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

by Robert Allen Sedler*

PART I**

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

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

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

1 C. Wricht, Preface to Cases on Remedies (1955).

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

3 It may be significant that the most current text on the subject is C. McCormick, Damages (1935).

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

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

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

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

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

Collateral Source Rule Sans Suprogation: A running s windgau, 10 Great D. 1827.

395 (1963).

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

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

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

THE COLLATERAL SOURCE RULE AND THE SILENT REVOLUTION

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

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

Note, Unreason in the Law of Damages, 77 Harv. L. Rev. 741 (1964).

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

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

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

13 Generally regarding insurance proceeds, see the discussion in Maxwell, supra note 6, at 672 70.

note 6, at 672-79.

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

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

¹⁴ For the view that such benefits generally do not meet all the tangible loss in cases of serious injury, see Morris and Paul, supra note 8, at 919-20.
¹⁵ The concern of the courts with limiting the liability of the new enterprises is reflected in decisions such as Beatty v. Central Iowa Ry., 58 Iowa 242, 12 N.W. 332 (1882); Blyth v. Birmingham Waterworks. [1856] 11 Excheq. 781; Winterbottom v. Wright, [1842] 10 M. & W. 109, 152 Eng. Rep. 402.
¹⁶ Dean Prosser suggests that liability insurance developed first as a means of indemnifying employers, particularly as to liability under the early Workmen's Compensation acts. W. Prosser, Torts 563 (3rd ed., 1964).

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

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

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

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

¹⁷ Contra, Drinkwater v. Dinsmore, 80 N.Y. 390 (1880).
18 The change in "systems of reparation" is effectively summarized in Conrad, Morgan, Pratt, Voltz and Bombauch, Automobile Accident Costs and Payments, ch. 1 (1964).

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

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

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

¹⁹ Here, of course, no problem of collateral source benefits is presented.
20 Some states have now adopted the "split-verdict" procedure in criminal cases where the jury is to assess the penalty. See e.g., Cal. Pen. Code § 190.1 (West 1959).

²¹ See the discussion in W. Prosser, supra note 16, at 430, 444.
22 To the extent that courts are extending the "last clear chance" doctrine, the opportunity for the jury to apply its version of comparative negligence is increased.

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

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

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

⁽Footnote continued from preceding page)

not. The references to the findings of the jury study project are to Kalven, The Jury, the Law and the Personal Injury Damage Award, 19 Omo St. L.J. 158

<sup>(1958).

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

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

25 M. Belli, The More Adequate Award 24 (1952).

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

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

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

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

See e.g., Smith v. Triplett, 83 S.W.2d 1104 (Tex. Civ. App. 1935).
 See e.g., Dempsey v. City of Scranton, 264 Pa. 495, 107 A. 877 (1919).
 See e.g., Littman v. Bell Telephone Co. of Pa., 315 Pa. 370, 172 A. 687

<sup>(1934).

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

33 See the discussion in Fleming, The Collateral Source Rule and Loss Allocation in Tort Law, 54 Calif. L. Rev. 1478, 1481-82 (1966). The most comprehensive study is Conrad, Morgan, Pratt, Vultz, and Bombaugh, Automobile Accident Costs and Payments (1964).

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

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

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

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

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

36 Id. at 1549.

³⁶ Id. at 1549.

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

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

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

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

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

³⁰ See the discussion of the "condition of desirable equilibrium" in James, Social Insurance and Tort Liability: The Problem of Alternative Remedies, 27 N.Y.U. L. Rev. 537, 557 (1952). We will be alluding to the "condition of equilibrium" in a number of contexts, particularly as regards subrogation.

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

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

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

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

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

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

44 Kalven, supra note 23, at 169.

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

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

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

⁴⁶ Note, Unreason in the Law of Damages: The Collateral Source Rule, 77 Harv. L. Rev. 741, 749 (1964). To the same effect see, Peckinpaugh, An Analysis of the Collateral Source Rule, 1966 Ins. L.J. 545, 551.

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

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

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

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

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

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

⁵¹See note 49, supra.

⁵² 370 S.W.2d 261 (Mo. 1963).

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

It is not difficult to conceive of the sick leave benefits influencing the jury to find in favor of the defendant. The case was contested both on the grounds of liability and on the existence of any harm. A claim of back injury and nothing more results in minimal jury sympathy; this is not the case of the "battered plaintiff." The fact that the plaintiff alone claimed some injury and that she insisted on getting the defendant's name and address might cause the jury to suspect her of being "litigation-minded." At this point the jury is probably ready to find for the defendant. But then they might ask, "What if she is telling the truth; what if she really was injured?" Now the fact that she received four months of sick leave becomes very significant. The jurors do not have to wrestle with their consciences. As a result of the accident she received a four month vacation with pay, so even if she was injured, she "got something." There is no need for the jury to give her any more, and they may, with a clear conscience, return a verdict for the defendant. The evidence of benefits from a collateral source may have tipped the scales and caused the jury to resolve considerable doubts in favor of the defendant. The decision permitting the defendant to introduce the evidence also seems correct. There was a genuine dispute as to whether the plaintiff suffered any injury at all, and the availability of sick leave was most relevant on this point. But the evidence may well have affected the jury's decision on the issue of liability, and this case demonstrates why defense counsel are so anxious to get this evidence before the jury.

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

^{53 375} U.S. 34 (1963).
54 37 Stat. 1158 (1915), as amended, 46 U.S.C. § 680 (1964).
55 44 Stat. 1424 (1927), as amended, 33 U.S.C. §§ 901-950 (1964).

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

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

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

lost time.

57 375 U.S. 253 (1963).

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

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

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

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

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

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

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

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

that the evidence should necessarily be excluded.

61 375 U.S. at 255.

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

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

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

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

⁶⁵ Thompson v. Kawasaki Kisen, 348 F.2d 879 (1st Cir. 1965).
66 377 S.W.2d 613 (Tex. 1964).
67 The plaintiff in that case persuaded the court that the evidence should be heard in the absence of the jury because of the prejudicial effect it might have.
The court heard the evidence and ruled it inadmissible.
68 255 F.2d 42 (2d Cir. 1958).
69 We are assuming that in most cases the jury awards damages for loss of future earning opportunity up to the time the plaintiff would reach the age of 65, since that is when most people retire,

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

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

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

71 351 F.2d 24 (7th Cir. 1965).

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

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

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

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

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

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

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

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

They may well have considered that the plaintiff had sustained no

defendant, and the court observed:

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

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

that the plaintiff must seek a corrective instruction.⁷⁸ but on the whole, the prejudicial effect of such evidence has been recognized by the courts. The "silent revolution" has not succeeded very much more than has the frontal attack on the rule.

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

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

⁽Footnote continued from preceding page)

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

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

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

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

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

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

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

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

⁷⁸ Id. at 374, 183 N.E.2d at 893.

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

80 See Averbach, The Collateral Source Rule, 21 Ohio St. L.J. 231, 240 (1960); West, The Collateral Source Rule Sans Subrogation: A Plaintiff's Windfall, 16 Okla. L. Rev. 395, 413-14 (1963); Note, The Mitigating Effect of Damages on Social Welfare Programs, 63 Harv. L. Rev. 330, 331 (1949); Note, Unreason in the Law of Damages: The Collateral Source Rule, 77 Harv. L. Rev. 240, 741, 49 (1964) 740, 741-42 (1964).

⁸¹ Averbach, supra note 80, at 240. 82 See Peckinpaugh, An Analysis of the Collateral Source Rule, 1966 Ins. L.J.

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

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

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

⁸³ Lambert, The Case for the Collateral Source Rule, 1966 Ins. L.J. 531, 543.
84 Professor Kalven says that this is a problem "to which there is no altogether satisfactory solution." Kalven, The Jury, the Law and the Personal Injury Damage Award, 19 Ohio St. L.J. 158, 169 (1958).
85 See the discussion of the relationship between tort liability and the deterrence of accident-producing conduct in F. Harper and F. James, 2 The Law of Torts, § 12.4 (1956).
86 See the discussion of this point in West, supra note 80, at 412.
87 See James, Social Insurance and Tort Liability: The Problem of Alternative Remedies, 27 N.Y.U. L. Rev. 537, 546 (1952).
88 M. Belli, The More Adequate Award (1952).
89 I cannot recall where I saw this phrase, but it does seem to succinctly summarize the position of defense advocates.

summarize the position of defense advocates.

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

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

⁹⁰ In this connection settlement practices must also be taken into account. Studies indicate that the plaintiff who has sustained relatively little loss is more likely to be overcompensated by a settlement, since it may be less expensive for the insurer or enterprise to settle such claims for more than they are worth than to engage in litigation. See Morris and Paul, The Financial Impact of Automobile Accidents, 110 U. Pa. L. Rev. 913, 920-26 (1962). However, a particular plaintiff who has suffered extensive injuries still may be overcompensated when out of pocket loss is considered.
⁹¹ Peckinpaugh, supra note 82, at 555.
⁹² But this assumption is made. See e.g., West, supra note 80, at 82. "The collateral source rule only involves allowing double recovery for an injury which has been wholly or partially repaired."
⁹³ Peckinpaugh, supra note 82, at 551.

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

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

⁹⁴ See Lambert, supra note 83, at 542.
95 See James, supra note 87, at 549; West, supra note 80, at 411; Note, Unreason in the Law of Damages, supra note 80, at 750.
96 This is the essential thesis of West, supra note 80. See also Note, Unreason in the Law of Damages, supra note 80, at 753.

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

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

⁹⁷ Maxwell, The Collateral Source Rule in the American Law of Damages, 46 Minn. L. Rev. 669 (1961).
98 Id. at 688.

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

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

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

⁹⁹ Id. at 695.

¹⁰⁰ Id.
101 For the same conclusion, see Schwartz, The Collateral Source Rule, 41
B.U. L. Rev. 348, 363 (1961); Averbach, supra note 80, at 240.
102 This writing, therefore, will not be a study of the collateral source rule.
No attempt has been made to investigate or discuss all the cases that have dealt with the problem of cumulative recovery. A number of cases will be cited and discussed as illustrative, but that is as far as we will go. A rather complete compilation of cases will be found in West, supra note 80.
103 It has been suggested that "invocation of the 'rule' has too often been a substitute for analysis of the merits of the parties' claims." Note, Unreason in the Law of Damages, supra note 80, at 753. Although courts have sometimes distinguished between various types of benefits, the problem usually is not approached with reference to the particular benefit involved.

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

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

THE FUNCTIONAL APPROACH

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

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

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

I. The Damaged Doctor.

The damaged doctor is the plaintiff in Coyne v. Campbell. 105 He was "damaged" in an automobile accident which occurred when his automobile was struck in the rear by the defendant's. Essentially he sustained a whiplash injury. Since he was a physician, he received medical treatment from a fellow physician without charge. Physiotherapy treatments were given by his nurse during regular office hours, without charge. He claimed approximately \$2200 as damages for the medical and nursing care, but the trial court excluded any evidence on this point. The jury returned a verdict for the plaintiff, but he was dissatisfied and appealed, charging error in the exclusion of the evidence as to the reasonable value of the medical and nursing care. The New York Court of Appeals affirmed the judgment. The case reflected the conflict between overcompensation and windfall, the majority rejecting the collateral source rule and taking the position that the plaintiff could not recover the reasonable value of the medical and nursing expenses. The dissenting opinion maintained that the wrongdoer-whom, you will recall was the presumably insured 106 driver of the other automobile, should not receive a windfall. Since that decision two cases involving identical facts have arisen in other jurisdictions, and both courts held that the value of the services was recoverable since "they were given to benefit the plaintiff and not the defendant."107

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

 ^{105 11} N.Y.2d 372, 183 N.E.2d 891 (1962).
 106 If he had not insured, it is not likely that suit would have been brought.
 107 Nelson v. Federal Mogul Service, 27 Pa. D.&C.2d 222 (1962); Odde v. Cardi, 218 A.2d 373 CR.I. 1966).

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

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

¹⁰⁸ See generally, W. Prosser, Torts § 119 (3rd. ed. 1964).

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

¹¹⁰ See e.g., Stevenson v. East Ohio Gas Co., 73 N.E.2d 200 (Onio App. 1946).
111 See Receiver for the Metropolitan Police District v. Croydon Corp., [1957] 2 Q.B. 154 (C.A. 1956); City of Philadelphia v. Philadelphia Rapid Transit Co., 337 Pa. 1, 10 A.2d 434 (1940). C.f. United States v. Standard Oil Co. of Calif., 332 U.S. 301 (1947). See generally the discussion in Maxwell, supra note 97, at 682-86; Fleming, The Collateral Source Rule and Loss Allocation in Tort Law, 54 Calif. L. Rev. 1478, 1485-98 (1966).
112 For a discussion of the nature of a "court" in a primitive legal system see A. Hoebel, The Law of Primitive Man 23-28 (1954). See also T. Ellis, The Nature of African Customary Law 212-15 (1962).

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

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

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

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

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

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

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

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

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

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

¹¹⁴ As I understand it, a physician will not accept compensation from another physician (apart from psychiatrists) for treating him or a member of his family. I do not believe, however, that there is a formal "canon of ethics" to this effect. It is customary to give a substantial gift to the physician who donated his services. 115 See Dahlin v. Kron, 232 Minn. 312, 45 N.W.2d 833 (1950).

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

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

 ¹¹⁶ Cf. United States v. Standard Oil Co. of Calif., 332 U.S. 301 (1947).
 117 See Sedler, Conditional, Experimental and Substitutional Relief, 16
 RUTGERS L. REV. 639, 714-15 (1962).
 118 See Medical Fabrics Co. v. D. C. McLintock Co., 12 N.J. Super. 177, 79
 A.2d 313 (App. Div. 1951); Hartman v. Cohen, 350 Pa. 41, 38 A.2d 22 (1944).
 119 [1948] 1 All E.R. 779 (K.B.).

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

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

 ^{120 [1960] 2} W. L.R. 169 (Q.B.).
 121 See West, supra note 80, at 414; Ganz, Mitigation of Damages by Benefits Received, 25 Mod. L. Rev. 559, 568 (1962).

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

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

II. The Retired Soldier and His Disability Pension.

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

^{122 70}A Stat. 91 (1956), as amended, 10 U.S.C. § 1201 (1964).
123 [1963] 1 Q.B. 750 (C.A. 1962).
124 The House of Lords has only recently held that it has the power to depart from prior holdings. See Practice Statement (Judicial Precedent) [1966] 3 All E.R. 77, and Dias, Precedents in the House of Lords—A Much Needed Reform, 1966 CAMB. L.J. 153.
125 See Bradburn v. Great Western Railway Co., [1874] L.R. 10 Ex. 1 (C.A.).
126 Browning v. The War Office, [1963] 1 Q.B. 750, 759 (C.A. 1962).
127 Peacock v. Amusement Equipment Co., [1954] 2 Q.B. 347 (C.A.). See the discussion in Browning v. The War Office, [1963] 1 Q.B. 750, 759 (C.A. 1962).

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

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

¹²⁸ See the discussion in Browning v. The War Office, [1963] 1 Q.B. 750, 759

⁽C.A. 1962).

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

130 7 & 8 Eliz. 2, c. 65.

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

132 [1952] 1 K.B. 26 (C.A. 1951).

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

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

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

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

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

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

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

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

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

135 [1963] 1 Q.B. at 760-61.

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

Suppose a young man contemplating a military career consults the recruiting officer and is told, among other things, that he can retire at half-pay after twenty years, and that if he is ever forced to retire because of disability incurred in the line of duty, he will receive a generous pension. He is told of all the other "fringe benefits." There is no doubt that the availability of these benefits cushions his shock when he is told of the low salary. The assumption may then be made that a serviceman or other public servant exposed to hazardous duty receives the guarantee of a disability pension¹³⁶ as part of his total compensation picture, and that if it were not for the possibility of a pension and other fringe benefits, he would receive a higher salary. In Payne, Singleton observed that the fact that a person in the Navy receives a pension is a factor which enters into the question of pay, and in the absence of pension rights, "it is reasonable to assume that the pay would be higher."137 In Browning, Donovan, dissenting, stressed that the plaintiff "earned" his pension by taking less salary, and drew an analogy to insurance premiums: the difference between the salary as it was with the pension rights included and what it would have been if there were no pension rights was the equivalent of the payment of premiums of insurance.188

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

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

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

138 [1963] 1 Q.B. at 763-64.

139 [1960] 1 Weekly L.R. 328 (Q.B.).

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

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

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

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

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

¹⁴⁰ Id. at 330.

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

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

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

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

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

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

¹⁴² Id. at 151, 245 P.2d at 675-76.
143 434 P.2d 665 (Alas. 1967).
144 434 P.2d at 673-74. See also Young v. Warr, S.C. , 165 S.E.2d 797

 ¹⁴⁶ Rusk v. Jeffries, 110 N.J.L. 307, 164 A. 313 (Ct. Err. & App. 1933).
 See also Capital Products v. Romer, 252 F.2d 843 (D.C. Cir. 1958).
 146 That this is realistic is demonstrated by the "package" concept found in collective bargaining agreements.

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

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

¹⁴⁷ We are also, for purposes of this example, assuming that income tax savings will not be considered.
148 Ganz, supra note 121, at 565.

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

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

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

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

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

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

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

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

^{160 &}quot;A system of compensation designed to limit awards to strict economic loss and to guarantee such recovery may someday evolve. Certainly, most of the problems to which the collateral source rule provides a rough solution can be eliminated in such a context." Maxwell, *supra* note 97, at 695.

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

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

III. The Insured Accident Victim

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

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

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

one of the earliest American cases on the subject of collateral source benefits. Althorf v. Wolfe, 22 N.Y. 355 (1860).

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

154 Id. See Michigan Hospital Service v. Sharpe, 339 Mich. 357, 63 N.W.2d

<sup>638 (1954).
155</sup> Subrogation on this basis was allowed in Michigan Hospital Service v. Sharpe, 339 Mich. 574, 64 N.W.2d 713 (1954). The Blue Cross policy did not provide for subrogation, but the Blue Shield policy did.
156 See the discussion and citation of cases in Maxwell, supra note 97, at 674;

West, supra note 80, at 409 n. 108.

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

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

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

¹⁵⁸ See the discussion in W. VANCE, supra note 153, \$11.

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

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

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

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

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

¹⁶⁰ Harding v. Town of Townshend, 43 Vt. 536, 537 (1870).
161 Bradburn v. Great Western Railway Co., [1874] L.R. 10 Ex. 1 (C.A.).
162 See e.g., Taylor v. Jennison, 355 S.W.2d 902 (Ky. 1960); Kirkham v.
Carter, 335 S.W.2d 83 (Mo. 1960). C.f. Kopp v. Home Mut. Ins. Co., 6 Wis.2d
53, 94 N.W.2d 224 (1959), holding that insured who had received Blue Cross benefits could also recover under the medical payments clause of an insurance

policy.

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

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

165 Lambert, supra note 164, at 544.

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

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

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

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

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

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

See also Althorf v. Wolfe, 22 N.Y. 355 (1860); Ganz, Mitigation of Damages by Benefits Received, 25 Mod. L. Rev. 559 (1962).

169 See Ganz, supra note 167, at 565.

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

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

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

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

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

^{(1954).}

¹⁷³ James, supra note 166, at 553 n. 60.
174 We may assume that this would be permitted under state insurance laws, or if such subrogation were desired, the companies would try to obtain favorable legislation.

¹⁷⁵ James, supra note 166, at 563.

occur.178 When the loss has been met by the health and accident insurer, it may be asked whether there is any utility in shifting it again from this efficient distributor to an enterprise or liability insurer, which will then have to distribute it among its consumers, if it can, 177 or among its policyholders.

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

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

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

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

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

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

¹⁷⁹ Id.

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

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

¹⁸⁰ Harding v. Town of Townshend, 43 Vt. 536 (1870).
¹⁸¹ 133 Conn. 433, 52 A.2d 137 (1947).

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

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

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

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

¹⁸² See Peckinpaugh, supra note 82, at 553.

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

However, not all insurance is loss insurance. As we have pointed out, it is possible for a person to "over-insure", that is, to take out more insurance than is necessary to cover his losses. Fire insurance policies are written so that the insured cannot cumulate, and where the property owner has insured the property in excess of its value, recovery under the policy is on a pro rata basis. 183 Perhaps a fear of arson for the purpose of collecting insurance proceeds has impelled such an approach. But health and accident insurance does not operate in this manner, and indeed is marketed on the basis that the plaintiff can cumulate. Perhaps it is undesirable to permit a person to insure against the contingency of illness to the extent that he can recover a specified sum for a stay in the hospital or for undergoing a particular operation. 184 This is not the concern of a court awarding personal injury damages, where the legislature has permitted the health and accident insurers to carry on their business in this way. Once the plaintiff's actual loss has been measured, insurance recovery beyond actual loss is truly collateral 185 to the tort case, and should not affect the damages award. Therefore, insurance coverage is relevant only insofar as it meets the loss which the defendant would otherwise be required to bear.

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

¹⁸³ W. Vance, supra note 153, § 154. 184 We do not seem to have considered the economic utility of "over-

insuring".

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

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