The Constitutionality of Offsetting Collateral Benefits Under Ohio Revised Code Section 2317.45

I. INTRODUCTION

Beginning in the early 1980s a number of state legislatures, having perceived a "crisis" in the insurance industry, enacted statutes that limited the amount of damages a plaintiff could recover in a tort action.[1] These statutes took a number of forms, including caps on noneconomic damages, the elimination of joint and several liability, and the elimination of the collateral source rule.[2]

The primary focus of this Note is upon the theories that underlie the abrogation of the collateral source rule. This analysis will center upon a critique of Ohio's statutory elimination of the collateral source rule, as well as the various legislative modifications of the collateral source rule undertaken in other states.

Part II discusses the general theories behind liability caps. Part III analyzes the history of the collateral source rule, and Part IV examines the statutory elimination of the collateral source rule in Ohio and the accompanying case law. Part V suggests some improvements to the current Ohio statute.

II. PURPOSE OF LIABILITY CAPS

Much of the motivating force behind the enactment of liability caps came from a dramatic increase in medical malpractice litigation across several states.[3] Studies in these states concluded that because of the high dollar recoveries by plaintiffs in medical malpractice actions, insurance coverage was growing prohibitively expensive for a large portion of the population.[4] Consequently,

---

[1] *See* Ruth Gastel, *The Civil Justice System*, INSURANCE INFORMATION INSTITUTE (Feb. 1991); Linda J. Gobis, Note, Lambert V. Wrensch: *Another Step Toward Abrogation of the Collateral Source Rule in Wisconsin*, 1988 WIS. L. REV. 857 (1988); Amanda E. Haiduc, Note, *The Tale of Three Damage Caps: Too Much Too Little and Finally Just Right*, 40 CASE W. RES. L. REV. 825 (1990); L. Timothy Perrin, Comment, *The Collateral Source Rule in Texas: Its Impending Demise and a Proposed Modification*, 18 TEX. TECH L. REV. 961 (1987); *see generally* Ralph D. Gaines Jr. & William K. Hancock, *Tort Reform in Alabama: A Proponent's Perspective*, 18 CUMB. L. REV. 649 (1988); Perry Pazer & Tim Hogan, *The New Collateral Source Rule: Is It Constitutional?*, 18 TRIAL L. Q. 9 (1987).

[2] *See* sources cited *supra* note 1.

[3] Haiduc, *supra* note 1, at 825. *See generally* Ruth Gastel, *Medical Malpractice*, INSURANCE INFORMATION INSTITUTE (Feb. 1991).

[4] *See* Haiduc, *supra* note 1, at 825; Gastel, *supra* note 3.

state legislatures enacted laws to limit plaintiffs' recovery of damages, particularly punitive damages. Ohio is among those states.[5]

While much of the emphasis in tort reform was upon controlling the rising cost of medical insurance, in large part due to high malpractice verdicts, there also was a concern about rising insurance rates in other highly litigious areas. One commentator suggested that in addition to rising insurance costs, state legislatures increasingly believed that the judicial system was not working efficiently and therefore that some sort of statutory damage limitation was necessary. "Although the 'insurance crisis' was the most widely publicized factor that led states to adopt tort reform measures, the state legislatures also were responding to scholarship indicating that the tort system failed to achieve its compensatory objectives and therefore should be substantially modified or even eliminated."[6]

This perceived crisis in insurance led many states, including Ohio, to abolish the collateral source rule altogether. Ohio enacted statutes to eliminate the collateral source rule first for medical malpractice claims and for claims regarding political subdivision immunity, and then for general negligence claims.[7] Although an insurance crisis certainly was a motivating force, at least in Ohio there was a concern over the plaintiffs who, under the collateral source rule, were receiving a double recovery.[8] According to the author of Ohio's

---

[5] OHIO REV. CODE ANN. § 2307.43 (Baldwin 1990). In August, 1991, the Ohio Supreme Court held that section 2307.43 was unconstitutional. Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991).

[6] Nancy L. Manzer, Note, *1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability*, 73 CORNELL L. REV. 628, 628 (1988). Some writers blame attorneys for the rising costs of insurance. *See* Dennis McLellan, *Surfeit of Civil Suits is a Crime, Advocate of Tort Reform Says*, L. A. TIMES, Aug. 15, 1990, at E1 (Orange County ed.). In this article, McLellan discusses a recent book by Robert V. Wills, entitled "Why Lawyers are Killing America." *Id.* Wills blames the rise in litigation for the spiraling costs of liability insurance. *Id.* Another author writes that "[t]he courts, insurance carriers and defense lawyers are the three main culprits in rising insurance defense costs," which translates into higher overall insurance rates. *Defense Lawyer Fingers Culprits in Cost Spiral*, THE NATIONAL UNDERWRITER COMPANY PROPERTY & CASUALTY/EMPLOYEE BENEFITS Edition 26 (Nov. 19, 1990).

[7] OHIO REV. CODE ANN. §§ 2305.27, 2743.02, 2317.45 (Baldwin 1990).

[8] STANTON DARLING, OHIO CIVIL JUSTICE REFORM ACT (1987). The Sixth Circuit agreed that the state legislature intended to prevent double recoveries with section 2317.45.

> The purpose of the Ohio law . . . seems to be to prevent injured plaintiffs from receiving a windfall due to their injury. The statute requires that damage awards be adjusted for collateral benefits received as a result of . . . the injury so that a plaintiff will receive, in total, only the amount that a jury has determined to be adequate compensation for the particular injury.

most recent statute abolishing the collateral source rule, the primary purpose of the statute is to prevent an injured party from receiving a double recovery.[9] The author noted previous legislative attempts to reduce awards by collateral benefits, including Ohio Revised Code section 2305.27, which applies to medical malpractice actions.[10]

III. HISTORY OF THE COLLATERAL SOURCE RULE

Before addressing the specifics of the statutory modifications of the collateral source rule, it first seems appropriate to consider the rule's long history. The rule has both an evidentiary and a damage component. As one commentator explains, "[a]s a rule of evidence, it precludes introduction into evidence of any benefits the plaintiff obtained from sources collateral to the defendant. As a rule of damages, it forces the defendant to pay for the entire loss he caused despite independent recoveries by the plaintiff for the same loss."[11]

One popular justification for the collateral source rule is that the defendant should not benefit from his wrongful conduct.[12] Other justifications are that "the plaintiff should retain any benefit he obtained on his own or which was intended for him alone, and . . . the defendant should not benefit from plaintiff's receipt of compensation from sources independent of the defendant."[13]

Another commentator stated that "[i]t is considered better that an injured party receive double recovery than that a wrongdoer be relieved of liability for damages, especially since one purpose of accessing [sic] damages is to deter negligent conduct and encourage due care in the future."[14] However, another writer recognized that:

> The collateral source rule has evolved from opposing principles of tort law. First, the rule conflicts with the compensatory function of tort law. Full compensation is provided when the plaintiff is restored to the position he or she occupied before the tort occurred. If a plaintiff receives compensation from a third party not connected to the defendant, receipt of these benefits should in theory be used to reduce the tortfeasor's total damages. However, the collateral source rule requires the tortfeasor to pay the judgment even though the plaintiff has already been partly or completely compensated for the injuries suffered.

Baker v. Goldblatt, No. 91-3508, 1992 WL 12679, at *5 (6th Cir. Jan. 30, 1992).

[9] DARLING, *supra* note 8, at 3.

[10] *Id.*

[11] Perrin, *supra* note 1, at 961.

[12] *Id.* at 966.

[13] *Id.* at 983.

[14] Joseph F. Cunningham, *Collateral Source: Double Judgment or Double Trouble*, 9 DISTRICT LAW 34, 35 (1985).

> Thus, double recovery is possible and the plaintiff can be put in a better position than before the tort occurred. The collateral source rule also conflicts with the damage mitigation principle . . . because receipt of benefits from a collateral source does not act to mitigate damages.[15]

The leading Ohio case on the collateral source rule is *Pryor v. Webber*.[16] In *Pryor* the plaintiff brought a negligence action and argued that evidence of diminished wages paid by her employer should not have been admitted. The Ohio Supreme Court agreed. In construing the collateral source rule, the court held that "the receipt of collateral benefits is deemed irrelevant and immaterial on the issue of damages."[17] Because the court held that the benefits were irrelevant, the jury should not hear evidence concerning plaintiff's receipt of employer benefits, nor should the court deduct the benefits.

The court stated that "[t]he entire theory of the collateral source rule is to keep the jury from learning anything about the collateral income so that it will not influence the decision of the jury."[18] The jury may decide in a plaintiff's favor regardless of whether the evidence of collateral benefits is introduced; however, the jury could deduct from its award an amount equal to, or greater than, the admitted benefits. Such an outcome could not be controlled or predicted by the trial judge.

IV. ABROGATION OF THE COLLATERAL SOURCE RULE

The Ohio legislature eliminated the collateral source rule by enacting Ohio Revised Code section 2317.45 (also referred to as H.B. 1), effective in 1988.[19] The scope of the statute is extremely broad. The statute provides:

> [I]f a plaintiff in a tort action is entitled to an award of compensatory damages, that plaintiff shall disclose to the court after such entitlement is determined all collateral benefits, all rights of recoupment relative to the disclosed collateral benefits, and the costs, premiums, or charges for any of the disclosed collateral benefits paid or contributed within the three-year period immediately preceding the accrual of the cause of action.[20]

---

[15] Gobis, *supra* note 1, at 860–61.

[16] 263 N.E.2d 235 (Ohio 1970).

[17] *Id.* at 239.

[18] *Id.*

[19] OHIO REV. CODE ANN. § 2317.45 (Baldwin 1990).

[20] OHIO REV. CODE ANN. § 2317.45(B)(1). The relevant sections of the statute are reproduced below:

> (A)(1) As used in this section:
>
> (a) "Collateral benefits" means benefits that a plaintiff has received, or may be entitled to receive within the next sixty months after the entry of judgment,

Once disclosure is made by the plaintiff, the court must determine whether "[t]he plaintiff has received the disclosed collateral benefit or is reasonably certain to receive it within the next sixty months after the entry of judgment" and that "[t]here are no rights of recoupment respecting the disclosed collateral

---

as a result of an injury, death, or loss to person or property that is a subject of a tort action, from any of the following:

(i) The government of the United States, or any state or any political subdivision of any state, under a program that provides medical, hospital, sickness, dental, or other health benefits, including, but not limited to, social security, medicare, and medicaid;

(ii) A federal, state, or political subdivision of a state disability income or workers' compensation program, or a wage continuation program of an employer;

(iii) A medical, hospital, sickness, dental, or other health insurance program;

(iv) An accident insurance program that provides medical, hospital, sickness, dental, or other health benefits;

(v) A contract or agreement under which medical, hospital, sickness, dental, or other health services are provided or under which the cost of those services are paid for or reimbursed.

(b) "Rights of recoupment" means rights or [sic] recoupment through subrogation, trust agreement, contract, lien, operation of law, or otherwise.

(c) "Tort action" means a civil action for damages for injury, death, or loss to person or property. "Tort action" includes a product liability claim that is subject to sections 2307.71 to 2307.80 of the Revised Code, but does not include a civil action for damages for a breach of contract or another agreement between persons.

(d) "Trier of fact" means the jury or, in a nonjury action, the court.

(2) As used in this division and divisions (B)(2)(a) and (c)(i) of this section, "plaintiff" includes, in a wrongful death action, the decedent and all beneficiaries of the action.

(B)(1) Except as provided in division (C) of this section, if a plaintiff in a tort action is entitled to an award of compensatory damages, that plaintiff shall disclose to the court after such entitlement is determined all relevant collateral benefits, all rights of recoupment relative to the disclosed collateral benefits, and the costs, premiums, or charges for any of the disclosed collateral benefits paid or contributed within the three-year period immediately preceding the accrual of the cause of action, by the plaintiff, any member of his immediate family, or the employer of the plaintiff or any member of his immediate family or, in a wrongful death action, the decedent, any beneficiary of the action, the employer of the decedent or any beneficiary of the action, any member of the immediate family of the decedent or any such beneficiary, or the employer of any member of the immediate family of the decedent or any such beneficiary.

benefit."[21] Following this determination, the court must calculate the costs of premiums paid for the collateral benefit.[22] Then, the court must, "prior to entering judgment for the plaintiff . . . subtract from the compensatory damages that the plaintiff otherwise would be awarded the amount of any disclosed collateral benefits . . . [and] add to the balance derived . . . the total of any costs, premiums, and charges."[23]

---

[21] OHIO REV. CODE ANN. § 2317.45(B)(2). The full text of this subsection reads as follows:

> (B)(2) Upon the disclosure required by division (B)(1) of this section, the court shall do all of the following:
>
> (a) Determine whether both of the following are satisfied in relation to any of the disclosed collateral benefits:
>
> (i) The plaintiff has received the disclosed collateral benefit or is reasonably certain to receive it within the next sixty months after the entry of judgment;
>
> (ii) There are no rights of recoupment respecting the disclosed collateral benefit.

[22] OHIO REV. CODE ANN. § 2317.45(B)(2)(b). The full text of this subsection reads as follows:

> (b) As to any disclosed collateral benefits in relation to which both requirements of division (B)(2)(a) of this section are satisfied, determine the total of the costs, premiums, or charges for such benefits paid or contributed within the three-year period immediately preceding the accrual of the cause of action, by the plaintiff, any member of his immediate family, or the employer of the plaintiff or any member of his immediate family or, in a wrongful death action, the decedent, any beneficiary of the action, the employer of the decedent or any beneficiary of the action, any member of the immediate family of the decedent or any such beneficiary, or the employer of any member of the immediate family of the decedent or any such beneficiary[.]

Two federal courts recently interpreted this subsection. In Deaton v. Dreis and Krump Manufacturing Co., 134 F.R.D. 219 (N.D. Ohio 1991), the district court held that in determining the amount of workers' compensation premiums paid by the employer that will be added back to the jury award, the employer's contribution is not limited to the amount paid on behalf of the particular employee. *Id.* at 225. That is, although the employer had paid only $5.27 in workers' compensation premiums for the plaintiff-employee, the court added back to the plaintiff's award the *total* amount of workers' compensation benefits the employer paid during the three years prior to the plaintiff's injury. *Id.* In this case, the employee had received $11,618.64 in workers' compensation, and the employer had paid $15,624 in premiums. *Id.* at 225. Therefore, the court concluded that the plaintiff's workers' compensation "which the statute requires be deducted from the verdict, is entirely offset by his employer's contribution." *Id.*

The Sixth Circuit disagreed with this interpretation in Baker v. Goldblatt, No. 91-3508, 1992 WL 12679 (6th Cir. Jan. 30, 1992). According to the court, "collateral benefits

According to the statute, the court makes all determinations concerning the offset of the collateral benefits, and "evidence of collateral benefits is not admissible in a tort action and shall not be submitted to or considered by the trier of fact in determining whether to award compensatory damages to a plaintiff . . . or in determining the amount of any such damages."[24]

A. *Analysis*

Certainly one of the most problematic aspects of Ohio's collateral benefits statute is the time frame during which benefits must be disclosed. The plaintiff

---

received by a plaintiff should be adjusted only by that portion of en employer's workers' compensation premiums directly related to the employment fo the particular plaintiff." *Id.* at *4.

[23] OHIO REV. CODE ANN. § 2317.45(B)(2)(c). The full text of this subsection reads as follows:

> (c) Prior to entering judgment for the plaintiff, do both of the following:
> (i) Subtract from the compensatory damages that the plaintiff otherwise would be awarded the amount of any disclosed collateral benefits in relation to which both requirements of division (B)(2)(a) of this section are satisfied;
> (ii) Subject to the limitation specified in this division, add to the balance derived under division (B)(2)(c)(i) of this section the total of any costs, premiums, and charges described in division (B)(2)(b) of this section. The amount of those costs, premiums, and charges that is added to that balance shall not exceed any amount subtracted pursuant to division (B)(2)(c)(i) of this section from the compensatory damages that the plaintiff otherwise would be awarded.

An example of how this would operate is as follows: Suppose that the jury renders a verdict for the plaintiff for compensatory damages in the amount of $10,000.00. Based upon evidence presented by the defendant, the judge determines that the plaintiff is entitled to collateral benefits from her insurance company of $6,000.00. The judge then subtracts the $6,000.00 of collateral benefits from the jury award for compensatory damges, which leaves the plaintiff with a $4,000.00 recovery. However, because the plaintiff paid $1,000.00 in premiums for the insurance coverage she received, the court adds this $1,000.00 to the $4,000.00 recovery. The result is that the plaintiff is entitled to receive $5,000.00 from the defendant.

[24] OHIO REV. CODE ANN. § 2317.45(B)(3). The full text of this subsection reads as follows:

> (3) Except as provided in division (B)(1) of this section, in another section of the Revised Code, or in the Rules of Evidence, evidence of collateral benefits is not admissible in a tort action and shall not be submitted to or considered by the trier of fact in determining whether to award compensatory damages to a plaintiff in a tort action or in determining the amount of any such damages.

is required to disclose all collateral benefits which meet the definitions in subsection (A)(1) and which were received three years prior to the accrual of the cause of action or which *may* be received up to five years following judgment.[25] According to subsection (B)(1), the plaintiff would wait until he or she is awarded damages before informing the court of any collateral benefits. If this is the case, not only will it be difficult for a plaintiff to collect and report all the benefits received, but it will be equally, if not more difficult, for the defendant to determine the accuracy and completeness of the plaintiff's disclosures. For example, if the judgment is entered three years after the cause of action accrued, the plaintiff must account for payments made up to six years earlier. In addition, the plaintiff must predict five years into the future what benefits will be received, and the defendant must rely upon this prediction. The statute does not provide for any special policing mechanism. If the plaintiff is "reasonably certain" to receive a benefit within five years, the court will consider it.[26] Although it is conceivable that the plaintiff will receive unanticipated benefits, the statute does not provide for a re-evaluation or opportunity for another hearing during the five-year period.

Another potential problem area concerns the meaning of "compensatory" damages as used in the statute. In general, compensatory damages are defined as:

> [D]amages in satisfaction of, or in recompense for, loss or injury sustained. They compensate a plaintiff for actual injury or loss resulting, for instance, from bodily injury or property damage. The term covers all loss recoverable as a matter of right and includes all damages (beyond nominal damages) other than punitive or exemplary damages.[27]

The meaning of compensatory damages in the context of section 2317.45 becomes important when considering an offset of workers' compensation

---

[25] OHIO REV. CODE ANN. § 2317.45(B)(1), (B)(2). Ohio's statute is unique with respect to the duration of its disclosure requirements. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-225a (West 1990) (providing that benefits up to the date of judgment may be deducted). *See also* MICH. COMP. LAWS ANN. § 600.6303 (West 1990) (Court must first determine that there is a previously existing contractual or statutory obligation on the part of the collateral source to pay the benefits before they may be deducted).

[26] OHIO REV. CODE ANN. § 2317.45(B)(2)(a)(i).

[27] 22 AM. JUR. 2D *Damages* § 23 (1988). Black's Law Dictionary defines compensatory damages as "such as will compensate the injured party for the injury sustained, and nothing more; such as will simply make good or replace the loss caused by the wrong or injury." BLACK'S LAW DICTIONARY 390 (6th ed. 1990). Dan Dobbs writes that "[t]he damages award is substitutionary relief, that is, it gives the plaintiff money mainly by way of compensation, to make up for some loss that was not, originally, a money loss, but one that ordinarily may be measured in money." DAN DOBBS, REMEDIES 135 (1973).

benefits.[28] Workers' compensation is awarded upon a scale based upon the type of injury sustained, and its purpose is to prevent the hardship to an employee of proving employer negligence.[29] Workers' compensation essentially operates so that "a right to compensation is given for all injuries incident to the employment . . . the amount of which is limited and determined in accordance with a definite schedule."[30]

There are many theories underlying workers' compensation. According to the Ohio Manufacturers' Association:

> The fundamental principle of the [Workers' Compensation Act] was the establishment of a balance between the interests of labor in receiving fair compensation for injured members of the work force, and the interests of industry in being able to anticipate the costs of compensation as a portion of its overall cost of doing business. Concessions were made on both sides in the attempt to balance these interests. Injured workers gave up the right to sue their employers by agreeing that their sole remedy would be compensation through a newly created state insurance fund. In return, employers agreed to prompt payment of compensation regardless of fault.[31]

The issue with respect to workers' compensation and the operation of section 2317.45 is the following: Suppose that a plaintiff has received workers' compensation benefits, and receives a special jury verdict that includes damages for emotional pain and suffering. Theoretically, it is unclear whether the workers' compensation benefits should be deducted from the plaintiff's

---

[28] In Ohio, workers' compensation legislation became effective in 1913. *See* OHIO REV. CODE ANN. §§ 4123.01–4123.99 (Baldwin 1990). The Ohio Constitution mandates the establishment of workers' compensation by employers. OHIO CONST. art. II, § 35. There is no right of subrogation included in the workers' compensation statutes, which means that an employee who receives workers' compensation benefits will fall within the scope of § 2317.45.

[29] 81 AM. JUR. 2D *Workmen's Compensation* §§ 1–3 (1976).

[30] *Id.* at § 2.

[31] Ohio Manufacturers' Association, THE FACTS ABOUT WHY OHIO NEEDS TOTAL REFORM FOR WORKERS' COMPENSATION 7 (Fall/1985 Reform Proposal).

> Workers' Compensation rests upon the economic principle that those persons who enjoy the product of a business—whether it be in the form of goods or services—should ultimately bear the cost of the injuries or deaths that are incident to the manufacture, preparation and distribution of the product . . . . If the cost is a predictable incident of the operation, sound business judgment demands that it be included as an element of the price.

WEX S. MALONE, ET. AL., CASES AND MATERIALS ON WORKERS' COMPENSATION AND EMPLOYMENT RIGHTS 39 (1980).

recovery, since workers' compensation benefits are not intended to compensate the plaintiff for emotional pain and suffering.

Thus, in the case of the plaintiff/employee who receives a large jury award for emotional pain and suffering, there is a strong argument that this plaintiff was never compensated by workers' compensation, and that, therefore, there should be no offset, particularly when the purported interest in enacting the statute was to prevent a double recovery. If a plaintiff was never compensated for pain and suffering, then there hardly could be a double recovery.

Although this is a theoretically sound argument, the legislature explicitly refers to the term "compensatory" throughout the text of section 2317.45.[32] If the legislature's ultimate goal was to limit judgment amounts as much as possible, then compensatory damages clearly would include traditional compensatory damages. Most likely the legislature's concern was upon limiting the final dollar amount of a plaintiff's recovery, as is the case with damage caps, rather than upon a direct correlation between the type of collateral benefit received and the particular type of damages awarded.

Yet another problematic area involves the awarding of attorneys' fees. In the typical case the jury most likely will render a verdict far enough in excess of the collateral benefits received that the attorney will be able to recover a fee from the excess. However, it is possible to imagine a situation in which, for example, over the course of several years the plaintiff has received, and spent, $20,000 in collateral benefits. After years of litigation, the plaintiff finally receives a jury verdict in an amount that is $20,000 or less. Because the collateral benefits are deducted before the defendant pays the judgment, there is no money available for the attorney. This poses several interesting issues.

First, this could deter a plaintiff's attorney from handling a case he otherwise might have because of a fear that no money will remain to pay his fee. Second, rather than discourage costly litigation, the statute encourages it. When faced with little or no recovery, both the plaintiff and the plaintiff's attorney have increased incentive to fight over the deduction of benefits. Third, an offset of nearly all of the judgment would result in an extremely dissatisfied plaintiff. An individual who was injured two or three years earlier, and who received benefits during those years, may have received only $200 or $300 per week, which probably was spent as it was received. After going through the time and expense of a trial, and after being awarded damages, the plaintiff still receives nothing. Such a result could encourage both the plaintiff and the plaintiff's attorney to settle for an amount below which the plaintiff may otherwise be willing to settle.

Alaska has solved the dilemma of recovering attorneys' fees by providing in its collateral benefits statute:

---

[32] *See* OHIO REV. CODE ANN. §§ 2317.45(B)(1), (B)(2)(c)(i).

> [A]fter the fact finder has rendered an award to a claimant, and after the court has awarded costs and attorneys fees, a defendant may introduce evidence of amounts received or to be received by the claimant as compensation for the same injury from collateral sources that do not have a right of subrogation by law or contract.[33]

There remains the troubling issue that was the root of the collateral source rule: Should the defendant benefit from his wrong? When the collateral benefits consist of workers' compensation benefits, it appears even more unjust that the defendant should escape financial responsibility for his wrong while the state workers' compensation bureau does not.

On the other hand, if the view of the Ohio Manufacturers' Association is accepted, then workers' compensation should absorb a loss which is an "incident" of employment.[34] While it seems unfair for the plaintiff to receive a double recovery, it also may seem unfair for workers' compensation to pay the defendant's bill. Perhaps the appropriate response to this issue would be to expand those programs that have subrogation rights.[35] Then, the defendant would be required to pay the amount of the judgment, the plaintiff would not receive a double recovery, and workers' compensation funds would be replaced. Rather than repeal the statute or declare it unconstitutional because of this discrepancy, those institutions that regularly pay such types of benefits could adopt subrogation rights.

B. *Ohio Case Law*

Relatively little litigation has arisen concerning the application and constitutionality of section 2317.45. The Ohio Supreme Court has not directly addressed the statute; however, given the split of opinion that is developing in the lower courts, it is likely that the supreme court will need to resolve the constitutionality of section 2317.45.

---

[33] ALASKA STAT. § 09.17.070 (1990).

[34] *See supra* note 31.

[35] Perrin, *supra* note 1, at 991. Subrogation is "the substitution of one person in the place of another with reference to a lawful claim or right . . . . It is the machinery by which the equities of one man are worked out through the legal rights of another." 73 AM. JUR. 2D § 1 (1974). Conceptually, subrogation resembles other equitable doctrines which are designed to prevent unjust enrichment. "[Subrogation] is not an absolute right, but one which depends on the equities and attending facts and circumstances of each case." *Id.* at § 11. The factors to consider when determining whether a right of subrogation exists include: the secondary liability of the person claiming subrogation rights, or "the necessity of acting to protect his own interests, or . . . an agreement that he is to have security." *Id.*

1. Morris v. Savoy

In August, 1991, the Ohio Supreme Court held that the Ohio statute that placed a cap upon medical malpractice recoveries was unconstitutional.[36] Interestingly, however, the court held that section 2305.27, which abrogated the collateral source rule for medical malpractice claims, was constitutional. The court made a number of statements regarding the ability of the state legislature to modify the collateral source rule that indicate that, should the constitutionality of section 2317.45 be challenged, the court would hold it constitutional.

According to the court, the legislature's intent in enacting section 2305.27 was to prevent particular kinds of double recoveries, "specifically those which would duplicate recovery from funds that are directly, or indirectly, supported by the general public or the business community, e.g., public welfare or workers' compensation . . . ."[37]

The court distinguished the unconstitutional damages cap from section 2305.27: "Such a setoff may inure to the benefit of the tortfeasor, but it does not do so to the detriment of the victim as does the damage cap of R.C. 2307.43 . . . ."[38] The court also permitted a setoff of plaintiff's future workers' compensation payments "to the extent they can be determined with a reasonable degree of certainty."[39]

2. Cook v. Wineberry Deli

In July 1991, the Court of Appeals for Summit County reversed a common pleas court decision holding section 2317.45 unconstitutional.[40] Because this case provides the most comprehensive analysis of section 2317.45 to date, the arguments provided by the lower court, and rejected by the court of appeals, will be discussed in detail. The arguments addressed in these two decisions comprise the major arguments in opposition to the constitutionality of section 2317.45.

After bringing a personal injury and loss of consortium action against defendant Wineberry Deli, the plaintiffs, Timothy and Karen Cook, received a jury award of $400,000 in compensatory damages.[41] Defendant moved to apply section 2317.45 to the $33,646.97 of workers' compensation benefits

---

[36] Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991).

[37] *Id.* at 772.

[38] *Id.*

[39] *Id.* at 773.

[40] Cook v. Wineberry Deli, Inc., No. 14841, 1991 WL 131485 (Ohio Ct. App., Summit Cty. July 17, 1991).

[41] *Id.* at *1.

plaintiff received.[42] The common pleas court denied this motion and held that section 2317.45 unconstitutionally deprived plaintiffs of "their right to a jury trial, their right to an open court and a remedy, their right to due process, and their right to equal protection under the law."[43]

Before analyzing the constitutional issues posed by the collateral benefits statute, the common pleas court reviewed some of the legislative history presented by plaintiffs. The court noted that the Ohio Alliance for Civil Justice "supported [the statute], originally citing a 'litigation explosion' as the root cause of unaffordable or unavailable liability insurance. It was also claimed that high jury awards caused liability insurance premiums to rise, making it impossible for business to operate with a safety net of insurance, consequently having a detrimental effect on investment and production."[44] The court also noted that the Ohio Alliance for Civil Justice received its support primarily from business and insurance companies.[45]

One group opposing the passage of section 2317.45 was the Ohio Public Interest Campaign. The group argued that "the insurance industry had contrived the insurance crisis solely for the purpose of promoting and protecting 'organized price gouging' by underwriters."[46]

Relying upon several studies, the common pleas court discussed evidence that

> [I]nsurance industry profits had actually increased by 505% since 1985. Furthermore, the insurance industry enjoyed net gains of approximately 75 billion dollars between 1976 and 1985. A National Association of Attorneys General Report states that since 1975 the property/casualty stock index has risen more than 500%. This rise was five times the increase in the Dow Jones Industrial Average.[47]

The court concluded that:

> [T]he purpose of [the statute] was not to end the insurance crisis that was contrived by businesses and insurance companies . . . . [The statute] did not seek fairness for all; it favored businesses and insurance companies . . . . [It]

---

[42] *Id.*

[43] Cook v. Wineberry Deli, Inc., No. CV88 08 2737, 1990 Ohio Misc. LEXIS 6, at *5. (Summit Cty. Oct. 8, 1990). Although the analysis of section 2317.45 is quite extensive, it is important to note that the judge adopted plaintiffs' brief, and incorporated it, verbatim, as the opinion of the court.

[44] *Id.* at *6. Although the research in the plaintiff's brief cites research to the contrary, there is an abundance of literature which cites a litigation explosion as a primary cause of rising insurance rates. *See* sources cited *supra* note 1.

[45] 1990 Ohio Misc. LEXIS 6, at *6.

[46] *Id.*

[47] *Id.* at *6–7.

> was enacted as neither a means of ensuring the availability of insurance coverage, as set out in the bill's preamble, nor as a measure of fairness to all Ohio citizens, as stated by its backers. Rather, it was enacted in response to an 'insurance crisis' contrived by the insurance industry to promote and protect price gouging by underwriters, a basis having no relationship to its stated purpose.[48]

The court of appeals did not address this lengthy legislative history. Instead the court noted:

> [I]n enacting R.C. 2317.45, the Ohio Legislature was responding to what it perceived as a crisis in the insurance industry due to rising costs and premiums. To relieve this crisis, the legislature determined that the common law collateral source rule should be partly abrogated, thus relieving the insurance industry—and, ultimately, the public—of the burden of paying compensation in excess of that required to make injured parties whole.[49]

a. *Right to a Jury Trial*

According to the common pleas court, section 2317.45 violates article 1, section 5 of the Ohio Constitution because it "plainly violates a negligently injured person's right to have all the facts in her or his case determined by a jury."[50] The court based its conclusion upon its perception that "the General Assembly has empowered the judiciary to 'materially change' and limit the right to have a jury determine the amount of any damages to be awarded in tort cases."[51]

The common pleas court advanced two additional reasons that section 2317.45 violated the right to a jury trial. First, the court stated that "[t]he effect of the statute is closely akin to that of an automatic remittitur, a court determined reduction of the damages awarded by a jury because the court considers them excessive, even though they are not the result of passion or prejudice."[52] The court then noted that "[r]emittitur is looked on with disfavor

---

[48] *Id.* at *8–9. What is noticeably absent from the court's opinion is a discussion of the legislature's response to the insurance crisis in Ohio. Also absent from the court's analysis was a discussion of the widespread trends in other states which limited recoveries in tort actions. *See supra* notes 1–6.

[49] Cook v. Wineberry Deli, Inc., 1991 WL 131485, at *4 (Ohio Ct. App Summit Cty. July 17, 1991).

[50] 1990 Ohio Misc. LEXIS 6, at *11. *See* OHIO CONST. art. I, § 5.

[51] 1990 Ohio Misc. LEXIS 6, at *11.

[52] *Id.* at *13.

in the Ohio courts, and historically, it may be done only with the consent of the plaintiff."[53]

Second, the court disregarded the argument advanced by the defendant that the statute is designed to "prevent[] a double recovery by the plaintiff."[54] The court regarded this argument as "fallacious" and stated that it "presumes that the collateral benefit has completely compensated the tort victim."[55] The fact that the source of the collateral benefit in this case was workers' compensation buttressed the court's statement that "[p]ayments made under Ohio Workers' Compensation Program are not, and were never meant to be complete compensation for an injured employee. Consequently, it is wholly inappropriate to subtract Workers' Compensation benefits from [plaintiffs'] compensatory award."[56]

The lower court also stated that even if it were to accept defendant's argument that plaintiffs would be receiving a double recovery, "[t]he wrong done to plaintiff by the defendant is not diminished in any way by the plaintiff's receipt of collateral benefits."[57] The plaintiff was held to be the party most entitled to benefit from the defendant's wrong.

The court of appeals rejected the lower court's reasoning. According to the court:

> R.C. 2317.45 specifically preserves the inadmissibility of evidence of collateral benefits at trial, and therefore does not in any way invade the province of the jury in its determination of the central issues of liability and the damages suffered by the plaintiff. The true significance of R.C. 2317.45 does not come into operation until after trial and after the jury's verdict. Cook's argument

---

[53] *Id.* at *13-14. Although this analogy has some merit, arguably the true effect of the statute is to achieve an equitable apportionment of damages; this is the crucial difference between remittitur and section 2317.45. Remittitur occurs "[i]f money damages awarded by a jury are grossly excessive as a matter of law, [whereupon] the judge may order the plaintiff to remit a portion of the award." BLACK'S LAW DICTIONARY 1295 (6th ed. 1990). In contrast, the judge's deduction of collateral benefits under section 2317.45 is not based upon the assumption that the jury's award was excessive. Instead, the deduction is based upon the realization that the plaintiff's recovery was excessive. Under section 2317.45, the injured party still receives the compensation awarded by the jury. If remittitur were applied, the total recovery to which the injured party is deemed entitled would be reduced.

[54] 1990 Ohio Misc. LEXIS 6, at *15.

[55] *Id.*

[56] *Id.* at *16.

[57] *Id.* at *16-17. This particular comment suggests that because the benefits are deducted from what a defendant otherwise would pay, justice was not achieved. Such a position ignores one of the primary goals of tort law: to compensate the injured party. This argument perhaps would be more persuasive in the criminal context where there are multiple purposes to be served by the judicial system. *See generally* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES (1989).

> ignores the obvious—that the issue of collateral benefits was never before the jury under the collateral source rule, and this situation is not altered under R.C. 2317.45. Therefore, R.C. 2317.45 neither removes nor adds to any issues before the jury, nor does it alter the trial proceedings in any manner.[58]

b. *Open Courts and Right to a Remedy*

The common pleas court held that section 2317.45 violated Ohio Constitution article I, section 16, which provides that "all courts shall be open, and every person, for an injury done to him in his lands, goods, person or reputation, shall have remedy by due course of law."[59] The court reasoned that the plaintiff is denied a remedy when the jury renders a verdict for compensatory damages and the judge then deducts from that verdict. The court stated:

> The parties are being told by the legislature that, regardless of what the finder of fact has determined, the defendant will not be held responsible for the full extent of plaintiff's resulting injuries . . . . The statute] strips a jury verdict of its purpose and significance. It is rendered a sterile, meaningless gesture and a mockery of what is supposed to be a meaningful remedy.[60]

The court of appeals strongly disagreed with this argument. The court of appeals stated:

> [I]n Cook's view, a meaningful remedy can be had only by holding the negligent tortfeasor responsible to the full extent of injuries suffered, regardless of the extent to which the plaintiff may already have been made whole through other sources of compensation . . . . By enacting R.C. 2317.45, the legislature has now shifted the emphasis in tort actions away from punishing the merely negligent tortfeasor, and toward ensuring that the plaintiff is fully compensated and made whole, regardless of the sources of compensation. Such a decision was properly within the province of the legislature to make.[61]

c. *Due Process*

Because the right to a jury trial and to a remedy are considered fundamental, the common pleas court held that the state must demonstrate that

---

[58] Cook v. Wineberry Deli, Inc., No. 14841, 1991 WL 131485, *5 (Ohio Ct. App. Summit Cty. July 17, 1991).

[59] OHIO CONST. art. 1, § 16.

[60] 1990 Ohio Misc. LEXIS 6, at *20.

[61] 1991 WL 131485 at *5-6.

the statute furthered a "compelling" state interest in order to comply with the requirement of due process of law.[62]

The lower court found a number of flaws in the statute, each of which it held violated due process.[63] One problem which the court found particularly troublesome was the possibility of a "double deduction."[64] That is, even though the jury will not be informed of a plaintiff's receipt of collateral benefits, "there is no procedural safeguard for plaintiffs to prevent the jury from discounting the verdict to reflect their own sensibilities regarding collateral benefits and 'double recoveries.'"[65]

The common pleas court was troubled by the fact that the defendant, and the defendant's insurance company would "reap the benefits of plaintiff's Workers' Compensation benefits . . . . Consequently, the injured party is saddled with the additional burden of supporting the liability insurance industry, rather than that burden properly being upon the defendant."[66]

The court of appeals dispensed with this line of argument rather quickly. Treating both the due process and equal protection claims together, the court of appeals applied rational basis review because section 2317.45 "neither implicates any fundamental or substantive rights, nor creates any suspect classifications . . . ."[67] With respect to Cook's contention that the insurance crisis was a "hoax," the court of appeals responded by stating that the

> [A]rguments, both pro and con, were thoroughly presented to and considered by the legislature when it deliberated the enactment of R.C. 2317.45. Even a cursory review of these arguments makes it clear that, at the very least, there were legitimate, debatable questions of whether an insurance crisis existed, and whether the remedy undertaken by the legislature was appropriate.[68]

d. *Equal Protection*

Relying upon article I, section 2 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution, the common pleas court held that section 2317.45 violates equal protection because "it treats tort victims who are injured at work or who are entitled to certain government

---

[62] Cook v. Wineberry Deli, Inc., No. CV88 08 2737, 1990 Ohio Misc. LEXIS 6, at *24 (Summit Cty. Oct. 8, 1990).

[63] The statute violated due process under both the Ohio Constitution and the United States Constitution. U.S. CONST. amend. XIV., OHIO CONST. art. I, § 16.

[64] 1990 Ohio Misc. LEXIS 6, at *33.

[65] *Id.*

[66] *Id.* at *34-35.

[67] Cook v. Wineberry Deli, Inc., No. 14841, 1991 WL 131485 at *7 (Ohio Ct. App. Summit Cty. July 17, 1991).

[68] *Id.*

benefits differently from tort victims who receive benefits from a private insurer, therefore, requiring different treatment of those within the classification."[69] The court also regarded the classification as unconstitutional because it separates victims of medical malpractice from the victims of other forms of negligence. Therefore, the court applied strict scrutiny.[70]

Although the court of appeals rejected the lower court's equal protection argument, the court of appeals did not provide any substantive analysis to guide future cases. In this respect the recent Ohio Supreme Court decision in *Morris v. Savoy*[71] may be helpful. In *Morris* the supreme court considered, and rejected, the argument that the collateral benefits statute for medical malpractice claims violated equal protection.[72] According to the supreme court, "a line is drawn—the statute covers only a 'medical claim'—but does not make any internal distinctions among class members. All plaintiffs in medical malpractice must confront the same setoff of benefits from collateral sources."[73] The same is true for section 2317.45—all plaintiffs face the same setoff.

3. Jeffers v. Phillips Ready Mix

In January, 1991, the Ohio Court of Appeals for the Second District upheld section 2317.45, and applied the statute in order to deduct workers' compensation benefits from plaintiff-appellant's jury award.[74] In this case, plaintiff-appellant Jeffers (hereinafter referred to as plaintiff) sued the defendant, a third party, for injuries plaintiff suffered while working for Sowder Concrete Corporation.[75] Both the plaintiff and the defendant were found negligent.[76] The jury awarded the plaintiff $39,500 in damages, and then reduced this amount by 40% due to plaintiff's negligence.[77] The net amount of damages totaled $23,700. However, the plaintiff also received collateral benefits totaling $22,403.14.[78] The plaintiff appealed the trial court's deduction of these benefits from the $23,700 jury award.

---

[69] 1990 Ohio Misc. LEXIS 6, at *42–43.

[70] *Id.* at *43. According to the court, "heightened rational basis" could be applied to the statute if an "important" rather than a "fundamental" right is infringed. *Id.* at *46–47.

[71] Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991).

[72] *Id.* at 772.

[73] *Id.*

[74] Jeffers v. Phillips Ready Mix, No. 90 CA 0057, 1991 Ohio App. LEXIS 50 (Greene Cty. Jan 8, 1991). The court makes no reference to the *Cook* decision. It appears that the constitutionality of section 2317.45 was not challenged.

[75] *Id.* at *1.

[76] *Id.*

[77] *Id.*

[78] *Id.* These collateral benefits were from workers' compensation. *Id.* This case is similar to *Cook* in that the plaintiffs received workers' compensation even though the

The plaintiff made three arguments relevant to this Note. First, the plaintiff argued that "the collateral benefits should be subtracted from the damages assessed by the jury before factoring in [plaintiff's] comparative negligence."[79] Second, the plaintiff argued that because the jury awarded $14,000 for future pain and suffering although he would not have future medical expenses, this amount should not be offset.[80] Third, the plaintiff argued that the jury received evidence of $10,292.36 in medical bills as proof of the plaintiff's injury, but that the judge deducted $22,403.14 of collateral benefits.[81]

The court systematically and straightforwardly overruled each of the plaintiff's objections to the operation of section 2317.45. The court held that collateral benefits are to be deducted from the jury award, reduced by the plaintiff's negligence.[82] The court reasoned that "[t]he answer is found in R.C. 2317.45 (B)(2)(c)(i), the operative portion of which reads . . . 'compensatory damages that the plaintiff otherwise would be awarded.'"[83] The plaintiff, but for the collateral benefits, would receive $23,700. Therefore, that is the amount from which the benefits should be deducted.

The court also rejected the plaintiff's future pain and suffering argument. The court did not consider whether in fact the plaintiff would receive a double recovery. Instead, the court held that "[t]he way the statute is written, compensatory damages includes all damages except punitive damages. While future pain and suffering is not something for which collateral benefits are received, it is not the province of the court to revise plain legislative enactments."[84]

The court also held that the post-verdict proceeding to determine collateral benefits controls the amount that should be offset. According to the court, "it does not matter whether the jury was aware of the medical expenses in order

---

employer had no responsibility for plaintiffs' injuries, yet the plaintiffs also received jury awards from defendants.

[79] *Id.* at *3.

[80] *Id.* at *4–5. Essentially, plaintiff is arguing that workers' compensation did not compensate him for this future pain and suffering, and therefore that this amount should not be deducted. *See supra* notes 28–32 and accompanying text.

[81] 1991 Ohio App. LEXIS 50, at *6. This argument actually presents the opposite of what is discussed earlier. *See supra* notes 25–26 and accompanying text. That is, it seemed that one of the problems with section 2317.45 is that the defendant would have to rely upon the plaintiff's disclosure of collateral benefits. In this case, however, the plaintiff did not inform the jury of all his medical expenses, and the defendant had evidence of benefits which exceed these disclosed expenses. In other words, the plaintiff has to be careful to inform the jury of all expenses, because he will be held accountable for all of the benefits, even if the jury was underinformed.

[82] 1991 Ohio App. LEXIS 50, at *4.

[83] *Id.*

[84] *Id.* at *5. By holding this way, the court does overlook one of the purposes of section 2317.45: to prevent a double recovery.

for them to be deductible . . . . [T]he collateral benefits adjustment is a post verdict adjustment. It is a proceeding wherein additional evidence can be taken, but wherein a jury is not involved."[85]

4. Sorrell v. Thevenir

In January 1991, the Ohio Court of Common Please for Gallia County held that section 2317.45 was unconstitutional.[86] The case currently is on appeal before the Ohio Court of Appeals for the Fourth District.[87] The lower court, concluded that "it is absurd to finance the tortious conduct of the defendant by appropriations from the Workers' Compensation system. Plaintiff's employer did not cause her injury but yet it is his premium that may be increased because of defendant's conduct."[88] The lower court held that section 2317.45 was unconstitutional because it violates the right to a jury trial, the right to a remedy found in the Ohio Constitution, and the right to due process under the Fourteenth Amendment and under the Ohio Constitution.[89]

The facts of *Sorrell* illustrate the hardship that section 2317.45 can cause; whether that hardship justifies a finding of unconstitutionality is another issue entirely. In *Sorrell*, the plaintiff, a convenience store employee, successfully sued a customer who allegedly injured her during one of his frequent visits to the store.[90] The jury awarded the plaintiff $10,128.26 in damages, $5,128.26 allocated to lost wages and medical benefits, and $5,000 for pain and suffering.[91] The plaintiff had received $10,906.96 of workers' compensation benefits, and an additional $3,428.26 paid by the workers' compensation fund to the plaintiff's doctor.[92] The defendant argued that this amount should be offset from the jury award, thereby leaving the plaintiff with no recovery from the defendant.[93]

---

[85] *Id.* at *6. Although the court does not explicitly say so, it appears that plaintiffs' argument in *Cook* that section 2317.45 deprived them of a jury trial had little merit in this court. *See supra* notes 50–58 and accompanying text.

[86] Sorrell v. Thevenir, slip op., No. 89 CL 121 (Ohio Ct. C.P. Gallia County Jan. 14, 1991).

[87] *See* Defendant's Notice of Appeal in the appendix to Defendant-Appellant's Brief at i, *Sorrell* (No. 91-CA04).

[88] *Sorrell*, slip. op. No. 89 CL 121, at 9.

[89] *Id.* at 5–12.

[90] *Id.* at 1.

[91] *Id.* at 2.

[92] Defendant-Appellant's Brief at 1–2, *Sorrell* (No. 91-CA-4).

[93] *Id.* at 2.

On appeal, both the plaintiff and the defendant essentially put forth the arguments presented in the *Cook* case.[94] Hopefully, the court of appeals will reverse the lower court's decision in *Sorrell* just as the court of appeals did in *Cook.*

C. *Analysis*

The court of common pleas in *Cook* identified a number of inconsistencies in the collateral benefits statute; none of these inconsistencies alone, however, justified holding section 2317.45 unconstitutional. By stretching each inconsistency to its extreme, the lower court found no reasonable basis for the statute. The court of appeals properly reversed the lower court's decision. Hopefully, courts in other districts will follow the lead established in *Cook.*

The court of appeals decision in *Cook* was correct for a number of reasons. First, although there may be some evidence that the insurance industry concocted an insurance crisis in order to push H.B. 1 through the Ohio legislature, there is an abundance of evidence that such a crisis did indeed exist.[95] In addition, there is strong evidence that a primary purpose of the statute is to prevent the plaintiff from receiving a double recovery.[96] This interest is independent of the insurance issue, and may instead suggest that the legislature is more concerned about other aspects of tort liability. According to one commentator,

> Tort scholars suggest that three of the tort system's primary objectives are promoting justice, deterring potentially injurious activities, and compensating accident victims. Although the justice and deterrence objectives often require the same outcomes, the compensation objective may require an outcome inconsistent with the other two goals. This potential inconsistency, coupled with the tort system's poor design for adequately compensating victims, suggests that compensation is at most a subsidiary goal of tort law, and perhaps is merely a means of fulfilling the justice and deterrence objectives.[97]

Consequently, even though some evidence may arguably suggest that the insurance situation in Ohio was not of crisis proportions, other legitimate reasons remain for eliminating the collateral source rule.[98]

---

[94] *See* Defendant-Appellant's Brief, *Sorrell* (No. 91-CA04); Plaintiffs-Appellees Brief, *Sorrell* (No. 91-CA-4). *See also supra* notes 40–70 and accompanying text.

[95] *See supra* notes 8–9 and accompanying text. *See generally* PETER W. HUBER, LIABILITY (1988). Huber writes eloquently of the insurance crisis that spread across the United States over the past two decades.

[96] *See supra* note 8 and accompanying text.

[97] *Id.*

[98] *See supra* notes 96–97 and accompanying text.

Attention must also be paid to the trend in most states toward limiting tort liability, either through damage caps or through abrogation of the collateral source rule. This reform is not limited to the medical malpractice area. By 1990, as many as ten states had altered the traditional collateral source rule.[99]

Neither court in *Cook* mentioned another Ohio statute that provides for the offsetting of collateral benefits against a political subdivision. This statute, Ohio Revised Code section 2744.05, provides that "[i]f a claimant receives or is entitled to receive benefits for injuries or loss allegedly incurred from a policy or policies of insurance or any other source, the benefits shall be disclosed to the court, and the amount of the benefits shall be deducted from any award against a political subdivision recovered by that claimant."[100]

The Ohio Supreme Court has held that this statute is constitutional.[101] The court rejected an equal protection challenge, and applied rational basis review.[102] Given that the two other Ohio statutes that provide for a deduction of collateral benefits have survived equal protection scrutiny, it is likely that the third statute will be upheld as well.

The most compelling argument made by the common pleas court in *Cook* is that workers' compensation did not adequately compensate the victim for his injury. This argument parallels the earlier discussion concerning whether workers' compensation benefits could legitimately be deducted from an award for emotional pain and suffering. Although this argument may be persuasive in the appropriate case, the jury verdict in *Cook* illustrates that this is not a concern here. The jury verdict form is reproduced below:

> (A) State the total amount of compensatory damages, past and future, to the Plaintiffs.
> STATE YOUR ANSWERS IN FIGURES IN INK $400,000.00
> (B) What portion of your answer to Interrogatory (A) is past damages, if any, to the Plaintiffs?
> STATE YOUR ANSWERS IN FIGURES IN INK $ 34,000.00
> (C) What portion of your answer to Interrogatory (A) is future damages, if any, to the Plaintiffs?
> STATE YOUR ANSWERS IN FIGURES IN INK $366,000.00
> IF YOU FIND THAT THERE ARE FUTURE DAMAGES, MOVE TO INTERROGATORY (D). IF YOU FIND THAT THERE ARE NO

---

[99] *See* ALASKA STAT. §§ 09.17.070 (1989), 09.55.548 (Supp. 1986); ARIZ. REV. STAT. ANN. § 12-565 (1989); CAL. CIV. CODE § 333.1 (West 1990); CONN. GEN. STAT. ANN. § 52-225a (West 1990); FLA. STAT. ANN. § 768.76 (West 1990); IND. CODE ANN. § 34-4-36-2 (West 1990); MICH. COMP. LAWS ANN. § 600.6303 (West 1990); MINN. STAT. § 548.36 (1990); OR. REV. STAT. § 18.580 (1989); UTAH CODE ANN. § 78-14-4.5 (1990).

[100] OHIO REV. CODE ANN. § 2744.05 (Baldwin 1990).

[101] Menefee v. Queen City Metro, 550 N.E.2d 181 (Ohio 1990).

[102] *See id.*

FUTURE DAMAGES, DO NOT ANSWER THE REMAINING QUESTIONS
(D) What are the portions of the future damages shown in your answer to Interrogatory (C) that fall into the following:
(1) Future economic loss $ 366,000.00
(2) Future noneconomic loss
THE TOTAL OF THESE TWO AMOUNTS MUST EQUAL YOUR ANSWER TO INTERROGATORY (C)
(E) What are the portions, if any, of future economic loss shown in your answer to Interrogatory (D)(1), if any, that fall into the following:
(1) Wages, salaries or other lost compensation (earning capacity) (fringe benefits) $ 300,000.00
(2) (Expenditures) (expenses) (costs) for medical care or treatment, rehabilitation services, or other care, treatment, services, products, or accommodations $66,000.00
(3) Any other (expenditures) (expenses) (costs) brought on by injury to person
THE TOTAL OF FUTURE ECONOMIC LOSS MUST EQUAL YOUR ANSWER TO INTERROGATORY
(D)(1).[103]

As the jury verdict form shows under (E)(1), the amount of wages, salaries, or other lost compensation totaled $300,000, and the costs for medical care or treatment totaled $66,000. The workers' compensation benefits in this case compensated the victim for precisely the type of harm that the jury deemed should be compensated. Therefore, the common pleas court's comments concerning inadequate compensation of an injured party who receives workers' compensation are inapplicable to the present case.[104]

V. CONCLUSION

The prevalence of statutes limiting liability in all types of tort actions indicates that the abrogation of the collateral source rule will continue. At least ten states have modified the collateral source rule either for medical malpractice actions or for personal injury actions.[105] Despite the argument that these statutes deprive a plaintiff of a full recovery while granting the defendant a windfall, these statutes allow a jury to determine the total compensation to which the plaintiff is entitled. The plaintiff then receives this amount—although he may not receive the entire amount from the defendant—and he may receive

[103] Cook v. Wineberry Deli, Inc., No. CV88 08 2737, 1990 Ohio Misc. LEXIS 6, at *55-56 (Summit Cty. Oct. 8, 1990).

[104] *See supra* notes 55-56 and accompanying text. The court in *Jeffers* alluded to the potential unfairness of deducting benefits that had not already compensated the injured party. *See supra* note 84 and accompanying text.

[105] *See supra* note 99 and accompanying text.

the amount over a period of years, but the plaintiff does receive the amount his injury is deemed to be worth. Damage caps, on the other hand, limit compensation to the statutory amount, regardless of the "true" value of the injury. If the goal of tort law is primarily to compensate the injured victim, then the elimination of the collateral source rule may serve this purpose more effectively than damage caps.

Ohio's latest modification of the collateral source rule, when considered with its provisions for medical malpractice actions and actions against political subdivisions, essentially abolishes the collateral source rule. Section 2317.45 is quite thorough in defining what types of benefits qualify as offsetting collateral benefits. The statute is much less clear concerning the procedures to enforce and review the disclosures made by the plaintiff. Section 2317.45, unlike some other statutes, defines the time period in which collateral benefits must be disclosed. Given the long time span covered by the statute, defendants need an opportunity to verify the accuracy of the collateral benefits, and to obtain review during the five-year period following the entry of judgment.

The injustice of offsetting workers' compensation benefits, thereby creating a windfall for a defendant, could be remedied by explicitly excluding workers' compensation benefits from the provisions of the statute, or by providing a statutory right of subrogation for workers' compensation benefits.

The Ohio legislature may wish to avoid the problem of attorneys' fees by amending the statute to include terms similar to Alaska's statute,[106] requiring the court to award costs and attorneys' fees before evidence of collateral benefits may be introduced. This would eliminate one of the strong incentives parties may have to continue litigating.

Until the Ohio Supreme Court decides the constitutionality of section 2317.45, the statute likely will be challenged throughout the state. Given the earlier decisions by the supreme court, which permit the offsetting of collateral benefits in medical malpractice actions, it seems unlikely that the court would not permit offsetting of collateral benefits in other actions. The supreme court may be concerned that an injured plaintiff in a workers' compensation case could be denied a pain and suffering recovery. Rather than strike the entire statute, the court could require that, in order for the statute to apply, the jury's verdict must be divided into separate damage amounts. In that way, it would be clear whether the plaintiff was receiving a double recovery.

As a whole, section 2317.45 is a reasonable statute. Those who oppose the statute argue that the insurance crisis is a result not entirely of large verdicts, but of attorneys and insurance companies.[107] Even if this is true, this does not justify overturning section 2317.45. Instead, other statutes should be passed to deal with all of the forces that push insurance rates unreasonably high. The

---

[106] *See supra* note 33 and accompanying text.

[107] *See supra* notes 46–48 and accompanying text.

workers' compensation bureau and other administrative agencies that also battle rising costs can remedy the perceived unfairness of section 2317.45 by providing for subrogation rights. By doing so, these agencies would fall outside of the statute. Rather than overrule one important attempt to contain rising insurance costs, the courts and the legislature should resolve some of the finer details of section 2317.45, and concentrate upon containing costs in other areas.

Julie A. Schafer