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TORT AND EVIDENCE LAW—A SPHINX WITHOUT A SECRET:
THE COLLATERAL SOURCE RULE AND MANDATORY HEALTH INSURANCE IN MASSACHUSETTS

INTRODUCTION

“My dear Gerald,” I answered, “Lady Alroy was simply a woman with a mania for mystery. She took these rooms for the pleasure of going there with her veil down, and imagining she was a heroine. She had a passion for secrecy, but she herself was merely a Sphinx without a secret.”¹

Just like Oscar Wilde’s Lady Alroy in her chambers, in courtrooms all over the country, the parties’ insurance has been jealously enshrouded in secrecy.² And, of course, so have been insurance payments.³ By virtue of the so-called “collateral source rule,”⁴ courts generally do not allow evidence of third party payments in personal injury cases.⁵ There are several justifications for the rule, discussed in Part I of this Note.

The Massachusetts Supreme Judicial Court affirmed the collateral source rule in the recent case *Law v. Griffith*.⁶ There, the plaintiff was injured in a car accident, caused by the defendant, Mr. Griffith, against whom the court entered a judgment.⁷ The *Griffith* court did not admit evidence of the actual insurance payments for

1. OSCAR WILDE, *THE SPHINX WITHOUT A SECRET* 84-85 (A.R. Keller & Co., Inc. 1907). Wilde’s protagonist, Lord Murchison, was in love with Lady Alroy, a mysterious woman, whose puzzling behavior he was trying to unravel after her sudden death. When going to an apartment, which his beloved used to visit in disguise, he was told that the lady did not do anything unusual there but read books and have tea. It turned out that, despite the air of mystery she had surrounded herself with, she had nothing to hide.

2. See FED. R. EVID. 411 (stating that evidence that a person charged with negligence does or does not have liability insurance is inadmissible); *Mangan v. Broderick & Bascom Rope Co.*, 351 F.2d 24, 30 (7th Cir. 1965) (finding that defense counsel’s mentioning of the fact that the plaintiff carried workman’s compensation was prejudicial). See generally JACOB A. STEIN, *STEIN ON PERSONAL INJURY DAMAGES* § 13:14 (3d ed. 2010) (discussing the limited admissibility of evidence of collateral sources).

3. See *Law v. Griffith*, 930 N.E.2d 126, 131 (Mass. 2010) (ruling that collateral source payments are inadmissible in evidence).

4. See *infra* Part I.

5. STEIN, *supra* note 2, § 13:14.

6. *Griffith*, 930 N.E.2d at 129; see *infra* Part II.

7. *Law v. Griffith*, No. 03-3179, 2006 WL 6482934 at *1 (Mass. Super. Ct. July 24, 2006), *rev’d*, 930 N.E.2d 126 (Mass. 2010).

the medical services rendered to the plaintiff.⁸ However, it admitted evidence of the victim's medical bills, as well as a range of payments accepted by the victim's health care provider.⁹ The problem in that case, and a main focus of this Note, is the huge discrepancy between the amount the provider billed the victim and the amount it accepted as a payment in full.¹⁰ The difference between those two figures—attributable to the deeply discounted rate the victim's insurer had negotiated with the provider¹¹—was almost ninety-six thousand dollars.¹² Presented with those two numbers and all the numbers in between, the jury would have to determine the "fair and reasonable" charge for the service rendered by the health care provider.¹³ The jury would not be aware of how much was actually paid on behalf of the victim. Neither would it know who, if anyone, had paid her medical bills; the plaintiff's health insurance would be discreetly kept out of the picture.¹⁴ However, health insurance in Massachusetts can hardly be a secret, since it is actually an obligation.¹⁵ Therefore, trying to conceal it is just as pointless as Lady Alroy hiding in her room.

This Note will argue that in the Commonwealth of Massachusetts the collateral source rule, as applied to health insurance reimbursement, is outdated and is more harmful than beneficial. Part I of this Note will provide an overview of the notion of compensation in negligence cases and will explain the origins and the purpose of the collateral source rule. Part II will discuss the reasons for the discrepancy between medical bills and insurance write-offs, and their application in *Law v. Griffith*. Part III will touch upon the current tendency toward abrogation of the collateral source rule in various other states. Part IV will discuss what makes Massachusetts unique with regard to health insurance. Finally, Part V will analyze the shortcomings of the collateral source rule and will propose that the state legislature abrogate the rule as applied to medical pay-

8. *Griffith*, 930 N.E.2d at 129.

9. *Id.*

10. *Id.* (stating that the provider accepted \$16,387.14 in lieu of a \$112,269.94 bill).

11. *Id.*

12. *Id.*

13. *Id.* (discussing the standard for recovery of medical expenses in negligence cases).

14. *See id.* (ruling that collateral source payments are irrelevant and therefore, inadmissible).

15. *See MASS. GEN. LAWS* ch. 111M, § 2(a) (2010) (indicating that with very narrow exceptions, health insurance is required for Massachusetts residents).

ments by health insurance companies, and make such evidence available at trial.

I. COMPENSATORY DAMAGES AND THE COLLATERAL SOURCE RULE

The purpose of compensation for damages is to place the tort victim in a position that he would have been in had the wrong not occurred.¹⁶ In general, the victim is not expected to make a profit on compensatory damages.¹⁷ However, in certain instances, excessive recovery is acceptable as an incidental effect of furthering another major goal of the tort system—deterrence from wrongdoing.¹⁸ It is considered that in order to effectively discourage a tortious act, the wrongdoer should be required to pay the full amount of the damage she has caused,¹⁹ even if that payment amounts to overcompensation.²⁰ One of the instances where the tort system allows the victim double recovery is when the victim has another source of payment for her injury. In such circumstances the collateral source rule comes into play.²¹

According to the collateral source rule, any “[p]ayments made to . . . the injured party from other sources are not credited against

16. RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (1979) (stating “the law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort”).

17. See *Cortez v. Trans Union, LLC*, 617 F.3d 688, 693 n.30 (3d Cir. 2010) (“Unlike punitive damages that are intended to punish and deter, compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrongful conduct.” (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003))) (internal quotation marks omitted); *Westric Battery Co. v. Standard Elec. Co.*, 482 F.2d 1307, 1318 (10th Cir. 1973) (“Appellant is entitled to be compensated for losses attributable to the injury inflicted, but it is *not entitled to earn a profit*”) (emphasis added); 25 C.J.S. *Damages* § 21 (2010) (“Compensatory damages are damages sufficient in amount to indemnify the injured person for the loss suffered and thereby make him or her whole. The purpose of awarding compensatory damages is *not to enable the injured party to make a profit on the transaction*”) (emphasis added) (footnote omitted).

18. See generally 1 DAN B. DOBBS, *THE LAW OF TORTS* 19 (2000) (stating that courts have recognized the deterrence from conduct that may lead to tort liability is another aim of tort law).

19. *Id.* (stating that tort law “deter[s] certain kinds of conduct by imposing liability when that conduct causes harm”).

20. RESTATEMENT (SECOND) OF TORTS § 920A(2) cmt. b (1979). “The injured party’s net loss may have been reduced correspondingly, and to the extent that the defendant is required to pay the total amount *there may be a double compensation* for a part of the plaintiff’s injury.” *Id.* (emphasis added).

21. *Id.*

the tortfeasor's liability."²² The rule encompasses any kind of compensation from third parties, such as insurance policies,²³ employment benefits,²⁴ gratuities (both in cash and in free-of-charge services),²⁵ and social legislation benefits such as pensions, social security, or welfare.²⁶

The collateral source rule is an English common law rule²⁷ and its application in the United States dates back to the nineteenth century case *The Propeller Monticello v. Mollision*.²⁸ *Monticello* involved a collision between a propeller and a schooner, resulting in total loss of the schooner and its cargo.²⁹ The United States Supreme Court held the owner of the propeller responsible, refusing to consider the fact that the schooner was insured,³⁰ and ordered that the defendant pay to the owner of the schooner the full value of the vessel and the lost cargo.³¹

In the context of personal injury, the collateral source rule means that payments made by the victim's health insurance will not be considered when assessing the compensation that the tortfeasor will have to pay.³² Therefore, if A negligently causes B an injury, under the collateral source rule, even if B is treated for free or his insurance pays for his treatment, A will be liable for the exact same amount as if B's injury were never covered. The underlying presumption of the rule is that if a potential wrongdoer were liable to the victim for the full monetary value of his injury, the wrongdoing would be less likely to materialize.³³ Courts recognize that the application of the rule may result in overcompensating, but assert that this is acceptable in cases where not allowing excessive recovery would mean a "windfall" for the tortfeasor.³⁴

22. *Id.* at § 920A(2).

23. *Id.* at § 920A cmt. c(1).

24. *Id.* at § 920A cmt. c(2).

25. *Id.* at § 920A cmt. c(3).

26. *Id.* at § 920A cmt. c(4).

27. *Id.* at § 920A cmt. d.

28. *The Propeller Monticello v. Mollision*, 58 U.S. (17 How.) 152 (1854).

29. *Id.*

30. *Id.* at 155 ("The contract with the insurer is in the nature of a wager between third parties, with which the trespasser has no concern.").

31. *Id.*

32. *See* *Law v. Griffith*, 930 N.E.2d 126, 132 (Mass. 2010) (quoting *Goldstein v. Gontarz*, 309 N.E.2d 196, 203 (Mass. 1974)) (stating that "jurors might be led by the irrelevancy" of the third party payment and deny recovery for the plaintiff); *Corsetti v. Stone Co.*, 483 N.E.2d 793, 802 (Mass. 1985).

33. *Griffith*, 930 N.E.2d at 132.

34. *Id.* ("[A]voiding a windfall to a tortfeasor is preferable even if a plaintiff thereby receives an excessive recovery in some circumstances."); *Pipkins v. TA Operat-*

A. *Rationale for the Collateral Source Rule*

The collateral source rule has a dual function: it is both an evidentiary rule and a rule of damages.³⁵ Thus, its two main justifications center around those two functions—ensuring that the tortfeasor will pay an adequate award for the damages he caused, and that the jury has an adequate basis for calculating that award.

1. A Windfall to the Victim—the Lesser of Two Evils

The collateral source rule is based on the belief that a windfall for one of the parties is inevitable: either the plaintiff will get more than necessary to make him whole, by recovering both from the tortfeasor and from another source, or the tortfeasor will pay less than the full amount of the damages he or she caused. Indeed, the rationale is:

[R]educing recovery by the amount of the benefits received by the plaintiff would grant a windfall to the defendant by allowing a credit for the reasonable value of those benefits. Such credit would result in the benefits being effectively directed to the tortfeasor and from the intended party—the injured plaintiff. If there is a windfall, it is considered more just that the injured person profit rather than grant the wrongdoer relief from full responsibility for the wrongdoing.³⁶

Analyzed that way, it may seem more reasonable that the victim, not the wrongdoer, reaps the benefit from having health insurance even if it leads to overcompensation.³⁷

2. Avoiding Jury Confusion

Another common justification for disallowing collateral source payments into evidence is the belief that the jury would not award the portion of the compensation covered by the collateral source.³⁸ Courts have ruled that this phenomenon would have several pernicious

ing Corp., 466 F. Supp. 2d 1255, 1262 (D.N.M. 2006) (“[A]ny windfall arising from the collateral source rule should benefit the plaintiff, and not the tortfeasor.”); *Lopez v. Safeway Stores, Inc.*, 129 P.3d 487, 491-92 (Ariz. Ct. App. 2006).

35. *Griffith*, 930 N.E.2d at 127; *Gormley v. GTE Prods. Corp.*, 587 So. 2d 455, 457 (Fla. 1991).

36. 22 AM. JUR. 2D *Damages* § 392 (2003).

37. See *Corsetti*, 483 N.E.2d at 802; *Pipkins*, 466 F. Supp. 2d at 1262 (noting that, under New Mexico law, “any windfall arising from the collateral source rule should benefit the plaintiff, and not the tortfeasor”); *Lopez*, 129 P.3d at 491-92.

38. See *Goldstein v. Gontarz*, 309 N.E.2d 196, 203 (Mass. 1974) (stating that “jurors might be led by the irrelevancy” of the third party payment and deny recovery for the plaintiff).

cious effects. For one, the defendant would pay less than the reasonable value for the treatment of the injury she caused.³⁹ Additionally, the plaintiff would receive an unjustly reduced award and thereby would be, in effect, “punished” for having purchased insurance.⁴⁰ The insurer would lose its right to recover the amount it paid, which would ultimately result in a rise in insurance premiums.⁴¹ For all these reasons, many courts have refused to allow any evidence of the presence or lack of collateral source payments.⁴²

Conversely, evidence of third party payments has been allowed in limited circumstances, where such evidence has been necessary to rebut misleading testimony by the plaintiff.⁴³ Once the plaintiff affirmatively leads the jury to believe that he has not received any third party benefits, evidence of such payments becomes admissible.⁴⁴

39. See *Griffith*, 930 N.E.2d at 132.

40. See *Helfend v. S. Cal. Rapid Transit Dist.*, 465 P.2d 61, 66-67 (Cal. 1970).

If we were to permit a tortfeasor to mitigate damages with payments from plaintiff's insurance, plaintiff would be in a position inferior to that of having bought no insurance, because his payment of premiums would have earned no benefit. Defendant should not be able to avoid payment of full compensation for the injury inflicted merely because the victim has had the foresight to provide [herself] with insurance.

Id.

41. 1 DOBBS, *supra* note 18, at 1059.

42. See *Gormley v. GTE Prods. Corp.*, 587 So. 2d 455, 457 (Fla. 1991); *Wills v. Foster*, 892 N.E.2d 1018, 1022-23 (Ill. 2008); *Martinez v. Milburn Enters., Inc* 233 P.3d 205, 235 (Kan. 2010); *Griffith*, 930 N.E.2d, at 131-32; *Leitinger v. Van Buren Mgmt., Inc.*, 720 N.W.2d 152, 158 (Wis. Ct. App. 2006).

43. See *Lange v. Mo. Pac. R.R.*, 703 F.2d 322, 323-24 (8th Cir. 1983) (the plaintiff falsely testified he had no disability insurance and had to return to work immediately after his surgery); *York v. Young*, 608 S.W.2d 20, 21.

(Ark. 1980) (the plaintiff, who had collision coverage, claimed he could not afford to have his vehicle repaired); *Corsetti v. Stone Co.*, 483 N.E.2d 793, 801-03 (Mass. 1985) (the plaintiff claimed he was impoverished due to his joblessness, caused by his injury, whereas he received more in compensation after his injury than he used to make while working); *Jojola v. Baldrige Lumber Co.*, 635 P.2d 316, 320 (N.M. Ct. App.1981) (the plaintiff exaggerated the gravity of his financial troubles caused by his injury, leading the jury to believe he received no compensation at all). In all of those cases evidence for collateral source payments was allowed, despite the fact that the respective jurisdictions recognize the collateral source rule.

44. *Jackson v. Beard*, 255 N.E.2d 837, 847 (Ind. Ct. App. 1970) (stating that “[t]he [plaintiff] having opened the gate on the matter of reduced income as a result of the collision complained of” defeated the collateral source rule and gave the defendant's counsel the right to cross-examine the plaintiff on the issue).

B. *Excessive Recovery and Subrogation Rights of the Insurers*

Opponents of the collateral source rule often criticize it on the grounds that it allows “double dipping” by the plaintiff.⁴⁵ However, the notion of “double recover[y]”⁴⁶ is somewhat of a misnomer because generally health insurance companies are entitled to recuperate their payments from the award plaintiff receives.⁴⁷ In this respect, the victim does not necessarily recover twice for the same injury because he pays back the benefits received from the collateral party.

Understandably, the insurer is entitled solely to the amount it paid and not the full amount received by the plaintiff.⁴⁸ Therefore, in situations where the amount recovered from the tortfeasor is greater than the amount the insurer paid, there is a sum that theoretically belongs to no one. It does not belong to the insurance company, because the company has already recouped what it paid.⁴⁹ The health care provider is not entitled to it, because the provider is bound by its contract with the insurance company to render services at certain negotiated rate⁵⁰ and getting more than the agreed upon price would be a violation of that agreement.⁵¹ The tortfeasor cannot get it back, because she, presumably, paid no more than the “fair and reasonable charge” of the injury she inflicted.⁵² The victim does not owe it, because his treatment was al-

45. See Michael W. Cromwell, Note, *Cutting the Fat Out of Healthcare Costs: Why Medicare and Medicaid Write-Offs Should Not Be Recoverable Under Oklahoma’s Collateral Source Rule*, 62 OKLA. L. REV. 585, 590 (2010); see also RESTATEMENT (SECOND) OF TORTS § 920 A(1) cmt. b (1979) (stating “to the extent that the defendant is required to pay the total amount there may be a double compensation for a part of the plaintiff’s injury . . .”) (emphasis added).

46. Cromwell, *supra* note 45, at 590.

47. 44A AM. JUR. 2D *Insurance* § 1785 n.2 (2010).

48. See generally Guillermo Gabriel Zorogastua, *Improperly Divorced from Its Roots: The Rationales of the Collateral Source Rule and Their Implications for Medicare and Medicaid Write-Offs*, 55 U. KAN. L. REV. 463, 469-70 (2007) (discussing principle of subrogation).

49. *Id.*

50. See *Law v. Griffith*, 930 N.E.2d 126, 129 n.3 (Mass. 2010) (explaining the nature of MassHealth); see also 42 C.F.R. § 447.15 (2010) (stating that Medicaid discounted payments should be accepted as payment in full by the provider); MASS. GEN. LAWS ch. 18 § 5H (2010) (stating that “[p]ayment by the department under the medical assistance program shall constitute payment in full . . . [.] [A] provider may not recover from any health insurer an amount greater than the amount so paid.”).

51. See *Sylvestre v. Martin*, No. SUCV2003-05988, 2008 WL 82631, at *2 (Mass. Super. Ct. Jan. 4, 2008) (citing *Kartell v. Blue Shield of Mass., Inc.*, 425 N.E.2d 313, 316 (Mass. 1981) (discussing the restrictions on “balance billing”—charging the insured the difference between the provider’s full charge and the discount rate)).

52. See *Griffith*, 930 N.E.2d at 128 (internal quotations omitted).

ready covered. But the victim is also the only party in this entire scheme who, if awarded the extra money, would not be profiting from another party's contract.⁵³ The reason is that, if the tortfeasor does not have to pay the difference between the "reasonable" value of the treatment and the written-off payment, the tortfeasor will be profiting from the victim's contract with his health insurance company *and* from the agreement between the health insurer and the medical provider. Since the victim is the one who purchased (or otherwise received) his health insurance, courts have considered it to be the least unjust outcome for the victim to receive the difference between the cost incurred and the price paid.⁵⁴

In this regard, the victim does not get compensated twice for the same expense, but receives a larger amount than the one the insurance company paid on his behalf. Often this amount is negligible,⁵⁵ or in some circumstances may serve to offset costs the victim was not compensated for.⁵⁶ In other situations, however, it may lead to quite striking results.⁵⁷ Such situations are those involving health insurance write-offs.⁵⁸

53. See *id.* at 132 (asserting that defendant is not to benefit from victim's health insurance contract); see also MASS. GEN. LAWS 18 § 5H (2010) (saying that a health care provider shall accept the negotiated rate as payment in full).

54. See *Lopez v. Safeway Stores, Inc.*, 129 P.3d 487, 491-92 (Ariz. Ct. App. 2006); *Pipkins v. TA Operating Corp.*, 466 F. Supp. 2d 1255, 1262 (D.N.M. 2006); *Goldstein v. Gontarz*, 309 N.E.2d 196, 203 (Mass. 1974); *Shea v. Rettie*, 192 N.E. 44 (Mass. 1934). *Shea* was cited in *Griffith* in support of the assertion that it would be unfair if the tortfeasor benefits from the victim's insurance. *Griffith*, 930 N.E.2d at 132 (citing *Shea*, 192 N.E. at 45-46).

55. See 1 DOBBS, *supra* note 18, at 1058 (stating that "overcompensation is often more theoretical than real").

56. Bryce Benjet, *A Review of State Law Modifying the Collateral Source Rule: Seeking Greater Fairness in Economic Damages Award*, 76 DEF. COUNS. J. 210, 210 (2009) (stating that one of the justifications of the collateral source rule is that the extra funds are used to offset attorney fees); see also The Legal Pad, *The Beauty of Double-Dipping*, THE BLOG OF CALLAW.COM (April 21, 2006, 3:47 pm), <http://legalpad.wordpress.com/2006/04/21/double-dipping/> (stating that a tort victim, who was also an attorney, asserted: "[t]he trial judge recognized that part of the reason for the collateral source rule is to offset all the deductions that get taken from the judgment before it finally gets to the plaintiff's pocket").

57. See *Griffith*, 930 N.E.2d at 129 (provider accepted \$16,387.14 in lieu of a \$112,269.94 bill).

58. A "write-off" is the difference between the amount billed by a medical provider and the amount the provider agrees to accept as payment in full for the same service. See *Robinson v. Bates*, 857 N.E.2d 1195, 1198 (Ohio 2006); see also discussion *infra* Part II.

II. MEDICAL BILLS, HEALTH INSURANCE WRITE-OFFS, AND LAW V. GRIFFITH⁵⁹

At first glance, there is nothing striking about the *Griffith* case. The facts and the procedural posture are fairly straightforward, and the real difficulty of the case does not become apparent until the damages determination stage. When Joanne Law was injured in a car accident, she went to the hospital, received medical treatment, and MassHealth⁶⁰ promptly paid the bill. She sued the driver of the vehicle that caused her injuries, and recovered \$28,556.50 as compensation for that same treatment.⁶¹ Subsequently, Ms. Law appealed and sought to introduce the actual hospital bill totaling \$112,269.90 as evidence of the “fair and reasonable charge”⁶² for her medical service, despite the fact that neither she nor MassHealth paid that sum.⁶³ The defendant, on the other hand, wanted to present the jury with the actual amount paid, \$16,387.14.⁶⁴ The Massachusetts Supreme Judicial Court allowed the bill but excluded from evidence the actual payment.⁶⁵ As the case was ultimately settled,⁶⁶ it is unclear how much the jury would have awarded on remand. If the plaintiff had received the full amount of the bill, MassHealth would have been able to get its \$16,387.14 back⁶⁷ and Ms. Law would have kept the remaining \$95,882.76⁶⁸ in addition to all the other compensatory damages she

59. See *infra* Part IV.2 (discussing the procedural posture of *Griffith*).

60. MassHealth is a public health insurance plan for qualifying low-income Massachusetts residents. See HEALTH AND HUMAN SERVICES, <http://www.mass.gov/eohhs/gov/departments/masshealth/> (last visited May 24, 2012). This Note does not consider any differences between private and public health insurance.

61. *Griffith*, 930 N.E.2d at 129. The jury awarded initially \$48,500 but found Ms. Law twenty-five percent liable for her own injury. As a result of the plaintiff’s contributory negligence, the judge reduced her award by \$12,125. Further, the award was reduced by \$7,818.50 due to compensation the plaintiff had already received. *Id.*

62. See *id.* at 130 (discussing the standard for recovery of medical expenses in negligence cases).

63. *Id.*

64. *Id.*

65. *Id.*

66. The Massachusetts Supreme Court remanded the case to trial court on the sole issue of appropriate damages. *Id.* at 136. In a phone call to the Essex County Superior Court, the author was informed that the case was subsequently settled for an undisclosed amount. *Id.*

67. See Zorogastua, *supra* note 48, at 469 (discussing the principle of subrogation, stating that “[t]hrough subrogation, a third party pays the plaintiff’s debt and then ‘receives’ the plaintiff’s rights and remedies”). In the given context, where MassHealth has paid for the plaintiff’s medical bills on her behalf, it is entitled to receive the compensation for those bills subsequently received by the tortfeasor.

68. See *Griffith*, 930 N.E.2d at 132.

would have received. In this scenario she would have essentially been awarded almost six times the amount that her insurer paid on her behalf, all tax-free.⁶⁹

The substantial difference between the medical bills and the amount accepted as payment in full comes from the discrepancy between the “full price” of a medical service juxtaposed with the so-called insurance “write-offs.”⁷⁰ In effect, the only patients who pay the list price are the uninsured,⁷¹ who have never had the chance to negotiate for discount rates with the medical providers in the manner insurance companies do.⁷² Often medical providers accept exceptionally low payments from insurance companies while off-setting the losses they incur by raising the cost for the uninsured.⁷³ In certain instances, as in *Griffith*, the health care provider would accept as payment in full as little as one seventh of the amount of the bill submitted.⁷⁴ In effect, the collateral source rule allows the victim of negligence to recover that difference. Those disparities between the amount charged and the compensation received have prompted many states to reevaluate the reasonableness of the collateral source rule at present time.

III. COLLATERAL SOURCE RULE REFORM

Perceived sometimes as an “oddit[y] of American accident law,”⁷⁵ the collateral source rule has been criticized by legal schol-

69. See 26 U.S.C. § 104(a)(2) (2006) (excluding “physical personal injuries” from taxable income).

70. See *Robinson v. Bates*, 857 N.E.2d 1195, 1198 (Ohio 2006) (stating that a “write-off” is the difference between the amount billed by a medical provider and the amount the provider agrees to accept as payment in full for the same service).

71. See *Griffith*, 930 N.E.2d at 133.

72. See Mark A. Hall & Carl E. Schneider, *Patients as Consumers: Courts, Contracts and the New Medical Market Place*, 106 MICH. L. REV. 643, 645 (2008).

73. *Id.* at 645 (stating that “insurers aggressively negotiate rates for plan members; uninsured patients must ‘bargain’ individually with providers who are determined to recoup what they bargained away to insurers”); see also Alicia Curtis, *The Reasonable Value of Medical Services: A Hospital Bill, the Insurer’s Payment, or the Jury’s Choice?*, 23 ME. B.J. 78, 78 (2008) (discussing the complexity of the calculation of the value of a treatment in the “distorted market for medical services”); James McGrath, *Overcharging the Uninsured in Hospitals: Shifting a Greater Share of Uncompensated Medical Care Costs to the Federal Government*, 26 QUINNIAC L. REV. 173, 175-76 (2007) (discussing the free market approach toward medical billing, where providers accept below market payments for their services and then shift the losses to uninsured).

74. See *Griffith*, 930 N.E.2d at 126.

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

ars and courts in certain jurisdictions.⁷⁶ The common law rule developed at a point in time when insurance virtually did not exist;⁷⁷ the contemporary reality, however, where risk-allocation is a common practice, has prompted a few changes to the traditional compensatory schemes. As part of a broader tort reform, many states have modified the collateral source rule in certain contexts⁷⁸ and completely abolished it in others.⁷⁹

Most relevant statutes do not allow recovery for damages already paid by a collateral source, but those statutes do not prohibit the plaintiff from recovering for damages when a third party payor has subrogation rights.⁸⁰ The idea of this change is to protect the subrogation rights of the insurers, which would presumably keep insurance premiums low.⁸¹ Certain jurisdictions have enacted statutes barring the collateral rule in all personal injury actions for damages over a certain amount. Addressing the issue of overcom-

76. See Fleming *supra* note 75, at 1478; see also Zorogastua *supra* note 48; Douglas H. Cook, *Personal Responsibility and the Law of Torts*, 45 AM. U. L. REV. 1245, 1260, 1274 (1996) (commenting on Richard C. Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669, 694-95 (1962) (discussing the collateral source rule as being at odds with the compensatory function of tort law)).

77. Bryce Benjet, *A Review of State Law Modifying the Collateral Source Rule: Seeking Greater Fairness in Economic Damages Awards*, 76 DEF. COUNS. J. 210, 211 (2009).

78. See, e.g., MASS. GEN. LAWS ch. 231, § 60G(a) (2010) (mandating the admission of evidence of collateral source payments in the context of medical malpractice). Similarly, CAL. CIV. CODE ANN. § 3333.1 (West 1997) and DEL. CODE ANN. tit. 18, § 6862 (West 1999) abrogate the collateral source rule in the context of medical malpractice.

79. The collateral source rule had been completely abrogated in: Alabama (ALA. CODE § 6-5-545 (2005)), Alaska (ALASKA STAT. § 09.17.070 (2010)), Colorado (COLO. REV. STAT. ANN. § 13-21-111.6 (West 2004)), Connecticut (CONN. GEN. STAT. § 52-225a (2012)), Florida (FLA. STAT. ANN. § 768.76 (West 2011)), Idaho (IDAHO CODE ANN. § 6-1606 (2010)), Indiana (IND. CODE ANN. § 34-44-1-2 (West 1999)), Iowa (IOWA CODE ANN. § 668.14 (West 1998)), Michigan (MICH. COMP. LAWS ANN. § 600.6303 (West 2000)), Minnesota (MINN. STAT. ANN. § 548.251 (West 2010)), New York (N.Y. C.P.L.R. 3101(f) (McKinney 2011)), North Dakota (N.D. CENT. CODE § 32-03.2-06 (1996)), Ohio (OHIO REV. CODE ANN. § 2315.20 (West 2011)), and Oregon (OR. REV. STAT. § 31.580 (2005) (*as cited in* Zorogastua, *supra* note 48, at 500); see also *Collateral Source Rule Reform*, AM. TORT REFORM ASS'N, <http://www.atra.org/issues/collateral-source-rule-reform> (last visited May 24, 2012) (summary of the states which have abrogated or modified the collateral source rule); 1 DOBBS, *supra* note 18, at 1058-61 (discussing the rationale and the substance of modifications of the collateral source rule among the states); Benjet, *supra* note 77, at 210.

80. Benjet, *supra* note 77, at 211.

81. See 1 DOBBS, *supra* note 18, at 1059. The idea is that if the collateral source rule were repealed the insurer would not be able to ever recuperate what it paid out for the plaintiff's loss, and therefore insurance premiums would rise. This Note, however, does not agree with such a proposition because it rests on the inaccurate presumption that abolishing the rule necessarily precludes recovery.

compensation, Montana, for example, requires deduction of prior collateral source payments from any compensation for personal injury or death, where the total award exceeds \$50,000.⁸² The jury determines the award without consideration of any collateral source payments and subsequently, upon separate submission of evidence, the trial judge must subtract such payments from the award.⁸³

Overall, the state laws concerning the collateral source rule remain inconsistent. Some states, including Massachusetts, have repealed the rule in specific contexts, but keep applying it in others.⁸⁴ State legislatures have been particularly willing to repeal the rule in medical malpractice lawsuits, presumably for policy reasons.⁸⁵ Certain courts have found statutes abrogating the collateral source to be unconstitutional,⁸⁶ others have upheld them.⁸⁷ It appears that similar statutes may or may not pass constitutional muster depending on the state they are adopted in. The Kansas Supreme Court in *Thompson v. KFB* for instance, found a statute allowing evidence of collateral source payments in cases where the plaintiff's damages which exceeded \$150,000 to be in violation of the rights of equal protection and due process, as set forth in the United States and Kansas Constitutions.⁸⁸ According to the *Thompson* court, the act failed to satisfy even the low "rationality basis" test and provided no reasonable justification for the created classification of the plaintiffs.⁸⁹ The Supreme Court of Alabama, however, upheld an even

82. MONT. CODE ANN. § 27-1-308 (1987).

83. See *Haman v. Maco Ins. Co.*, 86 P.3d 34, 37 (Mont. 2004) (Nelson, J., dissenting) (citing MONT. CODE ANN. § 27-1-308).

84. MASS. GEN. LAWS ch. 231, § 60-G (2010) (providing for medical malpractice awards to be offset by collateral sources minus any premiums paid by the claimant to secure those benefits); DEL. CODE ANN. tit. 18, § 6862 (West 1999 & Supp. 2010) (permitting evidence for collateral source payments in medical malpractice lawsuits). However, in both Massachusetts and Delaware the rule is still applicable in the personal injury context. See, e.g., *Law v. Griffith*, 930 N.E.2d 126, 131 (Mass 2010); *Miller v. State Farm Mut. Auto. Ins. Co.*, 993 A.2d 1049, 1053 (Del. 2010).

85. See *supra* note 84; see also *infra* Part IV.A.1.

86. See, e.g., *Farley v. Engelken*, 740 P.2d 1058, 1068 (Kan. 1987) (finding that the statute abrogating the collateral source rule discriminated against medical malpractice victims); *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 578 (Ky. 1995) (finding that the statute abrogating the rule was a violation of the separation of powers, since admission of evidence is a judicial function) (cited in 1 DOBBS, *supra* note 18, at 1059 n.22).

87. See, e.g., *Eastin v. Broomfield*, 570 P.2d 744, 753 (Ariz. 1977) (the court upheld an act repealing the collateral source rule, rejecting an equal protection argument) (cited in 1 DOBBS, *supra* note 18, at 1059 n.23).

88. *Thompson v. KFB Ins. Co.*, 850 P.2d 773, 774 (Kan. 1993).

89. *Id.* The court stated that, assuming that lowering the cost of health insurance was the objective of the statute and it was a reasonable one, the classification did not reasonably further such objective. *Id.* at 773.

broader statute, allowing evidence for collateral source payments in all civil actions.⁹⁰ In *Marsh v. Green*,⁹¹ the court rejected plaintiff's due process and equal protection claims, holding the statute constitutional and thereby reversing a previous case, *American Legion Post No. 57 v. Leahey*.⁹²

The idea of a collateral source rule reform has been accepted ambivalently by different states, and the courts' polar attitudes towards this reform remain difficult to reconcile. Recent health care law reforms in Massachusetts⁹³ have arguably made the applicability of the collateral source rule even more controversial.

IV. HOW IS MASSACHUSETTS DIFFERENT?

A. *The Collateral Source Rule in Massachusetts*

1. Abrogation of the Collateral Source Rule in Medical Malpractice

Concerned with the ever-rising cost of health insurance, Massachusetts has partially repealed the collateral source rule by adopting a statute applying to medical malpractice damages.⁹⁴ Under this statute, the judge in a jury trial will deduct the third party payments less any premiums paid to secure those benefits after the verdict.⁹⁵ The statute also bars the right of subrogation by collateral sources.⁹⁶ The abrogation of the rule is part of a trend in medical malpractice reform aimed at bringing down the medical malpractice insurance premiums of doctors, thereby decreasing the cost of their

90. See ALA. CODE § 12-21-45(a)(1975) (stating that “[i]n all civil actions where damages for any medical or hospital expenses are claimed and are legally recoverable for personal injury or death, evidence that the plaintiff’s medical or hospital expenses have been or will be paid or reimbursed shall be admissible as competent evidence”), upheld in *Marsh v. Green*, 782 So. 2d. 223, 231 (Ala. 2000) (denying plaintiff’s due process and equal protection arguments).

91. *Marsh*, 782 So. 2d at 231. Unlike the *Thompson* court, the court in *Marsh* did not evaluate the constitutionality of the statute, stating that the plaintiff is challenging the policy of the act and policy questions are to be decided by the legislature, and not the court. *Id.*

92. *Am. Legion Post No. 57 v. Leahey*, 681 So. 2d 1337 (Ala. 1996). The *Leahey* court held that a statute abrogating the collateral source rule violated equal protection and due process. Four years later the court reversed itself in the *Marsh* opinion. See *Marsh*, 782 So. 2d. at 231.

93. See *infra* Part IV.B.

94. MASS. GEN. LAWS ch. 231, § 60G(a) (2010).

95. *Id.*

96. *Id.* § 60G(c).

services and ultimately lowering the cost of health insurance.⁹⁷ As *Griffith* demonstrated, however, the Massachusetts Supreme Judicial Court is reluctant to disregard the collateral source rule in the context of personal injury.⁹⁸

2. *Griffith's* Majority and Section 79G

In *Law v. Griffith*, the Massachusetts Supreme Judicial Court, confronted with the issue of whether to admit the evidence of substantial insurance write-offs, decided to maintain the status quo and disallow such evidence, thereby refusing to abrogate the collateral source rule.⁹⁹ Generally, in order for the plaintiff to receive compensation for medical services, he or she must prove that: “(1) he or she has paid or become liable for the medical bills, (2) the defendant’s negligence was the cause of the injuries, and (3) the charges were reasonable for the services rendered.”¹⁰⁰

The dispute in *Griffith* centered around the third requirement. Indeed, the parties did not quarrel over the established standard that the plaintiff should receive “the value of reasonable medical services required to treat the injury.”¹⁰¹ They disagreed, however, as to the evidence the jury should use to determine that “reasonable” value. The defendant argued that the actual medical bills charged by the plaintiff’s health care provider should be excluded from evidence for two reasons: first, because the victim, as a MassHealth recipient, had not paid the bills herself; and second, because MassHealth had negotiated and paid a significantly lower amount for the medical services the plaintiff received.¹⁰² The defendant claimed that since no one paid the full amount of the bills, nor was any party responsible for it, this figure was irrelevant in establishing the reasonable value of the service.¹⁰³ A Superior Court judge accepted that argument and did not admit the bills into evidence.¹⁰⁴ Plaintiff appealed from the judgment, claiming that

97. See Lee Harris, *Tort Reform as Carrot-and-Stick*, 46 HARV. J. ON LEGIS. 163, 172 (2009).

98. *Law v. Griffith*, 930 N.E.2d 126, 134 (Mass. 2010).

99. *Id.*

100. Natalie J. Kussart, *Paid Bills v. Charged Bills: Insurance and the Collateral Source Rule*, *Arthur v. Catour*, 833 N.E.2d 847 (2005), 31 S. ILL. U. L.J. 151, 159 (2006).

101. *Griffith*, 930 N.E.2d, at 129 (citing *Scott v. Garfield*, 912 N.E.2d 1000 (Mass. 2009)).

102. *Id.*

103. *Id.*

104. *Law v. Griffith*, No. 03-3179, 2006 WL 6482934, at *1 (Mass. Super. Ct. July 24, 2006), *rev'd*, 930 N.E.2d 126 (Mass. 2010).

the bills should have been included in evidence.¹⁰⁵ The Appeals Court found that the Superior Court judge erred in excluding them and determined that a new trial on the damages was required.¹⁰⁶

The Massachusetts Supreme Judicial Court (SJC) affirmed the decision of the Appeals Court on the grounds that Massachusetts law requires acceptance of the medical bills as evidence of the “fair and reasonable charge” of the service provided.¹⁰⁷ In the meantime, the court refused to admit evidence of the actual amount accepted as payment in full by the provider.¹⁰⁸ The reason for that was the common law collateral source rule, articulated in section 920 of the Second Restatement of Torts.¹⁰⁹ The court did not find anything in the language of the relevant Massachusetts legislation¹¹⁰ that would suggest the rule was invalid in Massachusetts.¹¹¹ In fact, it concluded by negative implication that by abolishing the collateral source rule with respect to medical malpractice,¹¹² the legislature demonstrated its intent to keep the rule in other contexts.¹¹³

Interestingly, the SJC in *Griffith* acknowledged the inadequacy of the medical bills as evidence of the fair and reasonable value of the medical service.¹¹⁴ It refused, however, to deny the applicability of the collateral source rule to personal injury damages, absent relevant legislative action.¹¹⁵ The majority based its decision

105. *Griffith*, 930 N.E.2d at 129.

106. *Law v. Griffith*, No. 07-P-1972, 2009 WL 652945, at *1 (Mass. App. Ct. 2009).

107. *Griffith*, 930 N.E.2d at 130; *see also* MASS. GEN. LAWS ch. 233, § 79G (2010) (stating that “[i]n any proceeding commenced in any court . . . an itemized bill . . . shall be admissible as evidence of the fair and reasonable charge for such services or the necessity of such services or treatments”).

108. *Griffith*, 930 N.E.2d at 131.

109. RESTATEMENT (SECOND) OF TORTS § 920A (2) (1979) (stating that “[p]ayments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor’s liability, although they cover all or a part of the harm for which the tortfeasor is liable”).

110. MASS. GEN. LAWS ch. 233, § 79G (2010); *see also id.* ch. 231, § 60G.

111. *Griffith*, 930 N.E.2d at 134.

112. *See* MASS. GEN. LAWS ch. 231, § 60G (2010) (abrogating the collateral source rule in medical malpractice).

113. *Griffith*, 930 N.E.2d at 134.

114. *See id.* at 133 (stating that “American . . . medical care providers have developed charge structures that may have *little or no relationship* to the reasonable value of the medical services at issue”) (emphasis added).

115. *Id.* at 134-35 (comparing RESTATEMENT (SECOND) OF TORTS § 920 A cmt. d (1979), stating that the collateral source rule “can be changed by statute” with *Kerins v. Lima*, 680 N.E.2d 32, 43 (Mass. 1997) (quoting *Commercial Wharf E. Condo. Ass’n v. Waterfront Parking Corp.*, 552 N.E.2d 66, 71 (Mass.1990) (claiming that courts will not

largely on the statutory framework: the language of section 79G,¹¹⁶ mandating admission of medical bills in personal injury lawsuits in conjunction with the enactment of section 60G abrogating the collateral source rule in medical malpractice lawsuits.¹¹⁷ In sum, the court reached the conclusion that: 1) the test for determining compensation is the “fair and reasonable” value of the service;¹¹⁸ 2) the bills may be inadequate indication for that value;¹¹⁹ but 3) they must be admitted, because the statute requires it.¹²⁰

To reconcile these somewhat contradictory conclusions, the court created its own approach toward determining the “fair and reasonable” value of a medical service. By interpreting the second sentence of section 79G,¹²¹ the court concluded that it is appropriate to allow a defendant to bring a representative of the medical provider to testify on the range of payments accepted by the provider for the service rendered to the plaintiff.¹²² That witness, however, would not be allowed to mention whether the plaintiff has health insurance, the payor of the plaintiff’s medical bills, or the amount of the actual payments.¹²³

B. *Mandatory Health Insurance in Massachusetts*

The main reason for prohibiting disclosure of the insurance benefits conferred upon the plaintiff is the fear that the jury will award the plaintiff less if it is aware that she was insured at the time of the incident.¹²⁴ With regard to health insurance, however, there is not much room for secrecy in Massachusetts. In April 2006, Governor Mitt Romney signed into law a new bill requiring all residents

presume the legislature intended “radical change in the common law without a clear expression of such intent”).

116. MASS. GEN. LAWS ch. 233, § 79G (2010) (stating that “[i]n any proceeding commenced in any court . . . an itemized bill . . . shall be admissible as evidence of the fair and reasonable charge for such services or the necessity of such services or treatments”).

117. *See id.* ch. 231, § 60G (providing that compensation should be offset by collateral source payments, minus any premiums paid by the plaintiff to secure those benefits).

118. *Griffith*, 930 N.E.2d at 128.

119. *Id.* at 133.

120. *Id.* at 130-31.

121. MASS. GEN. LAWS ch. 233, § 79G (2010). “Nothing contained in this section shall be construed to limit the right of any party to the action to summon . . . such physician, dentist, pharmacist . . . for the purpose of cross examination with respect to such bill . . .” *Id.*

122. *Griffith*, 930 N.E.2d at 135.

123. *Id.*

124. *See Eichel v. N.Y. Cent. R.R. Co.*, 375 U.S. 253, 255 (1963).

of the state to obtain health insurance,¹²⁵ thereby making Massachusetts the first state in the nation where health insurance is mandatory. The law was part of an “innovative bipartisan plan,”¹²⁶ aimed at reducing both the number of uninsured and the cost of health insurance.¹²⁷ The plan provided that the state would establish a quasi-governmental authority, the Commonwealth Health Insurance Connector,¹²⁸ through which Massachusetts residents can purchase insurance, at rates based on the individual’s income.¹²⁹ Failure to abide by the compulsory purchase mandate would result in steep penalties.¹³⁰

C. *The Collateral Source Rule and the Medically Uninsured*

Being medically uninsured in Massachusetts seems to come at a pretty high price, even if a person does not need to see a doctor. If an uninsured Massachusetts resident gets injured in a car accident, however, he will have to face more than a fine for being uninsured. He will actually have to pay his full medical bill.¹³¹ So, if Ms. Law were not a MassHealth recipient, but instead had no insurance, she would have had to come up with \$112,269.94¹³² on her own. In those circumstances, there would be no discussion about evidence for insurance write-offs, because no such evidence would

125. See MASS. GEN. LAWS ch. 111M, § 2(a) (2010); see also David A. Farenthold, *Mass. Bill Requires Health Coverage*, WASH. POST, Apr. 5, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/04/04/AR2006040401937.html>.

126. William C. Symonds, *In Massachusetts, Health Care for All?*, BUS. WK., Apr. 14, 2006, available at http://www.businessweek.com/investor/content/apr2006/pi20060404_152510.htm.

127. MASS. GEN. LAWS ch. 111M, § 2(a) (2010) (indicating that with very narrow exceptions, health insurance is required for Massachusetts residents).

128. HEALTH CONNECTOR: HEALTH INSURANCE FOR MASSACHUSETTS RESIDENTS, <https://www.mahealthconnector.org/portal/site/connector/> (last visited May 24, 2012) (May 24, 2012).

129. *Id.*

130. See *Massachusetts Health Insurance Requirements*, MASSRESOURCES.ORG, <http://www.massresources.org/infopages.cfm?ABPageID=93&MainParentID=93#howmuchpenalty> (providing penalty rates for the uninsured) (last visited May 24, 2012). For example, for 2011, a 27 year old with an annual income of \$32,676 (300% of Federal Poverty Guidelines) would have to pay a tax penalty of \$1,212 per year for being uninsured.

131. See *Law v. Griffith*, 930 N.E.2d 126, 133 (Mass. 2010); see also George A. Nation III, *Obscene Contracts: The Doctrine of Unconscionability and Hospital Billing of the Uninsured*, 94 KY. L.J. 101, 119 (2005) (discussing the discrepancy in rates for uninsured and insured patients).

132. See *Griffith*, 930 N.E.2d at 129 (spelling out the full amount of the plaintiff’s medical bills).

exist. Following *Griffith's* rationale and section 79G, the court would admit the doctor's bill and a range of payments accepted for the service.¹³³ One could only guess what price tag the jury would have put on the medical services provided, faced with a "range" of payments for that same service between \$16,387.14¹³⁴ and \$112,269.94.¹³⁵ The *Griffith* court, however, did not comment on whether a court should allow evidence for the full payment of the medical bills in cases where the patient is uninsured.¹³⁶

The majority in *Griffith* approached the collateral source rule issue cautiously, apparently unwilling to set it aside, but in the meantime not expressing a strong opinion in its favor. The concurrence, on the other hand, had quite a different approach towards the problem.

D. Justice Cowin's Concurring Opinion in *Griffith*

The concurrence in *Griffith*¹³⁷ was more willing to comment on and even criticize the collateral source rule. Justice Cowin, joined by Chief Justice Ireland and Justice Spina, accepted the majority's analysis of the first sentence of section 79G, agreeing that the statute¹³⁸ unambiguously mandates the admissibility of itemized medical bills as evidence for the fair and reasonable charge of a medical service.¹³⁹ However, Justice Cowin criticized the majority's interpretation of the second sentence of the same statute,¹⁴⁰ which the majority qualified as "general" and not "delineating in any manner the permissible scope of the witnesses' testimony or the use of the records."¹⁴¹ The majority concluded that the Massachusetts legislature intended to retain the collateral source rule in tort recovery cases.¹⁴² Justice Cowin, however, found no language in the statute to suggest such intent.¹⁴³ According to the concurring justices, the majority adopted an inconsistent approach with respect to the applicability of the collateral source rule: on one hand, the court recognized the problem of the evidentiary deficiency of the rule; on

133. *Id.* at 128.

134. *Id.* at 131.

135. *Id.*

136. *See id.* at 135 n.16.

137. *Id.* at 136 (Cowin, J., concurring).

138. MASS. GEN. LAWS ch. 233, § 79G (2010).

139. *Griffith*, 930 N.E.2d at 135-36; *id.* at 136 (Cowin, J., concurring).

140. *See supra* note 121 and accompanying text.

141. *Griffith*, 930 N.E.2d at 135.

142. *Id.* at 134.

143. *Id.* at 136 (Cowin, J., concurring).

the other, it refused to repeal the rule.¹⁴⁴ This approach, Justice Cowin opined, conflicted with 79G, “which appear[ed] to accommodate no restrictions on the use of other admissible evidence.”¹⁴⁵

The concurring justices found unpersuasive the majority’s public policy argument that admitting evidence for health insurance write-offs creates a risk for potential unequal treatment of patients—recipients of MassHealth.¹⁴⁶ If the court allowed defendants to present to the jury evidence of MassHealth’s deeply discounted rates, the majority argued, the jury would award no more than the write-off amount, thereby creating a class of people, whose treatment is “worth” less than the treatment of plaintiffs carrying private insurance or no insurance at all.¹⁴⁷ Justice Cowin did not attempt to rebut or affirm the accuracy of that presumption, but believed it had nothing to do with determining the legislature’s intent when adopting section 79G.¹⁴⁸ According to Justice Cowin, the legislature’s intent to allow evidence of collateral payments was just as unambiguous as its intent to allow the actual medical bills before the jury.¹⁴⁹ In fact, by treating both kinds of evidence (of actual payments and medical bills) differently, the majority had misconstrued section 79G.¹⁵⁰ The statute’s purpose, in Justice Cowin’s view, was to provide a simple exception to the hearsay rule and not to create confusion.¹⁵¹

Furthermore, Justice Cowin discussed the history of the statute, enacted at a time when the funding of medical services was organized differently, and when third party payments were the exception, not the rule.¹⁵² And since health insurance write-offs were not common practice, the actual medical bills used to reflect rela-

144. *See id.* at 137 (stating that “[t]he court’s decision demonstrates that it recognizes the problem, but also that it shrinks from the most workable solution”).

145. *Id.*

146. *Id.* at 136.

147. *Id.* at 134 n.11 (majority opinion). The court’s presumption appears to be that if MassHealth patients’ treatment is “cheaper” than the treatment of “richer” plaintiffs, then the jury would undervalue all MassHealth-insured plaintiffs’ economic losses.

148. *Id.* at 138 (Cowin, J., concurring) (stating also that “jurors are as likely to be resentful of the rich as they are to be prejudiced against the poor”) *Id.*

149. *Id.* at 136.

150. *Id.* at 136-38.

151. “[T]he Legislature intended when it adopted in § 79G what appears to be an uncomplicated exception to the hearsay rule.” *Id.* at 138. Under the hearsay rule neither medical bills, nor actual insurance payments would be admitted into evidence. *See* FED. R. EVID. 801.

152. *Id.* at 136.

tively accurately the reasonable value of the service.¹⁵³ Justice Cowin noted that at the present time, when health care is funded largely by collateral sources such as private and public health insurance, this model has changed.¹⁵⁴ The medical bills now “often reflect costs, such as overhead, capital investment, research and development, and the subsidizing of . . . medical procedures, that are unrelated to the value of the specific services performed.”¹⁵⁵ Those factors, bearing no relevance to the actual treatment of the patient, have led to the inflation of charges for medical treatment, while at the same time providers are willing to accept significantly lower payments for the same services by insurance companies.¹⁵⁶ Therefore, according to Justice Cowin, the medical bills are no longer a reliable indicator of the reasonable value of medical services.¹⁵⁷

In order to avoid prejudice, the *Griffith* majority decided to exclude evidence of Ms. Law’s payments altogether.¹⁵⁸ However, according to Justice Cowin, the problem with potential jury prejudice could be easily solved by adequate jury instructions,¹⁵⁹ without completely excluding evidence of such payments. In Justice Cowin’s opinion, keeping a plaintiff’s health insurance obscured from a juror, who is presumably himself insured, does nothing to promote just compensation.¹⁶⁰ This sort of secrecy ultimately compels the jury to guess which one of the “range” of numbers before it is the correct one, instead of outright telling the jury how much was paid.¹⁶¹ The new realities in health care compensation, according to Justice Cowin, have made the collateral source rule “an anachronism” when applied to determining the value of medical services.¹⁶² The following section further discusses its deficiencies, particularly in a state with mandatory health insurance.

153. *Id.* at 137.

154. *Id.*

155. *Id.*

156. *Id.* at 138.

157. *Id.*

158. *Id.* at 131 (majority opinion).

159. *See id.* at 138 (Cowin, J., concurring) (stating that “jurors overwhelmingly fulfil [sic] their obligations with great seriousness, follow[ing] instructions”).

160. *Id.* at 139.

161. *Id.* at 138-39. “[J]urors will remain mystified by the refusal to tell them what a given procedure actually cost. In sum, we move farther and farther from the objective of valuing the medical services provided to the injured plaintiff.” *Id.* at 139 (Cowin J., concurring).

162. *Id.* at 137.

V. WHY THE COLLATERAL SOURCE RULE IS INADEQUATE TO SERVE ITS INTENDED PURPOSE IN MASSACHUSETTS

Most arguments in favor of the collateral source rule appear to be based on two general assumptions: that introducing evidence of third party payments will have a prejudicial effect on the jury, and that a windfall for one of the parties is unavoidable.¹⁶³ Those assumptions, however, are misguided, especially in the Commonwealth of Massachusetts.¹⁶⁴ Moreover, the rule seems to deepen the problem it purports to cure: instead of avoiding the under-compensation of low-income plaintiffs, it can potentially cause the opposite effect.¹⁶⁵

A. Does “Blindfolding”¹⁶⁶ the Jury Really Avoid Confusion?

1. The Prejudicial Effect of Insurance

One of the most common justifications for the inadmissibility of collateral source payments is that such evidence would lead the jury to reduce or deny adequate compensation.¹⁶⁷ Generally, this seems to be a legitimate concern, especially in times of economic recession, when juries are possibly becoming more conservative when assessing damages.¹⁶⁸ Since jurors have to award recovery for “the value of reasonable medical services required to treat the [plaintiff’s] injury,”¹⁶⁹ and the health insurance “write-offs” are not an adequate measure of such value,¹⁷⁰ it is logical to presume that seeing those bills would confuse the jury.

163. See *supra* Part I.A.

164. See *supra* Part IV.A-C.

165. See *supra* Part IV.A-B.

166. See EDIE GREENE & BRIAN H. BORNSTEIN, AMERICAN PSYCHOLOGICAL ASSOCIATION, DETERMINING DAMAGES: THE PHYSIOLOGY OF JURY AWARDS, 167 (2002) (describing the “[e]ffects of ‘blindfolding’” jurors, i.e., depriving them from material information, in order to avoid bias).

167. See *Law v. Griffith*, 930 N.E.2d 126, 132 (Mass. 2010) (quoting *Goldstein v. Gontarz*, 309 N.E.2d 196, 203 (Mass. 1974)). In *Goldstein*, the court stated that “jurors might be led by the irrelevancy” of the third party payment and deny recovery for the plaintiff. *Goldstein*, 309 N.E.2d at 203; see also *Corsetti v. Stone Co.*, 483 N.E.2d 793, 802 (Mass. 1985).

168. See generally Edie Green, *The Art and Science of Litigation Advocacy: Jury Damage Awards in Times of Recession*, THE JURY EXPERT (July 1, 2009), available at <http://www.thejuryexpert.com/2009/07/jury-damage-awards-in-times-of-recession/>. (discussing the possible effects of the recession on jury awards, and stating that “jurors who have recently lost jobs may be especially hard on plaintiffs”).

169. See *Rodgers v. Boynton* 52 N.E.2d 576, 576 (Mass. 1943).

170. See *Griffith*, 930 N.E.2d at 130 (discussing the standard for recovery of medical expenses in negligence cases); see also *id.* at 133 (stating that at the present time,

In Massachusetts, however, trying to keep evidence of such payments away from the jury likely causes more confusion than it prevents. It is axiomatic that society functions on the presumption that its members obey the law.¹⁷¹ Since in the Commonwealth of Massachusetts health insurance is required by statute,¹⁷² the jurors would be justified to suppose that the plaintiff is insured and that his insurance paid for the better portion of his medical bills.¹⁷³ Therefore, even if, as proponents of the collateral source rule suggest, this information is irrelevant in determining the fair value of the service,¹⁷⁴ now it has become implausible to hide it.

It is a well established rule that the presence of insurance often has prejudicial effect and is inadmissible,¹⁷⁵ since it may cause inflation of the award (if the tortfeasor has liability insurance) or deflation (if the victim has insurance against the risk in question). In that sense, however, the juries in Massachusetts already *are* biased;¹⁷⁶ they know it is more likely than not that someone paid for

medical bills admissible under the first sentence of § 79G may bear little relationship to the “fair and reasonable” value of medical services rendered).

171. The Ancient Roman law presumption of innocence, *Ei incumbit probatio qui dicit, non qui negat* (the burden of proof rests on who asserts, not on who denies, i.e. a person is innocent, until proven guilty) is embedded in the Fifth and Sixth Amendments of the U.S. Constitution. See U.S. CONST. amend. V-VI; François Quintard-Morénas, *The Presumption of Innocence in the French and Anglo-American Legal Tradition*, 58 AM. J. COMP. L. 107, 111 & 111 n.25 (2010).

172. See MASS. GEN. LAWS 111M, § 2(a) (2010) (indicating that, with very narrow exceptions, all residents of Massachusetts are required to obtain health insurance).

173. The term “better portion of [the] bill []” is used here in the sense of the major portion of the sum, owed by the patient, which does not necessarily mean the whole actual bill, since medical providers often accept a fraction of it as payment in full.

174. See, e.g., *Griffith*, 930 N.E.2d at 132; *Goldstein v. Gontarz*, 309 N.E.2d 196, 203 (Mass. 1974).

175. FED. R. EVID. 411 (stating that evidence that a person charged with negligence does or does not have liability insurance is inadmissible). See, e.g., *Mangan v. Broderick & Bascom Rope Co.*, 351 F.2d 24, 25 (7th Cir. 1965) (finding that the defense counsel’s mentioning of the fact that the plaintiff carried workman’s compensation was prejudicial). See generally STEIN, *supra* note 2, § 13:14 (discussing the limited admissibility of evidence of collateral sources). Introducing evidence that one of the parties is insured, however, is not always inadmissible. The courts apply a balancing test to determine admissibility of insurance payments. Compare *Wright v. Hiester Const. Co., Inc.*, 698 S.E.2d 822, 822-23 (S.C. Ct. App. 2010) (finding that the probative value of liability insurance outweighed the potential prejudicial effect and the risk of jury confusion), with *Walker v. Big Burger Rests., Inc.*, No. 09-532, 2010 WL 427736, at *3 (E.D. Pa. 2010) (stating that “any probative value of evidence regarding the assignment of the lien or workers’ compensation benefits would be outweighed by the prejudicial effect such evidence could have”).

176. Even in Massachusetts evidence of collateral source payments is admissible when the jury is misled by the plaintiff. See *supra* note 43. By the same logic, it should

the plaintiff's medical bills, and it is unrealistic to imagine that they will ignore that fact.

2. Health Insurance “Write-offs” and the “Anchor” Theory of Damage Determination

At the present time, health insurance write-offs are more of a rule than an exception, and the uninsured are practically the only ones who pay full price for medical services.¹⁷⁷ Even if the jury does not know that insurance companies pay discount rates, adopting *Griffith*'s approach will cure that lack of awareness. The *Griffith* court held that not only may the actual bill be offered into evidence, but a range of payments accepted by the provider for the same service may also be offered.¹⁷⁸ The very fact that there is a *range* is enough to put the jury on notice that some patients are liable for significantly smaller amounts for the same service than others. Logically, in cases like *Griffith*, where that range is particularly wide, the jury's task to determine what is the reasonable value of the service is exceptionally difficult.

Cognitive psychologists suggest that when quantifying a plaintiff's loss, juries rely on “salient numerical reference points,” figuratively named “anchors.”¹⁷⁹ Such “anchors” may be the relief amount stated by plaintiffs in the *ad damnum* clause¹⁸⁰ of their complaints, or the cap on damages in the given jurisdiction.¹⁸¹ Studies show that generally “the more you ask for, the more you get.”¹⁸² At the same time, however, the awards may be reduced by the presence of a “counteranchor”—an amount, proposed by the defense, especially if that number is offered by an expert.¹⁸³ In

be admissible if the jury is “misled” by the presumption that everyone in the state is actually insured.

177. See *Griffith*, 930 N.E.2d at 133; see also HALL & SCHNEIDER, *supra* note 72, at 645 (contending that “managed care relegates uninsured patients to a new marketplace . . . of uncommon harshness dominated by doctors, hospitals, and insurers” and explaining that “insurers aggressively negotiate rates for plan members; uninsured patients must ‘bargain’ individually with providers who are determined to recoup what they bargained away to insurers”).

178. See *supra* INTRODUCTION.

179. See GREENE & BORNSTEIN, *supra* note 166, at 135.

180. A clause in a complaint, stating the relief sought. BLACK'S LAW DICTIONARY 43 (9th ed. 2009).

181. See GREENE & BORNSTEIN, *supra* note 166, at 150-59.

182. *Id.*

183. *Id.* at 153-55. The expert function is important in *Griffith*, since the jury would presumably be presented with information about the range of payments by a representative of the provider, an expert witness. See MASS. GEN. LAWS ch. 233, § 79G (2010).

sum, often there are two conflicting reference points—one suggested by the defendant, and another by the plaintiff—between which the jury has to choose.

Applying the “anchor” theory to *Griffith*, however, would mean that the jury would have to base its determination of the value of the medical service rendered to the plaintiff not on two, but on multiple possible reference points, ranging between \$16,387.14 and \$112,269.94.¹⁸⁴ Despite the purpose for which this array of numbers would be offered—to aid the jury—they would, in effect, cancel each other’s “anchoring” function completely. It is obviously impossible that each number can be an indicator for the objectively “reasonable” value of the same service.

According to the holistic approach of assessing damages, the jury will award what intuitively “seems right.”¹⁸⁵ Under this approach, without any further guidance, the jury would have no choice but to make an estimate based on its own preconceived notions of appropriateness¹⁸⁶ and not on the records presented.¹⁸⁷ In that respect, showing the jury a range of payments accepted for the same service would be close to meaningless, since none of those numbers is a solid reference point upon which it could base its decision.

A Massachusetts jury, however, imagining that the plaintiff is insured, would be justified to assume that one of those numbers *is* in fact “right,” because it reflects the actual payment of the bill. In that respect, keeping evidence of insurance payments away from the jurors puts them in an awkward “guessing” position: they know someone covered the bill, and that the amount paid is likely introduced to them as part of the “range” of payments, but they do not

184. See *Law v. Griffith*, 930 N.E.2d 126, 135 (Mass. 2010) (admitting evidence for the “range” of payments between the actual payment of the bill and the full amount of the bill).

185. See GREENE & BORNSTEIN, *supra* note 166 (quoting a study of juries in tort and contract cases showing that about a third of the jurors pick a number that seems reasonable, without explicit calculation). The holistic and cognitive approaches are not mutually exclusive but complement one another. Interestingly, even *Griffith*’s majority recognizes the fact that the full bill is *not* a good indication of reasonableness. See *Griffith*, 930 N.E.2d at 133 (stating that “American . . . medical care providers have developed charge structures that may have *little or no relationship* to the reasonable value of the medical services at issue”) (emphasis added). Therefore, even the bill is not a reliable “anchor” for determining the reasonable value of the service.

186. See GREENE & BORNSTEIN, *supra* note 166, at 158-61.

187. See *id.* at 169 (stating that “in the absence of explicit instructions, juror’s assessment[s] of damages are likely to be inconsistent, haphazard and, on occasion, contrary to the . . . law”).

know which one is the number.¹⁸⁸ The collateral source rule, in its attempt to steer the jury's attention away from the fact the plaintiff may be insured (thereby preventing under-compensation), merely obscures the sum paid. In a state where health insurance is optional it is probably possible to make the jury "forget" about it. Where health insurance payment is presumed, however, it is pointless to try to keep it a secret.

B. *Punished Once, Punished Twice: The Collateral Source Rule and Uninsured Plaintiffs*

1. "Compensatory" Damages Are Meant to Compensate the Victim. Or Are They?

Assessing the "reasonable" value of a medical service is not the only difficulty confronting a jury in a tort action. The jury also has to make sure that the victim is placed back in the position he or she was in before the accident.¹⁸⁹ In monetary terms, that means that the victim should be reimbursed for at least his or her out of pocket expenses. While in *Griffith* the plaintiff, whose health insurer negotiated exceptionally low payments, will be most likely overcompensated,¹⁹⁰ under-compensation of other victims in similar circumstances is just as likely.

188. See *Griffith*, 930 N.E.2d at 139 (Cowan, J., concurring) (maintaining that hiding from the jury the fact that the plaintiff may be insured while being *expected* to be insured is counterintuitive).

If, in fact, we ever needed to shield jurors from the reality of insurance or other mechanisms by which another pays a party's tort damages, we need not do so now. Jurors know insurance exists; they have it themselves. Yet we cling to a curious practice whereby we attempt to deny to a juror, who may himself or herself that day have submitted a claim to a health carrier, the fact that a party in the case before him also has insurance coverage. The court today recognizes this reality but coyly deprives that juror of a complete picture of how that insurance has operated in the case on trial.

Id. (Cowan, J., concurring).

189. See *Cortez v. Trans Union, L.L.C.*, 617 F.3d 688, 693, n.30 (3d Cir. 2010) ("Unlike punitive damages that are intended to punish and deter, 'compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.'") (quoting *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003)); *Westric Battery Co. v. Standard Elec. Co.*, 482 F.2d 1307, 1318 (10th Cir. 1973) ("Appellant is entitled to be compensated for losses attributable to the injury inflicted, but it is *not entitled to earn a profit.*") (emphasis added); 25 C.J.S. *Damages* § 21 (2010) ("Compensatory damages are damages sufficient in amount to indemnify the injured person for the loss suffered and thereby make him or her whole. The purpose of awarding compensatory damages is *not to enable the injured party to make a profit on the transaction.*") (emphasis added) (footnote omitted).

190. Ms. Law's insurance paid a very low amount, compared to the full bill. The payment by MassHealth was likely on the lower end of the spectrum (since it was signif-

While the 2006 health care reform in Massachusetts decreased the percent of uninsured residents, a large number of people in the Commonwealth still do not carry health insurance.¹⁹¹ If any of those residents becomes injured in a tort and seeks medical attention, he will have to pay full price for the service. For example, let us imagine that the *Griffith* plaintiff, Ms. Law, was in fact uninsured. Then the only way to fully compensate her for her medical expenses would be to award her the entire amount of her bill. If *Griffith's* rationale applies to the uninsured plaintiffs, the court would admit no evidence of paid or unpaid amounts. All the jury would see would be a range of payments between \$16,387.14 (or possibly less, since it is unclear if indeed MassHealth negotiated the lowest possible rate for that particular service) and \$112,269.90.¹⁹² While it is impossible to foresee how much the jury would award, it would likely be a number in between both ends of the spectrum, and not necessarily the full amount of the bill. In that sense, the plaintiff would receive less than she owed her medical provider and would have to pay the difference out-of-pocket.

The *Griffith* majority, however, explicitly refused to express an opinion on the question of whether an uninsured patient would be allowed to admit evidence of his actual payments.¹⁹³ That approach unambiguously indicates that the uninsured are regarded as a different "class" of tort victims to whom the rule may or may not apply. Trying to treat the uninsured differently than the insured raises an equal protection issue, which is beyond the scope of this Note. In reality, whether such evidence is admitted or not, the uninsured plaintiff remains in a precarious position.

If evidence of actual payment by the victim is *not* admitted and all the jury sees is the bill and a range of payments accepted for the service, the plaintiff will most likely be under-compensated. The only way for the jury to fully compensate the victim will be to award nothing short of the full bill. In order to do that, the jury will have to assume that the victim has no insurance, and no "write-

icantly lower than the bill submitted) and therefore Ms. Law can only be over and not under-compensated. In fact, she already was awarded more than what MassHealth paid for her treatment. See *supra* note 61.

191. The most recent national data shows that in 2008 there were 264,000 uninsured Massachusetts residents. See *A Preliminary Evaluation of Health Insurance Coverage in the 2008 American Community Survey*, U.S. CENSUS BUREAU, (Sept. 22, 2009), available at http://www.census.gov/hhes/www/hlthins/data/acs/2008/2008ACS_healthins.pdf.

192. See *Griffith*, 930 N.E.2d at 135.

193. See *id.* at 136 n.16.

offs” are in place. Presuming that, however, would be counterintuitive for a Massachusetts jury, since health insurance is mandatory in the Commonwealth.¹⁹⁴ Therefore, it is more likely than not that the jury, unaware of how much was actually paid for the service and assuming the victim is insured, would award an amount smaller than the entire bill,¹⁹⁵ thereby under-compensating the plaintiff for her injury.

If evidence of actual payment by the victim *were* admitted, it would solve the problem of under-compensation. However, it is quite unrealistic that the uninsured plaintiff will have paid her medical bills in full in advance of her personal injury trial.¹⁹⁶ Even though there are probably some exceptions, it is hard to imagine that a person who cannot afford health insurance¹⁹⁷ could come up with a large sum out-of-pocket, pay his own bills, and then try to recoup the payment in court. Absent evidence of actual payment, the plaintiff cannot show that he is responsible for the entire bill, because he is not allowed to state that he has no insurance (and the jury will most likely presume he *is* insured). Therefore, whether evidence of actual payments is admitted or not, the uninsured victim would be “punished”: either for being uninsured or for not paying his bill, because in each of these scenarios the plaintiff will not be able to present evidence of his actual payment.¹⁹⁸

194. This hypothetical is applicable only in cases where the injured party *is* in fact a Massachusetts resident *and* the jury is aware of that fact or where the plaintiff is resident of a different state, but the jury is unaware of it, and assumes the plaintiff resides in the Commonwealth. Because this Note is intended to discuss the effect of the collateral source rule on Massachusetts residents only, the rule’s implication on out-of-state plaintiffs is outside the scope of this work.

195. See, e.g., GREENE & BORNSTEIN, *supra* note 166, at 168-69 (discussing the effects of hiding information from the jury regarding the economic consequences of their awards and stating that “a blindfold may permit (rather than prevent) juries to reach verdicts based on misinformation”). The authors give an example of a situation where jurors presume that the defendant has insurance, covering the total loss and explain that in such circumstances the jury may “inflate [plaintiff’s] award,” resulting in the defendant, with no insurance, having to pay an artificially inflated award. *Id.*

196. Evidence of the *unpaid* bill would not help the plaintiff unless it is made explicit that he has no insurance that would pay for it.

197. Even though insufficient financial means is not the only reason for being uninsured, statistics suggest it is the leading reason. See U.S. CENSUS BUREAU, *supra* note 191 (pointing out that the uninsured are generally lower income residents).

198. Perhaps an exception of the collateral source rule that would make it inapplicable in cases where the plaintiff is uninsured would solve the issue of possible under-compensation. Such an exception, however, seems against public policy, because it would benefit plaintiffs, who have violated the law by not obtaining obligatory health insurance, while law-abiding victims whose insurance has unfavorable terms (such as high deductibles and insignificant write-offs) would still be disadvantaged.

2. The Uninsured in Massachusetts Are Already a Marginalized Class

One of the arguments in favor of the collateral source rule, articulated by the *Griffith* majority, is that admitting evidence of insurance payments would create a perception of the public health benefit recipients as being a “lower” class of people, whose insurance pays less than full price for their treatment.¹⁹⁹ The effect of that social stratification of plaintiffs would arguably result in a lowering of the awards for economically disadvantaged victims. The majority’s argument did not rise to a constitutional concern but was framed in terms of social policy. If, however, the court is worried about disadvantaging low income individuals (which undisputedly MassHealth recipients are),²⁰⁰ it should be just as concerned about plaintiffs who do not qualify for MassHealth and still cannot afford insurance.

An uninsured plaintiff is not necessarily a sympathetic one, because in addition to violating a state law, he or she is hindering the goals of the Massachusetts Health Care Reform Act and, presumably, is burdening society at large.²⁰¹ Considering the fact that being uninsured is a violation punishable by law,²⁰² however, it becomes important to determine the probable reasons why certain Massachusetts residents violate it. When residents are actually paying for

199. *Law v. Griffith*, 930 N.E.2d 126, 134 n.11 (Mass. 2010); see also Brief for Massachusetts Academy of Trial Attorneys as Amicus Curiae, *Law v. Griffith*, 930 N.E.2d 126 (Mass. 2010), 2008 WL 7182151, at *13 (arguing that allowing evidence for actual payments leads to “discriminatory legal treatment of the under privileged”).

200. In order to qualify for MassHealth a resident needs to meet the income requirement of having income less than 100% to 150% poverty level, except in special circumstances. See *What Are the Income Limits?*, MASS RESOURCES.ORG, <http://www.massresources.org/pages.cfm?contentID=35&pageID=13&subpages=yes&SecondLeveldynamicID=565&DynamicID=559#income> (last visited May 24, 2012).

201. The idea of mandatory coverage is that it will bring the cost of health insurance down by providing a large pool of people contributing smaller payments and by reducing emergency room losses. By virtue of the 1986 Emergency Medical Treatment and Active Labor Act (EMTALA), an emergency room (ER) cannot deny treatment to an uninsured patient. That is why, allegedly, many uninsured patients use the ER as their only health care option and then do not pay their bills, causing losses, which are subsequently passed on to the other patients by inflating the price of the ER services. Presumably, if everyone has insurance, residents will more often seek preventive care, which is cheaper than emergency care, and will have their bills paid by their insurance, avoiding losses to the provider and therefore avoiding price inflation. In this respect, being uninsured theoretically contributes to high costs of medical services to everyone. See generally Craig Richardson, *Mandatory Health Insurance: Lessons from Massachusetts*, 29 CATO J. 335 (2009), available at <http://www.cato.org/pubs/journal/cj29n2/cj29n2-7.pdf>.

202. See *supra* Part IV.C.

being uninsured, neglect and lack of foresight are hardly the default reasons anymore. While there are many possible reasons why a person would choose not to purchase health insurance, pricing appears to be one of the major reasons.

According to a study conducted by The State Health Access Data Assistance Center the bulk of the uninsured in Massachusetts are lower income individuals.²⁰³ The survey points out that the uninsured in Massachusetts are primarily single young males, members of racial or ethnic minorities, non-citizens, or people who are not proficient in the English language.²⁰⁴ Other than the “single young male” category, the rest are economically disadvantaged and already marginalized. Therefore, if the Massachusetts Supreme Judicial Court is concerned with protecting the poor, it has a good reason to worry not only about the poor insured victims (who, as *Griffith* shows, have a legitimate chance of getting a windfall)²⁰⁵ but also the uninsured poor as well (who likely will be under-compensated).

In addition to being economically disadvantaged, the uninsured in Massachusetts are already penalized for their non-compliance with the law by having their tax return reduced.²⁰⁶ Of course, the fines they have to pay for being uninsured do not confer any health care benefits and they would still have to pay out-of-pocket for any expenses incurred, presumably at full price, even when they are injured by someone else.

The public and individual benefits of mandatory health insurance are not disputed in this Note.²⁰⁷ In this respect, the penalties

203. See Sharon K. Long, Lokendra Phadera & Victoria Lynch, *Massachusetts Health Reform in 2008: Who Are the Remaining Uninsured Adults?*, SHADAC.ORG 2 (Aug. 2010), <http://www.shadac.org/files/shadac/publications/MassReform2008UninsuredBrief.pdf>.

204. *Id.* at 3.

205. *Griffith*, 930 N.E.2d at 132.

206. See *Special Topics of Interest to Massachusetts Residents*, MASS-RESOURCES.ORG, available at <http://www.massresources.org/infopages.cfm?ABPageID=93&MainParentID=93#howmuchpenalty> (last visited May 24, 2012) (providing penalty rates for the uninsured). While those penalties do not affect persons whose income is too low to require filing a tax return, it certainly has an effect on people whose income, albeit being above the Federal Poverty Guidelines, is still far from being high. In practical terms, if, for example, in 2010, a married Massachusetts couple earning between \$29,148.00 and \$36,432.00 (200%-250% of the Federal Poverty Guidelines) did not carry adequate health insurance, the couple will have to pay \$912.00 (\$456.00 each) penalty out of their 2010 tax return. See *id.* If that couple has gross income of \$43,716.00 in 2010 and both partners are older than 27, they will have to pay \$ 2,232.00 (\$1,116.00) per person. See *id.*

207. See *supra* note 201 and accompanying text.

for violation of the requirement are not challenged. It is the contention of this Note, however, that those Massachusetts residents who are uninsured or inadequately insured already pay the price for their violations and there is no justification for further penalizing them. Since applying the collateral source rule to plaintiff's medical expenses may lead to under-compensation of uninsured victims, it amounts to duplicate punishment. Certainly, uninsured individuals made the choice to break the law and bear the risk of injury on their own. However, if their injuries are caused by the negligent conduct of another, the risk of loss should be shifted to the wrongdoer and not remain with the victim.

C. *Overcompensation and Deterrence: Is a Windfall Really Inevitable?*

1. Defendants Do Not Directly Profit from Plaintiff's Insurance "Write-Offs"

The collateral source rule is based on the presumption that a windfall for one of the parties is practically inevitable: either the victim will get more than enough to make him "whole" or the tortfeasor will benefit from the victim's contract with his insurer.²⁰⁸ Therefore, since the defendant is the person whose behavior society is trying to correct, it is considered fair that she pay the full value of her wrong, even if that amounts to overcompensating the plaintiff.²⁰⁹

208. See *supra* Part I.A.1.

209. The *Griffith* majority implicitly agrees with the proposition that one of the parties to the dispute will inevitably get a windfall: either the plaintiff will receive more than his insurance paid for his service, or the defendant will pay less than the full amount the medical provider charged. The latter effect will occur if the defendant only pays the reduced price of the service. However, this reduction is a result of the *plaintiff's* insurance company negotiating lower rates with the provider and it will arguably be unfair to allow the *defendant*, the adverse party, to benefit from it. Therefore, *Griffith* suggests, it will be more just for the plaintiff, the intended beneficiary of the health insurance, to receive the windfall, and not the defendant. See *Griffith*, 930 N.E.2d at 132.

[R]educing recovery by the amount of the benefits received by the plaintiff would grant a windfall to the defendant by allowing a credit for the reasonable value of those benefits. Such credit would result in the benefits being effectively directed to the tortfeasor and from the intended party—the injured plaintiff. If there is a windfall, it is considered more just that the injured person profit rather than grant the wrongdoer relief from full responsibility for the wrongdoing.

Id.

This line of reasoning, however, is somewhat misguided, since in most cases the defendant receives no direct “benefit” from the presumably lower amount of compensation paid for the plaintiff’s medical expenses. As much as the proponents of the collateral source rule want to shy away from that fact, in reality, in personal injury cases the defendant’s liability insurance²¹⁰ is the one paying for the plaintiff’s injuries. If, for example, Mr. Griffith had no liability insurance,²¹¹ he would have had to pay Ms. Law’s health care expenses out of pocket. Only in those circumstances would it be fair to say that Mr. Griffith would personally get a windfall if he only had to pay the amount negotiated by the plaintiff’s health insurance (assuming the negotiated rate was *not* the “fair and reasonable” value of the service). If, however, what the plaintiff’s health insurance paid was in fact the fair value of the service, or if Mr. Griffith was insured, the “inevitable windfall” theory falls apart.

If Mr. Griffith had liability insurance (which is the more plausible scenario, since he was required to have it by law)²¹² and the insurance, rather than Mr. Griffith personally, paid for Ms. Law’s medical expenses, it would make no immediate difference to Mr. Griffith whether the insurance company paid \$16,000.00 or \$120,000.00. While his insurance premiums would presumably go up, that increase would hardly be influenced by the amount awarded to the plaintiff, because he would be penalized with the same amount of surcharge points.²¹³ In effect, the defendant’s in-

210. Liability insurance is required for a motor vehicle registration. *See Applying for a Registration*, MASSACHUSETTS DEPARTMENT OF TRANSPORTATION, REGISTRY OF MOTOR VEHICLES, available at <http://www.mass.gov/rmv/regs/index.htm> (last visited May 24, 2012).

211. It is not clear from the case, whether he had insurance or not. In fact, discussing the defendant’s insurance status would have been considered prejudicial in and of itself. *See* FED. R. EVID. 411; *Mangan v. Broderick & Bascom Rope Co.*, 351 F.2d 24 (7th Cir. 1965) (finding that defense counsel’s mentioning of the fact that the plaintiff carried workman’s compensation was prejudicial). *See generally* STEIN *supra* note 2, § 13:14 (discussing the limited admissibility of evidence of collateral sources).

212. *See* MASS. GEN. LAWS ch. 90, § 1A (2008); *see also* RAYMOND J. KENNEY, JR. & TERESA J. FARRIS, 12 MASS. PRACTICE, MOTOR VEHICLE LAW & PRACTICE § 25:26 (4th ed. 2008) (stating that “[s]ince the 1920’s it has been mandatory that all operators traveling on public ways and roads within the Commonwealth and all vehicles registered in Massachusetts, be covered by a compulsory motor vehicle insurance policy”).

213. *See Merit Rating Board*, MASS. DEP’T OF TRANSP., <http://www.massdot.state.ma.us/rmv/MeritRatingBoard.aspx> (last visited May 24, 2012). According to the point surcharge system, Mr. Griffith would have received four surcharge points (since the claim against him is for over \$2000) whether he paid MassHealth’s write-off price or the full amount of the bill. Points are counted and not weighed, i.e. the surcharge is based on the number of points and not directly on the severity of the damage caused. *Id.*

insurance premiums would increase at the same rate, regardless of whether his liability insurer paid the full medical bill or the discounted amount; therefore, the defendant would get no “windfall.”²¹⁴

In addition to avoiding a “windfall” to the defendant, the idea behind requiring him to pay an amount, likely higher than the actual sum paid, is that this is the only way to effectively deter the defendant from wrongdoing.²¹⁵ This “you break it, you buy it” philosophy, however, does not always serve its intended purpose when the tortfeasor is insured.²¹⁶ If the amount paid does not directly affect the insurance premiums of the tortfeasor, inflating the compensatory payment to the plaintiff beyond the limits of actual compensation would hardly deter the defendant more effectively.²¹⁷

2. Fair Compensation Does Not *Require* a “Windfall” to the Victim²¹⁸

The problems of overcompensating tort victims and juries that are overly sympathetic towards the victim have been widely discussed.²¹⁹ This Note, however, is not concerned *per se* with the is-

214. Indeed, the only party that could possibly get a “windfall” in this situation is the insurance company, which would have to pay less if the plaintiff’s health insurer had negotiated lower prices for the health care provider’s services. Therefore the defendant’s auto insurer would, in fact, benefit from the plaintiff’s contract with the plaintiff’s health insurer. This Note is not intended to decide whether or not this is justified. Rather, its focus is on the defendant, since the collateral source rule is intended to help deter him from risk-taking. And the insurer getting a windfall has no bearing on the defendant’s behavior, or his pocket, because he will be surcharged by the same amount regardless. *See supra* note 213 and accompanying text.

215. *See* 2 DOBBS, *supra* note 18, at 19 (stating that tort law “deter[s] certain kinds of conduct by imposing liability when that conduct causes harm”); *see also supra* note 16.

216. 2 DOBBS, *supra* note 18, at 44-45 (discussing the possible effects of liability insurance and stating that “anyone can justifiably entertain the suspicion that the more insurance serves the compensation goal, the less it will serve the deterrence goal”).

217. The whole deterrence idea rests on the presumption that a person will not engage in risk-taking if she is required to pay “full price” for her wrongdoing. If however, the wrongdoer has to pay the same surcharge, whether her liability insurance paid the “full” or “discounted” price, paying a bigger award will not deter the tortfeasor any more effectively than a smaller one.

218. *See generally* STEIN, *supra* note 2, § 13.3 (arguing that since the insured plaintiff did not have to pay for his own medical treatment, the compensatory goal of the tort system does not require the defendant to pay for it). This Note does not completely embrace that approach. Rather than maintaining that the damage award should be offset by the collateral payment, this Note advocates that the payment should be introduced into evidence.

219. *See generally* Nancy S. Marder, *The Medical Malpractice Debate: The Jury as Scapegoat*, 38 LOY. L.A. L. REV. 1267, 1268 (2005) (arguing that the notion that the

sue of the plaintiff getting a “windfall,” but with the shortcomings of the collateral source rule, leading to overcompensation of some victims, while depriving others of adequate compensation.²²⁰ It is the assertion of this Note that the whole notion of “inevitable windfall” is misplaced, because the “reasonable value” of a medical service is not a magical number dreamed up in a vacuum; rather, it is a function of the totality of circumstances and, as such, may vary. It is possible that a relatively modest award, influenced by evidence of low actual payments, is nevertheless still reasonable. Therefore, it is possible for the tortfeasor to pay the fair and reasonable value of the injury she caused, without overcompensating the victim.

In short, a subjective, fact-based approach should be taken in order to determine the reasonable value of a service. Indeed, such an approach may render different results for different victims, depending on the terms of their health insurance. This brings the focus back to the problem that the defendant should not benefit from the victim’s contract with a third party insurer.²²¹ The suggestion of this Note, however, is not that the collateral source payments should be subtracted from the award,²²² nor that the award should be limited to the actual payments,²²³ but simply that the jury should be allowed to consider those payments when assessing the appropriate damages. To that effect, the defendant will not directly reap

civil juries tend to award excessive compensation and thereby exacerbate the medical malpractice “‘crisis’” is misguided); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 849 (1998) (contending that juries are “excessively generous in awarding compensatory damages, and out of control when awarding punitive damages”); JOHN GUNTHER, *THE JURY IN AMERICA AND THE CIVIL JUROR 175-96* (The Roscoe Pound Foundation 1988) (discussing the phenomenon of “ordinary people” awarding “mega-verdicts”).

220. See *supra* Part V.B.

221. See *The Propeller Monticello v. Mollison*, 58 U.S. (17 How.) 152, 155 (1854); *Helfend v. S. Cal. Rapid Transit Dist.*, 465 P.2d 61, 66-67 (Cal. 1970); *Law v. Griffith*, 930 N.E.2d 126, 132 (Mass. 2010); *Shea v. Rettie*, 192 N.E. 44, 45 (Mass. 1934). The notion of incidental benefit from a third party contract is articulated in *Implement Serv., Inc. v. Tecumseh Prods. Co.*, 726 F. Supp. 1171, 1182 n.9 (S.D. Ind., 1989) (stating that an “incidental beneficiary” is “one who benefits from the contracts of another, but whose benefit was not the intent of the contracting parties”).

222. This approach was taken in the medical malpractice area. See MASS. GEN. LAWS ch. 231, § 60G (2010) (abrogating the collateral source rule in medical malpractice and providing that the award should be offset by any collateral payments minus the premiums paid by the insured to secure those benefits).

223. Such is the approach towards collateral source payments paid by Medi-Cal—California’s equivalent of MassHealth. See *Hanif v. Hous. Auth. of Yolo Cnty.*, 246 Cal. Rptr. 192, 194-95, (Ct. App. 1988) (ruling that the plaintiff is not entitled to recover an amount larger than the actual payment for his medical service, so long as that amount is reasonable).

any “benefit” from the plaintiff’s contract. At best, the tortfeasor may be indirectly advantaged, which is too speculative and tangential to be considered.²²⁴

A possible critique of this subjective approach is the risk of implicit discrimination against recipients of government sponsored health insurance.²²⁵ While there is some merit to this concern, the same argument may be used in favor of the uninsured indigent patients, who would be disadvantaged by the exclusion of evidence of actual payments.²²⁶ In reality those two “classes” of patients (the MassHealth recipients and the uninsured poor) seem to bear mirroring risks. If the collateral source rule is abolished, a MassHealth patient may indeed be viewed as a member of a marginal “class” but will not bear the risk of being under-compensated. If the collateral source rule stands, an uninsured indigent victim will not necessarily be viewed by the jury as “poor” (because it will not know the victim could not afford insurance), but will most likely be under-compensated, because the jury will assume he is insured. Since the tort system is concerned more with compensating the victim²²⁷ and less with his economic appearance to the jury, it is fair to expect it to be more disturbed by potential under-compensation of the plaintiff than by the jury perceiving him as “poor.” It is arguably correct that the “reasonable” value of a service is an indicator of the gravity of the plaintiff’s injury and therefore it affects the entire compensation of the victim.²²⁸ The jury, however, would hardly need to use this circumstantial evidence in order to determine the extent of the injury, since direct evidence and expert testimony as to the nature and severity of the injury are clearly admissible.²²⁹

224. Speculative, because it is not clear whether a smaller award will prevent the defendant’s insurance from going up; tangential, because it concerns not only the contract between the plaintiff and his health insurance, but also the contract between the defendant and her liability insurance.

225. See Brief for the Massachusetts Academy of Trial Attorneys as Amici Curiae Supporting Appellant, *supra* note 199, at *13. (arguing that allowing evidence for actual payments leads to “discriminatory legal treatment of the under privileged”).

226. See *supra* Part V.A.

227. RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (1979) (stating “the law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort”).

228. See Brief for The Massachusetts Academy of Trial Attorneys as Amici Curiae Supporting Appellant, *supra* note 199, at *18 (“[A]pplying a significantly lower price . . . gives the whole claim, including the pain and suffering aspect, an overall cheaper feel.”).

229. See 31A AM. JUR. 2D *Expert and Opinion Evidence* § 244 (2002) “Medical experts may permissibly testify as to the duration and permanency of injuries, including

Another justification of the “windfall” for the plaintiff is the belief that the extra money would be used to offset other costs, including attorney fees and future medical expenses.²³⁰ This assertion, however, is also highly speculative and premised on the assumption that the jury will not adjust its award to allow for such costs and will necessarily under-compensate the victim. In fact, eighty percent of the mock jurors in a study indicated that they discussed and factored the attorney fees the plaintiff would have had to pay in their damage assessment, even when they were not instructed to do so.²³¹ Accordingly, the notion that it is permissible to offset those costs is misguided.

D. *Redressing Punitive Damages as Compensatory*

In addition to assessing the adequate compensation for the plaintiff, the common law rule permits the jury to award punitive damages.²³² The jury, however, is not required to award such damages.²³³ One of the likely effects of the collateral source rule is to defeat the jury’s discretion and make it award punitive damages without realizing it. The *Griffith* court, for example, justified giving a windfall to the plaintiff by suggesting that the deterrent purpose of tort damages requires paying the “fair” (not discounted) value of the wrong that the defendant committed.²³⁴ The compensatory function of damage awards in *Griffith* would have been satisfied even if the defendant had had to pay only the sum of \$16,387.00 MassHealth paid. Instead, the plaintiff sought to introduce the bills totaling \$112,269.00 into evidence, and was allowed to do so.²³⁵ It is unclear how much the jury would have been likely to award on remand, but, technically, the purpose of any amount over the actual sum paid is to deter and not to compensate. As such, the extra amount fits within the definition of “punitive damages.”²³⁶

such things as the effect of an injury on a person’s ability to work.” *Id.* (footnotes omitted).

230. *See supra* note 56.

231. *See* GREENE & BORNSTEIN, *supra* note 166, at 169.

232. 1 DOBBS, *supra* note 18, at 1062.

233. *Id.*

234. *See* Law v. Griffith, 930 N.E.2d 126, 132 (Mass. 2010) (“The purpose of the collateral source rule is tort deterrence. The tortfeasor is required to compensate the injured party for the fair value of the harm caused, and is not to benefit from [the victim’s] contractual arrangements.”).

235. *Id.* at 129.

236. *See* BLACK’S LAW DICTIONARY 1354 (9th ed. 2009) (defining punitive damages as damages “assessed by way of penalizing the wrongdoer or making an example to others”); *see also* Lopez v. Safeway Stores, Inc., 129 P.3d 487, 491 (Ariz. Ct. App.

This approach is questionable for two reasons. First, it would duplicate the punitive damages that the defendant would have to pay or would substitute them (if the jury chooses not to award punitive damages).²³⁷ Second, it ignores the fact that the defendant's liability insurance might ultimately pay the bill and that, as a result, the economic effect on the defendant would be, at best, indirect.²³⁸ Generally, punitive damages are not covered by liability insurance.²³⁹ When the damages are labeled "compensatory," however, they would be paid by the insurer, leading to overcompensating the victim without effectively deterring the wrongdoer, and simultaneously contributing to higher liability insurance premiums.

It appears that the collateral source rule, applied in the context of Massachusetts personal injury cases, can confuse the jury in many aspects. The rule does not allow the jury to know if the plaintiff had health insurance, and it fosters a reasonable presumption that he was insured. It disallows evidence of actual payments and thereby makes it highly likely that the jury will either under-compensate the plaintiff or grant him a windfall. Often the rule may lead the jury to believe it is compensating the plaintiff, while it is, in fact, punishing the tortfeasor. In the meantime, the rule provides no real benefit to any party, other than to a plaintiff whose insurance negotiated exceptionally low rates with the health care provider. This was the case in *Law v. Griffith*, and as a result, the plaintiff could have ultimately walked out of the courtroom with \$95,882.76—the difference between what her insurer paid for her treatment and what her medical provider billed the insurer.

CONCLUSION

The collateral source rule should be repealed in Massachusetts, because in a state where both health insurance and liability insurance are mandatory, the traditional rationales for the rule are irre-

2006) (stating that "[i]n many respects, the [collateral source] rule is punitive") (internal quotation marks omitted).

237. Awarding punitive damages generally requires that the defendant act with "recklessness, malice, or deceit." BLACK'S LAW DICTIONARY 1354 (9th ed. 2009). From the facts in *Griffith*, it does not seem that the defendant's conduct rose to that level.

238. See discussion *supra* Part C.1.

239. See, e.g., *Santos v. Lumbermens Mut. Cas. Co.*, 556 N.E.2d 983 (Mass. 1990) (ruling that punitive damages are not recoverable under either of both defendants' insurance policies"); see also *Insurability of Punitive Damages*, MCCULLOUGH, CAMPBELL & LANE LLP (2004) http://www.mcandl.com/puni_frame.html (stating that "[t]ypically, courts that have concluded that punitive damages ought not to be insurable").

versibly antiquated. The rule does not effectively serve to deter the wrongdoer, because her liability insurance pays for the damage. It does not guarantee adequate compensation of the victim, as it creates the risk of under-compensating some plaintiffs, while overcompensating others. Since the rule is counterintuitive when insurance is presumed, it does not prevent jury confusion but instead exacerbates it.

Overall, the shortcomings of the collateral source rule in Massachusetts significantly outweigh its benefits. Moreover, concerns, such as the risk that a jury would under-evaluate an insured plaintiff's injury, are more appropriately addressed with jury instructions,²⁴⁰ rather than by "blindfolding" the jury. For all these reasons, the rule should be abrogated and the jury should be allowed to factor the actual payments of medical expenses into its compensatory damages award.

While mystifying the behavior of a character like Oscar Wilde's Lady Alroy adds dramatism and suspense to a literary piece, obscuring a plaintiff's insurance in Massachusetts has no such creative value. Made obsolete by our contemporary reality, the collateral source rule serves no meaningful purpose; it simply perpetuates the "mystery" of a Sphinx without a secret.

*Tsvetelina Gerova-Wilson**

240. See LAURENCE H. GELLER & PETER HEMENWAY, *THE JUROR'S LONELY QUEST: LAST CHANCE FOR JUSTICE* 289 (NCDS Press 1977) (stating that "jury instructions, properly and promptly given, can make the law understandable and have tremendous potential for empowering jurors and for streamlining our current system").

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