The Collateral Source Rule: Double Recovery and Indifference to Societal Interests in the Law of Tort Damages

While society changes, the law of tort damages clings persistently to the outmoded collateral source rule, struggling to justify the rule and to balance conflicting objectives of compensation and punishment. Nineteenth century tort liability theory, predicated on individualistic notions of fault, suited a time of self-help, rugged individualism, and laissez-faire government. Punitive objectives, predicated on moral fault, comported with the compensatory purpose of tort damages because the defendant bore the responsibility of compensating the victim. Social changes, however, manifesting widespread insurance protection and government social welfare programs, shift responsibility for civil loss to society and away from the individual tortfeasor. Vicarious liability, strict products liability, comparative negligence, no-fault insurance, and notions of enterprise liability further evince pervasive legal changes in fault liability theory. These legal and social developments facilitate individual recovery for injuries and spread the cost to purchasers of insurance, buyers of goods, and taxpayers. Ensuring individual recovery and easing the burden of compensation for the loss by spreading the cost over a wide segment of the populace are socially approved goals. The collateral source rule, which forbids mention in court of plaintiff's prior compensation for the same injury, is unresponsive to legal and social changes invalidating the rule's punitive justification and adds to the public expense of compensating individual civil loss.

This comment analyzes the present utility of the collateral

1. "[T]he theory of enterprise liability in torts is that losses to society created or caused by an enterprise or, more simply, by an activity, ought to be borne by that enterprise or activity." Klemme, The Enterprise Liability Theory of Torts, 47 U. COLO. L. REV. 153, 158 (1976).

With the present predominance of unintentional harm brought on by complex machinery and technology in a congested urban society, many uncompensated personal injuries accidently occur. Enterprise liability would establish absolute liability without fault to ensure individual reparation and would evenly distribute the cost to society through insurance, taxes, or the pricing mechanism of the marketplace. To balance societal interests, the collateral source rule would be abolished, and recoveries for nonpecuniary losses such as pain and suffering would be denied. The theory is a response to a clear trend away from the concept of fault for determining liability for tort losses. See generally Klemme, supra.

source rule and finds the rule unjustified as a means of ensuring either punishment of the defendant or just compensation for the plaintiff. It further examines the efficacy of subrogation in eliminating the collateral source rule's vice of double recovery. The comment concludes that legislative reform abolishing the collateral source rule and subrogation in medical malpractice suits should extend to all tort actions for personal injury, thereby entirely eliminating double recovery and the consequent higher societal costs in insurance premiums, taxes, and prices.

By allowing double recovery, the collateral source rule compromises the strict compensatory purpose of tort damages, which seeks to reimburse injured parties only for their actual loss.\(^3\) Courts, invoking the collateral source rule, permit the plaintiff to recover an award undiminished by compensatory benefits from sources independent of the wrongdoer.\(^4\) For example, A sues B for personal injuries sustained in an auto collision. A claims, as special damages, $500 in medical expenses and $500 in lost wages. The collateral source rule bars B from proving that A's medical insurance reimbursed A for medical expenses, and that A's employer continued salary payments during A's disability. Consequently, A collects $1,000 from collateral sources, and $1,000 from B's insurer, receiving a total of $2,000 for a $1,000 economic loss. Because collateral sources reimbursed A's loss, A's additional recovery against B is not compensation. Instead, A's recovery is enrichment, and B's payment appears punitive in emphasizing the responsibility of B to pay for a loss A did not suffer.

Courts originally supported the collateral source rule because of its punitive effect.\(^5\) The rule was created in 1854,\(^6\) contemporaneous with the Clayton Act.

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3. James, Damages in Accident Cases, 41 CORNELL L.Q. 582 (1956).
4. Courts typically emphasize what the defendant deserves to pay rather than what the plaintiff should receive. For example:

   The weight of authority is conclusive to the effect that a defendant owes to the injured compensation for injuries, the approximate cause of which was his own negligence, and that payment by a third party cannot relieve him of this 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.


5. Early court opinions consistently required the defendant to pay for the injury. See The Propeller Monticello v. Mollison, 58 U.S. (17 How.) 152, 155 (1854); Clark v. Berry Seed Co., 225 Iowa 262, 280 N.W. 505 (1938); Perrott v. Shearer, 17 Mich. 47 (1868); Coulter v. Township of Pine, 164 Pa. 543, 30 A. 490 (1894); Heath v. Seattle Taxicab Co., 73 Wash. 177, 131 P. 843 (1913). Later decisions more frequently avoid the punitive justification; yet the following opinion characterizes the prevailing punishment objective:

   "This may permit a double recovery, but it does not impose a double burden. The tortfeasor bears only the single burden for his wrong. That burden is imposed by society not only..."
rary with the establishment of the fault theory of liability in 1850. Courts perceived the collateral source rule as deterring the socially inexpedient or wrongful conduct the new fault theory of liability sought to identify. Judicial policy makers morally appraising B's conduct would reason B deserves to pay because enforcing a penalty against B punishes his immoral conduct and deters similar wrongful acts. Courts argued that a wrongdoer should not avoid paying full compensation for the injury merely through the fortuitous circumstance of collateral benefits. Aversion to giving misbehaving defendants the mitigating benefit of collateral compensation had more to do with permitting double recovery than any belief in the merits of the plaintiff's entitlement to enrichment. Thus, despite its violation of the compensatory purpose of tort damages, the collateral source rule was embraced by courts naturally responding to the new emphasis on identifying and preventing civil misconduct. The rule's very adaptability to the punitive logic behind the fault theory of liability promoted its adoption.

The scarcity of collateral sources and the types of collateral benefits courts normally confronted also contributed to the rule's adoption. Generally, tort liability and private resources were the

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to make the plaintiff whole, but also to deter negligence and encourage due care." Gypsum Carrier, Inc. v. Handelsman, 307 F.2d 525, 534 (9th Cir. 1962). Subordination of punishment language to compensatory language indicates the shift to justifying the collateral source rule as a compensatory tool.


7. The theory of fault or moral blameworthiness as a condition of liability was revolutionary in the middle 1800s. Commentators credit Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850), with dispensing with strict liability for inadvertent harm and establishing the fault theory of liability. The defendant tried to break up a dog fight, and as he raised a club to strike the dogs, he poked the plaintiff in the eye. Because he was not at "fault," he was not liable. See, e.g., Gregory, Trespass to Negligence to Absolute Liability, 37 VA. L. REV. 359, 365 (1951).

8. See note 5 supra.

9. Id.

10. For example:

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


11. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 25.22 at 1353 (1956 ed.).
only available sources compensating personal injury losses.\textsuperscript{12} In contrast to today, accident and health insurance, personal liability insurance, work benefits, and government protection against personal injury losses were scarce or nonexistent in 1854.\textsuperscript{13} When confronted with collateral benefits, court decisions permitting double recovery had negligible social impact because the defendant, rather than a liability insurer, paid the award. The virtual absence of liability insurance and government protection against personal injury losses characterized the nineteenth century's valued social philosophy of self-help and rugged individualism. Judicial opinion naturally protected that sentiment. Courts were not about to mitigate damages because plaintiffs received collateral compensation from contractual arrangements, gifts from family and friends, or public charity, thereby thwarting or discouraging individual providence, family unity, and philanthropy.\textsuperscript{14} These collateral benefits represented individual resourcefulness in preparing for accidental loss, or donative intent for the sole benefit of the recipient. Property insurance, specifically marine and fire insurance, was common in comparison to accident and health insurance.\textsuperscript{15} The right to subrogate under marine and fire insurance contracts, however, granted the insurer a lien on the insured's tort recovery equal to the indemnity obligation under the insurance contract.\textsuperscript{16} This subrogation right avoided double recovery, enabled the courts to punish the defendant and still pay homage to the compensatory purpose of tort damages, and thus attenuated the dilemma of applying the collateral source rule.

Modern legal and social changes invalidate punitive justifications for the collateral source rule. The prevalence of inadvertent harm, the emphasis on securing compensation for personal injuries, and a view of social responsibility for individual loss lead to modern concepts of strict products liability, vicarious liability, comparative negligence, and wider liability insurance protection against negligence.\textsuperscript{17} Strict liability and vicarious liability may place legal responsibility on faultless parties.\textsuperscript{18} Additionally, allowing plaintiffs to recover under some comparative negligence

\textsuperscript{12} See generally Henderson, supra note 2, at 410.

\textsuperscript{13} Id.

\textsuperscript{14} See, e.g., Roth v. Chatlos, 97 Conn. 282, 287-88, 116 A. 332, 334 (1922); Clark v. Berry Seed Co., 225 Iowa 262, 271, 280 N.W. 505, 510 (1938).

\textsuperscript{15} See Henderson, supra note 2, at 410.

\textsuperscript{16} See W. VANCE, HANDBOOK ON THE LAW OF INSURANCE 786-90 (3d ed. 1951).

\textsuperscript{17} See generally Ehrensweig, Negligence Without Fault, 54 CAL. L. REV. 1422, 1425-43 (1966).

\textsuperscript{18} W. PROSSER, HANDBOOK OF THE LAW OF TORTS 459 (4th ed. 1971).
schemes when they are more at fault than defendants fails to comport with any punitive function in tort law. Finally, widespread liability insurance lightens a jury’s task of finding fault in the defendant. The jury’s inclination to find fault because of liability insurance embodies values of a society demanding reparation of harm and wide distribution of loss, through insurance or the marketplace, rather than a finding of moral blameworthiness. The shift in tort law towards social responsibility for individual loss and the spread of liability insurance envelop societal interests in private litigation and widen the gap between legal and moral fault. Finding legal liability with less concern for finding fault weakens the collateral source rule’s punitive justification because the rule cannot reform or deter faultless conduct.

Similarly, a punitive justification for the collateral source rule is lacking in ordinary negligence cases. Defendants liable for ordinary negligence normally do not display the malevolence necessary to justify punitive damages. They are held responsible for an error in judgment or accident proneness resulting in conduct falling below a uniform standard of behavior. Some opinions insist that relieving negligent tortfeasors from civil responsibility would encourage carelessness; yet, the financial protection of liability insurance relieves negligent tortfeasors from full civil responsibility and no demonstrable correlation exists between insurance coverage and accident rates. Courts are too suppositional in expecting undiminished civil liability to further deter negligent conduct; potential civil liability is a sufficient incentive to be careful. A tortfeasor’s knowledge subsequent to the negligent act, that a particular plaintiff is the beneficiary of collateral benefits, will not impair the deterrent effect of civil liability. Even assuming full civil responsibility deters negligence, courts should go on to determine not only who will bear the ultimate financial responsibility, but also the social expense of multi-

20. “Often it is true that liability attaches because of insurance, instead of insurance attaching because of liability.” Henderson, supra note 2, at 418.
21. See generally 2 F. HARPER & F. JAMES, supra note 11, § 25.22 at 1346.
22. Id.
23. See note 5 supra.
ple insurance recoveries before applying the collateral source rule. Because adequately insured tortfeasors generally do not pay compensatory damage awards personally, holding them responsible for losses collaterally compensated has no deterrent effect. True victims of the collateral source rule are not immoral tortfeasors, but the general populace who pay for rising insurance costs resulting from multiple insurance recoveries for a single claim. Similarly, taxpayers pay for excessive awards assessed against public entities because of the collateral source rule.

Public entities and insurance companies would not have to pay excessive awards, however, if courts expressly awarded punitive damages, rather than indirectly assessing punitive damages by invoking the collateral source rule. The tortfeasor would have to pay express punitive damages from his own resources, because insurance protection usually does not extend to punitive damages. Absent statutory authority, public entities, like insurance companies, are immune from assessments of punitive damages. By using the collateral source rule against insured defendants and public entities, courts punish society because society bears the expense of double recovery in higher insurance premiums and higher taxes. Adherence to the collateral source rule improperly ignores the twentieth century development of social responsibility for individual loss, which demands realization that the public's financial interests are involved in disputes between private litigants.

Public interest in eliminating double recovery is not as great when the defendant is neither insured nor a public entity, because the public does not pay for the injured's loss through the defendant. Nevertheless, the wisdom of permitting double recovery, even when societal interests are not integrally involved, rests on whether tort law should punish the tortfeasor or compensate the plaintiff.

The cardinal principle of tort law and the primary purpose of tort damages is compensation. To punish wrongdoers, courts

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27. Public policy does not permit liability insurance coverage for willful and intentional injuries. Punitive damages are personal punishment of the party at fault. Commentators, however, have noted a trend, in some jurisdictions, allowing insurance against punitive damages. See generally Farbstein & Stillman, Insurance for the Commission of Intentional Torts, 20 Hastings L.J. 1219 (1969); Levit, Punitive Damages Today: What Can Be Done to Protect Against Imposition of Such Damages, 1972 Ins. L.J. 211.


29. See Fleming, supra note 26, at 1480.
were willing to ignore the collateral source rule's compromise of compensatory objectives. Now that legal responsibility increasingly falls on relatively faultless defendants and the public increasingly bears the cost of double recovery,\textsuperscript{31} lawmakers should remember the first priority of tort law is compensation, not punishment of tortfeasors or enrichment of plaintiffs. Moreover, punitive damage awards\textsuperscript{32} or, alternatively, criminal penalties are more discriminate means of punishing wrongdoers than the collateral source rule. Thus, although society may not have a direct interest in every suit, adherence to the compensatory purpose of tort damages and alternatives for effectuating punishment justify abolition of the collateral source rule.

Reluctant to abandon the collateral source rule, modern courts find the rule serves "legitimate" compensatory objectives.\textsuperscript{33} Courts contend legal compensation never adequately compensates, and the collateral source rule allows a closer approximation of full compensation for injuries.\textsuperscript{34} Jurists reason attorney

\textsuperscript{30} "A cardinal principle of law is that in the absence of punitive damages a plaintiff can recover no more than the loss actually suffered." Snowden v. D.C. Transit Sys., Inc., 454 F.2d 1047, 1048 (D.C. Cir. 1971).

The primary object of an award of damages in a civil action and the fundamental principle or theory on which it is based is just compensation, indemnity, or reparation for the loss or injury sustained by the injured party, so that he may be made whole, and restored, as nearly as possible to the position or condition he was prior to the injury.

25 C.J.S. \textit{Damages} § 3 (1966). See also C. \textit{Mc Cormick, Handbook of the Law of Damages} §§ 20, 137 (1935); W. \textit{Prosser, supra} note 18, at 552; James, \textit{supra} note 3, at 582.

31. \textit{See text accompanying note 21 supra.}

32. Dean Prosser finds even punitive damages an anomalous practice of tort law. Tort law's function is not to punish. Rather, criminal law, with its procedural safeguards, provides the system for exacting punishment. \textit{See W. Prosser, supra} note 18, at 9-14. Another writer states the same idea as follows:

The aim of the criminal law . . . is to protect the public against harm, by punishing harmful results of conduct . . . . The function of tort law is to compensate someone who is injured for the harm he has suffered. . . . With crimes . . . there is emphasis on a bad mind, on immorality. With torts the emphasis is more on "the adjustment of the conflicting interests of individuals to achieve a desirable social result," with morality taking on less importance.

W. \textit{LaFave} & A. \textit{Scott, Criminal Law} 11 (1972).


Although we recognize that in the past a primitive moralism may have engendered the collateral source rule to serve punitive ends, we suggest below that the rule still serves not mere punitive purposes, but legitimate objectives that may or may not survive the spread of a philosophy of social insurance.

\textit{Id. at 4 n.8, 465 P.2d at 65 n.8, 84 Cal. Rptr. at 177 n.8.}

34. \textit{See, e.g., Tyminski v. United States, 481 F.2d 257, 270 (3rd Cir. 1973); Gypsum Carrier, Inc. v. Handelsman, 307 F.2d 525, 534 (9th Cir. 1962); Grayson v. Williams, 256 F.2d 61, 65 (10th Cir. 1958); Rayfield v. Lawrence, 253 F.2d 209 (4th Cir. 1958); Hudson
expenses contribute to the inadequacy of the award. Moreover, courts argue that bodily functions are priceless and that any award for a permanent disabling injury is insufficient. In all of these instances courts fail to analyze the collateral source rule directly; rather they indulge in evasive analysis of the rule's indirect effect on other deficiencies in the law.

The collateral source rule is a haphazard answer to present methods of allocating attorney costs. Courts suggest the prevailing plaintiff's payment of attorney expenses results in undercompensation and receipt of collateral benefits results in overcompensation — the net effect an equitable balance. Courts, therefore, concede the collateral source rule and payment of attorney expenses transgress compensatory principles, but apparently believe the violations of compensatory principles are justified because the two transgressions cancel each other. Attorney fees are too often the ruse under which courts justify other noncompensatory practices, such as pain and suffering damages, punitive dam-


37. The [Hudson] [c]ourt proceeds to state that legal compensation for personal injuries does not wholly compensate because the injured person seldom gets the full compensation that he recovers since a substantial attorney's fee comes out of it. This . . . reasoning is not convincing. If the law were to make the plaintiff whole and include attorney's fees, our law should be modified in accordance with the English practice . . .


39. One commentator asserts that pain and suffering damages are not compensatory because such awards do not replace what is lost or make the plaintiff whole. He suggests that pain and suffering awards ensure adequate compensation by supplementing compensatory damages for pecuniary losses. Further, pain and suffering awards finance contingent-fee litigation, because without them attorney fees would come out of an award for compensatory damages. D. Dobbs, HANDBOOK ON THE LAW OF REMEDIES 550 (1973).

Another writer takes a different view:

Do [juries] . . . actually award fees? The answer is not simple. They frequently discuss them in the deliberation; they see no impropriety in so doing. They are frequently well informed, although not always, about the level of contingent fees
ages,\textsuperscript{40} and not reducing awards by tax savings.\textsuperscript{41} Considering all the offsets courts permit, the defendant might advantageously pay the prevailing plaintiff's attorney costs, if the plaintiff's total recovery otherwise was made compensatory by denying punitive damages and reducing the recovery by collateral benefits and tax savings. Courts should urge direct reform if payment of attorney expenses by prevailing parties results in inequities. Collateral benefits are a haphazard answer because they are not available in every suit to offset the litigation expense.

Courts further contend the impossibility of complete compensation for many injuries justifies the collateral source rule because overcompensation never occurs.\textsuperscript{42} They insist that general damage awards\textsuperscript{43} inadequately compensate severe permanent injuries that cause continuing physical pain, mental anguish, or an inability to enjoy life. Collateral benefits, however, usually reimburse items of special damages\textsuperscript{44} such as hospitalization and other medical expenses or lost income. To the extent collateral benefits cover medical expenses and lost income, plaintiff suffers

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see today. Does this then mean that awards are higher by the amount of the fee? We seriously doubt it.


Yet, appellate judges have considered attorney's fees in determining whether an award is excessive:

Moreover, although there is no legal basis for the inclusion of an attorney's fee in the judgment it is a matter of common knowledge that in personal injury actions lawyers do not customarily perform service for the plaintiff gratuitously. \ldots Such circumstances cannot be ignored by the writer in performing his part of this Appellate Court's duty to determine whether the judgment is so grossly excessive as to shock the judicial conscience.

Renuart Lumber Yards, Inc. v. Levine, 49 So. 2d 97, 102 (Fla. 1950) (dissenting opinion). See also United States v. Jacobs, 308 F.2d 906, 907 n.1 (5th Cir. 1962).

40. A court approved the following jury instruction: "If you allow punitive damages in this case then in assessing such damage you may take into consideration the following items: 1. The probable and reasonable expense of the litigation including attorney's fees \ldots ." Brewer v. Home-Stake Prod. Co., 200 Kan. 96, 98, 434 P.2d 828, 829 (1967). Similarly: "[A]s a general rule in cases where exemplary damages are justified, the award of such damages should approximate (1) reasonable and necessary attorney's fees \ldots ." Jolley v. Puregro Co., 94 Idaho 702, 710, 496 P.2d 939, 947 (1972).


42. "[N]ot many people would sell an arm for the average or even the maximum amount that juries award for loss of an arm." Hudson v. Lazarus, 217 F.2d 344, 346 (D.C. Cir. 1954).

43. General damages are the natural and proximate results of personal injury. An example is pain. C. McCormick, supra note 30, § 8 at 34-35.

44. Special damages are unusual losses, of which without specific notice the defendant would have no knowledge. Special damages include loss of time and earnings, expenses of drugs, nursing, and medical care. Id. at 37.
no economic loss. Permitting the plaintiff double recovery on these items of special damages does increase his overall recovery, but does not affirmatively remedy the perceived inadequacy of general damage awards. Rather than focusing on methods for adequately measuring general damages, the courts allow recovery for losses which simply do not exist. Even if courts apply the collateral source rule to remedy perceived deficiencies in general damages, collateral benefits, while becoming more common, are not prevalent enough to either meet the problem adequately or justify the rule's existence. If courts seriously contend jury awards fall short of reasonable compensation and are not simply groping for support for an obsolete rule, they should solve the problem of adequate compensation by direct reform having universal application.

The California Supreme Court in Helfend v. Southern California Rapid Transit District45 articulated additional compensatory justifications for the collateral source rule. The court believed rewarding plaintiff's foresight in purchasing insurance protection was a legitimate objective.46 Viewing insurance as an investment, the court reasoned that if collateral benefits mitigated damages, the plaintiff's investment would have earned no benefit. Error lies in assuming the plaintiff received no value for the insurance premiums. Ordinarily plaintiffs do not pay insurance premiums as a wager on the chance of double recovery, but for the security of prompt compensation for personal injury without the uncertainty of litigation and without regard to the personal wealth of prospective defendants.47

The Helfend court also reasoned that the collateral source rule performs a needed function in computing general damages. Generally, a jury's failure to award general damages, in the face of a substantial award of special damages, results in an improper or irregular verdict.48 An award for general damages is then somewhat dependent on the existence and amount of special damages. Thus, the cost of medical care, as an item of special damages, provides attorneys and juries an important measure for assessing the plaintiff's general damages.49 The court implied that reduction or elimination of hospitalization expenses by collateral medical payments distorts measurement of pain and suffering. Inexpensive injuries are not painful, is the apparent logic. Assuming

45. 2 Cal. 3d 1, 465 P.2d 61, 84 Cal. Rptr. 173 (1970).
46. Id. at 6, 465 P.2d at 66, 84 Cal. Rptr. at 178.
47. Harvin, supra note 4, at 65.
49. 2 Cal. 3d at 8, 465 P.2d at 68, 84 Cal. Rptr. at 180.
the court is correct in believing that evidence of special damages is necessary to determine the amount of general damages, elimination of the collateral source rule will not prevent such a showing. Presumably, absent the collateral source rule, plaintiff will prove his medical expenses, lost wages, and other items of special damages; defendant will then rebut plaintiff's claim for special damages by showing plaintiff received reimbursement from collateral sources. Permitting the defendant to present evidence of collateral benefits to show the plaintiff did not suffer lost wages or the expense of medical care does not deny a disabling injury. Evidence of hospital care and absence from work, together with medical evidence substantiating the seriousness of the injury should support a general damage award, despite a reduction of special damages resulting from rejection of the collateral source rule.50

Finally, the Helfend court argued that the collateral source rule provides needed additional compensation to offset statutory subrogation.51 When a provider of collateral benefits has a subrogation right permitting it to reach any recovery indiscriminate of the recovery's purpose or nature,52 then the collateral source rule ensures plaintiffs will receive just compensation. For example, suppose A's total loss is $1,000. A receives $500 from a workmen's compensation fund. If the court permits A to use the collateral source rule to bar B from presenting evidence of collateral benefits, A will recover $1,000. Subrogation rights entitle the state workmen's compensation fund to recover $500 from A. This leaves A a total recovery of $1,000 for a $1,000 loss. Whereas, if the courts do not permit A to use the collateral source rule to exclude evidence of this collateral compensation, A will only recover $500 from B, which A must relinquish to the state work-


51. [T]he collateral source rule lies between two systems for the compensation of accident victims: the traditional tort recovery based on fault and the increasingly prevalent coverage based on non-fault insurance. Neither system possesses such universality of coverage or completeness of compensation that we can easily dispense with the collateral source rule's approach to meshing the two systems.

2 Cal. 3d at 9, 465 P.2d at 69, 84 Cal. Rptr. at 181.

52. In Bilyeu v. State Employees' Retirement Sys., 58 Cal. 2d 618, 375 P.2d 442, 25 Cal. Rptr. 582 (1962), the California Supreme Court interpreted CAL. LABOR CODE § 3856 (West 1971) as authorizing a state employees' retirement fund, obligated to pay disability retirement compensation, to attach a lien to a state employee's judgment against a tortfeasor "for any damages."
men's compensation fund. A's net compensation is $500, for a $1,000 loss. State law allowing subrogation permits this result if the lien attaches to any recovery. Such a law fails to consider that the judge or jury already reduced A's tort recovery by the collateral benefits received from the workmen's compensation fund, thereby inequitably requiring A to relinquish his remaining tort recovery. Thus, subrogation perpetuates the collateral source rule. The judiciary will not repeal the collateral source rule because they cannot concurrently control subrogation rights. To eliminate double recovery efficiently, state legislators must abolish the collateral source rule and repeal statutory subrogation rights. Courts can then easily bar enforcement of contractual subrogation agreements. Subrogation theory requires the obligations of the insurer and the tortfeasor to the injured party be the same. The insurer then, to the extent of his obligation under the insurance contract, may assert the insured's cause of action against the tortfeasor. Absent the collateral source rule, however, the tortfeasor is obligated to the injured party only to the extent of any deficiency in effective insurance coverage. Therefore, because the insured has no cause of action against the tortfeasor for the amount of collateral benefits, the insurer has no rights against the tortfeasor.

Insurance companies, of course, would oppose vehemently such a proposal. They would argue that denying first party insurers contractual subrogation rights is counterproductive to reducing insurance rates. This argument presupposes subrogation re-

53. Without a thorough revolution in the American approach to torts and the consequent damages, the rule . . . has become so integrated within our present system that its precipitous judicial nullification would work hardship . . . . The reforms which many academicians propose cannot readily be achieved through piecemeal common law development.

Helfend v. Southern Cal. Rapid Transit Dist., 2 Cal. 3d at 9, 465 P.2d at 69, 84 Cal. Rptr. at 189.

54. Commercial law, by analogy, provides support for this conclusion. See U.C.C. § 2-510(3) (1972 version) (antisubrogation clause).

55. W. VANCE, supra note 16, at 787. Subrogation rights usually do not exist outside express statutory authority or property insurance. Life and accident and health insurers are not in theory entitled to subrogation. Id. The terms of life and accident and health insurance contracts fix the amount payable by life or accident insurers, whereas assessment of the insured's actual loss determines the amount payable by the property insurer. Id. Accident and health insurers, however, increasingly provide for subrogation in the insurance contract. Peckinpaugh, An Analysis of the Collateral Source Rule, 32 Ins. Counsel. J. 32, 33 (1965).


57. First party insurance is coverage under which the policyholder collects payments for his losses from his own insurance company, rather than from the insurance company of some other person who caused the accident.
recoveries effectively reduce rates. Whether subrogation recoveries significantly contribute to rate structuring of accident and health policies is doubtful. Jurisdictions are split on the validity of subrogation agreements in accident and health insurance contracts. A minority of states invalidate subrogation agreements, relying on the common law prohibition on assignments of causes of action for personal injuries. A majority of states, however, condone express subrogation provisions as an equitable remedy barring double recovery. Although relevant data is inconclusive, rates probably will not be measurably affected in those jurisdictions permitting subrogation. One reported unofficial estimate shows that "systematic subrogation recoveries would not reduce the monthly contribution to the Kaiser Health Plan by more than four cents." Another unofficial estimate reports subrogation recoveries on automobile damage claims represent 8.56% of paid loss, and recoveries on workmen's compensation claims represent 2.45% of paid loss. Still another study finds "that aggregated subrogation collections . . . are relatively unimportant for some broad classes of insurance." These statistics and conclusions are attributable to the failure of insurance companies to investigate claims and subrogation opportunities, the economic impracticality of pursuing litigation, and more simply the fact that many injuries are not tort-induced. The foregoing might reasonably lead one to conclude insurance companies' rates already reflect the broadest risk — the risk of loss without the possibility of subrogation. That being true, any argument for raising rates because of a denial of subrogation rights is unpersuasive.

Conversely, the collateral source rule more directly affects liability insurance rates because a closer correlation exists between the liability insurer's loss experience and the practice of excluding evidence of collateral benefits. Unlike the impact of subrogation rights on a first party insurer's loss experience, the impact of the collateral source rule on a damage award is not contingent upon economic considerations or an insurance company's initiative, but rather is judicially imposed as an evidentiary rule. Thus, an increase in damage awards because of the

59. Id.
60. Id.
61. Fleming, supra note 26, at 1503 n.92.
63. R. Horn, SUBROGATION IN INSURANCE THEORY AND PRACTICE 191 (1964).
64. See Meyers, supra note 61, at 85-86.
collateral source rule is more apt to occur than a decrease in loss experiences of first party insurers because of subrogation. Therefore, an approach to double recovery abolishing the collateral source rule and subrogation is preferable to offsetting the collateral source rule with subrogation because it is more economically effective in reducing the public expense of double recovery and it ensures the injured party is made as whole as our jurisprudence can assure.

Rather than urge abolition of the collateral source rule and subrogation rights, some commentators advocate extension of subrogation as the solution to double recovery.65 These commentators believe subrogation is a "neat device" balancing punitive

65. See, e.g., Maxwell, supra note 6, at 694. Dean Maxwell advocates the collateral source rule: "For the present system, however, the rule seems to perform a needed function. At the very least, it removes some complex issues from the trial scene. At its best, in some cases, it operates as an instrument of what most of us would be willing to call justice." Id. at 695.

He also advocates subrogation as the solution to double recovery: "The existence of the right of subrogation would enable the courts to place liability for damage on the wrongdoer and yet to pay homage to the equally attractive idea of damages which are simply compensatory as far as the injured party is concerned." Id. at 683.

Commentators have urged other solutions. Professor Sedler bases his "functional approach" on a common sense appraisal of the propriety of double recovery: "[C]onsider the nature of the benefit and the economic and practical factors involved and then conclude how receipt of that benefit should affect recovery of personal injury damages." Sedler, supra note 25, at 63. He uses insurance premiums as an example:

[The effect is] that the plaintiff purchased the insurance for the benefit of the defendant. This was not his intention of course, but the insurance is available to meet a loss that the defendant would otherwise have had to meet under principles of tort liability. Since that loss was met by insurance, the plaintiff has no need to recover it from the defendant. But since the plaintiff's insurance has rebounded to the benefit of the defendant by relieving him of a portion of his liability, it seems only fair that the defendant pay for the insurance protection.

. . . [H]e should reimburse the plaintiff for the cost of the insurance under a restitutionary theory.

Id. at 89-90. Sedler's creative and simple idea is facially appealing, but one must question the assumption that the plaintiff received no value for the premiums. The plaintiff received value from the security of knowing compensation would be forthcoming for accidental losses, regardless of whether or not tort-induced.

Professor Fleming would probably see this plan as a worthless endeavor:

[Unofficial estimates show] that systematic subrogation recoveries would not reduce the monthly contribution to the Kaiser Health Plan by more than four cents. This throws some incidental light on how negligible is the proportionate cost of tort-proved accidents, and should give pause to those who argue that reducing the tortfeasor's liability by the benefits the plaintiff has received from an accident policy would unfairly divert to him the plaintiff's own expenditures.

Fleming, supra note 26, at 1503 n.92. Apparently, the California Legislature agrees with Professor Sedler. See note 77 infra.

66. Fleming, supra note 28, at 1498.
and compensatory objectives of tort law which are rendered in-
compatible by the collateral source rule. Subrogation allows
courts to forget nagging doubts about unjust enrichment of the
plaintiff, and still place liability for all damages on the wrong-
doer. Thus, those advocating subrogation as a solution to double
recovery are not focusing on the public expense as a problem
arising from the collateral source rule, but instead are concerned
with imperfections the rule creates in tort law's compensatory
objective.

Although subrogation eliminates some double recovery, abol-
ishing both the collateral source rule and subrogation would more
efficiently eliminate all double recovery. Extending subrogation
to offset the collateral source rule eliminates double recovery only
when the provider of collateral benefits asserts a subrogation
right acquired by statute or contract. The mere availability of
enforceable contractual subrogation rights does not ensure all
providers of collateral benefits will contract for the right. For
example, a physician rendering gratuitous medical services to a
colleague or an employer gratuitously continuing salary pay-
ments to a disabled employee will not make contractual arrange-
ments with the beneficiary regarding any potential tort recov-
eries. Abolishing the collateral source rule, conversely, avoids dou-
ble recovery independent of any contractual arrangements be-
tween the source of collateral benefits and the injured. Subroga-
tion can also foment litigation because an insurer, for example,
may pressure an insured to bring a tort action against the third
party to enable the insurer to attach a lien to the tort recovery.
If subrogation rights do not attach to the plaintiff's recovery and
state legislatures abolish the collateral source rule, claimants are
more likely to settle before trial because there is a single plaintiff
with a loss already partly satisfied and therefore a smaller claim.
Finally, subrogation, which most often simply transfers money
from defendant's to plaintiff's insurer, adds the administrative
cost of investigating subrogation opportunities and litigating
claims to the public expense. No social gain derives from making
the shift because either insurer can effectively spread the loss.
Abolition of both the collateral source rule and subrogation elimi-
nates double recovery without the additional administrative ex-

67. See Maxwell, supra note 6, at 683.
68. Fleming, supra note 26, at 1526.
69. 2 F. Harper & F. James, supra note 11, § 25.23 at 1356.
70. "[Subrogation] simply takes money from one of a man's pockets and puts it in
one of his others." Id. § 25.23 at 1360.
71. See generally id. § 25.23 at 1355-60.
pense. Diplomatic deference to views that courts should not relieve tortfeasors of any portion of their liability appears the only reason commentators urge adoption of subrogation to negate double recovery, instead of urging direct repeal of the collateral source rule.

Responding to a demand for lower medical malpractice insurance costs, state legislatures are beginning to sanction the admission of evidence of collateral benefits in medical malpractice suits. State legislators are finding the number of personal injury suits and the size of judgments have increased the cost of liability coverage to such an extent that it is no longer in the public interest to allow double recovery. The resulting statutory treatment of collateral benefits in medical malpractice suits varies amongst the states.

Legislators could write an ideal statute by combining features of the Iowa, Alaska, and California statutes and elimi-

72. "In view of the manifest strength and sincerity with which this viewpoint is entertained, it might be thought idle, if not tactless, to challenge the assumptions on which it evidently rests." Fleming, supra note 26, at 1483.


74. See, e.g., H.R. 1494, 44th Wash. Legis., 2d Ex. Sess. (1975-1976). (The Washington Legislature rejected the bill because the proposed reforms swept too broadly in regulating attorney fees and attempting to eliminate awards for pain and suffering. Instead, the Washington Legislature enacted the more moderate Substitute House Bill No. 1470, which retained similar treatment of the collateral source rule.).


77. (b) Except when the collateral source is a federal program which by law must seek subrogation and except death benefits paid under life insurance, a claimant may only recover damages from the defendant which exceed amounts received by the claimant as compensation for his injuries from collateral sources, whether private, group or governmental, and whether contributory or noncontributory. Evidence of collateral sources, other than a federal program which must by law seek subrogation and the death benefit paid under life insurance, is admissible after the fact finder has rendered an award.

nating the limitation to medical malpractice suits. First, to eradi-
dicate double recovery adequately, the statute must include collat-
eral benefits from nearly every source. The Iowa statute is an
example:

[T]he damages awarded shall not include actual economic
losses incurred or to be incurred in the future by the claimant
by reason of the personal injury, including but not limited to,
the cost of reasonable and necessary medical care, rehabilitation
services, and custodial care, and the loss of services and loss of
earned income, to the extent that those losses are replaced or are
indemnified by insurance, or by governmental, employment, or
service benefit programs or from any other source except the
assets of the claimant or of the members of the claimant’s im-
mediate family.

The general language — “or from any other source” — is broad
enough to encompass most sources of collateral benefits including
gratuities from all but the immediate family. The narrowly
drafted Washington statute, by comparison, fails to include in-
surance proceeds paid for by the plaintiff or his employer. Sec-
ond, state legislatures must provide a procedure for admitting

78. (a) In the event the defendant so elects, in an action for personal injury
against a health care provider based upon professional negligence, he may intro-
duce evidence of any amount payable as a benefit to the plaintiff as a result of
the personal injury pursuant to the United States Social Security Act, any state
or federal income disability or worker’s compensation act, any health, sickness
or income-disability insurance, accident insurance that provides health benefits
or income-disability coverage, and any contract or agreement of any group,
organization, partnership, or corporation to provide, pay for, or reimburse the
cost of medical, hospital, dental, or other health care services. Where the defen-
dant elects to introduce such evidence, the plaintiff may introduce evidence of
any amount which the plaintiff has paid or contributed to secure his right to
any insurance benefits concerning which the defendant has introduced evidence.

(b) No source of collateral benefits introduced pursuant to subdivision (a)
shall recover any amount against the plaintiff nor shall it be subrogated to the
rights of the plaintiff against a defendant.


79. Life insurance proceeds are not properly a collateral benefit. Life insurance is
more akin to the assets, investments, or vested interests of the plaintiff. See W. VANCE,
supra note 16, at 797.


81. Any party may present evidence to the trier of fact that the patient has
already been compensated for the injury complained of from any source, except
the assets of the patient, his representative, or his immediate family, or insur-
ance purchased with such assets. In the event such evidence is admitted, the
plaintiff may present evidence of an obligation to repay such compensation.
Insurance bargained for or provided on behalf of an employee shall be considered
insurance purchased with the assets of the employee.

WASH. REV. CODE § 7.70.080 (Supp. 1977).
evidence of collateral benefits to mitigate damages. The Alaska statute is an example of a good approach. In Alaska, a jury hears no evidence of collateral benefits, but renders an award as if the collateral source rule were in force. This measure avoids confusing the jury by complicating the damage issue with double recovery considerations. After the jury renders an award the judge hears evidence of collateral benefits. The judge then reduces the recovery by the amount of compensation from collateral sources; the statute does not leave this decision to the whim or comprehension of the jury. Finally, to ensure plaintiffs receive adequate compensation after repeal of the collateral source rule, the statute must deny subrogation rights.82 The subrogation right may be a lien on the insured’s recovery against the tortfeasor, an equitable interest in the insured’s recovery by virtue of a trust agreement, or a claim requiring intervention in the injured’s private action.83 The California statute comprehensively denies these rights: “No source of collateral benefits . . . shall recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant.”84 The California statute additionally permits the plaintiff to recover contributory costs, such as insurance premiums, expended in procuring the collateral benefit. This proposed statute mitigates damages by collateral benefits, denies subrogation rights, and permits the plaintiff to recover contributory costs, thus striking a balance between the public’s interest in limiting damage awards and the injured party’s interest in just compensation.

The confounding feature of existing state statutes is their limitation to medical malpractice suits. Legislatures overlook that the reasons underlying abolition of the collateral source rule in medical malpractice suits also apply to other types of tort actions. Rising liability insurance costs due to double recovery are not unique to medical malpractice insurance. Nor are the punitive justifications for the collateral source rule more appropriate outside medical malpractice litigation. A negligent physician is no less culpable than a negligent truck driver. State legislatures probably limited these statutes to medical malpractice suits because political pressures narrowly focused on the medical community’s demands for lower malpractice insurance costs85 and

82. See text accompanying note 52 supra.
83. Capwell & Greenwald, supra note 57, at 257.
85. The medical malpractice insurance crisis, however, does not simply pose an economic problem. The Washington Legislature was also concerned that physicians might
diverted legislative attention from the broader implications of double recovery. Because medical malpractice suits are not fairly distinguishable from other personal injury actions, these statutes should extend to all tort actions for personal injury.

In conclusion, the collateral source rule, justified upon an irrelevant morality that tort law must punish "bad" people, corrupts the compensatory purpose of tort damages and ignores the societal costs of personal injury recoveries. The rule is archaic and has no place in modern society. Insurance protection, employment benefits, and government aid evince widespread social compensation providing adequate individual compensation for nearly every kind of accidental loss. Society's shift from individual to collective loss bearing invalidates the postulate that tort law should punish individual tortfeasors by not allowing collateral benefits to mitigate damages. Increasing no-fault liability also characterizes the move to social responsibility for individual losses. Tort liability fast is shedding vestiges of its punitive function. Consequently, as the medical malpractice crisis demonstrates, tort law's focus should be on reducing the higher cost of individual reparation, while at the same time ensuring that injured parties recover all economic losses.

Recent judicial opinions frequently abandon punitive justifications for the collateral source rule, but insist the rule's elimination will be counterproductive to adequate compensation. If the law falls short of full compensation, then changes in practices for payment of attorney fees and in the juries' system of computing damages are preferable to leaving "adequate" compensation to the chance of double recovery.

Commentary against the collateral source rule criticizes judicial treatment of double recovery, characterizing it as

limit or eliminate certain helpful health services because insurance coverage against potential risk of injury to the patient is too expensive. H.R. 1494, 44th Wash. Legis., 2d Ex. Sess. (1975-1976). See note 73 supra.

While other purchasers of liability insurance may not provide as important public services as physicians, they also feel the financial impact of liability insurance rates and as a consequence may find it necessary to also curtail certain activities. For example, a Washington automobile driver, unable to afford exorbitant insurance rates, must limit or stop driving unless willing to risk suspension of his license if involved in an accident. See Wash. Rev. Code §§ 46.29.110, 170 (1976).

86. "[It may be that] tort liability will become only an excess or a guarantee liability, its function being merely to allot responsibility for compensation to a person . . . to the extent that the cost of compensation has not been met by another source." Fleming, supra note 26, at 1549.

"irresponsible social engineering." 88 Perhaps the collateral source rule is so embedded in the written law, through statutory subrogation rights, that courts cannot effectively achieve judicial nullification of double recovery. 89 Still, even if only to spur legislative action, courts should take a stance more cognizant of the social implications of double recovery beyond the impact of liability on private litigants. As one court has stated:

We see no compelling reason for providing the injured party with double recovery for his lost employment; no compelling reason of deterrence or retribution against the responsible party in the case, and we are not in the business of redistributing the wealth beyond the goal of making the victim whole. 90

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88. Fleming, supra note 26, at 1484.
89. See note 52 supra and accompanying text.
90. Equal Employment Opportunity Comm'n v. Enterprise Ass'n Steamfitters, 542 F.2d 579, 592 (2d Cir. 1976) (The EEOC sued on behalf of a victim of racial discrimination, seeking back wages. Collateral benefits were state unemployment compensation.).