



School of Law

COLLATERAL SOURCE AND TORT'S SOUL

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Collateral Source and Tort's Soul

By Jeremy Kidd¹ & Michael I. Krauss²

Abner carelessly sets a fire that burns down Bernice's just-built (at a cost of \$50,000) barn. Charlie and Denise take pity on the dejected Bernice, and organize a "barn bee", erecting a structure similar in every way to the one destroyed by Abner's fire. Should Abner be nonetheless liable to Bernice in tort for \$50,000?

How one answers this question says much about the way one understands tort law. Bernice had been directly harmed as a result of Abner's carelessness, and all would agree that Bernice was entitled to compensation for that harm. The question is whether the actions taken by Charlie and Denise constitute compensation, eliminating that entitlement.

The Common Law's collateral source rule (CSR) holds that in order to be considered compensation for tortious harm, benefits received by the tort victim must be: 1) directly inspired by the tortious harm *and*; 2) bestowed by the tortfeasor or by someone acting on the tortfeasor's behalf. Thus, the collateral source rule would allow Bernice to receive the new barn built by Charlie and Denise *and* sue Abner for the value of the barn he destroyed. The apparent "double recovery" afforded by CSR has led many to criticize it. Such criticisms, it turns out, reveal a fundamental misunderstanding regarding the nature of tort law.

Imagine that a tort victim is lucky enough to be the focus of compassion by others. Many

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politicians³ and some scholars⁴ apparently believe that this “lucky” victim should be compensated by tortfeasors only to the extent that these other sources fail to alleviate his damages. After all, luck has a lot to do with events that *precede* tort liability. A drunk driver is lucky if no one crosses the street as he blows through that stop light; conversely, for the manufacturer of the defective chain saw it is most “unlucky” that a brain surgeon, not an unskilled worker, purchased the one “lemon” of the production run.⁵ But in both these cases “luck” intervenes before any damage occurs. We shall see that to rely on the good fortune of an *already injured* tort victim shakes the foundation upon which to build a sound theory of tort compensation.

A staple of American tort law since before the Civil War,⁶ the collateral source rule is currently under frontal attack. Concerned about the economic impact of increasingly munificent tort awards,⁷ fourteen states have fully abrogated CSR,⁸ while others have suppressed it only vis-

³ Cite to fn below (sync footnote numbers) where we enumerate the states that have modified the collateral source rule.

⁴ See, e.g. David Fellman, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARVARD L. REV. 741, 741-42 (1964); Lawrence B. Clark, *Alabama’s Collateral Source Rule: A Defense Attorney’s Perspective*, 24 CUMB. L. REV. 415 (1993/1994).

⁵ See Nagel, *Moral Luck*, in *Mortal Questions*, 24-38 (Cambridge University Press, 1979); Browne, *A Solution to the Problem of Moral Luck*, 42 Phil. Q. 168 (Jul., 1992); Rosebury, *Moral Responsibility and “Moral Luck,”* 104 Phil. Rev 4 (Oct. 1995).

⁶ See Arthur V. Catour, *An Examination of the Collateral Source Rule in Illinois*, 38 Loy. U. CHI. L.J. 169, 176 (2006). [Summarize thesis of this article as regards longstanding nature of the CSR.]

⁷ See, e.g., Zywicki, *Public Choice and Tort Reform*, Law and Economics Working Paper No. 00-36, George Mason University School of Law (2000) (available at http://papers.ssrn.com/paper.taf?abstract_id=244658). [summarize this as regards the main text]

⁸ The following states have entirely abrogated their collateral source rules: Alaska (Alaska Stat. §09.17.070 (2004)), Colorado (Colo. Stat. §13-21-111.6 (2004)), Connecticut (Conn. Gen. Stat. Ann. §52-225a (West 2005)), Florida (Fla. Stat. Ann. §768.76 (West 2005)), Idaho (Idaho Code Ann. §6-1606 (2004)), Indiana (Ind. Code Ann. §34-44-1-2 (LexisNexis 1998)), Iowa (Iowa Code Ann. §668.14 (West 1998)), Kansas (Ky. Rev. Stat. §2906 (1988)), Michigan (Mich. Comp. Laws Ann. §600.6303 (West 2000)), Minnesota (Minn. Stat. Ann. §548.36 (West 2000)), New York (N.Y. C.P.L.R. 3101(f) (McKinney 2005)), North Dakota (N.D. Cent. Code §32-03.2-06 (1996)), Ohio (Ohio Rev. Code Ann. §2315.20 (LexisNexis 2005)), and Oregon (Or. Rev. Stat. §31.580 (2005) (formerly §18.580; renumbered 2003)).

à-vis "favored defendants" (typically, medical practitioners).⁹ New Hampshire,¹⁰ Georgia,¹¹ Kentucky¹² and Kansas¹³ each attempted to abolish or restrict CSR, only to have their supreme court overturn the modifying statute on state constitutional grounds. England has recently retreated from the rule.¹⁴ As the number of (social and private) insurance measures proliferates, this provides the impetus to reduce the ability of victims to recover, in tort, damages they have suffered.

Damage awards that do not correspond to harm wrongfully incurred on victims are clearly appropriate objects of tort reform efforts.¹⁵ Denying tort victims the right to be made whole by the individual who wrongfully caused them harm, however, is offensive to the moral foundations of tort law.¹⁶ When a victim suffers real injuries due to tortious acts of another who is no longer obliged to correct the wrong she has committed, that victim never receives what is due her from the tortfeasor – justice.

Multiple defenses for the collateral source rule have been offered, but none has stemmed the legislative assault on the rule. We believe that this is because authors who have defended CSR

⁹ See Guillermo G. Zorogastua, *Improperly Divorced from Its Roots: The Rationales of the Collateral Source Rule and Their Implications for Medicare and Medicaid Write-Offs*, 55 KAN. L. REV. 463, 464 n.5 (2007).

¹⁰ *Carson v. Maurer*, 424 A.2d 825, 836 (N.H. 1980) (holding that a New Hampshire statute abolishing the collateral source rule was unconstitutional).

¹¹ *Denton v. Con-Way S. Express, Inc.*, 402 S.E.2d 269, 272 (Ga. 1991), overruled on other grounds by *Grissom v. Gleason*, 418 S.E. 2d 27 (Ga. 1992) (holding that a Georgia statute unconstitutionally eliminated the collateral source rule).

¹² *O’Bryan v. Hedgespeth*, 892 S.W.2d 571, 578 (Ky. 1995) (statute that abrogated the collateral source rule held unconstitutional).

¹³ Kansas courts invalidated statutes attempting to eliminate the collateral sources rule on three separate occasions. See Christopher J. Eaton, Comment, *The Kansas Legislature’s Attempt to Abrogate the Collateral Source Rule: Three Strikes and They’re Out?*, 42 U. KAN. L. REV. 913, 916-20 (1994).

¹⁴ See Andrew S. Burrows, *Damages for Personal Injury: Collateral Benefits and Tax*, L.Q.R. 1989, 105 (JUL), 366, 367-68. See also G. Dworkin, *Damages, Collateral Benefits and Precedent*, 26 *Modern L. Rev.* 315 (1963). See *infra*, note XYZ.

¹⁵ Cite, e.g., Krauss on punitive damages.

¹⁶ Cite again Krauss on corrective justice.

have for the most part misidentified the basic principles of tort law upon which the rule rests, thus providing an inadequate defense against an onslaught of misguided tort reformers. These supporters of CSR tend to advance one of three propositions, all of which we find ultimately unsatisfactory:

1. Since tort victims are typically less at fault than tortfeasors,¹⁷ the windfalls created by collateral sources should accrue to the former, not the latter¹⁸
2. Since the victim has often paid (directly or indirectly) for the collateral benefit, it would be unfair to let the tortfeasor recoup this benefit;¹⁹ or
3. Since the "American rule"²⁰ prevents even blameless tort victims from recouping attorneys’ fees, a victim will not be fully compensated without the “windfall” provided by the collateral source rule.²¹

Each of these rationales is essentially a second-best justification. The first would presumably allow for a reduction of damages in violation of CSR, but only to the extent that a tort victim is comparatively negligent.²² The second would be compatible with a rule wherein a tortfeasor

¹⁷ In contributory negligence jurisdictions causally negligent plaintiffs may not recover from negligent defendants. In most comparative negligence jurisdictions, plaintiffs must be in some way less negligent than their adversaries in order to recover in tort.

¹⁸ Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478, 1483 (1966); FOWLER V. HARPER & FLEMING JAMES, JR., 2 THE LAW OF TORTS, § 25.22, at 1345. *See also* Hamilton v. Slover, 440 S.W.2d 947, 958 (Mo. 1969).

¹⁹ *See, e.g.*, Helfend v. Southern Cal. Rapid Transit Dist., 465 P.2d 61, 66-67 (Ca. 1970); Kickham v. Carter, 335 S.W.2d 83, 90 (Mo. 1960); Fellman, *supra* note 8, at 750-51. *See also* JEFFREY O’CONNELL, TORT LAW, NO-FAULT AND BEYOND, 114 (1975); Smith v. United States, 587 F.2d 1013, 1015 (3d Cir. 1978).

²⁰ Both English and Continental legal systems use fee-shifting, which entitles the victorious party to recover reasonable attorney’s fees, as established by a taxing master. This is not the case in the United States, where each party bears its own legal fees absent malice. *See, e.g.*, *Berlin v Nathan*, 381 N.E.2d 1367 (Ill. App. 1978)

²¹ *See* Hall v. Cole, 412 U.S. 1, 4 (1973); Hudson v. Lazarus, 217 F.2d 344, 346 (D.C. Cir.), cert. denied, 350 U.S. 856 (1954).

²² Point out that in many comparative negligence jurisdictions the tort victim can be “more negligent” than

must compensate for premiums paid by the victim to entitle him to collateral benefits, as a *quid pro quo* for the abolition of CSR. The third argues for a restructuring of attorney compensation, perhaps for abandoning the "American rule" in favor of a ‘loser-pays’ system, rather than for the imperfect (likely to be too feeble or too strong in any given case) patch of CSR. None of these “defenses” speaks to the fundamental wisdom of the collateral source rule itself.

Rather than “apologize” for CSR in this way, we argue that the rule, as expressed by the Court in *The Propeller Monticello*,²³ is both consistent with the basic assumptions of tort law and a window onto those basic assumptions. We also argue that recent attacks on CSR have weakened the unifying principles of tort law, mandating a return to these principles *via* a reaffirmation of the collateral source rule.

In Section I we trace the history of CSR, from its earliest explicit appearance in America, with some attention also given to treatments of collateral benefits in Canada and England. In Section II we examine CSR from the perspective of three kinds of tort theorists. In Section III we sketch the soundest theoretical treatment of collateral source within the context of a relational corrective-justice theory of tort law.²⁴ Section IV, the operational core of the article, then offers a number of thought experiments to show how the collateral source rule preserves the integrity of tort law.

The demise of the collateral source rule may be a runaway train that we cannot stop. But attempt to stop it we shall, for we believe that the rule is in most instances sound, and that its

the defendant and still recover. In product liability cases consumer misuse, if foreseeable, is not a defense even in contributory negligence jurisdictions. Give basic cites.

²³ See *infra*, note XYZ.

²⁴ In this article the defense of the collateral source rule on grounds of corrective justice is mainly, though not entirely, an argument from authority. In a forthcoming essay we more fully flesh out corrective justice’s attractiveness in this area.

elimination from Tort law further erodes tort's *raison d'être*.

I. A Concise History of The Collateral Source Rule

A. The Collateral Source Rule in America

*The contract with the insurer is in the nature of a wager between third parties, with which the trespasser has no concern. The insurer does not stand in the relation of a joint trespasser, so that satisfaction accepted from him shall be a release of others. This is a doctrine well established at common law...*²⁵

In The Propeller Monticello, a maritime collision resulted in the loss of a schooner and its cargo.²⁶ The owner had first-party coverage²⁷ on the schooner, and the insurer paid his claim. The master of the schooner then sued the negligent master of the other ship for the value of the schooner. At issue was whether, as a matter of law the court must reduce the damage award by the amount of insurance proceeds received.²⁸ The United States Supreme Court declined to require such reduction as a matter of admiralty law. As one commentator notes, the Court declared that it was following a “well established”²⁹ common law principle in ignoring collateral benefits.³⁰

²⁵ The Propeller Monticello v. Mollison, 58 U.S. 152, 155 (1854).

²⁶ *Id.* at 153.

²⁷ First party claims are brought by a policy holder against her own insurance company for loss to her own person or property. First party claims include “uninsured or underinsured motorist coverage”, where the policy-holder is injured by a driver who has insufficient insurance, and the policy holder ends up submitting a claim to her own insurance company. First party insurance includes health insurance, medical payment coverage, disability insurance, property damage insurance, and business interruption insurance. Liability insurance (where an insurance company pays a non-insured for damages owed by an insured) is commonly termed *Third* party insurance.

²⁸ *Id.* at 155.

²⁹ *Id.*

³⁰ Joel Jacobsen, *The Collateral Source Rule and the Role of the Jury*, 70 Or. L. Rev. 523 (1991). Courts in the United Kingdom followed the collateral source rule until 1956, when *British Transport Commission v.*

Thus was CSR formally enshrined in American case law. The exact boundaries of the rule would be circumscribed over the next 150 years,³¹ though its basic structure remained constant. The *Restatement (Second) of Torts* explains CSR thusly: “Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor’s liability, although they cover all or a part of the harm for which the tortfeasor is liable.”³² By the time of the second *Restatement*, however, the collateral source rule had already begun to endure criticism in legal academia.³³ Some insisted that “making the victim whole” was the goal of tort liability, and complained that CSR gave rise to “windfalls”³⁴ above and beyond the amount needed to accomplish this.³⁵ Others answered that the collateral source rule must therefore be premised on the need to *punish* the tortfeasor, and observed that *punishment* (as opposed to

Gourley, [1956] A.C. 185, was decided, abandoning the collateral source rule in a few instances. The rule is still alive and well, in principle, in Britain: *see Parry v Cleaver*, [1970] A.C. 1 [House of Lords]. *See infra*, note XYZ

³¹ *See, e.g.*, *Publix Theaters Corp. v. Powell*, 123 Tex. 304 (1934) (holding that contractual privity between tortfeasor and insurance company means that collateral source rule does not apply to insurance benefits); *Wichita City Lines v. Puckett*, 156 Tex. 456 (1956) (holding that contractual provisions must be unambiguous and clear before contractual privity disallows the collateral source rule); *Healy v. Rennert*, 9 N.Y.2d 202 (1961) (holding that disability pensions fall within the boundaries of the collateral source rule); *City of Salinas v. Souza & McCue Constr. Co.*, 66 Cal.2d 217 (1967) (holding that the collateral source rule does not apply when the tortfeasor is a public entity); *Mobley v. Garcia*, 54 N.M. 175 (1950) (holding that public assistance benefits are a collateral source, akin to private charity).

³² Restat. 2d of Torts, § 920A(2) (1979).

³³ *See, e.g.*, William Schwartz, *The Collateral Source Rule*, 41 B.U.L. Rev. 348 (1961); Lee R. West, *The Collateral Source Rule Sans Subrogation: A Plaintiff’s Windfall*, 16 Okla. L. Rev. 395 (1963); John G. Flemming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 Calif. L. Rev. 1478 (1966); Robert Alan Sedler, *The Collateral Source Rule and Personal Injury Damages: The Irrelevant Principle and the Functional Approach*, 58 Ky. L. J. 36 (1969)

³⁴ *See, e.g.*, *District of Columbia v. Jackson*, 451 A.2d 867, 870 (D.C. 1982).

³⁵ *See* David Fellman, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARVARD L. REV. 741, 741-42 (1964); Jacobsen, *supra* note 5, at 524. Of course, it is possible to read the Restatement without being overwhelmed by apparent contradictions; the same sentence that mentions compensation as the purpose of corrective justice also mentions restitution of harms, and the comments to § 920A of the Restatement offers that “[o]ne way of stating this conclusion is to say that it is the tortfeasor’s responsibility to compensate for all harm that he causes, not confined to the net loss that the injured party receives.” Restat. 2d of Torts, § 920A, comment b.

compensation) was essentially foreign to tort (unlike criminal and other public) law.³⁶ Many legal economists, somewhat perversely, rejoiced in this “publicization” of private law and defended the collateral source rule as punishment necessary to create the deterrence needed to make the defendant internalize the social costs of her actions.³⁷

One commentator observes that the *Monticello* Court’s reasoning was in analogy to the “law of releases,” which however has since been abandoned in most jurisdictions.³⁸ The “law of releases” held that releasing one joint tortfeasor from liability releases all fellow joint tortfeasors, absent an express indication to the contrary; analogously, partial payment (without release) by one tortfeasor inures to the benefit of all joint tortfeasors.³⁹ *Monticello* evoked releases analogically –the Court held that to reduce plaintiff’s tort award by the amount of insurance proceeds received would be tantamount to treating the insurer as a joint tortfeasor whose partial payment inured to other tortfeasors’ benefit. Insurers are surely not joint tortfeasors – their obligation to the victim is contractual, not tort-based -- so the Court refused to allow a tortfeasor to benefit from the payment by the insurer.⁴⁰

³⁶ See *Browning v. the War Office*, [1963] 1 Q.B. 750, 765 (opinion of Diplock, L.J.); Fellman, *supra* note 8, at 741. Fellman claims that “[i]nvocation of the rule has too often been a substitute for analysis of the merits of the parties’ claims.” *Id.* at 753 (Internal quotations omitted).

³⁷ See, e.g., Richard Posner, *Economic Analysis of Law* 201 (4th ed., 1992).

³⁸ Jacobsen, *supra* note 5, at 527-28.

³⁹ *Id.* at 527.

⁴⁰ It is not clear from the Court’s decision whether the insurance policy at issue in the case contained a subrogation clause. However, the Court does state that if there is an “equitable claimant” (into which category an insurer would presumably fall under the Court’s analysis), the tortfeasor is not required to inquire as to the “relative equities” of the various claimants, but only to “make satisfaction for the injury he has done. *The Propeller Monticello*, 58 U.S. at 155. Once that satisfaction has been made, the various claimants (the injured and the insurer, for example) are left to settle accounts. *Id.* However, the court expressly admits the possibility that an equitable claimant, such as the insurer, would be allowed to proceed in equity to recover damages related to the injury. *Id.* Under our theory of subrogation, discussed *infra* at x, a much wider range of equitable claimants would be free to proceed against the tortfeasor as described by the Court.

The law of releases relied on the same principle of indivisibility that underlies joint and several liability: if wrongful actions by multiple defendants result in harm to a victim, and the harm is not intellectually divisible, the victim may proceed against all defendants or against any subset of defendants, for the full amount of his damages.⁴¹ Joint and several liability conceives that each joint tortfeasor has wrongfully caused the entirety of the harm suffered by the victim. As joint tortfeasors were indivisible, each tortfeasor “represented” the entire tortious group, thus an unconditional release granted to one was assumed to imply renunciation of action against all.⁴² The link between the law of releases and CSR is of course indirect, for CSR enables a result that appears to be the mirror image of that of joint and several liability. Under the latter, a victim may not recover more than the full amount of harm, because each defendant is independently responsible for the entirety of the harm caused: thus, if one joint tortfeasor fully compensates the victim, the other joint tortfeasors are released from liability to the plaintiff.⁴³ By contrast, CSR provides that full compensation can be recovered from the tortfeasor even if payment has already been furnished by a source collateral to the injury, since the collateral source is NOT a joint tortfeasor.

In *The Propeller Monticello* the Court correctly rejected an invitation to apply a rule (the law of releases) that required joint and several liability. If the insurance company had been a joint tortfeasor the plaintiff could no longer proceed against the other joint tortfeasor (i.e., the defendant). The Court’s preferred alternative was the collateral source rule: in the absence of

⁴¹See, e.g., [Morison v General Motors Corp. \(1970, CA5 Fla\) 428 F2d 952](#), cert den [400 US 904, 27 L Ed 2d 141, 91 S Ct 142](#) (passenger's release to driver and liability insurer discharged automobile manufacturer, interpreting Ark.Stat.1947, § 34-1004).

⁴²See, e.g., *Denver & R.G.R. Co. v. Sullivan*, 21 Colo. 302, 307-08 (1895).

⁴³They may be liable to the paying tortfeasor, for contribution. Footnote here.

tort liability on the part of the insurer, the acknowledged tortfeasor may not benefit from the insurer’s payment. This is reinforced by the Court’s statement that “[t]he [tortfeasor] is not presumed to know, or bound to inquire, as to the relative equities of parties claiming the damages. He is bound to make satisfaction for the injury he has done.”⁴⁴ In other words, it does not matter whether or not the victim has subrogated the insurer, or promised to reimburse the insurer from any sums received from the tortfeasor, for this is a contractual matter between the victim and his collateral source.⁴⁵ As regards the victim, the tortfeasor must right the wrong.

This rationale was widely adopted by other courts.⁴⁶ In its modern formulation, CSR prohibits reduction of a tort damage award due to benefits received by the injured party unless those benefits come from the “tortfeasor or ... a person acting for him...[or from] another who is, or believes he is, subject to the same tort liability.”⁴⁷ All other benefits received by the tort victim are collateral, i.e., not credited to the tortfeasor. Tax savings (personal injury elements of tort awards are non-taxable⁴⁸) and savings accrued through work expenses not incurred⁴⁹ are similarly collateral. A tort victim who has incurred medical expenses, suffered lost wages, or experienced other compensable loss, may sue the tortfeasor for the entire amount of his injuries even if those losses have been neutralized by first party insurance, by the victim's relatives, by

⁴⁴ *The Propeller Monticello*, 58 U.S. at 155.

⁴⁵ For instance, the victim may have agreed to indemnify the collateral source if and when the victim recovered from the tortfeasor. This is a variant of a subrogation clause. Insurance with subrogation clauses might be expected to entail a lower premium than insurance without such a clause. But see O’Connell, *infra*, note 137

⁴⁶ *See, e.g.,* *Harding v. Town of Townshend*, 43 Vt. 536 (1871) (“The insurer and the defendant are not joint tortfeasors or joint debtors so as to make a payment or satisfaction by the former operate to the benefit of the latter.”); *Texas & Pac. Ry. Co. v. Levi & Bros.*, 59 Tex. 674 (1883); *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931 (Tx. 1980). [Why are we including a 1980 case here, isn’t this citation about classic cases?]

⁴⁷ Restat. 2d of Torts, § 920A(1) (1979).

⁴⁸ Cite to Krauss and Levy article in *Gonzaga*.

⁴⁹ *See* Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 *Harv. L. Rev.* 741, at 748.

the victim’s employer’s benevolence, or through the kindness of strangers. Only benefits received from the original tortfeasor, her agent, or an individual who considers himself a joint tortfeasor, reduce a tort defendant’s liability.

In the absence of a coherent theoretical defense of CSR, legislators have been bombarded with criticism of the rule. Detractors argue that, in addition to being "punitive" and yielding "windfalls", the collateral source rule unduly increases insurance premiums and the costs of trials.⁵⁰ Claims that CSR contributes to rising health care costs have led to its abolition in the medical malpractice field in several states.⁵¹ Other states have cast off CSR in product liability litigation,⁵² in actions against the government⁵³ and in suits under ‘no-fault’ statutes.⁵⁴ Some state supreme courts have rejected these legislative efforts to abolish CSR on state constitutional grounds, typically equal protection,⁵⁵ the right to a fair trial⁵⁶ or separation of powers.⁵⁷ Such "two cheers" judicial vindications of the collateral source rule do not defend its substance, of course and thus fail to dissuade legislatures from persisting in efforts to bring to an end what

⁵⁰ Noral J. Pasman-Green and Ronald D. Richards, Jr., *Who is Winning the Collateral Source Rule War? The Battleground in the Sixth Circuit States*, 31 U. TOL. L. REV. 425, 429-30 (2000).

⁵¹ Alaska Stat. § 09.55.548 (2004); Ariz. Rev. Stat. Ann. § 12-565 (2005); Cal. Civ. Code § 3333.1 (West 2005); Del. Code Ann. tit. 18 § 6862 (2005); 735 Ill. Comp. Stat. 5/2-1205 (2005); Iowa Code Ann. § 147.136 (West 2005); Mass. Ann. Laws Ann. 231 § 60G (West 2005); Neb. Rev. Stat. § 44-2819 (2005); N.Y. C.P.L.R. § 4545(a) (McKinney 2005); S.D. Codified Laws § 21-3-12 (2005); Tenn. Code Ann. § 29-26-119 (2005); Utah Code Ann. § 78-14-4.5 (West 2005); Wash Rev. Code Ann. § 7.70.080 (West 2005).

⁵² Ala. Code 1975 § 6-5-522 (2005); 735 Ill. Comp. Stat. 5/2-1205.1 (2005).

⁵³ Souza, 66 Cal.2d 217.

⁵⁴ See, e.g., Minn. Stat. Ann. § 65B.51 (West 2005); Mich. Comp. Laws Ann. §§ 500.3109, 500.3116 (West 2005). [cite Virginia obstetric injury case?]

⁵⁵ See, e.g., Coburn v. Agustin, 627 F. Supp. 983, 997 (D. Kan. 1985); American Legion Post No. 57 v. Leahey, 681 So. 2d 1337, 1346-467 (Ala. 1996) (holding that Alabama Code § 12-21-45 was violated the due process and equal protection guarantees of the state constitution). The Alabama Supreme Court reversed itself only four years later, in *Marsh v. Green*, 782 So. 2d 223 (Ala. 2000).

⁵⁶ Sorrell v. Thevenir, 633 N.E.2d 504, 506 (Ohio 1994).

⁵⁷ O’Bryan v. Hedgespeth, 892 S.W.2d 571, 578 (Ky. 1995).

they see as double compensation.⁵⁸ Tort reformers presumably move on to other perceived evils in modern tort law while biding their time until changes in state supreme courts’ composition allows for a renewed attack on CSR. For their part, the plaintiffs’ bar often foregoes substantive defense of the rule, preferring to attack reformers as paid lobbyists for today’s pariah, the insurance industry.⁵⁹ As a result of these tactics, loss of substantial support for CSR proceeds apace.⁶⁰

B. The Collateral Source Rule in England

In England as in the United States a tort victim is entitled to fully recoup all losses wrongfully inflicted by the defendant. What, however, constitutes “full recovery?”

England’s “collateral recovery” (as it is there called) doctrine responded to this question in ways similar to CSR. Collateral recovery’s “charitable gift” component, for example, rejects any reduction of the award of a plaintiff to whom a neighbor had donated a sum of money.⁶¹ The “insurance exception”, holding that plaintiff need not deduct from his claim moneys

⁵⁸ The Kansas legislature has passed three separate laws abrogating the collateral source rule, and all three have been struck down by the Kansas Supreme Court as unconstitutional. *Wentling v. Medical Anesthesia Servs.*, 237 Kan. 503, 518 (1985); *Farley v. Engelken*, 241 Kan. 663, 678 (1987); 252 Kan 1010, 1023 (1993). It is not unthinkable that the legislature will continue to attempt statutory abrogation of the rule, and it is unclear whether the Kansas Supreme Court will continue to strike down those attempts. Christopher J. Eaton, *The Kansas Legislature’s Attempt to Abrogate the Collateral Source Rule: Three Strikes and They’re Out?*, 42 U. KAN. L. REV. 913 (1994). See also Daena Goldsmith, *A Survey of the Collateral Source Rule: The Effects of Tort Reform and Impact on Multistate Litigation*, 53 J. AIR L. & COM. 799, 807-08 (1988).

⁵⁹ See, e.g., John W. Haley, SYMPOSIUM ON TORT REFORM: II. Alabama’s Collateral Source Rule: A Plaintiff’s Perspective, 24 CUMB. L. REV. 416, 417-18 (1993/1994) (“

⁶⁰ An example of this momentum is the American Law Institute’s recent recommendation of “a complete reversal of the collateral source rule wherever such an approach is feasible.” American Law Institute, 2 Enterprise Responsibility for Personal Injury: Reporters’ Study 161 (1996). QUERY: WHAT TREATMENT UNDER ERISA?

⁶¹ See, e.g., *Liffen v Watson* [1940] 1 K.B. 556; [1940] 2 All E.R. 213 *Hussain v New Paper Mills* [1988] A.C. 514; [1988] 1 All E.R. 541, HL; *Peacock v Amusement Equipment Co Ltd* [1954] 2 Q.B. 347; [1954] 2 All E.R. 689.

received from a first-party insurer, was first declared in *Bradburn v. Great Western Rail Co.*⁶²

This doctrine was endorsed by the Court of Appeal in *Shearman v Folland*⁶³, where L.J. Asquith explained it this way:

“What in a given case is, and what is not, “collateral”? Insurance affords the classic example of something which is treated in law as collateral. Where X is insured by Y against injury which comes to be wrongfully inflicted on him by Z, Z cannot set up in mitigation or extinction of his own liability X’s right to be recouped by Y or the fact that X has been recouped by Y. *Bradburn v Great Western Ry Co.*... There are special reasons for this. If the wrongdoer were entitled to set-off what the plaintiff was entitled to recoup or had recouped under his policy, he would, in effect, be depriving the plaintiff of all benefit from the premiums paid by the latter and appropriating that benefit to himself.”⁶⁴

In *Parry v Cleaver*⁶⁵, a majority of the House of Lords held that a police officer’s disability receipts should not be taken into account in assessing his tort damages for lost income. In *Hussain v New Taplow Paper Mills Ltd.*⁶⁶ however, the House of Lords held that while a tortfeasor may not benefit from amounts received by his victim under *an insurance policy* for which the victim had paid premiums, the latter must reduce his claim for lost wages by the amount of “sick pay” paid *by his employer*, whether or not the employer has taken out an insurance policy to cover this loss. And in *Hodgson v Trapp*⁶⁷ the House of Lords held that all *state* benefits (such as unemployment and mobility benefits, etc.) are deductible if a plaintiff’s tort claim includes such categories of losses.

C. The Collateral Source Rule in Canada

Canada has two private law systems: a civilian system in the largest province, Québec,

⁶² *Bradburn v Great Western Rail Co.*, [1874-80] All E.R. Rep. 195 (Ex. Div.) Plaintiff, injured by negligent railway, is entitled to full damages from railway without deducting sum of money received from a private insurer to compensate him for the accident.

⁶³ *Shearman v Folland* [1950] 1 All E.R 976 [C.App.]

⁶⁴ *Id.* at 978

⁶⁵ *Parry v Cleaver*, [1969] 1 All E. R. 555 [House of Lords]

⁶⁶ *Hussain v New Taplow Paper Mills Ltd.*, [1988] 1 All E.R. 541 [House of Lords]

⁶⁷ *Hodgson v Trapp*, [1988] 3 W.L.R. 1281 [House of Lords]

and common law in other provinces.⁶⁸ Both systems implement functional equivalents of America’s collateral source rule, while the other does so to a limited extent.

Québec Civil law is quite clear on this account. Article 1608 of Québec’s *Code civil* reads as follows:

L'obligation du débiteur de payer des dommages-intérêts au créancier n'est ni atténuée ni modifiée par le fait que le créancier reçoive une prestation d'un tiers, par suite du préjudice qu'il a subi, sauf dans la mesure où le tiers est subrogé aux droits du créancier.

*The obligation of the debtor to pay damages to the creditor is neither reduced nor altered by the fact that the creditor receives a prestation [sic] from a third person, as a result of the injury he has sustained, except so far as the third person is subrogated to the rights of the creditor.*⁶⁹

For collateral benefits resulting from first party insurance, Québec’s *Cour d’appel* held in *Trépanier c. Plamondon*⁷⁰, that a first-party insurer’s subrogation to its insured’s rights to sue in tort for the damages covered by the insurance payout is automatic. In other words, negligent tortfeasors may be held responsible *to the insurer* (who nonetheless sues in the insured’s name, or who joins the suit already filed by the insured for other damages not covered by insurance). The rights of the insured for non-insured amounts (non-pecuniary damages such as pain and

⁶⁸ provide a basic footnote to this effect. Among the Common Law provinces, substantive legal rules can differ (as they do in the United States) but the unitary court system (wherein all provincial court decisions are potentially appealable to the Supreme Court of Canada) tends to homogenize Common Law rules. The Supreme Court of Canada declines in practice to review Civil Law decisions of the *Cour d’appel du Québec*, reducing uniformization pressures between the two legal systems. See [cite to comparative law article regarding Canada]

⁶⁹ 1991, c. 64, Lois du Québec, a. 1608.

⁷⁰ [1985] C.A. 242, Cour d’appel du Québec

suffering, co-payments, etc.) are recoverable in preference to sums due the subrogated insurer if the tortfeasor is insufficiently solvent.⁷¹ This is the functional equivalent of CSR: the plaintiff’s suit against the tort victim will include amounts for insurance proceeds paid, which however will be funneled directly to the insurer upon payment. Where a collateral benefit is not the result of a first party insurance contract (government aid, private assistance), and where there is no subrogation of the collateral donor, collateral recovery by the victim is *a fortiori* the rule under Article 1608. The only way in which Québec law diverges from CSR is that it is apparently not possible to purchase non-subrogatory first-party insurance (which comes with a higher premium, since the insurer’s actuarial risk is higher, no tort recovery being possible).

Common law Canada also upholds the essence of the collateral source rule. In *Ratyck v Bloomer*,⁷² an employer had continued to pay to his employee, the tort victim, all wages “lost” during the tort-caused absence from work, even though their work contract did not entitle the victim to these payments. Canada’s Supreme Court held that these wages could not be claimed from the tortfeasor. As we will see,⁷³ this is not really a denial of CSR, as the victim never suffered compensable loss. In any case, *Ratyck* was significantly qualified by the interesting decision in *Miller v Cooper*,⁷⁴ itself in fact a consolidation of three British Columbia cases:

1. Part I (*Cunningham v Wheeler*) concerned a tort victim who had collected disability benefits pursuant to a formal plan contained in the collective bargaining agreement with his employer. No deductions had been taken from the victim’s paychecks for this benefit

⁷¹ (Arts. 1657,1658 *Code civil du Québec*.).

⁷² *Ratyck v Bloomer*, [1990] 1 S.C.R. 940

⁷³ see infra the most relevant thought experiment.

⁷⁴ *Miller v Cooper et al*, [1994] 1 S.C.R. 359

(i.e., there was an implicit⁷⁵, but no explicit premium for this “insurance”), nor was there a subrogation clause favoring the employer or the insurance company managing the disability plan. At trial it was held that these disability payments may not be deducted from the amount claimed by the victim as damages from the tortfeasor. The British Columbia Court of Appeals reversed, finding that the province’s Common law was contrary to Québec’s Civil law, and that unless there is subrogation for such payments all collateral amounts received must be deducted from claimed damages. This decision was appealed to the Supreme Court of Canada.

2. Part II (*Cooper v Miller*) was similar, except that the victim’s job-based disability insurance had an explicit premium, 30% of which was paid by the employee and 70% by the employer. As in *Cunningham*, there was no subrogation or reimbursement⁷⁶ clause in the insurance contract. Again the trial judge held that the victim’s benefits may not be deducted from her recovery of lost wages against the tortfeasor. This time the provincial Court of Appeals upheld the trial judgment, distinguishing *Cunningham* on the grounds that plaintiff had paid 30% of the premium cost.⁷⁷ Plaintiff appealed to Canada’s Supreme Court.
3. Part III (*Shanks v McGee*) involved a mixed disability plan: a short-term portion that was “free” to the injured employee and a long-term portion with a premium paid in part by his employer and in part by the employee-victim. There was a subrogation clause in the

⁷⁵ The employee’s compensation reflects all costs of hiring, including fringe benefits.

⁷⁶ "With subrogation, the insurer stands in the shoes of the insured. With reimbursement, the insurer has a direct right of repayment against the insured. As a matter of logic and case law, a party can have one right, but not the other." Marshall, *supra*, quoting Provident Life and Accident Ins. Co. v. Williams (W.D.Ark 1994), 858 F.Supp. 907, 911

⁷⁷ Of course, from an economic perspective, the tort victim “pays for” these benefits in every case, in that they are part of the consideration she receives for her job performance.

long-term plan, but not in the short-term plan. The trial judge refused to deduct payments from either plan from the victim’s tort award. The British Columbia Court of Appeal upheld the judgment with respect to the long-term disability benefits, but held that short-term benefits should be deducted since there was no direct contribution by the employee and no subrogation clause benefiting the insurer.

The Supreme Court of Canada, in a 6-3 decision, granted plaintiffs’ appeals of the reductions ordered in *Cunningham* and *Shanks*, and upheld the rejection of reduction in *Cooper*. The majority held that a private employment-related disability insurance policy, whether nominally paid for by the victim or not, should not be deducted from the victim’s tort suit. Distinguishing *Ratych*,⁷⁸ the court noted that in that case there had been no evidence that the victim had given any kind of consideration in return for the benefit, whether in form of a premium or of a reduced wage. In other words, *Ratych* was held by the majority to stand for the very limited proposition that a gratuitous payment of unearned wages does not allow a suit for lost wages – since no wages were in fact lost.⁷⁹

Miller v Cooper’s dissent argued that insurance payments (subrogated or not) must always reduce a tort plaintiff’s award. The dissent analogized to cases where a plaintiff’s precautions avert or reduce damages (as where a cyclist dons a crash helmet before being hit by negligent automobile driver): according to the dissent, the victim’s insurance prevents damages the same way a crash helmet would, thus the damage award must be reduced. This dissent would have constituted a frontal attack on CSR, but it did not prevail.

⁷⁸ Op cit supra.

⁷⁹ Note that in this case neither Québec nor American Common law would allow recovery: see OP CIT below.

Battle lines as currently drawn in The United States, England and Canada suggest two current questions for American law. First, is the collateral source rule, as formulated by the Restatement and practiced in courtrooms, the rule applied in *The Propeller Monticello*, or has it changed in intervening years? Second, does the collateral source rule in fact violate principles of tort law as its critics maintain?

A subtextual question is usefully introduced at this point – though ample treatment must await future developments of this article. It involves the relationship of "luck" (good and bad) to tort liability.⁸⁰ If a potential victim gets lucky *before* a tortious event occurs, with the result that she suffers little or no damage,⁸¹ that luck obviously accrues to the tortfeasor (who will have a reduced or nonexistent tort obligation). What, however, if the victim gets lucky *after* the tort – through, say, the subsequent generosity of others?⁸² This type of lucky break is one subset of collateral source recovery, and will become part of our examination in Part IV. Should the tortfeasor receive the benefit of *ex post facto* luck as he does when the luck prevents the loss *ex ante*? Alternatively put, what is the proper moment at which to measure a tort victim's compensable loss? With apologies for mixing metaphors, should the “frame be frozen” the instant a tort occurs, or should the “clock run” until the moment the jury sets the damage award – or should some other moment be tort theory’s “official time”? Often a victim’s non-speculative loss turns out to be much more⁸³, or much less⁸⁴, severe than appeared to be the case at the

⁸⁰ Cite to articles and books on moral luck.

⁸¹ Such is the case of the man negligently pushed off a cliff, but who miraculously lands without even breaking a bone.

⁸² See thought experiments 1-19, etc., *infra* at XX.

⁸³ Consider *Mahoney v Beatman*, 147 A. 762 (Conn. 1929). Plaintiff's Rolls Royce was side-swiped by an oncoming Nash Rambler negligently driven straddling the center line. The Rolls, which was speeding, then smashed into a tree. The initial side-swipe "caused" \$200 of damage to the Rolls, but the collision with the tree incurred additional damage of \$5850. The court awarded the plaintiff the full \$6050 damages,

moment of the tort. We believe that this discussion of the collateral source rule’s fit within a larger conception of tort law helps illuminate some possible answers to these questions.

II. A Role for the Collateral Source Rule in Tort Law

One of the most common critiques of CSR is that it violates basic tort principles. The rule’s sanction of "double recovery," once from a collateral source and "again" from the tortfeasor, is alleged to violate tort law’s “make-whole” principle.⁸⁵ This principle can itself be seen as a variant of corrective justice, though other views of tort law have gained in prominence in legal academia. Such views include distributive justice, wherein tort compensation is used to achieve some overarching goal of social distributional equality;⁸⁶ and efficiency theories, espousing the principle that tort law is inherently a deterrent that serves to achieve allocations of resources that mimic those of efficient markets.

Distributive justice theorists traditionally favor few restrictions on damage awards so as to allow redistribution of wealth from the “tortfeasor class” (where institutions are over-represented) to the “victim class” (mostly individuals). In general, distributive justice does not

reasoning that the Rolls' speeding did not cause the initial collision, but merely exacerbated its effect.

⁸⁴ See thought experiments X-XX (almost every one of them), *infra*. This might be also the case for a tort victim, apparently unable to work for life, who the next day is struck by lightning in an unrelated event. The accident is obviously not a collateral 'benefit' to the victim, but the tortfeasor will nonetheless still claim that it should reduce the amount owing. When, as it were, does the law say “les jeux sont faits”?

⁸⁵ Steven B. Hantler, Victor A. Schwartz, Cary Silverman & Emily J. Laird, *Moving Toward the Fully Informed Jury*, 3 *Georgetown J. L. & Pub. Policy* 21, 24 (2005). Hantler, *et al.* assert that the collateral source rule allows a victim to be made “more than whole,” and that courts have tolerated this violation of the make-whole doctrine out of a desire to avoid a windfall for the tortfeasor at the expense of a prudent victim. *Id.* at 24-25.

⁸⁶ Note that Distributive justice, per se, does not offer a specific definition of a fair distribution, and as such the distribution accorded by a market system based on merit, for example, could be described as meeting the demands of distributive justice. Heidi L. Feldman, *Harm and Money: Against the Insurance Theory of Compensation*, 75 *TEX. L. REV.* 1567, 1601 (1997).

even require any particular interaction between a tort plaintiff and defendant.⁸⁷ Indeed, from a distributive justice perspective, compensation for a specific act or for general practices may be seen as equal opportunities to correct imbalances⁸⁸ that other theories of tort would find largely irrelevant to the resolution of a claim.⁸⁹ Conversely, those espousing economic theories of tort are concerned with the way in which damages can improve the “efficiency” of the non-consensual interactions that are the hallmark of tort. The intrinsic relationship between tortfeasor and victim is less important to the economic analyst than is achieving the type of efficient outcomes that would obtain if people were capable of costlessly transacting, pre-tort.⁹⁰ Thus, efficiency theorists often favor imposition of caps, limitations on fees, and solutions such as early offers⁹¹ in an attempt to discourage lawsuits and encourage settlements of valid claims.⁹² Plaintiffs don't have to be made whole for a system of laws to be "efficient, either."⁹³ Instead of full

⁸⁷ E.g. Kyle D. Logue, *Reparations as Redistribution*, 84 B.U. L. REV. 1319 (2004).

⁸⁸ *Id.* at 1328-29.

⁸⁹ *Id.* at 1328.

⁹⁰ Robert Cooter and Thomas Ulen, *LAW & ECONOMICS*, 310 (2004). Many Law and Economics scholars view tort law as a means by which to fill in the gaps left behind by contract and property laws. In brief, there are times when clearly defined rights are violated under circumstances wherein the costs of contracting are too high. For example, it would be inefficient to require every driver to contract with every other driver in anticipation of future accidents, leading society to adopt generalized rules regarding the appropriate resolution of post-accident claims. *Id.* at 309-10.

⁹¹ See Jeffrey O’Connell, Jeremy Kidd & Evan Stephenson, *An Economic Model Costing “Early Offers” Medical Malpractice Reform: Trading Noneconomic Damages for Prompt Payment of Economic Damages*, 35 N.M. L. Rev. 259 (2005).

⁹² See, e.g., Patricia M. Danzon, *Liability for Medical Malpractice*, in 1B HANDBOOK OF HEALTH ECONOMICS 1339 (Anthony J. Culyer & Joseph P. Newhouse eds., 2000).

⁹³ This might happen if “penalties” for “inefficient” behavior were paid to the state, not to the tort victim. [See, e.g., S. Shavell, *Economic Analysis of Accident Law* (Cambridge, Harvard U. Press, 1987) at 233-34. This inability to see any qualitative difference between tort and criminal law – tort plaintiffs being merely “private attorneys general” -- leads, some efficiency theorists to endorse compensation to tort victims only up to the point where the marginal utility of the victim's wealth pre- and post-injury are equal. See, e.g., David Friedman, *What is ‘Fair’ Compensation for Death and Injury*, 2 INT’L REV. L. & ECON. 81 (1982). Any transfer of money from uninjured defendants to injured plaintiffs beyond that point is “inefficient:” since accidents usually reduce the utility that victims gain from monetary income, every additional dollar paid buys less satisfaction for the victim. This sense of efficiency will therefore often require that tortfeasors pay less than the monetary loss suffered by the victim. *Id.* at 83. For example, an individual who loses her sight during an accident will theoretically receive less utility from any activity which utilizes

compensation, some efficiency theorists espouse compensation for victims only up to the level that would correspond to a theoretical payout the victim would have been willing to accept, *ex ante*, for the risk being imposed by the tortious action.⁹⁴

This “insurance theory” of compensation is inadequate from the viewpoint of classical tort principles. One problem, well articulated by Ellen Smith Pryor,⁹⁵ is that the theory glosses over the fact that an individual’s utility function does not remain the same after a serious accident. In fact, neither the non-injured⁹⁶ nor the injured⁹⁷ are capable of adequately assessing the nature or the shape (i.e., the marginal utility) of victims’ post-injury utility functions. The insurance theory of compensation, by equalizing marginal utility only, stands to leave tort victims undercompensated as viewed from the perspective of corrective justice. Full compensation would require that *total* compensable utility be equalized before and after the tort; given typical diminished post-injury marginal utility of income this would require *more*, not less, money. Insurance theory also fails by imagining a hypothetical fully informed rational actor maximizing the probabilistic sum of pre- and post-tort utility.⁹⁸ Tort law, to the contrary, has

the sense of sight in a significant way. Another example would be an individual who loses both legs, and therefore loses the ability to engage in various activities. Friedman, *supra* note 40, at 83.

⁹⁴ *Id.* at 84. Individuals are theoretically indifferent, *ex ante*, between receiving a fully compensatory sum of money while being exposed to the risk of tortious action and being free from risk. Those injured as the result of a tortious action would rather have compensation before the injury (when their marginal utility of income is higher). Any greater amount will create an inefficient level of deterrence for the potential tortfeasor and keep beneficial actions from being taken. *Id.* To paraphrase Tina Turner, what’s full compensation got to do with it? [citation?]

⁹⁵ Ellen Smith Pryor, *The Tort Law Debate, Efficiency, and the Kingdom of the Ill: a Critique of the Insurance Theory of Compensation*, 79 VA. L. REV. 91 (1992).

⁹⁶ Those who are not disabled are seen as incapable of understanding “life options in various states of impairment, disability, or handicap.” *Id.* at 111. Asking the non-disabled, then, to contrast pre- and post-tort marginal utilities is futile, because they cannot avoid misperceptions regarding what it is like to be injured. *Id.* at 112.

⁹⁷ The disabled are unable to assess their own marginal utilities in an unbiased way because the prevailing biases in society will result in the disabled consistently underestimating their own options. *Id.* at 118-20.

⁹⁸ Heidi Feldman, *supra* note 91. at 1601.

always made awards of compensation to real victims’ needs in specific post-tort circumstances, as a “commitment to the ideal of corrective justice.”⁹⁹

Distinct from efficiency and distributive justice theories are corrective justice theories, which hold that tort law is intended to “correct” imbalances created by wrongful acts by creating in the victim a fundamental right to receive compensation for the exact harm caused by the tortfeasor. Under corrective justice, victims are not allowed to recover "more" than the damages wrongfully incurred in order to compensate for previous income inequalities, nor are (non-negligent) victims required to take "less" than full recovery because they could have avoided the harm at low cost.¹⁰⁰ A corrective justice advocate might defend substantial pain and suffering awards, while supporting abolition of punitive damages, since punishment is not a corrective measure.

How would each type of tort theory address the CSR debate? A distributively just result is a just distribution post-judgment; but the collateral source rule does not address this question at all. A distributive justice theorist could not defend CSR per se, for it might require a tortfeasor to compensate a victim who doesn’t “need” compensation, as she has already been “compensated” by a third party. CSR cares only for whether the elements of a tort are met and whether or not benefits received are collateral to the tort committed, not whether allowing "double compensation" promotes or hinders a distributively just allocation of resources.

Efficiency theorists also have difficulty with CSR. Reaching an efficient outcome

⁹⁹ Id.

¹⁰⁰ *LeRoy Fibre Co. v. Chicago, Milwaukee & St. Paul Ry. Co.*, 232 U.S. 340, 349-50 (1914). *See also* *Derheim v. N. Fiorito Co.*, 492 P.2d 1030, 1036 (Wash. 1972) (“It seems extremely unfair to mitigate the damages of one who sustains those damages in an accident for which he was in no way responsible...”). *But see* *Spier v. Barker*, 323 N.E.2d 164, 167-68 (N.Y. 1974) (“We today hold that nonuse of an available [one already installed] seat belt...is a factor which the jury may consider...in arriving at its determination as to whether the plaintiff has exercised due care.”)

requires deterring, among other things, both future suboptimal action and future frivolous lawsuits. If tort awards are “too high,” potential victims may have reduced incentives to take efficient precautions against injury,¹⁰¹ so an efficiency theorist might approve of a reduction in tort awards as a “deductible” minimizing moral hazard and the cost of litigation. CSR might on the other hand be viewed favorably if it enhanced deterrence of future torts. An efficiency theorist could resolve the apparent conflict by requiring the tortfeasor to pay the amount collaterally received by the victim to an unrelated third party, such as the state.¹⁰² Of course there are additional factors to be considered, such as the fact that reductions in tort awards might lead to “too few” lawsuits (expected precedential benefits of obtaining a judgment would diminish) “too much” preventative care on the part of potential victims, etc. Efficiency analysis, like distributive justice, is concerned with optimal *outcomes* – but categorical acceptance of the collateral source rule is indifferent to social optima.

Proponents of corrective justice view CSR through the same private ordering lens with which they view tort law generally. At one level the rule might seem to violate corrective justice, as it allows compensation to victims who have arguably already been “made whole.”¹⁰³ Liability in such situations might be deemed punitive, not corrective.¹⁰⁴ Of course, as

¹⁰¹ The existence of the contributory negligence defense counters this perverse incentive, but it is unclear exactly how much. If contributory negligence is available as a defense, decreased care on the part of the injured party will decrease the likelihood of winning any amount from the defendant. In the case of comparative negligence, however, it is much more likely that potential victims will decrease care, because there is no longer a concern over reaching a threshold of carelessness beyond which potential victims will be unable to recover anything from the tortfeasor. As the potential victim reduces care, the likelihood of injury increases and the likelihood increases that the jury will refuse to award damages for the “new” injuries. Cite to basic work on this by Posner, etc.

¹⁰² Shavell, *supra* note 98, 233-34.

¹⁰³ *Overton v. United States*, 619 F.2d 1299, 1306 (8th Cir. 1980); *See also* Feldman, *supra* note 33, at 1579. Feldman provides examples of the terminology which the courts have used to express this concept, including returning the victim to a pre-accident position, making the victim as if no harm had occurred, or making the victim as if there had been no injury. *Id.* at 1578-79. Feldman also notes, however, that

noted above, CSR could also be viewed as a slapdash method by which to compensate for other shortcomings of the tort system, such as the fact that attorneys’ fees are not recoverable.¹⁰⁵ According to this understanding CSR is not a coherent component of corrective justice, but rather a second-best patch. What if, however, instead of "making a victim whole," corrective justice were viewed as *requiring the tortfeasor to right the wrongs caused to the victim*? If this were so, the tortfeasor would have a direct duty to the victim that is not extinguished by favors bestowed on the victim by a third party (other than the tortfeasor’s agents).

It is this vision of tort law that we find most compelling.¹⁰⁶ We believe it leads to an endorsement of the collateral source rule as practiced in England, Canada and the United States. The following section will describe CSR in these corrective justice terms.

III. The Collateral Source Rule and Corrective Justice

A. A Two-Dimensional Analysis

The collateral source rule considers two variables to determine whether a tortfeasor may deduct from his debt favors received by the victim. The first, we believe, is whether collateral payment to the victim has come about *as a result of the tort itself*; the second is the *involvement of the tortfeasor in securing payment for the victim*. Figure 1 illustrates this. The vertical axis

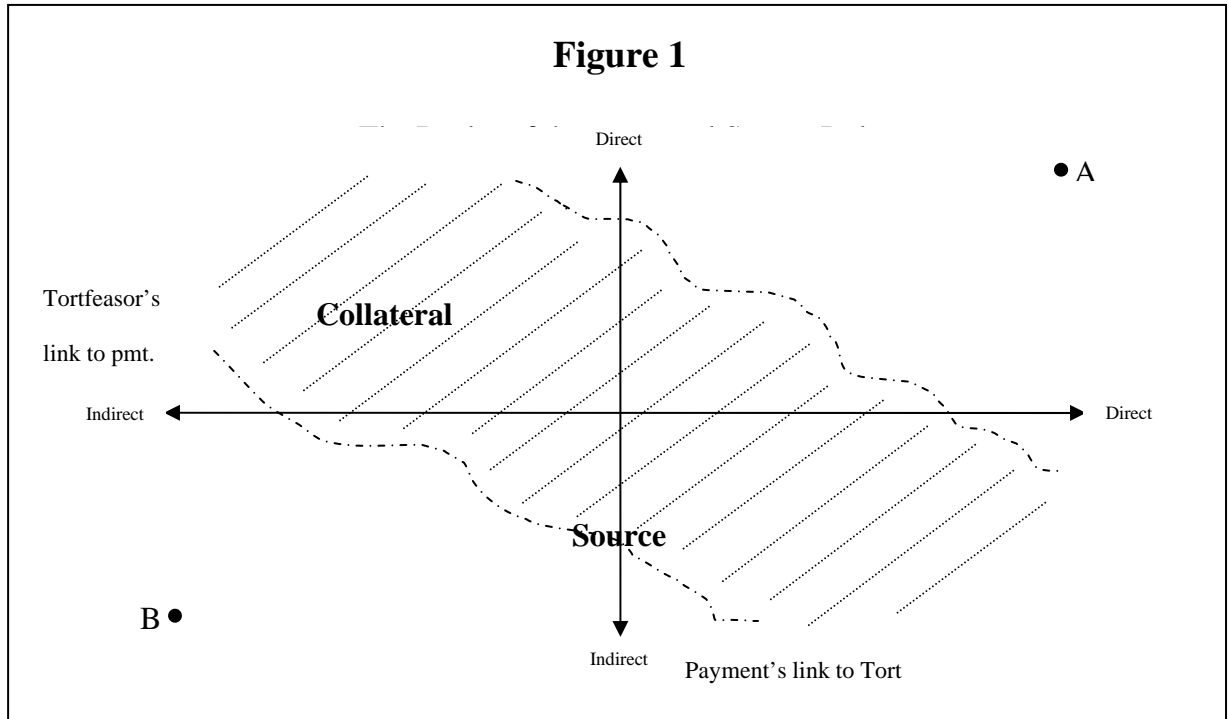
making the victim whole cannot be mean literally, and must be considered a metaphor, for monetary compensation cannot replace the loss occasioned by serious injury, such as the loss of a limb. *Id.* at 1579. Feldman suggests that if monetary damages cannot erase these harms, then the “metaphor” of making the victim whole should be discarded, along with its implicit objective of compensating the victim. *Id.* at 1580.

¹⁰⁴ See, e.g., Jacobsen, *supra* note 5, at 530-31.

¹⁰⁵ See McDowell, *supra* note 56; Hudson, 217 F.2d at 346 (recognizing that attorney’s fees significantly reduce the amount of compensation received by victims); Helfend, 465 P.2d 61. Such a validation of the collateral source rule would also be an implicit approval of the abandonment of the American Rule for recovery of lawyers fees. Goldsmith, *supra* note 24, at 805.

¹⁰⁶ Cite to Krauss, St. Louis L. J.

symbolizes how directly related might be the tort and the collateral payment. The horizontal axis represents how directly involved the tortfeasor is in securing this receipt.



Imagine that negligent driver T(ortfeasor) strikes and injures pedestrian V(ictim). If T learns the magnitude of the harm caused, and to make amends writes a personal check to V, we are at point A, where income received by V is a direct result of the tort, and T makes the payment directly. Now imagine that T’s liability insurance covers the accident damage. This would represent a slight shift to the left from point A, as T does not pay V directly, but through an agent (who had antecedently promised T to make such payments should T become obliged to do so in tort). Both of these payments would clearly be sufficient to reduce T’s obligation to V. Neither payment is “collateral”, however – both are, in fact, from the tortfeasor. They are deducted from the amount due by T, whether or not the legal system in question has accepted the collateral source rule.

What if payment to V came from T’s co-workers, who heard about the accident on the news? In such a situation we have shifted still further to the left from point A: exactly how much we have shifted might depend on whether T’s co-workers made their payment solely to help V, or whether (as is more likely) they were trying to acquit the debt of (and in that way assist) their co-worker T. The unlikely former case arguably shifts far enough to the left that it enters the realm of CSR, in which case T could not invoke the payment to reduce his debt to V.

The top-right quadrant of Figure 1 represents benefits received by the victim that “count” in mitigation of the tortfeasor’s liability. The shaded area in the center represents the realm over which the collateral source rule applies.

Beyond the realm of CSR, in the bottom left quadrant, are payments made to the victim which are not directly linked to either the tortfeasor or the tort. Imagine from the previous example that no payment was made to V, but that V had been injured immediately after purchasing a lottery ticket. Within 10 minutes lottery winners were announced, and V won a cash prize that happened to be exactly equal to the monetary value of the damages wrongfully caused by T. This situation would be represented by point B; the income received by the pedestrian is unrelated to the tort in any way except for temporal coincidence. Benefits such as this one are not deducted from the tortfeasor’s debt, but for reasons utterly foreign to CSR. Of course T gains no legal traction from the fact that V’s wealth is exactly the same after the accident as before – for V’s wealth would have been even higher had T not committed his tort. Lottery income will not be deducted from T’s obligation to V, because of causation¹⁰⁷ concerns,

¹⁰⁷ The lottery victory was not caused by the tort and is thus foreign to it.

not because of CSR.¹⁰⁸

Conceptually, in every legal system there are three areas into which resources received by the victim of a tort may fall. The first area represents remittances that are credited to the tortfeasor and reduce or eliminate the latter’s obligation to the victim; such payments are not collateral. The second and third types of payment result in no reduction of the tortfeasor’s obligation to the victim. In the second area, the plaintiff’s good fortune is related to the tort but for some reason is nonetheless not deducted from his damages: this is the domain of CSR. In the third, the non-deductibility of the benefit is the result of causation concerns; the same outcome would be reached in a jurisdiction where CSR had been abolished.

Of course, this typology does not explain *why* any particular payment should be deemed part of the second area, covered by the collateral source rule. Such explanations can be difficult to come by. One traditional explanation is this one:

[C]ourts have allowed this exception [the collateral source rule, area 2] to persist under the premise that “the wrongdoer ought not to benefit – in having what he owes diminished – by the fact that the victim was prudent enough to have other sources of compensation, which he was probably paying for.”¹⁰⁹

When applied to real-life situations, however, it is difficult to accredit such a simple-sounding explanation of CSR. To see this, consider a situation where Abner drives negligently, striking Bernice and proximately causing her to incur fifty thousand dollars worth of medical bills. In addition, Bernice is unable to work for 6 months, and suffers a loss of fifty thousand

¹⁰⁸ What if V is fired shortly after the lottery winners are announced because V’s employer, E (who previously did not know V played the lottery, and would never have found out but for V being a winner) believes the lottery to be immoral gambling? It would seem that lost wages might not be recoverable, again because of causation concerns, not because of the collateral source rule.

¹⁰⁹ Hantler, et al., *supra* note 32, at 25 (citing HARPER & JAMES, *supra* note 10, at 1345).

dollars in lost wages.¹¹⁰ But Bernice receives \$100,000 in gifts from others. Bernice sues Abner in tort for \$100,000; Abner concedes liability and contests only the amount of damages. The court must decide whether to allow Bernice to recover fully from Abner, allow some reduced amount, or reject her claim entirely. The court’s decision will be influenced by several contingencies: Does Bernice have insurance policies that covered Bernice’s losses? What was the amount of coverage? Who paid the premium to the insurance company?¹¹¹ Was Bernice’s income the result of charitable gifts (if so, from whom)? Did it come from government assistance programs? Different theories of tort law address these contingencies in different and sometimes unclear ways. We believe that only corrective justice has the potential to address them in a coherent and persuasive manner. Specifically, we believe there is a specific form of corrective justice into which the collateral source rule fits with relative ease. The ease with which a long-standing tort doctrine such as the collateral source rule fits into this form of corrective justice also provides indirect evidence that this form captures the true soul of tort law.

B. Corrective Justice, properly understood

Tort theorists such as Jules Coleman and Ernest Weinrib have developed Aristotle’s theory of corrective justice as the rationale for compensation of tort victims.¹¹² The common denominator of their models is the view that harmful wrongdoing creates a moral disproportion between victim and tortfeasor, requiring reparation to the former by the latter.¹¹³ To impose a legal duty to repair is a serious infringement on individual liberty, of course. Any such

¹¹⁰ Assume for simplicity’s sake that Bernice has not been subject to any pain or suffering or other form of loss resulting from the accident, treatment, or rehabilitation.

¹¹¹ See, e.g., *Radvany v. Davis*, 262 Va. 308 (2001).

¹¹² See, e.g., Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427 (1992); Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992).

¹¹³ Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 26 (1995).

infringement must be defended by moral postulates.¹¹⁴ Second-order questions also arise. Should a tortfeasor be able to “buy his way out” of personally compensating the victim, for example? Should third-party insurance be void as contrary to public policy under a corrective justice rationale?¹¹⁵

Jules Coleman insists that it is only defensible to infringe on the tortfeasor’s freedom because he has imposed a wrong upon his victim.¹¹⁶ Defining what constitutes a wrong, of course, is beyond the scope of this article.¹¹⁷ Coleman believes that a theory of corrective justice such as that proposed by Ernest Weinrib fails to adequately elucidate the types of wrong that must be righted.¹¹⁸ Weinrib, for his part, considers Coleman’s “mixed conception”¹¹⁹ of

¹¹⁴ Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349, 349-50 (1992).

¹¹⁵ Cite to early cases finding 3rd party insurance to be contrary to public policy.

¹¹⁶ *Id.* at 352-53.

¹¹⁷ The concept of “wrong” may be defined as an invasion of a right, a violation of a moral duty, some hybrid of the previous two, or a violation of a legal duty. See W. Hohfeld, *Fundamental Legal Conceptions, As Applied in Judicial Reasoning and Other Legal Essays* (1919). In Coleman’s construction of corrective justice, a harm is wrongful if it is the result of (moral) wrongdoing or a violation of rights. *supra* note 122, at 369. Weinrib argues that corrective justice is relational, that it is based upon relationships between individuals. See Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992). Under a relational theory of corrective justice, wrongful actions of one individual may disrupt the previously existing justice in holdings. *Id.* at 408-09 (summarizing Aristotle’s description of corrective justice). Weinrib defines this justice in Kantian and Hegelian terms, Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES L. 107, 124 (2001), taking as given that all holdings are just when there is a lack of influence by external forces. An individual action which disrupts prior justice in holdings is a violation of the negative rights which each individual should enjoy, and such a disruption creates simultaneously in the victim a right to recover, and in the wrongdoer a duty to compensate. Weinrib, *supra* note 82, at 409-10. Perry argues that if the duty to annul does not exist in the tortfeasor, it must exist in everyone. Stephen R. Perry, *Comment on Coleman: Corrective Justice*, 67 IND. L.J. 381, 396 (1992). That would create a collective action problem, as every individual would have an incentive to wait for others to annul the wrong, and require state action to satisfy society’s obligation to correct injustices. At that point, justice would become a question of political morality and corrective justice would become distributive justice, as the polity would determine what the just outcome should be. *Id.* at 397.

¹¹⁸ Coleman, *supra* note 76, at 437-38.

¹¹⁹ *Id.* at 435. Coleman refers to his theory of corrective justice as a “mixed” theory because it “mixes” the relational principles of Weinrib with his own “annulment” theory, which defines the moral obligation to annul wrongs committed. *Id.* at 438-39.

corrective justice flawed in allowing tort liability without wrongdoing.¹²⁰ But Weinrib’s and Coleman’s theories share two characteristics that are important to the discussion of CSR. Weinrib calls these characteristics correlativity and personality.¹²¹

- *Correlativity* requires that there be a connection between tortfeasor and victim, such that findings of fault and an awards of damages are not two distinct judgments.¹²² In other words, an authentic tort judgment is one in which three things are identified: 1) The wrong that was committed; 2) the identity of the wrongdoer; and 3) the identity of the wronged party. An attempt to award compensation to an injured individual without identifying the individual responsible for that injury cannot achieve corrective justice. Similarly, an attempt to punish a wrongdoer without identifying any individual injured as a result of the wrongdoer’s acts would not be a “tort event.” The idea of correlativity requires that the wrongdoer correct the injustice she has imposed on the victim.
- *Personality*, the capacity that every individual has for “purposive agency,”¹²³ provides the basis for imposing duties upon individuals. Each individual has the ability to act of her own volition, and when she chooses to act wrongfully (or to wrongfully fail to act, in those rare cases when action is legally required¹²⁴) she must bear the consequences of her agency and repair losses that have been caused.¹²⁵ Moreover, because it is the exercise of purposive agency which creates the imbalance, it must also be an exercise of purposive agency which corrects that imbalance. Thus, only those actions taken with the intent of

¹²⁰ Weinrib, *supra* note 84, at 131-32.

¹²¹ *Id.* at 115.

¹²² *Id.* at 116.

¹²³ *Id.* at 122.

¹²⁴ Footnote on affirmative duties

¹²⁵ *Id.*; Coleman, *supra* note 76, at 442-43.

correcting the imbalance will serve to do so; coincidence or happenstance are insufficient to counter an exercise of purposive agency.

A central belief of corrective justice adherents is that justice requires making the victim whole; yet as we have seen, this understanding fails to explain CSR.¹²⁶ If making the victim whole does not suffice to explain the rule, perhaps a theory based upon other central tenets of corrective justice, such as correlativity and personality, can be enlisted. Such a theory could then be shown to be superior in explaining both what corrective justice incorporated in 1854 (when the Supreme Court indicated that the collateral source rule was a “well-established” common law rule,¹²⁷ implying that it consistent with the essence of the common law of torts), and (perhaps) what it should incorporate today. Some tort theorists dispute the compatibility of CSR with the common law of torts.¹²⁸ This suggests either that tort law stubbornly maintained an incongruous rule for over a century or that these theorists have failed to identify its theoretical foundations. We submit that when collateral source is displayed side by side with a system of corrective justice based on correlativity and personality, wherein tort law is not concerned with making the victim whole but rather with righting wrongs, the two emerge harmonious.

C. Corrective Justice Applied to the Collateral Source Rule

Correlativity and personality serve to explain with far greater consistency when and why Abner is required to pay damages to the already-"compensated" Bernice. Bernice may have

¹²⁶ See *supra* Part II.B.

¹²⁷ 58 U.S. at 155.

¹²⁸ See, e.g., HARPER & JAMES, *supra* note 10, at 1345 (1957); Fellman, *supra* note 8, at 753; Banks McDowell, *supra* note 56, at 213; Julie A. Schaefer, *Note, The Constitutionality of Offsetting Collateral Benefits Under Ohio Revised Code Section 2317.45*, 53 OHIO ST. L.J. 587, 590 (1992).

indeed already received an item equivalent to her lost barn from some other source, but that does not release Abner from liability. Abner has exercised his agency in taking action that inflicted an unwarranted and injurious harm upon Bernice. In doing so, Abner imposed an injustice upon Bernice that he, and only he, must correct. He may do so through his own resources, or he may seek to prevail on others to act on his behalf to correct the injustice. Actions by non-agent strangers, however, do not affect the duty Abner must discharge because of his harmful unjust act. The relevant questions under this conception of corrective justice, in other words, are: what is the extent of the injustice imposed upon Bernice by Abner; and what has *Abner* (or his agent) done to correct that injustice?

If Bernice receives payment from her own (first party) insurance, for example, Abner has done nothing to correct his injustice, and so is still liable to Bernice for the entire damage he caused.¹²⁹ If strangers perform an act of charity to alleviate Bernice’s suffering, Abner’s obligation to Bernice is unaffected unless he played a role in marshalling those charitable forces, as for example when the charity originates with a group of Abner’s friends who in fact work to help extinguish his obligation. If on the other hand Bernice receives compensation from Abner’s (third party) insurance company, the latter’s payment is on Abner’s behalf and reduces his obligation.

The issue of government benefits appears more complicated. Sometimes government is by law subrogated to the rights of the beneficiary as against any tortfeasor who is responsible for the loss¹³⁰; in such cases the subrogation clause should obviously be given effect.¹³¹ What if no

¹²⁹ Of course, Bernice’s contract or (as in the case of Québec, supra TAN ___) the law itself, may subrogate Bernice’s insurer to her rights.

¹³⁰ The *Deficit Reduction Act of 1984*, 42 U.S.C. § 1395(y)(b)(2)(B)(iv), provides “the United States will be

subrogation is provided for?¹³² Tax revenues (including from Abner and Bernice) fund government programs, so it is tempting to consider that government might be acting as an agent for (among others) Abner, extinguishing his obligation to Bernice. On the other hand, the treatment of government benefits would be no different if Abner were a new immigrant (or a disabled or impecunious citizen) who has not paid taxes. Rather, government derives its sovereignty from the governed,¹³³ including Abner and Bernice. Therefore, when Bernice receives assistance from government agencies, every other citizen, including Abner, bestows that assistance upon Bernice. The government might therefore be Abner’s agent whether or not Abner “paid” for the government’s services. To answer whether, in a given circumstance, the government actually extinguishes Abner’s obligation, it is necessary to look more closely at the nature of each government program. If a government program provides a universal non-subrogatory benefit for all who suffer certain harms,¹³⁴ then when it provides benefits to Bernice, it does so on behalf of all, including Abner, whose obligation should therefore reduced or extinguished. However, to the extent that the government acts merely as an insurer, such as with

subrogated (to the extent Medicare payment has been made for an item or service) to any right of an individual.” See also cf. [Sereboff v. Mid Atl. Med. Servs., 547 U.S. 356 \(2006\)](#) (allowing subrogation under ERISA)

¹³¹ See O’Connell, A Proposal to Abolish Contributory and Comparative Fault, With Compensatory Savings by also Abolishing the Collateral Source Rule, 1979 U. Ill. L.F. 591, 604-05 (supplying selected subrogation cost statistics, showing the small percentage of losses subrogation actually recovers for the insurer). O’Connell’s proposal, that the collateral source rule be abolished to compensate for the inefficiencies of subrogation, is an efficiency argument that takes no account of the corrective justice basis of tort law.

¹³² The federal government obtains no subrogation rights after paying social security disability benefits. See Robert E. Keeton & Alan I. Widiss, Insurance Law § 3.10(6), at 227 (1988); *Federal Hometown Heroes Survivors Benefit Act*, Pub. L. No. 108-182, 117 Stat. 2649 (codified as amended at 42 U.S.C. § 3796(k) (Supp. III 2003) [no subrogation for federal payment to public safety officers killed in line of duty]

¹³³ citation.

¹³⁴ These benefits can be monetary compensation, such as Social Security disability payments, or they can be education/rehabilitation programs. Universal health care, etc.

unemployment insurance,¹³⁵ then it cannot be considered to be an agent of its citizens, and Abner’s obligation would remain intact. And to the extent the government is providing a charitable gift to a special class of citizens, an intention not to benefit the tortfeasor can be inferred.¹³⁶

D. Subrogation and the Collateral Source Rule

Corrective justice informs us that the basis of tort liability is the relationship the tort has created between victim and tortfeasor: payments by a third party to the victim do not impact the liability of the tortfeasor because they do not affect this relationship. It would be incorrect, however, to say that the payment by the third party is irrelevant. That payment may create a new relationship. It is not uncommon to see subrogation clauses in standard first party (non-life¹³⁷) insurance contracts. Such clauses indicate that if the insurance company repairs a loss caused by a tortfeasor, the company has the right to pursue reimbursement from that tortfeasor. In practice

¹³⁵ Worker’s compensation systems require payments solely by employers, which payments are distributed to employees in the event that an injury occurs in the workplace. Neither contributions nor distributions are universal.

¹³⁶ See, e.g., *Federal Hometown Heroes Survivors Benefit Act*, Pub. L. No. 108-182, 117 Stat. 2649 (codified as amended at 42 U.S.C. § 3796(k) (Supp. III 2003) [no subrogation for federal payment to public safety officers killed in line of duty]; R. Heidt, *When Plaintiffs Are Premium Planners For Their Injuries: A Fresh Look At The Fireman's Rule*, 82 Indiana L.J. 745, 746 (2007)

¹³⁷ Life insurance contracts never contain subrogation clauses, and many laws ban subrogation in this area. See Spencer L. Kimball & Don A. Davis, *The Extension of Insurance Subrogation*, 60 Mich. L. Rev. 841, 844 (1962); Robert H. Jerry, II, *Understanding Insurance Law* 710, 737 (3d ed. 2002); Robert E. Keeton & Alan I. Widiss, *Insurance Law* § 310(a)(6) (1988). Some in the life insurance industry think subrogatory policies would be mutually profitable: see Swan, *Subrogation in Life Insurance: Now is the Time*, 48 Ins. Counsel J. 634 (1981). The September 11 Victim Compensation Fund contains a provision requiring that claimants’ benefits be reduced by the amount of any compensation for September 11th-related-losses that the claimant has received or is entitled to receive from collateral sources, including life insurance. *Air Transportation Safety and System Stabilization Act* § 405(b)(6), [49 U.S.C.A. § 40101](#) (West 2003). This treatment establishes the non-tort, *sui generis* nature of this political payment to terrorism victims. See K. Abraham & K. Logue, *The Genie And The Bottle: Collateral Sources Under The September 11th Victim Compensation Fund*, 3 DePaul L. Rev. 591 (2003)

in most jurisdictions¹³⁸, the victim would remain the nominal plaintiff in the tort lawsuit against the tortfeasor, but the third party controls the lawsuit, hiring lawyers entrusted with prosecuting the case and pocketing compensatory damages awarded to the victim unless the latter has not been fully compensated.¹³⁹ Where subrogation is conventionally agreed to, the application of the collateral source doctrine is not problematic.¹⁴⁰ We propose below that a right of subrogation should be legally implied in the case of certain other payments made by third parties to tort victims.

There exist three broad categories of non-tortfeasor (and non-tortfeasor’s-agent) assistance to tort victims. *Gratuitous payments* bear no relation to the plaintiff’s status as a victim of a tort, but are simply the result of a third party benefactor’s desire to enrich the victim. Examples of such payments are lottery winnings and the coincidental benevolence of family members or friends unrelated to injuries suffered. *Mercy payments* are made out of a charitable desire to help restore the victim to their *ex ante*-tort level of well-being. Related to but, we think, distinct from mercy payments are *implied loan payments*, motivated to get the victim through a difficult time until they receive some other (including tort-related) kind of compensation.

The first category of payment, gratuitous payments, may or may not create a moral relationship between the benefactor and the tort victim, but any such relationship is foreign to the tortfeasor¹⁴¹: so there cannot be any implied right of subrogation with regard to the benefactor.

¹³⁸ A few jurisdictions (LA?) allow direct suits – we should research and list them.

¹³⁹ Mention this complication – insurance company must give priority to insured, as a matter of public policy in many states (i.e., contract cannot specify contrary), which leads to fraud and connivance. I have an Alabama case highlighting this that I can discuss in detail in this footnote.

¹⁴⁰ Refer to Quebec civil code; refer to legislative modifications that abrogate the collateral source rule except where there is explicit subrogation.

¹⁴¹ A previously poor lottery winner has no moral duty to enrich lottery coffers if and when he acquires a second jackpot, even if the lottery board falls upon hard times. On the other hand, a poor relative arguably

Gratuitous payments cannot be linked to the imbalance between the tortfeasor and victim, so the benefactor has no right to repayment once the tortfeasor has paid his debt; similarly, the tortfeasor has no claim for any reduction of it. Mercy and implied loan payments, on the other hand, are made specifically because of the tort victim’s status (they are on the lower part of the vertical axis in Figure 1), and the moral relationship created by this payment is therefore linked to the imbalance created by the tortfeasor’s actions. Both categories of payment arguably give rise to a moral duty to reimburse the benefactor, wherein the benefactor obtains a moral right to any compensation received, up to the amount of the benefactor’s payment, once the tortfeasor corrects his wrongs by compensating the victim.

The distinction between mercy and implied loan payments lies, we believe, in the proper resolution of the relationship thus created. Mercy payments are made without concern for whether the victim pursues compensation from the tortfeasor: they impose a moral obligation on the victim to reimburse the benefactor only if and when she is able to do so. Implied loan payments, on the other hand, are made out of a desire to support the victim only until such time as she receives compensation from the tortfeasor: they impliedly afford a *legal* right to reimbursement to the benefactor. Of course, payment to the victim does not create a relationship between the third party and the tortfeasor, who in neither case can invoke the gratuity.

At any point, an “implied loan” benefactor may choose to walk away and allow the victim to pursue justice alone, just as a conventionally subrogated party may renounce this right. If the benefactor chooses to exercise her right *not* to accept, or even seek, reimbursement, any imbalance between the victim and benefactor has been eliminated through forgiveness. Just as a

has a moral duty to favor his rich uncle if ever their financial roles become reversed. In no case does the presence of absence of such a relationship impact the tortfeasor, however.

tort victim may release the tortfeasor from the obligation to compensate, the benefactor has the right to release the tort victim from the obligation to reimburse. In the case of implied loan payments, the implication is that the benefactor is anticipating that the victim will fulfill the moral obligation to reimburse (by obtaining recovery from the tortfeasor); if the victim fails to do so, the benefactor should have the ability to enforce that obligation. That includes the capacity to bring a suit against the tortfeasor in the name of a recalcitrant victim, or to bring suit against the victim if the latter has received compensation from the tortfeasor. Of course, legally implied subrogation is negated by a signed release, a contractual non-subrogation clause or other unequivocal action taken by the benefactor.

CSR’s effect is that the tortfeasor’s obligation to the victim is not reduced by third party payments not made by agents of the tortfeasor. This does not mean that CSR always or often results in “double payment” to the victim, however. In cases where there is either explicit subrogation or an implied loan payments, indemnification from the tortfeasor may be obtained by the benefactor as needed. In such a case, the tortfeasor would have corrected the wrong committed, the victim would have been compensated for the harm, and the benefactor would have been placed in his pre-tort position. Once the tortfeasor or his agent has corrected the imbalance he wrongfully created, tort law is indifferent to further interactions. If, for example, the benefactor wishes to bestow an additional gift upon the victim (by foregoing legally implied subrogation), tort law has nothing to say.

We suggest that a proper default rule is that all non-gratuitous payments be considered implied loan payments unless there is reason to believe a mercy payment was intended. CSR then becomes a justice-preserving rule, and presumption of subrogation rule assures that justice

will be achieved for both victim and benefactor.

The principles of correlativity, personality, and corrective justice have been defended as justifying the collateral source rule in an abstract, theoretical sense. Part IV contains thought experiments submitting this theory to the disinfecting light of factual complications.

IV. Thought Experiments on the Collateral Source Rule

The collateral source rule is not a second-best “patch” on the tort system, designed to assure that tort victims receive everything to which they are entitled. Instead, it is a logical extension of a coherent system of tort law. The following thought experiments, or conundrums, illustrate scenarios for which the collateral source rule provides answers consistent with corrective justice. These thought experiments highlight, we think, the deep conceptual issues at stake in discussions involving the collateral source rule. To each conundrum we will present a resolution (should the collateral source rule apply, i.e., should the victim be able to claim money from the tortfeasor despite the favors bestowed on her?), and indicate how this resolution coheres with the theory of tort law we have sketched.

Scenario 1: *Joe buys a train ticket from New York City to Philadelphia. After purchasing the ticket, Joe asks a railroad employee for directions to his train. Instead of directing him to the regional train for which Joe has a ticket, the railroad employee negligently directs Joe to the New York-Baltimore Express, which makes no stop in Philadelphia. Joe has an important meeting in Philadelphia, on which depends his entire career. Luckily, Joe took a very early train, and so Joe arrives in Baltimore with sufficient time to catch a bus that will deliver him to*

Philadelphia just in time for his meeting. The bus ticket costs \$50.

Assume that the railroad is liable *respondeat superior* to Joe for the negligence of its employee.¹⁴² In this case, the negligence on the part of the railroad’s employee, absent contributory negligence on the part of Joe, creates the requirement to compensate Joe for the value of that harm. In corrective justice terms, the employee’s free and negligent act has created an imbalance, and the railroad has a moral obligation to correct that imbalance by paying Joe the value of the harm. Assuming no recovery for Joe’s stress or anxiety,¹⁴³ the value of that harm is easy to determine; the railroad is lucky that Joe had the foresight to travel so early in the morning, and thus the railroad must merely provide compensation in the amount of \$50. Here the victim has taken extra care that results in a minimization of the harm caused by the tortfeasor’s negligence. The tortfeasor fully benefits from this extra care, much as a driver benefits if the pedestrian whom the driver negligently strikes on the street had taken the extraordinary care to wear a crash helmet.

Scenario 2: *After arriving in Baltimore, instead of Philadelphia, due to the railroad employee’s negligence, Joe stands in line waiting to purchase a \$50 bus ticket to Philadelphia. Upon approaching the ticket window, Joe is approached by a local radio personality, who as part of a radio contest being conducted at the bus station, hands Joe a \$50 voucher good for any bus travel. Joe uses the voucher to purchase his bus ticket to Baltimore.*

¹⁴² People Express Airlines, Inc. v. Consolidated Rail Corp., 495 A.2d 107 (N.J. 1985)

¹⁴³ Emotional distress is not generally recoverable absent physical injury or intentional infliction.

The payment from the radio personality is a gratuitous payment. Joe may recover \$50 from the railroad, with no subrogatory rights to the radio station.

The imbalance created by the employee’s negligence has necessitated the purchase of a \$50 train ticket. Under the same assumptions as in Scenario 1, \$50 is the extent of the harm caused by defendant’s negligence, and \$50 will therefore be the cost to the railroad to correct the imbalance and extinguish the obligation to Joe. The fact that Joe did not end the day poorer than when he began it is not relevant: the gratuitous gain could have been used to purchase some other bus ticket. The local radio personality interposed herself and her \$50 voucher between Joe and the ticket window, but she was not involved in the creation of the imbalance, and she is not working on behalf of the railroad, so her interposition cannot extinguish the railroad’s obligation. Joe has no obligation to notify the radio station of any suit against the railroad, for it has no subrogatory rights. Rights of subrogation can arise through implication only when the benefactor has granted the benefit out of a desire to mitigate the impact of the negligent actions of another. Here, the radio personality had no knowledge of the railroad’s negligence, nor that Joe was purchasing a ticket because of that negligence. His payment to Joe could just as easily have been made to any other individual present at the bus depot. Similarly, Joe could have purchased the bus ticket to Philadelphia and used the voucher for some other voyage.

Scenario 3: *Joe waits patiently in line to buy his bus ticket to Philadelphia, striking up a conversation with a woman in line named Grace. Joe purchases his bus ticket for \$50, and takes a seat on the bus next to Grace. During the bus ride to Philadelphia, Joe and Grace find themselves compatible, and later are married. They live happily ever after.*

The fortuitous benefit Joe receives from meeting Grace well exceeds the amount of his loss. Nevertheless, Joe may recover \$50 from the railroad, with no subrogatory rights to Grace.

The value of the imbalance caused by the negligent actions of the railroad employee is easily quantified, as Joe is now \$50 less wealthy than before the negligent act. One could object that the railroad, through the negligent actions of its employee, actually made Joe much better off “net”; the benefits of Joe’s marriage clearly dwarf the cost of the bus ticket. Correct application of the collateral source rule, however, makes clear that it would be inappropriate to discount the benefit of a happy marriage when awarding damages to Joe, and *not* because the total value of happiness from the marriage is uncertain at the outset of the marriage. The tortious creation of the imbalance is indeed a “cause in fact” of the collateral benefit to Joe, but the love bestowed by Grace is gratuitous and was not meant to rectify the imbalance.

Scenario 4: *After arriving in Baltimore through the negligence of the railroad employee, Joe decides to call his employer with the bad news that may be late for the meeting in Philadelphia. He first checks his voice mail, and hears a message from his employer, who informs Joe that the meeting has been relocated, at the last minute, to Baltimore, and that Joe is to head there immediately if he possibly can. Joe is now able to arrive at the meeting with time to spare.*

While the railroad employee was clearly negligent, this negligence has in fact placed Joe in precisely the correct location to attend his meeting. Joe suffers no harm, and has no cause of action against the railroad. Much as a drunken driver may benefit from being lucky enough to be driving when no other drivers or pedestrians are present, thus avoiding causing harm to others,

the train company has benefited from an unforeseen event that eliminates the possibility of harm from its negligent action.

Scenario 5: *Having become wary of railroads, Joe decides to make his next trip to Philadelphia by airplane. As Joe drives to the airport, Earl negligently hits Joe’s car, causing \$1,000 in damage. Because of this accident, Joe misses the flight for which he intended to purchase a ticket. The plane on which Joe would have flown is hit by a meteor (through no fault of the airline) and crashes; all on board are killed.*

The benefit (in this case, the harm foregone) accruing from Earl’s negligence is gratuitous, indicating full recovery by Joe of \$1000. Joe is clearly better off as a result of Earl’s negligence; had Earl not been negligent, Joe would have would have died along with the other the passengers. The collateral benefit dwarfs the cost of repairing a car. Earl has acted negligently and inflicted harm upon Joe, causing an imbalance and creating an obligation to correct that imbalance. Assuming no physical or emotional damage to Joe, the harm inflicted is \$1,000, and Joe is entitled to sue Earl to recover that amount.

The resolution of Scenario 3 suggests the solution here, yet the circumstances of this case are slightly more complicated. Unlike Scenario 3, when Joe met Grace, who provided the collateral benefit by reciprocating Joe’s love, the collateral benefit here cannot be traced to the deliberate actions of any individual other than Earl. Benefits provided by Earl in his capacity as negligent tortfeasor are normally deducted from the total harm inflicted, for they are usually efforts to correct the imbalance Earl created. However, Earl did not provide provided this particular benefit in his capacity as negligent tortfeasor. When Earl acted negligently, causing

damage to Joe and therefore creating an imbalance, his obligation to compensate Joe sprang into being. In order for some benefit to extinguish the obligation owed by Earl, the benefit must arise from Earl’s (or a representative’s) efforts to extinguish that obligation. Earl has produced a collateral benefit accidentally and gratuitously, without intent to extinguish his obligation. Earl has done nothing to correct the imbalance negligently caused, and therefore cannot receive credit for the benefit to Joe.

Scenario 6: *“Verbitis” is a serious but rare contagious disease. Fortunately, the effects of the disease may be avoided in three ways, one preventative and two curative.*

- 1. A preventative measure, it turns out, is to ingest a Super Vitamin, which is primarily used and effective in the prevention of sunburn; this vitamin has as a happy side effect immunization against Verbitis. A Super Vitamin costs \$100. Someone exposed to Verbitis after taking a Super Vitamin will know that she has contracted the disease but will not experience any of its harmful effects – but the Super Vitamin is useless if one has already been exposed to the Verbitis virus.*
- 2. One curative method is a Verbitis cure pill, which costs \$500.*
- 3. A second curative method is to have a qualified physician spend five hours (the cost of this time varies in individual markets) on specialized acupuncture to cure Verbitis.*

Sally negligently exposes Joe to Verbitis, but Joe experiences no loss or bad effects because he had already purchased and taken a Super Vitamin.

Sally has acted negligently, and in so doing has put others at risk. Risk, however, is insufficient for recovery, even negligently caused risk.¹⁴⁴ Only *the realized risk, harm*, is sufficient to impose a duty upon Sally; in order for Sally to bear a moral obligation towards Joe, an imbalance must have been created. Assuming that knowledge that one has contracted Verbitis imposes no pain or suffering, Joe has experienced no adverse impact from Sally’s negligence. Fortunately for Sally, she “hit a rock skull”, i.e., the person in whom the risk of harm was actualized is an individual who could not be harmed. No imbalance can arise in the absence of harm, so no legal or moral obligation to correct an imbalance can exist. Joe can therefore recover nothing from Sally.

Scenario 7(a): *Marsha is broke. Joe gives Marsha a \$100 gift to help her out. Marsha later gets a great job, and earns lots of money. Sally subsequently negligently exposes Joe to Verbitis. Joe had not purchased a Super Vitamin, and so contracts the disease. Joe is poor, but spends his last \$500 on a Verbitis cure pill. Hearing about his plight, a grateful Marsha reimburses Joe for the \$500 Verbitis cure pill. The next day Marsha is struck by lightning and killed, leaving no heirs.*

Payment from Marsha may be either a mercy payment or an implied loan payment, both of which allow for full tort recovery by Joe against Sally. The precise classification of the payment matters only in determining subrogation rights – a moot issue in this case.

Joe has received a monetary gift from a collateral source. The gift was given because Marsha heard of Joe’s plight, spending his last \$500 on the Verbitis cure pill. This payment is in

¹⁴⁴ Liability for increased risk, without injury, is not a coherent doctrine in tort law. See E. Weinrib, *The Idea of Private Law*, Cambridge MA, Harvard U. Press, 1995, 154-156.

response to the negligent actions of Sally, so a determination must be made as to whether or not the collateral source rule applies. While the payment was made as a result of the negligently inflicted harm, it was not made to benefit Sally or extinguish the obligation Sally owes to Joe. Rather, the payment was made solely out of a desire to assist Joe. Only payments made in an attempt to correct the imbalance caused by Sally’s negligence will reduce Sally’s liability; Marsha cared only about Joe’s harm, not about Sally’s duty to correct the imbalance, so Sally may not invoke Marsha’s payment in response to Joe’s suit.

What if Marsha had given Joe a Verbitis Cure Pill, not \$500?

Scenario 7(b): *Same facts as in 7(a), except that Marsha heard that Joe needed a Verbitis cure pill and bought one for him (at a cost to her of \$500).*

Joe may still sue Sally for the \$500 cost of a Verbitis cure pill.

It does not matter what form the collateral payment takes, cash or an in-kind payment, for the only pertinent questions are whether the payment was a result of the tortious action, and whether the payment was made with the intent of correcting the imbalance created by the negligent act, and thereby extinguishing the obligation of the tortfeasor to their victim. If the answer to both questions is yes, the payment should be deducted from the tortfeasor’s total liability. If the answer to either question is no, no deduction should take place.

The form of payment is also irrelevant to the question of subrogation. However, it is relevant to this latter question that Marsha may have considered her payment to Joe as repayment of an existing debt. If Marsha felt a moral obligation to assist Joe without recourse because he

had assisted her previously, then Marsha made a mercy payment and likely had no anticipation of receiving reimbursement.

Scenario 8: *Prior to being negligently exposed to Verbitis by Sally, Joe purchased a \$100 health policy which is silent on the issue of subrogation, and which covers (among 10 other specifically insured risks) the cost of a Verbitis cure pill if needed. Sally then negligently exposes Joe to Verbitis. Joe’s insurer duly reimburses the \$500 Joe spent for a Verbitis cure pill.*

The insurance payment is in the form of an implied loan payment, not a mercy payment.

Payments from the victim’s insurance are often cited by defenders of the collateral source rule, who argue that it would be the height of injustice, as well as economically inefficient, to allow a tortfeasor to benefit from the foresight of the victim in purchasing insurance.¹⁴⁵ Others argue that the payment of an insurance award should not be deducted from a victim’s tort recovery because such deduction would not take into account the premiums paid by the victim to obtain and maintain the insurance.¹⁴⁶ Both arguments complicate the issue by avoiding the simple questions necessary to resolve it. First, is the payment made in response to the tortious action and the resulting imbalance that is created? Second, is the payment made with the intent of extinguishing, in part or in full, the obligation owed by the tortfeasor to her victim?

The issuer of Joe’s first-party insurance policy had previously agreed that it would offer coverage for the purchase of the Verbitis cure pills, whether the disease was contracted through

¹⁴⁵ But note that the drunk driver benefits for the foresight of a pedestrian victim who chose to purchase and don a crash helmet.

¹⁴⁶ Many legislative reforms abrogate the collateral source rule but oblige a tortfeasor to pay certain past and/or insurance premiums. See, e.g., New York.

the negligence of a third party or not. Joe’s insurance company had an obligation to purchase the cure pill because Sally’s wrongful acts infected Joe with Verbitis, so the payment was made in response to the tortious action. But Joe’s insurance company paid for the cure pill for one reason and one reason only: to fulfill its own contractual obligation to Joe. Sally’s actions in creating the condition precedent to the insurance company’s obligation are irrelevant to the existence of the condition. Sally’s negligent action has necessitated the purchase of a cure pill, and she bears the responsibility to correct that imbalance. If the insurance reimbursement to Joe had been pursuant to a liability policy owned by Sally, the payment would have been intended to extinguish Sally’s obligation to Joe. When the victim owns the policy, and the compensation is intended solely to meet contractual obligations to the victim, the imbalance remains uncorrected and the tortfeasor’s obligation remains unextinguished.

Because the payment by the insurance company is motivated purely by contractual obligations, it cannot be considered a mercy payment. Instead, it is an implied loan payment, and the insurance company has a presumptive right of subrogation. Does the absence of a subrogation clause in the policy release Joe from his obligation to repay the insurance company after having recovered from Sally in tort? This is a matter of contract interpretation. If an insurance company offers policies with and without explicit subrogation clauses, the owner of the insurance policy should perhaps¹⁴⁷ be assumed to have chosen the non-subrogation policy due to the lack of subrogation language. Subrogation clauses reduce the ultimate risk to the insurance company, and therefore allow for lower premiums.¹⁴⁸

¹⁴⁷ But see M. Rappaport, *The Ambiguity Rule And Insurance Law: Why Insurance Contracts Should Not Be Construed Against The Drafter*, 30 Ga. L. Rev. 171 (1995), 255-56.

¹⁴⁸ Why would anyone ever want to pay more for a non-subrogatory insurance policy? Recall that if the

Scenario 9: *Joe is a physician. It is professional courtesy among physicians that if one becomes ill, the closest colleague in the relevant specialty will treat him without charge. Sally negligently exposes Joe to Verbitis. Dr. Good, one of Joe’s physician colleagues, treats Joe for free (by administering five hours of special acupuncture).*

The benefit received from Dr. Good is in the form of an implied loan payment, but with subrogatory rights impliedly waived. Joe may sue Sally for the commercial value of a Verbitis Cure Pill (\$500) or of Dr. Good’s time, whichever amount is lower.

Dr. Good has provided a service to Joe for which Joe “paid” by being a fellow physician. This understanding between physicians has the appearance and function of a mutual insurance society, which would require a similar outcome to that discussed in Scenario 8. The service provided by Dr. Good is offered only because Sally’s negligence has infected Joe with Verbitis. Thus, the provision of treatment is made in response to the tortious action. Joe can still recover the full amount of treatment from Sally because the provision of treatment by Dr. Good was not intended to extinguish Sally’s obligation to Joe. Similar to the discussion in Scenarios 7(a) and 7(b), the form of payment does not impact the answer to the two relevant questions, and therefore has no legal significance in determining the total liability of Sally to Joe. Even if Dr. Good had been the recipient of a “free sample” Verbitis Cure Pill, which he proceeded to hand

insurance payout is incomplete, the subrogated insurer will recover only after the tort victim has been fully compensated by the tortfeasor. This is arguably why subrogation is legally implied in Québec. The effect of some of the state reforms of the collateral source rule, after all, is to make such policies non-priceable. *See also Aetna Insurance v. Naquin*, 488 So. 2d 950 (La. 1986) [illustrating Louisiana law’s legal subrogation doctrine].

over to Joe, the fact remains that the in-kind payment was made with no intent to correct that imbalance.

The implied contract between doctors, under the title of “professional courtesy,” has no specific terms regarding subrogation, so we begin from a default position that implied subrogation exists. The treatment was provided because Joe is a physician, not because Dr. Good has compassion for Joe, so the treatment was in the form of an implied loan rather than a mercy payment. However, the implied contract might assume that the reimbursement expected from Joe is not subrogation of his claim against Sally, but that Joe will “pay it forward”, i.e., provide treatment to another sick physician, free of charge, when the opportunity arises. This implied provision of the implied contract, therefore, would function as a waiver of Dr. Good’s subrogation rights, and would allow Joe to keep any amounts recovered from Sally. Examination of custom in the area would determine whether or not this is the case.

Scenario 10: *Some years before being negligently exposed to Verbitis by Sally, Joe non-tortiously comes down with a rare disease causing blindness. Then Sally negligently exposes Joe to Verbitis. Unexpectedly, Joe's sight is restored – it turns out that Verbitis has this effect on Joe’s rare form of blindness.¹⁴⁹ Joe then buys a Verbitis cure pill for \$500 (the cure does not bring back his blindness – his sight recovery is permanent). Verbitis subsequently becomes used in selective instances as a treatment for this very rare form of blindness.*

¹⁴⁹ *The Monticello Miracle: Freak Racetrack Accident Restores Vision.*, Hudson Valley Times Herald-Record, December 13, 2006.
<http://www.recordonline.com/apps/pbcs.dll/article?AID=/20061213/NEWS/612130326/-1/NEWS>

The benefit received as a result of Sally’s negligence is in the form of a gratuitous payment. Joe may recover \$500 from Sally in tort.

Sally’s negligent action has created a loss that must be corrected, but which also produces a benefit for Joe. The collateral source rule requires, as in Scenarios 4 and 5, that the benefit be ignored when determining the obligation owed by Sally to Joe. Opponents of the collateral source rule may decry this as an injustice, but the resolution is in fact wholly just. To allow deduction of the collateral benefit would be to allow a tortfeasor to avoid responsibility for the harm caused by her wrongful action. Sally acted wrongfully in exposing Joe to a disease that necessitates the purchase of a \$500 cure pill. Sally has an obligation to correct that imbalance, and cannot rely upon fate, destiny, or blind (sorry) luck to extinguish that obligation. Only purposeful remediation of a harm is sufficient to correct the imbalance created out of purposeful action. Joe may recover the full cost of the cure pill.¹⁵⁰

Scenario 11: *Sally negligently exposes Joe to Verbitis. Joe goes to the hospital to purchase a \$500 Verbitis cure pill. Joe is knocked to the ground by close-proximity lightning while walking out the hospital, and hits his head in a particular angle. His sight is miraculously restored by the incident, which otherwise has no effect on him.*

¹⁵⁰ Had Sally been a world-class ophthalmologist, and offered to cure Joe’s blindness in compensation for having exposed him to Verbitis, which offer Joe accepted, then of course there would have been a deliberate correction of the imbalance created by Sally. In other words, Joe was negligently exposed to Verbitis, but rather than Verbitis curing Joe’s blindness, Sally cures the blindness as a way of compensating Joe for her negligence.

The benefit received from being struck by lightning is in the form of a gratuitous payment. Joe may recover the cost of a Verbitis Cure Pill from Sally.

Joe was at the hospital at the precise moment lightning struck because he went there to purchase the cure pill, and he only needed the cure pill because Sally negligently exposed him to Verbitis. Thus, Sally is the cause-in-fact of Joe’s sight being restored, and the benefits of receiving his sight clearly outweigh the cost of the \$500 cure pill: it is difficult to imagine many newly blind individuals in America who would be unwilling to pay \$500 to restore sight.¹⁵¹ However, Sally can no more receive the benefit of this miraculous benefit than she could if Joe were to have found \$500 in front of the hospital. Tortious action will often cause individuals to take actions they would not otherwise have taken, or be in locations they would otherwise not have been, but the gratuitous result of those actions has no effect on the tortfeasor’s liability, once damage has been caused. Wrongful action, taken by Sally of her own volition, can only be negated by purposeful action in remediation of the harm caused, either taken by Sally herself, or by others with the intent of benefitting Sally.

Scenario 12(a): *Larry negligently prevents Jane from catching the last plane of the day from New York to Atlanta. As a result, Jane will assuredly miss a meeting and suffer a \$1,000 loss. Larry hands Jane \$750 because of the guilt he feels for the wrongful act.*

Larry’s action is not collateral, since his payment to Jane was fully intended to help correct the harm caused to Jane. Larry has taken purposeful action of his own volition in order

¹⁵¹ Cite to literature about born blind not wanting sight created?

to correct a wrongful act that was also taken of his own volition. The total loss suffered by Jane is \$1,000, and the value of Larry’s remedial act is \$750, so the lessened imbalance remains. Jane may recover \$250 from Larry, unless she has released him from liability in consideration of this settlement.

Scenario 12(b): *Same situation as 12(a), but Larry offers to give Jane a ride in his private jet to her destination (at a cost to Larry of \$10,000). Jane makes it to $\frac{3}{4}$ of the meeting and suffers only a \$250 loss.*

Once again, this payment is not collateral. Larry felt sufficient remorse to attempt to correct the harm he committed against Jane. He engaged in actions that reduced the loss suffered by Jane to \$250, which Jane may recover from Larry unless she has released him from liability in consideration of his offer to fly her to her destination. The cost to Larry of his remediation is irrelevant, of course, much as it would be irrelevant if a tortfeasor was hit by lightning on his way to the bank to withdraw funds to pay his tort award. Of course, Larry expended a tremendous amount of money to mitigate the harm suffered by Jane, reducing it to \$250. The amount of money used to reduce the actual harm to Jane is of interest only to the extent that we are curious as to precisely how guilty Larry felt regarding his wrongful action or the economic efficiencies of the situation – Larry could have given Jane \$2,000 and they both would have been financially better off – but this is irrelevant to a determination of his responsibility for the actual

harm caused. There is no evidence that Larry has taken any action to correct the imbalance of \$250, which still exists, so absent any release Jane may recover that \$250.¹⁵²

Scenario 13(a): *Larry negligently prevents Jane from catching the last plane of the day from New York to Atlanta. As a result, Jane will surely miss a meeting and suffer a \$1,000 loss. Lois observes this occurring and offers to allow Jane to ride along in Lois’s private jet. Lois was flying from New York to Orlando, and offers to make a stop in Atlanta if Jane will cover the marginal cost of diverting from the original flight plan - \$500. Jane agrees to pay the additional \$500, flies with Lois, and arrives in time for the entire meeting.*

Larry acted negligently and created an imbalance that he must act to correct. Similar to Scenario 1, Larry’s negligence has displaced Jane and required her to purchase passage with a private carrier. Due to the lucky ability of Jane to mitigate her damages by accepting the offer from Lois, Larry’s negligence causes only a \$500 imbalance. Larry’s obligation to correct that imbalance remains. There are no issues of subrogation, because Lois is not a collateral source. Rather, as stated above, Lois is operating as the equivalent of a discount air carrier. Compensated for her costs of stopping in Atlanta, Lois’s role is complete, and she is entitled to no other rights with respect to Jane or Larry.

¹⁵² If, however, Larry offers the charter jet ride explicitly as full compensation for his negligent actions if Jane accepts the offer she is releasing Larry from further obligation, and takes the chance that she will not make it to the meeting on time (if, for example, the plane is struck by a meteor and all on board are killed).

Scenario 13(b): *Assume that in 13(a), Lois offers her assistance in getting Jane to Atlanta without mention of any required payment. Lois’ jet arrives in Atlanta, deposits Jane at the terminal in time for her to reach her meeting on time, and then Lois continues her trip to Orlando.*

Larry’s actions have again caused harm to others, but we must be precise in describing the harm, for a tortfeasor is only responsible for correcting the actual imbalance that has been created. From Jane’s perspective, she has been the subject of negligent action by Larry, but due to the generous actions by Lois, she arrives at her meeting on time and suffers no harm.¹⁵³ If Jane suffered no harm, then no imbalance has been created and Larry is under no obligation to Jane. However, Larry’s actions have caused harm to someone in this scenario: Jane’s rescuer, Lois. Lois observed Larry’s negligent action and acted in an attempt to lessen the harm. While Lois was able to completely prevent harm to Jane, doing so imposed a cost on Lois, creating an imbalance between Larry and Lois. Larry is thus under an obligation to correct the imbalance and compensate Lois for the additional \$500 in cost imposed on Lois as a result of Larry’s negligent actions.¹⁵⁴

Of course, not every action taken in response to Larry’s initial negligence, even those taken in an attempt to prevent harm to Jane, will be sufficient to support the creation of an imbalance between Larry and the actor. For example, if the action taken is rash or excessive, a defense of contributory negligence or assumption of risk would be available to Larry. Any

¹⁵³ Again, assuming non-recovery of negligently inflicted emotional distress.

¹⁵⁴ *Eckert v Long Island R.R.* 43 N.Y. 502 (1871)

reaction in response to Larry’s negligence must be reasonably intended to mitigate the harm that would otherwise result from Larry’s negligence.

Scenario 13(c): *Assume that in 13(b) Lois had previously planned a stop in Atlanta on her way to Orlando, at the very airport where Jane’s plane was to land. Jane accepts the ride on Lois’ jet, and arrives in time for the meeting.*

Larry has acted negligently, and without Lois’ intervention, that negligence would have caused harm to Jane and created an imbalance which Larry would have been obligated to correct. However, due to Lois’ intervention, Jane has arrived in time for her meeting, so from her perspective no harm has been caused, and Larry owes no obligation to Jane. Likewise, Lois has not been harmed by Larry’s negligence, for no additional cost is required to land in Atlanta; Lois had already planned a stop in Atlanta, and was thus not displaced by Larry’s negligence.¹⁵⁵ Because his negligence has neither created an imbalance between him and Jane, nor between him and Lois, Larry has no obligation to compensate either. As in Scenario 4, Larry’s luck has freed him of liability, although perhaps not of personal shame or reputational loss.

Scenario 14: *Larry negligently prevents Jane from catching her plane to Atlanta. Larry’s mother Beth drives Jane to Beth’s advertising firm, and establishes a videoconference link with Jane’s meeting in Atlanta. The process takes a few hours, and Jane is able to attend $\frac{3}{4}$ of the meeting, suffering a \$250 loss.*

¹⁵⁵ We assume that any extra cost for carrying an additional passenger is *de minimis*.

Jane may recover \$250 from Larry due to his wrongful actions. While Larry has taken no steps to extinguish his obligation to Jane, Beth is willing to take purposeful action to correct the imbalance on Larry’s behalf. That purposeful action reduces Jane’s loss from \$1,000 to only \$250. Jane cannot invoke the collateral source rule, for the source, Beth, is not collateral to Larry. Note that only action by Larry *or his agent* will be sufficient to avoid application of the collateral source rule. If *Jane’s* mother had facilitated the videoconference link, the source would be collateral to Larry, and would not reduce Larry’s obligation (though perhaps a subrogation right would exist had a loan been implied).

Scenario 15: *Larry negligently prevents Jane from catching her plane to Atlanta, causing Jane to miss a meeting and suffer \$1,000 in damage. Jane’s neighbors hear about Jane’s loss, and Googles® Larry only to discover that he is rumored to be insolvent. Fearing that Jane may never recoup her loss, Jane’s neighbors take a collection that raises \$1,000, which they give her.*

Jane’s neighbors have taken purposeful action to aid Jane, rather than to extinguish Larry’s obligation. Their action is therefore collateral to Larry, and Jane may (if Larry is or becomes solvent) recover \$1,000 from him. If such recovery is possible, do Jane’s neighbors retain rights of subrogation? Their willingness to help a neighbor is likely based in some amount of good will that exists among the neighbors and Jane, which would normally argue in favor of the payment being considered a mercy payment with no subrogation rights. However, their payment appears primarily motivated by a belief that Jane will not be able to recover from Larry, and a desire to help Jane financially survive the arduous process of trial. To the extent this is their motivation, the payment would be an implied loan payment, and they would retain a right

of subrogation. If this case is at equipoise, as discussed above, then we believe that a default rule of subrogation should apply.

Whereas Dr. Good in Scenario 9 provided a collateral benefit as a professional courtesy, an implied mutual insurance arrangement hypothetically existed among doctors. There is no indication that the neighbors here are contributing to Jane’s benefit out of an understanding that she will do the same if they are in the same circumstance – for apparently they would not have made any collection had Larry been reachable in tort. We think that Jane must notify the neighbors of any compensation obtained from Larry, and allow the neighbors to choose to waive or exercise their rights of subrogation. Similarly, the neighbors may sue Larry in Jane’s name, if she declines to take action against him.

Scenario 16: *Larry negligently prevents Jane from catching her plane to Atlanta, causing Jane to miss a meeting and suffer \$1,000 loss. Sage, a wealthy woman who believes courts are overcrowded because of small disputes such as this, gives Jane \$1,000 in the hopes that litigation may be avoided. Sage is unconcerned about who is at fault – “accidents happen,” she shrugs.*

In Scenario 15, a benefactor took purposeful assistance in response to Larry’s wrongful action and the resulting imbalance, yet that action was intended to benefit Jane without (at least primarily) extinguishing Larry’s obligation to Jane. Who does Sage wish to benefit here? It appears that she favors no one, but simply wishes to keep the conflict out of the courts.

As the facts are presented here, Sage has said nothing to either Larry or Jane that might indicate her intent in giving the money to Jane. When faced with a payment to the victim by a third party who does not indicate the purpose for the payment, we believe the default rule must be to classify the payment as a collateral source, and allow full recovery by the tort victim. Here, however, Sage’s desire was to keep the action out of court, and if Sage discovers that Jane has filed a suit against Larry, Sage’s purpose is thwarted. Under those conditions, a court would be presented with a payment to a tort victim with the express intent that it be full compensation for the harm caused, in order to avoid the necessity of resolving the issue through a tort lawsuit. While not motivated by a personal interest in Larry’s welfare, as was the case in Scenario 14 when Larry’s mother bestowed a benefit on Jane, the payment by Sage was intended to extinguish his obligation to Jane, and as such, the payment is not collateral. Jane can recover nothing further from Larry.

Scenario 17: *Larry negligently prevents Jane from catching her plane to Atlanta, causing Jane to miss a meeting and suffer \$1,000 loss. Jane’s Dad, Frank, who has a borderline phobia about his children suffering from this type of mishap, had purchased non-subrogatory insurance policies to protect himself and his children against just such losses. The insurance company reimburses Jane \$1,000.*

In this case a third party provided payment with no intent to correct the imbalance caused by Larry’s negligence, so Jane may recover \$1,000 from Larry. The insurance policy is expressly non-subrogatory. Frank himself might have subrogation rights (for the amount of

premiums he paid on Jane’s policy), but it is doubtful he would exercise them. Rather, Frank appears to have provided the insurance because he wished his daughter to be able to avoid the suffering caused by this sort of loss, a motivation that speaks strongly in favor of considering the payment to be a mercy payment without subrogatory effect. It is possible, of course, that Frank had discussed the insurance policy with Jane, and that Jane had agreed to pay Frank any damages awarded after trial (perhaps net of expenses and fees). Such an agreement, of course, would make the insurance payment an implied loan, and Frank would retain subrogation rights.

Scenario 18: *Larry, a wealthy and eccentric man, negligently prevents Jane from catching her plane to Atlanta, causing Jane to miss a meeting and suffer \$1,000 loss. Jane goes to a local restaurant. Before Jane arrives at that restaurant, indeed before Larry misbehaved toward Jane, Larry had decided to give the person at table #3 a prize of \$1,000. Jane sits at table #3, at which point the maître d’ walks up and hands her \$1,000 “from Larry.”*

The resolution of this extreme case is that Jane may still recover her \$1,000 loss. True, the tortfeasor provided compensation to the victim in precisely the amount of the harm caused by his negligent act – but the benefit was gratuitous and not meant to rectify the imbalance he caused. Critics of the collateral source rule might decry this result, claiming that it compounds the double-recovery problems that critics see in the collateral source rule with an even more unjust double-payment problem. Full understanding of the collateral source rule reveals, however, that there is neither double-recovery nor double-payment.

Jane has unquestionably been harmed by Larry’s negligence, and an imbalance has been created that Larry must correct. Correction of the imbalance must be as purposeful as was the

negligent act. This requires more than simply giving money to a person who, by chance, happens to be the victim. The collateral source rule applies even though the “source” was Larry himself.

Scenario 19: *Larry negligently prevents Jane from catching her plane to Atlanta, causing Jane to miss a meeting and suffer \$1,000 loss. Fortunately, Jane has maintained an insurance policy against precisely this sort of occurrence, and receives a payment from that insurance carrier in the amount of \$1,000. The insurance carrier is a sole proprietorship owned by Larry. The policy is silent on the issue of subrogation.*

As in Scenario 18, Larry has made a payment to Jane in a set of circumstances that followed closely on the heels of Larry’s negligence. But in this scenario his payment to Jane was required by his contract, and was therefore not a purposeful act in mediation of the imbalance he had created. After all, if the contractual sum were not paid, Jane could compel payment through a resort to the courts without resorting to her valid tort law claims. In the absence of a volitional act by Larry to correct the imbalance, his obligation remains, and Jane may recover from Larry the \$1,000 value of the harm caused. This scenario is identical to Scenario 18, except that Larry might argue that he is subrogated against himself because of this insurance payment.

Larry’s involvement in Jane’s travel plans is due to a previous disruption, i.e., previous misfeasance by Larry has resulted in Jane invoking her contractual rights against Larry under the insurance contract. Perhaps Larry felt badly about his tort, yet independently of it he had a contractual obligation to meet Jane’s needs; should his action be considered a purposeful rectification of a corrective justice obligation, thus extinguishing it?

In a similar Virginia case,¹⁵⁶ it was held that a victim could recover in tort from a health insurance provider whose employee had negligently injured the victim; the provider had subsequently “made good” the injury by virtue of its insurance obligation. The defendant, Kaiser Permanente, provided both health insurance and (through its wholly owned facilities) medical care. One of Kaiser’s doctors had misperformed a procedure, necessitating several painful and expensive hospital procedures (performed by a non-Kaiser physician). These procedures were fully paid for by Kaiser (which, to recall, was on the hook as the patient’s health insurer); after all this the patient sued Kaiser for, among other items, the market value of these subsequent procedures. Kaiser objected to this, citing its previous payment of these very sums. Consistent with our theory of collateral source, the Virginia Supreme Court upheld Kaiser’s liability, reasoning that the contractual obligation by an insurer, and the ability by the insured to enforce that obligation under contract law, negates the assertion that the payment was in correction of the tort. We believe this result is correct, although it is possible that, in a similar case, the insurance policy would contain a subrogation clause, allowing the insurer to recover any judgment recovered. In that case, subrogated against itself, no payment would be owing.

In Scenario 18, Larry, as insurer, pays \$1,000 to Jane in fulfillment of his contractual obligation, and then is required by the court to pay \$1,000 more to Jane in fulfillment of his tort obligation. Because the insurance contract is silent on the issue of subrogation, Larry the insurer has not waived his subrogatory rights¹⁵⁷, and would therefore be entitled to receive the full

¹⁵⁶ *Karsten v. Kaiser Foundation Health Plan of Mid-Atlantic States, Inc.* 808 F.Supp. 1253 (E.D.Va.,1992.); *appeal dismissed on other grounds*, 36 F.3d 8 (C.A.4 (Va.),1994).

¹⁵⁷ Unless Larry’s typical policy contains subrogatory language that was absent from this policy, in which case the courts will almost assuredly interpret the policy against Larry, and hold that the absence of a subrogation clause indicates that Larry has waived his subrogation rights.

amount of the second payment of \$1,000 to Jane. This would render any lawsuit by Jane against Larry futile, for Jane would be suing Larry for Larry’s benefit.¹⁵⁸ Because punishment has no place in tort law, we believe that, in a circumstance such as this, unless she can establish that her insurance policy was non-subrogatory, Jane should be forced to deduct any amounts paid by Larry as insurer.¹⁵⁹

V. Conclusion

Understood correctly, the requirement of compensation flows naturally from the obligation of tortfeasors to correct their wrongs. Tortfeasors must compensate their victims. Sadly, most discussions of tort law end abruptly at this juncture, leaving a great deal of uncertainty regarding *why* compensation must be made. Many have interpreted the compensation requirement to signify that the victim must be returned to the precise state he occupied prior to the tort. That explanation is partially correct, but also fundamentally inaccurate, because it ignores tort law’s mooring in corrective justice. The primary purpose of tort law is to rectify certain moral imbalances created through our relationships with each other. Lacking this key understanding, tort law has become increasingly confused, and the controversy surrounding the collateral source rule is an illustration of this uncertainty. Attempts to “fix” the “problems” caused by the collateral source rule have yielded ever more complicated formulas which are ever less coherent.

¹⁵⁸ Of course Larry may, for public relations purposes, choose to waive his subrogatory rights.

¹⁵⁹ It is true that removing the threat of a lawsuit lowers the incentive for Larry to act non-negligently in the course of his business. However, other incentives exist to encourage non-negligent behavior, such as likely reduced profits resulting from increased payouts on insurance policies, as well as the reputational incentives inherent in any business. In the end, however, the issue of what incentives face Larry are irrelevant to the correct disposition of a tort case.

As tort law has subtly drifted from its moorings, the collateral source rule has begun to appear more and more out of step with tort law, and this perception has led to the call for its abrogation. In reality, however, the collateral source rule was an integral part of the common law of torts in 1854, and has remained relatively unchanged to today. As applied in the above thought experiments, the collateral source rule applies two simple criteria derived from tort law’s corrective justice foundations, so as to allow relatively easy answers to questions of liability and subrogation. More importantly, the collateral source rule, applied correctly, achieves justice for all parties impacted by tortious conduct. A tortfeasor acting freely, of her own volition, and in a wrongful manner, has created an imbalance; this imbalance she must correct. Victims receive compensation from tortfeasors because that is how imbalances are corrected. Any events not specifically intended to correct that imbalance are simply irrelevant to achieving true and complete justice between a damaged victim and her tortfeasor.

Imagine that, tomorrow morning, the nation awakens to discover that every state legislature has, in unison, decreed that tort victims will henceforth receive only fifty percent of their proven damages. Such action is necessary, legislatures claim, because high tort awards are harming the economy. When questions are posed, legislators answer in calming tones that we need not worry, most victims have first-party insurance, and those who do not will likely be the object of pity and compassion; charity will suffice to make those outliers whole.¹⁶⁰ The outrage that would stem from this “reform” exposes the importance of principles of corrective justice that most people associate with questions of tort law.¹⁶¹ For tort law loses its soul when it denies a

¹⁶⁰ Cite to article critical of Virginia’s med-mal cap.

¹⁶¹ See, e.g., Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427 (1992); Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992); Michael I. Krauss, *Tort Law and*

wronged victim compensation, forcing her to self-insure¹⁶² or to be lucky enough to be part of someone else’s utility function.

Our contention is that fundamental tort principles are similarly violated when the situation is, as it were, reversed: when the wronged victim IS also a beneficiary of “foreign [i.e., non-tortfeasor-driven] aid.” When it comes to the collateral source rule, legislators fail to understand this violation in their temptation to march in step to the reformist’s drum.¹⁶³ In the belief that the collateral source rule is unfair and unjust, efforts at abrogation of the rule continue apace. These attempts at reform are misguided, however, as they in fact push tort law further down the road toward public ordering. The calm simplicity of relational, private tort law offers a respite from this confusion.

This paper portrays the collateral source rule as a logical extension of a relational, corrective-justice based tort law. Relational principles achieve justice by requiring tortfeasors to make right their wrongful acts, as opposed to “making the victim whole.” We believe that the anti-collateral-source tide can be turned, relational principles of tort reinvigorated, and a more coherent body of tort principles returned to prominence. This will require a defense of common

Private Ordering, 35 ST. LOUIS UNIV. L. J. 623 (1992).

¹⁶² An individual pays for insurance compensation by making payments to a first-party insurer, who promises to compensate the individual in the event that certain risks are realized. Some individuals “self-insure,” by saving sufficient funds to cover their needs in the event of a risk being realized. In either case, it is the individual who has paid for her own compensation.

¹⁶³ The reformer’s drum is a drum which we have heard, the rhythm of which is often pleasing to our ears. There are a number of tort reforms which we believe can be useful in correcting serious flaws in our modern system of tort law. However, it is not true that all tort reform proposals are created equal; some reforms, such as efforts to eliminate punitive damages and impose reasonable limits on pain and suffering damages, have the potential to diminish the harmful quest for compensation-at-all-costs and re-enshrine justice as the predominant force in tort lawsuits. In some cases, however, the reformer’s drum becomes a frenzied thing, and reform begins to be pursued as a goal unto itself, irrespective of whether justice is advanced or impaired by any particular proposal. Other times, it is in pursuit of policy goals not unworthy in themselves, addressing real public concerns – such as a state’s loss of high quality medical professionals – but utilizing a means that is at odds with fundamental principles of tort law.

law tort rules from a solid foundation of corrective justice.