

THE COLLATERAL SOURCE RULE

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The trial bar generally, has neglected one of the most important damage rules. It is surprising how many experienced trial attorneys and even judges completely forget about the important "Collateral Source Rule." The impact of the rule in settlements, trials and recoveries is impossible to measure accurately in monetary terms.

Many claims men have been indoctrinated by literature or home office instruction to evaluate cases on the "rule of thumb" basis of three times the specials. There was never any validity to any such appraisal and, yet, reference thereto appears frequently in well regarded books currently on the market.¹ To the plaintiffs' bar practicing in areas surrounding military installations such a rule of thumb would, of course, be a workable impossibility. Many of the men stationed at Army, Navy or Air Force bases who are severely hurt off the base in civilian accidents, are brought into base hospitals, supplied with medical, nursing and hospital attention and remain without diminution in pay. If this out-moded style of evaluating cases by "three times specials" were to be applied in such cases, obviously the result would be three times zero or still zero.

Yet, it is surprising to find the paucity of study in connection with the existing law to cover such situations.

I have had occasion the last two or three years to alert audiences before whom I have spoken about the collateral source rule, by asking for a show of hands as to those in the audience familiar with the rule and have been greatly surprised in nearly all instances from coast to coast, and border to border, to find that so few lawyers comprehend the importance and impact of this rule.

The United States Court of Appeals, District of Columbia Circuit, expressed the collateral source rule extremely well in an opinion by Circuit Judge Edgerton in *Hudson v. Lazarus*.² The Court there said:

In general the law seeks to award compensation, and no more, for personal injuries negligently inflicted. Yet an injured person may usually recover in full from a wrongdoer regardless of anything he may get from a collateral source unconnected with the wrong-

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¹ Coughlin & Schneider, *You and Your Car Insurance* 94 (1954); Appleman, *Successful Jury Trials*, ch. 8 (1952); Pierson, *The Defense Attorney and Basic Defense Tactics*, 249.

² 217 F.2d 344, 346-47 (D.C. Cir. 1954), cert. denied 350 U.S. 856 (1954).

doer. Usually the collateral contribution necessarily benefits either the injured person or the wrongdoer. Whether it is a gift or the product of a contract of employment or of insurance, the purposes of the parties to it are obviously better served and the interests of society are likely to be better served if the injured person is benefited than if the wrongdoer is benefited. . . .

Receipt of money on an accident insurance policy does not reduce the damages the injured person may recover. The same has been held with regard to hospitalization insurance. And when medical and hospital services have been rendered gratuitously, or paid for by a third person as a gift to the injured person, he has usually been allowed to recover their value from the wrongdoer. . . .

Another basis for the rule has been stated as follows:

. . . [I]t might well be considered that medical and hospital services supplied by the Government to these members of the United States Navy were part of the compensation to them for services rendered, and therefore that by their service in the Navy they had paid for these.³

One of the most powerful cases dealing with this subject is *Sainsbury v. Pennsylvania Greyhound Lines, Inc.*⁴ In this case, an attorney-claim adjuster advised an injured sailor that inasmuch as he was in the service and would receive free medical care as well as his pay during his disability, he could recover solely for his pain and suffering. A release was executed for 500 dollars but the sailor subsequently retained counsel, repudiated the release, and did not cash the 500 dollar draft. The lower court held the release valid and binding.

On appeal the case was reversed and the court severely rebuked the lawyer-adjuster for falsely stating the law. The court said:

The representation by Weston to plaintiff that because he was in the service he could recover only for pain and suffering was a false statement of the law. It is generally well settled that the fact that the plaintiff may receive compensation from a collateral source (or free medical care) is no defense to an action for damages against the person causing the injury. . . . It is inconceivable that any member of the bar could have made a statement such as the one made by Weston without knowledge of its falsity or without acting with a reckless disregard for the truth.⁵

The courts, country-wide, have held that money or benefits received from a collateral source may not be availed of by a tortfeasor to reduce the special damages he must pay the wronged plaintiff. The doctrine is well-nigh universal.

³ *Plank v. Summers*, 203 Md. 598, 102 A.2d 253 (1954).

⁴ 183 F.2d 548 (4th Cir. 1950).

⁵ *Id.* at 550.

The progenitor of the doctrine seems to be *Althorf v. Wolff*.⁶ This was an appeal involving the refusal of the trial court to instruct the jury that the fact that a widow had received the proceeds of her late husband's life insurance should be taken into consideration by the jury in the diminution of damages. The court refused the request and the court of appeals affirmed.

Eleven years later, in *Harding v. Townshend*,⁷ the courts of our country first used the phrase "collateral." The opinion, in part, reads as follows:

There is no technical ground which necessarily leads to the conclusion that the money received by the plaintiff of the accident insurance company should operate as a defense or inure to the benefit of the defendant. . . . It cannot be said that the plaintiff took out the policy in the interest or behalf of the defendant; nor is there any legal principle which seems to require that it be ultimately appropriated to the defendant's use and benefit.

In 1886 in *Missouri, P. R. Co. v. Jarrard*,⁸ the court held that if the continuance of his wages was a provision of his contract or a grace of his employer's, the defendant was not entitled to the benefit of either.

An examination of a long line of cases in many of the jurisdictions indicates that the doctrine has been applied in the following types of situations: (1) salary received by the injured person during his period of disability; (2) pensions, whether retirement or disability, received as a result of the injuries; (3) insurance proceeds—death, hospitalization, medical care, etc.; (4) hospital and medical care furnished gratuitously.

In *Clark v. Berry Seed Co.*,⁹ the court said:

The weight of authority is conclusive to the effect that a defendant owes to the injured compensation for injuries, the proximate cause of which was his own negligence, and that the payment by a third party cannot relieve him of his obligation, that, regardless of the motive impelling their payment, whether from affection, philanthropy or contract, the injured is the beneficiary of the bounty and not the defendant who caused the injury.

New York cases of interest on this doctrine are *Lassell v. City of Gloversville*,¹⁰ and *Seidel v. Maynard*.¹¹ In the *Seidel* case, the Fourth Department, in a per curiam opinion, said:

⁶ 22 N.Y. 355 (1860).

⁷ 43 Vt. 536 (1871).

⁸ 65 Tex. 560 (1886).

⁹ 225 Iowa 262, 271, 280 N.W. 505 (1938).

¹⁰ 217 App. Div. 323, 217 N.Y. Supp. 128 (1926).

¹¹ 279 App. Div. 706, 108 N.Y.S.2d 450 (1951).

While the question of damages is not before us on this appeal, we call attention to the fact that any moneys received by plaintiff as disability compensation or sick-leave benefits under a Federal Sick-leave Regulation cannot be regarded as wages or used in diminution of damages arising by reason of loss of time.¹²

The Second Circuit, in *Landon v. United States*,¹³ held that defendant's liability for plaintiff's loss of earnings is not reduced, even though plaintiff receives full pay as a favor from his employer or under a contract for the period for which he was incapacitated.¹⁴

Frequently it becomes important in an accident case to determine whether or not payments made to the injured person, during his period of incapacity, by his employer or from disability or sick leave benefits can be introduced in evidence by the defendant.¹⁵

WAGES

Clark's New York Law of Damages¹⁶ contains the following statement:

As a general rule the defendant cannot show in mitigation or reduction of his liability for the invasion of the plaintiff's rights that the plaintiff has received from a third person property or money on account of the wrong, if the money or property was not given to him as a satisfaction of the wrong.

It is true that the Court of Appeals in the State of New York

¹² *Id.* at 451; see also Annot., 52 A.L.R.2d 1451 (1957); Restatement, Torts § 920, comment E. 2 Harper & James, The Law of Torts § 25.22 discusses the rule as follows: "Thus the plaintiff who has been paid his salary or a pension during disability, or had his medical expenses paid for by another, or out of the proceeds of an accident insurance policy, may still recover full damages for these items from a defendant who is liable for the injury. To this extent, plaintiff may get double payment on account of the same items. The defendant wrongdoer should not, it is said, get the benefit of payments that come to the plaintiff from a 'collateral source' (i.e., one 'collateral' to the defendant). The damages to be exacted, even of a wrongdoer, are to be sure 'compensatory.' But in these cases the courts measure 'compensation' by the total amount of the harm done, even though some of it has been repaired by the collateral source, not by what it would take to make the plaintiff whole. It is 'compensation' in a purely Pickwickian sense that only half conceals an emphasis on what defendant should pay rather than on what plaintiff should get."

¹³ 197 F.2d 128 (2d Cir. 1952).

¹⁴ See Averbach, "Methods of Proving Damages in Personal Injury Cases," May, 1958, Prac. Law 51, 52; Oleck, Damages to Persons and Property § 183 (1957); 2 Averbach, Handling Accident Cases, 201, 202 (1958).

¹⁵ See O'Connor, "Collateral Source Rule," Trial & Tort Trends (1957) and cases there cited from the various jurisdictions. See also Annot., 52 A.L.R.2d 1451 (1957); 18 A.L.R. 678 (1922); 95 A.L.R. 575 (1935); 128 A.L.R. 686 (1940); 13 A.L.R.2d 355 (1950); 18 A.L.R.2d 659 (1951); 19 A.L.R.2d 557 (1951); 3 Belli, Modern Trials § 397 (1954) (and cases therein under footnote 53, p. 2320).

¹⁶ 1 Clark, New York Law of Damages § 101 (1925).

in the year 1880 in *Drinkwater v. Dinsmore*,¹⁷ held that where proof is offered that the plaintiff did not suffer damages claimed, i.e., loss of wages, the defendant could show that he did not lose the wages, or, that they were not as much as claimed, reasoning that before the plaintiff could recover for loss of wages, he was bound to show that he lost wages in consequence of the injuries and how much they were.

It would seem that the more modern day trend of the courts, throughout the country, is to follow the rule that the defendant, having harmed and wronged the plaintiff, cannot offer evidence which would enable him to benefit from his wrong-doing. Civil service rights and pension assistance today carry with them many rights which, perhaps, were unknown in the year 1880 and, generally speaking, recipients of such bounty contribute out of their pay, or in some other manner, to the obtaining of such benefits and, consequently, when the plaintiff is entirely innocent of a wrongdoing and the defendant is completely at fault, it does not seem just and fair that the defendant should be allowed to benefit by his wrongdoing in being able to show that because of certain benefits received from a third person the damages to the plaintiff had been diminished.

The United States Court of Appeals said in 1952 about the *Drinkwater* case:¹⁸

The *Drinkwater* case appears to have had a checkered career. There a plaintiff's judgment in a personal injury action was reversed for error in excluding a question to the plaintiff as to whether or not his employer paid his wages while he was disabled. The court said that to recover for them the plaintiff must show that he actually lost his wages, and hence defendant could offer evidence that plaintiff had earned none or that his employer had contracted to pay "without service" or paid from "mere benevolence." This rule carried to its logical conclusion, means that the tort-feasor receives the benefit of the employer's benevolence intended only for the employee, and in general will restrict and disrupt carefully devised sickness, accident and pension plans for workers. Hence, it appears to be generally repudiated; only one other state is said to follow it. . . .

In *Brandt v. Glottstein*,¹⁹ the court stated:

There shall be no reference to the fact that plaintiff received compensation under the Workmen's Compensation Law since such fact is immaterial, upon an assessment of damages.

The attitude of New York courts, as expressed in the *Drinkwater* case, has been severely criticized by the New York State Law Revision

¹⁷ 80 N.Y. 390 (1880).

¹⁸ 197 F.2d 128, 130 (2d Cir. 1952).

¹⁹ *Supra* note 17.

Commission which recommended a bill to amend the Civil Practice Act. The Law Revision Commission prepared a legislative document²⁰ which had a special note reading:

This is an amendment recommended by the Law Revision Commission. Its purpose is to abrogate the rule of *Drinkwater v. Dinsmore* . . . and to conform New York law to the rule followed in most states that payments from collateral sources do not reduce the amount recoverable in a personal injury action.

Alabama seems to be the only state that follows the *Drinkwater v. Dinsmore* rule of New York.²¹ Pennsylvania and Missouri adopt a distinction and allow such reduction only in such cases where the wages are paid by the employer pursuant to contract. The distinction in those two states seems to depend upon whether the continued wage payments by the plaintiff's employer are made gratuitously or in discharge of a legal obligation; the plaintiff being permitted to recover for a loss of time only if the payments are gratuitous and were not paid as salary for services.²²

Two recent cases by the United States Court of Appeals, District of Columbia Circuit, have interpreted the principles laid down by that Court in *Hudson v. Lazarus*²³ in the following manner.

In the District Court appellant was awarded a jury verdict against appellees for injuries growing out of the collision between a motorcycle he was riding and a truck which was owned by one of the appellees and operated by the other. Although the evidence was sufficient to support such an instruction the court denied appellant's request for an instruction that should the jury find in his favor they should take into consideration, in determining the amount of damages, the reasonable value of the time he had lost from his employment.

Within the principles laid down by this Court in *Hudson v. Lazarus* . . . the denial of the requested instruction was error which requires reversal, notwithstanding appellant was paid the amount of his salary for the period he was unable to work.²⁴

Appellant was a member of the Metropolitan Police Department of the District of Columbia, which continued his salary something more than 20 weeks until he returned to duty.

²⁰ Documents of the New York Law Revision Comm'n, No. 65(G) (1957).

²¹ *Montgomery & E.R.R. v. Mallette*, 92 Ala. 209, 9 So. 363 (1890).

²² *Moon v. St. Louis Transit Co.*, 247 Mo. 227, 152 S.W. 303 (1912). The Pennsylvania cases are: *Norristown v. Moyer*, 67 Pa. 355 (1871); *Quigley v. Pennsylvania R.R.*, 210 Pa. 162, 59 Atl. 958 (1904); *Penask v. Peerless Oil Co.*, 311 Pa. 207, 166 Atl. 792 (1933); *Rundle v. State Belt Elect. St. R.R.*, 33 Pa. Super. Ct. 233 (1907).

²³ *Supra* note 2.

²⁴ *Geffen v. Winer*, 244 F.2d 375, 376 (D.C. Cir. 1957).

In *Capital Products v. Romer*,²⁵ the court said:

The record discloses that as a result of the accident, appellee, age 50, secured medical retirement from the Fire Department at half pay under an established pension system. Appellant claims that he should have been allowed to introduce this fact in mitigation of damages. The contention is unsound. See *Hudson v. Lazarus*. . . .²⁶

GRATUITOUS MEDICAL OR HOSPITAL CARE

The *Sainsbury v. Pennsylvania Greyhound Lines, Inc.* case²⁷ and *Hudson v. Lazarus*²⁸ expressed the generally accepted view that medical care, hospitalization, and even nursing care supplied by someone other than the defendant is covered by the collateral source doctrine.²⁹

Most courts hold, it seems, that plaintiff's receipt from an independent source of collateral benefits such as gratuitous medical, hospital or nursing care, can not be shown by the defendant in mitigation of damages.³⁰

The *Herrick* case³¹ involved medical care and hospitalization furnished gratuitously by the government to the plaintiffs, husband and wife, while the plaintiff husband, was in the armed forces. The *Rayfield* case³² involved the question of recovery under Virginia law for the reasonable value of medical and hospital services furnished to the plaintiff by a government hospital even though the plaintiff did not actually expend any money for such services. The court through Judge Stanley said:

It is well settled in most jurisdictions including Virginia where this accident occurred, that an injured person may recover in full from a wrongdoer regardless of any compensation he may receive from a collateral source. . . .

All the Virginia cases on the subject of "collateral payments" involve insurance benefits for which the plaintiff has paid a premium. The defendant contends that this court should make a distinction in cases where the "collateral source" payments resulted from some monetary payment by the plaintiff, such as the payment

²⁵ 252 F.2d 843 (D.C. Cir. 1958).

²⁶ *Id.* at 844.

²⁷ *Supra* note 4.

²⁸ *Supra* note 2.

²⁹ See *Grayson v. Williams*, 256 F.2d 61 (10th Cir. 1958); 1 *Personal Injury Newsletter*, 65, 124, 199 (1958); *Annot.*, 128 A.L.R. 682 (1940).

³⁰ *Capital Products, Inc. v. Romer*, 252 F.2d 843 (D.C. Cir. 1958); *Rayfield v. Lawrence*, 253 F.2d 209 (4th Cir. 1958); *Herrick v. Saylor*, 160 Fed. Supp. 25 (N.D. Ind. 1958).

³¹ *Supra* note 30.

³² *Supra* note 30.

of insurance premium, and the instant case where the plaintiffs have in fact paid no actual consideration for the services they received. This contention is untenable.³³

In both the *Herrick* and *Rayfield* cases, *supra*, the Court held that the defendant was not entitled to mitigate the damages and apply the "collateral source rule" doctrine.³⁴

THE APPLICATION OF THE "COLLATERAL SOURCE RULE"
IN CASES WHERE PART OF HOSPITAL BILLS ARE PAID
BY MEDICAL INSURERS SUCH AS BLUE CROSS

The Personal Injury Newsletter of April 13, 1959,³⁵ reports the case of first impression dealing with Blue Cross payments. The case was *Kopp v. Home Mut. Ins. Co.*,³⁶ and the following summary is quoted from the Newsletter:

Blue Cross coverage does not preclude recovery under medical payments clause for some hospital expenses. Plaintiff was insured under liability policy issued by defendant. The policy provided \$500.00 medical payments coverage. Plaintiff also had a contract with Blue Cross. He was hospitalized for injuries sustained while driving, in hospital affiliated with Blue Cross. The hospital looked only to Blue Cross for payment. Defendant contended that plaintiff never incurred any expense for his hospitalization and, therefore, had no right against it under the medical payments clause. Held, contention rejected and judgment for plaintiff affirmed. Plaintiff was entitled under his policy to payment of his hospital expenses, even though the expenses were paid by Blue Cross.

In *Gardner v. New York*³⁷ the court said:

Claimant, Marvin Gardner, by reason of the injuries sustained by his wife, Emma Gardner, lost the society and companionship of his wife, was compelled to provide medical, hospital, and nursing care, and to purchase medicines for her, all aggregating the sum of about \$500. Of the hospital bill of \$263.75, the Associated Hospital Service of Capital District paid the sum of \$248., through which organization claimant was insured against such charges to the extent of the payment. Payment by said organization does not inure to the benefit of the State of New York.

COLLATERAL PAYMENTS UNDER WORKMEN'S COMPENSATION LAWS

Compensation awarded under workmen's compensation laws are not available generally in mitigation of damages to the tortfeasor

³³ 253 F.2d at 213.

³⁴ Annot., 68 A.L.R.2d 876 (1959).

³⁵ 2 Personal Injury Newsletter 20 (1959).

³⁶ 6 Wis. 2d 53, 94 N.W.2d 224 (1959).

³⁷ 206 Misc. 503, 133 N.Y. Supp. 2d 852 (1954).

under the collateral source rule. Ohio Jurisprudence 2d indicates that the Ohio rule is the same as the New Jersey rule. The following language is used:

The same rule is held to apply with regard to compensation awarded under the Ohio Workmen's Compensation Law for an injury to or the death of an employee; recovery against the person causing the injury is not to be reduced by any payments or awards made under the act.³⁸

In *Chicago Great Western Ry. Co. v. Peeler*³⁹ the court said:

Appellant contends that it was entitled to make proof of the pension on cross examination of the plaintiff in mitigation of damages. If appellant is entitled to any benefit in this action from its contributions to the Railroad Retirement fund it is by way of set-off only, as provided in the statute. Without the aid of the statute an employer can not set up in mitigation of damages in a tort action by an injured employee indemnity from a collateral source, such as insurance or compensation or benefits under a Workmen's Compensation Act, even where the defendant has contributed to the fund.

*Overland Const. Co. v. Sydnor*⁴⁰ involved an appeal from a District Court's⁴¹ determination in favor of the plaintiff. The court said:

Appellant contends that appellee was not entitled to recover the reasonable value of hospital and medical services in the amount of \$4,379.17 because this amount was paid for him by the Industrial Commission of the State of Ohio. Appellant does not contend against the rule that ordinarily a tort-feasor is not entitled to any reduction of damages because the injured party has received the benefit of insurance. . . . The contention is that appellee was not entitled to recover because under Ohio General Code, §§ 1465-60 and 1465-69, appellant was required to make payments to the Industrial Commission of the State of Ohio, and that the amount of the hospital and medical expenses was paid by that commission. We cannot agree with this contention. . . . [A]n employer "cannot recover from any source any sum to reimburse an amount paid under the Workmen's Compensation Law to injured employees, whether the injury results from the negligence of some third party, or otherwise." . . .⁴²

We think the principles underlying *Pappas v. Baltimore & Ohio R. Co.*⁴³ . . . are sufficiently broad to include an employer

³⁸ 16 Ohio Jur. 2d, "Damages" § 119 (1955); See also Fed. Digest, "Damages" § 59, and other West key number digests.

³⁹ 140 F.2d 865, 868 (8th Cir. 1944).

⁴⁰ 70 F.2d 338 (6th Cir. 1934).

⁴¹ S.D. Ohio, W. Div.

⁴² Citing *Pappas v. B. & O.R.R.*, 37 F.2d 271 (6th Cir. 1930) and *Truscon Steel Co. v. Furnace Co.*, 129 Ohio St. 394, 166 N.E. 368 (1929).

⁴³ *Supra*, note 42.

who makes some contribution to the Commission, based upon the extent of his own employment, and which may redound incidentally or remotely to the benefit of an employee of another who sustains an injury through the contributor's negligence. That case must have recognized that such payments are not, in reality, paid by the employer but by the ultimate consumer as cost of production. In this case all of the amount so paid into the fund ultimately entered into the cost of the building.

CONCLUSION

The "collateral source rule" or doctrine is a fascinating subject. The observations and citations herein included, are not intended to be all inclusive, but are indications only of the tremendously important, but oft neglected rule of damages known as the "collateral source rule." Research in this field of damages will prove rewarding effort in the handling of cases, on a settlement level or at the trial level.

It must be obvious from the above discussion that great care must be exercised in the drafting of bills of particulars, interrogatories and in testimony given under deposition proceedings or at examinations before trial (E/B/T). Too many times attorneys give the net hospital bill (where the Blue Cross plan applies) or the net doctor's bills, (where the Blue Shield plan applies) or neglect to properly evaluate the effect of this rule upon lost time from employment. This is especially true in cases where the injured client is a federal, state or municipal employee and where the time spent away from work is charged to accumulated sick leave or employees pension or sick benefits insurance plans.

An analysis of the case law in the particular jurisdictions is imperative, for the courts generally permit a recovery by the injured plaintiff for the reasonable value of the medical, hospital and nursing care and the reasonable value of the lost time from work, notwithstanding the fact that payment has been obtained by means of the employer's gratuity or the benefits of a Blue Cross, Blue Shield or other insurance benefits. 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 tortfeasor the benefits of payments that come to the claimant from "collateral sources." The wrongdoer, the courts feel, is not entitled to such an "undeserved windfall."

Familiarity, therefore, with this rule is important for successful handling of tort litigation.