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The Collateral Source Rule and Personal Injury Damages: The Irrelevant Principle and the Functional Approach

By Robert Allen Sedler*

PART II**

It is the thesis of this writing that the collateral source rule represents an irrational and unsound way of dealing with the problem of cumulative recovery in personal injury actions. It is, therefore, an irrelevant principle. The plaintiff should be limited to recovery for what he has "lost," to the extent that our system of adjudication can accurately measure loss. Benefits received from a collateral source obviously have something to do with determining what loss actually resulted from the accident. However, the fact that the plaintiff has received benefits from a collateral source does not necessarily mean that the award of damages should be reduced thereby. It may be that realistically the plaintiff is not recovering on his own behalf, but on behalf of another, who is not able to proceed directly against the tortfeasor under our system. It may be that the plaintiff has given up something or "paid" to obtain the collateral benefit, which our system is unable to measure, so that the deduction of the benefit without giving the plaintiff credit for what he has given up or paid would be unfair and would not give proper compensation. Perhaps the plaintiff can be adequately compensated by being awarded the amount paid to obtain the benefits.

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** Editor's Note: In view of the necessarily unusual length of this article, it is being published in two parts. Part I appeared in Volume 58, Number 1, of the Kentucky Law Journal (58 Ky. L.J. 36).
The deficiencies and unscientific nature of the system under which we award compensation for personal injuries must be kept in mind. The functional approach, advanced in this writing, represents an attempt to deal with the problem of cumulative recovery and collateral source benefits in a realistic manner, with reference to economic factors and considerations of practicality. This approach would discard the collateral source rule, although frequently the result reached by its application may be reached under this approach. A particular solution—and I would not maintain that everyone would agree with all my solutions—is less important than the approach taken to the problem. In the second half of the writing, we will apply the functional approach to a number of collateral source benefits. The discussion will be divided into the two aspects of "out-of-pocket" loss: medical, hospital and nursing expenses; and loss of earning opportunity.

**MEDICAL, HOSPITAL AND NURSING EXPENSES**

**A. Gratuitous Medical and Hospital Treatment**

In the United States—seemingly alone among the industrialized nations of the world—adequate medical care is not considered an "inherent right" of every individual. Like any commodity, medical care is to be bought and purchased, and the quality and nature of the care may well depend upon a person's ability to pay. Medical and hospital treatment, therefore, represents an "out-of-pocket" loss, and the accident victim who has paid or who has become obligated to pay for such treatment and services is entitled to recover from the tortfeasor. In theory, he recovers the reasonable value, but in practice, of course, he recovers the actual cost, and the jury ordinarily will not determine whether the charges were reasonable. But not all people are able to pay for hospital and medical care, and while our society may not believe that there is an "inherent right" to such care, it

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186 Thus, I agree with Dean Maxwell's conclusion that "in some cases the rule operates as an instrument of what most of us would be willing to call justice." Maxwell, The Collateral Source Rule in the American Law of Damages, 46 Minn. L. R51. 669, 595 (1961). However, this does not seem to me as a justification for retaining the rule as the solution to the problem of cumulative recovery.

187 Such damages are frequently stipulated. But see Begley v. Adaber Realty & Inv. Co., 358 S.W.2d 785 (Mo., 1962), where the plaintiff failed to show that the bills were paid and did not introduce evidence as to their "reasonableness." The court denied recovery.
rejects the view that a poor person should not receive some medical attention. Charity is one of the seven virtues, and somehow the poor, if they seek it or are involved in an accident, will get medical care. Doctors have, and perhaps some still do, treated poor patients without charge or at a reduced fee. Most privately-incorporated hospitals are now non-profit institutions, (where doctrine is recognized they are entitled to benefit of charitable immunity) and have charity wards where the poor receive medical care free or in accordance with the administrator's estimate of their "ability to pay." The accident victim will certainly receive medical care. Under the collateral source rule, the accident victim can recover the value of medical and hospital services, for, at the time the question first arose, it was correctly reasoned that the charitable intention was to aid the victim rather than relieve the tortfeasor of his liability. How should this matter be dealt with under the functional approach?

We have already discussed the value of services furnished by a physician. Under our system of private medical care, a doctor who renders services is entitled to be paid. Where the services were necessitated by an accident, the cost should be borne by the person legally liable for the loss. The fact that the doctor rendered services "gratuitously" is irrelevant as regards the doctor's right to be paid. We do not, for reasons of judicial convenience, permit the doctor to sue the tortfeasor. By permitting the victim to recover, we hope that the doctor will be paid. If the cost of such services were paid by a third person, he too should recover the cost from the tortfeasor, but again, our system does not permit him to do so. By allowing the victim to recover their value from the tortfeasor, there is the possibility that the donor will be reimbursed. So, where the plaintiff is recovering the value of medical services rendered "gratuitously" or paid for by a third party, he is really recovering on behalf of the doctor or the donor. If the court is really concerned about

188 See the discussion, supra notes 15-17 and accompanying text.
189 Recovery is generally permitted. See West, The Collateral Source Rule Sans Subrogation: A Plaintiff’s Windfall, 18 OKLA. L. REV. 395, at 400 n. 31 (1963). In Jones v. Keith, 134 So. 630 (Ala. 1931), the court said by way of dicta that the plaintiff could not recover where his employer paid the costs. Where the employer pays the medical bills of his employee, the payment is analogous to payment of wages as a gratuity.
190 Except in a case such as Coyne v. Campbell, where the party rendering the services should not be entitled to recover their value.
protecting the doctor or donor, it can accomplish this by the use of a decree directing repayment. It is simpler to allow the injured party to recover the value of the services from the tortfeasor and let him make arrangements with the benefactor, who, considering the injured person's poverty, may be willing to make him a "gift" of the recovery.

We may now consider hospital services. Following the accident, the victim will be taken to the emergency room of some hospital. The particular hospital will depend on many factors, such as the arrangements the police have with emergency rooms of local hospitals. A number of localities now have public hospitals, supported by taxation, where care is rendered free of charge to specified classes of persons, or where any charge is dependent upon the patient's ability to pay. Our victim may be taken to one of these. Or, he may be taken to a private hospital and given free care in the charity ward. In either case, he either has paid nothing for the hospital services, or has paid substantially less than the "reasonable value," i.e. less than what he would have had to pay if he were financially able.

Clearly, there is no reason why he should recover the value of services for which he has not paid and consequently, is not "out-of-pocket." The Restatement of Torts draws a distinction between services rendered by a private charity and those rendered by a "state-supported or other public charity," and would allow the plaintiff to recover the value of the services from the defendant when they were rendered by the former, but not when rendered by the latter. Dean Maxwell contends that there is no sound reason to distinguish between services rendered by a private or public charity, and that if the collateral source rule is to be applied, it should include all such services. While we agree that there is no distinction, unlike Dean Maxwell, we would conclude that recovery should be denied in both cases. The reason is that for the particular plaintiff the cost of hospital services does not represent an item of loss, because he was not

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191 See the discussion, supra notes 117-21 and accompanying text.
192 We are assuming that the hospital services also include the services of attending physicians. The previous discussion of services rendered "gratuitously" by a physician refers to those rendered by a private physician.
193 Restatement of Torts, Explanatory Note § 924, comment f at 637 (Expenses, 1939).
194 Maxwell, supra note 185, at 689.
required to pay for them. Again, the principle that the tortfeasor takes his victim as he finds him operates for the defendant's benefit. Because the plaintiff was poor, he received free hospital care, and if our purpose in awarding compensation is to put him in as good a position as he would have been if the tort had not occurred, it is not necessary that we award him the cost of hospital services.

If this result is difficult to accept, it is only because in our society free medical and hospital care is available for some, but not all. Suppose that all accident victims, or indeed all persons, were entitled to free hospital and medical care, as under the National Health Service in Great Britain. An accident victim there who obtains free medical and hospital services, as most do, cannot recover the value of those services from the tortfeasor. If all persons obtained free medical and hospital care, we would not consider this a compensable item of damage, for this would not be an expense that an accident victim would be required to undergo. We allow recovery on the theory that the victim is "out-of-pocket," because he has paid for such care, and if he has not had to do so, there is no reason for him to recover. This does not mean that there is discrimination between "rich" and "poor" with respect to the recovery of damages. Just as the high wage-earner recovers more for his lost time than the low wage-earner, because he has lost more, the person who has paid for hospital services recovers their cost because he has lost something as a result of the accident, while the person who has not paid does not recover because he has not lost anything in this regard. While in the United States only a minority of accident victims receive free hospital and medical care, those who do have no need to recover this item of damages, and some courts have denied recovery where the services were furnished by a public hospital or a hospital where the plaintiff

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196 See supra note 167, at 563.
197 In Great Britain the plaintiff who has, in fact, obtained private medical care, can recover the cost from the tortfeasor. Law Reform (Personal Injuries) Act, 11 & 12 Geo. 6, c. 41, § 2, sched. 4. (1948).
198 See City of Englewood v. Bryant, 100 Colo. 552, 68 P.2d 913 (1937); Di Leo v. Dolinsky, 129 Conn. 203, 27 A.2d 126 (1942).
received the services free of charge.\textsuperscript{199} Under the functional approach, the plaintiff could not recover for hospital services rendered without charge whether at a public or private charity hospital.

The real question in such a case is whether the hospital should recover the cost of the services from the tortfeasor. Louisiana provides for such recovery by statute and the hospital is subrogated to any award made to the accident victim.\textsuperscript{200} Where the hospital requires that the patient pay for the services, if he recovers any compensation from a tortfeasor, the patient has not received "free" services. It has been argued that the plaintiff's recovery should not depend on "how knowledgeable the plaintiff and his benefactors set up the transaction."\textsuperscript{201} Nonetheless, if a particular hospital, whether public or private, enters into such an arrangement with the accident victim, the courts have little choice but to allow him to recover their value from the tortfeasor, since by obtaining the judgment he will become "legally obligated." But this is more than implying a contract to pay in such cases, as some courts have done when allowing the plaintiff to recover from the tortfeasor.\textsuperscript{202} Where the hospital has not been sufficiently concerned about reimbursement to expressly require it, it may be assumed that they are uninterested. Administratively, it may be questioned whether reimbursement arrangements are sound, particularly in the case of a public hospital. The number of accident cases in which third party liability is possible may not be significant. I think this would also be true for private hospitals. The potential amount recoverable is probably not sufficient to justify the time and record-keeping involved, and the arguments against subrogation are equally applicable here.\textsuperscript{203} If we could accept the concept of free hospital care, it would not be necessary to concern ourselves with holding the tortfeasor "responsible" for the cost. Unless it is clear that the plaintiff has paid or is legally obligated to pay for the hospital services he has received, recovery should not be allowed against the tortfeasor.

\textsuperscript{199} See Nelson v. Western Steam Navigation Co., 52 Wash. 117, 100 P. 325 (1909).
\textsuperscript{200} LA. REV. STAT., tit. 46, § 8 (1951).
\textsuperscript{201} Maxwell, supra note 185, at 688.
\textsuperscript{203} James, supra note 166, at 557-63.
However, the nature of the plaintiff's injuries may be such that he will require medical and hospital care in the future. Irrespective of the fact that the plaintiff is eligible to obtain free care, he should be entitled to recover the reasonable value of future medical and hospital services from the tortfeasor. In our society private medical and hospital care is to be preferred to the public or charitable kind. It is more desirable to have a private or semi-private room than to be in a ward with other indigents, and in many localities, faced with a choice between a public and private hospital, most people would prefer the private one. The accident victim, despite his poverty, is entitled to the same choice. In Great Britain, it is specifically provided that in determining the reasonableness of expenses for medical care, "the possibility of avoiding those expenses or part of them by taking advantage of facilities available under the National Health Service Act shall be disregarded." Under our system the plaintiff must recover for past and prospective damages in a single action, so there is no way of knowing whether he will actually make use of the free facilities and thereby obtain a windfall. If damages were awarded only after the expenses had been incurred, it would be possible to limit recovery only to those cases where the plaintiff actually made use of private care, but this is not the way it is done. Since there is a single recovery and since the plaintiff has a right to elect private care, he is entitled to recover the value of future medical and hospital services irrespective of his eligibility for free care.

B. Treatment in Military and Veterans Administration Hospitals.

If a person in active military service or one of his dependents is injured in an accident, he will be treated at a military hospital or elsewhere at government expense. However, others are also entitled to medical and hospital care at the expense of the government or the Veterans Administration. Former members of the military service and their dependents are entitled to care at military facilities. Veterans of any war or of service after January 31, 1955, who are unable to pay for necessary hospit-
talization, are entitled to be admitted to a Veterans Administration hospital, even for a non-service-connected disability. Where an accident victim has received free care at a military or Veterans Administration facility, the question is whether he can recover the value of the medical and hospital services from the tortfeasor. The question has arisen both with respect to ordinary tortfeasors and to the United States, sued as a defendant under the Federal Tort Claims Act. Let us first consider a person in active military service suing an ordinary tortfeasor, who seeks to recover the reasonable value of the medical and hospital services furnished by the government. A moment’s reflection will indicate that this is Sergeant Browning’s case again. The accident victim received free medical and hospital care in the sense that he did not have to pay the physician and hospital bills. But, as we have said, this fringe benefit is part of his total compensation picture. We cannot determine how much less compensation he received than would have been the case if this fringe benefit were not available. Therefore, as with the disability pension, the fact that he has received this benefit should not affect his recovery of damages against the tortfeasor; and the person in active military service has uniformly been permitted to recover the value of medical and hospital services from the tortfeasor. The same would be true of the services furnished his dependents, for these too, are part of his total compensation picture. As to the retired person, the medical and hospital services available after retirement fall into the same category as a disability pension, and he should be able to recover their value.

A different question is presented when the tortfeasor is the United States, and suit is brought under the Federal Tort Claims Act. The dependent or retired person could have been injured by a mail truck, for example, or even a military vehicle. It has also been held that a serviceman who is injured by a government instrumentality while off-duty may maintain a suit under the Act. You will recall that ordinarily recovery is reduced by

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benefits that were furnished to the victim by the tortfeasor rather than a collateral source. The result should be no different where the tortfeasor is the government; the government has injured a person, and has taken care of his medical and hospital services to a serviceman injured in the line of duty. There is no reason then, to permit the serviceman or his dependents to recover the reasonable value of the services in a suit under the Act.\textsuperscript{212}

However, if future medical and hospital services are necessary, the plaintiff should be entitled to recover their reasonable value in a suit against the government. The same would be true if the plaintiff had, in fact, incurred expenses for private care. As discussed previously, the availability of free medical care does not mean that the plaintiff “fails to mitigate damages” if he does not take advantage of such care. In our society, paid private medical care is still deemed superior to care at public expense.\textsuperscript{213} Since prospective damages must be recovered in the tort action, there is no way of knowing whether they would make use of the government’s facilities, and they are entitled to have the choice. For this reason recovery for future medical care has been permitted by a plaintiff who was eligible for free care at a Veterans Administration hospital,\textsuperscript{214} and this should be equally true for the plaintiff presently in service.

We may now consider the case of a person who is eligible for treatment at a Veterans Administration Hospital. Of course, he can recover for future medical and hospital services in actions against the ordinary tortfeasor as well as the government. The important question is whether he can recover for services that were actually furnished at the Veterans Administration Hospital. In a suit against an ordinary tortfeasor recovery has been permitted. The leading case is \textit{Hudson v. Lazarus},\textsuperscript{215} where the plaintiff, a veteran, received free care at a military hospital. In permitting full recovery, the court made the following points. First, it said that a collateral source benefit will either work to

\textsuperscript{212} See United States v. Brooks, 176 F.2d 482 (4th Cir. 1949); Jones v. United States, 236 F. Supp. 756 (E.D.N.C. 1964).

\textsuperscript{213} Thus, persons in active military service may fail to take advantage of medical care at military facilities. If the plaintiff had employed private care, he should be entitled to recover the cost from the United States.

\textsuperscript{214} Feeley v. United States, 337 F.2d 924 (3rd Cir. 1964).

\textsuperscript{215} 217 F.2d 344 (D.C. Cir. 1954).
the advantage of the injured person or the "wrongdoer," and "the purpose of the parties and the interest of society would be better served if the injured party rather than the wrongdoer is benefited." Secondly, the court observed that legal compensation for personal injuries does not fully compensate, since the injury cannot be measured in economic terms. We have discussed these kinds of justifications for the collateral source rule previously, and found them wanting. However, the court also "borrowed a leaf" from the functional approach, saying that it might well be considered that medical and hospital services supplied by the Government to these members of the United States Navy were part of the compensation to them for services rendered and that, therefore, by their service in the Navy they had paid for them. It is this point that seems crucial to me. Is this Sergeant Browning's case, so that under the functional approach, recovery would be permitted? Or, is this instead the case of the victim in the public hospital or charity ward, where we would deny recovery on the ground that the services did not cost the victim anything?

In criticizing the view that the free hospitalization was compensation for past services, one commentator observed that it was not available to all veterans, but only those who could not afford to pay for private care. I do not think that this fact alone is significant, since a fringe benefit may be made available only to those who are in need of it. This is true of medical and hospital care while a person is in service. The point, as I see it, is that it is difficult to think in terms of such care as representing compensation for past services performed by non-career veterans. The great majority of veterans today were draftees or volunteers for a specified period of time or the duration of a war. The draftees had no choice, and the volunteers, even if they considered the economic aspects of military service, could not have been influenced by the availability of this fringe benefit, which at least for older veterans did not exist at the time they entered service. Free hospital care for indigent veterans is but one of the benefits our society provides for those who have served in time of war, "hot" or "cold," and cannot be considered part of

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216 See the discussion, supra notes 85-95 and accompanying text.
217 217 F.2d at 347.
a total compensation picture in any meaningful sense. Because of their status as veterans, they are, if indigent, entitled to free care in a Veterans Administration Hospital. To this extent they are in a "favored class," as are veterans who attend school under the G.I. Bill of Rights or who receive civil service preference. They have received their medical and hospital care free and cannot be said to have "given up" anything in the economic sense in order to obtain such care. Perhaps it seems "heartless" to deny double recovery to indigent veterans, as it is to indigent plaintiffs who receive free care at a public or charity hospital. But, then, maybe we should add twenty per cent to the award when the plaintiff is an indigent. Facetiousness aside, if we purport to compensate for loss as well as we can measure it, a plaintiff who has received free care at a Veterans Administration Hospital has not suffered a loss in this respect because of the accident, and should not be entitled to recover that amount from the defendant.²¹⁹

The matter is complicated, however, by Veterans Administration regulations, which provide as follows:

Persons hospitalized pursuant to paragraph . . . (b) of §17.47 (the indigency provision), who it is believed may be entitled to hospital care or medical or to surgical treatment or to reimbursement for all or part of the cost thereof by reason of any one or more of the following:

* * *

(2) By reason of statutory or other relationships with third parties, including those liable for damages because of negligence or other legal wrong, will not be furnished hospital care, medical or surgical treatment, without charge therefor to the extent of the amount for which such parties, referred to in subparagraph (1) or (2) of this paragraph, are, or will become liable. Such patients will be requested to execute an appropriate assignment as prescribed in this paragraph.²²⁰

This is a part of a broader scheme designed to guarantee that the veteran is really indigent, and it includes union or fraternal

²¹⁹ See Smith v. Foucha, 172 So.2d 318 (La. App. 1965), where the court denied recovery on the grounds that (1) the services had not cost the plaintiff anything, and (2) the United States had subrogated to his claim.
²²⁰ 38 C.F.R. § 17.48 (f) (1966).
benefits, private insurance and workmen's compensation. This regulation was not involved in *Hudson v. Lazarus*, since it had not become effective until after the victim's death. In one case where the claim had been assigned, the court permitted the Veterans Administration to intervene and to recover the value of medical and hospital services as assignee.

I really question whether the number of cases where an indigent patient in the Veterans Administration Hospital is an accident victim are sufficient to justify the Veterans Administration trying to cover the cost of care from the tortfeasor. Perhaps there are, but I think it is more likely that the Veterans Administration lawyers were enamored of subrogation and inserted this provision in the regulations. It seems to me that compared to the total cost of supplying free care to indigents for non-service-connected disabilities, the amount of actual reimbursement would be quite small. When the veteran has not executed the assignment, there is no reason to permit him to recover the amount from the defendant; if he does not recover, he will not be "legally obligated" to the Veterans Administration. Even if the Veterans Administration sues as assignee, there is still no reason for the court to permit recovery. It should take the position that a veteran who has obtained free care is not entitled to recover that item of damage from the tortfeasor. It is difficult to see the utility in shifting the cost of care from the government to the enterprise or the defendant's liability insurer in the absence of evidence that this would result in substantial savings to the government. The argument against subrogation is strongest where the government is involved; the burden on the American taxpayer will not be appreciably lessened, if at all, by requiring the government to bear the full cost of treating indigent veterans, notwithstanding that tort recovery by a patient is possible.

The question has also arisen in a suit by a veteran, who has been furnished free care at a Veterans Administration Hospital, against the United States under the Federal Tort Claims Act. Incredibly enough, one court permitted the veteran to recover the value of such services. The court reasoned that (1) the

221 Id.
223 See, note 203 supra.
224 United States v. Gray, 199 F.2d 239 (10th Cir. 1952). A contrary result was reached in Feeley v. United States, 337 F.2d 924 (3rd Cir. 1964).
Veterans Administration furnished the hospitalization under separate legislation rather than under the Act, and (2) there was nothing to indicate that Congress intended for recovery under the Act to be diminished by the amount expended in furnishing hospitalization and treatment.\footnote{225} This ignores the fact that such care did not cost the plaintiff anything and that the United States, now being sued as tortfeasor, furnished it. It can be contended with equal logic that Congress did not intend for the United States to pay twice for the same injury.\footnote{226} It is absurd to permit recovery for medical expenses that the victim did not pay or give up anything to get, and doubly absurd where it was the tortfeasor who did pay for them.

The final case is where a non-military person was taken to a military hospital because he was a passenger in an automobile, driven by a serviceman, which was involved in an accident. He received complete care without charge, and was then permitted to recover the value of the medical and hospital services from the tortfeasor.\footnote{227} Recovery was justified on the ground that the government could not recover from the tortfeasor and the tortfeasor should not be able to avoid liability. As we have pointed out repeatedly, our theory of tort recovery proceeds on the basis of compensating the plaintiff rather than punishing the defendant and his insurer. Since the plaintiff received free hospital and medical care, for which he had given no "value," he should not recover the cost of such care from the defendant.

C. Insurance and Mutual Protection Benefits.

We have previously discussed the case of the insured plaintiff in the medical setting.\footnote{228} Under our approach, to the extent that medical and hospital expenses are covered by loss insurance, that amount should be deducted from the recovery in the tort
action, but the total cost of the premiums during the life of the policy would be added. Where the expenses are less than the total cost of the insurance, the plaintiff would recover the expenses. Insurance against the contingency of hospitalization, that is, insurance in excess of the hospital and medical expenses, would be unaffected. The same approach should be taken with respect to medical and hospital expenses paid for by a welfare fund or some other similar protective arrangement. In Kentucky, for example, hospitals are operated by the United Mine Workers, which are supported by contributions from employers based on coal royalties, and monthly contributions by employees. The Kentucky Court has allowed recovery for the value of medical and hospital services provided under such an arrangement, and courts have allowed full recovery where the plaintiff was a member of an employee's hospital association or made monthly contributions to obtain access to a clinic operated by his employer. As one court observed, "A person from whose paycheck deductions were made for a health and medical plan has paid the medical bill in any event." In that case the amount of the bill was less than the total of the contributions made, but where the total of contributions was less, the plaintiff should only recover that amount.

However, insurance that the plaintiff has taken out for his own benefit is different from accident insurance that the defendant has secured for the plaintiff's benefit. This brings us to the medical payment provisions of an automobile insurance policy, under which payment is made to a passenger in the insured's vehicle irrespective of liability. Where such payments have been made, the question is whether they may be set off against the passenger's claim for medical expenses in a personal injury action against the insured. Some courts have held that they may not. The rationale of these decisions seems to be

229 Conley v. Foster, 335 S.W.2d 904 (Ky. 1960), overruling Sedlock v. Trosper, 307 Ky. 369, 211 S.W.2d 147 (1948).
230 Grayson v. Williams, 256 F.2d 61 (10th Cir. 1958).
231 Moyer v. Merrick, 155 Colo. 73, 392 P.2d 653 (1964).
232 Id. at —, 392 P.2d at 655.
that the medical payments coverage is under a separate endorsement, for which the insured has paid an additional premium.\textsuperscript{236} This recognizes that realistically, the suit is against the driver’s insurer, and it is not a question of the driver who paid the premium for the medical payments coverage having to pay damages for the medical and hospital expenses as well.\textsuperscript{236} Nonetheless, the fact remains that all or part of the plaintiff’s medical expenses have been covered by the driver’s insurance, and there is no reason to require the insurance company to pay for them again. The sounder view is to credit the amount paid under the medical payment provision from the amount of the judgment rendered against the insured.\textsuperscript{237} The fact that the insurer would be obligated to pay under the liability provisions of the policy has nothing to do with the fact that it has already met this item of the plaintiff’s loss.

Medical payments could also be relevant in the passenger’s suit against the driver of the other vehicle involved in the accident, \textit{e.g.}, A is a passenger in B’s automobile, which is involved in a collision with C’s automobile. A receives medical payments from B’s insurer, and brings suit against C.\textsuperscript{238} Under the collateral source rule, there would be no deduction for the medical payments, since they were not furnished by C.\textsuperscript{239} Again, however, the plaintiff has received benefits for which he has given no value. His medical bills have been paid, and whether it is B’s insurer or C’s insurer who paid them is irrelevant. An adjustment can be made in the suit between B and C, if any, but

\begin{footnotesize}
\textsuperscript{235} However, the tendency now is to try to market such insurance as part of a comprehensive policy, \textit{e.g.} the Family Automobile Policy. Katz, \textit{supra} Note 233, at 278-79.

\textsuperscript{236} \textit{But see} Yarrington v. Thornbury, 198 A.2d 181 (Del. Sup. 1964), \textit{aff’d.}, 205 A.2d 1 (Del. 1964), where the court in holding that the defendant was entitled to have the amount paid set off against the judgment, stressed that he had paid the premiums. It may have been significant that the judgment was in excess of the policy limits.


\textsuperscript{238} If C had medical payments coverage, the question would be whether A’s insurer or C’s insurer would make payments to B. Presumably, the insurance companies have arrangements to cover the situation where the drivers of both automobiles have medical payments coverage or the passenger is entitled to such payments under his own policy.

\textsuperscript{239} \textit{See} Bailey v. Jeffries-Eaves, Inc., 76 N.M. 278, 414 P.2d 503 (1966), where this result was reached.
\end{footnotesize}
there is no reason to permit A to recover for the medical and hospital expenses met by B's insurance in his suit against C. It is important to distinguish between the situation where the plaintiff paid for the insurance and where he did not; where he did not, the benefits received from the insurance should be deducted irrespective of whether the insurance was paid by the defendant or someone else.

D. Medicare and Medical Assistance Payments.

As part of the Social Security legislation of 1965, Congress enacted a program of medical care for the aged. Part of this program consists of Medicaid, which expanded the provisions of the Kerr-Mills Act. Essentially this involves grants-in-aid to the states to support their programs of medical assistance for the indigent aged. As discussed previously, where a person has received free care through public facilities, he should not be able to recover the value of such care from the tortfeasor. If an accident victim received free care in the form of public assistance under such a program, he should not be able to recover from the tortfeasor for the same reason.

The major part of the program, however, commonly called Medicare, is tied to the Social Security Act, and this may complicate the question. Basic Medicare involves the hospital insurance benefits, which are provided for all persons over sixty-five who are entitled to social security or railroad retirement benefits. After an inpatient hospital deductible charge of $40 and a co-insurance charge, for the time being of $10, Medicare pays for full hospital care up to 90 days in any one "spell of illness." Extended care facility benefits are also provided. Secondly, there is what is called Voluntary Supplementary Medicare. This is designed to cover physicians' services, and it is available not only to persons covered by Basic Medicare, but

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242 The grants-in-aid may also relate to programs covering dependent children, blind persons, and permanently and totally disabled persons.
243 See the discussion supra, notes 192-99 and accompanying text.
to all citizens and resident aliens over sixty-five. Premiums are small, $3 per month until 1968, and an amount to be determined by the Secretary of Health, Education and Welfare thereafter; these premiums are matched by the federal government. The patient pays a $50 annual deductible fee and 20% of the costs; the program pays the remainder. All in all, we have made a substantial step toward providing adequate medical care for the aged regardless of their ability to pay.

Cases will doubtless arise—it is too early for any to have reached the appellate courts yet—where an accident victim who has had a substantial portion of his hospital and medical expenses met by Medicare, seeks to recover the full value of the hospital and medical expenses from the tortfeasor. Under our analysis thus far, if the services have been furnished by the government, or in this case, paid for by the government, he would not be permitted to recover their value, beyond the deductible amount which he paid. On the other hand, we have said that if the medical and hospital services were paid for by insurance, he could recover the total premium cost or the value of the services, whichever was less. Effective with the passage of Medicare, a sum of money attributable to the program is collected from the wage-earner along with his social security payments. Discounting the question of how the amount of social security payments attributable to Medicare would be determined for those presently enrolled in the program, we may ask whether Medicare benefits represent “insurance,” in which case the plaintiff could recover the value of the services or the cost of the insurance, or whether they represent free medical care furnished at public expense, in which case the plaintiff could not recover the value of the services beyond the deductible.

It is part of the ethos of social security, as indeed all social insurance, that it is only slightly different from private insurance. The wage-earner sets aside a portion of his wages (because required to do so by law), and when he reaches retirement age or becomes disabled, his savings all come back to him in the form of social security payments. From a political standpoint, social security was “sold” to the American public in this way. Moreover, social security was designed to eliminate the “means test,” so detested by social workers and social welfare planners.
Social security payments were to be the "right" of the wage-earner independent of his financial condition.\textsuperscript{243} This is not wholly undesirable. As recent commentators have observed:

When all is said and done about stripping the social insurances of their supposed insurance attributes, this much remains, however to be said: The beneficiary does make a financial contribution, whether correctly called a premium or a tax, which is regularly and observably deducted from his wages. From this he gains a feeling of personal involvement, the belief that his contribution is directly traceable to the benefit, and a strong sense that he has a right to it. Whatever may be the strictly logical and legal significance of the contribution, it is a political, social and psychological fact of the utmost importance, both in terms of the continually increasing benefits and the willingness to pay for them, and in terms of a popular mass demand that the worst features of public assistance be avoided. Sustaining as fas as possible the fiction of insurance this has important consequences in the character of the system...\textsuperscript{246}

But, of course, this is a fiction. It is difficult to characterize as insurance a payment that wage-earners are required by law to make, and which is deducted from their salaries each month along with withholding tax. Perhaps the fiction may be bent a little in the case of self-employed persons who have "elected" to come under social security, but even here the non-insurance factors of the program prevent such bending. The social security program simply does not operate like insurance. As has been observed:

The insurance principle is honored more in the propaganda than in the reality. Half of the premium attributable to each wage-earning beneficiary is not paid by the beneficiary at all but by his employer. The benefits do not bear a fixed ratio to the premiums, by whomever paid. They are adjusted in favor of the low income groups covered by the system, of those whose period of coverage for one reason or another is allowed to be lower than the standard, of those who, such as the disabled are advantaged in various ways. Benefit pay-

\textsuperscript{246} Id. at 821.
PERSONAL INJURY DAMAGES

ments are made to dependents but premiums do not vary in the light of that fact but remain the same whether the primary beneficiary has dependents or not. Benefit payments, moreover, are withheld or reduced if the primary beneficiary continues in substantial gainful employment in old age or after disability. Medical insurance payments are provided for persons sixty-five years of age not hitherto enrolled 'financed from premium payments from enrollees together with contributions from funds appropriated by the Federal Government.' As a result of these and other factors, there is only the most casual relationship between benefits and premiums, premiums and wages, wages and past productivity or work; and accordingly there is little foundation for the claim of benefits as a matter of earned right. The whole insurance concept thus becomes only a remote analogy rather than an operative reality.247

When the constitutionality of the Social Security Act was challenged before the Supreme Court, it was sustained, not as a government-operated insurance program, but as "a form of social insurance enacted pursuant to Congress' power to spend money in aid of the general welfare."248 In fact, the Supreme Court has held that Congress may constitutionally provide for the withdrawal of social security benefits enjoyed by a deported alien and his dependents.249 Without necessarily agreeing with the soundness of the result, it can be concluded that the decision does represent an affirmative declaration that social security benefits clearly are not in the nature of insurance.

Medicare, therefore, cannot be said to be a form of insurance, paid for by the recipient. For persons entitled to such benefits, hospital care is substantially free, and there is no reason for them to recover the value of such care from the tortfeasor. Voluntary Supplementary Medicare does involve a payment for the benefit, and the recipient should be able to recover the payments made from the tortfeasor, but no more. As we have pointed out, damages for hospital and medical services can be stipulated. In the case of a person receiving Medicare benefits, the damages will be the deductible and co-insurance amounts and the payments

247 Id. at 820.
for supplementary coverage. This is the only loss that an accident victim covered by Medicare can sustain.\textsuperscript{250}

E. Gratuitous Nursing Service.

Recovery for gratuitous nursing services has met some resistance notwithstanding the general acceptance of the collateral source rule. The value of nursing is a legitimate part of the accident victim's recovery, where the injury is so serious that nursing care is needed. Perhaps the plaintiff or his family will hire private nurses, but it may be that they cannot afford the cost. Suppose a three year old child is injured when a large metal boiler weighing over 200 pounds falls on him. The child requires a series of operations. He is in and out of the hospital, needing nursing care while he is at home. Since the family cannot afford to hire private nurses and the child needs constant attention, this is provided by the mother, who has spent over 1000 hours with the child.\textsuperscript{251} Or, as a result of the accident, a young woman is confined to her bed for nine months, during which time she is cared for by her mother.\textsuperscript{252} Perhaps the mother is a registered nurse, and instead of pursuing her employment, she cares for the injured member of her family.\textsuperscript{253}

Courts fully committed to the collateral source rule allow recovery on the ground that the services were performed for the benefit of the plaintiff rather than the tortfeasor.\textsuperscript{254} One court\textsuperscript{255} added that there is an understanding that the recipient will repay the services which cost the plaintiff nothing.\textsuperscript{256} Massa-

\textsuperscript{250} It is interesting to note that Medicare payments may not be made where payment has already been made under a federal or state workmen's compensation law. 79 Stat. 325 (1965), 42 U.S.C. § 1395(y) (Supp. 1966). No comparable provision is made for tort recovery.

\textsuperscript{251} This was the factual situation in \textit{Large v. Williams}, 151 Cal. App. 2d 315, 315 P.2d 919 (1957).

\textsuperscript{252} This was the factual situation in \textit{City of Englewood v. Bryant}, 68 P.2d 913 (Calif. 1937).

\textsuperscript{253} This was the factual situation in \textit{Large v. Williams}, 151 Cal. App. 2d 315, 315 P.2d 919 (1957). In \textit{Daniels v. Celeste}, 303 Mass. 148, 21 N.E.2d 1 (1939), the plaintiff's wife was a professional nurse, but did not appear to be working at the time.


\textsuperscript{255} \textit{Wells v. Minneapolis Baseball and Athletic Ass'n}, 122 Minn. 237, 142 N.W. 706 (1913).


\textsuperscript{256} \textit{See} \textit{Evans v. Pennsylvania R.R. Co.}, 255 F.2d 203 (3rd Cir. 1958); \textit{Gibney
chusetts draws a distinction between services rendered by a wife to her husband, for which there can be no recovery, and those rendered by a parent to an adult child, where recovery is permitted on the theory that the child has assumed a contractual obligation to pay their reasonable value. In the case involving the services rendered by the wife to her husband, the wife was a professional nurse, although it did not appear that she was working at the time of the injury. It was unfortunate that she could not find another nurse whose husband also needed such care. Each nurse could take care of the other’s husband. The first one to provide a day’s care would receive payment from the other. She would, in turn, pay the money back, and the first payment would exchange hands each day. Thus, each husband would have “paid” for his nursing services and could recover the total cost from the tortfeasor.

I would like to take this problem to our African chief, since I think, for him, this would be an easy case. As we have pointed out, persons other than the victim are affected by the accident, and usually it is the victim’s family that is affected the most. The chief would determine how each family was affected by the particular accident. If the family had the resources to hire private nurses and did so, the chief would order the defendant to reimburse the family for this expenditure, as would a court in our system. But he would realize that most families in his tribe (and many in our society) could not afford to expend the equivalent of $50 to $75 per day on private nurses. If we may return home for a moment, we may add “and take a chance on recovering it back in a personal injury suit some years later.” When the chief considered the claim of the mother who spent 1000 hours nursing her child back to health, he would not be impressed by the argument that the services “cost nothing.” They “cost” the mother a great deal and disrupted normal family life. The mother not only gave the child the care she normally

(Footnote continued from preceding page)

v. St. Louis Transit Co., 204 Mo. 704, 103 S.W. 43 (1907). Note that in Coyne v. Campbell, the plaintiff was not permitted to recover for the services rendered by his nurse.


would have, but the care that was necessitated by the accident for which the defendant was responsible, and care which, if the family could have afforded it, would have been rendered by private nurses. He would not be troubled by the lack of evidence as to the “economic value” of these services, but would use his layman’s judgment and experience. The American court that was confronted with this case took the same approach, leaving it to the jury to use their judgment in putting a price on the 1000 hours that the mother spent in nursing the child. The court viewed their award of $1500 for this item as “little enough for the amount of nursing care that the mother rendered.”

Not all cases may be this extreme. But whenever the accident victim required nursing care, whether at home or in the hospital, which was rendered by a family member, he would recognize the justice of the family's claim. Since the family could not afford private nursing care, the members of the family would have to assume the responsibility. Younger children might have to stay home from school. Older children who were working, or the mother, if she had an outside job, would have to miss work, and to that extent would be “out-of-pocket.” The chief might order the defendant to pay something to each member of the family who rendered assistance. More likely, he would see the loss as a loss to the family. Family life was disrupted because of the accident, and perhaps even if the family could have afforded to hire private nurses, they would have preferred to take care of the victim themselves. Whether they hired private nurses or took care of the victim themselves, it is proper that the defendant compensate them for the nursing services made necessary by the accident.

When we return to our more formalized legal system, it should be clear that there is nothing “gratuitous” about nursing services rendered to an accident victim by members of his family. Family life has been disrupted by the accident, and to award compensation for the value of the services to the victim—the only person who can bring suit to recover from the tortfeasor—is really to compensate the family for its loss. As a practical matter, the value the jury will assign to nursing services rendered by the family is probably less than the cost of professional nurses, so the defendant is in no position to complain. To deny recovery
for such services is clearly to discriminate against the families who cannot afford to expend the money for private nurses.\footnote{259} It must be remembered that we are talking about nursing services that were reasonably incurred, so that if private nurses had been hired, this item of damages would be recoverable. Where nursing services were not necessary, the plaintiff could not recover the cost of private nurses, under principles of avoidable consequences.\footnote{260} Where nursing services were necessary, it should not make any difference whether they were rendered by private nurses or by a member of the family.

It is this point that may be troubling the courts denying recovery for nursing services rendered “gratuitously” by a member of the family. Family members, particularly spouses, parents and children, are expected to render services to each other as part of their normal relationship. This includes services during the course of an illness or injury. The fear may be that they will try to take advantage of the fact that there is tort recovery to obtain compensation for the services rendered in the ordinary course of the relationship. But this is not what the cases have involved. In all cases where recovery was allowed, and in those where it was not, it appeared that true nursing services were actually being performed. The proper test to determine whether recovery should be allowed is whether the victim or his family would have been justified in hiring private nurses. If it would have been unreasonable to do so, recovery for the value of nursing services would be barred under principles of avoidable consequences. Where it would have been reasonable, the victim (who, under our system is the only one who can sue the tortfeasor\footnote{261}) should recover their value on behalf of the family.

It is not difficult to distinguish between the kind of nursing

\footnote{259} See the discussion of this point in James, Social Insurance and Tort Liability: The Problem of Alternative Remedies, 27 N.Y.U.L. Rev. 537, 551 n. 49 (1952); Lambert, The Case for the Collateral Source Rule, 1966 Ins. L.J. 531, 536.

\footnote{260} Under this principle, the plaintiff is not permitted to recover for expenses that were not reasonably incurred. A person injured by a tortfeasor is not entitled to nursing care unless the nature of the injuries makes such care reasonably necessary.

\footnote{261} Note, however, that it is the parent who recovers for the cost of medical and nursing services expended on behalf of a child. In Bradford v. Edmonds, 215 Cal. App. 2d 159, 30 Cal. Rptr. 185 (1963), the mother who had rendered the services was permitted to recover their value from the defendant. However, at the trial she failed to introduce evidence of what she did in the way of nursing services, and a new trial was ordered on that ground.
services that would properly be rendered by professional nurses and the kind normally rendered as part of the family relationship when illness or accident occurs. The latter appears when a victim who is permanently disabled as a result of the accident, and, therefore, will need extra care from his spouse or members of his family. Such a case is Gainar v. S.S. Longview Victory,262 where, as a result of carbon monoxide poisoning, the plaintiff suffered permanent brain damage, making him "little more than flesh and bones." The court awarded $100,000 for loss of earnings, $100,000 for pain and suffering, and $19,000 for past and future medical expenses. He also claimed recovery for the value of "nursing services" to be rendered by his wife in the future, but this claim was rejected by the court. The court said that it doubted whether the collateral source rule should be extended to the services rendered by a spouse and that, in any event, it was difficult to distinguish between customary duties and "extraordinary services made necessary by the injury." The court was correct to deny recovery for this item, since the services the wife would perform were in no sense nursing services, the kind of services that a private nurse would be hired to perform. These services consisted of (1) applying alcohol to his body, (2) obtaining medical prescriptions, (3) taking him to the doctor, (4) assisting him in shaving and dressing, (5) arranging medical appointments, and (6) "presumably aiding him in most of his activities." These are the things that a wife does for a disabled husband, or that one member of a family does for another. If the victim had no family, he would, in his condition, have had to have been institutionalized, and the cost of institutional care would be a proper item of damages. Again, we are back to the notion that the tortfeasor takes his victim as he finds him. Since the victim had a family and needed services that are ordinarily performed by one family member for another in case of disablement, there is no reason for the plaintiff to recover the value of such services.

The real problem is that the victim is an invalid, and what he is really seeking to recover is his total dependency on others as a result of the accident. There is no doubt that this condition should be the subject of compensation, and the question is how

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it is to be done. The answer appears on the case of *James v. State*,\(^2\) where due to the accident the plaintiff was paralyzed and would be confined to a wheelchair for the rest of his life. He sought to recover as a special item of damages the value of "nursing services" that had been rendered by his wife in the past and would be rendered by her in the future. These services were similar to those involved in *Gainar*. The court disallowed this item on the ground that compensation could not be recovered for services which were "normal marital obligations." The court did, however, make an award of $75,000 for pain and suffering. In commenting on that award, it observed that "it covers life in a wheelchair, the resulting sexual impotence, anxieties and *his total dependency on others for his every movement.*" (Emphasis added.)\(^3\) Life in a wheelchair and total dependency are compensated under the heading of damages for pain and suffering rather than nursing services of the wife. The jury will award compensation for the fact that he is dependent, and evidence of what his wife will have to do for him is relevant to show the nature of his dependency. Its award of damages for pain and suffering will not only compensate the plaintiff for his condition, but will take care of the disruption of family life that has been caused by the accident. To instruct the jury that it should award an additional sum for the wife's nursing services could only cause confusion.\(^4\) This situation is easily distinguishable from those where a member of the family has rendered true nursing services.

**F. A Comparison.**

We may now compare the results reached under the functional approach with those reached by an application of the collateral source rule. Under the functional approach, the plaintiff will ordinarily recover the value of "gratuitous medical services" furnished by a physician or paid by someone else. He recovers, in effect, on behalf of the physician or the donor, because our system does not permit them to proceed against the tortfeasor. By allowing the plaintiff to recover, there is the possibility that

\(^{263}\) 154 So.2d 497 (La. App. 1963).
\(^{264}\) 154 So. 2d at 499.
\(^{265}\) To the extent that the jury is awarding compensation for "loss of humanity," it is not likely to "add" a sum for the wife's services.
the proper person will be paid, if he desires it, and this can be accomplished by a direction to repay. We would deny recovery only in an unusual situation such as that presented in Coyne v. Campbell, where the plaintiff himself was a physician.

A clear departure from the collateral source rule occurs in the case of services rendered at a public or private charity hospital. We would deny recovery to the plaintiff, since as to him such care was free, and there is no reason to permit him to recover the cost from the defendant. Whether the hospital should be able to recover from the tortfeasor is a different matter, but in all probability it is not worthwhile for them to pursue such claims. 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 and thereby receive a "windfall," but recovery for past and future expenditures must be had in a single action, and at the time of suit there is no way of knowing what he will choose to do.

We would allow servicemen, active or retired, to recover the value of free medical care at military hospitals, not because such care came from a "collateral source," but because this represents a "fringe benefit," and we cannot measure what they "gave up" in order to get it. It is not proper to deduct the value of the benefit, without giving them credit for what they lost in order to receive it, and the defendant, who otherwise is responsible for the loss, must bear it, where he cannot demonstrate the amount that should be deducted. However, we would deny recovery in a suit against the United States under the Federal Tort Claims Act, because there it is the tortfeasor who has furnished the benefit. Again, note that in such cases the plaintiff would be entitled to recover the value of future medical and hospital expenses, since he might prefer private care. In contradistinction to the collateral source rule, we would deny recovery against a tortfeasor, whether the United States or not, where the plaintiff has received free care at a Veterans Administration Hospital. Such care simply represents a social welfare benefit extended to veterans who are indigent. In this connection, the courts should ignore the attempt of the lawyers
in the Veterans Administration to recover the cost of such care under the "assignment" method. It is difficult to believe that the total cost of care for indigent veterans who are accident victims amounts to such a significant portion of the Veterans Administration budget that the judicial machinery should be used to reallocate the loss which has come to rest in an efficient channel of distribution.

Where the expenses have been met by health insurance or some similar protective arrangement, the plaintiff should recover either the amount of the expenses or the total amount of his premiums or contributions, whichever is smaller. The collateral source rule would allow recovery of the expenses without regard to the premiums or contributions. Recovery should also be reduced by any amount paid to the plaintiff under a medical payments provision, whether he is suing the driver of the automobile in which he was riding or the driver of another vehicle involved in the accident. Such payments have operated to reduce his loss, and he has not given value for them. We would deny recovery for expenses met by Medicare and limit the beneficiary to what he has actually expended for the deductible and co-insurance amounts and the payments for supplementary coverage. Under the collateral source rule, recovery for the value of the hospital and medical services would be allowed. Finally, we would allow the plaintiff to recover the value of nursing services rendered by family members, where such services would be compensable if rendered by private nurses, distinguishing these from services rendered to a disabled accident victim in the course of the normal family relationship, which, in effect, are compensated by the award of damages for pain and suffering. It should be noted that not all courts allow recovery, even under the collateral source rule, for "gratuitous" services rendered by family members.

Loss of Earning Opportunity

From the standpoint of out-of-pocket loss, loss of earning opportunity is the most significant item of damages. As a result of the injury the plaintiff, if he has been working, will have lost
time from his work, which obviously represents a compensable loss.\textsuperscript{266} Moreover, the injury may have had permanent effects. Although the plaintiff perhaps will be able to return to work, his earning capacity might be impaired, and if so, he recovers damages for what is called impairment of future earning opportunity.\textsuperscript{267} This situation will ordinarily not present any collateral source problems,\textsuperscript{268} and for purposes of our analysis, may be disregarded. We are interested in the case where as a result of the injury, the plaintiff has become “permanently and totally disabled,” which means that he will not be able to work at all, or at least will be unable to earn anything significant. Whether the victim is “permanently and totally disabled” will depend not only on the nature of his injury, but on the nature of his employment. The longshoreman with a sixth grade education who has become a double amputee will, in all likelihood, be unable to work again. The college professor in the same situation may well continue his employment without reduction in earning capacity. The permanently and totally disabled victim likewise recovers for loss of future earning opportunity, \textit{i.e.}, he recovers what he would have earned if he had not been injured.\textsuperscript{269} Recovery for loss of earning opportunity, then, includes recovery for both “past” and “future” losses due to accident.

It is important to review the theoretical basis of this recovery. The plaintiff recovers for the earning opportunity that \textit{he} has lost. One way to deal with the societal problem of accidents might be to provide only minimum protection against the loss

\textsuperscript{266} If the plaintiff is a housewife, the husband recovers the value of her services. If a married woman has been working, she recovers for the lost income in her own right. \textit{See} W. Prosser, \textit{Law of Torts}, 913-14 (3rd ed. 1964).

\textsuperscript{267} This is a compensable interest even in the absence of evidence that the plaintiff has suffered a diminution in wages following the injury. \textit{See} Messer v. Beighley, 409 Pa. 551, 187 A.2d 165 (1963). \textit{See also} Gooch v. Lake, 327 S.W.2d 132 (Mo. 1959), where the plaintiff, a football player, was unable to play during his senior year of college. He was permitted to show that the starting salary of high school football coaches would depend on whether they played during their senior year and that, as a result of the accident, he would receive a lower starting salary. Even though the injury did not have a permanent effect, it resulted in an impairment of future earning opportunity, for which he could recover.

\textsuperscript{268} However, as a result of the injury, the plaintiff might receive a partial disability pension. The analysis applicable to the “permanently and totally disabled plaintiff” would also be applicable to this situation.

\textsuperscript{269} This is also true in a wrongful death action. The beneficiaries’ recovery is based on the loss of future earning opportunity of the decedent. Thus, whenever we are talking about recovery for loss of future earning opportunity, we include both a suit for personal injuries and a suit for wrongful death.
that results, i.e., in addition to medical and hospital expenses, we would award enough money so that the victim and his family could enjoy a modest standard of living during the period of disablement, whether temporary or permanent.\textsuperscript{270} Suppose that an executive earning $50,000 per year is killed or permanently disabled so that he is unable to work again. If he had the expectancy of twenty more years of gainful employment, he is entitled to recover the present worth of $1,000,000 with or without a deduction for taxes.\textsuperscript{271} But his family does not need nearly that much to subsist. Suppose we conclude that a family of four needs $6000 per year to enjoy a minimum standard of living. If he dies, leaving a wife and three children, we could give the family $6000 per year until the children were grown and then reduce the amount to that which is necessary to take care of the wife. This is not how our system works. Compensation is not based on the minimum needs of the victim or his family, nor even on “reasonable needs.” We try to put the victim or his family in as good a position as he would have been if the accident had not occurred.\textsuperscript{272} Supporters of the present system of vertical rather than horizontal splitting contend that “deserving” victims should obtain full recovery and “undeserving” victims should not recover, rather than permitting all victims, “deserving” and “undeserving” to obtain something.\textsuperscript{273} Therefore, when we speak in terms of “adequate compensation,” we are speaking in terms of what the victim or his family lost by the accident and not in terms of what his needs will be afterwards.

At the time our rules of damages for personal injuries developed, loss of work meant loss of pay. Whenever a plaintiff was unable to work for a period of time due to the injury, he received no pay, and it was only proper that he recover the amount of pay lost from the tortfeasor. The courts, however, said that what he was really recovering was the value of his

\textsuperscript{270} As is provided in Saskatchewan, for example, for all victims of automobile accidents. SASK. REV. STAT. ch 409, pt. II (1965). Tort recovery is also provided.

\textsuperscript{271} See Note 32, supra.

\textsuperscript{272} Thus, the plaintiff recovers damages for loss of earning opportunity based on his life expectancy as it existed before the accident rather than his life expectancy as it exists following the accident. See Prairie Creek Coal Mining Co. v. Kittrell, 106 Ark. 138, 153 S.W. 89 (1912).

lost time, and what he was earning was merely some evidence of what his time was worth.\textsuperscript{274} It is difficult to believe that the jury considers whether the plaintiff was being over-paid. Where a salaried or hourly employee has been injured, it is reasonable to assume that the jury awards him his pay for each day missed from work. Such damages are often stipulated. The concept that the plaintiff was recovering for the value of lost time proved useful where the plaintiff was not receiving a salary or hourly pay, as for example where he was unemployed at the time of the injury,\textsuperscript{275} was self-employed,\textsuperscript{276} was working in a family business without pay,\textsuperscript{277} or suffered permanent disability when he was just embarking on his career after a period of training.\textsuperscript{278}

The concept also proved useful in those rare cases where the employer continued to pay the wages as a "gratuity" either because he was charitably inclined or because he wished to retain the loyalty of a key employee. The courts that permitted the plaintiff to recover full damages despite the fact that his wages were continued stressed that he was recovering for the value of his lost time rather than for lost wages; this buttressed the application of the collateral source rule.\textsuperscript{279} Moreover, certain kinds of employees continued to receive their salary despite disablement, such as military personnel\textsuperscript{280} and policemen.\textsuperscript{281} Here too, the notion that the plaintiff was recovering for the value of his lost time operated with the collateral source rule so as to allow recovery.

Today, of course, the concept of "no work, no pay" has undergone radical change. Unemployment compensation and other forms of public assistance are available for those who

\begin{footnotes}
\item[274] See generally C. McCormick, Damages § 87 (1935).
\item[276] See, e.g., Chesapeake & O. Ry. v. Shanks, 260 Ky. 416, 86 S.W.2d 128 (1935).
\end{footnotes}
cannot obtain employment. An employee who suffers injury during the course of his employment is likely to receive workmen's compensation during the time that he misses work. He may have an accident insurance policy that provides payment for each day that he was incapacitated. With respect to time lost from work, however, the most important change has been the advent of sick leave. It is now recognized that employees are entitled to miss a certain number of days of work without loss of pay. Sick leave can take a variety of forms; the employee may have so many days per month or per year, and he may be able to accumulate the leave for a period of time. More significantly, the sick leave may be the equivalent, expressly or in practice, to vacation leave, that is, if the employee does not use up the time for actual illness he may take it, "pretending to be ill," or as vacation time without the pretense. Whatever the form, it is clear that sick leave is part of the employee's total compensation picture. Enterprises calculate the cost of sick leave benefits as part of total employment cost, and it has "dollar and cents" value in collective bargaining agreements.

The change in societal attitude is equally applicable where the employee has become totally and permanently disabled. At one time the individual who was no longer able to work was left to provide for himself with primary dependence on savings, efforts of other family members, and private or public charity. Now, if he has suffered the injury in the course of his employment, he will usually receive benefits under a workmen's compensation plan or similar statutory scheme. He may receive a disability pension from his employer. He may have income protection insurance, under which he receives a sum of money each month for a designated period of time or until the end of life. And he may receive a disability pension under the Social Security Act or similar legislation such as the Railroad Retirement Act or the Federal Civil Service Retirement Act.

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282 It must be remembered, however, that not all employees are covered. See the discussion in 1 A. Larson, The Law of Workmen's Compensation, § 5.30 (1966). Some employees such as railroad workers and seamen have a statutory cause of action against the employer, which alters common law defenses.


It is evident, therefore, that the question of collateral source benefits as affecting recovery for loss of earning opportunity will frequently arise. The plaintiff who was unable to work for a period of time because of the accident may not have lost any wages. The nature of his employment may have been such that his salary was continued during the period of disability, or the employer may have decided to continue it anyway. He may have received workmen’s compensation or have used up some or all of his sick leave time. Even if he did not get paid, he might have received insurance benefits, and if he was unemployed, he might have been receiving unemployment compensation or other public assistance during the time in which he was incapacitated. Where he suffered a permanent disability, he might be receiving benefits from workmen’s compensation, from a private disability pension, from a disability pension provided by the government or from income protection insurance. Our discussion of the problem will be divided into three parts: (1) loss of time without loss of pay; (2) private pensions and accident insurance; (3) social insurance. It is the latter which will require the most extensive discussion.

A. Loss of Time Without Loss of Pay.

Here we will be discussing the situation where the plaintiff may not have lost any pay, either because he used up sick leave time, the nature of the employment was such that pay continued during disability, or the employer simply paid his wages. The situation where the wages were not continued, but the plaintiff had accident insurance or received social insurance benefits will be discussed in the remaining sections. Let us first consider sick leave. If sick leave can, in effect, be taken like vacation time, it is clear that the plaintiff has lost something when he was compelled to use up sick leave time while recovering from the accident. What he has lost is part of his paid vacation from work. Suppose that in a given year the plaintiff can accumulate ten days of sick leave, which, if unused, he can take as vacation time. If he uses the sick leave to recuperate from the accident

28 It must be remembered that certain classes of plaintiffs may not have suffered any loss of earning opportunity, e.g., retired persons, children, and housewives.
and takes ten days of vacation without pay, he is out-of-pocket the wages for those ten days. More likely, he will take ten days less vacation than he would have if the accident had not occurred, and vacation time will have been spent in convalescence. It is surely reasonable to measure the economic value of his lost vacation by his wages for those days just as if he had used officially designated vacation time to recuperate.\(^{287}\) By the same token, where sick leave can be accumulated, particularly over a long period of time, the plaintiff loses the benefit of the leave for future use whenever he takes some of it as a result of the accident. Again, he has given up something of value, which can be measured in terms of his wages for the time lost.\(^{288}\) The point is that in some enterprises employees can take sick leave like vacation time. The prudent employee may accumulate the sick leave for future use to the extent possible. Others will take it at the end of each year. In either event, the employee who has such leave for convalescence is out-of-pocket, and he is properly compensated by the recovery of his wages for the time used as sick leave.

In other enterprises sick leave may mean just that. Employees may have to substantiate their absence by medical certification or similar evidence. It is also likely that sick leave cannot be accumulated for too long a period. Sick leave then becomes a contingent benefit, to be used only in the case of actual illness or disability. Here too, however, he should be able to recover the value of his lost time notwithstanding that his pay was continued under the sick leave arrangement. If, at the time of trial, he still could make use of the sick leave in the future, it cannot be said that he actually received his wages during the period of disability. For, if he should subsequently become ill, the sick leave would not be available, and he would lose the wages at that time. It is more likely that this will be known at the time of trial, and the question is whether the fact that he did not lose


wages because he used his sick leave time should affect his recovery. The answer to this question will be found in our analysis of Sergeant Browning's case. Sick leave represents a "fringe benefit," and as we have said, represents a part of the total compensation picture. We cannot measure how much the plaintiff "gave up" in reduced wages—and will give up in the future—in order to obtain the sick leave benefit, in the absence of a very special computer that our system lacks.\textsuperscript{289} We cannot say that the plaintiff suffered no wage loss because of the accident since he had sick leave, because we do not know what the sick leave "cost" him. We have, therefore, concluded that in all cases where the wages of the plaintiff were continued because of sick leave provisions, he should recover the value of his lost time from the defendant.

Where the pay is continued because of the nature of the employment—this is also Sergeant Browning's case—the same rationale is applicable. Where pay continues during disability, and this is known at the outset of the employment relationship, it is a fringe benefit and a part of the total compensation picture. The serviceman knows that his pay continues during a temporary disability, and if he must retire due to a line of duty injury, he will receive a disability pension. It cannot be doubted that the security in knowing that "the government will take care of you" operates as an inducement to enter and remain in military service despite the relatively low salary. Since we cannot measure the economic value of what the serviceman gave up to get this benefit, we must permit him to recover for the value of his lost time.\textsuperscript{290} This is also true in the case of a policeman who continues to receive pay when injured in the line of duty\textsuperscript{291} or a college professor whose salary continues during disability.\textsuperscript{292} In certain types of employment the security of continuation of

\begin{footnotesize}
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\item \textsuperscript{289} See Klein v. United States, 339 F.2d 512 (2d Cir. 1964), where the plaintiff's salary was continued under the employer's sickness and disability plan. The court allowed recovery, stressing that the benefit "was part of the bargain for her labor." Id. at 518.
\item \textsuperscript{290} See Bell v. Primeau, 104 N.H. 227, 183 A.2d 729 (1962). The English courts do not permit the serviceman to recover in such a case. See the discussion in Browning v. The War Office, [1963] 1 Q.B. 750, 759 (C.A. 1962). The plaintiff in \textit{Browning} did not claim damages for the value of his lost time.
\item \textsuperscript{291} See Wachtel v. Leonard, 45 Ga. App. 14, 163 S.E. 512 (1932); D'Archangelo v. Loyer, 125 Vt. 325, 215 A.2d 520 (1965).
\item \textsuperscript{292} See Ashley v. American Automobile Ins. Co. 19 Wis.2d 17, 119 N.W.2d 359 (1963).
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salary during disability may be significant, and we now realize that "pay" represents a combination of factors, of which salary is only one. The fact that a person's salary is continued during disability, therefore, does not mean that he has not "lost" something by undertaking the kind of employment that provides such security, and that something is probably less salary. Our inability to measure what he has given up in order to obtain the benefit precludes us from deducting the value of the benefit, and the ordinary rule allowing recovery for the value of his lost time must operate.

As we have stated repeatedly, under our system the plaintiff is entitled to recover the value of what he has lost because of the accident. His needs are irrelevant. When a person's pay is continued during disability for any reason, he does not need to recover the value of the lost time from the tortfeasor. He and his family will be able to subsist despite the injury. Our goal, however, is not that the family be able to subsist, but that he is to be made whole. It may seem illogical from an economic standpoint to permit a person to recover wages that he never lost. But since he "gave up" something in order to get those wages, we cannot make a deduction without giving him credit for what he surrendered. Since we cannot measure this, we have no choice but to give him the wages. This is the closest we can come to measuring his loss from the accident. So long as we award compensation to accident victims under our present system, we must continue to deal with collateral source benefits in terms of whether there has been a loss rather than in terms of whether a need has been met. Because of the limitations inherent in measuring loss accurately under our system, and in light of our theory of compensation, we may have to permit recovery for lost salary where the salary actually was continued.

No problem of measurement confronts us when we consider the true gratuity situation, that is, the situation where the employer continues the wages despite the fact that he is not re-
quired to do so by the contract or the nature of the employment. Rather he does so out of charity, or more likely because he thinks that it is in his interest to do so in order to retain the loyalty of a key employee. If we are to treat the gratuity as a separate category, we must assume that the plaintiff did not take less salary or give up something in the past in order to obtain the gratuity. Where the wages have been continued as a gratuity, for whatever reason, it is clear that the employer has lost something because of the accident. Either he had to hire a substitute or operate short-handed, and, as we have said, the accident is likely to have had effects on others than the immediate victim. The courts have had a difficult time with these cases. It may be that the employee will continue to perform some services, though his efficiency has been reduced. Some courts have tried to distinguish between the situation where it could be said that the employee actually lost no time from work, so that he could not recover for this item of damages, and where it could be said that he was really being paid a gratuity, so that recovery for the value of his lost time was justified under the collateral source rule. Where the employee was definitely away from work, most courts allow recovery, as we have said, either on the basis of the collateral source rule or on the ground that he is recovering for the value of his lost time rather than for lost salary. A notable exception is New York, which in the old case of Drinkwater v. Dinsmore, denied recovery, and reaffirmed its position in Coyne v. Campbell.

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294 In either event this is only likely to occur where there is an individual employer-employee relationship. In other cases the enterprise is likely to have sick leave arrangements.

295 If the employer has taken out insurance against the illness of a key employee, any payments made to the employee under the insurance do not represent a gratuity. Such benefits become a part of his total compensation picture.

296 This is true even if he has not continued the wages.


299 See e.g., Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374 (1927).

300 See e.g., Silverman v. Springfield Advertising Co., 120 Conn. 55, 179 A. 98 (1935).

301 80 N.Y. 390 (1880).

Let us bring this case before our African chief. As he would see it, the victim and his family were not affected by the accident, because the employer continued his wages, so there is no reason for the victim to recover from the tortfeasor. The effects of the accident were clearly felt by the employer. If he had hired a substitute, he would be out-of-pocket that amount. Apart from that, secondary effects might also be visible. The substitute may have been unable to perform the work as well as the injured person, consequently the employer would have been adversely affected in this regard whether or not he continued the employee's wages. This becomes more pronounced when no substitute was hired, and the employer had to operate "short-handed," regardless of whether or not he continued the employee's wages. Anytime an employee is unable to work, harm may be suffered by the employer.

Thus, for our chief the question is not whether the employee should recover the value of lost wages from the tortfeasor, but whether the employer should be compensated for the disruption of his enterprise due to the absence of his employee following an accident for which the defendant was responsible. The chief would certainly allow the employer to recover the salary he paid to the employee. That was the tortfeasor's responsibility, and the employer met it for him. Where the cost of hiring the substitute exceeded the employee's wages, the chief would also permit recovery for that amount: this is a clearly ascertainable loss to the employer, made necessary by the accident. Beyond this, the chief would be very hesitant to allow recovery, because he would find it difficult to measure the employer's loss due to the "secondary effects." He would note that he had the same kind of difficulty whenever self-employed person was injured: how could he determine what the victim lost due to his absence from the business, particularly if the business was operated with a substantial capital investment and a large number of employees. There, however, he would do the best he could, since all accident victims are entitled to compensation for their lost time.

303 In the same manner as where the employer pays the injured employee workmen's compensation. As we will see, in most states the employer can recover this amount either by subrogation or reimbursement.

Here the employer is not the accident victim, and the chief might conclude that the employer should not recover in excess of his out-of-pocket expenditures. Since the loss to the employer from the secondary effects of the employee's absence could not be measured to the chief's satisfaction, he would say, "I'm sorry, but you will just have to put up with this kind of loss as a cost of doing business. This won't happen that often, and there is only so much that our law can do."

Let us now return to our system and see how we have dealt with the problem of the disruption of the employer's enterprise. It is not inaccurate to say that the employer has never been permitted to recover damages for the disruption of his enterprise from the tortfeasor. The gist of the common law action per quod servitium amisit may have been the loss of services due to the injury, but recovery was essentially for the ordinary expenses of maintaining the injured servant or child and actual disbursements such as medical bills. Recovery may have included the cost of hiring a substitute or extra household help, but it may be questioned whether such help would have been regularly available. If the action survives today, and there have been few American cases recognizing it, it may be that the cost of hiring a substitute can be recovered. One court has stated in dicta that the employer could recover what he might have made above the cost of the employee's services, but the actual holding was that, in the absence of statutory subrogation, the employer could not recover workmen's compensation from the tortfeasor. The court flatly stated that the employer could not recover the wages paid to the injured employee. As pointed out

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305 We would say that "such damages are too speculative, since they cannot be proved with reasonable certainty." Of course, this represents a value judgment. Where the interest is sufficiently important to justify compensation, such as pain and suffering, we permit recovery, although damages are completely speculative. But where it is not that important, such as loss of enjoyment from being unable to play a musical instrument, we invoke the "certainty" rule. See Hogan v. Santa Fe Trail Transp. Co., 148 Kan. 720, 85 P.2d 28 (1938).


307 Id. at 1485.

308 Id. at 1490-91.

309 Id. at 1492.


311 Cf. Mankin v. Scala Theodrome Co., [1947] K.B. 257, where the employer and the employee made up a joint vaudeville act. The employer was permitted to recover damages based on reduced earnings. Both he and the employee joined as plaintiffs in the suit against the tortfeasor.
previously, on the whole, our tort law limits recovery to the immediate victim of the accident and does not allow recovery to others who may have been affected by it.\textsuperscript{312} Thus, the employer does not have a cause of action for the disruption of his business due to the absence of an employee. Even apart from questions of “duty,” “foreseeability” and the like, this loss simply cannot be measured, and since it is not likely to occur with great frequency,\textsuperscript{313} the employer will have to bear it. We would then agree with the African chief on this point.

However, this is a much different question than whether the employer who has suffered a measureable out-of-pocket loss as a result of the accident, \textit{i.e.}, the amount of salary paid to the employee, for which he received nothing in return, should be able to recover this amount from the tortfeasor. Practically all modern cases in which the employer has tried to recover from the tortfeasor involve claims for reimbursement of disability payments, pensions, or the cost of medical treatment for members of the armed forces, police force or other public servants.\textsuperscript{314} As we will see, in most states workmen’s compensation payments are recoverable by the employer or his insurer, either by way of an independent action against the responsible tortfeasor, by intervention in the employee’s action against the tortfeasor or by a lien on the employee’s judgment.\textsuperscript{315} Some civil law jurisdictions allow recoupment of payments made to the employee from the tortfeasor.\textsuperscript{316} Most English and American cases, on the other hand, hold that the employer cannot recover.\textsuperscript{317} The result is justified if, because of the jurisdiction’s commitment to the collateral source rule, the employee’s recovery is unaffected by the receipt of benefits from the employer, since otherwise the de-

\textsuperscript{312} See the discussion, \textit{supra} notes 110-11 and accompanying text.
\textsuperscript{313} Just as it is possible to obtain insurance against the death of a key employee, it should be possible to obtain insurance against his disablement or temporary absence from work.
\textsuperscript{314} See the discussion in Fleming \textit{supra} note 306, at 1487.
\textsuperscript{315} See the discussion, \textit{infra} notes 372-76 and accompanying text.
\textsuperscript{316} See the discussion in Fleming \textit{supra} note 306, at 1516-20.
\textsuperscript{317} United States v. Standard Oil Co., 332 U.S. 301 (1947); City of Philadelphia v. Philadelphia Rapid Transit Co., 337 Pa. 1, 10 A.2d 434 (1940); Receiver for the Metropolitan Police Dist. v. Croydon Corp., [1957] 2 Q.B. 154 (C.A. 1956). In the latter case the court said that the action \textit{per quod servitium amissit} was available only as to “menial servants.” Recovery was permitted as to sums expended for the benefit of the injured employee in Jones \textit{v. Waterman S. S. Corp.}, 155 F.2d 992 (3rd Cir. 1946), but it is doubtful if the decision (which was based on Pennsylvania law, and the court apparently was unaware of the \textit{City of Philadelphia} case) would be followed today.
fendant would have to pay twice for the same item of damages. But if the court holds that the employee cannot recover his salary which was met by the employer's gratuitous payment, and does not permit an action by the employer to recover the amount expended, we have a case of uncompensated loss. The employee has received his wages, so he has lost nothing due to the accident. The employer is out-of-pocket the wages he paid his employee, for which he received nothing in return, even discounting the disruption of his business. Since the defendant will not have had to pay anything to the employee for his lost time, there is no reason why he should not be liable for this out-of-pocket loss the employer has sustained. And apart from the employer's loss, he has made good an injury to the accident victim, the responsibility for which the law has assigned to the tortfeasor.

The solution for the African chief was to order the tortfeasor to make the payment to the employer, and as we have pointed out, this is what happens in the case of workmen's compensation and in some civil law jurisdictions. This solution has been advocated for all gratuity cases. But is this a sound solution in our legal system? We are not talking about a comprehensive plan of loss allocation resulting from accidents. The question is whether in the relatively few cases where the employer has continued to pay the salary of his injured employee because of charitable inclination or the employee's special value to him, the employer should have a separate cause of action against the tortfeasor to recover this amount. Our system is not that of the African chief, and we cannot call the parties under a tree. While we may allow recoupment in the case of an injured employee who has obtained workmen's compensation, such cases are significantly more in number. And such recoupment has been questioned as reallocating the loss from one efficient channel of distribution to another, perhaps less efficient, as well as presenting practical problems in apportionment.

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320 The tortfeasor may be a less efficient loss distributor, particularly where the employer is insured.

There are likely to be similar problems in permitting a separate action by the employer. Apart from that, the real objection is to "cranking up the machine again." The employer has, in fact, suffered a loss due to the accident, since he paid the employee his salary without receiving anything in return. It seems more efficient to permit the employee to recover this loss on his behalf, that is, to recover the value of his lost time without regard to the fact that his salary was continued. We could include a direction to repay, but this is not really necessary. The employee and the employer may adjust matters as they wish, and the defendant is protected, since he will have to meet the loss only once. An analogy may be drawn to cases where the accident victim was working but received no salary. By permitting him to recover the value of his lost time, we are, in effect, compensating the enterprise for the loss of the employee. A recent case involved a priest who was teaching at a college operated by his religious order. Following the accident, he missed some time from work and thereafter taught a reduced load. It was contended that since he had taken vows of poverty and was not paid wages, he suffered no economic loss in this regard. Nonetheless, the court permitted him to recover for the value of his lost time. No doubt he will turn the proceeds of the award over to the college, which is thereby compensated for the loss it suffered because of his absence. The same thing will happen when we allow recovery for the value of lost time to a woman who performed services as a bookkeeper for a partnership consisting of her husband and son, but received no salary. Interestingly enough, in that case, damages were computed on the basis of a monthly salary paid to a replacement. So too, when a partner in a business has been injured and continues to draw salary during the period of disablement. In all of these cases the enterprise has suffered a loss when an employee was unable to work due to the accident. It is more efficient to permit the plaintiff to recover on behalf of the enterprise, and for want of a better method, we

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322 See the criticism of the separate action in Maxwell, supra note 388, at 685.
measure the loss to the enterprise in terms of the value of the employee’s time. 326

Where the employee who received his salary during the period of disablement recovers the value of his lost time, funds are available from which he can reimburse the employer. He and the employer can adjust the matter as they wish. Therefore, recovery for the value of lost time should be unaffected by the fact that the plaintiff’s salary was continued. He is recovering on behalf of his employer, and under our system—which is necessarily more complicated than that of the African chief—it is sounder to go about it in this way rather than to permit a separate action by the employer against the tortfeasor.

B. Disability Pensions and Accident Insurance.

We have used the example of disability pensions to demonstrate the methodology of the functional approach. We conclude that the receipt of a disability pension should not operate to reduce recovery because we could not measure what the plaintiff “lost” in order to receive that benefit. This is not a question of cumulating benefits, but of measuring the plaintiff’s “true loss.” If compensation were determined with reference to the needs of the victim and his family, the disability pension would be most relevant, but this is not how we do it. We lack the necessary data to feed the value of the disability pension into the machine, because we have no way of measuring the cost of the pension to the plaintiff. Therefore, the disability pension must be ignored. It is for this reason that we disagree with the result in Sergeant Browning’s case and agree with the courts that do not allow it to be considered, 327 although we reject the rationale of the collateral source rule. 328

326 In Canning v. Hannaford, 373 Mich. 41, 127 N.W.2d 851 (1964), the court noted that the jury could have found that the earnings had decreased as a result of the plaintiff’s absence. Where a self-employed person is injured, and because of the nature of the enterprise it is not possible to say that a decrease in profits was due to the employee’s absence, he recovers damages based on the value of his lost time. See Dempsey v. City of Scranton, 264 Pa. 485, 107 A. 877 (1919). See also Baltazar v. Neill, 364 S.W.2d 846 (Tex. Civ. App. 1963). Following the plaintiff’s injury, his wife was required to quit her employment and take his place in the store. The court allowed the jury to consider evidence of the wife’s earnings in her former employment as bearing on the value of the plaintiff’s lost time.

327 See e.g., Capital Products, Inc. v. Romer, 252 F.2d 843 (D.C. Cir. 1958); Hume v. Lacey, 112 Cal. App. 2d 147, 245 P.2d 672 (1952); Rusk v. Jef-
Personal Injury Damages

Accident insurance may take a variety of forms, but perhaps we can concentrate our discussion on three types. The insured may receive a specified sum of money for each day that he is disabled, and for the wage-earner this would represent time away from work. A second kind of protection is against the loss of a member, and the insured receives a lump sum payment, e.g., $10,000 for the loss of a finger, $100,000 for the loss of both legs. He would also receive a lump sum payment for total and permanent disability. A third type may be called income protection. After the insured has been disabled for a certain period or has become totally and permanently disabled, he receives monthly payments, either for a specified time, e.g., two years, or the rest of his life.

It has long been held that recovery of damages is not affected by the receipt of accident insurance benefits of whatever variety. This is in accord with the general rule as to insurance. We have previously discussed the question in the case of the Insured

(Footnote continued from preceding page)


However, the disability benefit may be in lieu of other benefits that the plaintiff would have received but for the injury. In Healy v. Rennert, the plaintiff alleged that if he had not been injured, he could have retired in two years at half-pay. The evidence of the disability pension was introduced by the defendant to counter the plaintiff's claim of loss. Here the jury found for the defendant, and the court concluded that the introduction of the evidence of the disability pension was reversible error. See the discussion supra, note 75. Nonetheless, since the disability pension was, in effect, a substitute for the retirement pension, the plaintiff should not be able to recover the lost retirement pension in addition. Perhaps because of the posture of the case, this fact escaped the court's notice. The same situation was involved in Cunningham v. Rederiet Vindeggen A/S, 333 F.2d 308 (2d Cir. 1964). In a wrongful death action the plaintiff sought recovery for half the value of pension payments her deceased husband would have received upon retirement. She had received death benefits, which she would not have received if he had lived. The court correctly reasoned that she was entitled either to the death benefits or the loss of retirement benefits, but not both. However, it was applying New York law and read Healey to hold that damages for the loss of future benefits were recoverable without regard to the benefits received. In such a case it seems that the claim for the future benefits necessarily opens up the question of the present benefits. Unless the plaintiff can show (and perhaps this could be done at the pre-trial conference) that the loss of future benefits was greater, in which case he should be limited to the excess, he should not be permitted to claim those benefits.

329 See e.g., Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374 (1927); Bradburn v. Great Western Ry., [1874] L.R. 10 Ex. 1 (C.A.).
Accident Victim, and our solution was that as to loss insurance, recovery should be reduced by the receipt of the insurance benefits provided the plaintiff was given credit for the total cost of the premiums. Under this approach, the plaintiff would either recover the loss met by insurance or the total cost of the premiums, whichever was smaller. We also pointed out that today it is possible to take out insurance without regard to economic loss, so that some insurance is really insurance against the occurrence of a contingency. This kind of insurance should not affect the recovery of damages in personal injury actions, because, by definition, it is not insurance against loss.

It seems to me that per diem payments and the lump sum payment for dismemberment or total and permanent disability are properly classified as insurance against a contingency rather than loss insurance. The insured may have been thinking in terms of the insurance as a substitute for lost income, but then again he may not have been, and more importantly, the insurance is not marketed as loss insurance. By that I mean that the payments are not related at all to the insured's income. The insured can insure for any amount of per diem payment as long as he is willing to pay the premium. Moreover, it is usually provided that payment of benefits under the policy is not affected if the insured continues to receive his salary during the period of disability. Certainly, a lump sum payment for loss of a member bears no relationship to the insured's earning capacity. For these reasons, the receipt of benefits under such policies should not affect the plaintiff's tort recovery. This is truly collateral, and to the extent that the plaintiff obtains a "windfall," it is because he purchased insurance for just such a contingency.

Whether people should be permitted to "over-insure" in this way is a matter necessitating a legislative judgment, but so long as they are, the fact that an accident victim may have purchased such insurance should not affect his tort recovery.

Income protection insurance, on the other hand, would seem to be insurance against loss. Benefits are payable only after a waiting period, and the insured must be disabled. It is the

330 See the discussion supra, notes 179-81 and accompanying text.
331 An analogy may be drawn to the situation where the plaintiff has insured against an item of loss that is not included in tort recovery. See the discussion in James, supra note 259, at 550.
kind of insurance that commends itself to a wage-earner, and it is marketed on the basis that it is a substitute for lost earnings. Under the functional approach, as we have discussed it thus far, it would follow that payments under an income protection policy should be taken into account in determining the damages for loss of earning opportunity. In most cases the cost of the premiums would probably be less than the value of the benefits payable, particularly if they are payable for the rest of the plaintiff's life. Consequently this would affect the verdict significantly.

While this result would follow from the functional approach, I am reluctant to propose it. The reason stems from the earliest cases applying the collateral source rule, which involved benefits under a life insurance policy in a suit for wrongful death, and from the contrasting approaches to cumulative recovery under life insurance policies and fire insurance policies. There is no limit to the number of policies or the amount of life insurance that a person may carry, and when the insured dies, the beneficiaries are entitled to the face amounts of all the policies. Whereas in the case of fire insurance, recovery under all the policies cannot exceed the value of the property, and if the property has been over-insured, recovery is pro-rated.332 Perhaps this restriction is considered necessary to discourage arson or perhaps we believe that a property owner should not be able to "gamble" on the destruction of the property by fire. But there is nothing—other than the economic inability to pay the premiums—to prevent an individual who is earning $5000 per year from taking out $500,000 in life insurance policies. Where an individual is insured in excess of his "economic worth," there is no doubt that upon his death, his family will be better off than if he had lived. We often say that "I'm worth more dead than alive." It is not likely that the individual will terminate his life to provide the benefits, but in case he thinks of doing so, the policy contains a suicide provision. Nonetheless, we do not limit in any way the right of a person to take out as much life insurance as he wishes.

I think that this reflects an important societal value, which is that no one can carry "too much" life insurance. A person

332 See W. VANCE, INSURANCE § 154 (3rd ed. 1951).
cannot estimate the needs of his family after he is dead, as life insurance salesmen point out when trying to persuade us to increase the amount of insurance or take out a new policy. The wife or child may develop a serious illness. The costs of college may go up tremendously. No one knows what inflation will do to the value of the dollar, and so on. Thus, when it was contended that life insurance proceeds should affect recovery in a wrongful death action, American courts were not at all troubled by the fact that the beneficiaries would get full wrongful death recovery and keep the insurance proceeds. Indeed, one court treated the contrary view as too fallacious to require comment. The English courts, on the other hand, did allow life insurance benefits to be considered, but this was soon changed by statute.

It seems to me that attitudes toward life insurance should be equally applicable toward income protection insurance. While the insured may still be alive, he is disabled and unable to work. The economic problem is even more serious than if he were dead, since he too must be supported. It is true the insurance proceeds will meet some or all of the loss that would otherwise have had to be met by the defendant, and to the extent that he also recovers from the defendant, there is double recovery. He can be “made whole” if he recovers the cost of the premiums. Moreover, it is less complicated to compute the value of the disability payments than it is the value of life insurance proceeds. Life insurance would be payable at the time the insured died, so the fatal accident only means that payment is accelerated. Recovery would be reduced only by the accelerated value of the policy, that is, by the interest the beneficiaries receive on the proceeds between the time of actual death and the end of the insured’s life expectancy, and by the premiums the insured would have had to pay during the period of life.

333 "...[T]he plaintiff...recovers but once for the wrong done him, and he receives the insurance money upon a contract to which the defendant is in no way privy, and in respect to which his own wrongful act can give him no equities." Perrot v. Shearer, 17 Mich. 48, 56 (1868).
335 See the discussion in Ganz, Mitigation of Damages by Benefits Received, 25 Mod. L. Rev. 559 (1962).
336 Fatal Accident (Damages) Act, 1908, 8 Edw. 7, ch. 7. For a discussion of the interesting circumstances leading to the change see Ganz, supra note 335, at 559-60.
These problems are not present in the case of income protection insurance, which would not have been collected if the accident had not occurred. Our objection to allowing the deduction, therefore, must take account of the “double recovery” aspect.

In the next section we will discuss “double recovery” as applied to social insurance benefits in the context of our system of awarding damages for loss of future earning opportunity. We will conclude that social insurance benefits should not affect recovery of damages for loss of future earning opportunity, and the rationale may also be applicable to income protection insurance. However, for the time being, let us assume that the concept of double recovery is accurate, that we can realistically say that the plaintiff has been fully compensated for the loss of earning opportunity for the damages awarded. I still think there are valid reasons for not considering the insurance benefits in the personal injury action so that the plaintiff will, in theory, have double recovery.

In the first place, to allow recovery in the personal injury action to be reduced by the receipt of insurance benefits could have some effect on the marketability of income protection insurance. The potential purchaser is probably thinking as much about the possibility of disablement due to an accident as due to sickness, if not more so. The kind of accident uppermost in his mind is most likely an automobile accident, and when he thinks of an automobile accident, he thinks about recovery against the driver of the other automobile, if that is how the accident will happen (for he assumes that the accident will be the fault of the other driver). If he is told that he will retain the insurance proceeds and also have full recovery against the other driver, this is an additional argument in favor of purchasing income protection insurance. In any event, the possibility of cumulative recovery can only be a plus factor in the marketability of accident insurance, and for the court to hold that insurance proceeds will operate to reduce recovery works against the accident insurer. Maybe this should not matter. But it can be said that the question of whether accident insurance should operate to reduce recovery

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337 Apparently the English courts only considered the premium savings. See Ganz, supra note 335, at 559 n. 1.
in a tort action involves a conflict between the interests of the accident insurer and the liability insurer. Perhaps this is the kind of question that should be determined by the legislature on the basis of empirical data not available to a court in the context of a personal injury action. At least it is something to consider.

More significantly, I think, is our society's attitude toward insurance. If we say that a person cannot take out too much life insurance because he cannot estimate the needs of his family after he is dead, is this not equally true with respect to income protection? The accident victim has tried to protect his family from the effects of his disablement. Perhaps he has guessed correctly, but perhaps he has not. To the extent that we allow full recovery from the tortfeasor, it is more likely that the family will be adequately protected. Just as a person cannot have "too much" life insurance, he cannot have "too much" income protection when he is disabled. I think that our society would be opposed to letting the fact that the victim carried income protection insurance affect his tort recovery. I seriously doubt that even if they were directed to, the jury would reduce recovery by benefits payable under such a policy. It is for these reasons—apart from those to be discussed in connection with social insurance—that I think income protection insurance should not affect the recovery of damages for loss of future earning opportunity.

C. Social Insurance.

We are using the term, social insurance, in a rather broad sense to include all government-financed and all government-controlled programs of protection against loss. This is so that we may distinguish social insurance from private insurance and other benefits for which the recipient can be said to have "voluntarily paid." The problem is that in the United States there is not a comprehensive program of social insurance, and much of the social insurance that exists is made to resemble private insurance. We tend to finance these programs under "special funds" rather than from general revenues, with the beneficiaries and/or their employers being taxed or otherwise required to provide the funds of the program. The ethos of social
insurance in the United States has been discussed previously, and it may be just as well that we believe it.\footnote{338} We thus have a patchwork of programs, which, for purposes of this analysis, I am calling social insurance. Their common features are: (1) government control and/or financing; (2) payment of prescribed benefits to eligible individuals; (3) non-judicial administration of claims.\footnote{339} These programs represent attempts by government to provide some protection against the vicissitudes of life, and may properly be called social insurance. We are not now concerned with medical benefits, which were discussed previously. Let us first review the kinds of social insurance that we will discuss in connection with the question of whether receipt of benefits should affect recovery for loss of earning opportunity.

To deal with the problem of employee “on-the-job” injuries, all states have enacted workmen’s compensation statutes. Compensation is provided without regard to fault, but the sums are relatively modest. In exchange for such compensation, the employee loses his tort action against the employer, but as we will see, not necessarily against third parties. The costs are to be borne initially by the employer, who may either have taken out insurance or have been permitted to operate as a self-insurer. In theory, the cost of the awards or premiums will be reflected in the price of the employer’s product or service and distributed among consumers and users.\footnote{340} Longshoremen and harbor workers not covered by a state statute are covered by a federal workmen’s compensation law.\footnote{341}

Unemployment compensation is available for employees “temporarily” out of work. The unemployment compensation fund will usually be financed by a tax collected either from employers or from employers and employees.\footnote{342} Since these benefits expire after a period of time, it is likely that they will be involved in a personal injury action only to the extent that

\footnote{338} See the discussion supra, notes 245-47 and accompanying text.
\footnote{339} Note, however, that the opportunity for judicial review of the administrative determination is generally provided.
\footnote{342} See Note, The Mitigating Effect on Damages of Social Welfare Programs, 63 Harv. L. Rev. 330, 335 (1949).
the plaintiff, who may have been receiving unemployment compensation or some other form of public assistance, is seeking to recover for loss of earning opportunity during the period of disability.

The Social Security Act, in addition to providing retirement benefits, provides benefits for persons "permanently and totally disabled," which continue until the recipient becomes eligible for retirement benefits. Similar provisions are contained in the Railroad Retirement Act and the Federal Civil Service Retirement Act. Under these statutes the employee "contributes" to an annuity fund, and the railroad employer and the federal government also contribute to the respective fund. There is no doubt that these disability funds represent a substitute for social security disability, since federal employees and railroad workers are exempt from the social security tax. Irrespective of the difference in tax rates and benefits and the terminology of "contributions" and "annuities," the programs for the railroad and government employees are social insurance in the same sense as social security.

Finally, we make provision for war veterans who have become totally and permanently disabled after they have returned to civilian life. If this occurs, even though the cause of the disability is not service-connected, they receive specified disability pensions. This must be distinguished from the disability pension paid to a person injured in the line of duty while in active military service.

It should be quite clear that social insurance in the United States is a "crazy-quilt" pattern. There is no comprehensive program of social insurance designed to provide protection against the loss and dislocation resulting from accidents. The person injured in the course of his employment may receive

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workmen's compensation while one injured away from work does not. The unemployed person who has worked previously may be receiving unemployment compensation during the period of convalescence, but the person who was about to enter the job market when the accident occurred will not. Wage-earners covered by social security and similar programs receive a disability pension as do veterans, but other accident victims do not. Moreover, the programs appear to be set up as closely as possible to correspond with private insurance, so that beneficiaries and their employers are taxed specifically to provide the funds for particular social insurance programs. All of this makes it difficult to evaluate the question of social insurance as affecting tort recovery.

(1) *Cumulative recovery and social insurance: the nature of the problem.*

Where social insurance is available to meet part or all of a loss caused by an accident and the victim retains his common law action against the tortfeasor, we have another problem of cumulative recovery. Again, the question is whether the amount of damages in the personal injury, in this case, the amount the plaintiff is claiming for loss of earning opportunity, should be affected by the receipt of the social insurance benefit. Where two or more remedies are available to deal with an accident loss, e.g., social insurance and tort recovery, the following patterns of solution are possible:

(1) abolish one or more of the remedies;
(2) compel the victim to elect from one of the remedies;
(3) allow the victim to have the cumulative effect of two or more remedies;
(4) allow the victim to pursue both (or all) remedies, but limit his recovery to the maximum amount he could recover from a single source by:
   (a) considering one of the sources as primarily liable so that it bears the full burden, and the other source will be entitled to indemnity or subrogation;
(b) providing that the benefits had under one scheme diminish the amount to be had under the other.\textsuperscript{347}

Since we do not have a comprehensive system of social insurance in the United States, the problem has not been approached from this perspective. As we will see, each social insurance benefit has been considered separately, and different results have been reached. It is well then to consider how a country with a comprehensive social insurance program has dealt with the question of social insurance and tort recovery.

We will do this by looking at the British experience. The British system of social insurance has been described as follows:

The National Insurance Act of 1946 has co-ordinated and extended the many different branches of social insurance into one comprehensive system. It covers benefits for sickness, unemployment, maternity, and widowhood; retirement pensions; guardians' allowances; and death grants. It covers everybody, employed persons as well as self-employers, housewives and other nonemployable persons. It is supplemented by the National Insurance (Industrial Injuries) Act of 1946, which replaces the former system of workmen's compensation by a corresponding system of insurance against industrial accidents arising in the course of employment, and the National Health Service Act, 1946, which provides free medical and dental treatment for everybody. Between them these acts provide a comprehensive system of minimum grants, insuring everybody, regardless of personal and financial status, against the major vicissitudes of modern life, and providing a bare minimum subsistence, but no more.\textsuperscript{348}

The theory of British social insurance, then, is that of a "bare minimum subsistence." This is the antithesis of the common law tort action, which seeks to compensate each successful plaintiff for the whole of his loss and to put him in as good a position as he would have been if the tort had not occurred. Obviously the scale of benefits under social insurance would be far below the

\textsuperscript{347} This is taken from James, \textit{Social Insurance and Tort Liability: The Problem of Alternative Remedies}, 27 N.Y.U. L. Rev. 537, 540-41 (1952).

amount recoverable in a common law action, not only because
the common law action would allow recovery for pain and
suffering, but also because the maximum compensation for an
employed person under social insurance, while based on wages
earned, would not begin to approximate the amount recoverable
for a loss of earning opportunity under tort rules of damages.\footnote{349} Social insurance, it must be remembered, looks to the need of
the victim and his family—and the minimum need at that—while
tort recovery looks to the loss suffered by the particular plaintiff.
It was, therefore, a question of prime importance as to how the
social insurance program would affect tort recovery, and this
was not only considered by the Beveridge Committee\footnote{350} but a
special departmental committee, the Monckton Committee on
Alternative Remedies, was set up to consider the problem.\footnote{351}

Since benefits under the social insurance program were so
much less than tort recovery, there was no question of abolishing
the common law action.\footnote{352} Nor was it considered desirable to
require the victim to elect between social insurance and tort
recovery.\footnote{353} The question, then, was how the receipt of social
insurance benefits would affect tort recovery, which is the
question with which we are concerned. The Beveridge Report
had said that “an injured person should not have the same need

\footnote{349} \textit{Id.} at 253-54. At that time an unemployed person with one child would
receive in social insurance benefits less than $1000 for an incapacity lasting one
year, whereas if he were earning around $50 per week, the author estimated
that he would receive around $3400 in damages.

\footnote{350} Social Insurance and Allied Services, Report by Sir William Beveridge,
Cm. No. 6860 (1946).

\footnote{351} \textit{Id.}

\footnote{352} Friedman, \textit{supra} note 348, at 253. Not a single witness before the Monck-
ton Committee favored the abolition of the tort remedy. James, \textit{supra} note 347,
at 542 n. 16.

\footnote{353} A cardinal purpose of all forms of social insurance is to provide a
quick and a sure and a well-adapted remedy for the needs it seeks to
alleviate. Among the evils of the older system are delays and many
uncertainties (e.g., as to the fact of recovery, as to amount, as to de-
fendant's financial responsibility). Moreover, successful litigation brings
a lump sum recovery, which often throws the burden of providence and
of wise investment on one ill fitted to meet it (while social insurance
provides periodic payments to meet continuing needs). All these things
bring real human hardship and a train of broader social consequences.
Yet the older remedy with all its drawbacks, is potentially much greater.
Thus to tempt the injured man—and to tempt others to tempt him—to
renounce the benefits of social insurance may bring about the very evils
the scheme was adopted to avoid. Benefits under a social insurance
scheme (e.g., workmen's compensation, disability payments) should,
therefore, be payable forthwith, whatever is to happen later in the tort
suit. James, \textit{supra} note 347, at 543.
met twice over," and this was the position of the majority of the members of the Monckton Committee, which recommended that in assessing tort damages the court should reduce recovery by benefits already paid or by the value of future benefits. A minority of the Committee, representing employee's organizations, took the position that social insurance was but a more comprehensive form of private insurance and since benefits payable under private insurance policies did not affect tort recovery, neither should benefits paid by social insurance. A proposal by the Trade Unions Congress that damages exceeding five-twelfths of the amount of the insurance benefit be retained, as representing the portion of the insurance met by employee's contributions, was also rejected.

When it came Parliament's turn to wrestle with the question, a different solution emerged. The Law Reform (Personal Injuries) Act of 1948 provided that in determining loss of future earning opportunity, the court should take into account one-half of all social insurance benefits (industrial injury, industrial disablement or sickness) payable for a period of five years after the cause of action accrued. This was treated as a straight political compromise, although it was defended by the Government on the ground that the employee contributed five-twelfths to the fund and that the defendant, whether employer or other tort-feasor, was also a contributor. The compromise, then, is between alternative (3), which would allow the victim to cumulate remedies, and alternative (4)(b), which would reduce benefits recoverable under one remedy by the amount recovered under another. The victim can cumulate, but there is a partial reduction in recovery because of the receipt of social insurance benefits. In subsequent years Parliament provided that in a wrongful death

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354 See Friedman, supra note 348, at 254.
355 It must be remembered that in England, personal injury actions are tried before the court rather than a jury.
356 Friedman, supra note 348, at 255.
358 Friedman, supra note 348, at 254.
359 Id. at 254-55.
360 11 & 12 Geo. 6, c. 41.
361 See the discussion in Friedmann supra note 348, at 255-56.
362 Id. at 258. See also the discussion in Ganz, supra note 335, at 566.
case, social insurance benefits were to be completely dis-\textsuperscript{363} regarded. Here, again, the law eventually adopted was contrary to the recommendation of the Monckton Committee.\textsuperscript{364}

Another possible solution is alternative (4)(a), under which the fund could recoup the amount of payments either by reimbursement from the beneficiary or by an action against the tortfeasor. Apparently this is what was done with respect to health insurance payments in Great Britain prior to 1948.\textsuperscript{365} Such a solution was rejected both by the Monckton Committee and by the Government, on the ground that the victim should never be deprived of social insurance benefits and that to allow recoupment would give the fund an undesirable interest in litigation.\textsuperscript{366} On the other hand, this is the solution that is favored in most other countries such as France, Germany and Soviet Russia.\textsuperscript{367} The justification that has been advanced is: (1) for an accident victim to come out better than he would have been without the accident is incompatible with the purposes of tort law and extravagant of the community’s resources; and (2) it is self-evident that the tortfeasor should not take advantage of collateral benefits.\textsuperscript{368} This assumes that the problem is one of overcompensation as against windfall, and it is resolved by permitting the fund to recover.

The arguments against subrogation made with respect to insurance,\textsuperscript{369} are equally applicable here. Most significantly, such recoupment shifts the loss from an efficient channel of distribution, the public treasury, to another channel which may or may not be as efficient.\textsuperscript{370} Nonetheless, this represents the solution that most other countries with comprehensive social insurance systems have adopted.

\textsuperscript{363} Fatal Accidents Act, 1959, 788 Eliz. 2, ch. 65.
\textsuperscript{364} Ganz, \textit{supra} note 335, at 566 n. 39.
\textsuperscript{365} See the discussion \textit{id.} at 566.
\textsuperscript{366} \textit{Id.} See also the discussion in Fleming, \textit{The Collateral Source Rule and Loss Allocation in Tort Law}, 54 CALIF. L. REV. 1478, 1514-15 (1966).
\textsuperscript{367} See Fleming, \textit{supra} note 366, at 1514-26.
\textsuperscript{368} \textit{Id.} at 1516.
\textsuperscript{369} See the discussion \textit{supra} notes 96, 170-76 and accompanying text.
\textsuperscript{370} According to Professor Fleming, this kind of argument is rejected on the continent “[b]ecause ‘the principle of the thing’ is to the European mind too important to be cavalierly sacrificed to administrative considerations. . . .” Fleming, \textit{supra} note 366, at 1516.
(2) The present approach in the United States.

Because of the absence of a comprehensive system of social insurance, little attention has been paid to the basic question of loss allocation. We have not considered what losses should be met by society through social insurance, what losses should be met by the individual through private insurance, and what losses should be met by the responsible party under a system of tort recovery. In most cases of social insurance benefits, the plaintiff is permitted to cumulate both remedies and obtain full recovery under the application of the collateral source rule. In some cases the social insurance fund is permitted to recoup either by reimbursement from the beneficiary or subrogation against the tortfeasor. In still others recoupment is obtained by reducing, in accordance with administrative regulations, the benefits payable from the social insurance fund. We will now consider the approach that has been taken toward cumulative recovery where the plaintiff has received workmen's compensation, unemployment compensation or disability pensions.

In exchange for workmen's compensation the employee loses his common law action against the employer, but in many states his rights against third parties are not affected. Where the employee is injured by a third party tortfeasor in the course of his employment, he receives workmen's compensation payments. The question is how this affects his recovery from the tortfeasor. Here the solution in practically all states is to prohibit the injured employee from retaining both benefits and to reallocate the cost of the employee's injuries to the tortfeasor. This is accomplished by permitting the employer or his insurer either to (1) sue the tortfeasor directly, (2) intervene in the employee's action, or (3) obtain a lien against the employee's judgment. This has led to problems in determining what amount of the employee's recovery is the equivalent of his workmen's compensation payments. While shifting the loss from the employer to the tort-

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371 For the view that such consideration is necessary see Fleming, supra note 366, at 1544-49.
372 See the discussion in Fleming, supra note 366, at 1505-8.
373 Id. at 1505-06; see also A. Larson, supra note 340, § 74.
374 A. Larson, supra note 373. There are also problems as to what defenses may be asserted where the employer is suing directly or has intervened. Id. § 75.
Feasor may be critized from the standpoint of effective loss allocation,\textsuperscript{375} the reason for the rule is understandable when we consider the circumstances surrounding the establishment of workmen's compensation, one of the first pieces of social legislation in the country. The employer was giving up his common law defenses, which usually enabled him to avoid liability, thus placing the cost of the human overhead of doing business on the employee. There were doubts as to the constitutionality of the legislation.\textsuperscript{376} It seemed logical to the legislative mind of the late nineteenth and early twentieth century that if the injury was caused by a "wrongdoer"—as a defendant who was found liable under the law of negligence as it existed at that time would be—he rather than the employer should bear the loss. To permit double recovery to the injured employee would also have been inconceivable. Therefore, most statutes expressly provided for recovery by the employer.

However, a few did not, and the courts had to resolve the question in the context of the employee's suit against the tortfeasor. After some difficulty, the Ohio courts concluded that (1) the employer would not be permitted to recover the amount of the payments from the tortfeasor, and (2) the employee's recovery against the tortfeasor would not be affected by his receipt of workmen's compensation benefits.\textsuperscript{377} The legislature agreed, and it is specifically provided by statute that receipt of workmen's compensation benefits may not be considered by the jury in a personal injury action.\textsuperscript{378} Thus, the employee obtains cumulative recovery. The same solution has been adopted by other courts that have passed on the question. Not only is the employee's recovery not affected, but the introduction of evidence that he

\textsuperscript{375} Apparently, however, workmen's compensation insurance is operated so as to take account of subrogation, and subrogation recovery is credited against the losses of an enterprise or group. See James, \textit{supra} note 347, at 561-62.

\textsuperscript{376} See the discussion in A \textsc{Larson}, \textit{supra} note 340, § 5.20. The first New York statute was held unconstitutional. Ives v. South Buffalo Ry., 201 N.N. 271, 94 N.E. 431 (1911). A constitutional amendment was then passed, and another statute enacted. Doubts as to constitutionality under the federal Constitution were finally laid to rest with the decision in New York Cent. R.R. v. White, 243 U.S. 188 (1917).

\textsuperscript{377} Truscon Steel Co. v. Trumbull Cliffs Furnace Co., 120 Ohio St. 394, 166 N.E. 368 (1929), overruling Ohio Public Service Co. v. Sharkey, 117 Ohio St. 586, 160 N.E. 687 (1928).

\textsuperscript{378} \textsc{Ohio Rev. Code} § 4123.93 (Page 1965).
has received such benefits is reversible error because of the prejudicial effect it may have on the jury.\textsuperscript{379} The courts have given varied reasons. One court cited the collateral source rule.\textsuperscript{380} Another took the position that if the legislature did not permit the plaintiff from cumulating remedies, it was not for the court to do so in a personal injury action.\textsuperscript{381} The situation with respect to workmen’s compensation, then, is that in most states the employer or his insurer is reimbursed for the workmen’s compensation payment, but this is not provided for in the statute, the plaintiff is permitted cumulative recovery.\textsuperscript{382}

Unemployment compensation may be involved in a personal injury action in two situations. A person who is disabled for a period and not covered by workmen’s compensation may receive benefits from the unemployment compensation fund. Or, an unemployed person may have been injured during the time in which he was drawing benefits, and they continued after the injury. As we have said, the question will arise only as to recovery for loss of earnings during the period of disablement. Apparently there is no provision for subrogation of the unemployment compensation fund in any of the states, probably because the number of cases in which the recipient would have a tort action is small. Where a plaintiff who has been working before the accident, received unemployment compensation during the period of disablement, courts have allowed recovery for the value of the lost time without reference to the unemployment compensation,\textsuperscript{383} the same approach that is taken to workmen’s compensation benefits where there is no subrogation. And the


\textsuperscript{380} Ridgeway v. North Star Terminal & Stevedoring Co., 378 P.2d 647 (Alaska 1963). In that case, suit was brought against the employer, and the issue was whether the plaintiff had elected to come under workmen’s compensation. The court held that he had not, and presumably he would be required to return the workmen’s compensation payments.

\textsuperscript{381} Abbott v. Hayes, 92 N.H. 126, 26 A.2d 842 (1942).

\textsuperscript{382} In North Carolina the employee may bring suit against the tortfeasor, and it is specifically provided that evidence of workmen’s compensation benefits is inadmissible in that action. However, the employee is required to make reimbursement. \textit{See} N.C. Gen. Stat. \$ 97-10.2 (1965), and Spivey v. Babcock & Wilcox Co., 264 N.C. 387, 141 S.E. 2d 808 (1965).

\textsuperscript{383} \textit{See}, e.g., Gypsum Carrier Inc. v. Handelsman, 307 F.2d 525 (9th Cir. 1962); Kura v. Froblaskoe, 324 Mich. 179, 39 N.W.2d 889 (1949); Lobalzo v. Varoli, 409 Pa. 15, 185 A.2d 557 (1962). \textit{See also} Cunnen v. Superior Iron Works, 175 Wis. 172, 184 N.W. 767 (1921), involving benefits under a federal statute.
introduction of evidence that the plaintiff received unemployment compensation benefits has been held to constitute reversible error.\textsuperscript{384} In California, it appears that the recipient of unemployment compensation must return the benefits if he receives compensation from another source for the period in which he was receiving unemployment compensation benefits, so in such a case the fund is reimbursed.\textsuperscript{385}

The plaintiff who is unemployed at the time of the accident is entitled to recover the value of his lost time, and here the notion that he is recovering for the lost time rather than the lost wages is useful.\textsuperscript{386} It is not fair to deny him recovery where he was unable to look for work because of the injury, and in such a case the jury does the best it can. Evidence that the plaintiff was receiving public assistance benefits during the period of disability has been held inadmissible, although in the particular case, it appeared that the plaintiff would have received the benefits even if she had been working.\textsuperscript{387} In another case where the plaintiff had been unemployed and obtained employment with the defendant, in which he was injured, it was held that the fact that unemployment compensation benefits were resumed during the period of disability would not affect recovery.\textsuperscript{388} We may assume that under the present approach, the receipt of unemployment compensation benefits will not affect recovery, since they are from a collateral source. In the absence of reimbursement, the effect is to enable the plaintiff to have cumulative recovery.

Where a person covered under Social Security or Railroad Retirement\textsuperscript{389} becomes totally and permanently disabled, he receives a disability pension until he reaches age sixty-five, at which time he reverts to the retirement pension. Apparently no effort is made by the fund to recoup payments when the beneficiary recovers personal injury damages,\textsuperscript{390} although benefits are to be reduced when the beneficiary has recovered workmen's

\textsuperscript{384} See particularly Lobalzo v. Varoli, 409 Pa. 15, 185 A.2d 557 (1962).
\textsuperscript{385} See the discussion in Coyne v. Westinghouse Electric Corp., 204 F. Supp. 403 (S.D. Cal. 1962).
\textsuperscript{386} See the discussion, supra note 275 and accompanying text.
\textsuperscript{387} Mobley v. Garcia, 54 N.M. 175, 217 P.2d 256 (1950).
\textsuperscript{389} Benefits under the Federal Civil Service Retirement Act will be discussed in connection with suits against the United States.
\textsuperscript{390} See the discussion of this point in Fleming, supra note 366, at 1515-16.
compensation benefits.\(^{391}\) Recovery of personal injury damages may affect the disability pension paid by the Veterans Administration to veterans for a non-service-connected disability. The Administrator is given the discretion to deny or discontinue a pension when "the corpus of the veteran's estate is such that it is reasonable that some part of the corpus be consumed for the veteran's maintenance."\(^{392}\) There is no such discretion with respect to social security disability pensions, which may be reduced only because of workmen's compensation payments.

In suits against ordinary tortfeasors, the courts have uniformly excluded evidence of the receipt of social security disability pensions\(^{393}\) and veterans' disability pensions\(^{394}\) We will subsequently discuss the problem of disability pensions in a suit against the United States under the Federal Tort Claims Act. Evidence of benefits received under the Railroad Retirement Act has been excluded.\(^{395}\) That problem will ordinarily arise in a suit against the railroad employer under FELA. Because of the "contribution" aspect, the danger exists that the court would treat this like private insurance. This has not been the case. The courts have recognized that the Railroad Retirement Act represents a social security program for railroad workers, and the fund is supported by tax collections from employers and employees who are, therefore, not subject to the social security tax.\(^{396}\)

The pattern of loss allocation with respect to social insurance, then, has been as follows. Where the employee who received workmen's compensation is entitled to recovery against a third party tortfeasor, in most states it is specifically provided by statute that the employer or his insurer is reimbursed for the workmen's compensation payments. The loss is thus allocated to

\(^{393}\) See, e.g., A. H. Bull Steamship Co. v. Ligon, 285 F.2d 936 (5th Cir. 1960); McMinn v. Thompson, 61 N.M. 387, 301 P.2d 326 (1956); Stone v. City of Seattle, 64 Wash.2d 166, 391 P.2d 179 (1964). In all of these cases the defendant claimed that the evidence was relevant for a subsidiary purpose, e.g., to show a reason for the plaintiff to take the benefit rather than to work.
\(^{394}\) See, e.g., A. H. Bull Steamship Co. v. Ligon, 285 F.2d 936 (5th Cir. 1960); Kainer v. Walker, 377 S.W.2d 613 (Tex. 1964); Stone v. City of Seattle, 64 Wash.2d 166, 391 P.2d 179 (1964).
the third party tortfeasor. Where the statute is silent, the employee has been able to obtain cumulative recovery. Tort recovery is not affected by the receipt of unemployment compensation, and the recipient is able to cumulate unless the fund is entitled to reimbursement from him. The recipient of social security or railroad retirement benefits obtains cumulative recovery. In the case of veteran's benefits, the recipient obtains full compensation against the tortfeasor, but the tort recovery may cause the pension to be terminated or reduced.

Thus, it appears that most European countries with comprehensive systems of social insurance reallocate the loss to the tortfeasor, while permitting the social insurance fund to recoup. England permits the accident victim to obtain cumulative recovery in part, and reduces the liability of the tortfeasor by the remainder; there is no recoupment for the social insurance fund. In the United States, due to the fact that we do not have a comprehensive system of social welfare, and perhaps because the question must be answered by state courts, there is no consistent approach.

(3) The functional approach.

It must be remembered that we are approaching the problem in the context of our system of awarding compensation for personal injuries, where the amount of recovery is determined in adversary proceedings before a jury of laymen. Since we have not abolished the remedy of tort recovery where the accident victim has received social insurance benefits, the question is how the tort recovery is to be affected by the receipt of such benefits. Any attempt at loss reallocation must be made within this framework.

In attempting to find a solution under the functional approach, I find it sounder to distinguish between recovery of lost earnings during a temporary disability resulting from the accident, and recovery for loss of future earning opportunity where the victim is disabled. It seems more realistic to look at the problem from this perspective rather than with reference to the nature of the social insurance benefit.

397 Except in the case of the employee who was injured by his employer or who cannot maintain an action against a third party tortfeasor.
When a person misses work because of an accident, we permit him to recover the value of his lost time, and the measure of recovery depends on what his time was worth. As we say, the goal of tort law is to put him in as good a position as he would have been if the accident had not occurred. Social insurance benefits are designed to provide minimum subsistence during a period of disability, and the goal is to enable the victim and his family to meet the crisis caused by the accident. The goals of tort recovery and social insurance are not inconsistent. Suppose a person who was earning $30 per day misses 30 days of work. He receives workmen's compensation payments on the basis of two-thirds of lost wages, and the $20 per day may be said to represent the minimum subsistence that he needs. While it is difficult to justify a definition of minimum subsistence that is based on the individual's wages, nonetheless, this is how it is done. In any event, because the victim received social insurance, his actual loss is less than it would have been if he had not received the benefit. Ten dollars per day is all the plaintiff needs to make him whole, that is, to put him in as good a position as he would have been if the accident had not occurred. Our system is fully capable of absorbing the "data" of the social insurance benefit. There is no dispute as to the economic loss he suffered during the period of disability, and as pointed out, frequently lost wages are stipulated. If the jury does not "compromise" the verdict, it will award him the full amount of his loss, which will be $10 or $30 as the judge directs. It may be pointed out that the award will not compensate him for his true loss, because he will not get to keep the full sum: his lawyer must receive a fee from the recovery. But this is true of the sum awarded for medical expenses or any other item of damage. Perhaps the contingent fee system needs to be reformed.398 This factor is irrelevant when his compensation is purportedly based on the economic loss he demonstrates, and,

398 "For example, the public turned on the time-honored practice under which a physician, for the successful cure of a patient, was entitled to one-half of the patient's earnings for life. The public was not mollified when the Imperial Medical Association pointed out that this practice was justified because, after all, the physician took the risk that this treatment might not be successful and that the patient might die, in which case he would receive no fee at all, and that, furthermore, if the patient had not been cured he would have had no further earnings." Krause, A Restoration of the Institute—A Re-Tort to Dean Prosser, 19 J. LEGAL ED. 321, 323 (1967).
in fact, he received $10 per day less than he otherwise would have
because of the accident, not $30 per day less. The matter of
adequate compensation for the plaintiff and his attorney is
not realistically met by pretending that the plaintiff suffered
economic loss which he did not suffer.

Our plaintiff, therefore, has lost only $10 per day, and under
a compensatory theory of damages, this is all he is entitled to
recover from the tortfeasor. Whether the remaining $20 loss
should be met by the tortfeasor or the social insurance fund is
an entirely different question, the answer to which requires the
kind of empirical data more likely possessed by legislatures than
courts. It may be asked how much the workmen’s compensation
fund would save if subrogation were allowed and whether it
would be enough to appreciably affect the employer’s insurance
premiums or cost of doing business, if he is a self-insurer. We
might ask today whether workmen’s compensation insurance
rates are less because of the subrogation against the tortfeasor.
I would guess that it probably is not economically feasible to
shift the loss from the employer or his insurer to the tortfeasor
or his insurer. Nonetheless, the legislatures of most states have
made the decision that the loss is to be reallocated to the tort-
feasor. This being so, the employee may obtain full recovery
against the tortfeasor and then make reimbursement to the
employer, or the employer may subrogate in the action directly.
In either case there is no problem as to tort recovery. In other
states, either the legislature has specifically provided that the
employee may have cumulative recovery—as it may do—or, where
the statute is silent, the courts are probably right in concluding
that legislative silence demonstrates its intention that the plaintiff
should have cumulative recovery. Perhaps someday we will
rethink the matter of loss allocation for on-the-job injuries
suffered by employees. But for the time being, it can be said
that the legislature has spoken, and the court in the personal
injury case need not concern itself with the problem.

In other situations, however, legislative intent will not be
of much assistance. The legislature has ordinarily provided other
social insurance benefits, such as unemployment compensation
to one temporarily unable to work, without regard to ultimate
loss allocation. In these cases, the receipt of social insurance
benefits should be deducted from tort recovery. If his normal wages were $30 per day and he received $20 per day in social insurance benefits for the period of disablement, he has only lost $10 per day as a result of the accident, and this is all he needs to recover. The minimum subsistence, as represented by the social insurance benefit, has operated to meet some of the loss caused by the tortfeasor. Therefore, the plaintiff's loss is less, and the fact that the defendant's victim—whom he takes as he finds—was entitled to social insurance, has worked to the defendant's benefit. A question may be raised, however, because of the method by which we measure compensation for loss, namely what will happen when the jury is given the data of the social insurance benefit. In a doubtful case, as we have seen, it may find against the plaintiff, because it concludes that he has received sufficient compensation by the social insurance benefit. The fact that this could happen if the jury were aware of the social insurance benefit does not trouble me very much. Much of our negligence law is "never-never land" anyway. The jury assumes that the defendant is insured or otherwise financially responsible, which may cause it to tip the scales against him in a close case. If a balance is achieved by knowledge of the plaintiff's receipt of social insurance benefits, it is not all that bad. But, more importantly, the problem need not arise. Damages for lost wages usually can be stipulated, and all that is necessary is that the amount received from social insurance benefits be deducted from the total. It may then be announced to the jury that the plaintiff's lost wages are a specified amount. In the rare cases where the parties do not stipulate, the evidence of social insurance should be allowed, and the judge can follow it with a cautionary instruction. In his discretion he could refuse to allow the introduction of the evidence and make some adjustment in the judgment.

A similar question is involved where the plaintiff who was unemployed at the time of the injury was receiving unemployment compensation benefits. I would allow the jury to consider the fact that he had received such benefits in determining the value of his lost time. The question is whether he suffered any

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399 See the discussion, supra, notes 52-76 and accompanying text.
loss at all, and the jury is merely guessing. It may conclude that the unemployment compensation was as much as he would have earned if he could have obtained a job. The fact remains that he did not lose the “full value” of his time, and I think the jury should have this information. Since he received the social insurance benefit, we may assume that his subsistence needs were met, and if he is limited to that amount, there is no danger that he will become a “public charge” as a result of the jury’s reduced award of damages for lost time.

Thus far, we have advocated solution 4(b): recovery in the tort action is diminished by the amounts received from social insurance. The question is not what the defendant should pay, but what the plaintiff has lost as a result of the accident. So long as we can accurately measure this loss, there is no reason to permit the plaintiff to recover more. Note that this means that part of the loss is borne by the social insurance fund and part is borne by the tortfeasor, but the tortfeasor’s liability is reduced at the expense of the social insurance fund. As we said before, perhaps a different allocation is possible, but this is the kind of solution that must come from the legislature. In the absence of legislative action, the only course for the court in the personal injury action is to reduce the plaintiff's recovery by the value of the social insurance benefits.

We may now consider the effect of the receipt of social insurance benefits, namely disability pensions, on recovery of damages for loss of future earning opportunity. It becomes clear that in most cases we are talking about substantial sums of money, both as regards loss of future earnings and the amount of the disability pension. Realistically, the jury awards damages for loss of earning opportunity until the plaintiff would reach the age sixty-five unless it concludes that he had a lower life expectancy. At that age it assumes that he would retire. The disability pension will continue until he reaches age sixty-five, at which time he receives a retirement pension, which is irrelevant. Thus, if the plaintiff lost $100,000 in earnings until age sixty-five (assume that this is the present worth figure) and would have received pensions totalling $50,000 (also the present

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400 This would include pensions paid to the survivors upon the death of the wage-earner.
worth figure), it would make quite a difference whether the value of the pension was deducted.

From what we have said so far, it would seem that it should be deducted. The plaintiff is not entitled to recover for loss of future opportunity twice over. If he has lost $100,000 in earnings that he otherwise would have had, and $50,000 of this is met by a disability pension, it follows that all he needs to make him whole is $50,000, and this is what he should recover from the defendant. The problem, however, is that with respect to future earning opportunity, we do not really "know" what he has lost. When the jury says that he has lost $100,000, this represents a relatively uneducated guess. It is at this point that we must again take a realistic look at our system of awarding damages for personal injuries. We feed a certain amount and a certain kind of data into the machine, always concerned with how much and what kind of data the machine can absorb. We introduce evidence of the plaintiff's life expectancy, but he may live that long or he may not, he may retire at sixty-five or he may retire earlier or later. We introduce evidence of what the plaintiff was making at the time of the injury and evidence calculated to show what he might make in the future. We consider his education, experience and so on. We also guess as to what the dollar will be worth some years hence. When our lay jury somehow arrives at this figure, it must reduce it to present worth, with or without the aid of annuity or combined tables. The process is as unscientific as it can be. The matter is further compounded by the fact that the jury returns a general verdict, which may or may not have been influenced by a number of factors. Even if a special verdict were required as to each item of damages as well as liability, the amount awarded for loss of future earning opportunity would still represent a guess. From a scientific standpoint, it cannot be said whether a verdict "overcompensates" or "undercompensates." We cannot say that we know whether we have adequately compensated the plaintiff for what he has lost, because we have no way of scientifically measuring his loss, or at least the method we employ is not that of scientific measurement.

In view of this, the question becomes whether we should feed

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\(^{401}\) See the discussion, supra, notes 19-22 and accompanying text.
the additional data into the machine. There is no doubt that data concerning the receipt of disability pensions is relevant to determine the plaintiff's actual loss, but the fact that the data is relevant does not mean that the machine can absorb it. The inability of the machine to absorb data has been given as a justification for refusing to permit the jury to consider the tax aspects of personal injury damages. It is one thing to award the plaintiff a monthly sum, adjustable for a number of factors, and set the monthly disability pension off against that sum. It is another to award the plaintiff a lump sum representing, as best as we can measure, the total loss of future earning opportunity, reduced to present worth, and to set off against that sum the estimated value of the disability pension. At this point the fact that the defendant is legally responsible for the loss may become relevant. If we purport to compensate the plaintiff for his actual loss, and the process, because of its unscientific nature, necessarily creates both a risk of overcompensation and undercompensation, it is proper to take the risk of overcompensation so as to protect the innocent plaintiff against the defendant who must bear responsibility for the accident.

However, I would prefer to approach the question from a different perspective, namely to consider the consequences of running the risk of overcompensation as opposed to the consequences of running the risk of undercompensation. To the extent that the data concerning the receipt of the disability pensions is fed into the machine, the risk of overcompensation is reduced. If the receipt of such benefits may be considered, we may assume that in the great run of cases, the amount of recovery will be less. Conversely, if the data may not be considered, the total of all judgments in personal injury cases will be higher. The consequences of higher personal injury judgments that will be felt by defendants as a class can be distributed by insurance, or in the case of the uninsured enterprise, by the cost of the enterprise's products or services. To the extent that recoveries are greater, because not reduced by the receipt of social insurance benefits, the cost of the insurance premiums or the cost of the

\textsuperscript{402} See note 32, supra.

\textsuperscript{403} While the jury may take a gestalt approach, it will still be influenced by the data it receives. To the extent that it sees some of the loss as having been met, it will see the total loss as less.
enterprise's product will increase.\textsuperscript{404} Perhaps empirical data might indicate that the savings would be so significant that it is in the best interests of society to reduce recovery by the amount of social insurance benefits. No such data has been produced, and I would doubt that the savings among defendants as a class or among a group of insureds or producers would be appreciable. Today, when the loss is initially \textit{shifted} to defendants as a class, it will usually be \textit{distributed}, and the impact on the particular defendant ordinarily is insignificant.\textsuperscript{405} In terms, then, of the consequences that overcompensation will have upon defendants, the risk of overcompensation is not of much concern.

On the other hand, plaintiffs in personal injury actions are not loss distributors.\textsuperscript{406} Where the plaintiff is undercompensated, he must bear the full extent of such undercompensation, and the loss to him is significant. Undercompensation does not have such an effect on the defendant. For this reason, from the perspective of consequences, the risk of overcompensation is to be preferred to the risk of undercompensation. More importantly, when we are dealing with social insurance benefits, undercompensation could have undesirable social effects. The relationship between social insurance benefits and tort recovery is more marked in the case of lower income people, people whose income more closely approaches the subsistence level. The social insurance benefits are more important for the individual earning $5,000 per year than the one earning $20,000 per year, since the difference between the social insurance benefits paid the former, even if they are to some extent based on prior income, will not be a multiple of four.\textsuperscript{407} As to the low income person, the proportion of the loss met by social insurance will be much higher in proportion to the total loss of future earning opportunity. If the jury miscalculates his loss of future earning opportunity and makes the deduction for the value of the social insurance benefit, there is the real risk that he and his family will have barely enough money to meet

\textsuperscript{404}At some point, depending on the amount of the increase in costs, it may be more economical for the enterprise to insure.

\textsuperscript{405}See generally, F. Harper & F. James, 2 \textit{The Law of Torts}, \textsection 13.4 (1956).

\textsuperscript{406}An individual plaintiff may have taken out first person insurance against loss. But plaintiffs as a class cannot be considered as loss distributors.

\textsuperscript{407}Social security benefits, for example, are adjusted in favor of low income groups. See the discussion in ten Broek and Matson, \textit{The Disabled and the Law of Welfare}, 54 Calif. L. Rev. 809, 819-20 (1966).
their minimal needs. Not only will the plaintiff not have been in as good a position as he would have been if the accident had not occurred, but insufficient recovery may change the very nature of his life and that of his family. Social insurance benefits, it must be remembered, are designed to enable the plaintiff and his family to exist at the subsistence level. Tort recovery is designed to enable the plaintiff and his family to maintain the standard of living they would have had if the accident had not occurred. There is always the danger that the jury will miscalculate, and if it does so, the plaintiff and his family will not enjoy that standard. In the case of the low-income plaintiff, the result of the miscalculation may mean that he and his family will have little above the social insurance benefits, since they represent a substantial proportion of his total loss.

The risk of undercompensation, which will bear heavily on the individual plaintiff, can not be justified in the absence of evidence that to reduce the liability of defendants as a class by allowing the jury to consider the receipt of social insurance will have positive societal benefit. It is for this reason that I would exclude such evidence from the jury's consideration. The process of determining damages for loss of future earning opportunity involves too much guesswork. To inject a new variable, designed to reduce recovery, offers little promise of societal benefit and greatly increases the risk of undercompensation, particularly among those plaintiffs in the lower-income bracket, where subsistence approaches earnings. It is sounder, therefore, to permit cumulative recovery, thereby increasing the risk of overcompensation. The consequences of overcompensation to defendants as a class seems slight, particularly when it is considered that they are not required to pay more than they would have had to pay in the absence of social insurance benefits. The danger to plaintiffs as a class, and most importantly the individual plaintiff, by the injection of social insurance into an already uncertain process could be great. Therefore, it is more in the interest of society—who, in the final analysis, may actually have to support the undercompensated plaintiff and his family—if the jury has guessed incorrectly—to increase the risk of overcompensation rather than the risk of undercompensation. In the absence of a more scientific method of compensation, the courts should not increase the risk
of undercompensation, with its attendant consequences, by allowing the jury to consider the receipt of social insurance benefits. The question of loss allocation between the social insurance fund and the tortfeasor is an entirely different question, the resolution of which can only follow a change in our present method of compensating accident victims. This is not the concern of the court awarding damages in a personal injury case, and upon a consideration of the consequences and risks, we have concluded that it is better to permit cumulative recovery to the accident victim.

(4) Social insurance and suits against the Government.

Finally, we may consider the effect of social insurance where the defendant is the United States in a suit under the Federal Tort Claims Act, and the social insurance has also been provided by the United States. Since the United States is both the tortfeasor and the source of the social insurance fund, the discussion may help to focus on loss allocation. But again, this is loss allocation within the context of our present system of awarding compensation for personal injuries. Also, the relationship between the victim and the government will vary. In some cases the victim will be a serviceman or federal employee, in others he will be a veteran, while in some, he will simply be the recipient of a social insurance benefit such as a social security disability pension.

Let us first consider the cases in which the question has arisen. It is now well-settled that in a suit against the government by a serviceman or a veteran injured while a patient at a government hospital, payments under a serviceman's disability pension or a veteran's disability pension, whether for a service-connected or non-service-connected disability, are to be deducted from tort recovery for loss of future earning opportunity. However, it has also been held that in a suit by an injured fed-

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408 As we have pointed out, we are not at all optimistic about the likelihood of such a change.
409 The question could also arise in a suit against a state that had abolished sovereign immunity, where the state had provided social insurance benefits to the plaintiff.
410 See United States v. Brooks, 176 F.2d 482 (4th Cir. 1949).
412 See United States v. Gray, 199 F.2d 239 (10th Cir. 1952).
eral employee, disability benefits under the Federal Civil Service Retirement Act would not be considered. Likewise, in a wrongful death action, benefits received by a widow as "mother's insurance" under the Social Security Act did not affect recovery.

Although the tort recovery and the social insurance come from a single source, tort recovery is predicated on the negligence of the government as any other tortfeasor while social insurance involves the government in a different capacity. Moreover, the ethos of social insurance in this country, as discussed previously, may make the court reluctant to treat the government as the sole "source" of the benefit. This may explain the different treatment of the serviceman and federal employee. In the case of the servicemen, one of whom was killed and the other injured when they were struck by a government vehicle while off duty, the government as employer paid disability and death benefits. Although the employee, as we have said, has "given up" something to get these benefits, he did not make "contributions" into a fund, as does the federal employee into the Federal Civil Service Retirement Fund. In the case of the serviceman, the court saw the government as employer meeting some of the loss caused by the tort, and applied the principle of mitigation permitting a deduction for the value of the benefits given to the victim by the tortfeasor. Whereas, in the case of the federal employee, the court concluded that the benefits under the Civil Service Retirement Act were benefits from a collateral source. It stressed the participation of the employee in the fund and pointed out that payments were based primarily upon salary and duration of service. It saw the fund as analogous to a pension fund maintained

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416 United States v. Harue Hayashi, 282 F.2d 599 (9th Cir. 1960).
417 See the discussion, supra, notes 245-46 and accompanying text.
418 United States v. Brooks, 176 F.2d 482 (4th Cir. 1949).
419 See the discussion of Sergeant Browning's case, supra, notes 136-148 and accompanying text.
420 Note that recovery against the United States is not affected by the receipt of National Service Life Insurance benefits, since such insurance is purchased by the serviceman. United States v. Brooks, 176 F.2d 482 (4th Cir. 1949).
421 The court stated that it was applying Virginia law. As we have pointed out, this is questionable where federal social insurance benefits are involved. See the discussion, supra note 226.
by a private employee with his and the employee’s contributions.\textsuperscript{422} But, as we have pointed out, the employee’s “contributions” to the fund are a substitute for social security taxes, which the federal employee does not pay. And the serviceman’s disability pension represents something for which he has “paid” by taking less salary, even though he does not thereby “contribute” to a special fund. In both cases the tortfeasor has met a part of the loss by a disability pension. The serviceman “contributed” by taking less salary; the contributions by the federal employee were in lieu of social security taxes that other wage-earners had to pay. Any “benefit” the government received, therefore, was offset by the loss of tax revenue. It is difficult to justify the different treatment in these cases.

Now let us consider the cases of the plaintiff injured while a patient at a Veterans Administration Hospital. In one, the plaintiff was receiving a disability pension not connected with the prior service.\textsuperscript{423} In another, plaintiff had been receiving a pension for tuberculosis, which had cleared up, and following the injury in the hospital, he was given another disability pension.\textsuperscript{424} In the third, he had been receiving a pension for a service-connected disability, which was increased following his injury at the hospital.\textsuperscript{425} In all cases the value of the pension was deducted. It should be noted that there is no jury in suits under the Federal Tort Claims Act,\textsuperscript{426} so the difficulty of computation may be lessened. In any event, Congress has decided to deal with this problem by legislation. It is provided that where a veteran receives injuries at a Veterans Administration Hospital, this is to be considered as a service-connected disability with a correspondingly higher pension. It is further provided that if the veteran recovers against the United States under the Federal Tort Claims Act, no benefits are to be paid until the aggregate amount of benefits that would have been paid equals the total amount of recovery in the tort action.\textsuperscript{427} Presumably this means the amount of the judgment—

\textsuperscript{422} If this were so, then under traditional doctrine, the employer (here the United States) should be credited with the percentage of the benefits represented by his contributors. He has paid for that benefit, and his liability should be reduced thereby.

\textsuperscript{423} United States v. Gray, 199 F.2d 239 (10th Cir. 1952).


which would include damages for future medical expenses\textsuperscript{428} and pain and suffering. If the court, in addition, were to deduct the value of the disability pension from the tort judgment, the plaintiff would truly receive less compensation than that to which he is entitled. When faced with the statute, a court concluded that the statute merely authorized the Veterans Administration to withhold benefits that were included in the tort recovery.\textsuperscript{429} Under this approach, if the court takes the pension into account in determining tort recovery, the veteran would continue to receive it.

The statute does not cover the pension for a non-service connected disability, but where the veteran has been receiving such a pension, the administration may consider the tort recovery in deciding whether to continue or grant the pension.\textsuperscript{430} It is clear that Congress and the courts are unwilling to permit what they consider to be double recovery against the United States in this situation. This is certainly a proper result. The victim will be compensated as fully as our system is capable of doing. He will either receive compensation under the Federal Tort Claims Act with credit for the Veterans Administration disability pension he receives, or payment will be withheld until the portion of the judgment representing loss of future earning opportunity equals the amount of the unpaid pensions.\textsuperscript{431} At that point the pension payments will be resumed. In effect, the payment of the pension continues, but the United States will not have to pay the portion of the judgment met by such payments. As the subsequent discussion will indicate, we believe it is sounder for the adjustment to be made by the Veterans Administration rather than the court, but in this area at least, the present practice prevents double recovery against the United States for a single loss.

In United States v. Harue Hayashi,\textsuperscript{432} when faced with the question of "mother's insurance benefits," the court took a different approach. Suit was brought under the Federal Tort Claims

\textsuperscript{428} Which, as we have said, are recoverable against the United States. See the discussion, supra notes 213-14 and accompanying text.
\textsuperscript{431} The court will specify the amount representing compensation for loss of future earning opportunity.
\textsuperscript{432} 282 F.2d 599 (9th Cir. 1960).
Act to recover for the wrongful death of the plaintiff's husband. Upon his death she received these benefits as provided in the Social Security Act,\(^4\) which would continue until she reached age sixty-two. It is not unsound to consider these benefits as a substitute for the disability pension the husband would have received if he had lived. The court held that the value of the benefits would not be deducted, likening them to insurance benefits paid from a special fund, observing that the fund was fed by contributions from the decedent and his employer. Recovery under the Federal Tort Claims Act would be from general revenues. Since the funds were different, the court reasoned that the "mother's insurance" benefits were payable from a collateral source and would not affect the liability of the United States under the Federal Tort Claims Act.

Thus, the holdings of the different Courts of Appeals—no case has been decided by the Supreme Court—as supplemented by Congressional legislation, have produced the following results. Benefits are deducted in the case of the serviceman and the recipients of veterans' disability pensions. They are not deducted in the case of federal employees covered by the Civil Service Retirement Act and recipients of disability pensions under the Social Security Act.

But it is clear that all cases involve the same basic question, whether the liability of the United States as tortfeasor is affected by the receipt of social insurance provided by the United States. The benefits payable to injured servicemen and the dependents of deceased servicemen are related to social security benefits, and it is not possible to cumulate benefits under servicemen's legislation and under the Social Security Act.\(^4\) While federal employees "contribute" to the Civil Service Retirement Act, this is in lieu of social security taxes. So, whether the plaintiff in the tort action is a federal employee or not, the United States is involved principally as social insurer. The benefits payable to servicemen and federal employees serve the same function as social insurance benefits payable to others. In all the cases, it is sound to think of the United States in the role as tortfeasor and social insurer.

Disregarding the concept of collateral source or separate funds, which would be irrelevant under the functional approach, the question is what should be done when the tortfeasor has provided social insurance benefits for the victim. This social insurance conforms to the ethos we have discussed, so the benefits bear some relationship to the amount of taxes paid in, and in the case of federal employees, we call the payments "contributions" and the benefits "annuities." But this is all social insurance, and in theory social insurance benefits are designed to provide minimum subsistence. The government, as tortfeasor, on the other hand, is required to make good the losses suffered by the victim in the same manner as a private tortfeasor. Since the victim is to be compensated for what he lost and only for that loss, it follows ideally that any social insurance benefits which have met some of the loss (notwithstanding that their purpose may have been to provide subsistence, unrelated to the question of tort liability), must be deducted from tort recovery.

We recognized the theoretical justification for such a rule when discussing the effect of social insurance upon tort recovery in the action against the private tortfeasor. We concluded, however, that under our system of awarding damages for personal injuries, too great a risk is involved in allowing the jury to consider the receipt of social insurance benefits as affecting recovery for loss of future earning opportunity. To allow the jury to consider the social insurance benefits increases the risk of undercompensation, and the consequences of undercompensation are more serious than those of overcompensation. It is better, we say, to take the chance of overcompensation, which affects defendants as a class, since this class can efficiently distribute the loss. Our conscience is not troubled, because the defendant is only required to pay what he would have had to pay in the absence of the social insurance benefit and does not have to "pay twice" for the same loss.

When the government is the tortfeasor, the public treasury is required to bear the same loss twice, because the government is at the same time the social insurer (note that we treat the payment of benefits to servicemen and government employees as the equivalent of social insurance). Social insurance benefits and tort recovery came from the same source, the public treasury,
and whether a particular fund has been set aside to meet certain losses is irrelevant. Disregarding how or from whom the particular taxes may have been collected, the public is compensating the victim for his loss. The unwillingness to subject the public treasury to double payment is clearly reflected in the decisions requiring a deduction of servicemen's and veteran's benefits and in the congressional legislation dealing with tort recovery by persons injured in a government hospital. In the cases involving social security benefits and Civil Service Retirement benefits, however, the court did not seem at all concerned by the effect on the public treasury. Perhaps they were mesmerized by the analogy to insurance or private pension plans. Or, they may have been concerned about their ability to adjust the social insurance benefits to the tort recovery in the context of a personal injury action, notwithstanding the absence of a jury. Although the court can "absorb" the data more readily than the jury, it is still guessing when it is trying to measure loss of future earning opportunity. More significantly, it must make a series of predictions when awarding damages in a lump sum, and these predictions may turn out to be inaccurate. Our system of awarding damages, particularly as regards loss of future earning opportunity, is simply not very efficient, and to consider the receipt of social insurance benefits, operates to increase the risk of undercompensation, with its possible disastrous consequences for the individual plaintiff.

Therefore, although I agree that the public treasury should not have to bear the same loss twice, I question the soundness of making the allocation between tort recovery and social insurance in the context of personal injury litigation. We have discussed the effort of Congress to prevent double recovery by victims of accidents in Veterans Administration hospitals. When faced with this statute, the court interpreted it as a direction to the social insurance fund to withhold the benefits only if their value was not deducted in the tort action. The court claimed that it still had the responsibility to determine what was "just compensation" and proceeded to deduct the value of the benefits.\textsuperscript{435} This procedure is very questionable, and I doubt if this is what Congress intended. It seems more likely that Congress wanted the court to award

\footnotetext{435}{Christopher v. United States, 237 F. Supp. 787 (E.D. Pa. 1965).}
damages without consideration of the disability pension, in accordance with the traditional rules of damages, and then wanted the Veterans Administration to see to it that the United States was not to be subject to double recovery.

Certainly, such an approach is more realistic. Our method of awarding compensation in personal injury action does not lend itself to measuring efficiently the receipt of social insurance benefits against tort recovery, and this is only slightly less so when the court is making the necessary guesses. To reduce tort recovery by the receipt of such benefits is to increase the risk of undercompensation. Where the tortfeasor is the government, it makes no difference to the public treasury whether the adjustments necessary to prevent double recovery are made by the social insurance fund or by the courts. And it makes more sense to have the social insurance administrator do so than the judge. I think this is what Congress intended when it tried to prevent double recovery by a plaintiff injured in a Veteran's Administration hospital. This can also be done in the case of a veteran who was receiving a pension for a non-service-connected disability at the time he was injured by the government, since the administrator can take the tort recovery into account in determining whether the veteran needs the pension. It is interesting to note that while a social security disability pension is reduced by any amounts received from workmen's compensation, and a pension under the Federal Civil Service Retirement Act is reduced by amounts paid under the Federal Employees Compensation Act, no provision is made for a reduction because of recovery under the Federal Tort Claims Act. Perhaps this will also be done, and Congress could at that time make a decision whether benefits should be affected because of recovery from third party tortfeasors.

It is, therefore, our conclusion that in a suit against the United States under the Federal Tort Claims Act the court should not deduct the value of social insurance benefits from the amount of tort recovery. In the case of the private tortfeasor we justified the solution on the grounds that (1) to do so increases the risk of undercompensation, whereas the risk of overcompensation is

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to be preferred to that of undercompensation, and (2) in any event, the tortfeasor is not required to meet the same loss twice. In the case of a suit against the United States we justify the solution on the ground that the social insurance fund can make the necessary adjustments to prevent double recovery more efficiently than the courts. Apart from the difficulty of accurately measuring loss of future earning opportunity in the context of adversary proceedings, the social insurance administrator has the benefit of hindsight, which the court does not. If this method is followed, both the objectives of tort recovery and social insurance will be satisfied. Tort recovery is designed to compensate the victim for his loss as best as it can be measured under our system. Social insurance is designed to provide minimum subsistence for victims of misfortune. So long as tort recovery is accomplishing its purpose, it swallows up the necessity for social insurance. Once the victim is awarded tort recovery, social insurance benefits can be discontinued, so they should be ignored by the court in ascertaining loss. If, because of the difficulties inherent in the system, tort recovery has failed, social insurance can step in and fill the void with subsistence payments.

The same principle is applicable in the case of the private tortfeasor. As we have said, the question is not whether the loss or a portion of it should be met by social insurance or tort liability. Rather it is what should be done in the context of our present system of dealing with accident victims. Our society recognized both social insurance and tort liability as methods of dealing with the harm caused by accidents. In the light of the way our system of tort recovery operates, it is more efficient to discount social insurance benefits in the tort action. If the victim is not to have his loss met twice over, pragmatic considerations dictate that, perhaps by default, the savings go to the social insurance fund rather than to the government. And where the victim clearly should not have his loss met twice over, as where the United States is the tortfeasor, the same pragmatic considerations dictate that the necessary adjustment be made by the social insurance fund rather than by the court in the tort action. We, therefore, conclude that in all cases the receipt of social insurance benefits should not be considered in determining loss of future earning opportunity.
D. A Comparison.

It will be seen that the functional approach will produce relatively little change in the matter of damages for loss of earning opportunity. Where the plaintiff has received his salary during the period of disability either because of sick leave benefits or because of the nature of his employment or as a true gratuity, we would allow him to recover the value of his lost time from the defendant without any consideration of this fact. He has either "paid" for this benefit, the amount of which we cannot measure, and therefore, cannot estimate its value to him, or he recovers the value of the gratuity on behalf of his employer, and they are left to adjust matters. His recovery also would not be affected by the receipt of disability pensions from his employer or by accident insurance. Again he has "paid" for the disability pension, which forms part of his total compensation picture. Since this amount cannot be measured, the true value of the pension is not known, and it cannot be deducted. As to the insurance, here we would not limit recovery to the cost of the premiums because of society's attitude toward such insurance, i.e., that a person cannot have too much protection against loss of income. We would permit recovery for lost earnings during the period of disability to be affected by the receipt of unemployment compensation or some other form of public assistance. Likewise, we would allow the jury to consider the receipt of unemployment compensation to determine the value of the lost time of an unemployed person. In these two situations, therefore, we would reach a different result than that required by the collateral source rule. In most states the employer who has paid workmen's compensation or his insurer, subrogates to the claim of the employee against the third party tortfeasor or is entitled to reimbursement from the employee. In the states where this is not so, a legislative intention to permit the employee to have cumulative recovery may be inferred, if not expressly provided.

With respect to recovery of damages for loss of future earning opportunity, we would exclude evidence of the receipt of social insurance benefits. This is not because such evidence is not relevant to measure actual loss. It is because our system of awarding damages for personal injuries, as presently constituted, cannot absorb this data. To permit its consideration would markedly
increase the risk of undercompensation, and in light of the resultant consequences, we conclude that the risk of overcompensation is to be preferred to the risk of undercompensation. This factor would be excluded from the personal injury award, and any adjustment should be made by the social insurance fund. This is in accord with the result reached under the collateral source rule, although the reasoning is quite different. We would go further than is required under the collateral source rule and take the same approach to all social insurance benefits where the United States is a defendant under the Federal Tort Claims Act. We would exclude the social insurance benefits from the personal injury action, and allow the adjustment necessary to prevent double recovery from the same source to be made by the social insurance fund. Our reason is that the social insurance fund is better equipped to make the judgment, with the benefit of hindsight, than the court which must make it in the context of estimating damages for prospective loss.

CONCLUSION

We have traveled far afield in our attempt to come up with a solution to the problem of collateral source benefits. Our law of personal injury damages grew up at a time when tort recovery was the only method of obtaining compensation for an accident, and the law reflected the values of the time. When societal values changed and benefits from other sources became available to the accident victim, the court dealt with the problem in terms of an all-embracing rule, reflecting the attitudes of a time when such benefits were considered "charity" and the defendant in a tort action was considered a "wrongdoer." The rationale of the rule does not accord with our present day attitudes toward compensation and allocation of losses, and its application adds an air of unreality to the already unscientific process of tort recovery.

It is for this reason that we must analyze the matter of collateral source benefits carefully and consider the relationship that the receipt of such benefits should bear to tort recovery. We must do so, however, in the context of our present system of awarding compensation. We still look toward tort recovery as the primary method of compensating the accident victim for the loss he suf-
fered, and we measure the loss by rather unscientific means. This being so, there are necessarily limitations on how we can allocate loss between tort recovery and collateral sources. Within the framework of this system, then, we have tried to propose a solution. Under this solution, the receipt of collateral source benefits frequently will not reduce recovery. But this is justified not in terms of a rule, but by considerations of practicality and economic and social policy. I call this solution the functional approach. If courts will come to deal with the problem of collateral source benefits and tort recovery in this way, the collateral source rule will be rendered irrelevant as a product of a by-gone era.