THE COLLATERAL SOURCE RULE AND STATE-PROVIDED SPECIAL EDUCATION AND THERAPY

I. INTRODUCTION

Two years ago, Jane and John Doe had a child[1] who suffered from oxygen deprivation during childbirth.[2] The lack of oxygen at this critical time caused the child to suffer severe mental retardation and cerebral palsy.[3] Jane and John have filed a medical malpractice action against the doctor who delivered their child.[4] The Does' complaint alleges that the doctor negligently failed to diagnose and treat their child's fetal distress. A portion of the damages the Does seek from the doctor are to cover the expenses associated with providing their child with the special education and therapy that he will require throughout his school-age years.

Assuming the Does are successful in their malpractice claim, under the traditional application of the collateral source rule[5] they will be entitled to recover damages for the cost of special education and therapy—despite the fact that their state of residence provides, as a matter of right, free special

---

1. Courts have considered the applicability of the collateral source rule to free, state-provided special education and therapy in seven cases. *See infra* notes 74-114. This hypothetical is based on a compilation of facts from five of the seven cases. The remaining two cases considering the collateral source rule in this context involved injuries to young children. The age of these plaintiffs and the enormous cost of providing them with special education until they reach adulthood make the application of the collateral source rule to free, state-provided special education and therapy a crucial factor in determining the amount of the plaintiff's recovery for economic damages.

2. Commonly referred to as oxygen deprivation, fetal anoxia or intrauterine asphyxia may result from a "prolapse of the [umbilical] cord, placenta abruption, [or] compression of the umbilical vein." AGNES C. FRENAY & ROSE M. MAHONEY, UNDERSTANDING MEDICAL TERMINOLOGY, 298 (9th ed. 1993).

3. A full discussion of the link between oxygen deprivation, mental retardation and cerebral palsy is beyond the scope of this Note. For purposes of this hypothetical, the traditional view that such a causal link exists is presumed. For an opposing view, see David G. Duff, *Compensation for Neurologically Impaired Infants: Medical No Fault in Virginia*, 27 HARV. J. ON LEGIS. 391, 395 (1990) (noting that a "reassessment" of the traditional view is necessary in light of recent medical research).

4. This hypothetical assumes that the state where the Does live has not adopted a no-fault system of compensation for neurologically impaired infants suffering severe mental injuries during childbirth. Several states, including Virginia have adopted such a system. For a discussion of the Virginia approach, see *id.*

5. The traditional approach has been followed by five of the seven jurisdictions considering the application of the collateral source rule to free, state-provided special education and therapy. *See infra* notes 74-102 and accompanying text.

education and therapy to all disabled children.[6] Moreover, under the traditional application of the collateral source rule, no evidence relating to the existence of the free, state-provided services will be admissible at trial if it is offered to mitigate the damages suffered by the Does.[7] Rather, the only evidence the jury may consider when computing the damages will be the expenses associated with providing special education and therapy for the child in a private educational institution for children with disabilities.[8] Furthermore, under the collateral source rule, the Does will be entitled to recover the reasonable cost of providing special education and therapy for their child even if they intend to avail themselves of the special education and therapy the state will provide to their child at no cost.[9]

This Note offers a critical analysis of the collateral source rule as it is applied to free, state-provided special education and therapy. Part II of this Note briefly introduces the collateral source rule and its application in a modern court. Part III provides a brief history of the collateral source rule and its development since its inception in the mid-nineteenth century. Part IV examines the various justifications and critiques offered for the collateral source rule. Part V discusses the few occasions that courts have examined the application of the collateral source rule to state-provided special education and therapy. Part VI presents a critical analysis of the application of the collateral source rule to state-provided special education and therapy. Finally, Part VII offers a proposal for dealing with the existence of free, state-provided services in cases where the plaintiff seeks an award of damages for the cost of special education and therapy.

II. DEFINITION AND OPERATION OF THE COLLATERAL SOURCE RULE

In its most basic form, the "collateral source rule provides in general that compensation received from a third party will not diminish the recovery

---

6. The right of a child with disabilities to receive free, state-provided special education and therapy is mandated by federal statute. *See* 20 U.S.C. § 1412 (1990). The statute provides that to receive federal funding, states must assure "all children with disabilities the right to a free appropriate public education . . . available for all children with disabilities between the ages of three and twenty-one . . . regardless of the severity of their disability . . . ." *Id.*

In accord with federal law, most states also have laws guaranteeing children with disabilities free, state-provided special education and therapy. For an example of one of these statutes, see *infra* note 86.

7. *See infra* notes 17-18 and accompanying text.

8. *See infra* note 76 and accompanying text.

9. *See infra* note 82 and accompanying text.

against a wrongdoer."[10] Section 920A(2) of the *Restatement (Second) of Torts* states the rule in similar terms: "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."[11]

No matter what precise language is used to define the rule, most courts and commentators characterize the collateral source rule as functioning *both* as part of the substantive law of damages *and* as a "rule" of evidence.[12] Although this characterization has caused some confusion,[13] it is nevertheless an accurate description of the role the collateral source rule plays in most jurisdictions which apply the rule.[14]

---

10. Hubbarb Broadcasting, Inc. v. Loescher, 291 N.W.2d 216, 222 (Minn. 1980).

11. RESTATEMENT (SECOND) OF TORTS § 920A(2) (1977); *See also* Kistler v. Halsey, 481 P.2d 722, 724 (Colo. 1971) ("[C]ompensation or indemnity received by an injured party from a collateral source, wholly independent of the wrongdoer . . . will not diminish the damages otherwise recoverable from the wrongdoer.").

12. *See, e.g.*, Richard C. Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669, 675 (1962); Robert A. Sedler, *The Collateral Source Rule and Personal Injury Damages: The Irrelevant Principle and the Functional Approach*, 58 KY. L.J. 36, 41 (1969). *But see*, Joel K. Jacobsen, *The Collateral Source Rule and the Role of the Jury*, 70 OR. L. REV. 523, 525-526 (1991). Jacobsen eschews as "hermaphroditic" the traditional notion that the collateral source rule is both part of the substantive law of damages and a rule of evidence. *Id.* Instead, Jacobsen argues that "properly analyzed, the collateral source rule is a substantive rule of damages and not a rule of evidence." *Id.*

13. *See* Jacobsen, *supra* note 12, at 525 (noting that classification of the collateral source rule as a rule of evidence would appear to make the collateral source rule "an exception to Federal Rule of Evidence 101 . . . and the *Erie* doctrine" which mandates "that federal law govern[] evidentiary questions in federal courts").

14. Although most jurisdictions apply the rule in its traditional form, incorporating both the substantive and evidentiary components, some jurisdictions have retained the substantive aspect of the rule—prohibiting the outright deduction of collateral source benefits while abandoning the rule's evidentiary component. In these jurisdictions, the defendant is entitled to introduce evidence that all or a portion of the plaintiff's damages were paid by a collateral source. The plaintiff is then entitled to introduce evidence about the cost to obtain the collateral source benefit (in most situations this evidence will be of paid insurance premiums). The fact finder is then entitled to consider this evidence in calculating the plaintiff's damages, but is not required to summarily reduce the plaintiff's award by the amount of the collateral benefits. This approach to the collateral source rule typically applies when a plaintiff seeks damages for medical or hospital expenses. See, for example, ALA. CODE § 12-21-45 (1995), which provides:

> (a) In all civil actions where damages for any medical or hospital expenses are claimed and are legally recoverable for personal injury or death, evidence that the plaintiff's medical or hospital expenses have been or will be paid or reimbursed shall be admissible as competent evidence. In such actions upon admission of evidence respecting reimbursement or payment of medical or hospital expenses, the plaintiff shall be entitled to introduce evidence of the cost of obtaining reimbursement or payment of medical or hospital expenses.

Id.

As part of the substantive law of damages, the collateral source rule dictates that compensation received from a source wholly independent from the tortfeasor[15] will not be deducted from the plaintiff's recovery from the tortfeasor.[16] In furtherance of this objective, the collateral source rule also incorporates an evidentiary component, which precludes the introduction of evidence relating to any benefits the plaintiff may have received from a collateral source, when offered by the tortfeasor to mitigate[17] the amount of damages suffered.[18]

---

15. The collateral source rule only applies if the source of the benefit is wholly independent of the tortfeasor. The rule has no application if the tortfeasor or a person acting on behalf of the tortfeasor makes payments to the plaintiff to compensate him for the injuries he sustained. In this situation, the tortfeasor is entitled to a *pro tanto* reduction of the plaintiff's damage award. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §920A(1) (1977) ("A payment made by a tortfeasor or by a person acting for him to a person whom he has injured is credited against his tort liability, as are payments made by another who is, or believes he is, subject to the same tort liability.").

16. For example, in a case where the plaintiff recovers $100 from the tortfeasor for injuries sustained as a result of the tortfeasor's negligence, the tortfeasor is not entitled to have the judgment reduced to $75 where the plaintiff's medical insurer paid medical bills of $25. Rather, under the traditional application of the collateral source rule, the plaintiff is entitled to recover the full $100 from the tortfeasor.

17. The evidentiary component of the collateral source rule only precludes a plaintiff from offering evidence of collateral source benefits to mitigate the amount of damages the plaintiff suffered. The collateral source rule does not preclude the defendant from offering evidence that the plaintiff received collateral source benefits when this evidence is offered for purposes other than to mitigate the amount of damages the plaintiff suffered. For example, in *Moore v. Missouri Pacific R.R. Co.*, 825 S.W.2d 839, 842-843 (Mo. 1992), the court allowed the defendant to introduce evidence of collateral benefits received to rebut the plaintiff's contention that the defendant's conduct caused the plaintiff to suffer financial distress which precluded him from continuing medical treatment. The court held "the raising of plaintiff's financial condition . . . permits the opposing party to attack [the plaintiff's] claims of financial distress by showing that other financial assistance was available." *Id.* at 843. Similarly, where the plaintiff is seeking damages for lost wages and there is evidence that the plaintiff has been malingering in (i.e., not returning to work because of payments from collateral sources such as unemployment compensation and social security benefits), evidence of the collateral payments is admissible. *See, e.g.*, Corsetti v. Stone Co., 483 N.E.2d 793, 802 (Mass. 1985).

18. Although this evidentiary component may appear similar to the substantive law of damages component discussed above, a closer examination reveals a significant difference. While the substantive component of the collateral source rule precludes an outright deduction of the amounts received from the collateral source, the evidentiary component of the collateral source rule precludes the defendant from offering evidence that the plaintiff has received a benefit from a collateral source—evidence that could mitigate the amount of damages that the plaintiff has suffered. Thus, the collateral source rule effectively precludes a defendant from offering evidence that the plaintiff never really suffered the damages claimed because those damages were reimbursed by a collateral source. At least one commentator has focused on this component of the collateral source rule as an invasion of the province of the jury and its fact finding role. *See* Jacobsen, *supra* note 12 at 541.

III. HISTORY AND DEVELOPMENT OF THE COLLATERAL SOURCE RULE

Most commentators agree that the collateral source rule[19] traces its roots to an 1854 Supreme Court case, *The Propeller Monticello v. Mollison*.[20] The date of this decision is important for two reasons. First, the date provides the collateral source rule with almost one hundred and fifty years of precedental value— a factor that has made abolition or even modification of the rule a difficult process.[21] Second, the date of the decision provides the context for understanding a rule which, at first glance, appears to be far removed from modern notions of the proper functioning of the tort system.[22]

---

19. The term "collateral" was first used to describe the benefit conferred upon the plaintiff by a third party in *Harding v. Town of Townsend*, 43 Vt. 536, 538 (1871) (holding proceeds of plaintiff's liability insurance should not reduce the amount of damages the plaintiff was entitled to recover from the defendant). *See* Albert Averbach, *The Collateral Source Rule*, 21 OHIO ST. L.J. 231, 233 (1960).

20. 58 U.S. (17 How.) 153 (1854). *The Propeller Monticello* arose from a collision on Lake Huron between the propeller and a schooner—both carrying cargo. The schooner, which sank, was insured. The insurer accepted the abandonment of the schooner and paid its owners for the loss. *Id.* at 153-156. In a subsequent tort action brought by the schooner's owner, the steamship owner argued that an insurance pay-off released it from liability. *Id.* The Supreme Court disagreed:

> 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.

Id. at 157-60; *see, e.g.*, Deana A. Goldsmith, *A Survey of the Collateral Source Rule: The Effects of Tort Reform and Impact on Multistate Litigation*, 53 J. AIR L. & COM. 799 (1988); Maxwell, *supra* note 12, at 671 n.6. *But* see, Jacobsen, *supra* note 12, at 527. Jacobsen argues that scholars tracing the collateral source rule to *The Propeller Monticello* are incorrect. *Id.* Rather, Jacobsen maintains that *The Propeller Monticello* simply abolished the common-law rule that releasing one tortfeasor from liability was a bar against seeking recovery from a joint-tortfeasor. *Id.* Jacobsen points out that the defendant in *The Propeller Monticello* "did not raise the issue of insurance proceeds as mitigation, but rather as a total defense." *Id.; cf.* O'Connor, *"Collateral Source" Rule and Full Special Damages*, 1957 TRIAL & TORT TRENDS, 642, 645 (suggesting that *Althorf v. Wolfe*, 22 N.Y. 355 (1860), was the first American case to apply the collateral source rule).

21. Even though the collateral source rule has been the subject of abundant criticism from academics and students alike, *see, e.g.*, Charles W. Peckinpaugh, Jr., *An Analysis of the Collateral Source Rule*, 1966 INS. L.J. 545; Note, *Unreason and the Law of Damages*, 77 HARV. L. REV. 741 (1964) (frequently cited student piece critical of the collateral source rule), its proponents are no less passionate in their defense of the rule; *see* Thomas F. Lambert, Jr., *The Case for the Collateral Source Rule*, 1966 INS. L.J. 531 (arguing that the collateral source rule "must be protected not only against frontal assault but against the erosions of side-door evasions and back-door intrusions"); *see also* Maxwell, *supra* note 12, at 695 ("At its best, in some cases, [the collateral source rule] operates as an instrument of what most of us would be willing to call justice.".) There is no doubt that intense passion on both sides has forced even legislatures hostile to the collateral source rule to modify or abrogate the rule only in specific types of actions or for specific types of damages. For a discussion of the various approaches taken by state legislatures in statutes abolishing or modifying the collateral source rule, see Michael Flynn, *Private Medical Insurance and the Collateral Source Rule: A Good Bet?*, 22 U. TOL. L. REV. 39, 49-64 (1990).

22. Traditionally the tort system was thought of as having two primary goals: 1) just and fair

The collateral source rule developed at a time when the various collateral sources available to assist today's plaintiff were almost completely unknown.[23] "People paid their medical bills out of private funds or savings, or a member of the family paid for them. . . . Those who were unable to pay were treated in the 'poor ward' of a hospital or at a 'charity' hospital . . . ."[24] Moreover, the existing theories of recovery upon which an injured plaintiff could base her claim for damages made it clear that the tortfeasor was thought of as a "wrongdoer" deserving to pay for the harm that she caused.[25]

From a plaintiff's perspective, the attractiveness of such a rule was readily apparent. The collateral source rule has been articulated as follows:

> Where a part of the wrongdoer's liability is discharged by payment from a collateral source . . . the question arises who shall benefit therefrom, the wrongdoer or the injured person. No reason in law, equity or good conscience can be advanced why a wrongdoer should benefit from part payment from a collateral source of damages caused by his wrongful act.[26]

---

compensation of the injured party and 2) deterrence of wrongful or negligent conduct. The continued validity of these goals has been the subject of debate in light of the rise in the availability of liability insurance and social welfare programs. *See infra* notes 63-65 and accompanying text.

23. *See* James D. Ghiardi, *The Collateral Source Rule: Multiple Recovery in Personal Injury Actions*, 1967 INS. L.J. 457, 458. An example of a typical collateral source problem faced by nineteenth century courts was as follows:

> The plaintiff, an elderly woman of modest means, was injured by the clear negligence of defendant's servant. It is probable that the defendant did not carry liability insurance . . . The plaintiff needed medical and nursing care as a result of her injuries, so her two sons came from out of state to care for her. Their services were performed gratuitously. At the trial, the tortfeasor asked the court to not allow the jury to award the plaintiff the "reasonable compensation for nurse hire and attendance" since she had received these services for free from her sons.

Banks McDowell, *The Collateral Source Rule--The American Medical Association and Tort Reform*, 24 WASHBURN L.J. 205, 207 (1985) (footnote omitted). The trial court was then faced with the choice of denying the plaintiff a significant portion of her damages or making the tortfeasor answer for the injuries his servant caused. Given this choice, the decision was relatively easy. *Id.* at 207-08.

24. Sedler, *supra* note 12, at 39.

25. *Id.* In the latter part of the nineteenth century, a tortfeasor would only be liable if found negligent "under the rather strict concepts of negligence that existed . . . and if the plaintiff was not barred by contributory negligence, assumption of the risk, the fellow-servant rule, or one of the other liability-limiting devices developed . . . to protect the new industrial enterprises." *Id.* Moreover, the general unavailability of liability insurance meant the deterrent goal of the tort system would be furthered as the defendant who was forced to pay the full amount of the plaintiff's damages, even though a portion of those damages were offset by a collateral source, quickly realized the negative consequences of her actions. *Id.*

26. Grayon v. Williams, 256 F.2d 61, 65 (10th Cir. 1958) (holding that the plaintiff could recover the reasonable value of medical and hospital expenses plus charges of special nurses, even though the

There can be no doubt that this articulation, as well as the ability to provide compensation to injured plaintiffs, led to a rapidly expanding application of the collateral source rule.[27] Courts applied the collateral source rule to the following: payments to the plaintiff by insurers,[28] benefits provided by employers,[29] gratuitous services,[30] damages due regardless of a widow's remarriage to a wealthier husband,[31] savings from the tax- free status of compensatory damages,[32] and various services provided by governmental

---

special nurses were paid for by a hospital association to which plaintiff contributed).

27. While the application of the collateral source rule most commonly arises in the context of a plaintiff who has brought a tort action against the defendant, the rule has also been employed in breach of contract cases, *see* John G. Fleming, *The Collateral Source Rule and Contract Damages*, 71 CAL. L. REV. 56 (1983) (arguing that the difference in policies underlying contract and tort does not by itself justify the reluctance to use the collateral source rule in contract cases), civil rights actions brought under section 1983, *see* Linda L. House, *Section 1983 and the Collateral Source Rule*, 40 CLEV. ST. L. REV. 101 (1992) (discussing the different treatments the collateral source rule receives in various state and federal courts considering the application of the rule in civil rights actions), and employment discrimination actions brought under Title VII of the Civil Rights Act of 1964, *see* Thomas W. Lee, *Deducting Unemployment Compensation and Ending Employment Discrimination: Continuing Conflict*, 43 EMORY L.J. 325 (1994) (examining whether unemployment compensation is truly collateral to the defendant employer in an employment discrimination case where the employer has made payments to the unemployment compensation fund).

28. Although the collateral source rule expanded into other areas, payments by the plaintiff's insurer to the plaintiff that cover a portion of her damages, most commonly medical expenses, still represent the most common situation in which the application of the collateral source rule arises. This fact has made abolishing or modifying the collateral source rule an important goal of those seeking to reform the U.S. health care system. *See infra* note 49.

29. The issue of collateral source benefits arises in the context of employment benefits when an employer continues to make payments to an employee who has been injured by the conduct of a third party and is unable to work. Typical of these types of employer provided collateral benefits are paid vacation and paid sick-days. Many cases address the collateral source rule in these contexts. *See, e.g.*, Lewis v. County of Contra Costa, 278 P.2d 756 (Cal. Ct. App. 1955) (sick leave); Hawthorne v. Southeastern Fid. Ins. Co., 387 So. 2d 26 (La. Ct. App. 1980) (vacation time); McCary v. Caperton, 601 So. 2d 866 (Miss. 1992) (sick leave); Amiker v. Brakefield, 473 So. 2d 939 (Miss. 1985); Ellard v. Harvey 231 S.E.2d 339 (W. Va. 1976) (sick leave); Fisher v. Thompson, 275 S.E.2d 507 (N.C. Ct. App. 1981) (sick leave).

30. When the collateral source rule is applied to gratuitous services, the plaintiff is usually permitted to recover the reasonable value of the services rendered even though she incurred no cost. *See* Cates v. Wilson, 361 S.E.2d 734, 739 (N.C. 1987) (plaintiff entitled to recover value of medical services provided for free by family member); Scott v. Southern Ry. Co., 97 S.E.2d 73, 76 (S.C. 1957) (automobile furnished to plaintiff for free while his vehicle was repaired); Degen v. Outboard Marine Corp., 241 N.W.2d 703, 708 (S.D. 1976) (plaintiff entitled to recover for medical bills even though his parents paid the bills).

31. As divorced from modern concepts as this may appear, defendants in earlier times attempted to argue that a widow's remarriage to a wealthier husband reduced the amount of damages she was entitled to recover for the death of her husband. This argument was universally rejected by the courts. *See, e.g.*, Bunda v. Hardwick, 138 N.W.2d 305, 308 (Mich. 1965); Moore v. Ready Mixed Concrete Co., 329 S.W.2d 14, 21 (Mo. 1959).

32. One commentator has called this a "very important" but "indirect" application of the

agencies.[33]

While the early and middle part of this century saw the judicial application of the collateral source rule expand,[34] beginning in the 1970s the collateral source rule became the prime target of state legislatures looking for a way to check the rising costs of medical malpractice insurance.[35] Numerous states enacted statutes eliminating or qualifying the collateral source rule.[36] Although these legislative attempts to encroach upon the collateral source rule have not met with complete success,[37] the abolition or modification of the

---

collateral source rule. *See* Lee R. West, *The Collateral Source Rule Sans Subrogation: A Plaintiff's Windfall*, 16 OKLA. L. REV. 395, 405 (1963). In this situation the collateral source rule operates in the following manner: Under section 104(a)(2) of the Internal Revenue Code, damages for personal injuries, even damages for lost wages are tax free. 26 U.S.C. § 104(a)(2) (1994). Thus, defendants sought to have a plaintiff's award of damages for lost wages reduced to reflect what the plaintiff would have received had the money been earned and hence subject to income tax. The majority of courts addressing this issue have held that the plaintiff's award should not be reduced. *See, e.g.*, Mitchell v. Emblade, 298 P.2d 1034, 1037 (Ariz. 1956); Hall v. Chicago & N.W. Ry. Co., 125 N.E.2d 77, 85 (Ill. 1955).

33. The collateral source rule has been applied to benefits received by plaintiffs from various governmental agencies and social programs including: Social Security, *see, e.g.*, Allen v. Louisiana, 535 So. 2d 903, 913 (La. Ct. App. 1988); Pacesetter Corp. v. Barrickmen, 885 S.W.2d 256, 260 (Tex. Ct. App. 1994); Medicaid and Medicare, *see, e.g.*, Williamson v. St. Francis Medical Center, Inc., 559 So. 2d 929, 934 (La. Ct. App. 1990); Badgett v. Davis, 411 S.E.2d 200, 202 (N.C. Ct. App. 1991); and veteran's benefits, *see, e.g.*, Hudson v. Lazurus, 217 F.2d 344, 347 (D.C. Cir. 1954) (collateral source rule applied to plaintiff's treatment at a Veteran's hospital). *See also* RESTATEMENT (SECOND) OF TORTS § 920A cmt. (4)(c) (1977) ("Social legislation benefits, welfare payments, pensions under special retirement acts, all are subject to the collateral-source rule.").

34. *See supra* notes 28-33 and accompanying text.

35. For a discussion of the reform-minded state legislatures' goals and the various steps undertaken to achieve those goals, see Eleanor D. Kinney, *Malpractice Reforms in the 1990's: Past Disappointments, Future Successes?*, 20 J. HEALTH POL. POL'Y & L. 99 (1995).

36. *See* Flynn, *supra* note 21, at 49-64. Flynn classifies legislative actions attempting to reform the operation of the collateral source rule into four categories: 1) statutes which provide that the plaintiff's recovery from the defendant must be reduced by the amount of the collateral source benefits; 2) statutes that permit the admission of facts that the plaintiff has received collateral source benefits to mitigate the amount of damages the plaintiff has suffered into evidence; 3) statutes which narrow the description of recoverable damages to those damages not payable by a collateral source; and 4) the use of automobile no-fault insurance systems which specifically provide for the "admission and use of collateral source benefits to reduce any tort recovery by an injured party." *Id.* at 64.

37. A number of the state statutes modifying or abrogating the collateral source rule have encountered serious constitutional obstacles. *See generally*, Faye L. Ferguson, Note, *Equal Protection Challenges to Legislative Abrogation of the Collateral Source Rule*, 44 WASH. & LEE L. REV. 1303 (1987). The bulk of these challenges were based on the argument that abolishing or modifying the operation of the collateral source rule for only a particular class of plaintiffs or defendants violated the Equal Protection Clause of the Fourteenth Amendment *Id.* at 1306-07. Ferguson noted that the constitutionality of the statutes depended on the level of scrutiny the particular court chose to use. *Id.* at 1330; *see also* Christopher J. Eaton, Comment, *The Kansas Legislature's Attempt to Abrogate the Collateral Source Rule: Three Strikes and They're Out?*, 42 KAN. L. REV. 913 (1994) (discussing

collateral source rule remains a central focus of those seeking to reform not only the tort system,[38] but also the health insurance system in the United States.[39]

IV. JUSTIFICATIONS AND CRITICISMS OF THE COLLATERAL SOURCE RULE

Courts and commentators have generally advanced four justifications or rationales for the collateral source rule.[40] Each of these justifications has been the subject of vigorous attacks by opponents of the rule.[41]

A. Benefit of the Bargain Rationale

One of the most common arguments in support of the collateral source rule is that the plaintiff should not be denied the benefit of contractual arrangements he has made with third parties for compensation in the event of a loss.[42] This rationale for the rule frequently arises where the plaintiff has purchased some form of an insurance policy.[43] Proponents of the collateral

---

three separate occasions when the Kansas Supreme Court declared the Kansas statute unconstitutional); Julie A. Schafer, Note, *The Constitutionality of Offsetting Collateral Benefits Under Ohio Revised Code Section 2317.45*, 53 OHIO ST. L.J. 587 (1992); Calvin R. Wright, Note, *The Collateral Source Rule in Georgia: A New Method of Equal Protection Analysis Brings a Return to the Old Common Law Rule*, 8 GA. ST. U. L. REV. 835 (1992).

38. *See* Martha Middleton, *A Changing Landscape*, 81 A.B.A. J. 56 (1995) (discussing proposed federal reforms of the tort system and noting that since 1986 eight states have focused on the abolition or modification of the collateral source rule as a key reform).

39. Abolition of the collateral source rule is seen by many as a key ingredient in containing health care costs in the United States. Many reformers believe the collateral source rule causes an upward pressure on medical malpractice premiums which in turn causes an increase in health care costs. For a discussion of the various legal reforms linked to health care reforms, see Christopher S. Kozak, *A Review of Federal Medical Malpractice Tort Reform Alternatives*, 19 SETON HALL LEGIS. J. 599 (1995). The Health Security Act, proposed by the Clinton presidency in 1993, contained provisions to reform medical malpractice— including the abolition of the collateral source rule. *See* S. 1757, 103rd Cong. (1993).

40. *See infra* notes 42-73 and accompanying text.

41. *See infra* notes 42-73 and accompanying text.

42. *See, e.g.*, Rexroad v. Kansas Power & Light Co., 388 P.2d 832, 842 (Kan. 1964) ("The reasons generally given for the rule are that the contract of insurance and the subsequent conduct of the insurer and insured in relation thereto are matters with which the wrongdoer has no concern and which do not affect the measure of his liability.") (citation omitted).

43. The desire to protect the benefit of the plaintiff's bargain with an insurance company has led one commentator to classify this rationale as the "foresight theory." *See* West, *supra* note 32, at 413. Under this theory, the plaintiff should not be punished for his "foresight" in obtaining insurance to protect himself by the reduction of his award from the tortfeasor to account for the proceeds of the insurance policy. *Id.* Closely related to the "foresight theory" is the notion that the collateral source rule encourages the socially useful practice of individuals maintaining private insurance policies. *See,*

source rule argue that allowing the defendant to offset the amount that the plaintiff has received from these sources would "deny" the plaintiff the benefit of the bargain for which he contracted.[44]

Critics of the collateral source rule have attempted to undermine the benefit of the bargain rationale by pointing out its inherent weaknesses. One commentator has noted that in purchasing insurance purchasers contract for the security that insurance provides in the event that their injuries are otherwise uncompensable.[45] Purchasers are not wagering on the possibility that they might realize a double recovery through the application of the collateral source rule.[46] Moreover, while some commentators recognize the legitimate end of protecting the plaintiff's investment in insurance, they point out that providing the plaintiff's insurer with a right of subrogation[47] would both protect this investment in insurance and avoid the taboo of a "double-recovery" for the plaintiff.[48] Others advocate abrogating the collateral source

---

e.g., Helfend v. Southern Cal. Rapid Transit Dist., 465 P.2d 61, 66 (Cal. 1970) (en banc) ("The collateral source rule expresses a policy judgment in favor of encouraging citizens to purchase and maintain insurance for personal injuries and for other eventualities.").

44. *See* Jacobsen, *supra* note 12, at 523. While voicing his own criticisms of the collateral source rule, Jacobsen acknowledges that critics who base their attacks solely upon the grounds that the plaintiff's recovery is more than his out-of-pocket expenses overlook the "[collateral source] rule's legitimate function of protecting the plaintiff's investment in insurance." *Id.* The same logic that is used in the benefit of the bargain rationale is similar to the reasoning that allows for the application of the collateral source rule to benefits rendered to the plaintiff gratuitously with a slightly different twist. In cases of services or benefits rendered gratuitously, the justification for applying the collateral source rule is that to do otherwise would not only deprive the plaintiff of an intended gift, but also frustrate the intent of the donee who intended to confer the gift on the plaintiff and not upon the tortfeasor. *See* Lambert, *supra* note 21, at 543.

45. *See* Note, *supra* note 21, at 751. The author asserts that in purchasing insurance, the plaintiff purchased the security of "prompt and sure payments without the necessity of litigation and without regard to the liability and financial resources of prospective defendants." *Id.* Therefore, the author reasons that the application of the collateral source rule to insurance proceeds in cases where the defendant is capable of paying the judgment provides the plaintiff with more than he bargained for in purchasing insurance. *Id.*

46. *Id.*

47. *Black's Law Dictionary* defines subrogation as "[t]he substitution of one person in the place of another with reference to a lawful claim, demand or right . . . ." BLACK'S LAW DICTIONARY 1427 (6th ed. 1990).

48. In the context of the collateral source rule, subrogation would work as follows: *A* injures *B*. *B's* insurer, *C*, pays *B* for the losses he sustains. Subrogation would give *C* the legal right to recover the costs of *B's* injuries from *A*. This would prevent *B* from obtaining a windfall, while at the same time providing *B* and all insureds with reduced premiums because a portion of an insurance company's payouts would be recoverable. Moreover, in paying *C*, *A* would still be responsible for the full amount of the damages he caused *B* to suffer. For an article proposing the use of subrogation to alleviate the problems associated with the collateral source rule, see West, *supra* note 32, at 398. West's proposal is not limited to cases involving insurance. Rather, West argues that even providers of gratuitous benefits

rule, but in a manner which allows the plaintiff to recover from the tortfeasor the cost of obtaining the collateral benefit.[49] Still others assert that the benefit of the bargain rationale is inappropriate for some collateral sources— most notably government assistance and social programs.[50]

B. Legal Compensation Does Not Adequately Compensate the Plaintiff

Another argument commonly advanced in support of the collateral source rule is that legal compensation does not adequately compensate the plaintiff. This rationale was most clearly stated in *Hudson v. Lazarus*:[51]

> Legal "compensation" for personal injuries does not actually compensate. Not many people would sell an arm for the average or even the maximum amount that juries award for loss of an arm.

---

to the plaintiff receive a right of subrogation. *Id.* at 419. *See also* Ghiardi, *supra* note 23, at 463 ("If subrogation is employed, a plaintiff receives compensation once and not twice. And only one insurer pays the loss rather than two, as is the case when the collateral source rule is employed.").

However, the use of subrogation to alleviate some of the perceived problems with the collateral source rule has met with some sharp criticism. *See* McDowell, *supra* note 23, at 217-19. The notion that subrogation benefits everyone because it lowers insurance rates has also been the subject of debate. *See* Flynn, *supra* note 21, at 50 (arguing that empirical evidence suggests that in states were subrogation has been utilized, there has not been a decrease in insurance premiums).

49. This approach to modifying the collateral source rule has been embraced by many state legislatures searching for a way to reform the collateral source rule. Statutes generally abrogating the rule, but allowing the plaintiff to recover the cost of obtaining the collateral benefit, most typically insurance premiums, have been enacted in several states. *See, e.g.*, FLA. STAT. ANN. § 768.76(1) (1996). The statute provides:

> In any action to which this part applies in which liability is admitted or is determined by the trier of fact and in which damages are awarded to compensate the claimant for losses sustained, the court shall reduce the amount of such award by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to him, from all collateral sources . . . . Such reduction shall be offset to the extent of any amount which has been paid, contributed, or forfeited by, or on behalf of, the claimant or members of his immediate family to secure his right to any collateral source benefit which he is receiving as a result of his injury.

Id.

50. *See* Fleming, *supra* note 27, at 58 ("[b]enefits from a public source cannot be attributed either to the plaintiff's thrift or prescience. . ."); James A. Lorentzen & Ronald M. Rankin, *The Collateral Source Issue: Forging a Middle Ground*, 35 FED'N OF INS. COUNS. Q. 3, 21-22 (1984) ("A plaintiff receiving medicare or some other form of government assistance has not paid for the coverage as in the case of accident and health insurance."). Taking a slightly different perspective on the application of the collateral source rule, Richard Maxwell rejects the argument that the collateral source rule should not apply to benefits from social programs because the tortfeasor has contributed to those programs with his taxes making them not "wholly independent" sources. *See* Maxwell, *supra* note 12, at 689. He concluded that "[o]nly in the most indirect sense can the benefits be said to have been provided by the wrongdoer." *Id.*

51. 217 F.2d 344, 346 (D.C. Cir. 1954).

> Moreover the injured person seldom gets the compensation he "recovers", [sic] for a substantial attorney's fee usually comes out of it. There is a limit to what a negligent wrongdoer can fairly, i.e., consistently with the balance of individual and social interests, be required to pay. But it is not necessarily reduced by the injured person's getting money or care from a collateral source.[52]

Moreover, some proponents of the collateral source rule contend that in its attempt to assist plaintiffs obtain complete recovery, the rule actually encourages plaintiffs to forgo litigation and settle for less.[53]

The notion that applying the collateral source rule is justified because it helps the plaintiff obtain a full and complete recovery has been the subject of intense criticism.[54] Charles Peckinpaugh claims that this argument "is actually a criticism of our system of litigation, and more particularly [relies on the assumption] that a jury is incapable of performing its proper function of awarding full compensation to an injured plaintiff."[55] In a similar manner, opponents of the rule assert that this argument is really nothing more than an

---

52. *Id.*; *see also* Lambert, *supra* note 21, at 542. In his argument in support of the collateral source rule, Lambert notes: "Litigation at its best is inconvenient and at its worst, an ordeal, facts which should be considered when pondering the rejection of the collateral source rule. The conventional rules of damages allow no compensation for such inconvenience." *Id.* For Lambert and other proponents of the collateral source rule, one of the ways to compensate the plaintiff for this inconvenience is to follow the traditional application of the collateral source rule.

53. *See* Lorentzen & Rankin, *supra* note 50, at 11. The authors argue that "[t]he plaintiff is more likely to settle [for a smaller sum with the application of the collateral source rule because she knows] that [s]he has collateral sources from which to gain a full and complete recovery." *Id.* The authors conclude, however, that this argument, despite an element of truth, "hardly seems the proper foundation for the wide-ranging and pervasive way in which the collateral source rule has been applied." *Id.*

54. *See, e.g.*, McDowell, *supra* note 23, at 213. In criticizing the collateral source rule, McDowell labeled the under compensation/under payment of legal fees rationale as the only possible justification that can be advanced in light of the dramatic changes that the tort system has seen since the rule was originally developed. *Id.* McDowell then concludes that the application of the collateral source rule actually does not improve the position of the plaintiff, but instead forces her to pay more in legal fees. *Id.* at 213-15.

55. *See* Peckinpaugh, *supra* note 21, at 552. Peckinpaugh also contends that even as a device to account for the alleged undercompensation of plaintiffs the collateral source rule is a failure as the amount received from the collateral source rule is "fortuitous" and bears no relation to the actual amount a particular plaintiff is undercompensated. *Id.* Moreover, Peckinpaugh is quick to point out that the collateral source rule provides no assistance to a plaintiff who is undercompensated by our present system yet has no collateral source from which to recoup this loss. *Id.*; *see also* Ghiardi, *supra* note 23, at 461. In rejecting the collateral source rule, Ghiardi argues in similar terms that "[i]f we accept the premise that plaintiffs never are fully compensated, we should change the system to assure adequate compensation and not perpetuate a rule which overcompensates some and undercompensates others." *Id.*

unprincipled critique of the "American rule"[56] and hence an inappropriate justification for the collateral source rule.[57] Other critics attack this justification of the collateral source rule by arguing that juries recognize that the plaintiff must pay her legal fees and adjust the amount of the verdict accordingly.[58]

C. *The Wrongdoer Deserves to Pay/Any Windfall Should Go to the Plaintiff*

A third common argument in support of the collateral source rule is the contention that as the wrongdoer, the defendant deserves to pay.[59] Proponents of the collateral source rule taking this position contend that forcing defendants to bear the full cost of the damages they cause, furthers the tort system's goal of deterrence.[60] Recognizing that application of the collateral source rule will often provide the plaintiff with what critics call a windfall (i.e., recovery for damages already reimbursed or provided for by a collateral source), some supporters of the rule maintain that if there is any "windfall," it is better that it be bestowed upon the "innocent" plaintiff rather than the "guilty" defendant.[61]

---

56. Under the so-called "American rule" each party to the litigation is responsible for its own legal fees. In contrast, under the "English rule" the losing party in the litigation is charged with the responsibility of paying not only its own legal fees and costs, but also the legal fees and costs of the prevailing party. The abolition of the "American rule" in favor of the "English rule" has been the subject of intense debate among those seeking to reform the U.S. tort system. For a discussion of this issue, see Herbert M. Kritzer, *The English Rule*, 78 A.B.A. J. 54 (1992).

57. *See, e.g.*, Jacobsen, *supra* note 12, at 534. These critics point out that this argument in favor of the collateral source rule is really an attack on the "American rule" and argue that if the abolition of the "American rule" is necessary to reform the tort system, it should be openly abolished rather than "by subterfuge under the cover of collateral source rule." *Id.*

58. *See,* Note, *supra* note 21, at 750. The author argues that juries recognize that plaintiffs must pay legal fees and use awards of damages for pain and suffering to compensate plaintiffs for these added fees and costs. *Id.*

59. John G. Flemming, *The Collateral Source Rule and Loss Allocation in Tort Law,* 54 CAL. L. REV. 1478, 1483 (1966) (noting the common argument in favor of the collateral source rule is that "the defendant is a *wrongdoer* who should not be Alet off' from any portion of what is his*due* . . .") (emphasis added).

60. *See* Lambert, *supra* note 21, at 544. A staunch supporter of the collateral source rule, Lambert argues that "[i]f civil liability is a deterrent to accidents, then undiminished and unabated damages for wrongdoing should exert an even more admonitory pressure towards accident prevention." *Id.*

61. *See supra* note 51 and accompanying text; *see also* Flynn, *supra* note 21, at 67. In arguing for the continued application of the collateral source rule to medical insurance payments, Flynn claims that "[a]bsent the Collateral Source Rule the insured who receives medical benefits, the Awinnings' from payment of insurance premiums, loses his legal right to full compensation from a *guilty* tortfeasor." *Id.*

Critics of the collateral source rule attack this justification of the rule as being far detached from modern concepts of the proper functioning of the tort system.[62] They contend that the tort system has evolved in such a way to prevent defendants, even defendants who have been found civilly liable, from being considered "guilty" or "wrongdoers."[63] Many commentators also contend that the increasing use and availability of liability insurance, coupled with the rise of the modern welfare state, has shifted the primary focus of the tort system away from deterrence and towards compensation.[64] These commentators argue that a key component of a system that strives for fair and just compensation is the mitigation of damages,[65] which the collateral source rule fundamentally undermines by allowing the plaintiff to recover for damages he really never suffered.[66]

D. Evidence of Collateral Source Benefits Will Prejudice and Confuse the Jury

The collateral source rule generally precludes the introduction of evidence relating to payments or services provided to the plaintiff by collateral

---

(emphasis added).

62. *See* West, *supra* note 32, at 412. West claims that the punitive aspect of the collateral source rule is a "historical hangover from the days when torts and crimes were administered by the same court and in the same action." *Id.*

63. *See* Lorentzen & Rankin, *supra* note 50, at 6 (arguing that "in today's complex litigation—where manufacturers can be found liable without proof of fault and where culpable plaintiffs can collect under comparative negligence . . . the concept that defendants deserve to pay because they are at fault in causing injury is fallacious in many cases").

64. *See,* Flemming, *supra* note 59, at 1547-48; *see also* Sedler, *supra* note 12, at 46. Sedler argues that wrongdoers today do not act morally wrong, but rather the basis of modern liability "is really that it is an efficient loss distributor." *Id.* Proponents of this view note that by focusing on "loss distribution" the modern tort system recognizes the impact liability insurance has had in diminishing the ability to deter conduct with monetary damages. These authors point out that individual tortfeasors shift the major burden of the loss to their liability insurance carriers. While the tortfeasor may realize a slight increase in insurance premiums, the "real cost will be spread out to all insureds of the defendant's class." *See* Flynn, *supra* note 21, at 48-49; *see also* McDowell, *supra* note 23, at 210.

65. The principle of mitigation is clearly embodied in the RESTATEMENT (SECOND) OF TORTS §920 (1977) which states:

> When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.

66. The prospect of a "windfall" or "double-recovery" for the plaintiff led one critic to argue that the collateral source rule should be named the "double-recovery rule." *See* Ghiardi, *supra* note 23, at 457 (arguing that "the collateral source rule exists as an anomaly in the law of personal injury reparations which should be excised").

sources.[67] This prohibition on the introduction of collateral source evidence is thought to protect the plaintiff in two ways. Most importantly, the prohibition aims to prevent the jury from using the collateral source evidence to reduce the amount of the plaintiff's award.[68] Additionally, particularly in regard to future and continuing collateral source benefits, the prohibition on the introduction of evidence relating to collateral source payments is designed to prevent jury confusion.[69]

Joel Jacobsen, one of the staunchest critics of evidence exclusion relating to collateral source benefits, maintains that the collateral source rule has a "tendency to diminish the jury's fact-finding role by concealing facts relevant to the calculation of damages."[70] Other commentators have interpreted the evidentiary exclusion as evincing a lack of public support for the collateral source rule.[71] Moreover, critics of the collateral source point out that the introduction of future or contingent collateral source benefits is simply the product of a system in which all damages must be sought in one action.[72] They further contend that such evidence is no more confusing to a jury than other types of complicated evidence which the jury is already forced to consider.[73]

---

67. *See supra* notes 17-18 and accompanying text.

68. *See* Peckinpaugh, *supra* note 21, at 551. This argument is presumably based on the assumption that the jury would consider the evidence of the collateral source payments as an indication that the plaintiff did not suffer the full amount of the damages claimed. The jury would likely use this information to reduce the amount of the plaintiff's recovery in violation of the collateral source rule. *Id.*

69. *Id.* at 554 (discussing the argument that the jury will be confused by the introduction of evidence of collateral source benefits and the tax free status of compensatory damages); *see also supra* note 32. The notion that the jury may become confused if exposed to evidence of collateral sources is applicable to any item of damages involving uncertainty to future collateral benefits. Several courts addressing the issue of the applicability of the collateral source rule to free, state- provided special education and therapy have focused on this argument in their decisions to apply the rule. *See infra* note 95 and accompanying text.

70. *See* Jacobsen, *supra* note 12, at 523.

71. *See* Lorentzen & Rankin, *supra* note 50, at 7. In analyzing this aspect of the collateral source rule, the author states that "[t]he public at large must feel or believe that the collateral source rule is unjustified; otherwise there would be no concern about keeping collateral source information away from the jury." *Id.*; *see also* Peckinpaugh, *supra* note 21, at 551.

72. *See* Sedler, *supra* note 12, at 43 ("The plaintiff must recover all damages, past and prospective, in a single action, and we are making no more than a guess--only to some extent, an educated guess--as to what they are.").

73. Critics point out that juries are already required to decide the outcome of very complex issues whose resolution often depends on evidence with which the jury is wholly unfamiliar. *See,* Peckinpaugh, *supra* note 21, at 554. These types of situations often arise in complex cases such as medical malpractice or toxic tort actions. *Id.* Moreover, the estimation of future losses is simply a product of our jury system which requires that all damages be reduced to their present value. *Id.*

V. COURTS CONSIDERING THE APPLICATION OF THE COLLATERAL SOURCE RULE TO STATE- PROVIDED SPECIAL EDUCATION AND THERAPY

A. Majority Approach

In *Healy v. White,* the Supreme Court of Connecticut was the first to address the application of the collateral source rule to state-provided special education and therapy.[74] In *Healy*, the plaintiffs sought recovery for injuries their son sustained as a result of the defendant's negligence.[75] At trial, the plaintiffs introduced evidence that the child would require special education at a private school that would cost between $8,000 and $16,000 annually.[76] On appeal following a verdict in favor of the plaintiffs, the defendant argued that the plaintiffs' might not incur the full amount of the damages because all or part of the special education services would be provided by the municipality.[77] The Connecticut Supreme Court held that such evidence "would not be relevant because Connecticut follows the majority rule in this country regarding collateral sources."[78]

The application of the collateral source rule to state- provided special education and therapy was next addressed in *Northern Trust Co. v. County of Cook.*[79] In *Northern Trust*, the defendant[80] appealed the trial court's refusal to admit evidence of the availability of free, state-provided services for handicapped children.[81] Noting the uncertainty of the future availability of state-provided services, the court of appeals affirmed the trial court's decision

---

Indeed, concerns of the jury speculating about future benefits "form a weak foundation for the law of damages." *See* Jacobsen, *supra* note 12, at 536. One critic has even suggested that the exclusion of collateral source benefits works to the detriment of plaintiffs who are not the beneficiaries of collateral source payments because the jury assumes that most people have insurance and adjust the amount of the award accordingly. *See* McDowell, *supra* note 23, at 215.

74. 378 A.2d 540 (Conn. 1977).

75. The defendants' truck collided with the plaintiffs' car. The plaintiffs' seven and one-half year old son flew from the car. The boy sustained brain damage and suffered from epilepsy after the accident. *Id.* at 542-43.

76. *Id.* at 546.

77. *Id.* At the time of the appeal, the boy "was receiving special education at no cost through a public school program provided by the town of Newtown." *Id.*

78. *Id.* The court specifically held that "proof as to whether or not [the municipality] would continue its special education program in its public school system was not relevant under the collateral source rule." *Id.*

79. 481 N.E.2d 957, 960 (Ill. App. Ct. 1985).

80. The defendant was a doctor who admitted liability for negligently failing to diagnose and treat the meningitis and ventriculitis the plaintiff developed shortly after birth. *Id.* at 959.

81. *Id.* at 960.

to exclude as evidence the existence of free, state-provided special education and therapy.[82]

In *Enson v. Wilson,* the Supreme Court of Alabama also addressed the application of the collateral source rule to state- provided special education and therapy.[83] The parents of a premature child who suffered a degree of brain damage and retardation brought a medical malpractice action against the delivering obstetrician.[84] The court granted the plaintiffs' motion in limine "to preclude any reference by defendants to the special education and therapy available to [the child] from governmental sources."[85] On appeal, the defendants challenged the motion in limine contending that they were entitled to introduce evidence that Alabama[86] and federal laws[87] conferred an absolute right on the child to receive special education and related services, thus reducing the child's future financial needs.[88] In affirming the trial court's exclusion of the evidence, the Alabama Supreme Court relied in part on *Healy* and found "no reason" to distinguish special education and therapy from other government services that courts had found were covered by the collateral source rule.[89]

The Alabama Supreme Court, in *Williston v. Ard,* recently reaffirmed its decision regarding the application of the collateral source rule to state-

---

82. *Id.* The court offered no other rationale for its decision, and it did not consider how the future availability of state-provided services supported the exclusion of evidence or that prior to trial, the plaintiff was receiving free, state- provided special education and therapy. By the time the case reached the appellate court, the plaintiff had availed himself of several years of free, state-provided "physical, occupational, speech and music therapy, adaptive physical education and special transportation." *Id.* at 959.

83. 519 So. 2d 1244 (Ala. 1978).

84. *Id.* at 1246-50.

85. *Id.* at 1266.

86. The defendants were referring to the Alabama Exceptional Child Education Act, ALA. CODE § 16-39-3 (1975). The statute provides:

> Each school board shall provide not less than 12 consecutive years of appropriate instruction and special services for exceptional children, beginning with those six years of age, in accordance with the provisions of this chapter. Such public school instruction and special services shall be made available at public expense for each school year .... No matriculation or tuition fees or other fees or charges shall be required or asked of exceptional children or their parents or guardians, except such fees or charges as may be charged uniformly of all public school pupils.

Id.

87. *See supra* note 6.

88. *Ensor,* 519 So. 2d at 1266.

89. *Id.* at 1266-67. The court stated the general proposition that evidence of benefits conferred on the plaintiff from collateral sources "is not relevant, its existence renders neither more probable nor less probable any material fact in the case . . . ." *Id.* at 1266 (quoting 22 AM. JUR. 2D *Damages* § 206 (1988)).

provided special education and therapy.[90] In *Williston*, the defendant[91] sought to introduce testimony from the local special education coordinator about the availability of programs in the county school for multihandicapped children like the plaintiff.[92] The trial court had excluded the evidence under the collateral source rule. On appeal, the Alabama Supreme Court reaffirmed its decision in *Ensor* and upheld the trial court's refusal of the special education coordinator's testimony.[93]

The Supreme Court of North Carolina, in *Cates v. Wilson,* adopted a similar application of the collateral source rule to state-provided special education and therapy.[94] In *Cates*, the North Carolina Supreme Court affirmed the reversal of a trial court's decision to allow testimony about the existence of state-provided special education and therapy in a medical malpractice action.[95] During the trial, the defendant's expert testified that the plaintiff's local public school "provided excellent training for mentally and physically handicapped persons until age 22."[96] The defendant's expert also testified that under North Carolina law,[97] special education was available to all, regardless of their financial status, and that while there could be no guarantee of continued availability, public funding for special education had been "reliable."[98]

In finding that the trial court committed prejudicial error in admitting the expert's testimony, the North Carolina Supreme Court identified several reasons for applying the collateral source rule to state-provided special education and therapy. First, the court stated that if the collateral source rule were not applied to special education, the "compensatory goal underlying our tort system" would be thwarted because the plaintiff would be forced "to

90. 611 So. 2d 274 (Ala. 1992).

91. The defendant was a doctor sued for negligently causing a child to suffer severe brain damage during the course of a "routine appendectomy." *Id.* at 276.

92. *Id.* at 278.

93. *Id.* The court stated: "an amount of damages is not decreased by the benefits received by a plaintiff from a source wholly collateral to and independent of the wrongdoer, including services provided by the state at government expense or decreased by institutionalization at government expense." *Id.*

94. 361 S.E.2d 734 (N.C. 1987).

95. *Id.* at 737-39. *Cates* was a medical malpractice action brought on behalf of a child who suffered brain damage and cerebral palsy during birth due to the defendant doctor's alleged negligence. *Id.* at 736.

96. *Id.* at 737.

97. *Id.* (referring to Pub. Law No. 94-142).

98. *Id.*

depend on public coffers."[99] The court then reasoned that the lack of certainty to the future availability of public resources made mitigating damages premised on the continued existence of public benefits unwise.[100] Finally,[101] the court concluded "as between defendants who tortiously inflict injury and innocent taxpayers who fund [these special education programs] . . . we think it better that the loss fall on the tortfeasor."[102]

B. Minority Approach

Taking a strikingly different approach than the majority of jurisdictions, in *Florida Physician's Insurance Reciprocal v. Stanley* the Supreme Court of Florida held that the collateral source rule did not preclude the introduction of evidence relating to the availability of state-provided special education.[103] In so holding, the court reversed the appellate court which found error in the trial court's decision to allow the defendant to cross-examine the plaintiff's expert about the existence of state—provided special education and therapy. The four person majority[104] of the Florida Supreme Court reasoned that the "collateral source rule should be limited to those benefits earned in some way

---

99. *Id.* at 738. In making this assertion, the court felt the plaintiff should not be denied the opportunity of utilizing private care and cited Sedler for the proposition that

> the plaintiff should be able to recover the cost of future medical services, since he is likely to prefer private care, and it is his "right" to have it. It may be that he will employ the free care for which he is eligible . . . but . . . at the time of suit there is no way of knowing what he will choose to do.

Id. (quoting Sedler, *supra* note 12, at 186).

100 *Cates*, 361 S.E.2d at 738-39. The court was concerned that public benefits could not be counted on to exist throughout the plaintiff's lifetime, especially in light of the increasing budget constraints that both federal and state governments face. *Id.* Other judges have also found the uncertainty of continued funding to be a significant factor behind their support of the application of the collateral source rule to state-provided special education and therapy. *See* Florida Physician's Ins. Reciprocal v. Stanley, 452 So. 2d 514, 516-17 (Fla. 1984).

101. The court noted that the collateral source rule should apply to future public benefits because the utilization of these benefits hinges on the plaintiff's continued indigence. *Cates*, 361 S.E.2d at 739. However, the court observed that under North Carolina law access to special education did not hinge on financial status. *Id.* Most likely, the court discussed this rationale in reference to the other public services, such as Medicaid and Aid to Families with Dependent Children, whose availability does depend on financial need.

102. *Id.*

103. *Physician's*, 452 So. 2d at 515. Like most of the cases considering the collateral source rule in the context of state-provided special education and therapy, this action was brought on behalf of a child who claimed that the doctor's negligence during delivery caused his mental retardation and cerebral palsy. *Id.* at 514.

104. In *Physician's* three justices concurred with the majority's written opinion, while three justices offered a vigorous dissent.

by the plaintiff."[105] Building on this reasoning, the court found that "[g]overnmental or charitable benefits available to all citizens, regardless of wealth or status, should be admissible for the jury to consider in determining the reasonable cost of necessary future care."[106]

Three dissenting justices voiced concern about the "speculative value of future public assistance."[107] The dissent further reasoned that "[b]y denying the victim full compensation for the cost of future care, the majority opinion transfers the responsibility for the tort from the tortfeasor, where it legally and morally belongs, to the victim and the community."[108]

Recently, the Missouri Supreme Court, in *Washington v. Barnes Hospital,* unanimously followed the approach taken by the Florida Supreme Court.[109] In *Barnes*, the plaintiff brought a medical malpractice suit against defendant doctors and hospital for failure to diagnose her placental abruption which caused permanent brain damage to the fetus. At trial, the court denied the defendants' request to introduce evidence about the availability of free, public special education and therapies.[110] On appeal, the Missouri Supreme Court examined the various rationales advanced in support of the collateral source rule.[111] Finding these rationales inapplicable in the context of free, state-provided special education and therapy, the Missouri Supreme Court reversed the decision of the trial judge and held that the collateral source rule did not

---

105. *Physician's*, 452 So. 2d at 515.

106. *Id.* In taking this approach, the Florida court cited with approval *Peterson v. Lou Bachrodt Chevrolet Co.*, 392 N.E.2d 1, 5 (Ill. 1979). In *Peterson*, the Illinois Supreme Court refused to apply the collateral source rule to gratuitous medical services. *Physician's*, 452 So. 2d at 516. The dissent in *Physician's* was quick to point out the factual dissimilarities between the case it was considering and *Peterson*. *Id.* at 516-17 (Shaw, J., dissenting). In particular, the dissent focused on the fact that in *Peterson*, the plaintiff voluntarily applied for and received free medical services at the Shriner's Hospital prior to seeking compensation for the same services from the tortfeasor. The dissent in *Physician's* interpreted *Peterson* to mean that "an individual is not entitled to recover for the value of previously rendered free services he has voluntarily obtained." *Id.* at 516 (Shaw, J., dissenting). Moreover, the majority apparently took no notice of the fact that the Illinois Court of Appeals specifically rejected the application of *Peterson's* approach to state provided special education in *Northern Trust.*

107. *Id.* at 517 (Shaw, J., dissenting).

108. *Id.* (Shaw, J., dissenting). The dissent was unwilling to allow taxpayer contributions to "become a device for reducing the legal liability of a tortfeasor." *Id.* (Shaw, J., dissenting).

109. 897 S.W.2d 611 (Mo. 1995).

110. *Id.* at 615.

111. The court considered and rejected the following: the benefit of the bargain rationale; the punishment rationale; the windfall for the plaintiff rationale; the argument that the rule is necessary to protect the injured plaintiff from the uncertainty of continued funding and availability of public benefits; and the argument that the collateral source rule is needed to compensate the plaintiff for the costs incurred in the form of legal fees and expenses. *Id.* at 619.

preclude introducing evidence of the availability of free, state-provided education and therapy offered to mitigate the plaintiff's damages.[112] Rather, the court held that the evidence was admissible[113] and that, at retrial, the plaintiffs would be entitled to "respond to this evidence with arguments of [the state-provided services'] inadequacy, the risk of its continued availability, etc."[114]

VI. ANALYSIS OF THE JUSTIFICATIONS FOR THE APPLICATION OF THE COLLATERAL SOURCE RULE TO FREE, STATE-PROVIDED SPECIAL EDUCATION AND THERAPY

A rule of law is only valid to the extent that the application of the rule furthers the substantive polices which the rule embodies.[115] The simple fact that a common-law rule is firmly entrenched in our system cannot justify the application of that rule in situations where it loses touch with its traditional justifications. The application of the collateral source rule to prevent the admission of evidence of free, state-provided special education and therapy is a clear example of a situation in which a rule of law has been applied without regard to its origins and policies.

The benefit of the bargain rationale traditionally advanced in support of the collateral source rule[116] does not sustain the application of the rule to state-provided special education and therapy. Individuals do not contract with the state to provide special education and therapy in the event that such services become necessary. At most, a potential plaintiff may have contributed to the state special education system by paying taxes.[117] This form of indirect payment does not establish the same type of indemnity policy as the payment

---

112. *Id.* at 621.

113. The court also indicated in dicta that an additional justification for allowing this mitigation evidence was the fact that the plaintiff "opened the door to this issue by injecting testimony of [the plaintiff's] financial condition into the case." *Id.* This is consistent with the approach taken by other courts, *see supra* note 17.

114. *Barnes*, 897 S.W.2d. at 621.

115. A "fundamental" tenant of jurisprudence is that a principle of law cannot be applied once courts have strayed from the foundation upon which the principle is based. *See* Victor E. Schwartz, *Tort Law Reform: Strict Liability and the Collateral Source Rule Do Not Mix*, 39 VAND. L. REV. 569, 573 (1986) (arguing that if the defendant is found liable under strict liability, the courts are no longer applying the collateral source rule as originally intended or justified).

116. For a discussion of this rationale, see *supra* notes 42-44 and accompanying text.

117. A taxpayer's contribution to the state special education system may take a variety of different forms, but a common method of funding special education and therapy is through a property tax. *See, e.g.*, MO. ANN. STAT. § 162.920 (Vernon 1995).

of medical or life insurance premiums.[118] Indeed, any payment of taxes in support of the state special education system does not raise the same concerns about protecting a plaintiff who has had the independent foresight to obtain some form of indemnity insurance in the event of tragedy. Thus, the failure to extend the collateral source rule to state-provided special education and therapy does not undermine the socially beneficial goal of individually maintained private insurance policies.[119]

Similarly, the deterrence/windfall justification[120] for the collateral source rule offers no support for the application to state-provided special education and therapy. While the deterrent/windfall argument may have originally offered sound footing for the collateral source rule,[121] the tort system has undergone profound changes since the rule's inception.[122] The increase of liability insurance has decreased the importance of the deterrent goal of the tort system and given rise to a system that focuses on loss allocation.[123] When viewed from this perspective, the application of the collateral source rule to state-provided special education and therapy places an extremely heavy burden on society. Under the modern tort system, a strong argument can be made that the collateral source rule's exclusion of evidence relating to the availability of free, state-provided special education and therapy results in higher costs to consumers.[124] Furthermore, the application of the collateral source rule to state-provided special education and therapy may cause members of society to suffer yet an additional blow: even though the rule may allow an injured plaintiff to recover the full cost of his special education and therapy needs, members of society still may be forced to bear the cost of providing the injured plaintiff with special education and therapy if the

118. *See supra* notes 50, 105 and accompanying text.

119. For a discussion of this rationale, see *supra* note 43 and accompanying text.

120. For a discussion of this argument in favor of the collateral source rule, see *supra* notes 59-61 and accompanying text.

121. *See supra* notes 23-25 and accompanying text.

122. For a discussion of the changes in the tort system, see *supra* notes 62-63 and accompanying text.

123. *See supra* note 64 and accompanying text.

124. See *supra* note 64 and accompanying text for a discussion of the way tortfeasors and insurance companies shift the burden for damage awards to consumers in the form of increased prices and premiums. Under this system of loss redistribution, the application of the collateral source rule to state-provided special education and therapy increases the amount of loss that a tortfeasor must redistribute. The application of the collateral source rule to state-provided special education increases the amount of damages for special education and therapy recoverable by an injured plaintiff. This increased amount of damages for education and therapy increases the total amount of damages, which in turn increases the total amount of damages that must be redistributed.

plaintiff chooses to utilize the state-provided special education system. In this regard, the application of the collateral source rule to free, state-provided special education and therapy injects a societal cost into personal injury awards that far outweighs any possible deterrent effect the rule may have in the modern tort system.[125]

Contending that juries will be confused by the introduction of state-provided special education and therapy evidence does not support arguments against the application of the rule.[126] Juries are already entrusted with the responsibility of considering extremely difficult and foreign evidence to reach their verdicts in a variety of complex cases.[127] The introduction of state-provided special education and therapy evidence would certainly not be any more confusing. Indeed, it could be argued that nothing could be more confusing than the approach under the traditional application of the collateral source rule because jurors know from their own life experience that the state provides free special education services—often services of considerable quantity and quality—to handicapped children and yet are not instructed how to deal with that knowledge in reaching the amount of their verdict.

Moreover, the contention that under our tort system a plaintiff never fully recovers for his injuries[128] also falls short of offering a sound justification for applying the collateral source rule to state-provided special education and therapy. Certainly no amount of money can truly compensate a person for the loss of their mental or physical abilities, but that is just one of many harsh facts inherent in our tort system. It is a reflection of the limitations of a system in which the best that can be done is make a rough estimate of the plaintiff's injury and reduce that estimation to a money judgment.[129] Indeed, if no amount of money will ever compensate an injured plaintiff for the loss of mental or physical capacity, it is certainly difficult to quantify the degree to which the additional dollars provided by applying the collateral source rule assist in compensating an injured plaintiff. Thus, while perhaps offering the most emotionally appealing argument in favor of applying the collateral source rule to state-provided special education and therapy, the notion that an

125. See *supra* notes 61-64 and accompanying text for an examination of the modern tort system's decreased deterrent ability.

126. For a discussion of this argument in favor of the collateral source rule, see *supra* notes 67-69 and accompanying text.

127. *See supra* note 73 and accompanying text.

128. For a discussion of this rationale, see *supra* notes 51-53 and accompanying text.

129. *See supra* note 72 and accompanying text.

injured plaintiff is never fully compensated for his injuries fails to offer a principled basis for the rule's application.[130]

VII. PROPOSAL

None of the arguments commonly offered to justify the application of the collateral source rule supports the traditional application of the rule to free, state-provided special education and therapy.[131] While these arguments fail to support the traditional application of the collateral source rule,[132] the substantive component of the rule continues to have merit. The substantive component reflects a principle which should be maintained when considering the award of damages to a plaintiff requiring special education and therapy (i.e., a defendant should never be allowed to *summarily* deduct from the plaintiff's damages the amount that the plaintiff receives in compensation for her injuries from outside sources).[133] In light of the importance of this principle, an approach which precludes the summary reduction of the plaintiff's damages based on the availability of free, state-provided special education and therapy yet allows for the introduction of evidence relating to both the existence and quality of the state-provided services, not only meets the needs of an injured plaintiff, but also addresses the concerns of a society and a judicial system attempting to reach a just award of damages for a plaintiff in need of special education and therapy.

In terms of educational expenditures, a severely injured plaintiff requires an award of damages which allows her to obtain the special education and therapy that she requires. An approach to state-provided special education and therapy which prevents the summary reduction from the plaintiff's damages to account for the availability of free, state-provided special education and therapy, yet allows for the introduction of evidence relating to the existence and quality of the state-provided services, ensures that this need is fulfilled. The prohibition against the summary reduction of the plaintiff's damage award prevents forcing the plaintiff to use the state-provided services if those services will not satisfy her needs.[134] In a similar fashion, under this approach,

130. *See supra* note 54.

131. See *supra* Part VI for an analysis of the application of the collateral source rule to state-provided special education and therapy in light of the traditional justifications for the rule.

132. For an explanation of substantive and evidentiary components of the collateral source rule, see *supra* notes 12-18 and accompanying text.

133. *See supra* notes 15-16 and accompanying text.

134. In the absence of the rule's substantive component, the plaintiff's award of damages would

the plaintiff will provide the jury with a range of evidence relating to the state-provided services, including any evidence that these services will not fulfill her needs.[135] All of the information that the plaintiff provides to the jury will assist the plaintiff to obtain an award which accurately assesses her special education needs.

In the context of a plaintiff in need of special education and therapy, society is primarily concerned with providing her with appropriate services at an appropriate overall cost. An approach which prevents a summary deduction from the plaintiff's damage award, yet allows for the full and complete introduction of evidence relating to state-provided services, fosters this goal. First, the prohibition against summary reduction prevents a plaintiff from being denied access to appropriate services.[136] Second, if the jury concludes that the state-provided services meet the plaintiff's needs, then the plaintiff's damage award could be adjusted accordingly. Under modern theories of loss shifting,[137] reducing the plaintiff's award would prevent society from paying twice for the special education services it provides: once in the form of taxes[138] and again in the form of higher consumer prices.[139] Thus, society is able to fulfill efficiently the plaintiff's special education

---

be reduced by the amount of the collateral source benefit. In the context of state-provided special education and therapy, the absence of the rule's substantive component would allow for the reduction of the plaintiff's damage award to reflect the value of the free, state-provided services. Such a reduction would effectively preclude the plaintiff from choosing to receive special education and therapy from a private provider because her damage award would not provide funds for private services. The failure to adhere to the substantive component of the rule would be extremely harsh to a plaintiff whose special education and therapy needs could not be adequately met by the state-provided services.

135. In this context, the plaintiff may seek to introduce a wide variety of information. Perhaps most importantly, the plaintiff would introduce any evidence that would tend to show that the state-provided services would fail to meet her special education needs. For example, the plaintiff may introduce evidence that she requires a particular service which can be more readily obtained at a private institution. The plaintiff would also introduce any evidence to support the notion that the continued existence of free, state-provided services was uncertain. The plaintiff also would offer evidence relating to the proximity of state-provided services compared to private services and any other evidence indicating that private services would better meet her special education and therapy needs.

136. See *supra* note 134 for an explanation of how the absence of the substantive component of the collateral source rule could force the plaintiff to utilize state-provided services.

137. *See supra* notes 62-64 and accompanying text.

138. See *supra* note 117 and accompanying text for an explanation of how various taxes are used to fund state-provided special education and therapy.

139. See *supra* note 64 and accompanying text for an explanation of the way consumers pay for increased jury awards in the form of higher prices and increased insurance premiums. For a discussion of how members of society can actually pay twice for the cost of providing an injured plaintiff with special education and therapy, see *supra* notes 124-25 and accompanying text.

needs while avoiding duplicate costs.

Similarly, the judicial system's goal of accurately assessing the injured plaintiff's special education needs to establish just and fair compensation is satisfied by an approach that bars summary reduction of the plaintiff's damages and encourages introducing a range of state-provided services evidence. An approach which prevents the summary reduction of a plaintiff's damage award to account for the existence of free, state-provided special education and therapy promotes a judicial system which avoids arbitrary results. Indeed, under this approach, instead of automatically deducting the value of the state-provided services from the plaintiff's damage award, the court considers a range of evidence relating to the state-provided services and is able to make an informed decision. The ability to make an informed decision in light of all relevant evidence, including evidence of free, state-provided services, enables the court to make an accurate assessment of the plaintiff's true special education needs. The ability to make an accurate assessment of the plaintiff's needs avoids overcompensation and assists the court in establishing a just and fair result.

VIII. CONCLUSION

In its traditional form, the collateral source rule should not be applied to free, state-provided special education and therapy. However, an approach which preserves the substantive component of the rule—preventing the summary reduction of the plaintiff's damage award, but also promoting the full introduction of evidence relating to the state-provided services—answers the problems inherent in awarding damages to a plaintiff in need of special education and therapy. This approach protects the plaintiff from arbitrary results while addressing the concerns of society and fostering the goals of the judicial system. Therefore, in keeping with this approach, courts and legislatures should follow the lead of the Florida and Missouri courts recognizing that the traditional application of the collateral source rule cannot be applied soundly to state-provided special education and therapy.[140] By preventing summary reduction and promoting full introduction of evidence, courts and legislatures will find a workable solution to awarding damages in cases which involve a plaintiff in need of special education and therapy.

Richard C. Witzel Jr.

---

140. *See supra* notes 103-14 and accompanying text.