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The Collateral Source Rule in the American Law of Damages

It is an undisputed principle of American law that injured persons cannot allow their injuries to expand if they are able to take reasonable steps to prevent such expansion. Further, benefits accruing to the injured party which are the result of the wrongful act should be credited to the defendant in any award of damages. This principle, however, is not without its exceptions, the most important of which is the collateral source rule. This maxim denies to the wrongdoer credit for reparations made to the injured party from sources other than the wrongdoer. In his Article, Dean Maxwell examines the development and present status of the collateral source rule in terms of four types of benefits received—insurance, employment benefits, gratuities, and social legislation benefits. He concludes, although not without reservations, that the rule at best “operates as an instrument of what most of us would be willing to call justice.”

Richard C. Maxwell*

INTRODUCTION

A pervasive principle in damages law is the doctrine of avoidable consequences. Injured persons cannot allow their injuries to expand through natural deterioration of the situation in which they have been left but must take reasonable steps to change the course of events and thus avoid all or part of the consequences of the wrongdoer's acts.¹ A related idea has culminated in the rule that

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1. MCCORMICK, DAMAGES 127 (1935). The research for this article was done in the course of preparing a revision of this treatise. The collateral source doctrine was not given separate treatment in 1935 but was men-

benefits to the injured party which are the result of a wrongful act should be credited to the defendant in an award of damages for the resulting harm.² These ideas have been subjected to many limitations.³ Perhaps the most important of these is the widespread judicial refusal to credit to the benefit of the wrongdoer money or services received in reparation of the injury caused which emanate

tioned at various places in the text. The increasing interest in the doctrine and the large number of cases which have been decided since the first edition of McCormick's *Damages* justifies a coverage of the problem as a separate section in the Avoidable Consequences chapter. This article will be used as the basis for such a section.

2. The most obvious application of this idea is in the field of damages for breach of contract where savings to the plaintiff by virtue of not having to perform his side of the agreement and the returns from utilization by the plaintiff for other purposes of the goods or facilities relieved from the performance obligation by the defendant's breach must be credited to the defendant in determining the net loss as the basis for an award of damages. *Isbrandtsen Co. v. Producers Cotton Oil Co.*, 158 Cal. App. 2d 712, 322 P.2d 1005 (Dist. Ct. App. 1958); 5 CORBIN, CONTRACTS § 1038 (1951). The standard examples of the application of the doctrine in tort damages involve trespasses to land which are beneficial to the land such as the unauthorized digging of useful drains. *E.g.*, *Burtraw v. Clark*, 103 Mich. 383, 61 N.W. 552 (1894) (new trial ordered to allow trespasser to show that drain was beneficial in which case nominal damages were said to be appropriate—some indication that result would be different if landowner were taking steps to refill the drain); compare *Dandoy v. Oswald Bros. Paving Co.*, 113 Cal. App. 570, 298 Pac. 1030 (Dist. Ct. App. 1931) (dirt piled on land which did not decrease value—recovery of amount necessary to put the land in its original condition).

3. *E.g.*, many cases hold that a buyer need not avoid consequences by entering into a forward contract for the purchase of goods to replace those which were to be furnished under a contract repudiated by the seller but may recover on the basis of the market price at the time of performance without taking any action after the repudiation. An explanation of this result is that the action which the defendant attempts to require of the plaintiff is one which the defendant can also undertake if he wishes protection. 5 CORBIN, CONTRACTS § 1053, at 265 (1951); *Reliance Cooperage Corp. v. Treat*, 195 F.2d 977 (8th Cir. 1952), discussed in 37 MINN. L. REV. 215 (1953). Also in the administration of the rule requiring the crediting of benefits it has been held that a profit and loss balance will not be struck in such essentially nonpecuniary situations as are illustrated by *Morris v. St. Paul City Ry.*, 105 Minn. 276, 117 N.W. 500 (1908), where the court refused to instruct a jury that the damages awarded for pain resulting from the miscarriage which was found to be a result of the defendant's act should be considered in the light of the fact that the injured plaintiff would have suffered some pain from childbirth in the normal course of events. *Cf.* *Thompson v. Town of Fort Branch*, 204 Ind. 152, 178 N.E. 440 (1931); *Annot.*, 82 A.L.R. 1423 (1933), where amount recoverable by father for funeral expenses of minor child was held not subject to reduction by amount by which cost of maintenance of child would have exceeded value of child's services. Compare *Maben v. Rankin*, 55 Cal. 2d 139, 358 P.2d 681 (1961), suggesting that in an action for unlawful detention in a psychiatric ward the defendant physician may be entitled to be credited with any benefit conferred by the treatment given during the detention.

from sources other than the wrongdoer.⁴ This limitation has become known as the collateral source rule. The purpose of this Article is to examine its development and present status in American law.⁵

An early American case applying the doctrine is *Althorf v. Wolfe* decided by the New York Court of Appeals in 1860.⁶ Counsel for the defendant in a wrongful death case asked for an instruction that the proceeds of the deceased's insurance policy which had been received by the plaintiff widow should be considered by the jury in assessing the damages. The instruction was not given and the Court of Appeals affirmed without discussion of this issue. Perhaps the court thought it too obvious to be worth discussing that the early accrual of benefits under a life insurance contract in which the deceased had invested was not a benefit which his widow must deduct when suing for his wrongful death. In 1871, however, the Vermont court, in deciding that a policy of accident insurance was "collateral" and not to be taken into account in a personal injury action,⁷ noted that Lord Campbell in an unreported *nisi prius* decision had instructed the jury that life insurance benefits should be deducted in a death case.⁸ The Vermont

4. Sums received by the injured party from the wrongdoer in reparation of the damage are credited to him in computing the damages. *United States v. Brooks*, 176 F.2d 482 (4th Cir. 1949). Sums received from joint tortfeasors in return for a covenant not to sue are usually handled so as to produce a credit to those remaining in the suit. *New York, C. & St. L.R.R. v. American Transit Lines*, 408 Ill. 336, 97 N.E.2d 264 (1951). The joint tort-feasor problem is discussed in 12 N.Y.U.L. REV. 146 (1934) and 44 ILL. L. REV. 831 (1950).

5. The doctrine has had some recent discussion from both sides of the personal injury docket. Lubin, *The Collateral-Source Doctrine*, 4 TRIAL LAWYER'S GUIDE 337 (1960); Norris, *The Collateral Source Doctrine: An Increasing Problem*, 1959 INS. L.J. 488. A fine policy analysis of the various situations to which the doctrine has been applied is James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U.L. REV. 537, 544 (1952); see also 2 HARPER & JAMES, TORTS § 25.22 (1956). Various aspects of the doctrine are treated in RESTATEMENT, TORTS § 920(e), § 924(c), (f) (1939). The law of the New England states is emphasized in Schwartz, *The Collateral-Source Rule*, 3 B.U.L. REV. 348 (1961). A short recent discussion is Comment, 63 W. VA. L. REV. 177 (1961).

6. 22 N.Y. 355 (1860). This case has been called the earliest American case. See O'Connor, *The "Collateral Source" Rule and Full Special Damages*, 1957 TRIAL & TORT TRENDS 642, 645, but *The Propeller Monticello v. Mollison*, 58 U.S. (17 How.) 152 (1854), applies the doctrine in a case involving the collision of an insured ship.

7. *Harding v. Town of Townshend*, 43 Vt. 536 (1870). This case has been credited with first using the term "collateral" to describe a benefit of the sort involved in this article. Averbach, *The Collateral Source Rule*, 21 OHIO ST. L.J. 231, 233 (1960).

8. For a discussion of modern English law on the problem of private insurance benefits, see Notes, 80 L.J. 210 (1935); 76 L.Q. REV. 345 (1960).

court did not approve of this result but found it "less objectionable" than in the case before them to allow the deduction of the proceeds of an accident policy which is, they said, "in the nature of a wager between the plaintiff and a third person, the insurer . . ."⁹ Thus, the pattern for the application of the collateral source rule in tort cases involving insurance was established.¹⁰ This type of case is the most frequently encountered of those in which the rule has been utilized. This Article will examine the subject in terms of the types of benefits received.

I. INSURANCE PROCEEDS

Typically, the insurance cases make no distinction in relation to the type of insurance involved nor do they usually rest upon a stated conclusion that double recovery is avoided because the insurer is subrogated to the rights of the insured.¹¹ The statement in

Generally, such benefits are not taken into account in assessing damages. The problem of social insurance payments in England is mentioned in note 84 *infra*. See also Note, 6 AUSTL. L.J. 225 (1932).

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

10. In *United Protective Workers v. Ford Motor Co.*, 223 F.2d 49 (7th Cir. 1955), an action for breach of an employment contract, the court affirmed a ruling that the damages should be reduced by the amount of social security and retirement annuity payments received by the plaintiff worker during the period he was improperly retired. The opinion states: "We have been unable to find a single case in which this rule [the collateral source doctrine] has been carried over to contract damages." *Id.* at 54. Compare, however, *Lee v. Burrell*, 51 Mich. 132, 16 N.W. 309 (1883), where, in a suit for breach of contract to pay the plaintiff's debts, it was shown that, by virtue of the defendant's failure to perform, the property of the plaintiff was sold on execution. The court held that the fact that plaintiff's friends purchased the property for him at the sale was immaterial in the assessment of the damages. In *Brewster v. Silverstein*, 133 N.Y. Supp. 473 (Sup. Ct. 1912), the proceeds of a policy insuring rents were held immaterial in a suit for rent by the insured landlord. The tort influence in the theory of implied warranty is perhaps a factor in *Donohue v. Acme Heating Sheet Metal & Roofing Co.*, 214 Minn. 424, 8 N.W.2d 618 (1943), where damages for breach of implied warranty of an oil heater were not reduced by the proceeds of insurance for smoke damage.

11. It seems settled that insurers under life and accident policies are not entitled to subrogation. VANCE, *INSURANCE* 679 (2d ed. 1930). Some cases do tie the collateral source rule to the existence of a right of subrogation in the insurer. *E.g.*, *Mayor of N.Y. v. Pentz*, 24 Wend. 668, 671 (N.Y. Ct. Err. 1840), which states:

If the underwriters are not entitled to be repaid the amount of damages which they make good, then it must follow that the amount which may have been, or may hereafter be received of them, must so far diminish the total amount of damages, which the owners of the property destroyed have sustained . . .

A similar idea is stated in *Merrick v. Brainard*, 38 Barb. 574, 589 (N.Y. Sup. Ct. 1860). Statements in recent cases on the subject range from observations that the collateral source rule exists "to implement the insurance company's right of subrogation," *Consolidated Freightways, Inc. v. Moore*,

the familiar case of *Perrott v. Shearer*¹² is representative. The answer given there to a double recovery argument is that the plaintiff "recovers but once for the wrong done him, and he receives the insurance money upon a contract to which the defendant is in no way privy, and in respect to which his own wrongful act can give him no equities."¹³

Although the principle became settled in its present form quite early in most states, it has come again and again before the appellate courts.¹⁴ The idea that the right to recover full damages exists in spite of insurance payments and without regard to subrogation is apparently not obvious. Suits are brought from time to time on the theory that the insurance proceeds must be deducted¹⁵ and

38 Wash. 2d 427, 430, 229 P.2d 882, 884 (1951), to the reasoning in *Publix Cab Co. v. Colorado Nat'l Bank*, 139 Colo. 205, 229, 338 P.2d 702, 715 (1959), involving a claim of a hospital association for the value of medical services furnished to the injured plaintiff under an employee's plan that a "ruling in favor of subrogation in this case would undermine the principle that one who carries health and hospital insurance nevertheless has a right to recover these amounts from the wrongdoer." Compare the attempt of the United States Court of Appeals to ascertain Colorado law on the question of the effect of the receipt of employment benefits on the employee's suit for damages against a third party wrongdoer. *United States v. Gaidys*, 194 F.2d 762 (10th Cir. 1952).

12. 17 Mich. 47, 56 (1868). Familiar because it is utilized to present the doctrine in the most widely used casebook on Damages, McCORMICK & FRITZ, *CASES ON DAMAGES* (2d ed. 1952). For what it is worth, students are invariably shocked by the case until the idea of subrogation is brought into the discussion.

13. Bizarre grounds for the doctrine can be found in some of the multitude of cases. Thus, in *Western & Atl. R.R. v. Meigs*, 74 Ga. 857, 868 (1885), the court met an argument for the consideration of life insurance proceeds in a wrongful death action with the suggestion that if the recovery could thus be reduced, it might be insisted that, where the husband's life was insured for more than she was allowed to recover under the law . . . the [defendant] company could claim a balance against the family of the deceased, on the idea that the killing of the husband and father was a positive pecuniary benefit

The reasons given for the doctrine have had little relation to the type of insurance involved. Although accident insurance does not have the investment features usually associated with life insurance, *Cornish v. North Jersey St. Ry.*, 73 N.J.L. 273, 274, 62 Atl. 1004, 1005 (Sup. Ct. 1906), an accident insurance situation, stated that the tort-feasor "was no more entitled to be credited with the sums repaid to the plaintiff under such contracts than it would be to his withdrawal of his accumulations in a savings bank." The special problem of wrongful death actions against an employer who has furnished life insurance to the deceased employee is considered in Note, 15 Wyo. L.J. 232 (1961).

14. There are over 100 appellate cases on the question. Some of them are cited in *Annots.*, 18 A.L.R. 678, 683 (1922), 81 A.L.R. 320 (1932), 95 A.L.R. 575, 577 (1935).

15. A judgment obtained in such a suit bars further recovery. *Weber v. Morris & Essex R.R.*, 36 N.J.L. 213 (Sup. Ct. 1873); *Moultrou v. Gorham*, 113 Vt. 317, 34 A.2d 96 (1943).

the argument that the insurance company alone can maintain the suit after it has paid the claim is perennially made and denied except on special procedural grounds.¹⁶ Putting the fact that plaintiff has been reimbursed by an insurance company in evidence before a jury has been held to be prejudicial error,¹⁷ but there is some indication that where such an error occurs in a case where the insurer is subrogated to plaintiff's claim an instruction to that effect will cure the error.¹⁸ Be that as it may, the fact that a statute has made it illegal for the insurer to take any part of the insured's recovery against the wrongdoer has been held not to require the deduction of the proceeds of the insurance from the amount to be awarded insured in his suit for damages which is based on the same injury which has already been the subject of a payment by the insurance company.¹⁹

If there is a trend, it is probably in the direction of extending the application of the collateral source rule in the insurance cases. The Kentucky court recently overruled an earlier decision involving a hospital service plan which denied recovery for the value of the hospital and medical services furnished under the plan.²⁰ The court in the later decision stated that the only concern of the wrongdoer with such an arrangement "is that he not be required to pay twice."²¹

16. *Powers v. Ellis*, 231 Ind. 273, 108 N.E.2d 132 (1952); *Illinois Cent. Ry. v. Hicklin*, 131 Ky. 624, 115 S.W. 752 (1909). See *Annot.*, 96 A.L.R. 864 (1935), on the procedural variations under various statutes. An interesting modern case raising the real party in interest question is *Anheuser-Busch, Inc. v. Starley*, 28 Cal. 2d 347, 170 P.2d 448 (1946), where a shipper, having been paid for the injury to its goods in transit by the carrier, sued the third party tort-feasor for damages. The court found that the position of the carrier in the situation before it was analogous to an insurer. The collateral source rule was applied and the court found that the shipper's position satisfied the California requirements for a real party in interest. The court found it necessary, however, to adjust the rules as to the availability of the defense of contributory negligence so as not to deprive the defendant of his right to assert such a defense. Mr. Justice Traynor, in a strong dissent, advances the proposition that the shipper is not properly considered the real party in interest. See the discussions in 34 CALIF. L. REV. 769 (1946); 42 ILL. L. REV. 129 (1947); 24 N.D. BAR BRIEFS 11 (1948). An interesting recent analysis of the situation in one state is *Comment*, 26 Mo. L. REV. 62 (1961).

17. *Evans v. Chicago, M. & St. P. Ry.*, 133 Minn. 293, 158 N.W. 335 (1916); *Kickham v. Carter*, 335 S.W.2d 83 (Mo. 1960); *Bliss v. Moore*, 112 Vt. 185, 22 A.2d 315 (1941).

18. *Moidel v. Peoples Natural Gas Co.*, 397 Pa. 212, 154 A.2d 399 (1959).

19. *Rhinehart v. Denver & R.G.R.R.*, 61 Colo. 369, 158 Pac. 149 (1916).

20. *Sedlock v. Trosper*, 307 Ky. 369, 211 S.W.2d 147 (1948). See *Annot.*, 13 A.L.R.2d 355 (1950).

21. *Conley v. Foster*, 335 S.W.2d 904, 907 (Ky. Ct. App. 1960).

The cases which do not apply the collateral source rule in the simple case where the plaintiff has obtained insurance which covers the harm which the defendant causes are few and somewhat dubious in their holdings. In *Congdon v. Howe Scale Co.*,²² for example, the fact that the plaintiff had been paid under a policy of accident insurance was shown on cross-examination and the court "presumed" on appeal that the trial court admitted it on the issue raised by the defense "that the plaintiff's injuries were slight, and largely feigned."²³

The idea that the collateral source rule is a doctrine for tort cases²⁴ is borne out in several decisions involving contract claims which the plaintiff's insurance has compensated. In two of these the defendant's contract was to supply water to protect the plaintiff's property from fire. The fire occurred, the contract was breached and the plaintiff was reimbursed by his insurance company for the resulting destruction. One case said:

Such property so insured was not under the protection of the contract with defendant, because that property so covered by insurance . . . was not a loss to plaintiff . . . [H]e cannot recover its value from defendant; otherwise he could recover double compensation, which the law does not permit in such cases.²⁵

The other case pointed out that the plaintiff "had two contracts protecting him against the loss of his property. He is entitled to be made whole, and when he has collected on one of his contracts a part of his loss, he can only collect on the other the remainder."²⁶ Thus, the damages recoverable for breach of contract are reduced to the extent of the proceeds of the insurance.

Can the plaintiff elect which of his protective contracts he will take shelter under? The reluctant insured in *Anderson v. Rexroad*²⁷ sued for the destruction of her house as a third party beneficiary under a contractor's agreement with a city by which the contractor undertook that "all losses or damages arising from the nature of the work to be done, from the action of the elements, or from unforeseen circumstances or difficulties shall be sustained by the contractor." The defendant contractor brought the matter of

22. 66 Vt. 255, 263, 29 Atl. 253, 255 (1894).

23. In *Morton v. Washington Light & Water Co.*, 169 N.C. 468, 86 S.E. 294 (1915), and in *Skelly Oil Co. v. Johnston*, 151 S.W.2d 863 (Tex. Civ. App. 1941), the opinions assume, without discussion, that the proceeds of insurance are to be deducted from the recovery.

24. See note 10 *supra*.

25. *Warren Co. v. Hanson*, 17 Ariz. 252, 260, 150 Pac. 238, 241 (1915).

26. *Georgetown Power Co. v. Neale*, 137 Ky. 197, 206, 125 S.W. 293, 296 (1910).

27. 180 Kan. 505, 507, 306 P.2d 137, 140 (1957).

the plaintiff's insurance into the case and the plaintiff countered with affidavits from herself and her insurer tending rather ambiguously to show that no formal claim had been made or paid. The plaintiffs, said the court, "had a duty to mitigate their damages" and "the fact that they refrained from collecting from the insurance company the amount alleged to be due . . . did not preclude the trial court from instructing the jury to reduce the total replacement cost of the dwelling by such amount."²⁸

It seems at least arguable in the *Rexroad* case that the contractor's undertaking to sustain the losses which might result from the unusual risks that the work he was being paid to do involved should accrue to the benefit of insurers paying claims resulting from that work. The contractor's agreement here is essentially a limited insurance agreement, the subject matter of which is, to some extent at least, under the control of the insurer. It might well be asked whether this argument does not also cover the cases involving contracts to furnish water to fight fires where the promisor has control of the subject matter and thus should bear the loss when his promisee's house burns down as the result of a breach. Although there is nothing shocking about such a result, the cases are distinguishable on a sound basis. An agreement to perform a service, *i.e.*, to furnish water, and an agreement to bear losses are clearly different in nature without regard to the element of control. The notion of control imports the element of fault into these cases where perhaps it has no place. Possibly the matter should be decided simply on the basis of the nature of the contractual burden assumed by the parties between whom we are trying to choose in placing the ultimate obligation for paying the damages.²⁹ If, however, we cannot make a choice between loss bearers on this basis, should we then say that the choice rests with the plaintiff, depending on which of his remedies he wishes to pursue?³⁰ At this point the factor of the direct connection and

28. *Id.* at 517, 306 P.2d at 147.

29. A difficulty in the *Rexroad* case may be the construction which had been placed on the contract in a previous decision, by which the court writing the opinion was bound, to the effect that the agreement was intended to protect the residents of the city as well as the city itself, thus giving the plaintiff in the case a direct contractual action. *Id.* at 506, 306 P.2d at 139.

30. In *General Motors Acceptance Corp. v. Keran*, 314 Ill. App. 320, 41 N.E.2d 211 (1942), plaintiff employer sued in the form of a creditor's bill to have applied to its judgment against its employee the liability of an insurance policy issued by defendant which allegedly covered the employee's liability for injuries caused while the employee was using a certain automobile. The employer had paid the damages and recovered the amount from its insurer. One basis for the court's affirmance of a judgment for the defendant insurer was stated as follows: "We know of no rule of law that permits a party who has paid a legal tort liability, for which it has been reim-

partial control of the contractor in a case like *Rexroad* might furnish a rational basis for imposition of the burden.³¹

The collateral source rule is a factor, too, in the cases where the benefits of one insurance policy are claimed by two parties. Thus, in a recent decision,³² the buyer of machinery on credit agreed to insure against fire but the agreement provided "that destruction of the equipment should not relieve the bankrupt from liability for the full purchase price." The buyer did not insure but the seller did procure insurance on its own initiative. Fire destroyed the equipment and the trustee in bankruptcy of the buyer claimed the proceeds of the insurance policy as a credit on the seller's claim for the unpaid purchase price. One alternative considered by

bursed by an insurance company, to recover a like amount from another insurance company." *Id.* at 323, 41 N.E.2d at 212. There was no suit brought by the persons injured by the employee's negligence against the employee because the employer settled the claim. If such a suit had been brought, would not the defendant insurance company in the principal case have had to pay, assuming coverage by its policy of employee's liability? Should the fact of the settlement throw the burden on the employer's insurance company? The factors which should be considered in solving problems arising out of situations in which "two persons are under obligation or other risk to a third person, who, however, is entitled either legally or equitably to but one performance" have been stated to be:

agreement, command, fault, normal fault, control, the operation of a dangerous instrumentality or the creation of a dangerous situation, difficulty of proof, form of undertaking or other manifestation of understanding, variation of risk, and a proper imposition of the cost of insurance.

Campbell, Non-Consensual Suretyship, 45 YALE L.J. 69, 104 (1935).

31. Some support for this proposition is found in the arguably analogous situation of *Grubnau v. Centennial Nat'l Bank*, 279 Pa. 501, 124 Atl. 142 (1924), where in a suit by a depositor against a bank for the benefit of a surety company which had paid to the depositor the sums paid out from depositor's account to a forger the argument was made for the bank that the depositor "had recourse against two persons to recover loss and as it could only be made whole, the extent of recovery from one must be accounted for in an action against the other" *Id.* at 504, 124 Atl. at 143.

The court answered that the depositor's claim was against first, an insurer; second, a company refusing to pay money in violation of the terms of its contract. The remedies cannot surely be considered in the same right. The insurance was not in ease of the bank's mistake. It would be a novel proposition to hold that an insurance contract could reach out to indemnify a stranger, in no way a party to the insurance, whose wrongful act caused the insurance company to pay loss to the insured which would not have occurred but for the wrongful act. Such protection would be given without cost or contractual relation, merely because the person wronged chooses to collect from the insurance company first, rather than the bank

Id. at 504-05, 124 Atl. at 143-44. *Accord*, *Wormhoudt Lumber Co. v. Union Bank & Trust Co.*, 231 Iowa 928, 2 N.W.2d 267 (1942); *Napolitano v. Manhattan Sav. Bank*, 295 N.Y. 727, 65 N.E.2d 430 (1946).

32. In the *Matter of Future Mfg. Co-op.*, 165 F. Supp. 111 (N.D. Cal. 1958).

the court was to allow the seller "to recover and retain both the full purchase price of the insured goods and the insurance proceeds."³³ The court found this alternative unsatisfactory as running counter to "the public policy against a double recovery as well as that against placing an insured in a position where he might be tempted to cause a loss or be careless to prevent it."³⁴ After a review of the authorities in the area and a consideration of other alternatives the court decided, in effect, to reject the application of the collateral source rule in this situation and to give the buyer the benefit of the vendor's insurance by allowing the seller "to recover the purchase price less the insurance proceeds."³⁵ The fact that the buyer had breached its contract to carry insurance was considered immaterial by the court, the question being stated simply in terms of "the effect of the payment received [by the seller] under its fire policy upon its contractual right to recover the balance of the purchase price from the bankrupt"³⁶

Since such cases resolve themselves into questions of where primary and secondary responsibility lie and ultimately where the final loss should fall, it would seem that a party who pays premiums on property insurance pursuant to contract should be in a better position to claim the ultimate benefit of the proceeds of such insurance than one who has breached his obligation to carry insurance. Yet in one case from the Court of Civil Appeals of Texas³⁷ a party in possession of a building under a lease which "provided for the payment of the premiums for such insurance as a part of the rent" was not given the benefit of the proceeds of such insurance in the suit which resulted from the burning of the building. The court gives as a reason the fact that "no legal privity exists between the lessee and the insurance company which would give such lessee a right to avail itself, as a defense, of the payment of insurance to the insured lessor."³⁸ The fact that both the assignee

33. *Id.* at 113.

34. *Ibid.*

35. *Ibid.* Detailed discussion of the numerous complexities of situations such as this one are found in King, *Subrogation Under Contracts Insuring Property*, 30 TEX. L. REV. 62 (1951); Langmaid, *Some Recent Subrogation Problems in the Law of Suretyship and Insurance*, 47 HARV. L. REV. 976 (1934); Note, 28 COLUM. L. REV. 202 (1928).

36. In the Matter of Future Mfg. Co-op., 165 F. Supp. 111, 112 (N.D. Cal. 1958). The court stated that to subrogate the insurer to the vendor's rights would normally give "the insurer a windfall if . . . its rates are not fixed in anticipation of such a collateral recovery." *Id.* at 113. See the discussion in 72 HARV. L. REV. 1380, 1382 (1959).

37. *Publix Theatres Corp. v. Powell*, 44 S.W.2d 1053, 1056 (Tex. Civ. App. 1931).

38. *Id.* at 1056.

of the lease in possession without the consent of the lessor and the original lessee were found negligent is a far better reason for ascribing such ultimate responsibility.³⁹

In *Monsanto Chem. Co. v. American Bitumuls Co.*⁴⁰ an agreement by the owner of chemicals to obtain "adequate insurance" for the benefit of itself and the party to whom possession was being delivered was breached by the owner who took a policy which insured only its own interest. In an action for the loss of the chemicals in a fire resulting from the negligence of the party in possession it was held that the agreement to carry "adequate insurance" had the effect of making the proceeds of the insurance policy actually obtained a satisfaction in full of the owner's claim against the party in possession for negligence. The result of such a holding is, of course, to throw the loss, so far as the lawsuit in which it is rendered is concerned, on the insurer of the owner. The court does point out that the failure of the owner to advise the insurer of its agreement with the possessor "is a matter of concern only between [the owner] . . . and its insurers."⁴¹ It is possible that the insurer would have a remedy against the owner in a separate suit to recover the amount paid under the policy.⁴²

II. EMPLOYMENT BENEFITS

Most of the cases involving payments to an employee by an employer during the period of a disability of the employee brought about by the wrongful act of a third party apply the collateral source rule and refuse to reduce the damages by the amount of the payments. The insurance cases are frequently relied on in these decisions, and the conclusion is also supported by reference to the common distinction drawn in personal injury damages between recovery for loss of wages, as such, and for "loss of time."⁴³ There

39. The usual rule allowing subrogation to the insurer of a lessor against the lessee without regard to legal fault is explained in 72 HARV. L. REV. 1380, 1381 (1959), as perhaps resting on "the desire to mitigate the harshness of the risk-of-loss rule when it places the loss on a party not in possession."

40. 249 S.W.2d 428 (Mo. 1952).

41. *Id.* at 431.

42. Many complexities are involved in the maintenance of suits by insurers against insureds based on the failure to disclose relevant facts at the time the insurance contract is entered into. VANCE, INSURANCE 364 (3d ed. 1951).

43. *E.g.*, Nashville, C. & St. L. Ry. v. Miller, 120 Ga. 453, 47 S.E. 959 (1904); Ohio & Miss. Ry. v. Dickerson, 59 Ind. 317 (1877); Shea v. Rettie, 287 Mass. 454, 192 N.E. 44 (1934); Motts v. Michigan Cab Co., 274 Mich. 437, 264 N.W. 855 (1936); Denco Bus Lines v. Hargis, 204 Okla. 339, 229 P.2d 560 (1951); McCORMICK, DAMAGES § 87 (1935); Note, 68 L.Q. REV.

is a tendency for the opinions to be apologetic about the rule and to seek a justification that tends to show that plaintiff was actually out of pocket in the matter. In a case where accumulated sick leave under the plaintiff employee's contract replaced the wages lost when plaintiff was injured the court indicated that the collateral source rule should be applied since plaintiff had "lost the benefit of such sick leave for future needs."⁴⁴

Refusal to apply the doctrine in the case of an employer's payments to an employee, however, has been confined to a small number of jurisdictions. Certainly the most famous case in this category is *Drinkwater v. Dinsmore*, a New York decision.⁴⁵ The issue on appeal was the propriety of a question asked by defense counsel of plaintiff: "During the time when you were sick with this broken leg, were not your wages paid for by this Knickerbocker Ice Company [the employer]?"⁴⁶ The Court of Appeals held that it was error to sustain an objection to this question, which was designed, said the court, to show that plaintiff "did not suffer the damages claimed, to wit: the loss of wages."⁴⁷ The language of the opinion is broad enough to cover wages paid during a period of disability under the contract of employment or "from mere benevolence." The opinion in *Drinkwater* is not on its face decisive of a case where the plaintiff's suit is framed in terms of loss of time rather than for the recovery of lost wages as such, but the New York rule has apparently not been understood or administered in this limited fashion. Rather, it is applicable to any payment of wages to an incapacitated plaintiff employee by his employer.⁴⁸ A recent opinion written at the trial level in New York distinguished *Drinkwater* on the ground that the payments in that case were "voluntary payments of plaintiff's salary" and that in the case before it the plaintiff had been paid under a contractual provision for sick leave and was "obliged to relinquish the substantial right to sick leave benefits for the wages which he received."⁴⁹ The distinction between the gratuitous and the con-

150 (1952). Numerous cases on all aspects of the problem are collected in Annots., 18 A.L.R. 678 (1922), 95 A.L.R. 575 (1935), 128 A.L.R. 686 (1940).

44. *Martin v. Sheffield*, 112 Utah 478, 487, 189 P.2d 127, 131 (1948).

45. 80 N.Y. 390 (1880). A discussion of the New York situation and of the general problem is in N.Y. L. REV. COMM. REP. 221 (1957).

46. 80 N.Y. at 391.

47. *Id.* at 392.

48. See the N.Y. L. REV. COMM. REP. 237 (1957). The New York cases suggest that if the employee has agreed to reimburse the employer out of any recovery for payments made the *Drinkwater* rule does not apply. See *Landon v. United States*, 197 F.2d 128, 131 (2d Cir. 1952).

49. *D'Amico v. Resnik*, 197 N.Y.S.2d 826, 829 (Sup. Ct. 1960). See

tractual payment has cut both ways on the matter of allowing a third party tort-feasor to take advantage of payments made to an employee plaintiff by his employer. Alabama, which has authority similar to the usual New York rule,⁵⁰ has also held that a donation by the employer to the employee after the salary was stopped was "a matter with which the defendant had no concern."⁵¹

Pennsylvania has made the application of the collateral source rule in this type of case turn on whether the employer's payments are gratuities or continuations of wages⁵² without seeming to make the distinction turn on whether the payment is a matter of contract. In one case where an injured employee performed some limited services and continued to receive his usual salary, recovery of "loss of earning power" was denied.⁵³ In another, payment as a matter of right of their "full rate of compensation" to injured firemen during a period when no services were rendered was said to be "not strictly speaking wages" and that "loss of earnings" was a recoverable item in such circumstances if properly proved.⁵⁴

Missouri seems to have arrived at a position similar to that of Pennsylvania, although a leading case in that state is open to the interpretation that a continuation of payments to an employee after an injury is a gratuity if the employee can no longer render the services for which he was hired.⁵⁵ The language is not clear on the

Note, 10 OKLA. L. REV. 184 (1957), which suggests that the question be made to turn in the case of "contract benefits" on whether the plaintiff can "show that he has actually sustained a loss . . ." The writer apparently has in mind a showing like that made in the *D'Amico* case. The *D'Amico* case was distinguished in *De Paulis v. United States*, 193 F. Supp. 7, 8 (E.D.N.Y. 1961), where payments to disabled police officers were made under regulations of the Police Commissioner and the court held there could be no recovery for "loss of salary."

50. *Montgomery & E. Ry. v. Mallette*, 92 Ala. 209, 9 So. 363 (1891).

51. *Bachelor v. Morgan*, 179 Ala. 339, 353, 60 So. 815, 819 (1912). Although Texas seems committed to the full application of the collateral source doctrine in these situations, *Missouri Pac. Ry. v. Jarrard*, 65 Tex. 560 (1886); *St. Louis & S.F. Ry. v. Clifford*, 148 S.W. 1163 (Tex. Civ. App. 1912), there is in one Texas Supreme Court case a bow in the direction of the idea that the employer's payment must be a gratuity. *Huston Belt & Terminal Ry. v. Johansen*, 107 Tex. 336, 179 S.W. 853 (1915).

52. *Pensak v. Peerless Oil Co.*, 311 Pa. 207, 166 Atl. 792 (1933); *Williams v. Pennsylvania R.R.*, 127 Pa. Super. 163, 193 Atl. 79 (1937).

53. *Quigley v. Pennsylvania R.R.*, 210 Pa. 162, 59 Atl. 792 (1904).

54. *Philadelphia v. Philadelphia Rapid Transit Co.*, 337 Pa. 1, 10 A.2d 434 (1940).

55. *Moon v. St. Louis Transit Co.*, 247 Mo. 227, 152 S.W. 303 (1912). An earlier case from the Supreme Court of Missouri, *Williams v. St. Louis & S. F. Ry.*, 123 Mo. 573, 585, 27 S.W. 387, 391 (1894), had held it was no defense . . . that plaintiff's employer . . . had continued his salary while he was disabled by an injury caused by defendant. There can be no abatement of damages on the ground of partial compensation when it comes from a collateral source, independent of defendant.

result in a situation where the continuation of payments is a matter provided for in the contract of original hiring, although the opinion concedes

that in case one is employed for wages . . . and his right to the agreed compensation depends upon his rendition of specific services and his failure to render such services ends his right to compensation, then in case of his injury . . . and failure to work he has no legal claim to compensation [from his employer] and if money is paid him it is, on its face, a mere gratuity and falls within the rule [*i.e.*, the collateral source rule].⁵⁶

It is hard to see that these cases are really saying more than that the fact that plaintiff has performed some work after his injury for which he is paid bears on the question of how much time he has lost; whereas, if he has received payments from his employer, although he has not worked for these payments, this should not bear on the element of lost time.⁵⁷

The difficulties encountered in application of the gratuities-wages distinction, in addition to the lack of clarity in the policy that is being advanced by applying it, are sufficient to justify its dismissal as a solution to the problems presented.⁵⁸

It is clear that the retreat from the collateral source rule in these jurisdictions has not been accomplished without a number of stragglers wandering off from the column. The policy of allowing compensatory damages and no more, which the cases denying the application of the collateral source rule represent, seems to falter frequently when the realities of giving the wrongdoer credit for

There is also a case from the Missouri Court of Appeals in 1894, *Ephland v. Missouri Pac. Ry.*, 57 Mo. App. 147 (1894), which follows on similar facts the *Drinkwater* case from New York. See note 45 *supra*.

56. *Moon v. St. Louis Transit Co.*, 247 Mo. 227, 229, 152 S.W. 303, 305.

57. Many of the Pennsylvania cases are consistent with this statement. See *Stevenson v. Pennsylvania Sports & Enterprises*, 372 Pa. 157, 93 A.2d 236 (1952); *Goodhart v. Pennsylvania R.R.*, 177 Pa. 1, 35 Atl. 191 (1896); *Schwoerer v. Philadelphia*, 167 Pa. Super. 356, 74 A.2d 755 (1950).

58. After discussing an argument to the effect that an injured policeman's pension was a part of his compensation and that the damages for loss of salary following personal injury should be reduced to that extent, the court in *Rusk v. Jeffries*, 110 N.J.L. 307, 311, 164 Atl. 313, 314 (Ct. Err. & App. 1933), concluded: "The general and more reasonable rule is that the amount so paid, regardless of whether paid pursuant to *contract* or as a *gratuity*, cannot operate to reduce the damages recoverable against a tortfeasor." The case is discussed in 8 TEMP. L.Q. 109 (1933). The Louisiana cases seem to support the proposition that payments by the employer, whether gratuitous or pursuant to contract, will be credited on any claim for "loss of wages." The lack of discussion in the cases makes their interpretation difficult. *Le Blanc v. Southern Farm Bureau Cas. Ins. Co.*, 104 So. 2d 279 (La. Ct. App. 1958); *Fenerty v. Culotta*, 80 So. 2d 537 (La. Ct. App.), *aff'd*, 228 La. 649, 83 So. 2d 888 (1955); *Althans v. Toyé Bros. Yellow Cab Co.*, 191 So. 717 (La. Ct. App. 1939).

the benefit bestowed by the collateral source are faced. Although the invocation of the collateral source rule has not been made to depend on subrogation of the party actually bearing the loss to those claims of the plaintiff which go beyond his actual out of pocket loss, the existence of the right of subrogation would enable the courts to place liability for damage on the wrongdoer and yet to pay homage to the equally attractive idea of damages which are simply compensatory as far as the injured party is concerned. The idea that the employer can be subrogated to the rights of the employee against a tort-feasor to the extent of the payments made to the employee during the period when he is unable to work is suggested in *Philadelphia v. Philadelphia Rapid Transit Co.*⁵⁹ These amounts had not been included in the employee's recovery against the tort-feasor, apparently on the assumption that the usual Pennsylvania rule was applicable. The court concluded, however, that the right of subrogation could only have been asserted in the original action. The further argument of the employer that his action could be independently maintained as one for loss of services was found to assert a doubtful right "under modern conditions."⁶⁰ Further, the payment of the injured employees' compensation and hospital expenses during their disability was not a loss which the employer could recover; this right of recovery was in the employees and the employer's right "is based on subrogation."⁶¹

In the interesting case of *Standard Oil Co. v. United States*,⁶² the Government also attempted to recover both under a theory of loss of services and under a theory of subrogation for payments of wages and for medical care during the period of a soldier's disability caused by defendant.⁶³ The government-soldier relationship was not found sufficient in itself nor sufficiently similar to a master and servant relationship to justify an action for loss of services. Subrogation was denied on the ground that the injured soldier has already accepted a settlement from the tort-feasor. Even if the ele-

59. 337 Pa. 1, 10 A.2d 434 (1940).

60. *Id.* at 5, 10 A.2d at 435.

61. *Id.* at 5, 10 A.2d at 436.

62. 153 F.2d 958 (9th Cir. 1946); 1 ARK. L. REV. 59 (1946); 45 MICH. L. REV. 110 (1946); 41 ILL. L. REV. 551 (1947).

63. Recent cases support the recovery of full personal injury damages by military personnel without regard to the provision of government medical and hospital services and the continuation of their pay during a period of disability. *Rayfield v. Lawrence*, 253 F.2d 209 (4th Cir. 1958), Annot., 68 A.L.R.2d 876 (1959); *Burke v. Byrd*, 188 F. Supp. 384 (N.D. Fla. 1960); *Gillis v. Farmers Union Oil Co.*, 186 F. Supp. 331 (D.N.D. 1960), discussed in 63 W. VA. L. REV. 177 (1961); *Herrick v. Sayler*, 160 F. Supp. 25 (N.D. Ind. 1958); *Plank v. Summers*, 102 A.2d 262 (Md. Ct. App. 1954), discussed in 42 GEO. L.J. 556 (1954) and 68 HARV. L. REV. 366 (1954).

ment of the settlement had not been present in the case, the technical requirements underlying the remedy of subrogation would have furnished a possible defense to such an action.⁶⁴ These technical difficulties would not exist if the subrogation were provided by contract or by statute as in the case of most workmen's compensation statutes.⁶⁵

The idea that the employer should have an independent right to sue the wrongdoer for injury to the employee seems, at first glance, to be particularly useful and applicable when the loss to the employer is so clear as it is in the situation where the injured employee's wages have been paid under compulsion of statute or contract during a period of incapacity caused by a third party's wrong.⁶⁶ The conclusion in *Philadelphia v. Philadelphia Rapid Transit Co.*⁶⁷ that such expenditures are not items recoverable in the master's action for loss of services is, however, borne out by the cases. Even when the modern employment relation is found to contain the necessary basis to support an action for loss of services,⁶⁸ the recovery seems to be limited to the value of the lost services to the employer; that is, what it will cost the employer to get the job done less the amount that he would have had to pay the employee. The fact that the wages continue under contract or statute is considered immaterial. This is considered a payment for past service, not an expense of accomplishing the job that the employee has now been incapacitated from performing.⁶⁹

64.

These cases turn on a technical distinction requiring for purposes of subrogation that the obligation resting on the ultimate debtor . . . must be discharged. . . . To effect this discharge the obligation of the insurer to the insured must be of the same nature as the obligation of the tortfeasor to the insured.

46 COLUM. L. REV. 669, 672 n.16 (1946).

65. See note 115 *infra*.

66. In *Darmour Prod. Corp. v. Baruch Corp.*, 135 Cal. App. 351, 27 P.2d 664 (Dist. Ct. App. 1933), a suit brought by a motion picture company for the loss of services of an actress "whose appearance, action and characteristics cannot *easily* be duplicated" (italics by the court) failed at the pleading stage on the ground that "defendants are entitled to have the complaint made certain in its terms as to just what plaintiff expects to show as elements of its damage. . . ." *Id.* at 354, 27 P.2d at 665.

67. 337 Pa. 1, 10 A.2d 434 (1940).

68. Doubt on this point is expressed in *The Federal No. 2*, 21 F.2d 313 (2d Cir. 1927), and *Chelsea Moving & Trucking Co. v. Ross Towboat Co.*, 280 Mass. 282, 182 N.E. 476 (1932), as well as in *Philadelphia v. Philadelphia Rapid Transit Co.*, 337 Pa. 1, 10 A.2d 434 (1940). The reasoning usually runs to the effect that the modern employment relation has changed from a familial nature to one of contract. These cases involve negligent torts. Other lines of authority come into play if the element of intent is introduced. PROSSER, TORTS 732 (2d ed. 1955).

69. *Inter-state Tel. & Tel. Co. v. Public Serv. Elec. Co.*, 86 N.J.L. 26,

The one American case that utilizes the loss of services theory as a basis for allowing recovery of sums expended by the employer for the benefit of an injured employee is *Jones v. Waterman S. S. Corp.*⁷⁰ which finds the "ship-seaman" situation with which it deals "more closely analogous to that of father and child than to that of an employer to a mere employee." The opinion finds in this relationship the basis for an independent action in the employer which is not affected by a release executed to the tort-feasor by the injured seaman. The possibility of imposing a double recovery on the tort-feasor by such a solution to the problem is obvious. Reimbursement of the employer should be accomplished by contractual or, if necessary, statutory provision for his sharing in the employee's recovery rather than by a refurbishing of the independent action for loss of services. The complications that have attended the dual claims situations of parent and child and husband and wife, particularly in relation to medical expenses, do not encourage the revitalization of the master and servant duality in the sense of creating separate causes of action.⁷¹

Different considerations might be involved in a situation where the employer had bargained for the exclusive services of the employee for a period of time and the contract had taken account of the possibility that the employee might become incapacitated through no fault of either contracting party and provided for payment of all or a part of his compensation during such periods of

90 Atl. 1062 (Sup. Ct. 1914). The full statement of the court is:

The legal right of an employer to recover damages for the loss of services of employees due to a tortious act of a third person has never included the wages paid his servants for past work or the wages he might pay for future work. What the employer loses is the value of the services to him; what the present plaintiff seeks to recover is the value of the services to the employee. The employer loses what he might have made over and above the cost of the employee's services; he does not in any proper sense lose the necessary expense of securing that labor.

Id. at 29, 90 Atl. at 1063.

70. 155 F.2d 992, 1000 (3d Cir. 1946). The opinion relies on *Standard Oil Co. v. United States*, 153 F.2d 958 (9th Cir. 1946), in its lower court holding which allowed an independent action by the government against the tort-feasor who incapacitated a soldier. *United States v. Standard Oil Co.*, 60 F. Supp. 807 (S.D. Cal. 1945).

71. Dean Prosser points out that the rights of husband and parent evolved from the master and servant cases. PROSSER, *TORTS* 698 (2d ed. 1955). In its operation the principle of dual actions seems to have been more a source of confusion than of help in the cases. In actions by a wife which ask for the value of reasonable medical and hospital services the question sometimes turns on the matter of whose credit was relied on by the persons rendering such services. *Hudock v. Youngstown Municipal Ry.*, 164 Ohio St. 493, 132 N.E.2d 108 (1956) (verdict for plaintiff wife was found to be influenced by the prejudicial material that came in during

disability. It might truly be said in such a case that the interests of each party to the contract had been injured by a third party tort-feasor whose conduct incapacitated the employee. In such a situation, the collateral source rule might properly be said to have no application to the element of loss of time. Rather, it could be said, an interest of the employer as opposed to an interest of the employee has been injured insofar as the contract payments during incapacity are concerned.⁷²

the attempt of plaintiff's counsel to prove that husband was too sick to work and thus medical services were rendered on the basis of her credit); *Seifert v. Milwaukee & Suburban Transp. Corp.*, 4 Wis. 2d 623, 626, 91 N.W.2d 236, 238 (1958) (wife allowed to recover value of doctor's services because of existing doctor-patient relationship but value of hospital, ambulance and drug bills not allowed since the "record is not clear whether the . . . bills were charged to the plaintiff or to her husband or whether she or he paid them"). Perhaps justice would be better served in the majority of these cases by simply treating these expenses as an element of the recovery of the wife and leaving out of her action against the tort-feasor the matter of adjustment between her and any other party who may have actually paid the expenses. *City of Marion v. Flanary*, 324 S.W.2d 803, 804 (Ky. 1959) (fact that husband paid his wife's medical bills immaterial

since legal liability of the wrongdoer to pay such expenses rests upon the ground that they were rendered necessary by the defendant's act and not upon the ground that they have been paid. The defendant cannot take advantage of the fact that these expenses had been paid for the plaintiff by her husband);

Greyhound Corp. v. Dowling, 334 S.W.2d 259, 261 (Ky. 1960) (fact that husband had paid expenses was raised in wife's suit and held immaterial: "where two parties have an interest in the recovery of one item of damages, one party may maintain the action for the benefit of both"). An earlier Kentucky case, *Chesapeake & O. Ry. v. Stump*, 165 Ky. 708, 709, 178 S.W. 1037, 1038 (1915), points out that since the wife has the right of action for medical services "payment to her will necessarily acquit the company [defendant] of all liability, even though the husband happened to furnish the money necessary to pay the bills." There has also been erosion of the rule that the value of the medical and hospital expenses made necessary for a minor as the result of wrongfully caused personal injury is recoverable by the parent. See, e.g., *Bauman v. City & County of San Francisco*, 42 Cal. App. 2d 144, 108 P.2d 989 (1940); *Carangelo v. Nutmeg Farm, Inc.*, 115 Conn. 457, 162 Atl. 4 (1932). Compare *Johnson v. Rhuda*, 156 Me. 370, 164 A.2d 675 (1960) (father recovered value of services gratuitously furnished injured child by wife and mother).

72. Compare *Agwilines, Inc. v. Eagle Oil & Shipping Co.*, 153 F.2d 869 (2d Cir. 1946), which involved damage to a ship under a time charter which provided for payment of half hire during repair periods. Libel by the shipowner resulted in an award which took into account the half hire paid during the period of disablement. The award was affirmed on appeal in an opinion by Judge Learned Hand which found that the collateral source doctrine had no application

for it presupposes that the tortfeasor has caused a loss, since otherwise it is absurd to speak of indemnity. As we have just said, the libellant suffered no loss from the detention of the ship, except the loss of the half hire during the repairs. By the charter-party it had already parted with all right to her use, and the collision could not result in depriv-

III. GRATUITIES

The workings of private charity in helping accident victims are usually treated as classic cases for the application of the collateral source rule.⁷³ Massachusetts, however, has held that recovery in a personal injury action "is purely compensatory" and has refused to allow recovery for the value of necessary nursing services performed for the plaintiff by his wife, a registered nurse.⁷⁴ The court distinguishes cases where the salary of the plaintiff has been continued through a period of disability on the ground that in "those cases recovery is not permitted for loss of salary but is allowed for something apart and distinct, the impairment of the capacity to earn."⁷⁵ An earlier Massachusetts case⁷⁶ which applied the collateral source rule to allow recovery of services rendered for an injured mother by her daughter was distinguished on the ground that the relationship was "not analogous to that of husband and wife" in that it was possible to say that a mother accepting services from her adult daughter became "bound to pay their reasonable value."⁷⁷

Although there is other support for the idea that the recovery for medical expenses requires a stricter adherence to a pure theory of compensation than do the other elements of personal injury recovery,⁷⁸ the great bulk of the cases involving gratuitous medi-

ing it of what it did not have. The charterer did indeed suffer a loss, for which, if we could, we should allow it to recover. . . .

Id. at 871.

The possible analogy of this case to the kind of employment contract mentioned in the text is pointed out in 31 MINN. L. REV. 201 (1947), which also states that no case dealing directly with just such an employment contract has been found. Solutions to the problems of valuing the varying interests of several owners in a single tract of land for purposes of eminent domain may be suggestive in the dual interest cases we are dealing with here. See McCORMICK, DAMAGES § 131 (1935).

73. *Ostmo v. Tennyson*, 70 N.D. 558, 296 N.W. 541 (1941) (offer to prove that auto dealer took back damaged truck without any deduction for the damage); *Norristown v. Moyer*, 67 Pa. 355 (1871) (charitable subscription for victim of the fall of a rotten flag staff); *Scott v. Southern Ry. Co.*, 231 S.C. 28, 97 S.E.2d 73 (1957) (automobile furnished "gratis" while plaintiff's vehicle repaired).

74. *Daniels v. Celeste*, 303 Mass. 148, 21 N.E.2d 1 (1939). A collection of related authority is found in Annot., 128 A.L.R. 686 (1940).

75. *Daniels v. Celeste*, 303 Mass. 148, 151, 21 N.E.2d 1, 3 (1939).

76. *Copithorne v. Hardy*, 173 Mass. 400, 53 N.E. 915 (1899).

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

78. *E.g.*, *Rigby v. Aetna Cas. & Sur. Co.*, 151 So. 119 (La. Ct. App. 1934); *Morris v. Grand Ave. Ry.*, 144 Mo. 500, 46 S.W. 170 (1898); *Nelson v. Western Steam Nav. Co.*, 52 Wash. 177, 100 Pac. 325 (1909). Compare *Williams v. Campbell*, 185 So. 683 (La. Ct. App. 1939), where workmen's compensation carrier intervened in plaintiff's personal injury suit asking for sums paid for medical services for plaintiff's benefit. The court in allowing this recovery by plaintiff for the benefit of the intervenor seems

cal service are treated as any other instance of charitable intervention in an injured person's situation. Reasonable medical service "is one of the elements of injury" and the fact that the service is supplied "gratuitously" is "for the benefit of the injured person."⁷⁹

A modern case approving the recovery of hospital services without regard to the fact that the injured party received the services without charge from a naval hospital as a veteran justified the collateral source rule on the ground that "legal 'compensation' for personal injuries does not actually compensate."⁸⁰ In addition to stating the irrefutable proposition that "not many people would sell an arm for the average or even the maximum amount that juries award for loss of an arm" the court pointed out that a "substantial attorney's fee" must be paid from the recovery.⁸¹ Certainly, the collateral source rule is not an apt solution for either of these problems. It must be justified in relation to gratuities, as in other cases, as an aid to the orderly administration of justice. To open to fruitful investigation by the defense in a personal injury case the question of the economic framework within which the needs of the plaintiff resulting from the injury were furnished is to make recovery depend on how knowledgeably the plaintiff and his benefactors set up their transaction.⁸² The increase in complexity

to approve the recovery by an injured person "as an element of damages for his injuries the value of nursing and physician's services, and for medical and hospital bills . . . although he be not personally bound for their payment and although . . . such services be gratuitously rendered to him." *Id.* at 688. The court rested its conclusion ultimately, however, on the finding that "plaintiff has committed himself personally to the payment of all of said \$901.50, subsequent to its incurring . . ." *Id.* at 688.

79. *Rayfield v. Lawrence*, 253 F.2d 209 (4th Cir. 1958); Annot., 68 A.L.R.2d 876 (1959); *City of Eaglewood v. Bryant*, 100 Colo. 552, 68 P.2d 913 (1937); *Roth v. Chatlos*, 97 Conn. 282, 288, 116 Atl. 332, 334 (1922); Annot., 22 A.L.R. 1558 (1923), discussed in 31 YALE L.J. 776 (1922); *Royer v. Eskovitz*, 358 Mich. 279, 100 N.W.2d 306 (1960).

80. *Hudson v. Lazarus*, 217 F.2d 344 (D.C. Cir. 1954).

81. *Id.* at 346.

82. A Note in 43 GEO. L.J. 515, 516-17 (1955), discussing *Hudson v. Lazarus*, pointed out that

the question of medical care provided to veterans seems to have been resolved by Veterans Administration Regulation, 38 C.F.R. § 17.48 (d) . . . which provides that an appropriate assignment shall be requested from the veteran in order to permit the Government to collect from the tortfeasor for the cost of the veteran's hospital care.

This provision was adopted too late to have application to the case under discussion. Such an assignment would not, of course, include the future medical expenses which would be recoverable in a situation where the injuries were of such a nature as to extend beyond the time of trial. The fact that these services will be rendered by a veteran's hospital is not admissible on the matter of damages. *City of Fort Worth v. Barlow*, 313 S.W.2d 906 (Tex. Civ. App. 1958).

arguably offsets the advantages that may accrue from preventing awards that go beyond the compensatory limits in the legal sense.

IV. SOCIAL LEGISLATION BENEFITS

The *Restatement of Torts* distinguishes from other donations to an injured party "the value of services rendered gratuitously by a state-supported or other public charity." As to such sums, says the *Restatement*, "there can be no recovery."⁸³ It is not easy to see why this distinction should be made.⁸⁴ Only in the most indirect sense can the benefits be said to have been provided by the wrongdoer.⁸⁵ Neither, in most cases, can the legislation under which such benefits are given be said to have impinged upon the usual principles of liability.⁸⁶ The New Mexico court in holding that the right to recover "as to loss of earnings and earning capacity" was not affected by the fact that plaintiff was being supported by "public assistance" justified their decision with a standard statement of the collateral source rule: "The right of redress of wrong is fundamental. Charity cannot be made a substitute for such right, nor can benevolence be made a set-off against the acts of a tort-feasor."⁸⁷ If the rule is not to be applied in cases where the benefits involved have their source in social legislation, a sound basis of distinction should be found.

In relation to a justification based upon the idea that the source of the benefits is the wrongdoer, suits against the United States under the Federal Tort Claims Act⁸⁸ have developed some interesting doctrines. Damages under the Act are to be compensatory

83. Section 924, comment *f*, at 637 (1939). This idea is followed in *DiLeo v. Dolinsky*, 129 Conn. 203, 27 A.2d 126 (1942) (injured child treated at a home for crippled children at state expense).

84. The difficulties encountered in handling the problem of dealing with payments made under the comprehensive English social insurance legislation to plaintiffs in personal injury cases are discussed in Friedmann, *Social Insurance and the Principles of Tort Liability*, 63 HARV. L. REV. 241, 253 (1949).

85. *A. H. Bull S.S. Co. v. Ligon*, 285 F.2d 936 (5th Cir. 1960). A defendant who was not the employer of plaintiff but who paid into the state workmen's compensation fund was denied mitigation by virtue of amounts paid to the injured party by the fund on the ground that the payments made to the fund "are not, in reality, paid by the employer but by the ultimate consumer as cost of production." *Overland Const. Co. v. Sydnor*, 70 F.2d 338, 340 (6th Cir. 1934).

86. *Cunnen v. Superior Iron Works Co.*, 175 Wis. 172, 184 N.W. 767 (1921); Annot., 18 A.L.R. 667 (1922).

87. *Mobley v. Garcia*, 54 N.M. 175, 177, 217 P.2d 256, 257 (1950); Annot., 19 A.L.R.2d 553 (1950). In *Kurta v. Probelske*, 324 Mich. 179, 36 N.W.2d 889 (1949), receipt of unemployment compensation was held not "to mitigate damages" in a personal injury case.

88. 28 U.S.C. § 2674 (1958).

in nature⁸⁹ but the cases have applied the collateral source rule as a part of the applicable state law. When the source of the benefit involved is the defendant United States Government, it does not necessarily follow that the benefit will be considered as emanating from the wrongdoer and that its value will be deducted.⁹⁰ A court of appeals in *United States v. Gray*⁹¹ approved the exclusion of evidence that the veteran plaintiff had received hospitalization and treatment for her injury from the Veterans' Administration. The court reasoned that the benefits had been furnished under legislation "wholly separate and distinct from the Tort Claims Act" and, further, that there was nothing in that Act to indicate "that Congress intended for recovery under the Tort Claims Act to be offset or diminished by amounts expended in furnishing hospitalization and treatment for disability."⁹² The opinion also considered the contention of the Government that the value of payments to the plaintiff of a veteran's pension for "total-permanent disability" should be deducted from the award and held that such payments should have been deducted since they "were essentially compensation for her disability."⁹³ It may be noted that in the *Gray* case there is nothing to indicate that a specific claim for medical and hospital expenses was made and proved. The court states that the award "was based in large part upon loss of earnings."⁹⁴ *United States v. Brooks*,⁹⁵ a case where it seems that there was a specific demand for the value of necessary hospital and medical services, found it clear that neither government-furnished medical and hospital services nor government disability payments to an injured soldier should be disregarded in computing recovery. The payments were considered simply instances for the application of the rule that "in tort actions by employees against their employers, it is well settled that wages and other payments made by the employer to the employee are properly deductible in mitigation of damages."⁹⁶ Perhaps the *Gray* case would have treated the matter of medical and hospital expenses differently if the existence in the award of an amount to cover the value of such services had been clear. In the *Brooks* case, too, the court had the advantage of comparing the hospital services which the government provides

89. *Massachusetts Bonding & Ins. Co. v. United States*, 352 U.S. 128 (1956).

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

91. 199 F.2d 239 (10th Cir. 1952).

92. *Id.* at 244.

93. *Ibid.*

94. *Id.* at 243.

95. 176 F.2d 482 (4th Cir. 1949)

96. *Id.* at 484 n.1.

as a matter of course to an injured soldier with the proceeds of that soldier's National Service Life Insurance Policy. As to the latter the court found it "perfectly clear that there should have been no deduction."⁹⁷ The Government is no better off as the defendant in a wrongful death action "because it is also an insurer."⁹⁸

United States v. Harue Hayashi,⁹⁹ a recent case from the Ninth Circuit, faced with the question of deducting " 'mother's insurance benefits' under the Social Security Act from the award made to . . . [plaintiff] for pecuniary loss due to the death of her husband," states a rule which attempts to be general in application: "injury-related benefits paid from unfunded general revenues are to be deducted and similar benefits paid from a special funded source are not."¹⁰⁰ The court states that the "objection to double compensation is that the same source is made to pay twice."¹⁰¹ On the other hand, "if different sources are tapped, neither pays twice." The distinction is drawn between benefits "paid from unfunded general tax monies appropriated for the purpose" and benefits paid "from a special fund supplied in part by the beneficiary or a relative upon whom the beneficiary is dependent."¹⁰² If one does not get too far into the intricacies of the economics of large public funds,¹⁰³ these ideas seem to explain the cases except perhaps the holding in *Gray* on medical services furnished to a veteran for the treatment and care of the very injury for which she was suing the United States as a tort-feasor.

The most recent case on the problem, *United States v. Price*,¹⁰⁴ decided that benefits received by the plaintiff under the Civil Service Retirement Act should not be considered in an award of damages against the United States. This result is consistent with the principle stated in the *Hayashi* case but adds another element which may be of importance in getting at the core of what is really being done in these decisions. The opinion points out that "the Act establishes a comprehensive program for the retirement of government employees, and is not designed to compensate them for particular injuries suffered."¹⁰⁵ This statement seems to hold hope of

97. *Id.* at 485.

98. *Ibid.*

99. 282 F.2d 599 (9th Cir. 1960).

100. *Id.* at 604.

101. *Ibid.*

102. *Id.* at 603.

103. See RIESENFELD & EDLUND, REPLACEMENT PAMPHLET, MODERN SOCIAL LEGISLATION 172 (1958).

104. 288 F.2d 448 (4th Cir. 1961).

105. *Id.* at 450.

a rational explanation at first reading but it does not survive its attempted application to a case of medical and hospital benefits furnished to a veteran to care for injuries for which the Government is responsible in tort as in the *Gray* case. Such benefits are certainly not designed to compensate the injured veteran for the particular injury received. They are available without regard to the cause of the injury. The appropriation to pay for them cannot be regarded as designed to take care of victims of the Government's torts. The result of the case can rest, of course, on the concept that benefits payable from a fund supplied in part by contributions of the plaintiff are from a collateral source. One might, however, argue that that part of the benefits attributable to the contributions of the plaintiff should be excluded from consideration in assessing damages.

A similar argument has been made in negligence suits brought by railroad employees against their employers under the Federal Employers' Liability Act¹⁰⁶ proposing that a plaintiff's immediate eligibility for benefits under the Railroad Retirement Act by virtue of his disability should operate in mitigation of damages since the employer defendant contributes to the fund from which such payments are made.¹⁰⁷ The problem of mitigation is actually presented in these cases only where the plaintiff's disability is such as to accelerate his right to a pension.¹⁰⁸ Although the

106. 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1958).

107. See Comment, 38 MICH. L. REV. 1073, 1080 (1940), which reached the conclusion that to allow mitigation "would conflict with the . . . objects of the acts" since "the Retirement Act was enacted to meet a problem entirely foreign to that dealt with by the Employers' Liability Act"

108. See *McCarthy v. Palmer*, 113 F.2d 721 (2d Cir.), cert. denied, 311 U.S. 680 (1940). The Railroad Retirement Act, 50 Stat. 309, as amended 45 U.S.C. § 228b(a) (1958), accelerates pensions in accordance with years of service and extent of disability. There is authority that even if the disability provisions are not operative in a particular case, plaintiff's pension rights at the normal age of retirement are "relevant to a determination of his probable lost future earnings." See *Murray v. New York, N.H. & H.R.R.*, 255 F.2d 42, 45 (2d Cir. 1958). *Contra*, *Descoteau v. Boston & Me. R.R.*, 101 N.H. 271, 140 A.2d 579 (1958). Note, 63 HARV. L. REV. 330, 335 (1949), suggests the solution of mitigation "up to the value of the acceleration of half the pension" since "the only benefit to the plaintiff that results from the injury is acceleration of the pension." The comment points out, however, that the only case to that time to face the problem, *Hetrick v. Reading Co.*, 39 F. Supp. 22 (D.N.J. 1941), held that no mitigation was proper on the ground that the purpose of the annuity system of the Retirement Act was not to compensate for injuries. Note that a different situation exists under the unemployment insurance provisions administered by the Railroad Retirement Board. The receipt of unemployment benefits during the employee's tortiously-caused disability does not mitigate damages as against the employer but the Board has a right to

question is somewhat complicated by the fact that there is an express provision in the Federal Employers' Liability Act for a "set-off" in favor of a railroad defendant as to "any sum it has contributed . . . to any insurance, relief benefit, or indemnity that may have been paid to the injured employee . . . on account of the injury or death" which was the subject of the action,¹⁰⁹ the cases have held that this provision does not have reference to the benefits under the Railroad Retirement Act. The opinions merely state the conclusion: "The benefits received under such a system of social legislation are not directly attributable to the contributions of the employer, so they cannot be considered in mitigation of the damages caused by the employer."¹¹⁰

It is obviously difficult on this theory for any contribution by an employer to a social insurance plan of broad purposes to qualify as a factor in mitigation of damages in an FELA case. Some payments that have been said to meet the test are benefits from a "relief department" of a railroad company to the extent that such benefits are attributable to the employer's contributions¹¹¹ and payments made to the injured employee by the employer on the mistaken theory that the state compensation act was applicable.¹¹² A recent breach of contract case which approved the deduction of social security benefits paid to the wrongfully discharged plaintiff in the computation of damages furnishes some explanation of the obvious reluctance of courts to retreat from the collateral source rule in any personal injury situation in its statement that "tort law

be reimbursed from any recovery against the tort-feasor even if the tort-feasor is the employer railroad company. *Carr v. Boyd*, 123 Colo. 350, 229 P.2d 659 (1951) (third party defendant); *Tate v. Jacksonville Terminal Co.*, 127 So. 2d 702 (Fla. Dist. Ct. App. 1961) (railroad defendant).

109. 35 Stat. 66 (1908), 45 U.S.C. § 55 (1958).

110. *New York, N.H. & H.R.R. v. Leary*, 204 F.2d 461, 468 (1st Cir. 1953). The *Leary* case states that the Railroad Retirement Act "authorizes disability payments only for employees who have reached sixty years of age or have completed thirty years of service. We think these age and service requirements for disability payments remove these payments from the coverage of § 55 of the Federal Employers' Liability Act." This is not accurate. The disability provisions of the Railroad Retirement Act, 45 U.S.C. § 228b(a), at the time provided coverage for employees disabled from their regular occupation when they had 20 years service or were over 60 and for employees disabled from any regular employment who had 10 years of service or were over 60. These provisions have since been made even more liberal. It is doubtful that this error was a substantial factor in the decision. In accord with the result in *Leary* is *Sinovich v. Erie R.R.*, 230 F.2d 658 (3d Cir. 1956); see *Flener v. Louisville & N.R.R.*, 198 F.2d 77, 80 (7th Cir. 1952).

111. See *Wagner v. Chicago & A.R.R.*, 265 Ill. 245, 106 N.E. 809 (1914).

112. See *Giesecking v. Litchfield & M. Ry.*, 344 Mo. 672, 127 S.W.2d 700, cert. denied, 308 U.S. 583 (1939).

has a flavor of punitive damages" as opposed to the situation where one is "found to have breached . . . [a] contract" who "is not a wrongdoer in the tort sense."¹¹³

A frequently proposed solution for the situations involving social legislation and the competing policies underlying the collateral source rule and its opposite number, the compensatory principle in damages awards, has been stated in the following language:

provide machinery whereby the ultimate burden is caused to rest where, by the tradition of the common law, it belongs . . . on the wrongdoer. Thus, a system of subrogation or of reimbursement of the government agency will perform the punitive function of damages after recovery by the aggrieved party has been mitigated so as to conform with the principle of compensation.¹¹⁴

A system of statutory subrogation has, to a very great extent, been the solution to the collateral source problem posed by the dual remedies available to injured workmen under Workmen's Compensation acts and the principles of common-law tort liability when the injury involved results from the negligence of a third party.¹¹⁵ There obviously are no strains set up between the competing policies of allowing full recoveries against wrongdoers and restricting plaintiffs to compensatory damages when the collateral source rule is invoked in favor of an injured workman to exclude evidence of amounts he has received by way of workmen's compensation benefits if these amounts are to be returned to the pay-

113. *United Protective Workers v. Ford Motor Co.*, 223 F.2d 49, 54 (7th Cir. 1955), note 10 *supra*, discussed in 40 MINN. L. REV. 272 (1956) and 1956 WASH. U.L.Q. 377. Compare *Marshall Field & Co. v. NLRB*, 318 U.S. 253 (1943), which approved an order of the Board ordering an employer to compensate employees for loss of pay in a discriminatory discharge proceeding without deduction of amounts received under the Unemployment Compensation Act. This case has been distinguished from an ordinary breach of contract case on the ground that the "primary purpose of an order for reinstatement and back pay under the National Labor Relations Act is the prevention of discriminatory discharge . . . and only secondarily to remedy the wrong done an employee." 40 MINN. L. REV. 272, 273 (1956). The Minnesota court has refused to deduct unemployment compensation from damages in an action for breach of an employment contract. *Bane v. International Sisal Co.*, 212 Minn. 135, 141, 4 N.W.2d 113, 116 (1942) ("benefits received were intended to alleviate the distress of unemployment . . . not to diminish the amount which an employer must pay as damages in making whole a wrongfully discharged employee"). *Accord*, *Billetter v. Posell*, 94 Cal. App. 2d 858, 211 P.2d 621 (1949).

114. Note, 63 HARV. L. REV. 330, 337 (1949). See also 40 MINN. L. REV. 272, 274 (1956) and 1956 WASH. U.L.Q. 377, 380.

115. RIESENFELD & MAXWELL, MODERN SOCIAL LEGISLATION 416 (1950). See, e.g., MINN. STAT. § 176.061(5) (1957). Some recent subrogation problems under the Minnesota Act are discussed in 42 MINN. L. REV. 678 (1958); 43 MINN. L. REV. 170 (1958).

ing party from the proceeds of his common-law recovery.¹¹⁶ The collateral source rule has been applied, however, even in those situations where subrogation of the employer or insurer was precluded for various reasons.¹¹⁷ Thus, again, the policy of making the wrongdoer pay demonstrates its hardihood.

CONCLUSION

Whether the rugged constitution of this policy as evidenced by the continuing, and perhaps increasing, strength of the collateral source rule is beneficial to the objectives that a modern system for compensating injury ought to strive for is doubtful. The changing aspect of the very meaning of legal wrong in an age when complexity of machines and social organization makes responsibility more difficult to fix tends to rob the punitive content of an award of damages of its function.¹¹⁸ An extension of the operation of subrogation would help in some situations to properly allocate the proceeds of an award and justify the existence of the rule. But the general utility of even this solution has been forcefully questioned on the ground that the shifts of loss brought about by its use may have an ultimately undesirable social impact.¹¹⁹

A system of compensation designed to limit awards to strict economic loss and to guarantee such recovery may some day evolve. Certainly, most of the problems to which the collateral source rule applies a rough solution can be eliminated in such a context. For the present system, however, the rule seems to perform a needed function. At the very least, it removes some complex issues from the trial scene. At its best, in some cases, it operates as an instrument of what most of us would be willing to call justice.

116. Such a case is *Coker v. Five-Two Taxi Serv.*, 211 Miss. 820, 52 So. 2d 835 (1951).

117. *United Gas Corp. v. Guillory*, 207 F.2d 308 (5th Cir. 1953) (employer not entitled to be reimbursed because his negligence contributed to the employee's injury). *Liberty Mut. Ins. Co. v. Manasco*, 123 So. 2d 527 (Ala. 1960), discussed in 13 ALA. L. REV. 471 (1961) (insurance carrier not entitled to reimbursement for medical and hospital expenses because of technical meaning of compensation under Alabama Act). Compare N.Y. L. REV. COMM. REP. 242 (1957), as to possible problems under *Drinkwater v. Dinsmore*, 80 N.Y. 390 (1880).

118. See Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219 (1953).

119. See 2 HARPER & JAMES, TORTS § 25.22 (1956).

