# THE COLLATERAL SOURCE RULE IN PERSONAL INJURY LITIGATION

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## INTRODUCTION

The so-called *Collateral Source Rule* provides that any benefits received by an injured party from a source which is entirely independent of and collateral to a wrongdoer who is legally responsible for the injuries will not serve to reduce the damages otherwise recoverable from the wrongdoer. The application of this rule to various factual circumstances has given rise to a substantial amount of litigation;[1] for the rule is an attempt to resolve a basic conflict between two guiding principles of tort law, namely, (1) the limitation of compensation to the injured party to the amount necessary to make him whole, and (2) the avoidance of a windfall to the wrongdoer if a choice must be made between him and the injured party.

The Collateral Source Rule has been applied as both a rule of damages and a rule of evidence. The rule has been in existence in American Law for at least one hundred years. One of the earliest cases to apply it was *Althorfe v. Wolfe*,[2] where the court refused to diminish damages in a widow's wrongful death action by the amount of the proceeds of her husband's life insurance policy.

The rule covers a variety of benefits received by the plaintiff including salary continued during disability, gratuitous payments or services received by the plaintiff, insurance benefits, pension or retirement benefits and government or Veteran's benefits. The rule has even been applied to exclude evidence of the plaintiff's remarriage.[3] If a widow or widower chooses to find solace in a second spouse, this is an exercise of privilege and any mitigation of the party's damages

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1 *See*, Annot., 7 A.L.R.3d 516 (1966).

2 22 N.Y. 355 (1860).

3 In United States v. S.S. Washington, 172 F. Supp. 905 (E.D. Va. 1959) a United States vessel collided with a private tanker, and four died. The court held that the remarriage of a widow does not diminish the amount of her damages. *Accord*, Duffy v. City of New York, 16 Misc. 1015, 184 N.Y.S.2d 1006 (Sup. Ct. 1958).

comes from a source wholly collateral to the wrongdoer whose acts resulted in the death of the prior spouse.

Despite its salutary effects, the Collateral Source Rule is not universally applied and is not without its critics.[4] In a few cases, some courts have refused to apply the rule on various grounds of policy. In *City of Salinas v. Souza & McCue Const. Co.*,[5] a case involving damage arising out of a breach of contract, the court upheld admission of evidence of a settlement agreement between a contractor and subcontractor. The city alleged that the contractor was compensated by this indemnity agreement, in whole or in part, for damages allegedly sustained because of the city's misrepresentation and breach of a sewer line contract.

The court ruled on policy grounds that the Collateral Source Rule should not apply to governmental entities, apparently for three reasons :

(1) There is no deterrent effect to a judgment, since agents of government and public officials who act for government, and whose acts form the basis of liability against the government, have no proprietary interest in the government itself;

(2) Since the Collateral Source Rule has a punitive capacity, levying basically punitive damages against a public entity has not been authorized merely because of the abrogation of sovereign immunity;

(3) On policy grounds alone an application of the Collateral Source Rule against a public entity imposes an unjust burden on the taxpayer, without directly penalizing the wrongdoer.

Despite such critics, the Collateral Source Rule has found general acceptance. Many reasons have been given in commentaries and case law concerning the acceptability and application of this rule. One court has stated:

> Legal "compensation" for personal injuries does not actually compensate. Not many people would sell an arm for the average or even the maximum amount that juries award for loss of an arm. Moreover, the injured person seldom gets the compensation he "recovers," for a substantial attorney's fee usually comes out of it. There is a limit to what a negligent wrongdoer can fairly, *i.e.*, consistently with the balance of the individual and social interest, be required to pay. But it is not

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[4] *See, e.g.*, Peckingpaugh, *An Analysis of the Collateral Source Rule*, 32 INS. COUNSEL J. 32 (1965); Schwartz, *The Collateral Source Rule*, 41 B.U.L. Rev. 348 (1961); Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741 (1964).

[5] 66 Cal. 2d 217, 57 Cal. Rptr. 337, 424 P.2d 921 (1967).

> necessarily reduced by the injured person's getting money or care from a collateral source.[6]

The rèasoning behind the above quote is a recognition of the fact that in many cases the legal, compensatory damages are inadequate to compensate for the actual harm done.

Another justification for the Collateral Source Rule is recognition of the fact that the plaintiff may have paid, by money or as part of his compensation in employment, for insurance proceeds, wage loss protection and pension benefits, and that such payments should be immune from mitigating the actual damages. In other words, "If there must be a windfall certainly it is more just that the injured person shall profit therefrom, rather than that the wrongdoer shall be relieved of his full responsibility for his wrongdoing."[7]

As alluded to earlier in the *City of Salinas* case, there appears to be a generally recognized deterrent effect in personal injury judgments. This recognition sustains the desirability of the Collateral Source Rule. The rule reflects a policy of not diluting the deterrent effect of the law of civil liability.

Another reason for supporting the Collateral Source Rule is not found in the annals of case law. However, it is known to attorneys who have had substantial experience in the personal injury field. That is, the benefits of an accident insurance policy or any other form of collateral compensation usually provide greater inducement to the recipient to settle a case without the necessity of litigation. Because of his receipt of collateral benefits, he is more inclined to compromise his claim at a figure more acceptable to the wrongdoer and his insurance company.

As the reader might have determined from the above comments, it is the writers' position that the Collateral Source Rule is beneficial, both as a rule of damages and as a rule of evidence, and should be retained. It is the purpose of the article to describe the rule in its many facets, referring to both local and national cases.

## INJURED PARTY'S RECEIPT OF GRATUITIES

The reasonableness of the Collateral Source Rule can easily be seen in circumstances involving payments to the injured party out of funds to which he has contributed or from insurance which he has purchased. Yet, when the injured party is rendered some gratuity which saves him expenses which he might otherwise have to sustain

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[6] Hudson v. Lazarus, 217 F.2d 344, 346 (D.C. Cir. 1954).
[7] Grayson v. Williams, 256 F.2d 61, 65 (10th Cir. 1958).

because of his injury, the applicability of the rule might seem somewhat less pertinent. Still, the general policy is that the injured party's fortuitous receipt of benefits, due to his injured condition, should not inure to the benefit of the wrongdoer. As stated by the Supreme Court of New Mexico, "The right of redress for 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."[8]

The majority of jurisdictions apply the Collateral Source Rule to gratuitous payments. However, this aspect of the rule does not enjoy universal adherence.[9] The minority position has been attacked as creating a windfall to the wrongdoer and frustrating the intent of the gift. Those courts which have applied the Collateral Source Rule to gratuitous payments employ this argument in sustaining the rule. They reason that the donor of the gift did not intend to provide an escape hatch for the wrongdoer. The point of the gift is frustrated if the wrongdoer, rather than the injured party, becomes the actual beneficiary.[10]

In surveying the case law regarding application of the Collateral Source Rule to gratuities, one sees the rule applied in a variety of circumstances.[11] This aspect of the rule has found acceptance even in circumstances where the gratuity rendered partook of the nature of a duty. In *Howells v. North American Transportation and Trading Co.*[12] the supreme court, in *dictum*, recognized the right of plaintiffs to recover for the reasonable value of the husband's services in attending his wife. The value would be measured by the value of services of a competent nurse. In *Johnson v. Rhuda*,[13] a child-pedestrian was injured by the defendant's automobile. The child's father, as a party plaintiff, was allowed to recover for the value of nursing services rendered by his wife and the mother of the child on the theory that, "The labor of the house belongs to the husband."

In cases where free medical care has been provided by virtue of

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8 Mobley v. Garcia, 54 N.M. 175, —, 217 P.2d 256, 257 (1950), where the plaintiff, although supplied medical care by Department of Welfare, was allowed to collect from defendant the value of services thus charitably rendered.

9 *See, e.g.*, Coyne v. Campbell, 11 N.Y.2d 372, 230 N.Y.S.2d 1, 183 N.E.2d 891 (1962), where gratuitous medical services rendered to the plaintiff, a physician, by colleagues were not considered a part of plaintiff's damages.

10 *E.g.*, Roth v. Chatlos, 97 Conn. 282, 116 A. 332 (1922).

11 For examples of instances in which the Collateral Source Rule is applied to property damage cases, *see* Ostmo v. Tennyson, 70 N.D. 558, 296 N.W. 541 (1941), where the court ruled inadmissible evidence that a car dealer took back a damaged truck without deducting for any damage, and Scott v. Southern Ry., 231 S.C. 28, 97 S.E.2d 73 (1957), where an automobile was furnished without charge while the plaintiff's vehicle was being repaired.

12 24 Wash. 689, 64 P. 786 (1901).

13 156 Me. 370, 164 A.2d 675 (1960).

the injured party's enlistment in the Armed Forces or by virtue of veteran's benefits, courts have ruled that the services thus rendered are not to be deducted from the damages. In *Burke v. Byrd*,[14] the plaintiff was injured while a passenger in the defendant's automobile. He received free hospital and medical treatment incidental to his United States Air Force enlistment. In litigation, the court held that he was entitled to recover from the defendant for the "reasonable value of medical services rendered the serviceman by the United States Government and for which the serviceman does not pay."[15] It has also been held that a defendant is not entitled to a reduction in plaintiff's award because the plaintiff has received some free medical services, by virtue of veteran's benefits.[16]

Case law also finds the Collateral Source Rule mixed with statutory law in preventing a calculation of the loss of past or future earnings on the basis of net income after taxes. This interpretation of the rule treats any tax exemption on a damages award as a gratuity conferred upon the injured plaintiff by Congress.[17]

The Washington Court has had an opportunity to interpret the Collateral Source Rule with respect to gratuitous payments. In *Nelson v. Western Steam Navigation Co.*[18] an injured longshoreman, employed by a private company, was given free medical care and hospitalization in a marine hospital facility which treated only sailors and mariners. The supreme court found error in the trial court's determination that plaintiff was entitled to receive, as damages, the value of the medical and hospital care necessitated by defendant's negligence. Two annotations of this case[19] seem to indicate that *Nelson* holds with the minority in allowing no recovery under the Collateral Source Rule for the value of services gratuitously rendered.

However, to understand the meaning of the *Nelson* case, it is necessary to read the opinion, four years later, in *Heath v. Seattle Taxicab Co.*[20] The *Heath* opinion involved two of the justices who concurred in the *Nelson* case. The court's opinion interpreted the holding in *Nelson* as being based on a credit allowed the defendant because the payments came directly from the defendant rather than from a source collateral to the defendant. In the words of the court:

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14 188 F. Supp. 384 (N.D. Fla. 1960).

15 *Id.* at 385.

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

17 *See, e.g.*, Prudential Ins. Co. of America v. Wilkerson, 327 F.2d 997 (5th Cir. 1964); Hall v. Chicago N.W. Ry., 5 Ill. 2d 135, 125 N.E.2d 77 (1955). *Cf.* INT. REV. CODE OF 1954, § 104(a)(2).

18 52 Wash. 177, 100 P. 325 (1909).

19 Annot., 19 A.L.R.2d 557, & Annot., 68 A.L.R.2d 876.

20 73 Wash. 177, 131 P. 843 (1913).

> The situation here presented is distinctly different from that found in *Nelson v. Western Steam Nav. Co.*, 52 Wash. 177, 100 Pac. 325. There the plaintiff, claiming to have been injured by the negligence of the steamship company, was held not entitled to recover for his hospital and physician's fees, which were paid from the seamen's fund. That fund is created under a Federal law by payments made by the various steamship companies, and is not contributed to by the seamen. It should therefore inure to protect the steamship company from paying again items of expense which have already been paid from the fund, in which the steamship company has a direct and pecuniary interest.[21]

When presented with the proper case, the Washington Court should hold with the majority rule so that the rule in Washington will be that gratuities, coming from a source collateral to the defendant, are within the comprehension of the Collateral Source Rule.

## Insurance Proceeds

In present times, when a great majority of the population finds itself multiply insured against virtually every eventuality and casualty, it has become axiomatic application of the Collateral Source Rule that insurance proceeds payable to an injured party, from a source collateral to the wrongdoer, are not to be deducted from any damages assessed against the wrongdoer.[22] The most common situation in which insurance payments reduce the expenses resulting from an injury concerns the payment of hospital and medical expenses. In such cases, the rule is virtually universal that the payments are not deductible from the damages.[23]

The application of the Collateral Source Rule to insurance is based upon the policy that the party who has had the foresight to provide insurance for himself should not have his good judgment inure to the benefit of someone who has injured him. The rationale is well stated in one of the early cases applying the Collateral Source Rule. In *Perrott v. Shearer*,[24] the court stated that the insured plain-

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[21] *Id.* at 187, 131 P. at 847.

[22] *E.g.*, Grayson v. Williams, 256 F.2d 61 (10th Cir. 1958), where the cost of a special nurse was defrayed by an Employees' Hospital Association. The court held that the plaintiff's damages would include charges for special nurses even though this charge was paid by the Association to which he had contributed. *See also* Lyons v. Freeborg, 3 Wn. 2d 380, 100 P.2d 1041 (1940), a suit for property damage to plaintiff's auto caused by defendant's negligence. The damages were $275.00, $225.00 of which had been paid by the plaintiff's insurance company. The trial court ruled that plaintiff was entitled to recover only out-of-pocket expenses, namely, fifty dollars. On appeal this case was reversed on the Collateral Source Rule rationale. *Accord*, Bader v. Marlin, 160 Wash. 460, 295 P. 160 (1931).

[23] *See* Taylor v. Jennison, 335 S.W.2d 902 (Ky. 1960); Kickham v. Carter, 335 S.W.2d 83 (Mo. 1960).

[24] 17 Mich. 47 (1868).

tiff is not receiving a "double recovery." Rather, he "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."[25]

The general rule with regard to payment of insurance proceeds is applied in cases involving life insurance. The law holds that damages for wrongful death are not reduced because some statutory beneficiary under a wrongful death statute has been the beneficiary of a life insurance policy of the deceased.[26]

### PENSION AND RETIREMENT BENEFITS

Where an injured party is entitled to pension or retirement benefits, as a result of or subsequent to sustaining personal injuries, it is generally held that such payments cannot be shown to reduce the injured party's damages for future loss of earnings, or for any other mitigating purpose.[27] The Collateral Source Rule, in this respect, has been applied to social security payments and veterans' pensions. In *A. H. Bull S.S. v. Ligon*,[28] a longshoreman sued a ship owner for personal injury. The injured party's earnings before the accident were approximately $2,900.00 per year. After the accident he earned $400.00 per year. The Fifth Circuit Court of Appeals, in this opinion, affirmed the trial court's exclusion of evidence which was offered to show that the plaintiff was entitled to receive social security payments and a veteran's pension, all of which would be terminated if the plaintiff's earnings exceeded $1,200.00 per year.[29]

Some cases have even applied the Collateral Source Rule, with respect to pensions, against a unit of government which is a party defendant, and which is the very unit making the pension payments. In *Price v. United States*,[30] the trial court awarded, for the loss of an arm, $96,800.00 to a crane operator who had been working at a naval shipyard. The court ruled that the amount could not be reduced by benefits payable under the Civil Service Retirement Act, because of the Collateral Source Rule. It distinguished certain other cases

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[25] *Id.* at 56.

[26] In Walthew v. Davis, 201 Va. 557, 111 S.E.2d 784 (1960), a girl passenger in an airplane was killed because of the pilot's negligence. The court ruled that damages for this girl's death were not reduced because her mother was a beneficiary of a policy of insurance on the girl's life.

[27] For authorities collected on this point, see Annot., 75 A.L.R.2d 885 (1961).

[28] 285 F.2d 936 (5th Cir. 1960).

[29] *Accord,* Cunningham v. Rederiet Vindeggen A/S, 333 F.2d 308 (2d Cir. 1964). Also, the same rule has been applied to benefits payable to a plaintiff from the Railroad Retirement Fund. Sinovich v. Erie R.R., 230 F.2d 658 (3d Cir. 1956).

[30] 179 F. Supp. 309 (E.D. Va. 1959), *aff'd,* 288 F.2d 448 (4th Cir. 1961).

involving veterans' benefits which the court deemed to be in the area of gratuities, indicating that it felt that payments made under the Civil Service Retirement Act were part of the employee's compensation.[31]

Case law in Washington has followed the general trend with regard to pension payments. In *Heath v. Seattle Taxicab Co.*,[32] the plaintiff, a policeman, recovered a judgment for personal injuries sustained through the negligence of defendant's driver. The defendant-appellant excepted to the trial court's refusal to give instructions deducting from plaintiff's damages amounts paid to him from the Police Pension Fund. The evidence showed that part of the Police Pension Fund came from deductions from policemen's salaries. The court applied the Collateral Source Rule in stating:

> It would be contrary to public policy, and shocking to the sense of justice, to hold that the proceeds of insurance paid for by the injured person for his own benefit . . . should inure to the benefit of, and grant immunity to, the person whose negligence, willful or otherwise, injured him or caused his death.[33]

A later Washington case involving generally the same issues is *Stone v. City of Seattle*.[34] This was a suit for negligence, concerning personal injuries allegedly received in a fall on a defective sidewalk. The trial court instructed the jury that damages for future loss of earnings were not to be reduced by reason of any social security or veterans' benefits. This instruction was approved by the supreme court and was obviously based on the Collateral Source Rule rationale.

In a more recent Washington case, *Pancratz v. Turon*,[35] an appellate level case not directly involving pension payments but similar benefits, the executor of the estate of Mabel Pancratz brought an action for her wrongful death. The action was based upon the alleged negligence of the defendants in the operation of a motor vehicle. One of the beneficiaries of the action was a twenty-five year old incompetent daughter of the decedent. The jury came back with a verdict of $14,791.61 for the plaintiff. The plaintiff appealed on the issue of damages only.

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[31] *See also* Lehr v. City of New York, 219 N.Y.S.2d 308 (1961), which held that a payment of a pension does not operate to bar a death action against the city, nor may it be shown to mitigate damages, even though the defendant is paying the pension benefits.

[32] 73 Wash. 177, 131 P. 843 (1913).

[33] *Id.* at 186, 131 P. at 847.

[34] 64 Wn. 2d 166, 391 P.2d 179 (1964).

[35] 3 Wn. App. 182, 473 P.2d 409 (1970).

On appeal, the plaintiff contended that it was error for the trial court to allow the jury to consider the fact and amount of the social security and veteran's administration payments being made to the guardian of the daughter for her support, but which were being paid not as a result of her mother's death. The same benefits had been paid during the life of the mother and were a result of the earlier death of the incompetent girl's father.

The defendant-respondent contended that the Collateral Source Rule should be applied to preclude mitigation of plaintiff's losses only where benefits spring into existence *because* of the death or other injury caused by the tortfeasor. In cases where the same benefits were being paid before the tortfeasor's wrongful act, the jury should be entitled to know that these benefits were being paid in order to measure the economic loss caused by the tortfeasor's negligence.

Division Two of the Washington Court of Appeals rejected the defendant's contention. It noted that the defense could show that such payments were being made to the mother, while she lived, to negate the plaintiff's contention that the mother was the daughter's sole source of support. The court stated, however, that any evidence of continued payments to a new guardian after the decedent's death was not relevant and any increase in benefits occasioned by the death was inadmissible because of the Collateral Source Rule.

The court determined that the jury had exercised the opportunity to reduce the damages because of the wrongfully admitted evidence and therefore granted a new trial to the plaintiff.

## Government Benefits

Civil Service employees, veterans and other classes of individuals often receive various benefits, payable by a branch of government, after the persons entitled have been injured. Because such payments are generally in the category of gratuities or some form of employment compensation, the courts have held that such benefits do not mitigate the damages assessable against a wrongdoer, under the Collateral Source Rule. As noted earlier in this article, this rule has been applied against a unit of government which is the wrongdoer as well as the payor of the benefits. In *Poniatowski v. City of New York*,[36] the plaintiff, a policeman injured while on duty, recovered judgment against the city for the negligence of a fellow police officer. The court noted that the city was not entitled to show, in mitigation of damages, that the plaintiff was receiving a disability retirement pension.

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[36] 14 N.Y.2d 76, 198 N.E.2d 237, 248 N.Y.S.2d 849 (1964).

The general attitude toward government benefits received by injured persons recognizes that various levels of government have produced enlightened legislation for employees and other persons. This legislation seeks to work a benefit to the injured party and should not be manipulated so that the actual benefit accrues to the wrongdoer who produced the injury. Thus we have the general rule that receipt by injured victims of the benefits of any type of social legislation—social security payments, unemployment compensation, veterans' benefits, workmen's compensation benefits—will not mitigate the tortfeasor's damages.[37]

The United States Supreme Court has obliquely recognized the application of the Collateral Source Rule, in general and in particular with regard to government benefits. In *United States v. Standard Oil Company of California*,[38] the main holding was that the government was not allowed to collect from the defendant amounts the government had spent on medical care of soldiers injured by defendant's negligence.[39] In *dictum*, the court approved of the Collateral Source Rule. In the course of the opinion, the court recognized that in the United States the prevailing rule seemed to be that an injured person may recover for wages lost or medical expenses incurred, even though such amounts were supplied by insurance, by an employment contract or gratuitously.

A final case to be considered under the category of government benefits is one of peculiar interest for the opinion recognizes the fact that the Collateral Source Rule is so broadly applied that any practicing attorney is charged with knowledge thereof. In *Sainsbury v. Pennsylvania Greyhound Lines*,[40] a sailor was injured when a bus on which he was a passenger ran off the road and struck an embankment. He was first treated at a private hospital and later transferred to a government hospital where he remained for three months. The claims adjuster, known by the plaintiff to be a member of the bar, secured a release from the plaintiff, after having advised him that he was entitled to recover only for *pain and suffering*, since, as a serviceman, he was entitled to free medical care and disability payments should they be required. It was obvious to the court that the attorney had misstated the law and had induced the serviceman to believe that he was not entitled to recover for the value of benefits

[37] *E.g.*, United States v. Harue Hayashi, 282 F.2d 599 (9th Cir. 1960) (Social Security "mother's insurance benefits"). *See also* United States v. Gray, 199 F.2d 239 (10th Cir. 1952), where a veteran sued the government under the Federal Tort Claims Act. The court held that it was proper to exclude evidence that plaintiff had received hospital and medical benefits for her injury from the Veterans' Administration.

[38] 332 U.S. 301 (1947).

[39] *But see* Medical Care Recovery Act, 42 U.S.C. §§ 2651-53 (1962).

[40] 183 F.2d 548 (4th Cir. 1950).

received from the government. The court held his statement to be *fraud*, justifying recission of the release and implying that the Collateral Source Rule was embedded in the law and engraved on the consciousness of the personal injury bar. The court stated that, "[i]t is inconceivable that any member of the bar could have made a statement such as the one made by Weston (the adjuster) without knowledge of its falsity or without acting with a reckless disregard for the truth."[41]

## Wage Continuation Payments

In some cases, an injured party who is unable to follow the course of his regular employment, because of an injury, will receive a continuation of his wages. This is generally considered part of his compensation as an employee or a gratuity from the employer. In either case, the Collateral Source Rule will apply to preclude introduction of these matters into evidence in order to mitigate the damages of the injured person.

In *Geffen v. Winer*,[42] the wages of an injured policeman were continued by his employer. The trial court refused to give plaintiff's requested instruction that the wages which he would have earned during the time he was unable to work were part of his damages. Because of this action on the part of the trial court, the D.C. Circuit reversed the case on the basis of the Collateral Source Rule.

Another case which illustrates the aspect of the rule treated in this section is *R.E. Dunas Milner Chevrolet Co. v. Morphis*.[43] The plaintiff, a medical doctor, was injured in an automobile accident due to the defendant's negligence. Pursuant to a medical partnership agreement, the plaintiff continued to receive his partnership "draw" for several months after the accident. On appeal by the defendant, the appellate court held that there was no error in the trial court's exclusion of evidence of such payments because plaintiff's damages were not to be reduced by the amount paid to him by the partnership, whether this was paid under a contract or as a gratuity.

The rule applied in the above two cases, cited for purposes of illustration, is generally followed throughout the nation.

## Subrogation and Workmen's Compensation Law

The practical trial attorney knows that many benefits received and retained by a plaintiff, because of the Collateral Source Rule,

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41 *Id.* at 550.
42 244 F.2d 375 (D.C. Cir. 1957).
43 337 S.W.2d 185 (Tex. Civ. App. 1960).

are not actually a total windfall for the injured party. In some instances payments received by an injured person under many insurance policies, and other modes of compensation, must be repaid, in whole or in part, because of policy and contract provisions. In any event, the party paying benefits to an injured party generally has a right of recovery, by means of subrogation, against the tortfeasor.[44]

The personal injury practitioner in the State of Washington quite often will find himself involved in a subrogation situation when he pursues a cause of action for a party injured, during the course of his employment, by a person not related to his employment. In such cases, the Department of Labor and Industries and the accident fund and the medical aid fund, provided for by Washington industrial insurance law, are subrogated to the rights of the injured workman against any recovery he obtains from the third-party tortfeasor and have a lien upon any such cause of action.[45]

If the board that deals with industrial injuries has no right of subrogation by statute, then it may be argued that the injured workman may retain the benefits received under industrial insurance law and may further prosecute his rights against the third-party defendant. The damages computed against the latter will not be reduced by the workman's recovery under industrial insurance provisions, because of the Collateral Source Rule. A case illustrating this point is *Powell v. Wagner*,[46] where plaintiff sued for injuries sustained in an automobile accident. Fifty-seven percent of the plaintiff's award was for medical and hospital bills which had been previously paid by the Ohio Industrial Commission. Under applicable law, no subrogation rights existed on behalf of the Ohio insurance fund with regard to the employee's rights against a third-party tortfeasor. The court held that under the Collateral Source Rule workmen's compensation payments made to the plaintiff did not reduce the damages payable by the defendant despite the fact that the plaintiff would not have to repay the Ohio industrial insurance fund.

## MEDICAL-PAY OFFSETS

As one must infer by now, any payments made to an injured party by the tortfeasor will mitigate any damages to be computed

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[44] Concerning the right of recovery over by means of subrogation or similar theories against a third person tortfeasor by an employer who has paid salary, wages, sick leave pay, medical expenses or the like to or for an injured employee, *see generally* Annot., 70 A.L.R.2d 475 (1960).

[45] WASH. REV. CODE § 51.24.010 (1971).

[46] 178 F. Supp. 345 (E.D. Wis. 1959).

against him. In such cases the Collateral Source Rule never comes into play because the payments are not "collateral," but direct from the defendant. However, the law seems to take an unusual twist when dealing with payments from a host driver's insurance company. Specifically, the question is whether amounts paid to an injured party under medical-pay provisions of the driver's insurance policy can be deducted from any payment to be made under the liability provisions of the same policy to a guest passenger of the insured. There seems to be law to support both affirmative and negative answers to the question.

The first line of authority would allow the defendant's insurer to mitigate the damages by the amounts paid under the medical-pay provisions of the policy of the host driver. This rule will allow admission of such payments on the basis that the Collateral Source Rule does not apply because the source is not "collateral."[47]

The alternate line of authority will apply the Collateral Source Rule and exclude evidence of any medical payments, which do not arise from the liability coverage of the driver. In such cases the automobile guest is permitted to recover under both medical pay and liability portions of the insurance policy of the host driver. The rationale followed by the cases is that the right to medical payment is based in contract while the liability payment "sounds in tort."[48]

The latter theory, which allows the guest passenger to recover under both medical-pay provisions and liability provisions is well analyzed in the case of *Truitt v. Gaines*.[49] In this case, a woman and her son were involved in an automobile accident, whereafter they sued their host driver. The host's insurance company paid $500.00 to each plaintiff under the medical-pay provisions of the defendant's policy. In the suit, the husband of the woman and father of the son, also one of the plaintiffs, asked, as part of the damages, $1,977.55 for medical expenses of his wife and son. The court noted that the liability and medical pay coverages were in separate parts of the defendant's policy, and that each was supported by a separate consideration, a separately computed premium. The result was that the plaintiffs successfully invoked the Collateral Source Rule. Relying on authority from throughout the nation, the trial court held that the plaintiffs may recover for medical expenses, regardless of any payment by the defendant's insurance company, under a separate and divisible medical payment contract.[50]

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[47] *E.g.*, Turner v. Mannon, 236 Cal. App. 2d 134, 45 Cal. Rptr. 831 (1965).
[48] *E.g.*, Distefano v. Delta Fire and Casualty Co., 98 So. 2d 310 (La. App. 1957).
[49] 199 F. Supp. 143 (D. Del. 1961), *aff'd*, 318 F.2d 461 (3d Cir. 1962).
[50] *Accord*, Severson v. Milwaukee Auto Insurance Co., 265 Wis. 488, 61 N.W.2d 872 (1953).

It is asserted that, because of the previously discussed policy reasons behind the Collateral Source Rule, the latter line of authority is the more reasonable approach. However, it would seem that closer drafting of insurance policy contracts could change the effect of these cases and allow insurance companies to set off any medical payments against liability payments.

A sidelight from the case law involving the application of the Collateral Source Rule to medical payments arises in the area of uninsured motorist coverage. The issue, there, is whether the insurance company may deduct medical payments to its own insured from any liability payments under uninsured motorist coverage. Case law on this issue is meager. However, one case has confronted the problem directly. In *Cannizzo v. Guarantee Insurance Co.*,[51] the plaintiff was injured in an automobile accident with an uninsured motorist. His insurance policy with defendant provided, in Part II, for $2,000.00 medical payment coverage and in Part IV for uninsured motorist coverage.

The arbitration award, under the uninsured motorist coverage, did not deduct the $2,000.00 paid to plaintiff by defendant under Part II of his policy. Judgment was entered confirming this award. The defendant appealed from an order denying its motion to compel the plaintiff to execute a satisfaction of the judgment upon defendant's payment of the arbitration award less the disputed $2,000.00.

On appeal, the court referred to a California statute[52] which stated that an arbitration award *may* be reduced by the amount of medical payments. This, the court reasoned, was a permissive statute, allowing insurance companies to put into policies provisions for deduction of medical payments from uninsured motorist coverage. The defendant-appellant in the instant case did not do so and was, therefore, not allowed to make the deduction. Although this rule might not be a direct application of the Collateral Source Rule, it would seem consistent with the reasoning of that rule. Unless the policy specifically so provides, medical payments made by the claimant's company are not deductible from a recovery under separate provisions for uninsured motorist coverage.

There is apparently no case law on this subject in the State of Washington. A perusal of the applicable statute[53] throws no light on the subject. The California statute is silent as to deductions in uninsured motorist coverage cases. If we follow the reasoning of the *Cannizzo* case, we must conclude that no credit is allowed for pay-

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[51] 245 Cal. App. 2d 70, 53 Cal. Rptr. 657 (1966).
[52] CAL. INS. CODE § 11580.2(h) (1971 supp.).
[53] WASH. REV. CODE § 48.22.030 (1967).

ments made under the medical-pay provisions which are separate from the uninsured motorist coverage provisions in the policy.

ADMISSIBILITY FOR A LIMITED PURPOSE

As the practicing attorney and the student of law well know, nearly all of the exclusionary rules of evidence may be circumvented, and evidence, otherwise inadmissible, may be admitted for a particular and limited purpose. The Collateral Source Rule is no exception to this general rule of practical evidence. It is common for defense counsel to attempt to get before the jury evidence of collateral payments, for some express purpose other than to depreciate the damages of the plaintiff.

Various courts have handled the attempt to admit collateral payments for a limited purpose in different fashions. Apparently, as in other areas of the law of evidence, two lines of authority have emerged. The first would admit evidence of collateral payments for particular purposes with cautionary instructions to the jury concerning the limited use of such evidence. The second would totally exclude such evidence as being too prejudicial. A third line of authority is developing which takes a position between the other two rules. This rationale would require a very strong showing of probative value on the part of the evidence sought to be admitted which would necessarily outweigh its prejudicial effect.

The rule of total exclusion is based upon the belief that admitting evidence of collateral payments made to the plaintiff will necessarily prejudice the jury in that its verdict will reflect a reduction in damages because of such evidence, even though it is supposedly admitted to show something else. The courts that hold in this fashion believe that it is very likely the jury will misuse the evidence and that its substantive or impeaching value is clearly outweighed by the potential prejudice.[54]

Even in cases that have resulted in defense verdicts, rather than reduced verdicts, appellate courts have granted new trials because of the wrongful admission of collateral payments. In *Healy v. Rennert*,[55] the plaintiff, a fireman, was injured on duty by the alleged negligence of the defendant. He received a disability retirement from the fire department. Plaintiff had spent eighteen years

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[54] *E.g.*, Gaughman v. Washington Terminal Co., 345 F.2d 434 (D.C. Cir. 1965), where the court ruled that it was prejudicial error to allow evidence of plaintiff's receipt of sums from the Railroad Retirement Board and Public Assistance even for the limited purpose of showing that such payments provided an incentive for the plaintiff to malinger.

[55] 9 N.Y.2d 44, 173 N.E.2d 777 (1961).

with the fire department and was eligible for normal retirement in two years at one-half pay. Over the objection of counsel, the defendant was permitted to show that, because of his accidental injuries, the plaintiff was immediately entitled to receive a disability pension at three-fourths of his regular pay and that the plaintiff was the member of a health insurance plan which paid for certain expenses. The trial judge instructed that the jury could not consider the pension in mitigation of the damages, but they might consider the plaintiff's motives in applying for his increased and accelerated pension and the effect of such pension upon his alleged disability and injuries.

The plaintiff carried an appeal to the Appellate Division of the New York Supreme Court which affirmed. Plaintiff then took his case to the highest court of the state, the New York Court of Appeals, which reversed and granted a new trial. On appeal the plaintiff had contended that the evidence and the instruction required a reversal because the jury may have found for the defendant because they felt there were no damages, rather than deciding the case on the issues of negligence and contributory negligence. The defendant contended that he was found to be free from liability and that submission of evidence of collateral payments was never a topic of the jury's deliberation.

The New York Court of Appeals, in ruling that an injured person may recover for wages lost and medical expenses even though such amounts were paid by insurance or gratuitously, reaffirmed the Collateral Source Rule. The court stated that the evidence of the plaintiff's receipt of the disability pension was without probative force. Confronting defendant's contention that the jury ruled in his favor on the basis of liability and never reached the issue of damages, the court stated that the jury may very well have believed the plaintiff suffered no damages because of the inadmissible evidence and may have decided the case on that basis rather than on the issues of negligence and contributory negligence. The court stated that the trial court's limiting instruction was ineffective to negate the prejudicial effect of the evidence, that it was confusing and that, "[t]he whole subject should have been removed from the jury."[56]

The United States Supreme Court has voiced its agreement with the rule of exclusion. In *Eichel v. New York Central Railroad*[57] the trial court and the circuit court of appeals both agreed that evidence of a disability pension paid to the plaintiff after he was injured was admissible for a limited purpose—to impeach the plaintiff's

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[56] 173 N.E.2d at 779.
[57] 375 U.S. 253 (1963).

disability evidence and to show that he was a malingerer. On appeal, the United States Supreme Court unanimously reversed the court of appeals and held that admission of the evidence of the pension payments was erroneous, even though it was admitted for the limited purpose of showing a possible motive for the individuals not having returned to work. Concerning the value of such evidence the Court stated:

> In our view the likelihood of misuse by the jury clearly outweighs the value of this evidence. Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice. . . .[58]

A recent case in the State of Washington, from the intermediate appellate level, would indicate that the rule in Washington is that evidence of collateral payments is admissible for a legitimate, limited purpose. In *Fleming v. Mulligan*,[59] the plaintiff fell off the back of the defendant's truck. The main issue of the case was which of two different host-guest statutes applied to private roads. The case was reversed because the trial court removed from the jury the issue of whether the plaintiff was a guest of the defendant.

Concerning the Collateral Source Rule, it was noted that, during cross-examination, the plaintiff was required to testify over objection of his counsel that he had received sick leave from his employer. The appellate court said that this evidence was not admissible for the purpose of mitigating the damages. However, such questioning was permissible for a limited reason—to test the witness' accuracy concerning his direct testimony as to the time he had lost from work, which was one of the elements of claimed damages.

It is asserted that the reasoning in the *Fleming* case is specious. It would seem that the evidence admitted was highly prejudicial and the jury could not overlook it when assessing the damages. In addition, there should have been other ways to test the accuracy of the witness' statement on direct examination as to his time lost from work. The manifest purpose of the admission of the evidence was to prejudice the jury on the issue of damages and it should have been excluded. These writers feel that the beneficial effects of the Collateral Source Rule should be protected, not only from frontal attack, but also from side door intrusions.

Certainly there may be exceptional cases where the probative force of collateral payments might be so great as to clearly outweigh any prejudice that may be generated by such evidence. The rule should not be one of total, absolute and universal exclusion; how-

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[58] *Id.* at 255.

[59] 3 Wn. App. 951, 475 P.2d 754 (1970).

ever, evidence of collateral payments should only be admitted under very careful and exacting guidelines. One recent case providing an excellent statement of this "middle-ground rule" is *Hrnjak v. Graymar, Inc.*[60]

In the *Hrnjak* case, the plaintiff was moving very slowly on the Santa Anna Freeway, when his automobile was rear ended by the defendant's truck which was doing approximately fifty miles per hour at the time. The collision was apparently caused by brake failure in the defendant's truck. Despite substantial evidence of general and special damages, which includes more than $6,000.00 in out-of-pocket medical expenses, the jury returned a verdict for $6,100.00 in favor of the plaintiff. During the trial, the court had allowed the defense to show that the plaintiff had received compensation under liability and disability policies but admonished that the sole purpose in admitting such evidence was to show the possible inducement for the plaintiff to feign injury and to refuse to return to gainful employment.

The Supreme Court of California reversed holding that the trial court had abused its discretion in not weighing the probative value against the prejudicial impact of such evidence. The court stated its position as follows:

> The potentially prejudicial impact of evidence that a personal injury plaintiff received collateral insurance payments varies little from case to case. Even with cautionary instructions, there is substantial danger that the jurors will take the evidence into account in assessing the damages to be awarded to an injured plaintiff. Thus, introduction of the evidence on a limited admissibility theory creates the danger of circumventing the salutary policies underlying the collateral source rule. Admission despite such ominous potential should be permitted only upon a persuasive showing that the evidence sought to be introduced is of substantial probative value.[61]

The rule in the *Hrnjak* case allows the trial court discretion to admit or refuse admission of collateral payments. This discretion is not untrammeled, however, since a court on appeal may reverse a decision if the trial court has clearly abused its discretion. This should provide adequate protection for the plaintiff in the event that the trial judge does not conform to the policy of the *Hrnjak* case.

## CONCLUSION

Although some features of the Collateral Source Rule have made it a subject of criticism, it is this article's position that the rule is

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[60] 4 Cal. 3d 725, 484 P.2d 599, 94 Cal. Rptr. 623 (1971).
[61] *Id.* at 732-33, 484 P.2d at 604, 94 Cal. Rptr. at 628.

essentially one of fairness and reason and that it should become and continue to be a rule of universal application. Generally stated, this rule lays down a proposition of equity that the wrongdoer is not entitled to mitigate his damages by showing that the economic losses of the victim of his negligence were in fact lessened, by continued wage payments, employment benefits, the benefits of social legislation or gratuitous care or services, from sources collateral to and unrelated to the defendant.

Recent case law indicates that there has been no significant shift from the law's pervasive favoring of the Collateral Source Rule. It is further predicted that the rule should and will continue to receive judicial approval and that the great weight of American judicial authority will continue to apply the rule in most contexts.