

MISSOURI SECTION

NOTES

THE COLLATERAL SOURCE DOCTRINE IN MISSOURI

Two results are achieved by requiring a tortious defendant to pay damages to an injured plaintiff. The plaintiff is compensated and, at least in a pecuniary sense, is restored to his condition as it existed prior to the tortious act. The compensation of the plaintiff is said to be the *raison d'être* of damages.¹ However, an additional result is reached; the tortious defendant is penalized. Modern judicial thought apparently considers the penal aspect of damages as an incidental by-product. The possible deterrent effect and the satisfaction of the ancient desire for vengeance² are de-emphasized.

In most cases it cannot be ascertained whether the damages are serving a compensatory or a penal purpose; the effects, from which the purpose might be inferred, are compatible with either. In some situations, however, the dominant motive can be isolated to some extent. The penal effect is sought in those cases in which exemplary damages are imposed.³ Also it has been observed that the causal remoteness of the consequences for which a defendant will be held liable varies directly with the "fault" of the defendant.⁴

A determination as to which of the two motives is dominant could also be attempted in those cases in which the injured plaintiff has received compensation from a source independent of the tortfeasor. The general problem can best be illustrated by considering a hypothetical case: *A* is hit and injured by an automobile negligently operated by *B*. *C*, an eccentric millionaire, takes *A* to a hospital and pays all of *A*'s medical expenses. *C* then goes

1. SEDGWICK, MEASURE OF DAMAGES § 30 (9th ed. 1912):

In all cases, then, of civil injury and of breach of contract the declared object of awarding damages is to give compensation for pecuniary loss; that is, to put the plaintiff in the same position, so far as money can do it, as he would have been if the contract had been performed or the tort not committed.

2. DEUTERONOMY 19: 21: "And thine eye shall not pity; but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot."

3. MCCORMICK, DAMAGES 275 (1935).

4. PROSSER, TORTS 457 (1941).

to Afghanistan. *A* sues *B*. Should medical expenses be a proper element of damages in that action?

One answer is that the gift from *C* to *A* should be considered as wholly unconnected with the rest of the case and should have no mitigating effect on the measure of damages. Therefore the medical expenses should be allowed as damages. This answer is perhaps unrealistic, because the gift *is* connected with the rest of the case. If *A* had not been injured the gift would not have been given. Although the law sometimes refuses to attach legal significance to one incident factually connected with a series of incidents which do have legal significance, a factually connected incident should not be disregarded without good reason.⁵

Another answer would be that *A* should *not* recover for his medical expenses because he had no medical expenses. This answer clearly is in harmony with the compensation principle.

5. Another somewhat more persuasive answer is that the medical expense should be a proper element of damages because *C* intended to benefit *A*. If the expenses were not allowed, the net effect would be to bestow a benefit on *B*, not *A*, and the intent of the donor would be frustrated. The policy of allowing a donor to make a gift to whomever he chooses should in this case override the policy of restricting recovery to an amount sufficient to compensate the plaintiff. Something more than compensation is allowed, but the penal motive is not obviously present. The main difficulty with this answer is that it assumes a considerable knowledge of the intent of the donor which does not in fact exist. *C* intended to benefit *A*, and did benefit *A*. At the time that *C* made the gift it had not been established that *A* could recover from *B*. To the extent that *C* intended to convert a possible compensation to an accomplished compensation, his intent has been fulfilled. There is no showing that *C* intended to accomplish anything other than conversion.

Suppose that *C*, instead of directly paying *A*'s bills had paid them indirectly by establishing prior to the injury a charitable hospital at which *A* received free treatment. In such a case it would be more difficult to argue that *C*'s intent would be frustrated by not allowing *A* to recover from *B* the reasonable value of the medical services received. Although it does not necessarily follow, the intent of *C* could easily be the same whether he paid *A*'s bills directly or indirectly. The policy of not frustrating the intent of the donor could be viewed as a policy of not frustrating an intent which the donor may or may not have had, *i.e.*, an intent not to benefit *B* as well as *A*. Viewed in this manner the policy may not be strong enough to override the opposing policy of limiting the recovery to compensation only. The position could be taken that recovery should be allowed if the donor so intended, and that an appropriate legal apparatus should be set up to determine the intent of the donor.

It could also be argued that the real problem here is one of the proper disposition of extra money, *i.e.*, money received from a source not usually present in tort cases, and that it is better to give it to injured *A* than to *B*. Adherents of this approach could say that there is no penal motive involved, that it is only a question of allocating a windfall. It may be that this approach assumes the question by characterizing the money received from *C* as "extra." Perhaps that money is not really "extra" until it is decided that *A* should recover the value of the medical expenses from *B*.

In dealing with this problem the courts have developed the "collateral source" doctrine, which has been widely accepted in the United States.⁶ Under the collateral source doctrine the damages recoverable from a tortious defendant are not mitigated by the fact that the plaintiff has received compensation from someone unconnected with the defendant. It is possible to consider the collateral source doctrine as a manifestation of the dominance of the penal motive in this area of the law of damages, because although the compensation effect has been achieved prior to litigation the defendant still must pay damages. The penal motive, if actually present, is unexpressed by the courts and is probably unconscious.

This note is an attempt to discover if an unconscious penal purpose is in fact consistently dominant by examining the application of the collateral source doctrine by the Missouri courts, and to evaluate in terms of social desirability the decisions of the Missouri courts in this area of the law of damages. Although the doctrine is applicable to cases involving either damage to property or personal injuries, this note will be limited to a discussion of the personal injury cases.

In personal injury cases where the injured person has been compensated under an insurance policy not procured by the defendant, the rule is well established in Missouri that such compensation does not reduce the amount of damages recoverable from the tortfeasor.⁷ It should be noted that life insurers and personal injury insurers are not entitled to subrogation,⁸ and that therefore the insurer has no legal right to be reimbursed. The question of the effect of insurance payments on the measure of damages was first raised in Missouri in 1885 in the case of *Carroll v. Missouri Pacific Ry.*⁹ It was there held that the fact that the plaintiff, in an action for the wrongful

6. RESTATEMENT, TORTS § 920 comment e; § 924 comment c, f (1939); McCORMICK, DAMAGES 310, 323, 324 (1935). The doctrine is also accepted in England: *Bradburn v. Great Western Railway*, L.R. 10 Ex. 1 (1874); *Yates v. Whyte*, 4 Bing. N.C. 272, 132 Eng. Rep. 793 (1838).

7. *Jackson v. Thompson*, 358 Mo. 1001, 218 S.W.2d 97 (1949); *Pogue v. Rosegrant*, 98 S.W.2d 528 (Mo. 1936); *Carroll v. Missouri Pacific Ry.*, 88 Mo. 239 (1885); *Bright v. Thacher*, 202 Mo. App. 301, 215 S.W. 788 (1919); *Dover v. Mississippi River and Bonne Terre Ry.*, 100 Mo. App. 330, 73 S.W. 298 (1903). Cf. *Gould v. Chicago, B. & Q. Railroad*, 315 Mo. 713, 290 S.W. 135 (1926).

8. VANCE, INSURANCE 796, 797 (Anderson 3d ed. 1951).

9. 88 Mo. 239 (1885).

death of her husband, had received the benefit of an insurance policy on his life should not be considered as a defense or in mitigation of damages in her action against the tortfeasor. Not much later the rule was extended to cases involving damage to property.¹⁰ In 1903, in a case where the defendant-employer had paid half of the premiums on the plaintiff-employee's accident insurance policy, an instruction allowing but not requiring the jury to consider the acceptance of benefits under the policy in mitigation of damages was sustained.¹¹ This instruction, however, was challenged only by the defendant and not by the plaintiff. The rationale for this rule denying mitigation because of insurance benefits as applied to hospital and other medical expenses is that the plaintiff became liable for such expenses when the services were rendered and was thereby damaged, and that it is no concern of the defendant how the plaintiff provided the funds to pay the bills.¹² A somewhat similar rationale could be used if the plaintiff's insurance indemnified him against loss of wages; the plaintiff's loss occurred when he did not work, and events happening after the loss occurred do not affect that loss.

It is obvious that the requirement that the defendant pay unmitigated damages in these cases is motivated by something other than a pure desire for compensation. It does not necessarily follow, however, that the penal motive is dominant. The courts may have felt that it was more important to reward the prudence and foresight of the plaintiff than it was to limit damages to compensation, and for that reason attached no legal significance to the receipt of benefits by the plaintiff from his insurance. The courts also may have been influenced by the fact that many people use life insurance policies as a form of savings and consider the payment of the proceeds of a policy as a return of an investment rather than as compensation for a loss.

The problem of collateral source compensation also arises when an employer continues to pay wages to an employee who was injured by a third person. The solution of this problem prior to the passage of the Workmen's Compensation Act caused the

10. *Mathews v. St. Louis and San Francisco Ry.*, 121 Mo. 298, 24 S.W. 591 (1893), *aff'd*, 165 U.S. 1 (1896); *Dillon v. Hunt*, 105 Mo. 154, 16 S.W. 516 (1891).

11. *Dover v. Mississippi River and Bonne Terre Ry.*, 100 Mo. App. 330, 73 S.W. 298 (1903).

12. *Pogue v. Rosegrant*, 98 S.W.2d 528 (Mo. 1936).

Missouri courts some difficulty. In 1894 the Kansas City Court of Appeals held that an injured employee could not recover for loss of wages during his disability if his employer had continued to pay him.¹³ The court said in that case:

. . . no deduction or diminution thereof was made by his employers. He did not, therefore, lose his wages and was, of course, not damaged in this respect. . . . We are confident that in a case where mere compensation for loss is sought, there can not be allowed, under the name of compensation, a sum which has not been lost.¹⁴

A few months later, however, the Supreme Court of Missouri took the antithetical position¹⁵ and said:

Most clearly, it was no defense to this action to show that plaintiff's employer . . . had continued his salary while he was disabled by an injury caused by defendant. There can be no abatement of damages on the ground of partial compensation, when it comes from a collateral source, independent of defendant.¹⁶

These two conflicting views were reconciled by the Missouri Supreme Court in the case of *Moon v. St. Louis Transit Co.*,¹⁷ although the previous cases were not discussed. The court there recognized that if the employer had made wage payments purely gratuitously they could not be considered in mitigation of damages, because there is no more reason to deduct from damages a gift from an employer than there is to deduct a gift from a stranger. The court held, however, that since the employee had performed some services for the employer during the period of his disability, and the employer had continued to pay his wages, the employee could not recover for the loss of wages. This decision presumably is still controlling in cases where an employer continues to pay wages when he is not compelled to do so by the Workmen's Compensation Act.

The rule in the *Moon* case is logical in a quasi-mathematical sense. The formula for computing damages for loss of wages is: damages = (wage prior to injury - wage after injury) x (period of disability).¹⁸ If the employee continues to perform some ser-

13. *Ephland v. Missouri Pacific Ry.*, 57 Mo. App. 147 (1894).

14. *Id.* at 160, 161.

15. *Williams v. St. Louis and San Francisco Ry.*, 123 Mo. 573, 27 S.W. 387 (1894).

16. *Id.* at 585, 27 S.W. at 391.

17. 247 Mo. 227, 152 S.W. 303 (1912).

18. See, e. g., *Bradfield v. Kansas City*, 204 S.W. 819 (Mo. App. 1918). The formula is not expressed in algebraic terms in this case.

vices, although less in quantity or different in quality, and his employer continues to pay him full wages, it is apparent that the damages computed by the formula would be zero. It is a situation in which no loss has occurred, rather than one in which a loss has been compensated from a collateral source. This rationale tends to overlook a crucial point. The mere fact that the employee continued to do *some* work does not mean that he earned a full wage; the element of gratuity may be very strong in the employer's action. The difficulties of proof involved, however, in the factual question of when an employee is earning his full wage may justify the adoption of the "some services" criterion of the *Moon* case. Whether or not that criterion is considered correct, it is obvious that the rule in the *Moon* case makes a conscious effort to measure damages on a purely compensatory basis. It does not succeed, because it does allow double compensation if the wages were purely gratuitous.

Employers to whom the Missouri Workmen's Compensation Act¹⁹ applies²⁰ are required to furnish medical expenses up to a specified amount²¹ and wage payments on a prescribed scale²² to a completely or partially disabled employee, or in the case of death, to his dependents,²³ if the employee's injuries were received in and arose out of the course of his employment.²⁴ These provisions are applicable even though the injuries were caused by the negligence of some third person.²⁵ The Act severely limits the employee's common law rights against his employer for negligence,²⁶ but does not destroy the employee's action against a third person tortfeasor.²⁷ Thus an employee may receive com-

19. MO. REV. STAT. §§ 287.010 *et seq.* (1949).

20. MO. REV. STAT. § 287.090 (1949).

21. MO. REV. STAT. § 287.140 (Supp. 1951).

22. MO. REV. STAT. § 287.160 (1949); MO. REV. STAT. § 287.170 (Supp. 1951).

23. MO. REV. STAT. § 287.240 (1949).

24. MO. REV. STAT. § 287.120 (1949).

25. *Schumacher v. Leslie*, 360 Mo. 1238, 232 S.W.2d 913 (1950); *Gardner v. Stout*, 342 Mo. 1206, 119 S.W.2d 790 (1938); *McKenzie v. Missouri Stables, Inc.*, 225 Mo. App. 64, 34 S.W.2d 136 (1930).

26. MO. REV. STAT. § 287.120 (1949); *General Motors Corp. v. Holler*, 150 F.2d 297 (8th Cir. 1945); *State ex rel. National Lead Co. v. Smith*, 134 S.W.2d 1061 (Mo. App. 1939). The employee's common law rights have not been completely extinguished. *McDaniel v. Kerr*, 258 S.W.2d 629 (Mo. 1953).

27. *Schumacher v. Leslie*, 360 Mo. 1238, 232 S.W.2d 913 (1950); *Smith v. Siedhoff*, 209 S.W.2d 233 (Mo. 1948); *DeMoulin v. Roetheli*, 354 Mo. 425, 189 S.W.2d 562 (1945); *Reiling v. Russell*, 345 Mo. 517, 134 S.W.2d 33

compensation under the Act from his employer for medical expenses and loss of wages, and sue a third person whose negligence caused the injury. Under the construction which the Missouri courts have placed upon section 287.150 of the 1949 Revised Statutes,²⁸ medical expenses and loss of wages are proper elements of damages in such an action. In the case of *McKenzie v. Missouri Stables, Inc.*,²⁹ it was held that under section 287.150 either the employer or the employee could bring the action against the negligent third person. If the employee brings the action, he is an express trustee for the employer's benefit of an amount of the proceeds of the action equal to the compensation he has received from the employer, and must credit any surplus against compensation payments payable by his employer in the future. Conversely, if the employer brings the action, he is an express trustee for the benefit of the employee of any recovery exceeding the amount paid as compensation. The employer must pay this surplus to the employee, and is entitled to credit the amount so paid against future payments.

Negligence on the part of the employer, however, will not bar the action by either the employee or the employer against a concurrently negligent defendant.³⁰ A settlement between the

(1939); *General Box Co. v. Missouri Utilities Co.*, 331 Mo. 845, 55 S.W.2d 442 (1932); *Brouk v. United Wood Heel Co.*, 145 S.W.2d 475 (Mo. App. 1940); *American Veterinary Laboratories v. Campbell Co.*, 227 Mo. App. 799, 59 S.W.2d 53 (1933); *Sylcox v. National Lead Co.*, 225 Mo. App. 543, 38 S.W.2d 497 (1931); *McKenzie v. Missouri Stables, Inc.*, 225 Mo. App. 64, 34 S.W.2d 136 (1930). It should be noted that under the Federal Rules of Civil Procedure, the third person can force the employee to join the employer and his insurer as parties plaintiff. *Du Vaul v. Miller*, 13 F.R.D. 197 (W.D. Mo. 1952).

28. Mo. REV. STAT. § 287.150 (1949). Injured employee may hold third person, when—effect:

Where a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his dependents would have been entitled to recover. Any recovery by the employer against such third person, in excess of the compensation paid by the employer, after deducting the expense of making such recovery shall be paid forthwith to the employee or to the dependents, and shall be treated as an advance payment by the employer, on account of any future installments of compensation.

29. 225 Mo. App. 64, 34 S.W.2d 136 (1930).

30. *General Box Co. v. Missouri Utilities Co.*, 331 Mo. 845, 55 S.W.2d 442 (1932). Contributory negligence on the part of the injured employee will bar the action by either the employee or the employer against the

employee and the tortfeasor does not bar the action by the employer,³¹ although presumably his recovery would be limited to the amount actually paid or payable as compensation. The employer has no action against the tortfeasor unless he has paid or is liable to pay compensation.³²

The net effect is that compensation received by an employee under the Workmen's Compensation Act neither reduces the amount of damages recoverable from a third party tortfeasor nor permits double compensation of the injured person, because the collateral source, *i.e.*, the employer, is allowed reimbursement.³³ The justice of such a result in a case where the employer has not been concurrently negligent is apparent. The employee is protected against harm by impecunious third persons, and the damages paid by the financially responsible third person are equal to the harm he caused. In this situation the legislature has decreed that the compensation motive is dominant, and also that the penal motive shall be given effect if the financial condition of the negligent third person permits. The justness of reimbursing the employer when he has also been negligent is not quite apparent. Although the employee is compensated, the full force of the penal motive is directed at the third party for the benefit of the perhaps equally blameworthy employer.

The collateral source problem also arises when the plaintiff has received compensation in some form from his family. In *Morris v. Grand Avenue Ry.*,³⁴ the plaintiff sought to recover *expenses* for medicines and doctor's bills, but failed to prove that he had paid or become liable for such expenses, although he introduced evidence as to the value of the doctor's services. The instructions given by the trial court allowed the jury to compensate the plain-

negligent third person. *Anzer v. Humes-Deal Co.*, 332 Mo. 432, 58 S.W.2d 962 (1933).

31. *Everard v. Woman's Home Companion Club*, 234 Mo. App. 760, 122 S.W.2d 51 (1938).

32. *Pfützing* to the use of *Stotsky v. Shell Pipe Line Corp.*, 226 Mo. App. 861, 46 S.W.2d 955 (1932). It has been indicated, however, that the statute of limitations begins to run against the employer on the date of the injury. *Goldschmidt v. Pevely Dairy Co.*, 341 Mo. 982, 111 S.W.2d 1 (1937).

33. *Schumacher v. Leslie*, 306 Mo. 1238, 232 S.W.2d 913 (1950); *State ex rel. Missouri Pacific Ry. v. Haid*, 332 Mo. 616, 59 S.W.2d 690 (1933); *Anzer v. Humes-Deal Co.*, 332 Mo. 432, 58 S.W.2d 962 (1933); *Brouk v. United Wood Heel Co.*, 235 Mo. App. 511, 145 S.W.2d 475 (1940); *Everard v. Woman's Home Companion Reading Club*, 234 Mo. App. 760, 122 S.W.2d 51 (1938); *McKenzie v. Missouri Stables, Inc.*, 225 Mo. App. 64, 34 S.W.2d 136 (1930).

34. 144 Mo. 500, 46 S.W. 170 (1898).

tiff for those expenses. The case was reversed and remanded for that reason by the Missouri Supreme Court, which said:

. . . [The jury is] authorized to compensate him for his pecuniary loss actually sustained, and not those that might or would have occurred but for the interposition of others through kindness or charity.

. . . [T]o authorize a recovery on the part of the injured plaintiff, there must have been an actual loss to him of time or money, or a liability that same may or will occur; . . . when loss has not or cannot occur by reason of the action of others gratuitously exercised in behalf of the party injured, or when no legal liability has arisen by reason of restrictions of law against the intervening third party performing the needful services, no action can be maintained.³⁵

If a member of the plaintiff's family pays his medical bills, bills for which the plaintiff became liable when the services were received, the plaintiff is entitled to recover the value of the services.³⁶ The damage is sustained when the plaintiff incurs the liability, and the method by which that liability is later discharged has no effect on the measure of damages. However, under the *Morris* case, if the plaintiff never became liable for his medical expenses, he could not recover for them. Because services rendered by one member of a family for another are presumed to be gratuitous, the rule in the *Morris* case prevents recovery by a plaintiff for the reasonable value of nursing services received by him from members of his family.³⁷

The distinction between services rendered and liability incurred does not limit recovery to pure compensation because a plaintiff is allowed to recover for liabilities incurred which were

35. *Id.* at 505, 507, 46 S.W. at 170, 171.

36. *Gentili v. Dimaria*, 89 S.W.2d 93 (Mo. App. 1936). *Cf.* *Fisher v. Ozark Milk Service Inc.*, 356 Mo. 95, 201 S.W.2d 305 (1947).

37. *Gibney v. St. Louis Transit Co.*, 204 Mo. 704, 103 S.W. 43 (1907); *Baldwin v. Kansas City Ry.*, 218 S.W. 955 (Mo. App. 1920). A different result was reached in: *Murray v. Missouri Pacific Ry.*, 101 Mo. 236, 13 S.W. 817 (1890); *Kaiser v. St. Louis Transit Co.*, 108 Mo. App. 708, 84 S.W. 199 (1904); *MacDonald v. St. Louis Transit Co.*, 108 Mo. App. 374, 83 S.W. 1001 (1904). These cases have not been expressly overruled on this point.

Medical and other expenses incurred in treating a deceased, and his funeral expenses, are not proper elements of damage in a wrongful death action unless the beneficiaries of the action were under a legal obligation to pay such expenses. *McCullough v. W. H. Powell Lumber Co.*, 205 Mo. App. 15, 216 S.W. 803 (1919). If the members of the family who render the service incur expenses incidental to the rendition of the services, *e.g.*, bills for room and board if they have to leave home to care for the plaintiff, the plaintiff may recover the amount of such bills. *Dean v. Wabash R.R.*, 229 Mo. 425, 129 S.W. 953 (1910).

later gratuitously discharged by third persons. The proper distinction would be between gratuitous benefits on the one hand, and presently existing liabilities and "out-of-pocket" expenses on the other. The language in the *Morris* case opinion could be construed as reaching either one of these two distinctions, and the family services cases decided under that case construed it as reaching the unsound one. Although the sound distinction is a perfect expression of the pure compensation motive, it should be noted that in some cases it leads to an extremely undesirable result. If the family is poor and cannot afford to hire a nurse, and some members are forced to neglect their own employment to perform nursing services, compensation for those services is denied. On the other hand, if the family can afford to hire an outsider to do the nursing, the expenses are recoverable from the person who caused the injury, and the richer family loses neither time nor money. A preferable result was reached in the earlier case of *Kaiser v. St. Louis Transit Co.*,³⁸ where the court said:

. . . Plaintiff would have required the attendance of a paid nurse if his wife and daughter had not nursed him, and we think the gratuity was to him and that he is entitled to the benefit of it rather than the defendant.³⁹

The unjust result reached under the *Morris* rule stems not from the rule itself, but from the presumption applied in conjunction with that rule. If services rendered by one member of a family for another were not presumed to be gratuitous, the proper result in these cases would be reached. If the liability of the recipient member of the family to the serving member were made contingent on recovery from the negligent outsider, the policy of attempting to preserve familial tranquility, which the presumption of donation was originally designed to effect, would be maintained. To allow recovery for services rendered by family members would be pure compensation uninfluenced by penal motives, because in a very real sense it is not only the injured individual who has been damaged but also the family unit as a whole; in such cases there has been no collateral source compensation.

The increase of social legislation in recent years has increased the importance of the problem of the effect on the measure of

38. 108 Mo. App. 708, 84 S.W. 199 (1904).

39. *Id.* at 712, 84 S.W. at 200.

damages of compensation received from governmental sources.⁴⁰ The question has not often arisen in Missouri, however. The few cases dealing directly with the subject have held that such compensation is not ground for mitigation.⁴¹ The case of *Dempsey v. Thompson*,⁴² however, decided that the defendant is entitled to have the jury instructed in a personal injury action that an award is not subject to federal or state income taxation and should not include an allowance for such taxes. If the income tax exemptions are considered as a passive form of governmental compensation, this ruling is an exception to the collateral source doctrine. It is, however, a correct implementation of the general theory that damages in negligence cases are purely compensatory.

Although a possibly unconscious penal motive may appear in some of the cases, it cannot be said that the Missouri courts have demonstrated a consistent preference for either the compensatory or the penal motive in the collateral source cases. The inconsistency is most strikingly shown by a comparison of the rule in the *Moon* case⁴³ with the rule in the *Morris* case.⁴⁴ Under the *Moon* rule the fact that the compensation from the collateral source is gratuitous *allows* the plaintiff to recover the amount of that compensation. Under the *Morris* rule the fact that the compensation from the collateral source is gratuitous *prohibits* the plaintiff from recovering the amount of that compensation. It may be that the amount of compensation received from the col-

40. Note, 63 HARV. L. REV. 330 (1949).

41. *Hilton v. Thompson*, 360 Mo. 177, 227 S.W.2d 675 (1950); *Gould v. Chicago, B. & Q. R.R.*, 315 Mo. 713, 290 S.W. 135 (1926). In *Burens v. Wolfe Wear-U-Well Corp.*, 236 Mo. App. 892, 158 S.W.2d 175 (1942), which was not a personal injury action, the court said:

. . . Furthermore, it would not have been proper for defendant to plead and prove unemployment compensation received by plaintiff. Such compensation is not a proper subject of mitigation. It is a grant allowed according to a beneficent economic policy of the State, designed to alleviate adversity and promote the public welfare. It is not earned income of a recipient during a period of unemployment to be used in mitigation or a wrong responsible for the loss of employment. A wrongdoer cannot diminish his liability to the extent of such contributions, nor will he be permitted to benefit by payments made to the injured person from collateral sources, whether in compensation or as gratuities.

Id. at 898, 158 S.W.2d at 178, 179. The tort involved in the case was intentional.

42. 251 S.W.2d 42 (Mo. 1952).

43. See note 18 *supra*.

44. See note 34 *supra*.