*, 172 So.2d 318 (La. App. 1965), where the court denied recovery on the grounds that (1) the services had not cost the plaintiff anything, and (2) the United States had subrogated to his claim.

²²⁰ 38 C.F.R. § 17.48 (f) (1966).

benefits, private insurance and workmen's compensation.²²¹ This regulation was not involved in *Hudson v. Lazarus*, since it had not become effective until after the victim's death. In one case where the claim had been assigned, the court permitted the Veterans Administration to intervene and to recover the value of medical and hospital services as assignee.²²²

I really question whether the number of cases where an indigent patient in the Veterans Administration Hospital is an accident victim are sufficient to justify the Veterans Administration trying to cover the cost of care from the tortfeasor. Perhaps there are, but I think it is more likely that the Veterans Administration lawyers were enamoured of subrogation and inserted this provision in the regulations. It seems to me that compared to the total cost of supplying free care to indigents for non-service-connected disabilities, the amount of actual reimbursement would be quite small. When the veteran has not executed the assignment, there is no reason to permit him to recover the amount from the defendant; if he does not recover, he will not be "legally obligated" to the Veterans Administration. Even if the Veterans Administration sues as assignee, there is still no reason for the court to permit recovery. It should take the position that a veteran who has obtained free care is not entitled to recover that item of damage from the tortfeasor. It is difficult to see the utility in shifting the cost of care from the government to the enterprise or the defendant's liability insurer in the absence of evidence that this would result in substantial savings to the government. The argument against subrogation²²³ is strongest where the government is involved; the burden on the American taxpayer will not be appreciably lessened, if at all, by requiring the government to bear the full cost of treating indigent veterans, notwithstanding that tort recovery by a patient is possible.

The question has also arisen in a suit by a veteran, who has been furnished free care at a Veterans Administration Hospital, against the United States under the Federal Tort Claims Act. Incredibly enough, one court permitted the veteran to recover the value of such services.²²⁴ The court reasoned that (1) the

²²¹ *Id.*

²²² *City of Fort Worth v. Barlow*, 313 S.W.2d 906 (Tex. Civ. App. 1958).

²²³ *See*, note 203 *supra*.

²²⁴ *United States v. Gray*, 199 F.2d 239 (10th Cir. 1952). A contrary result was reached in *Feeley v. United States*, 337 F.2d 924 (3rd Cir. 1964).

Veterans Administration furnished the hospitalization under separate legislation rather than under the Act, and (2) there was nothing to indicate that Congress intended for recovery under the Act to be diminished by the amount expended in furnishing hospitalization and treatment.²²⁵ This ignores the fact that such care did not cost the plaintiff anything and that the United States, now being sued as tortfeasor, furnished it. It can be contended with equal logic that Congress did not intend for the United States to pay twice for the same injury.²²⁶ It is absurd to permit recovery for medical expenses that the victim did not pay or give up anything to get, and doubly absurd where it was the tortfeasor who did pay for them.

The final case is where a non-military person was taken to a military hospital because he was a passenger in an automobile, driven by a serviceman, which was involved in an accident. He received complete care without charge, and was then permitted to recover the value of the medical and hospital services from the tortfeasor.²²⁷ Recovery was justified on the ground that the government could not recover from the tortfeasor and the tortfeasor should not be able to avoid liability. As we have pointed out repeatedly, our theory of tort recovery proceeds on the basis of compensating the plaintiff rather than punishing the defendant and his insurer. Since the plaintiff received free hospital and medical care, for which he had given no "value," he should not recover the cost of such care from the defendant.

C. Insurance and Mutual Protection Benefits.

We have previously discussed the case of the insured plaintiff in the medical setting.²²⁸ Under our approach, to the extent that medical and hospital expenses are covered by loss insurance, that amount should be deducted from the recovery in the tort

²²⁵ At the same time the court held that the plaintiff's disability pension, also furnished by the Veteran's Administration, was to be deducted.

²²⁶ In suits arising under the Act, liability is to be determined "in accordance with the law of the place where the act or omission occurred." Some courts proceed on the assumption that whether benefits obtained from the United States are to be deducted from the award is to be determined by state law. It would seem that the question should be determined by federal law, since "double recovery" involves the federal social insurance programs apart from the government's tort liability. However, where the collateral source benefit was not received from the federal government, *e.g.*, from the plaintiff's employer, state law should apply. See *Klein v. United States*, 339 F.2d 512 (2d Cir. 1964).

²²⁷ *Rayfield v. Lawrence*, 253 F.2d 209 (4th Cir. 1958).

²²⁸ See the discussion, *supra* notes 179-89 and accompanying text.

action, but the total cost of the premiums during the life of the policy would be added. Where the expenses are less than the total cost of the insurance, the plaintiff would recover the expenses. Insurance against the contingency of hospitalization, that is, insurance in excess of the hospital and medical expenses, would be unaffected. The same approach should be taken with respect to medical and hospital expenses paid for by a welfare fund or some other similar protective arrangement. In Kentucky, for example, hospitals are operated by the United Mine Workers, which are supported by contributions from employers based on coal royalties, and monthly contributions by employees. The Kentucky Court has allowed recovery for the value of medical and hospital services provided under such an arrangement,²²⁹ and courts have allowed full recovery where the plaintiff was a member of an employee's hospital association²³⁰ or made monthly contributions to obtain access to a clinic operated by his employer.²³¹ As one court observed, "A person from whose paycheck deductions were made for a health and medical plan has paid the medical bill in any event."²³² In that case the amount of the bill was less than the total of the contributions made, but where the total of contributions was less, the plaintiff should only recover that amount.

However, insurance that the plaintiff has taken out for his own benefit is different from accident insurance that the defendant has secured for the plaintiff's benefit. This brings us to the medical payment provisions of an automobile insurance policy, under which payment is made to a passenger in the insured's vehicle irrespective of liability.²³³ Where such payments have been made, the question is whether they may be set off against the passenger's claim for medical expenses in a personal injury action against the insured. Some courts have held that they may not.²³⁴ The rationale of these decisions seems to be

²²⁹ Conley v. Foster, 335 S.W.2d 904 (Ky. 1960), *overruling* Sedlock v. Trooper, 307 Ky. 369, 211 S.W.2d 147 (1948).

²³⁰ Grayson v. Williams, 256 F.2d 61 (10th Cir. 1958).

²³¹ Moyer v. Merrick, 155 Colo. 73, 392 P.2d 653 (1964).

²³² Id. at —, 392 P.2d at 655.

²³³ See generally Katz, *Automobile Medical Payments Coverage—A Changing Concept?*, 28 INS. COUNSEL J. 276 (1961).

²³⁴ See Moore v. Leggette, 45 Misc. 2d 603, 257 N.Y.S.2d 463 (Sup. Ct. 1965); Edmondson v. Keller, 401 S.W.2d 718 (Tex. Civ. App. 1966); Severson v. Milwaukee Auto Ins. Co., 265 Wis. 483, 61 N.W.2d 872 (1953).

that the medical payments coverage is under a separate indorsement, for which the insured has paid an additional premium.²³⁵ This recognizes that realistically, the suit is against the driver's insurer, and it is not a question of the driver who paid the premium for the medical payments coverage having to pay damages for the medical and hospital expenses as well.²³⁶ Nonetheless, the fact remains that all or part of the plaintiff's medical expenses have been covered by the driver's insurance, and there is no reason to require the insurance company to pay for them again. The sounder view is to credit the amount paid under the medical payment provision from the amount of the judgment rendered against the insured.²³⁷ The fact that the insurer would be obligated to pay under the liability provisions of the policy has nothing to do with the fact that it has already met this item of the plaintiff's loss.

Medical payments could also be relevant in the passenger's suit against the driver of the other vehicle involved in the accident, *e.g.*, A is a passenger in B's automobile, which is involved in a collision with C's automobile. A receives medical payments from B's insurer, and brings suit against C.²³⁸ Under the collateral source rule, there would be no deduction for the medical payments, since they were not furnished by C.²³⁹ Again, however, the plaintiff has received benefits for which he has given no value. His medical bills have been paid, and whether it is B's insurer or C's insurer who paid them is irrelevant. An adjustment can be made in the suit between B and C, if any, but

²³⁵ However, the tendency now is to try to market such insurance as part of a comprehensive policy, *e.g.* the Family Automobile Policy. Katz, *supra* Note 233, at 278-79.

²³⁶ *But see* Yarrington v. Thornbury, 198 A.2d 181 (Del. Sup. 1964), *aff'd.*, 205 A.2d 1 (Del. 1964), where the court in holding that the defendant was entitled to have the amount paid set off against the judgment, stressed that he had paid the premiums. It may have been significant that the judgment was in excess of the policy limits.

²³⁷ *See* Adams v. Turner, 238 F. Supp. 643 (D.D.C. 1965); Dodds v. Bucknum, 214 Cal. App. 2d 206, 29 Cal. Rptr. 393 (1963); Yarrington v. Thornbury, 198 A.2d 181 (Del. Sup. 1964), *aff'd.*, 205 A.2d (Del. 1964); Tort v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962); Chambers v. Pinson, 6 Ohio App.2d 66, 216 N.E.2d 394 (1966).

²³⁸ If C had medical payments coverage, the question would be whether A's insurer or C's insurer would make payments to B. Presumably, the insurance companies have arrangements to cover the situation where the drivers of both automobiles have medical payments coverage or the passenger is entitled to such payments under his own policy.

²³⁹ *See* Bailey v. Jeffries-Eaves, Inc., 76 N.M. 278, 414 P.2d 503 (1966), where this result was reached.

there is no reason to permit A to recover for the medical and hospital expenses met by B's insurance in his suit against C. It is important to distinguish between the situation where the plaintiff paid for the insurance and where he did not; where he did not, the benefits received from the insurance should be deducted irrespective of whether the insurance was paid by the defendant or someone else.

D. Medicare and Medical Assistance Payments.

As part of the Social Security legislation of 1965,²⁴⁰ Congress enacted a program of medical care for the aged. Part of this program consists of Medicaid, which expanded the provisions of the Kerr-Mills Act.²⁴¹ Essentially this involves grants-in-aid to the states to support their programs of medical assistance for the indigent aged.²⁴² As discussed previously, where a person has received free care through public facilities, he should not be able to recover the value of such care from the tortfeasor.²⁴³ If an accident victim received free care in the form of public assistance under such a program, he should not be able to recover from the tortfeasor for the same reason.

The major part of the program, however, commonly called Medicare, is tied to the Social Security Act, and this may complicate the question. Basic Medicare involves the hospital insurance benefits, which are provided for all persons over sixty-five who are entitled to social security or railroad retirement benefits.²⁴⁴ After an inpatient hospital deductible charge of \$40 and a co-insurance charge, for the time being of \$10, Medicare pays for full hospital care up to 90 days in any one "spell of illness." Extended care facility benefits are also provided. Secondly, there is what is called Voluntary Supplementary Medicare. This is designed to cover physicians' services, and it is available not only to persons covered by Basic Medicare, but

²⁴⁰ 49 Stat. 620 (1935), as amended, 79 Stat. 353 (1965), 42 U.S.C. §§ 301-306, 1395-1396 (Supp. I, 1964).

²⁴¹ 74 Stat. 987 (1960), as amended, 79 Stat. 353 (1965), 42 U.S.C. §§ 301-306 (Supp. I, 1964).

²⁴² The grants-in-aid may also relate to programs covering dependent children, blind persons, and permanently and totally disabled persons.

²⁴³ See the discussion *supra*, notes 192-99 and accompanying text.

²⁴⁴ Federal employees are covered by the Retired Federal Employees Health Benefits Program. 74 Stat. 849 (1960), as amended, 79 Stat. 170 (1965), 5 U.S.C. §§ 3051-3060 (1964) (Supp. I, 1964).

to all citizens and resident aliens over sixty-five. Premiums are small, \$3 per month until 1968, and an amount to be determined by the Secretary of Health, Education and Welfare thereafter; these premiums are matched by the federal government. The patient pays a \$50 annual deductible fee and 20% of the costs; the program pays the remainder. All in all, we have made a substantial step toward providing adequate medical care for the aged regardless of their ability to pay.

Cases will doubtless arise—it is too early for any to have reached the appellate courts yet—where an accident victim who has had a substantial portion of his hospital and medical expenses met by Medicare, seeks to recover the full value of the hospital and medical expenses from the tortfeasor. Under our analysis thus far, if the services have been furnished by the government, or in this case, paid for by the government, he would not be permitted to recover their value, beyond the deductible amount which he paid. On the other hand, we have said that if the medical and hospital services were paid for by insurance, he could recover the total premium cost or the value of the services, whichever was less. Effective with the passage of Medicare, a sum of money attributable to the program is collected from the wage-earner along with his social security payments. Discounting the question of how the amount of social security payments attributable to Medicare would be determined for those presently enrolled in the program, we may ask whether Medicare benefits represent “insurance,” in which case the plaintiff could recover the value of the services or the cost of the insurance, or whether they represent free medical care furnished at public expense, in which case the plaintiff could not recover the value of the services beyond the deductible.

It is part of the ethos of social security, as indeed all social insurance, that it is only slightly different from private insurance. The wage-earner sets aside a portion of his wages (because required to do so by law), and when he reaches retirement age or becomes disabled, his savings all come back to him in the form of social security payments. From a political standpoint, social security was “sold” to the American public in this way. Moreover, social security was designed to eliminate the “means test,” so detested by social workers and social welfare planners.

Social security payments were to be the "right" of the wage-earner independent of his financial condition.²⁴⁵ This is not wholly undesirable. As recent commentators have observed:

When all is said and done about stripping the social insurances of their supposed insurance attributes, this much remains, however to be said: The beneficiary does make a financial contribution, whether correctly called a premium or a tax, which is regularly and observably deducted from his wages. From this he gains a feeling of personal involvement, the belief that his contribution is directly traceable to the benefit, and a strong sense that he has a right to it. Whatever may be the strictly logical and legal significance of the contribution, it is a political, social and psychological fact of the utmost importance, both in terms of the continually increasing benefits and the willingness to pay for them, and in terms of a popular mass demand that the worst features of public assistance be avoided. Sustaining as far as possible the fiction of insurance this has important consequences in the character of the system. . . .²⁴⁶

But, of course, this is a fiction. It is difficult to characterize as insurance a payment that wage-earners are required by law to make, and which is deducted from their salaries each month along with withholding tax. Perhaps the fiction may be bent a little in the case of self-employed persons who have "elected" to come under social security, but even here the non-insurance factors of the program prevent such bending. The social security program simply does not operate like insurance. As has been observed:

The insurance principle is honored more in the propaganda than in the reality. Half of the premium attributable to each wage-earning beneficiary is not paid by the beneficiary at all but by his employer. The benefits do not bear a fixed ratio to the premiums, by whomever paid. They are adjusted in favor of the low income groups covered by the system, of those whose period of coverage for one reason or another is allowed to be lower than the standard, of those who, such as the disabled are advantaged in various ways. Benefit pay-

²⁴⁵ See ten Broek and Matson, *The Disabled and the Law of Welfare*, 54 CALIF. L. REV. 809, 818-19 (1966).

²⁴⁶ *Id.* at 821.

ments are made to dependents but premiums do not vary in the light of that fact but remain the same whether the primary beneficiary has dependents or not. Benefit payments, moreover, are withheld or reduced if the primary beneficiary continues in substantial gainful employment in old age or after disability. Medical insurance payments are provided for persons sixty-five years of age not hitherto enrolled 'financed from premium payments from enrollees together with contributions from funds appropriated by the Federal Government.' As a result of these and other factors, there is only the most casual relationship between benefits and premiums, premiums and wages, wages and past productivity or work; and accordingly there is little foundation for the claim of benefits as a matter of earned right. The whole insurance concept thus becomes only a remote analogy rather than an operative reality.²⁴⁷

When the constitutionality of the Social Security Act was challenged before the Supreme Court, it was sustained, not as a government-operated insurance program, but as "a form of social insurance enacted pursuant to Congress' power to spend money in aid of the general welfare."²⁴⁸ In fact, the Supreme Court has held that Congress may constitutionally provide for the withdrawal of social security benefits enjoyed by a deported alien and his dependents.²⁴⁹ Without necessarily agreeing with the soundness of the result, it can be concluded that the decision does represent an affirmative declaration that social security benefits clearly are not in the nature of insurance.

Medicare, therefore, cannot be said to be a form of insurance, paid for by the recipient. For persons entitled to such benefits, hospital care is substantially free, and there is no reason for them to recover the value of such care from the tortfeasor. Voluntary Supplementary Medicare does involve a payment for the benefit, and the recipient should be able to recover the payments made from the tortfeasor, but no more. As we have pointed out, damages for hospital and medical services can be stipulated. In the case of a person receiving Medicare benefits, the damages will be the deductible and co-insurance amounts and the payments

²⁴⁷ *Id.* at 820.

²⁴⁸ *Helvering v. Davis*, 301 U.S. 619 (1937).

²⁴⁹ *Flemming v. Nestor*, 363 U.S. 603 (1960).

for supplementary coverage. This is the only loss that an accident victim covered by Medicare can sustain.²⁵⁰

E. *Gratuitous Nursing Service.*

Recovery for gratuitous nursing services has met some resistance notwithstanding the general acceptance of the collateral source rule. The value of nursing is a legitimate part of the accident victim's recovery, where the injury is so serious that nursing care is needed. Perhaps the plaintiff or his family will hire private nurses, but it may be that they cannot afford the cost. Suppose a three year old child is injured when a large metal boiler weighing over 200 pounds falls on him. The child requires a series of operations. He is in and out of the hospital, needing nursing care while he is at home. Since the family cannot afford to hire private nurses and the child needs constant attention, this is provided by the mother, who has spent over 1000 hours with the child.²⁵¹ Or, as a result of the accident, a young woman is confined to her bed for nine months, during which time she is cared for by her mother.²⁵² Perhaps the mother is a registered nurse, and instead of pursuing her employment, she cares for the injured member of her family.²⁵³

Courts fully committed to the collateral source rule allow recovery on the ground that the services were performed for the benefit of the plaintiff rather than the tortfeasor.²⁵⁴ One court²⁵⁵ added that there is an understanding that the recipient will repay the services which cost the plaintiff nothing.²⁵⁶ Massa-

²⁵⁰ It is interesting to note that Medicare payments may not be made where payment has already been made under a federal or state workmen's compensation law. 79 Stat. 325 (1965), 42 U.S.C. § 1395(y) (Supp. 1966). No comparable provision is made for tort recovery.

²⁵¹ This was the factual situation in *Large v. Williams*, 151 Cal. App. 2d 315, 315 P.2d 919 (1957).

²⁵² This was the factual situation in *City of Englewood v. Bryant*, 68 P.2d 913 (Calif. 1937).

²⁵³ For a case in point see *Bradford v. Edmands*, 215 Cal. App. 2d 159, 30 Cal. Rptr. 185 (1963). In *Daniels v. Celeste*, 303 Mass. 148, 21 N.E.2d 1 (1939), the plaintiff's wife was a professional nurse, but did not appear to be working at the time.

²⁵⁴ See *Bradford v. Edmands*, 215 Cal. App. 2d 159, 30 Cal. Rptr. 185 (1963); *Large v. Williams*, 154 Cal. App. 2d 315, 315 P.2d 919 (1957); *City of Englewood v. Bryant* 68 P.2d 913 (Calif. 1937); *Wells v. Minneapolis Baseball and Athletic Ass'n*, 122 Minn. 237, 142 N.W. 706 (1913).

²⁵⁵ *Wells v. Minneapolis Baseball and Athletic Ass'n*, 122 Minn. 237, 142 N.W. 706 (1913).

²⁵⁶ See *Evans v. Pennsylvania R.R. Co.*, 255 F.2d 203 (3rd Cir. 1958); *Gibney*

chusetts draws a distinction between services rendered by a wife to her husband, for which there can be no recovery,²⁵⁷ and those rendered by a parent to an adult child, where recovery is permitted on the theory that the child has assumed a contractual obligation to pay their reasonable value.²⁵⁸ In the case involving the services rendered by the wife to her husband, the wife was a professional nurse, although it did not appear that she was working at the time of the injury. It was unfortunate that she could not find another nurse whose husband also needed such care. Each nurse could take care of the other's husband. The first one to provide a day's care would receive payment from the other. She would, in turn, pay the money back, and the first payment would exchange hands each day. Thus, each husband would have "paid" for his nursing services and could recover the total cost from the tortfeasor.

I would like to take this problem to our African chief, since I think, for him, this would be an easy case. As we have pointed out, persons other than the victim are affected by the accident, and usually it is the victim's family that is affected the most. The chief would determine how each family was affected by the particular accident. If the family had the resources to hire private nurses and did so, the chief would order the defendant to reimburse the family for this expenditure, as would a court in our system. But he would realize that most families in his tribe (and many in our society) could not afford to expend the equivalent of \$50 to \$75 per day on private nurses. If we may return home for a moment, we may add "and take a chance on recovering it back in a personal injury suit some years later." When the chief considered the claim of the mother who spent 1000 hours nursing her child back to health, he would not be impressed by the argument that the services "cost nothing." They "cost" the mother a great deal and disrupted normal family life. The mother not only gave the child the care she normally

(Footnote continued from preceding page)

v. St. Louis Transit Co., 204 Mo. 704, 103 S.W. 43 (1907). Note that in *Coyne v. Campbell*, the plaintiff was not permitted to recover for the services rendered by his nurse.

²⁵⁷ Daniels v. Celeste, 303 Mass. 148, 21 N.E. 2d 1 (1939).

²⁵⁸ Cepithorne v. Hardy, 173 Mass. 400, 53 N.E. 914 (1899). For a criticism of this distinction, see Schwartz, *The Collateral Source Rule*, 41 B.U.L. REV. 348, 355 (1961).

would have, but the care that was necessitated by the accident for which the defendant was responsible, and care which, *if the family could have afforded it*, would have been rendered by private nurses. He would not be troubled by the lack of evidence as to the "economic value" of these services, but would use his layman's judgment and experience. The American court that was confronted with this case took the same approach, leaving it to the jury to use their judgment in putting a price on the 1000 hours that the mother spent in nursing the child. The court viewed their award of \$1500 for this item as "little enough for the amount of nursing care that the mother rendered."

Not all cases may be this extreme. But whenever the accident victim required nursing care, whether at home or in the hospital, which was rendered by a family member, he would recognize the justice of the family's claim. Since the family could not afford private nursing care, the members of the family would have to assume the responsibility. Younger children might have to stay home from school. Older children who were working, or the mother, if she had an outside job, would have to miss work, and to that extent would be "out-of-pocket." The chief might order the defendant to pay something to each member of the family who rendered assistance. More likely, he would see the loss as a loss to the family. Family life was disrupted because of the accident, and perhaps even if the family could have afforded to hire private nurses, they would have preferred to take care of the victim themselves. Whether they hired private nurses or took care of the victim themselves, it is proper that the defendant compensate them for the nursing services made necessary by the accident.

When we return to our more formalized legal system, it should be clear that there is nothing "gratuitous" about nursing services rendered to an accident victim by members of his family. Family life has been disrupted by the accident, and to award compensation for the value of the services to the victim—the only person who can bring suit to recover from the tortfeasor—is really to compensate the family for its loss. As a practical matter, the value the jury will assign to nursing services rendered by the family is probably less than the cost of professional nurses, so the defendant is in no position to complain. To deny recovery

for such services is clearly to discriminate against the families who cannot afford to expend the money for private nurses.²⁵⁹ It must be remembered that we are talking about nursing services that were reasonably incurred, so that if private nurses had been hired, this item of damages would be recoverable. Where nursing services were not necessary, the plaintiff could not recover the cost of private nurses, under principles of avoidable consequences.²⁶⁰ Where nursing services were necessary, it should not make any difference whether they were rendered by private nurses or by a member of the family.

It is this point that may be troubling the courts denying recovery for nursing services rendered "gratuitously" by a member of the family. Family members, particularly spouses, parents and children, are expected to render services to each other as part of their normal relationship. This includes services during the course of an illness or injury. The fear may be that they will try to take advantage of the fact that there is tort recovery to obtain compensation for the services rendered in the ordinary course of the relationship. But this is not what the cases have involved. In all cases where recovery was allowed, and in those where it was not, it appeared that true nursing services were actually being performed. The proper test to determine whether recovery should be allowed is whether the victim or his family would have been justified in hiring private nurses. If it would have been unreasonable to do so, recovery for the value of nursing services would be barred under principles of avoidable consequences. Where it would have been reasonable, the victim (who, under our system is the only one who can sue the tortfeasor²⁶¹) should recover their value on behalf of the family.

It is not difficult to distinguish between the kind of nursing

²⁵⁹ See the discussion of this point in James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U.L. REV. 537, 551 n. 49 (1952); Lambert, *The Case for the Collateral Source Rule*, 1966 INS. L.J. 531, 536.

²⁶⁰ Under this principle, the plaintiff is not permitted to recover for expenses that were not reasonably incurred. A person injured by a tortfeasor is not entitled to nursing care unless the nature of the injuries makes such care reasonably necessary.

²⁶¹ Note, however, that it is the parent who recovers for the cost of medical and nursing services expended on behalf of a child. In *Bradford v. Edmands*, 215 Cal. App. 2d 159, 30 Cal. Rptr. 185 (1963), the mother who had rendered the services was permitted to recover their value from the defendant. However, at the trial she failed to introduce evidence of what she did in the way of nursing services, and a new trial was ordered on that ground.

services that would properly be rendered by professional nurses and the kind normally rendered as part of the family relationship when illness or accident occurs. The latter appears when a victim who is permanently disabled as a result of the accident, and, therefore, will need extra care from his spouse or members of his family. Such a case is *Gainar v. S.S. Longview Victory*,²⁶² where, as a result of carbon monoxide poisoning, the plaintiff suffered permanent brain damage, making him "little more than flesh and bones." The court awarded \$100,000 for loss of earnings, \$100,000 for pain and suffering, and \$19,000 for past and future medical expenses. He also claimed recovery for the value of "nursing services" to be rendered by his wife in the future, but this claim was rejected by the court. The court said that it doubted whether the collateral source rule should be extended to the services rendered by a spouse and that, in any event, it was difficult to distinguish between customary duties and "extraordinary services made necessary by the injury." The court was correct to deny recovery for this item, since the services the wife would perform were in no sense nursing services, the kind of services that a private nurse would be hired to perform. These services consisted of (1) applying alcohol to his body, (2) obtaining medical prescriptions, (3) taking him to the doctor, (4) assisting him in shaving and dressing, (5) arranging medical appointments, and (6) "presumably aiding him in most of his activities." These are the things that a wife does for a disabled husband, or that one member of a family does for another. If the victim had no family, he would, in his condition, have had to have been institutionalized, and the cost of institutional care would be a proper item of damages. Again, we are back to the notion that the tortfeasor takes his victim as he finds him. Since the victim had a family and needed services that are ordinarily performed by one family member for another in case of disablement, there is no reason for the plaintiff to recover the value of such services.

The real problem is that the victim is an invalid, and what he is really seeking to recover is his total dependency on others as a result of the accident. There is no doubt that this condition should be the subject of compensation, and the question is how

²⁶² 226 F.Supp. 912 (E.D. Va. 1964).

it is to be done. The answer appears on the case of *James v. State*,²⁶³ where due to the accident the plaintiff was paralyzed and would be confined to a wheelchair for the rest of his life. He sought to recover as a special item of damages the value of "nursing services" that had been rendered by his wife in the past and would be rendered by her in the future. These services were similar to those involved in *Gainar*. The court disallowed this item on the ground that compensation could not be recovered for services which were "normal marital obligations." The court did, however, make an award of \$75,000 for pain and suffering. In commenting on that award, it observed that "it covers life in a wheelchair, the resulting sexual impotence, anxieties and *his total dependency on others for his every movement.*" (Emphasis added.)²⁶⁴ Life in a wheelchair and total dependency are compensated under the heading of damages for pain and suffering rather than nursing services of the wife. The jury will award compensation for the fact that he is dependent, and evidence of what his wife will have to do for him is relevant to show the nature of his dependency. Its award of damages for pain and suffering will not only compensate the plaintiff for his condition, but will take care of the disruption of family life that has been caused by the accident. To instruct the jury that it should award an additional sum for the wife's nursing services could only cause confusion.²⁶⁵ This situation is easily distinguishable from those where a member of the family has rendered true nursing services.

F. A Comparison.

We may now compare the results reached under the functional approach with those reached by an application of the collateral source rule. Under the functional approach, the plaintiff will ordinarily recover the value of "gratuitous medical services" furnished by a physician or paid by someone else. He recovers, in effect, on behalf of the physician or the donor, because our system does not permit them to proceed against the tortfeasor. By allowing the plaintiff to recover, there is the possibility that

²⁶³ 154 So.2d 497 (La. App. 1963).

²⁶⁴ 154 So. 2d at 499.

²⁶⁵ To the extent that the jury is awarding compensation for "loss of humanity," it is not likely to "add" a sum for the wife's services.

the proper person will be paid, if he desires it, and this can be accomplished by a direction to repay. We would deny recovery only in an unusual situation such as that presented in *Coyne v. Campbell*, where the plaintiff himself was a physician.

A clear departure from the collateral source rule occurs in the case of services rendered at a public or private charity hospital. We would deny recovery to the plaintiff, since as to him such care was free, and there is no reason to permit him to recover the cost from the defendant. Whether the hospital should be able to recover from the tortfeasor is a different matter, but in all probability it is not worthwhile for them to pursue such claims. The plaintiff should be able to recover the cost of future medical services, since he is likely to prefer private care, and it is his "right" to have it. It may be that he will employ the free care for which he is eligible and thereby receive a "windfall," but recovery for past and future expenditures must be had in a single action, and at the time of suit there is no way of knowing what he will choose to do.

We would allow servicemen, active or retired, to recover the value of free medical care at military hospitals, not because such care came from a "collateral source," but because this represents a "fringe benefit," and we cannot measure what they "gave up" in order to get it. It is not proper to deduct the value of the benefit, without giving them credit for what they lost in order to receive it, and the defendant, who otherwise is responsible for the loss, must bear it, where he cannot demonstrate the amount that should be deducted. However, we would deny recovery in a suit against the United States under the Federal Tort Claims Act, because there it is the tortfeasor who has furnished the benefit. Again, note that in such cases the plaintiff would be entitled to recover the value of future medical and hospital expenses, since he might prefer private care. In contradistinction to the collateral source rule, we would deny recovery against a tortfeasor, whether the United States or not, where the plaintiff has received free care at a Veterans Administration Hospital. Such care simply represents a social welfare benefit extended to veterans who are indigent. In this connection, the courts should ignore the attempt of the lawyers

in the Veterans Administration to recover the cost of such care under the "assignment" method. It is difficult to believe that the total cost of care for indigent veterans who are accident victims amounts to such a significant portion of the Veterans Administration budget that the judicial machinery should be used to reallocate the loss which has come to rest in an efficient channel of distribution.

Where the expenses have been met by health insurance or some similar protective arrangement, the plaintiff should recover either the amount of the expenses or the total amount of his premiums or contributions, whichever is smaller. The collateral source rule would allow recovery of the expenses without regard to the premiums or contributions. Recovery should also be reduced by any amount paid to the plaintiff under a medical payments provision, whether he is suing the driver of the automobile in which he was riding or the driver of another vehicle involved in the accident. Such payments have operated to reduce his loss, and he has not given value for them. We would deny recovery for expenses met by Medicare and limit the beneficiary to what he has actually expended for the deductible and co-insurance amounts and the payments for supplementary coverage. Under the collateral source rule, recovery for the value of the hospital and medical services would be allowed. Finally, we would allow the plaintiff to recover the value of nursing services rendered by family members, where such services would be compensable if rendered by private nurses, distinguishing these from services rendered to a disabled accident victim in the course of the normal family relationship, which, in effect, are compensated by the award of damages for pain and suffering. It should be noted that not all courts allow recovery, even under the collateral source rule, for "gratuitous" services rendered by family members.

LOSS OF EARNING OPPORTUNITY

From the standpoint of out-of-pocket loss, loss of earning opportunity is the most significant item of damages. As a result of the injury the plaintiff, if he has been working, will have lost

time from his work, which obviously represents a compensable loss.²⁶⁶ Moreover, the injury may have had permanent effects. Although the plaintiff perhaps will be able to return to work, his earning capacity might be impaired, and if so, he recovers damages for what is called impairment of future earning opportunity.²⁶⁷ This situation will ordinarily not present any collateral source problems,²⁶⁸ and for purposes of our analysis, may be disregarded. We are interested in the case where as a result of the injury, the plaintiff has become "permanently and totally disabled," which means that he will not be able to work at all, or at least will be unable to earn anything significant. Whether the victim is "permanently and totally disabled" will depend not only on the nature of his injury, but on the nature of his employment. The longshoreman with a sixth grade education who has become a double amputee will, in all likelihood, be unable to work again. The college professor in the same situation may well continue his employment without reduction in earning capacity. The permanently and totally disabled victim likewise recovers for loss of future earning opportunity, *i.e.*, he recovers what he would have earned if he had not been injured.²⁶⁹ Recovery for loss of earning opportunity, then, includes recovery for both "past" and "future" losses due to accident.

It is important to review the theoretical basis of this recovery. The plaintiff recovers for the earning opportunity that *he* has lost. One way to deal with the societal problem of accidents might be to provide only minimum protection against the loss

²⁶⁶ If the plaintiff is a housewife, the husband recovers the value of her services. If a married woman has been working, she recovers for the lost income in her own right. See W. PROSSER, *LAW OF TORTS*, 913-14 (3rd ed. 1964).

²⁶⁷ This is a compensable interest even in the absence of evidence that the plaintiff has suffered a diminution in wages following the injury. See *Messer v. Beighley*, 409 Pa. 551, 187 A.2d 168 (1963). See also *Gooch v. Lake*, 327 S.W.2d 132 (Mo. 1959), where the plaintiff, a football player, was unable to play during his senior year of college. He was permitted to show that the starting salary of high school football coaches would depend on whether they played during their senior year and that, as a result of the accident, he would receive a lower starting salary. Even though the injury did not have a permanent effect, it resulted in an impairment of future earning opportunity, for which he could recover.

²⁶⁸ However, as a result of the injury, the plaintiff might receive a partial disability pension. The analysis applicable to the "permanently and totally disabled plaintiff" would also be applicable to this situation.

²⁶⁹ This is also true in a wrongful death action. The beneficiaries' recovery is based on the loss of future earning opportunity of the decedent. Thus, whenever we are talking about recovery for loss of future earning opportunity, we include both a suit for personal injuries and a suit for wrongful death.

that results, *i.e.*, in addition to medical and hospital expenses, we would award enough money so that the victim and his family could enjoy a modest standard of living during the period of disablement, whether temporary or permanent.²⁷⁰ Suppose that an executive earning \$50,000 per year is killed or permanently disabled so that he is unable to work again. If he had the expectancy of twenty more years of gainful employment, he is entitled to recover the present worth of \$1,000,000 with or without a deduction for taxes.²⁷¹ But his family does not need nearly that much to subsist. Suppose we conclude that a family of four needs \$6000 per year to enjoy a minimum standard of living. If he dies, leaving a wife and three children, we could give the family \$6000 per year until the children were grown and then reduce the amount to that which is necessary to take care of the wife. This is not how our system works. Compensation is not based on the minimum needs of the victim or his family, nor even on "reasonable needs." We try to put the victim or his family in as good a position as he would have been if the accident had not occurred.²⁷² Supporters of the present system of vertical rather than horizontal splitting contend that "deserving" victims should obtain full recovery and "undeserving" victims should not recover, rather than permitting all victims, "deserving" and "undeserving" to obtain something.²⁷³ Therefore, when we speak in terms of "adequate compensation," we are speaking in terms of what the victim or his family lost by the accident and not in terms of what his needs will be afterwards.

At the time our rules of damages for personal injuries developed, loss of work meant loss of pay. Whenever a plaintiff was unable to work for a period of time due to the injury, he received no pay, and it was only proper that he recover the amount of pay lost from the tortfeasor. The courts, however, said that what he was really recovering was the value of his

²⁷⁰ As is provided in Saskatchewan, for example, for all victims of automobile accidents. SASK. REV. STAT. ch 409, pt. II (1965). Tort recovery is also provided.

²⁷¹ See Note 32, *supra*.

²⁷² Thus, the plaintiff recovers damages for loss of earning opportunity based on his life expectancy as it existed before the accident rather than his life expectancy as it exists following the accident. See *Prairie Creek Coal Mining Co. v. Kittrell*, 106 Ark. 138, 153 S.W. 89 (1912).

²⁷³ See Blum and Kalven, *Public Law Perspectives on a Private Law Problem—Auto Compensation Plans*, 31 U. CHI. L. REV. 641 (1964).

lost time, and what he was earning was merely some evidence of what his time was worth.²⁷⁴ It is difficult to believe that the jury considers whether the plaintiff was being over-paid. Where a salaried or hourly employee has been injured, it is reasonable to assume that the jury awards him his pay for each day missed from work. Such damages are often stipulated. The concept that the plaintiff was recovering for the value of lost time proved useful where the plaintiff was not receiving a salary or hourly pay, as for example where he was unemployed at the time of the injury,²⁷⁵ was self-employed,²⁷⁶ was working in a family business without pay,²⁷⁷ or suffered permanent disability when he was just embarking on his career after a period of training.²⁷⁸

The concept also proved useful in those rare cases where the employer continued to pay the wages as a "gratuity" either because he was charitably inclined or because he wished to retain the loyalty of a key employee. The courts that permitted the plaintiff to recover full damages despite the fact that his wages were continued stressed that he was recovering for the value of his lost time rather than for lost wages; this buttressed the application of the collateral source rule.²⁷⁹ Moreover, certain kinds of employees continued to receive their salary despite disablement, such as military personnel²⁸⁰ and policemen.²⁸¹ Here too, the notion that the plaintiff was recovering for the value of his lost time operated with the collateral source rule so as to allow recovery.

Today, of course, the concept of "no work, no pay" has undergone radical change. Unemployment compensation and other forms of public assistance are available for those who

²⁷⁴ See generally C. McCORMICK, DAMAGES § 87 (1935).

²⁷⁵ See, e.g., Smith v. Triplett, 83 S.W.2d 1104 (Tex. Civ. App. 1935).

²⁷⁶ See, e.g., Chesapeake & O. Ry. v. Shanks, 260 Ky. 416, 86 S.W.2d 128 (1935).

²⁷⁷ See, e.g., Nemer v. Anderson, 151 Colo. 411, 378 P.2d 841 (1963).

²⁷⁸ See, e.g., Grayson v. Irvmar Realty Corp., 12 Misc. 2d 38, 173 N.Y.S.2d 71 (Sup. Ct. 1958).

²⁷⁹ See, e.g., Silverman v. Springfield Advertising Co., 120 Conn. 55, 179 A. 98 (1935).

If the plaintiff's employer continues to pay the plaintiff his wages or salary during his disability, as a gratuity, the plaintiff could hardly be said to have lost any wages, but this generosity ought not to lessen the amount which the wrongdoer should pay, and in these cases the courts have insisted that it is the 'value' of the plaintiff's lost time that is the measure of his recovery. C. McCORMICK, *supra* note 274, at 310.

²⁸⁰ See Bell v. Primeau, 104 N.H. 227, 183 A.2d 729 (1962).

²⁸¹ See Wachtel v. Leonard, 45 Ga. App. 14, 163 S.E. 512 (1937).

cannot obtain employment. An employee who suffers injury during the course of his employment is likely to receive workmen's compensation during the time that he misses work. He may have an accident insurance policy that provides payment for each day that he was incapacitated. With respect to time lost from work, however, the most important change has been the advent of sick leave. It is now recognized that employees are entitled to miss a certain number of days of work without loss of pay. Sick leave can take a variety of forms; the employee may have so many days per month or per year, and he may be able to accumulate the leave for a period of time. More significantly, the sick leave may be the equivalent, expressly or in practice, to vacation leave, that is, if the employee does not use up the time for actual illness he may take it, "pretending to be ill," or as vacation time without the pretense. Whatever the form, it is clear that sick leave is part of the employee's total compensation picture. Enterprises calculate the cost of sick leave benefits as part of total employment cost, and it has "dollar and cents" value in collective bargaining agreements.

The change in societal attitude is equally applicable where the employee has become totally and permanently disabled. At one time the individual who was no longer able to work was left to provide for himself with primary dependence on savings, efforts of other family members, and private or public charity. Now, if he has suffered the injury in the course of his employment, he will usually receive benefits under a workmen's compensation plan or similar statutory scheme.²⁸² He may receive a disability pension from his employer. He may have income protection insurance, under which he receives a sum of money each month for a designated period of time or until the end of life. And he may receive a disability pension under the Social Security Act,²⁸³ or similar legislation such as the Railroad Retirement Act²⁸⁴ or the Federal Civil Service Retirement Act.²⁸⁵

²⁸² It must be remembered, however, that not all employees are covered. See the discussion in I. A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION*, § 5.30 (1966). Some employees such as railroad workers and seamen have a statutory cause of action against the employer, which alters common law defenses.

²⁸³ 42 U.S.C. § 423 (1964).

²⁸⁴ 45 U.S.C. § 228b (1964).

²⁸⁵ 5 U.S.C. § 8337 (1966).

It is evident, therefore, that the question of collateral source benefits as affecting recovery for loss of earning opportunity will frequently arise. The plaintiff who was unable to work for a period of time because of the accident may not have lost any wages.²⁸⁶ The nature of his employment may have been such that his salary was continued during the period of disability, or the employer may have decided to continue it anyway. He may have received workmen's compensation or have used up some or all of his sick leave time. Even if he did not get paid, he might have received insurance benefits, and if he was unemployed, he might have been receiving unemployment compensation or other public assistance during the time in which he was incapacitated. Where he suffered a permanent disability, he might be receiving benefits from workmen's compensation, from a private disability pension, from a disability pension provided by the government or from income protection insurance. Our discussion of the problem will be divided into three parts: (1) loss of time without loss of pay; (2) private pensions and accident insurance; (3) social insurance. It is the latter which will require the most extensive discussion.

A. *Loss of Time Without Loss of Pay.*

Here we will be discussing the situation where the plaintiff may not have lost any pay, either because he used up sick leave time, the nature of the employment was such that pay continued during disability, or the employer simply paid his wages. The situation where the wages were not continued, but the plaintiff had accident insurance or received social insurance benefits will be discussed in the remaining sections. Let us first consider sick leave. If sick leave can, in effect, be taken like vacation time, it is clear that the plaintiff has lost something when he was compelled to use up sick leave time while recovering from the accident. What he has lost is part of his paid vacation from work. Suppose that in a given year the plaintiff can accumulate ten days of sick leave, which, if unused, he can take as vacation time. If he uses the sick leave to recuperate from the accident

²⁸⁶ It must be remembered that certain classes of plaintiffs may not have suffered any loss of earning opportunity, *e.g.*, retired persons, children, and housewives.

and takes ten days of vacation without pay, he is out-of-pocket the wages for those ten days. More likely, he will take ten days less vacation than he would have if the accident had not occurred, and vacation time will have been spent in convalescence. It is surely reasonable to measure the economic value of his lost vacation by his wages for those days just as if he had used officially designated vacation time to recuperate.²⁸⁷ By the same token, where sick leave can be accumulated, particularly over a long period of time, the plaintiff loses the benefit of the leave for future use whenever he takes some of it as a result of the accident. Again, he has given up something of value, which can be measured in terms of his wages for the time lost.²⁸⁸ The point is that in some enterprises employees can take sick leave like vacation time. The prudent employee may accumulate the sick leave for future use to the extent possible. Others will take it at the end of each year. In either event, the employee who has such leave for convalescence is out-of-pocket, and he is properly compensated by the recovery of his wages for the time used as sick leave.

In other enterprises sick leave may mean just that. Employees may have to substantiate their absence by medical certification or similar evidence. It is also likely that sick leave cannot be accumulated for too long a period. Sick leave then becomes a contingent benefit, to be used only in the case of actual illness or disability. Here too, however, he should be able to recover the value of his lost time notwithstanding that his pay was continued under the sick leave arrangement. If, at the time of trial, he still could make use of the sick leave in the future, it cannot be said that he actually received his wages during the period of disability. For, if he should subsequently become ill, the sick leave would not be available, and he would lose the wages at that time. It is more likely that this will be known at the time of trial, and the question is whether the fact that he did not lose

²⁸⁷ See *Carroll v. Roman Catholic Diocese*, 26 App. Div.2d 552, 271 N.Y.S.2d 7 (1966); *Rigney v. Cincinnati Steel Ry.*, 99 Ohio App. 105, 131 N.E.2d 413 (1954). See the discussion in James, *supra* note 259, at 549-50; Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741, 751 (1964).

²⁸⁸ See *Thomas v. Paper Haulers, Inc.*, 165 So.2d 61 (La. App., 1964); *D'Amico v. Resnick*, 22 Misc. 2d 545, 197 N.Y.S.2d 826 (Sup. Ct. 1960). See the discussion in Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669, 680 (1962).

wages because he used his sick leave time should affect his recovery. The answer to this question will be found in our analysis of Sergeant Browning's case. Sick leave represents a "fringe benefit," and as we have said, represents a part of the total compensation picture. We cannot measure how much the plaintiff "gave up" in reduced wages—and will give up in the future—in order to obtain the sick leave benefit, in the absence of a very special computer that our system lacks.²⁸⁹ We cannot say that the plaintiff suffered no wage loss because of the accident since he had sick leave, because we do not know what the sick leave "cost" him. We have, therefore, concluded that in all cases where the wages of the plaintiff were continued because of sick leave provisions, he should recover the value of his lost time from the defendant.

Where the pay is continued because of the nature of the employment—this is also Sergeant Browning's case—the same rationale is applicable. Where pay continues during disability, and this is known at the outset of the employment relationship, it is a fringe benefit and a part of the total compensation picture. The serviceman knows that his pay continues during a temporary disability, and if he must retire due to a line of duty injury, he will receive a disability pension. It cannot be doubted that the security in knowing that "the government will take care of you" operates as an inducement to enter and remain in military service despite the relatively low salary. Since we cannot measure the economic value of what the serviceman gave up to get this benefit, we must permit him to recover for the value of his lost time.²⁹⁰ This is also true in the case of a policeman who continues to receive pay when injured in the line of duty²⁹¹ or a college professor whose salary continues during disability.²⁹² In certain types of employment the security of continuation of

²⁸⁹ See *Klein v. United States*, 339 F.2d 512 (2d Cir. 1964), where the plaintiff's salary was continued under the employer's sickness and disability plan. The court allowed recovery, stressing that the benefit "was part of the bargain for her labor." *Id.* at 518.

²⁹⁰ See *Bell v. Primeau*, 104 N.H. 227, 183 A.2d 729 (1962). The English courts do not permit the serviceman to recover in such a case. See the discussion in *Browning v. The War Office*, [1963] 1 Q.B. 750, 759 (C.A. 1962). The plaintiff in *Browning* did not claim damages for the value of his lost time.

²⁹¹ See *Wachtel v. Leonard*, 45 Ga. App. 14, 163 S.E. 512 (1932); *D'Archangelo v. Loyer*, 125 Vt. 325, 215 A.2d 520 (1965).

²⁹² See *Ashley v. American Automobile Ins. Co.* 19 Wis.2d 17, 119 N.W.2d 359 (1963).

salary during disability may be significant, and we now realize that "pay" represents a combination of factors, of which salary is only one. The fact that a person's salary is continued during disability, therefore, does not mean that he has not "lost" something by undertaking the kind of employment that provides such security, and that something is probably less salary. Our inability to measure what he has given up in order to obtain the benefit precludes us from deducting the value of the benefit, and the ordinary rule allowing recovery for the value of his lost time must operate.

As we have stated repeatedly, under our system the plaintiff is entitled to recover the value of what he has lost because of the accident. His needs are irrelevant. When a person's pay is continued during disability for any reason, he does not need to recover the value of the lost time from the tortfeasor. He and his family will be able to subsist despite the injury. Our goal, however, is not that the family be able to subsist, but that *he* is to be made whole. It may seem illogical from an economic standpoint to permit a person to recover wages that he never lost. But since he "gave up" something in order to get those wages, we cannot make a deduction without giving him credit for what he surrendered. Since we cannot measure this, we have no choice but to give him the wages. This is the closest we can come to measuring *his* loss from the accident. So long as we award compensation to accident victims under our present system, we must continue to deal with collateral source benefits in terms of whether there has been a loss rather than in terms of whether a need has been met.²⁰³ Because of the limitations inherent in measuring loss accurately under our system, and in light of our theory of compensation, we may have to permit recovery for lost salary where the salary actually was continued.

No problem of measurement confronts us when we consider the true gratuity situation, that is, the situation where the employer continues the wages despite the fact that he is not re-

²⁰³ Perhaps the soundest way to deal with the problem of the disabled wage-earner is to require the employer to continue his wages during the period of disability, just as he now provides compensation for work-connected injuries. Or, it may be sounder to permit the employer to recover the costs from the tortfeasor on the ground that this would materially reduce the cost of sick leave benefits, leaving more money available for other fringe benefits or higher wages. But this is not how we approach the problem, and the matter of loss allocation and reallocation is not the concern of the court hearing the personal injury case.

quired to do so by the contract or the nature of the employment. Rather he does so out of charity, or more likely because he thinks that it is in his interest to do so in order to retain the loyalty of a key employee.²⁹⁴ If we are to treat the gratuity as a separate category, we must assume that the plaintiff did not take less salary or give up something in the past in order to obtain the gratuity.²⁹⁵ Where the wages have been continued as a gratuity, for whatever reason, it is clear that the employer has lost something because of the accident. Either he had to hire a substitute or operate short-handed,²⁹⁶ and, as we have said, the accident is likely to have had effects on others than the immediate victim. The courts have had a difficult time with these cases. It may be that the employee will continue to perform some services, though his efficiency has been reduced. Some courts have tried to distinguish between the situation where it could be said that the employee actually lost no time from work, so that he could not recover for this item of damages,²⁹⁷ and where it could be said that he was really being paid a gratuity, so that recovery for the value of his lost time was justified under the collateral source rule.²⁹⁸ Where the employee was definitely away from work, most courts allow recovery, as we have said, either on the basis of the collateral source rule²⁹⁹ or on the ground that he is recovering for the value of his lost time rather than for lost salary.³⁰⁰ A notable exception is New York, which in the old case of *Drinkwater v. Dinsmore*,³⁰¹ denied recovery, and reaffirmed its position in *Coyne v. Campbell*.³⁰²

²⁹⁴ In either event this is only likely to occur where there is an individual employer-employee relationship. In other cases the enterprise is likely to have sick leave arrangements.

²⁹⁵ If the employer has taken out insurance against the illness of a key employee, any payments made to the employee under the insurance do not represent a gratuity. Such benefits become a part of his total compensation picture.

²⁹⁶ This is true even if he has not continued the wages.

²⁹⁷ See *Whiddon v. Malone*, 220 Ala. 220, 124 So. 516 (1929); *Moon v. St. Louis Transp. Co.*, 247 Mo. 227, 152 S.W. 303 (1912); *Kite v. Jones*, 389 Pa. 339, 132 A.2d 683 (1958). These three cases involved high-ranking executives who were able to perform some of their duties, but clearly at a reduced efficiency.

²⁹⁸ *Stevenson v. Pennsylvania Sports Enterprises Inc.*, 372 Pa. 157, 93 A.2d 236 (1952). Here the plaintiff came into work occasionally to answer phone calls and went out a few times. See the criticism of the distinction in Maxwell, *supra* note 288, at 682.

²⁹⁹ See e.g., *Campbell v. Sutliff*, 193 Wis. 370, 214 N.W. 374 (1927).

³⁰⁰ See e.g., *Silverman v. Springfield Advertising Co.*, 120 Conn. 55, 179 A. 98 (1935).

³⁰¹ 80 N.Y. 390 (1880).

³⁰² 11 N.Y.2d 372, 183 N.E.2d 891 (1962).

Let us bring this case before our African chief. As he would see it, the victim and his family were not affected by the accident, because the employer continued his wages, so there is no reason for the victim to recover from the tortfeasor. The effects of the accident were clearly felt by the employer. If he had hired a substitute, he would be out-of-pocket that amount. Apart from that, secondary effects might also be visible. The substitute may have been unable to perform the work as well as the injured person, consequently the employer would have been adversely affected in this regard whether or not he continued the employee's wages. This becomes more pronounced when no substitute was hired, and the employer had to operate "short-handed," regardless of whether or not he continued the employee's wages. Anytime an employee is unable to work, harm may be suffered by the employer.

Thus, for our chief the question is not whether the employee should recover the value of lost wages from the tortfeasor, but whether the employer should be compensated for the disruption of his enterprise due to the absence of his employee following an accident for which the defendant was responsible. The chief would certainly allow the employer to recover the salary he paid to the employee. That was the tortfeasor's responsibility, and the employer met it for him.³⁰³ Where the cost of hiring the substitute exceeded the employee's wages, the chief would also permit recovery for that amount: this is a clearly ascertainable loss to the employer, made necessary by the accident. Beyond this, the chief would be very hesitant to allow recovery, because he would find it difficult to measure the employer's loss due to the "secondary effects." He would note that he had the same kind of difficulty whenever self-employed person was injured: how could he determine what the victim lost due to his absence from the business, particularly if the business was operated with a substantial capital investment and a large number of employees. There, however, he would do the best he could, since all accident victims are entitled to compensation for their lost time.³⁰⁴

³⁰³ In the same manner as where the employer pays the injured employee workmen's compensation. As we will see, in most states the employer can recover this amount either by subrogation or reimbursement.

³⁰⁴ See *e.g.*, *Dempsey v. City of Scranton*, 264 Pa. 495, 107 A. 877 (1919). Cf. *Steitz v. Gifford*, 280 N.Y. 15, 19 N.E.2d 661 (1939).

Here the employer is not the accident victim, and the chief might conclude that the employer should not recover in excess of his out-of-pocket expenditures. Since the loss to the employer from the secondary effects of the employee's absence could not be measured to the chief's satisfaction,³⁰⁵ he would say, "I'm sorry, but you will just have to put up with this kind of loss as a cost of doing business. This won't happen that often, and there is only so much that our law can do."

Let us now return to our system and see how we have dealt with the problem of the disruption of the employer's enterprise. It is not inaccurate to say that the employer has never been permitted to recover damages for the disruption of his enterprise from the tortfeasor. The gist of the common law action *per quod servitium amisit* may have been the loss of services due to the injury, but recovery was essentially for the ordinary expenses of maintaining the injured servant or child and actual disbursements such as medical bills.³⁰⁶ Recovery may have included the cost of hiring a substitute or extra household help,³⁰⁷ but it may be questioned whether such help would have been regularly available. If the action survives today, and there have been few American cases recognizing it,³⁰⁸ it may be that the cost of hiring a substitute can be recovered.³⁰⁹ One court has stated in dicta that the employer could recover what he might have made above the cost of the employee's services,³¹⁰ but the actual holding was that, in the absence of statutory subrogation, the employer could not recover workmen's compensation from the tortfeasor. The court flatly stated that the employer could not recover the wages paid to the injured employee.³¹¹ As pointed out

³⁰⁵ We would say that "such damages are too speculative, since they cannot be proved with reasonable certainty." Of course, this represents a value judgment. Where the interest is sufficiently important to justify compensation, such as pain and suffering, we permit recovery, although damages are completely speculative. But where it is not that important, such as loss of enjoyment from being unable to play a musical instrument, we invoke the "certainty" rule. See *Hogan v. Santa Fe Trail Transp. Co.*, 148 Kan. 720, 85 P.2d 28 (1938).

³⁰⁶ See Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478, 1485 (1966).

³⁰⁷ *Id.* at 1485.

³⁰⁸ *Id.* at 1490-91.

³⁰⁹ *Id.* at 1492.

³¹⁰ *Interstate Tel. & Tel. Co. v. Public Service Elec. Co.*, 86 N.J.L. 26, 91 A. 1062 (1914).

³¹¹ *Cf. Mankin v. Scala Theodrome Co.*, [1947] K.B. 257, where the employer and the employee made up a joint vaudeville act. The employer was permitted to recover damages based on reduced earnings. Both he and the employee joined as plaintiffs in the suit against the tortfeasor.

previously, on the whole, our tort law limits recovery to the immediate victim of the accident and does not allow recovery to others who may have been affected by it.³¹² Thus, the employer does not have a cause of action for the disruption of his business due to the absence of an employee. Even apart from questions of "duty," "foreseeability" and the like, this loss simply cannot be measured, and since it is not likely to occur with great frequency,³¹³ the employer will have to bear it. We would then agree with the African chief on this point.

However, this is a much different question than whether the employer who has suffered a measureable out-of-pocket loss as a result of the accident, *i.e.*, the amount of salary paid to the employee, for which he received nothing in return, should be able to recover this amount from the tortfeasor. Practically all modern cases in which the employer has tried to recover from the tortfeasor involve claims for reimbursement of disability payments, pensions, or the cost of medical treatment for members of the armed forces, police force or other public servants.³¹⁴ As we will see, in most states workmen's compensation payments are recoverable by the employer or his insurer, either by way of an independent action against the responsible tortfeasor, by intervention in the employee's action against the tortfeasor or by a lien on the employee's judgment.³¹⁵ Some civil law jurisdictions allow recoupment of payments made to the employee from the tortfeasor.³¹⁶ Most English and American cases, on the other hand, hold that the employer cannot recover.³¹⁷ The result is justified if, because of the jurisdiction's commitment to the collateral source rule, the employee's recovery is unaffected by the receipt of benefits from the employer, since otherwise the de-

³¹² See the discussion, *supra* notes 110-11 and accompanying text.

³¹³ Just as it is possible to obtain insurance against the death of a key employee, it should be possible to obtain insurance against his disablement or temporary absence from work.

³¹⁴ See the discussion in Fleming *supra* note 306, at 1487.

³¹⁵ See the discussion, *infra* notes 372-76 and accompanying text.

³¹⁶ See the discussion in Fleming *supra* note 306, at 1516-20.

³¹⁷ *United States v. Standard Oil Co.*, 332 U.S. 301 (1947); *City of Philadelphia v. Philadelphia Rapid Transit Co.*, 337 Pa. 1, 10 A.2d 434 (1940); *Receiver for the Metropolitan Police Dist. v. Croydon Corp.*, [1957] 2 Q.B. 154 (C.A. 1956). In the latter case the court said that the action *per quod servitium amisit* was available only as to "menial servants." Recovery was permitted as to sums expended for the benefit of the injured employee in *Jones v. Waterman S. S. Corp.*, 155 F.2d 992 (3rd Cir. 1946), but it is doubtful if the decision (which was based on Pennsylvania law, and the court apparently was unaware of the *City of Philadelphia* case) would be followed today.

fendant would have to pay twice for the same item of damages. But if the court holds that the employee cannot recover his salary which was met by the employer's gratuitous payment,³¹⁸ and does not permit an action by the employer to recover the amount expended, *we have a case of uncompensated loss*. The employee has received his wages, so he has lost nothing due to the accident. The employer is out-of-pocket the wages he paid his employee, for which he received nothing in return, even discounting the disruption of his business. Since the defendant will not have had to pay anything to the employee for his lost time, there is no reason why he should not be liable for this out-of-pocket loss the employer has sustained. And apart from the employer's loss, he has made good an injury to the accident victim, the responsibility for which the law has assigned to the tortfeasor.

The solution for the African chief was to order the tortfeasor to make the payment to the employer, and as we have pointed out, this is what happens in the case of workmen's compensation and in some civil law jurisdictions. This solution has been advocated for all gratuity cases.³¹⁹ But is this a sound solution in our legal system? We are not talking about a comprehensive plan of loss allocation resulting from accidents. The question is whether in the relatively few cases where the employer has continued to pay the salary of his injured employee because of charitable inclination or the employee's special value to him, the employer should have a separate cause of action against the tortfeasor to recover this amount. Our system is not that of the African chief, and we cannot call the parties under a tree. While we may allow recoupment in the case of an injured employee who has obtained workmen's compensation, such cases are significantly more in number. And such recoupment has been questioned as reallocating the loss from one efficient channel of distribution to another, perhaps less efficient,³²⁰ as well as presenting practical problems in apportionment.³²¹

³¹⁸ As the New York courts have held: *Coyne v. Campbell*, 11 N.Y.2d 372, 183 N.E.2d 891 (1962); *Drinkwater v. Dinsmore*, 80 N.Y. 390 (1880). In England, the employee may recover the value of his lost time from the tortfeasor in the gratuity situation. *Peacock v. Amusement Equip. Co.* [1954] 2 Q.B. 347 (C.A.).

³¹⁹ See West, *The Collateral Source Rule Sans Subrogation: A Plaintiff's Windfall*, 16 OKLA. L. REV. 395, 414 (1963).

³²⁰ The tortfeasor may be a less efficient loss distributor, particularly where the employer is insured.

³²¹ See 2 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 74.30 (1968).

There are likely to be similar problems in permitting a separate action by the employer.³²² Apart from that, the real objection is to "cranking up the machine again." The employer has, in fact, suffered a loss due to the accident, since he paid the employee his salary without receiving anything in return. It seems more efficient to permit the employee to recover this loss on his behalf, that is, to recover the value of his lost time without regard to the fact that his salary was continued. We could include a direction to repay, but this is not really necessary. The employee and the employer may adjust matters as they wish, and the defendant is protected, since he will have to meet the loss only once. An analogy may be drawn to cases where the accident victim was working but received no salary. By permitting him to recover the value of his lost time, we are, in effect, compensating the enterprise for the loss of the employee. A recent case³²³ involved a priest who was teaching at a college operated by his religious order. Following the accident, he missed some time from work and thereafter taught a reduced load. It was contended that since he had taken vows of poverty and was not paid wages, he suffered no economic loss in this regard. Nonetheless, the court permitted him to recover for the value of his lost time. No doubt he will turn the proceeds of the award over to the college, which is thereby compensated for the loss it suffered because of his absence. The same thing will happen when we allow recovery for the value of lost time to a woman who performed services as a bookkeeper for a partnership consisting of her husband and son, but received no salary.³²⁴ Interestingly enough, in that case, damages were computed on the basis of a monthly salary paid to a replacement. So too, when a partner in a business has been injured and continues to draw salary during the period of disablement.³²⁵ In all of these cases the enterprise has suffered a loss when an employee was unable to work due to the accident. It is more efficient to permit the plaintiff to recover on behalf of the enterprise, and for want of a better method, we

³²² See the criticism of the separate action in Maxwell, *supra* note 388, at 685.

³²³ *McLaughlin v. Chicago, M., St. P. & Pac. Ry.*, 31 Wis.2d 378, 143 N.W.2d 32 (1966).

³²⁴ *Nemer v. Anderson*, 151 Colo. 411, 378 P.2d 841 (1963).

³²⁵ *Lashin v. Corcoran*, 146 Conn. 512, 152 A.2d 639 (1959); *Canning v. Hannaford*, 373 Mich. 41, 127 N.W.2d 851 (1964). *Contra*, *Pensak v. Peerless Oil Co.*, 311 Pa. 207, 166 A. 792 (1933).

measure the loss to the enterprise in terms of the value of the employee's time.³²⁶

Where the employee who received his salary during the period of disablement recovers the value of his lost time, funds are available from which he can reimburse the employer. He and the employer can adjust the matter as they wish. Therefore, recovery for the value of lost time should be unaffected by the fact that the plaintiff's salary was continued. He is recovering on behalf of his employer, and under our system—which is necessarily more complicated than that of the African chief—it is sounder to go about it in this way rather than to permit a separate action by the employer against the tortfeasor.

B. Disability Pensions and Accident Insurance.

We have used the example of disability pensions to demonstrate the methodology of the functional approach. We conclude that the receipt of a disability pension should not operate to reduce recovery because we could not measure what the plaintiff "lost" in order to receive that benefit. This is not a question of cumulating benefits, but of measuring the plaintiff's "true loss." If compensation were determined with reference to the needs of the victim and his family, the disability pension would be most relevant, but this is not how we do it. We lack the necessary data to feed the value of the disability pension into the machine, because we have no way of measuring the cost of the pension to the plaintiff. Therefore, the disability pension must be ignored. It is for this reason that we disagree with the result in Sergeant Browning's case and agree with the courts that do not allow it to be considered,³²⁷ although we reject the rationale of the collateral source rule.³²⁸

³²⁶ In *Canning v. Hannaford*, 373 Mich. 41, 127 N.W.2d 851 (1964), the court noted that the jury could have found that the earnings had decreased as a result of the plaintiff's absence. Where a self-employed person is injured, and because of the nature of the enterprise it is not possible to say that a decrease in profits was due to the employee's absence, he recovers damages based on the value of his lost time. See *Dempsey v. City of Scranton*, 264 Pa. 485, 107 A. 877 (1919). See also *Baltazar v. Neill*, 364 S.W.2d 846 (Tex. Civ. App. 1963). Following the plaintiff's injury, his wife was required to quit her employment and take his place in the store. The court allowed the jury to consider evidence of the wife's earnings in her former employment as bearing on the value of the plaintiff's lost time.

³²⁷ See e.g., *Capital Products, Inc. v. Romer*, 252 F.2d 843 (D.C. Cir. 1958); *Hume v. Lacey*, 112 Cal. App. 2d 147, 245 P.2d 672 (1952); *Rusk v. Jef-*

(Continued on next page)

Accident insurance may take a variety of forms, but perhaps we can concentrate our discussion on three types. The insured may receive a specified sum of money for each day that he is disabled, and for the wage-earner this would represent time away from work. A second kind of protection is against the loss of a member, and the insured receives a lump sum payment, *e.g.*, \$10,000 for the loss of a finger, \$100,000 for the loss of both legs. He would also receive a lump sum payment for total and permanent disability. A third type may be called income protection. After the insured has been disabled for a certain period or has become totally and permanently disabled, he receives monthly payments, either for a specified time, *e.g.*, two years, or the rest of his life.

It has long been held that recovery of damages is not affected by the receipt of accident insurance benefits of whatever variety.³²⁹ This is in accord with the general rule as to insurance. We have previously discussed the question in the case of the Insured

(Footnote continued from preceding page)

fries, 110 N.J.L. 307, 164 A. 313 (Err. & App. 1933); *Healy v. Rennert*, 9 N.Y.2d 202, 173 N.S.2d 777 (1961). See also the criticism of *Browning* on the ground that the plaintiff "gave value" for the pension in *Jolowicz, Comment on Browning v. The War Office*, 1963 CAMB. L.J. 37, 39-40 (1963).

However, the disability benefit may be in lieu of other benefits that the plaintiff would have received but for the injury. In *Healy v. Rennert*, the plaintiff alleged that if he had not been injured, he could have retired in two years at half-pay. The evidence of the disability pension was introduced by the defendant to counter the plaintiff's claim of loss. Here the jury found for the defendant, and the court concluded that the introduction of the evidence of the disability pension was reversible error. See the discussion *supra*, note 75. Nonetheless, since the disability pension was, in effect, a substitute for the retirement pension, the plaintiff should not be able to recover the lost retirement pension in addition. Perhaps because of the posture of the case, this fact escaped the court's notice. The same situation was involved in *Cunningham v. Rederiet Vindeggen A/S*, 333 F.2d 308 (2d Cir. 1964). In a wrongful death action the plaintiff sought recovery for half the value of pension payments her deceased husband would have received upon retirement. She had received death benefits, which she would not have received if he had lived. The court correctly reasoned that she was entitled *either* to the death benefits or the loss of retirement benefits, but not both. However, it was applying New York law and read *Healey* to hold that damages for the loss of future benefits were recoverable without regard to the benefits received. In such a case it seems that the claim for the future benefits necessarily opens up the question of the present benefits. Unless the plaintiff can show (and perhaps this could be done at the pre-trial conference) that the loss of future benefits was greater, in which case he should be limited to the excess, he should not be permitted to claim those benefits.

³²⁸ Note again that it is possible to treat the matter differently under a comprehensive scheme of loss allocation, but this is not the question with which a court can be concerned.

³²⁹ See *e.g.*, *Campbell v. Sutliff*, 193 Wis. 370, 214 N.W. 374 (1927); *Bradburn v. Great Western Ry.*, [1874] L.R. 10 Ex. 1 (C.A.).

Accident Victim,³³⁰ and our solution was that as to loss insurance, recovery should be reduced by the receipt of the insurance benefits provided the plaintiff was given credit for the total cost of the premiums. Under this approach, the plaintiff would either recover the loss met by insurance or the total cost of the premiums, whichever was smaller. We also pointed out that today it is possible to take out insurance without regard to economic loss, so that some insurance is really insurance against the occurrence of a contingency. This kind of insurance should not affect the recovery of damages in personal injury actions, because, by definition, it is not insurance against loss.

It seems to me that per diem payments and the lump sum payment for dismemberment or total and permanent disability are properly classified as insurance against a contingency rather than loss insurance. The insured may have been thinking in terms of the insurance as a substitute for lost income, but then again he may not have been, and more importantly, the insurance is not marketed as loss insurance. By that I mean that the payments are not related at all to the insured's income. The insured can insure for any amount of per diem payment as long as he is willing to pay the premium. Moreover, it is usually provided that payment of benefits under the policy is not affected if the insured continues to receive his salary during the period of disability. Certainly, a lump sum payment for loss of a member bears no relationship to the insured's earning capacity. For these reasons, the receipt of benefits under such policies should not affect the plaintiff's tort recovery. This is truly collateral, and to the extent that the plaintiff obtains a "windfall," it is because he purchased insurance for just such a contingency.³³¹ Whether people should be permitted to "over-insure" in this way is a matter necessitating a legislative judgment, but so long as they are, the fact that an accident victim may have purchased such insurance should not affect his tort recovery.

Income protection insurance, on the other hand, would seem to be insurance against loss. Benefits are payable only after a waiting period, and the insured must be disabled. It is the

³³⁰ See the discussion *supra*, notes 179-81 and accompanying text.

³³¹ An analogy may be drawn to the situation where the plaintiff has insured against an item of loss that is not included in tort recovery. See the discussion in James, *supra* note 259, at 550.

kind of insurance that commends itself to a wage-earner, and it is marketed on the basis that it is a substitute for lost earnings. Under the functional approach, as we have discussed it thus far, it would follow that payments under an income protection policy should be taken into account in determining the damages for loss of earning opportunity. In most cases the cost of the premiums would probably be less than the value of the benefits payable, particularly if they are payable for the rest of the plaintiff's life. Consequently this would affect the verdict significantly.

While this result would follow from the functional approach, I am reluctant to propose it. The reason stems from the earliest cases applying the collateral source rule, which involved benefits under a life insurance policy in a suit for wrongful death, and from the contrasting approaches to cumulative recovery under life insurance policies and fire insurance policies. There is no limit to the number of policies or the amount of life insurance that a person may carry, and when the insured dies, the beneficiaries are entitled to the face amounts of all the policies. Whereas in the case of fire insurance, recovery under all the policies cannot exceed the value of the property, and if the property has been over-insured, recovery is pro-rated.³³² Perhaps this restriction is considered necessary to discourage arson or perhaps we believe that a property owner should not be able to "gamble" on the destruction of the property by fire. But there is nothing—other than the economic inability to pay the premiums—to prevent an individual who is earning \$5000 per year from taking out \$500,000 in life insurance policies. Where an individual is insured in excess of his "economic worth," there is no doubt that upon his death, his family will be better off than if he had lived. We often say that "I'm worth more dead than alive." It is not likely that the individual will terminate his life to provide the benefits, but in case he thinks of doing so, the policy contains a suicide provision. Nonetheless, we do not limit in any way the right of a person to take out as much life insurance as he wishes.

I think that this reflects an important societal value, which is that no one can carry "too much" life insurance. A person

³³² See W. VANCE, *INSURANCE* § 154 (3rd ed. 1951).

cannot estimate the needs of his family after he is dead, as life insurance salesmen point out when trying to persuade us to increase the amount of insurance or take out a new policy. The wife or child may develop a serious illness. The costs of college may go up tremendously. No one knows what inflation will do to the value of the dollar, and so on. Thus, when it was contended that life insurance proceeds should affect recovery in a wrongful death action, American courts were not at all troubled by the fact that the beneficiaries would get full wrongful death recovery and keep the insurance proceeds.³³³ Indeed, one court treated the contrary view as too fallacious to require comment.³³⁴ The English courts, on the other hand, did allow life insurance benefits to be considered,³³⁵ but this was soon changed by statute.³³⁶

It seems to me that attitudes toward life insurance should be equally applicable toward income protection insurance. While the insured may still be alive, he is disabled and unable to work. The economic problem is even more serious than if he were dead, since he too must be supported. It is true the insurance proceeds will meet some or all of the loss that would otherwise have had to be met by the defendant, and to the extent that he also recovers from the defendant, there is double recovery. He can be "made whole" if he recovers the cost of the premiums. Moreover, it is less complicated to compute the value of the disability payments than it is the value of life insurance proceeds. Life insurance would be payable at the time the insured died, so the fatal accident only means that payment is accelerated. Recovery would be reduced only by the accelerated value of the policy, that is, by the interest the beneficiaries receive on the proceeds between the time of actual death and the end of the insured's life expectancy, and by the premiums the insured would have had to pay during the period of life

³³³ ". . . [T]he plaintiff . . . recovers but once for the wrong done him, and he receives the insurance money upon a contract to which the defendant is in no way privy, and in respect to which his own wrongful act can give him no equities." *Perrot v. Shearer*, 17 Mich. 48, 56 (1868).

³³⁴ *Althorf v. Wolfe*, 22 N.Y. 355 (1960). See the discussion in Maxwell, *supra* note 287, at 671.

³³⁵ See the discussion in Ganz, *Mitigation of Damages by Benefits Received*, 25 Mod. L. Rev. 559 (1962).

³³⁶ Fatal Accident (Damages) Act, 1908, 8 Edw. 7, ch. 7. For a discussion of the interesting circumstances leading to the change see Ganz, *supra* note 335, at 559-60.

expectancy.³³⁷ These problems are not present in the case of income protection insurance, which would not have been collected if the accident had not occurred. Our objection to allowing the deduction, therefore, must take account of the "double recovery" aspect.

In the next section we will discuss "double recovery" as applied to social insurance benefits in the context of our system of awarding damages for loss of future earning opportunity. We will conclude that social insurance benefits should not affect recovery of damages for loss of future earning opportunity, and the rationale may also be applicable to income protection insurance. However, for the time being, let us assume that the concept of double recovery is accurate, that we can realistically say that the plaintiff has been fully compensated for the loss of earning opportunity for the damages awarded. I still think there are valid reasons for not considering the insurance benefits in the personal injury action so that the plaintiff will, in theory, have double recovery.

In the first place, to allow recovery in the personal injury action to be reduced by the receipt of insurance benefits could have some effect on the marketability of income protection insurance. The potential purchaser is probably thinking as much about the possibility of disablement due to an accident as due to sickness, if not more so. The kind of accident uppermost in his mind is most likely an automobile accident, and when he thinks of an automobile accident, he thinks about recovery against the driver of the other automobile, if that is how the accident will happen (for he assumes that the accident will be the fault of the other driver). If he is told that he will retain the insurance proceeds and also have full recovery against the other driver, this is an additional argument in favor of purchasing income protection insurance. In any event, the possibility of cumulative recovery can only be a plus factor in the marketability of accident insurance, and for the court to hold that insurance proceeds will operate to reduce recovery works against the accident insurer. Maybe this should not matter. But it can be said that the question of whether accident insurance should operate to reduce recovery

³³⁷ Apparently the English courts only considered the premium savings. See Ganz, *supra* note 335, at 559 n. 1.

in a tort action involves a conflict between the interests of the accident insurer and the liability insurer. Perhaps this is the kind of question that should be determined by the legislature on the basis of empirical data not available to a court in the context of a personal injury action. At least it is something to consider.

More significantly, I think, is our society's attitude toward insurance. If we say that a person cannot take out too much life insurance because he cannot estimate the needs of his family after he is dead, is this not equally true with respect to income protection? The accident victim has tried to protect his family from the effects of his disablement. Perhaps he has guessed correctly, but perhaps he has not. To the extent that we allow full recovery from the tortfeasor, it is more likely that the family will be adequately protected. Just as a person cannot have "too much" life insurance, he cannot have "too much" income protection when he is disabled. I think that our society would be opposed to letting the fact that the victim carried income protection insurance affect his tort recovery. I seriously doubt that even if they were directed to, the jury would reduce recovery by benefits payable under such a policy. It is for these reasons—apart from those to be discussed in connection with social insurance—that I think income protection insurance should not affect the recovery of damages for loss of future earning opportunity.

C. *Social Insurance.*

We are using the term, social insurance, in a rather broad sense to include all government-financed and all government-controlled programs of protection against loss. This is so that we may distinguish social insurance from private insurance and other benefits for which the recipient can be said to have "voluntarily paid." The problem is that in the United States there is not a comprehensive program of social insurance, and much of the social insurance that exists is made to resemble private insurance. We tend to finance these programs under "special funds" rather than from general revenues, with the beneficiaries and/or their employers being taxed or otherwise required to provide the funds of the program. The ethos of social

insurance in the United States has been discussed previously, and it may be just as well that we believe it.³³⁸ We thus have a patchwork of programs, which, for purposes of this analysis, I am calling social insurance. Their common features are: (1) government control and/or financing; (2) payment of prescribed benefits to eligible individuals; (3) non-judicial administration of claims³³⁹ These programs represent attempts by *government* to provide some protection against the vicissitudes of life, and may properly be called social insurance. We are not now concerned with medical benefits, which were discussed previously. Let us first review the kinds of social insurance that we will discuss in connection with the question of whether receipt of benefits should affect recovery for loss of earning opportunity.

To deal with the problem of employee "on-the-job" injuries, all states have enacted workmen's compensation statutes. Compensation is provided without regard to fault, but the sums are relatively modest. In exchange for such compensation, the employee loses his tort action against the employer, but as we will see, not necessarily against third parties. The costs are to be borne initially by the employer, who may either have taken out insurance or have been permitted to operate as a self-insurer. In theory, the cost of the awards or premiums will be reflected in the price of the employer's product or service and distributed among consumers and users.³⁴⁰ Longshoremen and harbor workers not covered by a state statute are covered by a federal workmen's compensation law.³⁴¹

Unemployment compensation is available for employees "temporarily" out of work. The unemployment compensation fund will usually be financed by a tax collected either from employers or from employers and employees.³⁴² Since these benefits expire after a period of time, it is likely that they will be involved in a personal injury action only to the extent that

³³⁸ See the discussion *supra*, notes 245-47 and accompanying text.

³³⁹ Note, however, that the opportunity for judicial review of the administrative determination is generally provided.

³⁴⁰ See I. A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 2.20 (1961).

³⁴¹ 33 U.S.C. §§ 901-950 (Supp. IV, 1968), *amending* 33 U.S.C. §§ 901-950 (1964). Federal employees are also covered by federal statute. Railroad workers and seamen are entitled to maintain a statutory action under the Federal Employers Liability Act and the Jones Act.

³⁴² See Note, *The Mitigating Effect on Damages of Social Welfare Programs*, 63 HARV. L. REV. 330, 335 (1949).

the plaintiff, who may have been receiving unemployment compensation or some other form of public assistance, is seeking to recover for loss of earning opportunity during the period of disability.

The Social Security Act, in addition to providing retirement benefits, provides benefits for persons "permanently and totally disabled," which continue until the recipient becomes eligible for retirement benefits.³⁴³ Similar provisions are contained in the Railroad Retirement Act³⁴⁴ and the Federal Civil Service Retirement Act.³⁴⁵ Under these statutes the employee "contributes" to an annuity fund, and the railroad employer and the federal government also contribute to the respective fund. There is no doubt that these disability funds represent a substitute for social security disability, since federal employees and railroad workers are exempt from the social security tax. Irrespective of the difference in tax rates and benefits and the terminology of "contributions" and "annuities," the programs for the railroad and government employees are social insurance in the same sense as social security.

Finally, we make provision for war veterans who have become totally and permanently disabled after they have returned to civilian life. If this occurs, even though the cause of the disability is not service-connected, they receive specified disability pensions.³⁴⁶ This must be distinguished from the disability pension paid to a person injured in the line of duty while in active military service.

It should be quite clear that social insurance in the United States is a "crazy-quilt" pattern. There is no comprehensive program of social insurance designed to provide protection against the loss and dislocation resulting from accidents. The person injured in the course of his employment may receive

³⁴³ 70 Stat. 815 (1956), as amended 79 Stat. 366 (1965), 42 U.S.C. § 423 (Supp. IV, 1968), amending 42 U.S.C. § 423 (1964). The term "permanently and totally disabled" needs some qualification. Prior to 1965 the disability had to be one "which can be expected to result in death or to be of long-continued and indefinite duration." 70 Stat. 815 (1956), 42 U.S.C. § 423 (c)(2) (1964). The 1965 amendment changes the definition to "or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423 (d)(1) (A) (Supp. III, 1967).

³⁴⁴ 49 Stat. 968 (1935), as amended, 78 Stat. 1094 (1964), 45 U.S.C. § 228b (Supp. IV, 1968), amending 45 U.S.C. 228(b) (1964).

³⁴⁵ 5 U.S.C. § 8337 (Supp. IV, 1968).

³⁴⁶ 38 U.S.C. § 521 (Supp. IV, 1968), amending 38 U.S.C. § 521 (1964).

workmen's compensation while one injured away from work does not. The unemployed person who has worked previously may be receiving unemployment compensation during the period of convalescence, but the person who was about to enter the job market when the accident occurred will not. Wage-earners covered by social security and similar programs receive a disability pension as do veterans, but other accident victims do not. Moreover, the programs appear to be set up as closely as possible to correspond with private insurance, so that beneficiaries and their employers are taxed specifically to provide the funds for particular social insurance programs. All of this makes it difficult to evaluate the question of social insurance as affecting tort recovery.

(1) *Cumulative recovery and social insurance: the nature of the problem.*

Where social insurance is available to meet part or all of a loss caused by an accident and the victim retains his common law action against the tortfeasor, we have another problem of cumulative recovery. Again, the question is whether the amount of damages in the personal injury, in this case, the amount the plaintiff is claiming for loss of earning opportunity, should be affected by the receipt of the social insurance benefit. Where two or more remedies are available to deal with an accident loss, *e.g.*, social insurance and tort recovery, the following patterns of solution are possible:

- (1) abolish one or more of the remedies;
- (2) compel the victim to elect from one of the remedies;
- (3) allow the victim to have the cumulative effect of two or more remedies;
- (4) allow the victim to pursue both (or all) remedies, but limit his recovery to the maximum amount he could recover from a single source by:
 - (a) considering one of the sources as primarily liable so that it bears the full burden, and the other source will be entitled to indemnity or subrogation;

- (b) providing that the benefits had under one scheme diminish the amount to be had under the other.³⁴⁷

Since we do not have a comprehensive system of social insurance in the United States, the problem has not been approached from this perspective. As we will see, each social insurance benefit has been considered separately, and different results have been reached. It is well then to consider how a country with a comprehensive social insurance program has dealt with the question of social insurance and tort recovery.

We will do this by looking at the British experience. The British system of social insurance has been described as follows:

The National Insurance Act of 1946 has co-ordinated and extended the many different branches of social insurance into one comprehensive system. It covers benefits for sickness, unemployment, maternity, and widowhood; retirement pensions; guardians' allowances; and death grants. It covers everybody, employed persons as well as self-employers, housewives and other nonemployable persons. It is supplemented by the National Insurance (Industrial Injuries) Act of 1946, which replaces the former system of workmen's compensation by a corresponding system of insurance against industrial accidents arising in the course of employment, and the National Health Service Act, 1946, which provides free medical and dental treatment for everybody. Between them these acts provide a comprehensive system of minimum grants, insuring everybody, regardless of personal and financial status, against the major vicissitudes of modern life, and providing a bare minimum subsistence, but no more.³⁴⁸

The theory of British social insurance, then, is that of a "bare minimum subsistence." This is the antithesis of the common law tort action, which seeks to compensate each successful plaintiff for the whole of his loss and to put him in as good a position as he would have been if the tort had not occurred. Obviously the scale of benefits under social insurance would be far below the

³⁴⁷ This is taken from James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U. L. REV. 537, 540-41 (1952).

³⁴⁸ Friedmann, *Social Insurance and The Principles of Tort Liability*, 63 HARV. L. REV. 241, 241-42 (1949).

amount recoverable in a common law action, not only because the common law action would allow recovery for pain and suffering, but also because the maximum compensation for an employed person under social insurance, while based on wages earned, would not begin to approximate the amount recoverable for a loss of earning opportunity under tort rules of damages.³⁴⁹ Social insurance, it must be remembered, looks to the *need* of the victim and his family—and the minimum need at that—while tort recovery looks to the *loss* suffered by the particular plaintiff. It was, therefore, a question of prime importance as to how the social insurance program would affect tort recovery, and this was not only considered by the Beveridge Committee,³⁵⁰ but a special departmental committee, the Monckton Committee on Alternative Remedies, was set up to consider the problem.³⁵¹

Since benefits under the social insurance program were so much less than tort recovery, there was no question of abolishing the common law action.³⁵² Nor was it considered desirable to require the victim to elect between social insurance and tort recovery.³⁵³ The question, then, was how the receipt of social insurance benefits would affect tort recovery, which is the question with which we are concerned. The Beveridge Report had said that “an injured person should not have the same need

³⁴⁹ *Id.* at 253-54. At that time an unemployed person with one child would receive in social insurance benefits less than \$1000 for an incapacity lasting one year, whereas if he were earning around \$50 per week, the author estimated that he would receive around \$3400 in damages.

³⁵⁰ Social Insurance and Allied Services, Report by Sir William Beveridge, CMD. NO. 6860 (1946).

³⁵¹ *Id.*

³⁵² Friedman, *supra* note 348, at 253. Not a single witness before the Monckton Committee favored the abolition of the tort remedy. James, *supra* note 347, at 542 n. 16.

³⁵³ A cardinal purpose of all forms of social insurance is to provide a quick and a sure and a well-adapted remedy for the needs it seeks to alleviate. Among the evils of the older system are delays and many uncertainties (e.g., as to the fact of recovery, as to amount, as to defendant's financial responsibility). Moreover, successful litigation brings a lump sum recovery, which often throws the burden of providence and of wise investment on one ill fitted to meet it (while social insurance provides periodic payments to meet continuing needs). All these things bring real human hardship and a train of broader social consequences. Yet the older remedy with all its drawbacks, is potentially much greater. Thus to tempt the injured man—and to tempt others to tempt him—to renounce the benefits of social insurance may bring about the very evils the scheme was adopted to avoid. Benefits under a social insurance scheme (e.g., workmen's compensation, disability payments) should, therefore, be payable forthwith, whatever is to happen later in the tort suit. James, *supra* note 347, at 543.

met twice over,³⁵⁴ and this was the position of the majority of the members of the Monckton Committee, which recommended that in assessing tort damages the court³⁵⁵ should reduce recovery by benefits already paid or by the value of future benefits.³⁵⁶ A minority of the Committee, representing employee's organizations, took the position that social insurance was but a more comprehensive form of private insurance and since benefits payable under private insurance policies did not affect tort recovery,³⁵⁷ neither should benefits paid by social insurance.³⁵⁸ A proposal by the Trade Unions Congress that damages exceeding five-twelfths of the amount of the insurance benefit be retained, as representing the portion of the insurance met by employee's contributions, was also rejected.³⁵⁹

When it came Parliament's turn to wrestle with the question, a different solution emerged. The Law Reform (Personal Injuries) Act of 1948³⁶⁰ provided that in determining loss of future earning opportunity, the court should take into account one-half of all social insurance benefits (industrial injury, industrial disablement or sickness) payable for a period of five years after the cause of action accrued. This was treated as a straight political compromise,³⁶¹ although it was defended by the Government on the ground that the employee contributed five-twelfths to the fund and that the defendant, whether employer or other tortfeasor, was also a contributor.³⁶² The compromise, then, is between alternative (3), which would allow the victim to cumulate remedies, and alternative (4)(b), which would reduce benefits recoverable under one remedy by the amount recovered under another. The victim can cumulate, but there is a *partial reduction* in recovery because of the receipt of social insurance benefits. In subsequent years Parliament provided that in a wrongful death

³⁵⁴ See Friedman, *supra* note 348, at 254.

³⁵⁵ It must be remembered that in England, personal injury actions are tried before the court rather than a jury.

³⁵⁶ Friedman, *supra* note 348, at 255.

³⁵⁷ See, e.g., *Bradburn v. The Great Western Ry. Co.*, [1874] L.R. 10 Ex. 1 (C.A.).

³⁵⁸ Friedman, *supra* note 348, at 254.

³⁵⁹ *Id.* at 254-55.

³⁶⁰ 11 & 12 Geo. 6, c. 41.

³⁶¹ See the discussion in Friedmann *supra* note 348, at 255-56.

³⁶² *Id.* at 258. See also the discussion in Ganz, *supra* note 335, at 566.

case, social insurance benefits were to be completely disregarded.³⁶³ Here, again, the law eventually adopted was contrary to the recommendation of the Monckton Committee.³⁶⁴

Another possible solution is alternative (4)(a), under which the fund could recoup the amount of payments either by reimbursement from the beneficiary or by an action against the tortfeasor. Apparently this is what was done with respect to health insurance payments in Great Britain prior to 1948.³⁶⁵ Such a solution was rejected both by the Monckton Committee and by the Government, on the ground that the victim should never be deprived of social insurance benefits and that to allow recoupment would give the fund an undesirable interest in litigation.³⁶⁶ On the other hand, this is the solution that is favored in most other countries such as France, Germany and Soviet Russia.³⁶⁷ The justification that has been advanced is: (1) for an accident victim to come out better than he would have been without the accident is incompatible with the purposes of tort law and extravagant of the community's resources; and (2) it is self-evident that the tortfeasor should not take advantage of collateral benefits.³⁶⁸ This assumes that the problem is one of overcompensation as against windfall, and it is resolved by permitting the fund to recover.

The arguments against subrogation made with respect to insurance,³⁶⁹ are equally applicable here. Most significantly, such recoupment shifts the loss from an efficient channel of distribution, the public treasury, to another channel which may or may not be as efficient.³⁷⁰ Nonetheless, this represents the solution that most other countries with comprehensive social insurance systems have adopted.

³⁶³ Fatal Accidents Act, 1959, 788 Eliz. 2, ch. 65.

³⁶⁴ Ganz, *supra* note 335, at 566 n. 39.

³⁶⁵ See the discussion *id.* at 566.

³⁶⁶ *Id.* See also the discussion in Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478, 1514-15 (1966).

³⁶⁷ See Fleming, *supra* note 366, at 1514-26.

³⁶⁸ *Id.* at 1516.

³⁶⁹ See the discussion *supra* notes 96, 170-76 and accompanying text.

³⁷⁰ According to Professor Fleming, this kind of argument is rejected on the continent "[b]ecause 'the principle of the thing' is to the European mind too important to be cavalierly sacrificed to administrative considerations. . . ." Fleming, *supra* note 366, at 1516.

(2) *The present approach in the United States.*

Because of the absence of a comprehensive system of social insurance, little attention has been paid to the basic question of loss allocation. We have not considered what losses should be met by society through social insurance, what losses should be met by the individual through private insurance, and what losses should be met by the responsible party under a system of tort recovery.³⁷¹ In most cases of social insurance benefits, the plaintiff is permitted to cumulate both remedies and obtain full recovery under the application of the collateral source rule. In some cases the social insurance fund is permitted to recoup either by reimbursement from the beneficiary or subrogation against the tortfeasor. In still others recoupment is obtained by reducing, in accordance with administrative regulations, the benefits payable from the social insurance fund. We will now consider the approach that has been taken toward cumulative recovery where the plaintiff has received workmen's compensation, unemployment compensation or disability pensions.

In exchange for workmen's compensation the employee loses his common law action against the employer, but in many states his rights against third parties are not affected. Where the employee is injured by a third party tortfeasor in the course of his employment, he receives workmen's compensation payments. The question is how this affects his recovery from the tortfeasor. Here the solution in practically all states is to prohibit the injured employee from retaining both benefits and to reallocate the cost of the employee's injuries to the tortfeasor.³⁷² This is accomplished by permitting the employer or his insurer either to (1) sue the tortfeasor directly, (2) intervene in the employee's action, or (3) obtain a lien against the employee's judgment.³⁷³ This has led to problems in determining what amount of the employee's recovery is the equivalent of his workmen's compensation payments.³⁷⁴ While shifting the loss from the employer to the tort-

³⁷¹ For the view that such consideration is necessary see Fleming, *supra* note 366, at 1544-49.

³⁷² See the discussion in Fleming, *supra* note 366, at 1505-8.

³⁷³ *Id.* at 1505-06; see also A. LARSON, *Supra* note 340, § 74.

³⁷⁴ A. LARSON, *supra* note 373. There are also problems as to what defenses may be asserted where the employer is suing directly or has intervened. *Id.* § 75.

feasor may be criticized from the standpoint of effective loss allocation,³⁷⁵ the reason for the rule is understandable when we consider the circumstances surrounding the establishment of workmen's compensation, one of the first pieces of social legislation in the country. The employer was giving up his common law defenses, which usually enabled him to avoid liability, thus placing the cost of the human overhead of doing business on the employee. There were doubts as to the constitutionality of the legislation.³⁷⁶ It seemed logical to the legislative mind of the late nineteenth and early twentieth century that if the injury was caused by a "wrongdoer"—as a defendant who was found liable under the law of negligence as it existed at that time would be—he rather than the employer should bear the loss. To permit double recovery to the injured employee would also have been inconceivable. Therefore, most statutes expressly provided for recovery by the employer.

However, a few did not, and the courts had to resolve the question in the context of the employee's suit against the tortfeasor. After some difficulty, the Ohio courts concluded that (1) the employer would not be permitted to recover the amount of the payments from the tortfeasor, and (2) the employee's recovery against the tortfeasor would not be affected by his receipt of workmen's compensation benefits.³⁷⁷ The legislature agreed, and it is specifically provided by statute that receipt of workmen's compensation benefits may not be considered by the jury in a personal injury action.³⁷⁸ Thus, the employee obtains cumulative recovery. The same solution has been adopted by other courts that have passed on the question. Not only is the employee's recovery not affected, but the introduction of evidence that he

³⁷⁵ Apparently, however, workmen's compensation insurance is operated so as to take account of subrogation, and subrogation recovery is credited against the losses of an enterprise or group. See James, *supra* note 347, at 561-62.

³⁷⁶ See the discussion in A LARSON, *supra* note 340, § 5.20. The first New York statute was held unconstitutional. *Ives v. South Buffalo Ry.*, 201 N.N. 271, 94 N.E. 431 (1911). A constitutional amendment was then passed, and another statute enacted. Doubts as to constitutionality under the federal Constitution were finally laid to rest with the decision in *New York Cent. R.R. v. White*, 243 U.S. 188 (1917).

³⁷⁷ *Truscon Steel Co. v. Trumbull Cliffs Furnace Co.*, 120 Ohio St. 394, 166 N.E. 368 (1929), *overruling* *Ohio Public Service Co. v. Sharkey*, 117 Ohio St. 586, 160 N.E. 687 (1928).

³⁷⁸ OHIO REV. CODE § 4123.93 (Page 1965).

has received such benefits is reversible error because of the prejudicial effect it may have on the jury.³⁷⁹ The courts have given varied reasons. One court cited the collateral source rule.³⁸⁰ Another took the position that if the legislature did not permit the plaintiff from cumulating remedies, it was not for the court to do so in a personal injury action.³⁸¹ The situation with respect to workmen's compensation, then, is that in most states the employer or his insurer is reimbursed for the workmen's compensation payment, but this is not provided for in the statute, the plaintiff is permitted cumulative recovery.³⁸²

Unemployment compensation may be involved in a personal injury action in two situations. A person who is disabled for a period and not covered by workmen's compensation may receive benefits from the unemployment compensation fund. Or, an unemployed person may have been injured during the time in which he was drawing benefits, and they continued after the injury. As we have said, the question will arise only as to recovery for loss of earnings during the period of disablement. Apparently there is no provision for subrogation of the unemployment compensation fund in any of the states, probably because the number of cases in which the recipient would have a tort action is small. Where a plaintiff who has been working before the accident, received unemployment compensation during the period of disablement, courts have allowed recovery for the value of the lost time without reference to the unemployment compensation,³⁸³ the same approach that is taken to workmen's compensation benefits where there is no subrogation. And the

³⁷⁹ *Mangan v. Broderick & Bascom Rope Co.*, 351 F.2d 24 (7th Cir. 1965); *Ridgeway v. North Star Terminal & Stevedoring Co.*, 378 P.2d 647 (Alaska 1963); *Abbott v. Hayes*, 92 N.H. 126, 26 A.2d 842 (1942).

³⁸⁰ *Ridgeway v. North Star Terminal & Stevedoring Co.*, 378 P.2d 647 (Alaska 1963). In that case, suit was brought against the employer, and the issue was whether the plaintiff had elected to come under workmen's compensation. The court held that he had not, and presumably he would be required to return the workmen's compensation payments.

³⁸¹ *Abbott v. Hayes*, 92 N.H. 126, 26 A.2d 842 (1942).

³⁸² In North Carolina the employee may bring suit against the tortfeasor, and it is specifically provided that evidence of workmen's compensation benefits is inadmissible in that action. However, the employee is required to make reimbursement. See N.C. GEN. STAT. § 97-10.2 (1965), and *Spivey v. Babcock & Wilcox Co.*, 264 N.C. 387, 141 S.E. 2d 808 (1965).

³⁸³ See, e.g., *Gypsum Carrier Inc. v. Handelsman*, 307 F.2d 525 (9th Cir. 1962); *Kurta v. Probelske*, 324 Mich. 179, 36 N.W.2d 889 (1949); *Lobalzo v. Varoli*, 409 Pa. 15, 185 A.2d 557 (1962). See also *Cunnien v. Superior Iron Works*, 175 Wis. 172, 184 N.W. 767 (1921), involving benefits under a federal statute.

introduction of evidence that the plaintiff received unemployment compensation benefits has been held to constitute reversible error.³⁸⁴ In California, it appears that the recipient of unemployment compensation must return the benefits if he receives compensation from another source for the period in which he was receiving unemployment compensation benefits, so in such a case the fund is reimbursed.³⁸⁵

The plaintiff who is unemployed at the time of the accident is entitled to recover the value of his lost time, and here the notion that he is recovering for the lost time rather than the lost wages is useful.³⁸⁶ It is not fair to deny him recovery where he was unable to look for work because of the injury, and in such a case the jury does the best it can. Evidence that the plaintiff was receiving public assistance benefits during the period of disability has been held inadmissible, although in the particular case, it appeared that the plaintiff would have received the benefits even if she had been working.³⁸⁷ In another case where the plaintiff had been unemployed and obtained employment with the defendant, in which he was injured, it was held that the fact that unemployment compensation benefits were resumed during the period of disability would not affect recovery.³⁸⁸ We may assume that under the present approach, the receipt of unemployment compensation benefits will not affect recovery, since they are from a collateral source. In the absence of reimbursement, the effect is to enable the plaintiff to have cumulative recovery.

Where a person covered under Social Security or Railroad Retirement³⁸⁹ becomes totally and permanently disabled, he receives a disability pension until he reaches age sixty-five, at which time he reverts to the retirement pension. Apparently no effort is made by the fund to recoup payments when the beneficiary recovers personal injury damages,³⁹⁰ although benefits are to be reduced when the beneficiary has recovered workmen's

³⁸⁴ See particularly *Lobalzo v. Varoli*, 409 Pa. 15, 185 A.2d 557 (1962).

³⁸⁵ See the discussion in *Coyne v. Westinghouse Electric Corp.*, 204 F. Supp. 403 (S.D. Cal. 1962).

³⁸⁶ See the discussion, *supra* note 275 and accompanying text.

³⁸⁷ *Mobley v. Garcia*, 54 N.M. 175, 217 P.2d 256 (1950).

³⁸⁸ *Labick v. Vicker*, 200 Pa. Super. 111, 186 A.2d 874 (1962).

³⁸⁹ Benefits under the Federal Civil Service Retirement Act will be discussed in connection with suits against the United States.

³⁹⁰ See the discussion of this point in *Fleming*, *supra* note 366, at 1515-16.

compensation benefits.³⁹¹ Recovery of personal injury damages may affect the disability pension paid by the Veterans Administration to veterans for a non-service-connected disability. The Administrator is given the discretion to deny or discontinue a pension when "the corpus of the veteran's estate is such that it is reasonable that some part of the corpus be consumed for the veteran's maintenance."³⁹² There is no such discretion with respect to social security disability pensions, which may be reduced only because of workmen's compensation payments.

In suits against ordinary tortfeasors, the courts have uniformly excluded evidence of the receipt of social security disability pensions³⁹³ and veterans' disability pensions.³⁹⁴ We will subsequently discuss the problem of disability pensions in a suit against the United States under the Federal Tort Claims Act. Evidence of benefits received under the Railroad Retirement Act has been excluded.³⁹⁵ That problem will ordinarily arise in a suit against the railroad employer under FELA. Because of the "contribution" aspect, the danger exists that the court would treat this like private insurance. This has not been the case. The courts have recognized that the Railroad Retirement Act represents a social security program for railroad workers, and the fund is supported by tax collections from employers and employees who are, therefore, not subject to the social security tax.³⁹⁶

The pattern of loss allocation with respect to social insurance, then, has been as follows. Where the employee who received workmen's compensation is entitled to recovery against a third party tortfeasor, in most states it is specifically provided by statute that the employer or his insurer is reimbursed for the workmen's compensation payments. The loss is thus allocated to

³⁹¹ 70 Stat. 406 (1965), 42 U.S.C. § 424a (Supp. I, 1964).

³⁹² 38 U.S.C. § 522 (1964).

³⁹³ See, e.g., *A. H. Bull Steamship Co. v. Ligon*, 285 F.2d 936 (5th Cir. 1960); *McMinn v. Thompson*, 61 N.M. 387, 301 P.2d 326 (1956); *Stone v. City of Seattle*, 64 Wash.2d 166, 391 P.2d 179 (1964). In all of these cases the defendant claimed that the evidence was relevant for a subsidiary purpose, e.g., to show a reason for the plaintiff to take the benefit rather than to work.

³⁹⁴ See, e.g., *A. H. Bull Steamship Co. v. Ligon*, 285 F.2d 936 (5th Cir. 1960); *Kainer v. Walker*, 377 S.W.2d 613 (Tex. 1964); *Stone v. City of Seattle*, 64 Wash.2d 166, 391 P.2d 179 (1964).

³⁹⁵ See, *Eichel v. New York Cent. R.R.*, 375 U.S. 253 (1963); *New York, N.H. & H. Ry. Co. v. Leary*, 204 F.2d 461 (1st Cir. 1963).

³⁹⁶ See the discussion, *Eichel v. New York Cent. R.R.*, 375 U.S. 253, 254 (1963).

the third party tortfeasor. Where the statute is silent, the employee has been able to obtain cumulative recovery. Tort recovery is not affected by the receipt of unemployment compensation, and the recipient is able to cumulate unless the fund is entitled to reimbursement from him. The recipient of social security or railroad retirement benefits obtains cumulative recovery. In the case of veteran's benefits, the recipient obtains full compensation against the tortfeasor, but the tort recovery may cause the pension to be terminated or reduced.

Thus, it appears that most European countries with comprehensive systems of social insurance reallocate the loss to the tortfeasor, while permitting the social insurance fund to recoup. England permits the accident victim to obtain cumulative recovery in part, and reduces the liability of the tortfeasor by the remainder; there is no recoupment for the social insurance fund. In the United States, due to the fact that we do not have a comprehensive system of social welfare, and perhaps because the question must be answered by state courts, there is no consistent approach.

(3) *The functional approach.*

It must be remembered that we are approaching the problem in the context of our system of awarding compensation for personal injuries, where the amount of recovery is determined in adversary proceedings before a jury of laymen. Since we have not abolished the remedy of tort recovery where the accident victim has received social insurance benefits,³⁹⁷ the question is how the tort recovery is to be affected by the receipt of such benefits. Any attempt at loss reallocation must be made within this framework.

In attempting to find a solution under the functional approach, I find it sounder to distinguish between recovery of lost earnings during a temporary disability resulting from the accident, and recovery for loss of future earning opportunity where the victim is disabled. It seems more realistic to look at the problem from this perspective rather than with reference to the nature of the social insurance benefit.

³⁹⁷ Except in the case of the employee who was injured by his employer or who cannot maintain an action against a third party tortfeasor.

When a person misses work because of an accident, we permit him to recover the value of his lost time, and the measure of recovery depends on what his time was worth. As we say, the goal of tort law is to put him in as good a position as he would have been if the accident had not occurred. Social insurance benefits are designed to provide minimum subsistence during a period of disability, and the goal is to enable the victim and his family to meet the crisis caused by the accident. The goals of tort recovery and social insurance are not inconsistent. Suppose a person who was earning \$30 per day misses 30 days of work. He receives workmen's compensation payments on the basis of two-thirds of lost wages, and the \$20 per day may be said to represent the minimum subsistence that he needs. While it is difficult to justify a definition of minimum subsistence that is based on the individual's wages, nonetheless, this is how it is done. In any event, because the victim received social insurance, his actual loss is less than it would have been if he had not received the benefit. Ten dollars per day is all the plaintiff needs to make him whole, that is, to put him in as good a position as he would have been if the accident had not occurred. Our system is fully capable of absorbing the "data" of the social insurance benefit. There is no dispute as to the economic loss he suffered during the period of disability, and as pointed out, frequently lost wages are stipulated. If the jury does not "compromise" the verdict, it will award him the full amount of his loss, which will be \$10 or \$30 as the judge directs. It may be pointed out that the award will not compensate him for his true loss, because he will not get to keep the full sum: his lawyer must receive a fee from the recovery. But this is true of the sum awarded for medical expenses or any other item of damage. Perhaps the contingent fee system needs to be reformed.³⁹⁸ This factor is irrelevant when his compensation is purportedly based on the economic loss he demonstrates, and,

³⁹⁸ "For example, the public turned on the time-honored practice under which a physician, for the successful cure of a patient, was entitled to one-half of the patient's earnings for life. The public was not mollified when the Imperial Medical Association pointed out that this practice was justified because, after all, the physician took the risk that this treatment might not be successful and that the patient might die, in which case he would receive no fee at all, and that, furthermore, if the patient had not been cured he would have had no further earnings." Krause, *A Restoration of the Institute—A Re-Tort to Dean Prosser*, 19 J. LEGAL ED. 321, 323 (1967).

in fact, he received \$10 per day less than he otherwise would have because of the accident, not \$30 per day less. The matter of adequate compensation for the plaintiff and his attorney is not realistically met by pretending that the plaintiff suffered economic loss which he did not suffer.

Our plaintiff, therefore, has lost only \$10 per day, and under a compensatory theory of damages, this is all he is entitled to recover from the tortfeasor. Whether the remaining \$20 loss should be met by the tortfeasor or the social insurance fund is an entirely different question, the answer to which requires the kind of empirical data more likely possessed by legislatures than courts. It may be asked how much the workmen's compensation fund would save if subrogation were allowed and whether it would be enough to appreciably affect the employer's insurance premiums or cost of doing business, if he is a self-insurer. We might ask today whether workmen's compensation insurance rates are less because of the subrogation against the tortfeasor. I would guess that it probably is not economically feasible to shift the loss from the employer or his insurer to the tortfeasor or his insurer. Nonetheless, the legislatures of most states have made the decision that the loss is to be reallocated to the tortfeasor. This being so, the employee may obtain full recovery against the tortfeasor and then make reimbursement to the employer, or the employer may subrogate in the action directly. In either case there is no problem as to tort recovery. In other states, either the legislature has specifically provided that the employee may have cumulative recovery—as it may do—or, where the statute is silent, the courts are probably right in concluding that legislative silence demonstrates its intention that the plaintiff should have cumulative recovery. Perhaps someday we will rethink the matter of loss allocation for on-the-job injuries suffered by employees. But for the time being, it can be said that the legislature has spoken, and the court in the personal injury case need not concern itself with the problem.

In other situations, however, legislative intent will not be of much assistance. The legislature has ordinarily provided other social insurance benefits, such as unemployment compensation to one temporarily unable to work, without regard to ultimate loss allocation. In these cases, the receipt of social insurance

benefits should be deducted from tort recovery. If his normal wages were \$30 per day and he received \$20 per day in social insurance benefits for the period of disablement, he has only lost \$10 per day as a result of the accident, and this is all he needs to recover. The minimum subsistence, as represented by the social insurance benefit, has operated to meet some of the loss caused by the tortfeasor. Therefore, the plaintiff's loss is less, and the fact that the defendant's victim—whom he takes as he finds—was entitled to social insurance, has worked to the defendant's benefit. A question may be raised, however, because of the method by which we measure compensation for loss, namely what will happen when the jury is given the data of the social insurance benefit. In a doubtful case, as we have seen,³⁹⁹ it may find against the plaintiff, because it concludes that he has received sufficient compensation by the social insurance benefit. The fact that this could happen if the jury were aware of the social insurance benefit does not trouble me very much. Much of our negligence law is "never-never land" anyway. The jury assumes that the defendant is insured or otherwise financially responsible, which may cause it to tip the scales against *him* in a close case. If a balance is achieved by knowledge of the plaintiff's receipt of social insurance benefits, it is not all that bad. But, more importantly, the problem need not arise. Damages for lost wages usually can be stipulated, and all that is necessary is that the amount received from social insurance benefits be deducted from the total. It may then be announced to the jury that the plaintiff's lost wages are a specified amount. In the rare cases where the parties do not stipulate, the evidence of social insurance should be allowed, and the judge can follow it with a cautionary instruction. In his discretion he could refuse to allow the introduction of the evidence and make some adjustment in the judgment.

A similar question is involved where the plaintiff who was unemployed at the time of the injury was receiving unemployment compensation benefits. I would allow the jury to consider the fact that he had received such benefits in determining the value of his lost time. The question is whether he suffered any

³⁹⁹ See the discussion, *supra*, notes 52-76 and accompanying text.

loss at all, and the jury is merely guessing. It may conclude that the unemployment compensation was as much as he would have earned if he could have obtained a job. The fact remains that he did not lose the "full value" of his time, and I think the jury should have this information. Since he received the social insurance benefit, we may assume that his subsistence needs were met, and if he is limited to that amount, there is no danger that he will become a "public charge" as a result of the jury's reduced award of damages for lost time.

Thus far, we have advocated solution 4(b): recovery in the tort action is diminished by the amounts received from social insurance. The question is not what the defendant should pay, but what the plaintiff has lost as a result of the accident. So long as we can accurately measure this loss, there is no reason to permit the plaintiff to recover more. Note that this means that part of the loss is borne by the social insurance fund and part is borne by the tortfeasor, but the tortfeasor's liability is reduced at the expense of the social insurance fund. As we said before, perhaps a different allocation is possible, but this is the kind of solution that must come from the legislature. In the absence of legislative action, the only course for the court in the personal injury action is to reduce the plaintiff's recovery by the value of the social insurance benefits.

We may now consider the effect of the receipt of social insurance benefits, namely disability pensions,⁴⁰⁰ on recovery of damages for loss of future earning opportunity. It becomes clear that in most cases we are talking about substantial sums of money, both as regards loss of future earnings and the amount of the disability pension. Realistically, the jury awards damages for loss of earning opportunity until the plaintiff would reach the age sixty-five unless it concludes that he had a lower life expectancy. At that age it assumes that he would retire. The disability pension will continue until he reaches age sixty-five, at which time he receives a retirement pension, which is irrelevant. Thus, if the plaintiff lost \$100,000 in earnings until age sixty-five (assume that this is the present worth figure) and would have received pensions totalling \$50,000 (also the present

⁴⁰⁰ This would include pensions paid to the survivors upon the death of the wage-earner.

worth figure), it would make quite a difference whether the value of the pension was deducted.

From what we have said so far, it would seem that it should be deducted. The plaintiff is not entitled to recover for loss of future opportunity twice over. If he has lost \$100,000 in earnings that he otherwise would have had, and \$50,000 of this is met by a disability pension, it follows that all he needs to make him whole is \$50,000, and this is what he should recover from the defendant. The problem, however, is that with respect to future earning opportunity, we do not really "know" what he has lost. When the jury says that he has lost \$100,000, this represents a relatively uneducated guess. It is at this point that we must again take a realistic look at our system of awarding damages for personal injuries. We feed a certain amount and a certain kind of data into the machine, always concerned with how much and what kind of data the machine can absorb. We introduce evidence of the plaintiff's life expectancy, but he may live that long or he may not, he may retire at sixty-five or he may retire earlier or later. We introduce evidence of what the plaintiff was making at the time of the injury and evidence calculated to show what he might make in the future. We consider his education, experience and so on. We also guess as to what the dollar will be worth some years hence. When our lay jury somehow arrives at this figure, it must reduce it to present worth, with or without the aid of annuity or combined tables. The process is as unscientific as it can be. The matter is further compounded by the fact that the jury returns a general verdict, which may or may not have been influenced by a number of factors.⁴⁰¹ Even if a special verdict were required as to each item of damages as well as liability, the amount awarded for loss of future earning opportunity would still represent a guess. From a scientific standpoint, it cannot be said whether a verdict "overcompensates" or "undercompensates." We cannot say that we know whether we have adequately compensated the plaintiff for what he has lost, because we have no way of scientifically measuring his loss, or at least the method we employ is not that of scientific measurement.

In view of this, the question becomes whether we should feed

⁴⁰¹ See the discussion, *supra*, notes 19-22 and accompanying text.

the additional data into the machine. There is no doubt that data concerning the receipt of disability pensions is relevant to determine the plaintiff's actual loss, but the fact that the data is relevant does not mean that the machine can absorb it. The inability of the machine to absorb data has been given as a justification for refusing to permit the jury to consider the tax aspects of personal injury damages.⁴⁰² It is one thing to award the plaintiff a monthly sum, adjustable for a number of factors, and set the monthly disability pension off against that sum. It is another to award the plaintiff a lump sum representing, as best as we can measure, the total loss of future earning opportunity, reduced to present worth, and to set off against that sum the estimated value of the disability pension. At this point the fact that the defendant is legally responsible for the loss may become relevant. If we purport to compensate the plaintiff for his actual loss, and the process, because of its unscientific nature, necessarily creates both a risk of overcompensation and undercompensation, it is proper to take the risk of overcompensation so as to protect the innocent plaintiff against the defendant who must bear responsibility for the accident.

However, I would prefer to approach the question from a different perspective, namely to consider the consequences of running the risk of overcompensation as opposed to the consequences of running the risk of undercompensation. To the extent that the data concerning the receipt of the disability pensions is fed into the machine, the risk of overcompensation is reduced. If the receipt of such benefits may be considered, we may assume that in the great run of cases, the amount of recovery will be less.⁴⁰³ Conversely, if the data may not be considered, the total of all judgments in personal injury cases will be higher. The consequences of higher personal injury judgments that will be felt by defendants as a class can be distributed by insurance, or in the case of the uninsured enterprise, by the cost of the enterprise's products or services. To the extent that recoveries are greater, because not reduced by the receipt of social insurance benefits, the cost of the insurance premiums or the cost of the

⁴⁰² See note 32, *supra*.

⁴⁰³ While the jury may take a gestalt approach, it will still be influenced by the data it receives. To the extent that it sees some of the loss as having been met, it will see the total loss as less.

enterprise's product will increase.⁴⁰⁴ Perhaps empirical data might indicate that the savings would be so significant that it is in the best interests of society to reduce recovery by the amount of social insurance benefits. No such data has been produced, and I would doubt that the savings among defendants as a class or among a group of insureds or producers would be appreciable. Today, when the loss is initially *shifted* to defendants as a class, it will usually be *distributed*, and the impact on the particular defendant ordinarily is insignificant.⁴⁰⁵ In terms, then, of the consequences that overcompensation will have upon defendants, the risk of overcompensation is not of much concern.

On the other hand, plaintiffs in personal injury actions are not loss distributors.⁴⁰⁶ Where the plaintiff is undercompensated, he must bear the full extent of such undercompensation, and the loss to him is significant. Undercompensation does not have such an effect on the defendant. For this reason, from the perspective of consequences, the risk of overcompensation is to be preferred to the risk of undercompensation. More importantly, when we are dealing with social insurance benefits, undercompensation could have undesirable social effects. The relationship between social insurance benefits and tort recovery is more marked in the case of lower income people, people whose income more closely approaches the subsistence level. The social insurance benefits are more important for the individual earning \$5,000 per year than the one earning \$20,000 per year, since the difference between the social insurance benefits paid the former, even if they are to some extent based on prior income, will not be a multiple of four.⁴⁰⁷ As to the low income person, the proportion of the loss met by social insurance will be much higher in proportion to the total loss of future earning opportunity. If the jury miscalculates his loss of future earning opportunity and makes the deduction for the value of the social insurance benefit, there is the real risk that he and his family will have barely enough money to meet

⁴⁰⁴ At some point, depending on the amount of the increase in costs, it may be more economical for the enterprise to insure.

⁴⁰⁵ See generally, F. HARPER & F. JAMES, 2 THE LAW OF TORTS, § 13.4 (1956).

⁴⁰⁶ An individual plaintiff may have taken out first person insurance against loss. But plaintiffs as a class cannot be considered as loss distributors.

⁴⁰⁷ Social security benefits, for example, are adjusted in favor of low income groups. See the discussion in ten Broek and Matson, *The Disabled and the Law of Welfare*, 54 CALIF. L. REV. 809, 819-20 (1966).

their minimal needs. Not only will the plaintiff not have been in as good a position as he would have been if the accident had not occurred, but insufficient recovery may change the very nature of his life and that of his family. Social insurance benefits, it must be remembered, are designed to enable the plaintiff and his family to exist at the subsistence level. Tort recovery is designed to enable the plaintiff and his family to maintain the standard of living they would have had if the accident had not occurred. There is always the danger that the jury will miscalculate, and if it does so, the plaintiff and his family will not enjoy that standard. In the case of the low-income plaintiff, the result of the miscalculation may mean that he and his family will have little above the social insurance benefits, since they represent a substantial proportion of his total loss.

The risk of undercompensation, which will bear heavily on the *individual* plaintiff, can not be justified in the absence of evidence that to reduce the liability of defendants as a class by allowing the jury to consider the receipt of social insurance will have positive societal benefit. It is for this reason that I would exclude such evidence from the jury's consideration. The process of determining damages for loss of future earning opportunity involves too much guesswork. To inject a new variable, designed to reduce recovery, offers little promise of societal benefit and greatly increases the risk of undercompensation, particularly among those plaintiffs in the lower-income bracket, where subsistence approaches earnings. It is sounder, therefore, to permit cumulative recovery, thereby increasing the risk of overcompensation. The consequences of overcompensation to defendants as a class seems slight, particularly when it is considered that they are not required to pay more than they would have had to pay in the absence of social insurance benefits. The danger to plaintiffs as a class, and most importantly the individual plaintiff, by the injection of social insurance into an already uncertain process could be great. Therefore, it is more in the interest of society—who, in the final analysis, may actually have to support the undercompensated plaintiff and his family—if the jury has guessed incorrectly—to increase the risk of overcompensation rather than the risk of undercompensation. In the absence of a more scientific method of compensation, the courts should not increase the risk

of undercompensation, with its attendant consequences, by allowing the jury to consider the receipt of social insurance benefits. The question of loss allocation between the social insurance fund and the tortfeasor is an entirely different question, the resolution of which can only follow a change in our present method of compensating accident victims.⁴⁰⁸ This is not the concern of the court awarding damages in a personal injury case, and upon a consideration of the consequences and risks, we have concluded that it is better to permit cumulative recovery to the accident victim.

(4) *Social insurance and suits against the Government.*

Finally, we may consider the effect of social insurance where the defendant is the United States in a suit under the Federal Tort Claims Act, and the social insurance has also been provided by the United States.⁴⁰⁹ Since the United States is both the tortfeasor and the source of the social insurance fund, the discussion may help to focus on loss allocation. But again, this is loss allocation within the context of our present system of awarding compensation for personal injuries. Also, the relationship between the victim and the government will vary. In some cases the victim will be a serviceman or federal employee, in others he will be a veteran, while in some, he will simply be the recipient of a social insurance benefit such as a social security disability pension.

Let us first consider the cases in which the question has arisen. It is now well-settled that in a suit against the government by a serviceman or a veteran injured while a patient at a government hospital, payments under a serviceman's disability pension⁴¹⁰ or a veteran's disability pension, whether for a service-connected⁴¹¹ or non-service-connected⁴¹² disability, are to be deducted from tort recovery for loss of future earning opportunity. However, it has also been held that in a suit by an injured fed-

⁴⁰⁸ As we have pointed out, we are not at all optimistic about the likelihood of such a change.

⁴⁰⁹ The question could also arise in a suit against a state that had abolished sovereign immunity, where the state had provided social insurance benefits to the plaintiff.

⁴¹⁰ See *United States v. Brooks*, 176 F.2d 482 (4th Cir. 1949).

⁴¹¹ See *Christopher v. United States*, 237 F. Supp. 787 (E.D. Pa. 1965); *Schwartz v. United States*, 230 F. Supp. 536 (E.D. Pa. 1964).

⁴¹² See *United States v. Gray*, 199 F.2d 239 (10th Cir. 1952).

eral employee, disability benefits under the Federal Civil Service Retirement Act⁴¹³ would not be considered.⁴¹⁴ Likewise, in a wrongful death action, benefits received by a widow as "mother's insurance" under the Social Security Act⁴¹⁵ did not affect recovery.⁴¹⁶

Although the tort recovery and the social insurance come from a single source, tort recovery is predicated on the negligence of the government as any other tortfeasor while social insurance involves the government in a different capacity. Moreover, the ethos of social insurance in this country, as discussed previously,⁴¹⁷ may make the court reluctant to treat the government as the sole "source" of the benefit. This may explain the different treatment of the serviceman and federal employee. In the case of the servicemen, one of whom was killed and the other injured when they were struck by a government vehicle while off duty,⁴¹⁸ the government as employer paid disability and death benefits. Although the employee, as we have said, has "given up" something to get these benefits,⁴¹⁹ he did not make "contributions" into a fund,⁴²⁰ as does the federal employee into the Federal Civil Service Retirement Fund. In the case of the serviceman, the court saw the government as employer meeting some of the loss caused by the tort, and applied the principle of mitigation permitting a deduction for the value of the benefits given to the victim by the tortfeasor. Whereas, in the case of the federal employee, the court concluded that the benefits under the Civil Service Retirement Act were benefits from a collateral source.⁴²¹ It stressed the participation of the employee in the fund and pointed out that payments were based primarily upon salary and duration of service. It saw the fund as analogous to a pension fund maintained

⁴¹³ 80 Stat. 572, 5 U.S.C. § 2257 (1966).

⁴¹⁴ *United States v. Price*, 288 F.2d 448 (4th Cir. 1961).

⁴¹⁵ 49 Stat. 623 (1935), as amended, 42 U.S.C. § 402(g) (1964).

⁴¹⁶ *United States v. Harue Hayashi*, 282 F.2d 599 (9th Cir. 1960).

⁴¹⁷ See the discussion, *supra*, notes 245-46 and accompanying text.

⁴¹⁸ *United States v. Brooks*, 176 F.2d 482 (4th Cir. 1949).

⁴¹⁹ See the discussion of Sergeant Browning's case, *supra*, notes 136-148 and accompanying text.

⁴²⁰ Note that recovery against the United States is not affected by the receipt of National Service Life Insurance benefits, since such insurance is purchased by the serviceman. *United States v. Brooks*, 176 F.2d 482 (4th Cir. 1949).

⁴²¹ The court stated that it was applying Virginia law. As we have pointed out, this is questionable where federal social insurance benefits are involved. See the discussion, *supra* note 226.

by a private employee with his and the employee's contributions.⁴²² But, as we have pointed out, the employee's "contributions" to the fund are a substitute for social security taxes, which the federal employee does not pay. And the serviceman's disability pension represents something for which he has "paid" by taking less salary, even though he does not thereby "contribute" to a special fund. In both cases the tortfeasor has met a part of the loss by a disability pension. The serviceman "contributed" by taking less salary; the contributions by the federal employee were in lieu of social security taxes that other wage-earners had to pay. Any "benefit" the government received, therefore, was offset by the loss of tax revenue. It is difficult to justify the different treatment in these cases.

Now let us consider the cases of the plaintiff injured while a patient at a Veterans Administration Hospital. In one, the plaintiff was receiving a disability pension not connected with the prior service.⁴²³ In another, plaintiff had been receiving a pension for tuberculosis, which had cleared up, and following the injury in the hospital, he was given another disability pension.⁴²⁴ In the third, he had been receiving a pension for a service-connected disability, which was increased following his injury at the hospital.⁴²⁵ In all cases the value of the pension was deducted. It should be noted that there is no jury in suits under the Federal Tort Claims Act,⁴²⁶ so the difficulty of computation may be lessened. In any event, Congress has decided to deal with this problem by legislation. It is provided that where a veteran receives injuries at a Veterans Administration Hospital, this is to be considered as a service-connected disability with a correspondingly higher pension. It is further provided that if the veteran recovers against the United States under the Federal Tort Claims Act, no benefits are to be paid until the aggregate amount of benefits that would have been paid equals the *total amount of recovery* in the tort action.⁴²⁷ Presumably this means the amount of the judgment—

⁴²² If this were so, then under traditional doctrine, the employer (here the United States) should be credited with the percentage of the benefits represented by his contributors. He has paid for that benefit, and his liability should be reduced thereby.

⁴²³ *United States v. Gray*, 199 F.2d 239 (10th Cir. 1952).

⁴²⁴ *Christopher v. United States*, 237 F. Supp. 787 (E.D. Pa. 1965).

⁴²⁵ *Schwartz v. United States*, 230 F. Supp. 536 (E.D. Pa. 1964).

⁴²⁶ 28 U.S.C. § 2402 (1964).

⁴²⁷ 28 U.S.C. § 351 (1964).

which would include damages for future medical expenses⁴²⁸ and pain and suffering. If the court, in addition, were to deduct the value of the disability pension from the tort judgment, the plaintiff would truly receive less compensation than that to which he is entitled. When faced with the statute, a court concluded that the statute merely authorized the Veterans Administration to withhold benefits that were included in the tort recovery.⁴²⁹ Under this approach, if the court takes the pension into account in determining tort recovery, the veteran would continue to receive it.

The statute does not cover the pension for a non-service connected disability, but where the veteran has been receiving such a pension, the administration may consider the tort recovery in deciding whether to continue or grant the pension.⁴³⁰ It is clear that Congress and the courts are unwilling to permit what they consider to be double recovery against the United States in this situation. This is certainly a proper result. The victim will be compensated as fully as our system is capable of doing. He will either receive compensation under the Federal Tort Claims Act with credit for the Veterans Administration disability pension he receives, or payment will be withheld until the portion of the judgment representing loss of future earning opportunity equals the amount of the unpaid pensions.⁴³¹ At that point the pension payments will be resumed. In effect, the payment of the pension continues, but the United States will not have to pay the portion of the judgment met by such payments. As the subsequent discussion will indicate, we believe it is sounder for the adjustment to be made by the Veterans Administration rather than the court, but in this area at least, the present practice prevents double recovery against the United States for a single loss.

In *United States v. Harue Hayashi*,⁴³² when faced with the question of "mother's insurance benefits," the court took a different approach. Suit was brought under the Federal Tort Claims

⁴²⁸ Which, as we have said, are recoverable against the United States. See the discussion, *supra* notes 213-14 and accompanying text.

⁴²⁹ *Christopher v. United States*, 237 F.Supp. 787 (E.D. Pa. 1965).

⁴³⁰ *Ashley v. American Auto. Ins. Co.*, 19 Wis.2d 17, 119 N.W.2d 359 (1963).

⁴³¹ The court will specify the amount representing compensation for loss of future earning opportunity.

⁴³² 282 F.2d 599 (9th Cir. 1960).

Act to recover for the wrongful death of the plaintiff's husband. Upon his death she received these benefits as provided in the Social Security Act,⁴³³ which would continue until she reached age sixty-two. It is not unsound to consider these benefits as a substitute for the disability pension the husband would have received if he had lived. The court held that the value of the benefits would not be deducted, likening them to insurance benefits paid from a special fund, observing that the fund was fed by contributions from the decedent and his employer. Recovery under the Federal Tort Claims Act would be from general revenues. Since the funds were different, the court reasoned that the "mother's insurance" benefits were payable from a collateral source and would not affect the liability of the United States under the Federal Tort Claims Act.

Thus, the holdings of the different Courts of Appeals—no case has been decided by the Supreme Court—as supplemented by Congressional legislation, have produced the following results. Benefits are deducted in the case of the serviceman and the recipients of veterans' disability pensions. They are not deducted in the case of federal employees covered by the Civil Service Retirement Act and recipients of disability pensions under the Social Security Act.

But it is clear that all cases involve the same basic question, whether the liability of the United States as tortfeasor is affected by the receipt of social insurance provided by the United States. The benefits payable to injured servicemen and the dependents of deceased servicemen are related to social security benefits, and it is not possible to cumulate benefits under servicemen's legislation and under the Social Security Act.⁴³⁴ While federal employees "contribute" to the Civil Service Retirement Act, this is in lieu of social security taxes. So, whether the plaintiff in the tort action is a federal employee or not, the United States is involved principally as social insurer. The benefits payable to servicemen and federal employees serve the same function as social insurance benefits payable to others. In all the cases, it is sound to think of the United States in the role as tortfeasor and social insurer.

⁴³³ 49 Stat. 623 (1935), *as amended*, 42 U.S.C. § 402(g) (1964).

⁴³⁴ *See* 64 Stat. 512 (1950), *as amended*, 42 U.S.C. § 417 (1964).

Disregarding the concept of collateral source or separate funds, which would be irrelevant under the functional approach, the question is what should be done when the tortfeasor has provided social insurance benefits for the victim. This social insurance conforms to the ethos we have discussed, so the benefits bear some relationship to the amount of taxes paid in, and in the case of federal employees, we call the payments "contributions" and the benefits "annuities." But this is all social insurance, and in theory social insurance benefits are designed to provide minimum subsistence. The government, as tortfeasor, on the other hand, is required to make good the *losses* suffered by the victim in the same manner as a private tortfeasor. Since the victim is to be compensated for what he lost and only for that loss, it follows ideally that any social insurance benefits which have met some of the loss (notwithstanding that their purpose may have been to provide subsistence, unrelated to the question of tort liability), must be deducted from tort recovery.

We recognized the theoretical justification for such a rule when discussing the effect of social insurance upon tort recovery in the action against the private tortfeasor. We concluded, however, that under our system of awarding damages for personal injuries, too great a risk is involved in allowing the jury to consider the receipt of social insurance benefits as affecting recovery for loss of future earning opportunity. To allow the jury to consider the social insurance benefits increases the risk of undercompensation, and the consequences of undercompensation are more serious than those of overcompensation. It is better, we say, to take the chance of overcompensation, which affects defendants as a class, since this class can efficiently distribute the loss. Our conscience is not troubled, because the defendant is only required to pay what he would have had to pay in the absence of the social insurance benefit and does not have to "pay twice" for the same loss.

When the government is the tortfeasor, the public treasury is required to bear the same loss twice, because the government is at the same time the social insurer (note that we treat the payment of benefits to servicemen and government employees as the equivalent of social insurance). Social insurance benefits and tort recovery came from the same source, the public treasury,

and whether a particular fund has been set aside to meet certain losses is irrelevant. Disregarding how or from whom the particular taxes may have been collected, the public is compensating the victim for his loss. The unwillingness to subject the public treasury to double payment is clearly reflected in the decisions requiring a deduction of servicemen's and veteran's benefits and in the congressional legislation dealing with tort recovery by persons injured in a government hospital. In the cases involving social security benefits and Civil Service Retirement benefits, however, the court did not seem at all concerned by the effect on the public treasury. Perhaps they were mesmerized by the analogy to insurance or private pension plans. Or, they may have been concerned about their ability to adjust the social insurance benefits to the tort recovery in the context of a personal injury action, notwithstanding the absence of a jury. Although the court can "absorb" the data more readily than the jury, it is still guessing when it is trying to measure loss of future earning opportunity. More significantly, it must make a series of predictions when awarding damages in a lump sum, and these predictions may turn out to be inaccurate. Our system of awarding damages, particularly as regards loss of future earning opportunity, is simply not very efficient, and to consider the receipt of social insurance benefits, operates to increase the risk of undercompensation, with its possible disastrous consequences for the individual plaintiff.

Therefore, although I agree that the public treasury should not have to bear the same loss twice, I question the soundness of making the allocation between tort recovery and social insurance in the context of personal injury litigation. We have discussed the effort of Congress to prevent double recovery by victims of accidents in Veterans Administration hospitals. When faced with this statute, the court interpreted it as a direction to the social insurance fund to withhold the benefits only if their value was not deducted in the tort action. The court claimed that it still had the responsibility to determine what was "just compensation" and proceeded to deduct the value of the benefits.⁴³⁵ This procedure is very questionable, and I doubt if this is what Congress intended. It seems more likely that Congress wanted the court to award

⁴³⁵ *Christopher v. United States*, 237 F. Supp. 787 (E.D. Pa. 1965).

damages without consideration of the disability pension, in accordance with the traditional rules of damages, and then wanted the Veterans Administration to see to it that the United States was not to be subject to double recovery.

Certainly, such an approach is more realistic. Our method of awarding compensation in personal injury action does not lend itself to measuring efficiently the receipt of social insurance benefits against tort recovery, and this is only slightly less so when the court is making the necessary guesses. To reduce tort recovery by the receipt of such benefits is to increase the risk of undercompensation. Where the tortfeasor is the government, it makes no difference to the public treasury whether the adjustments necessary to prevent double recovery are made by the social insurance fund or by the courts. And it makes more sense to have the social insurance administrator do so than the judge. I think this is what Congress intended when it tried to prevent double recovery by a plaintiff injured in a Veteran's Administration hospital. This can also be done in the case of a veteran who was receiving a pension for a non-service-connected disability at the time he was injured by the government, since the administrator can take the tort recovery into account in determining whether the veteran needs the pension.⁴³⁶ It is interesting to note that while a social security disability pension is reduced by any amounts received from workmen's compensation,⁴³⁷ and a pension under the Federal Civil Service Retirement Act is reduced by amounts paid under the Federal Employees Compensation Act,⁴³⁸ no provision is made for a reduction because of recovery under the Federal Tort Claims Act. Perhaps this will also be done, and Congress could at that time make a decision whether benefits should be affected because of recovery from third party tortfeasors.

It is, therefore, our conclusion that in a suit against the United States under the Federal Tort Claims Act the court should *not* deduct the value of social insurance benefits from the amount of tort recovery. In the case of the private tortfeasor we justified the solution on the grounds that (1) to do so increases the risk of undercompensation, whereas the risk of overcompensation is

⁴³⁶ *Ashley v. American Auto. Ins. Co.*, 19 Wis.2d 17, 119 N.W.2d 359 (1963).

⁴³⁷ 42 U.S.C. § 424a (Supp. I, 1964).

⁴³⁸ 5 U.S.C. § 8337 (f)(g) (1966).

to be preferred to that of undercompensation, and (2) in any event, the tortfeasor is not required to meet the same loss twice. In the case of a suit against the United States we justify the solution on the ground that the *social insurance fund can make the necessary adjustments to prevent double recovery more efficiently than the courts*. Apart from the difficulty of accurately measuring loss of future earning opportunity in the context of adversary proceedings, the social insurance administrator has the benefit of hindsight, which the court does not. If this method is followed, both the objectives of tort recovery and social insurance will be satisfied. Tort recovery is designed to compensate the victim for his loss as best as it can be measured under our system. Social insurance is designed to provide minimum subsistence for victims of misfortune. So long as tort recovery is accomplishing its purpose, it swallows up the necessity for social insurance. Once the victim is awarded tort recovery, social insurance benefits can be discontinued, so they should be ignored by the court in ascertaining loss. If, because of the difficulties inherent in the system, tort recovery has failed, social insurance can step in and fill the void with subsistence payments.

The same principle is applicable in the case of the private tortfeasor. As we have said, the question is not whether the loss or a portion of it should be met by social insurance or tort liability. Rather it is what should be done in the context of our present system of dealing with accident victims. Our society recognized both social insurance and tort liability as methods of dealing with the harm caused by accidents. In the light of the way our system of tort recovery operates, it is more efficient to discount social insurance benefits in the tort action. If the victim is not to have his loss met twice over, pragmatic considerations dictate that, perhaps by default, the savings go to the social insurance fund rather than to the government. And where the victim clearly should not have his loss met twice over, as where the United States is the tortfeasor, the same pragmatic considerations dictate that the necessary adjustment be made by the social insurance fund rather than by the court in the tort action. We, therefore, conclude that in all cases the receipt of social insurance benefits should not be considered in determining loss of future earning opportunity.

D. *A Comparison.*

It will be seen that the functional approach will produce relatively little change in the matter of damages for loss of earning opportunity. Where the plaintiff has received his salary during the period of disability either because of sick leave benefits or because of the nature of his employment or as a true gratuity, we would allow him to recover the value of his lost time from the defendant without any consideration of this fact. He has either "paid" for this benefit, the amount of which we cannot measure, and therefore, cannot estimate its value to him, or he recovers the value of the gratuity on behalf of his employer, and they are left to adjust matters. His recovery also would not be affected by the receipt of disability pensions from his employer or by accident insurance. Again he has "paid" for the disability pension, which forms part of his total compensation picture. Since this amount cannot be measured, the true value of the pension is not known, and it cannot be deducted. As to the insurance, here we would not limit recovery to the cost of the premiums because of society's attitude toward such insurance, *i.e.*, that a person cannot have too much protection against loss of income. We would permit recovery for lost earnings during the period of disability to be affected by the receipt of unemployment compensation or some other form of public assistance. Likewise, we would allow the jury to consider the receipt of unemployment compensation to determine the value of the lost time of an unemployed person. In these two situations, therefore, we would reach a different result than that required by the collateral source rule. In most states the employer who has paid workmen's compensation or his insurer, subrogates to the claim of the employee against the third party tortfeasor or is entitled to reimbursement from the employee. In the states where this is not so, a legislative intention to permit the employee to have cumulative recovery may be inferred, if not expressly provided.

With respect to recovery of damages for loss of future earning opportunity, we would exclude evidence of the receipt of social insurance benefits. This is not because such evidence is not relevant to measure actual loss. It is because our system of awarding damages for personal injuries, as presently constituted, cannot absorb this data. To permit its consideration would markedly

increase the risk of undercompensation, and in light of the resultant consequences, we conclude that the risk of overcompensation is to be preferred to the risk of undercompensation. This factor would be excluded from the personal injury award, and any adjustment should be made by the social insurance fund. This is in accord with the result reached under the collateral source rule, although the reasoning is quite different. We would go further than is required under the collateral source rule and take the same approach to *all* social insurance benefits where the United States is a defendant under the Federal Tort Claims Act. We would exclude the social insurance benefits from the personal injury action, and allow the adjustment necessary to prevent double recovery from the same source to be made by the social insurance fund. Our reason is that the social insurance fund is better equipped to make the judgment, with the benefit of hindsight, than the court which must make it in the context of estimating damages for prospective loss.

CONCLUSION

We have traveled far afield in our attempt to come up with a solution to the problem of collateral source benefits. Our law of personal injury damages grew up at a time when tort recovery was the only method of obtaining compensation for an accident, and the law reflected the values of the time. When societal values changed and benefits from other sources became available to the accident victim, the court dealt with the problem in terms of an all-embracing rule, reflecting the attitudes of a time when such benefits were considered "charity" and the defendant in a tort action was considered a "wrongdoer." The rationale of the rule does not accord with our present day attitudes toward compensation and allocation of losses, and its application adds an air of unreality to the already unscientific process of tort recovery.

It is for this reason that we must analyze the matter of collateral source benefits carefully and consider the relationship that the receipt of such benefits should bear to tort recovery. We must do so, however, in the context of our present system of awarding compensation. We still look toward tort recovery as the primary method of compensating the accident victim for the loss he suf-

ferred, and we measure the loss by rather unscientific means. This being so, there are necessarily limitations on how we can allocate loss between tort recovery and collateral sources. Within the framework of this system, then, we have tried to propose a solution. Under this solution, the receipt of collateral source benefits frequently will not reduce recovery. But this is justified not in terms of a rule, but by considerations of practicality and economic and social policy. I call this solution the functional approach. If courts will come to deal with the problem of collateral source benefits and tort recovery in this way, the collateral source rule will be rendered irrelevant as a product of a by-gone era.