

February 1961

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Recommended Citation

Lee O. Hill, *Damages--Collateral Source Rule*, 63 W. Va. L. Rev. (1961).

Available at: <https://researchrepository.wvu.edu/wvlr/vol63/iss2/13>

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modernizing the statute by judicial interpretation would be inconsistent with the statute itself and the principle of stare decisis, and that any revising of the Copyright Act is up to Congress.

John James McKenzie

Damages — Collateral Source Rule

P, a soldier, was severely injured in a collision between the vehicle which he was driving and a vehicle being towed by *D*, and was taken to an army hospital for care and treatment. *D* timely objected to the attempted recovery by *P* of the reasonable value of the hospital and medical services on the grounds that *P* had personally paid nothing therefor and that the United States had borne the expenses thereof. *Held*, following the so-called "modern rule," that *P* could recover the reasonable value of medical and hospital services rendered him without charge by virtue of such services being considered a part of his compensation from the United States. *Gillis v. Farmers Union Oil Co.*, 186 F.Supp. 331 (D.C. N.D. 1960).

The principal case is a recent example of the modern application of the collateral source rule, without mentioning the rule as such. In terse terms the rule is that a defendant who has negligently injured another owes full compensation for the injuries inflicted, and payment for these injuries from a collateral source in no way relieves the defendant of his obligation. *Burks v. Webb*, 199 Va. 296, 99 S.E.2d 629 (1957). Generally, the application of the rule can be divided into three areas: 1) where the plaintiff receives compensation under contracts of employment or insurance policies; 2) where the plaintiff receives wages or medical services which are gratuitously rendered; 3) where the plaintiff has received compensation under workmen's compensation acts or similiar social legislation. The prevailing rule in the United States seems to be that an injured person may recover from the defendant that which he receives under all three areas of the rule. *Standard Oil of California v. United States*, 153 F.2d 958 (9th Cir. 1946), *aff'd*, 332 U.S. 301 (1947). However, different jurisdictions vary in their adoption of the rule. Some states allow recovery under the first and third areas, while refusing recovery under the second; therefore, it is necessary to consider each area separately.

As a rationale for the decision in the principal case, the court regarded the hospitalization furnished to the plaintiff by the United States as an incident of his employment by the government. In *Hudson v. Lazarus*, 217 F.2d 344 (D.C.Cir. 1954), the court said that although in general the law sought to award compensation and no more for personal injuries, still an injured person could recover in full from the tort-feasor without regard to what might have been received from a collateral source unconnected with the wrongdoer. The court pointed out that the collateral contribution necessarily benefits either the injured party or the wrongdoer. Whether it was the product of an insurance policy or of a contract of employment, the court felt that the interests of society and the parties in litigation would be better served if the injured person were to receive the benefits rather than the tort-feasor. The *Hudson* case refused to draw a distinction between the rendition of hospital and medical services to a veteran as opposed to rendering such services to one on active duty.

Whether or not the plaintiff had a life and accident or a hospitalization insurance policy is of no concern to the defendant, *Kurta v. Probelske*, 324 Mich. 179, 36 N.W.2d 889 (1949), and the defendant is obligated to the plaintiff for medical expenses even though such were furnished the plaintiff at the insistence of his employer under an implied contract right. *Clark v. Berry Seed Co.*, 225 Iowa 262, 280 N.W. 505 (1938). Although the majority rule in the United States seems to be that a plaintiff may recover from a defendant a full measure of the compensation due him without regard to anything the plaintiff might receive by reason of a contract of employment or an insurance policy, the English courts seem to be contra. See *Boker v. Dalgleish Steam Shipping Co.*, [1922] 1 K.B. 361.

There is a minority of cases in the United States which seems to follow the English view in this area. In *Whiddon v. Malone*, 220 Ala. 220, 124 So. 516 (1929), it was held that since the plaintiff's wages had been continued from the date of the injury until the time of trial due to a provision in the contract between the plaintiff and his employer, there could be no recovery for lost wages because, the court felt, there had really been no lost wages. In another instance where plaintiff's wages and hospital expenses were provided by his employer, it was held that the plaintiff had therefore sustained no losses of monetary importance and could

only recover for pain and suffering. *United States v. Gaidys*, 194 F.2d 762 (10th Cir. 1952), applying *Koons v. Nelson*, 113 Colo. 574, 160 P.2d 367 (1945). *But see Publix Cab Co. v. Colorado Nat. Bank*, 139 Colo. 205, 338 P.2d 702 (1959), where the Colorado court said that one who carries health and hospital insurance has nevertheless the right to recover those amounts from the wrongdoer. This recent decision did not mention the collateral source rule, nor did it refer to either of the earlier cases from that state.

Where the plaintiff has received gratuitous medical services, the majority of jurisdictions still allows him to recover the reasonable value therefor from the tort-feasor. *Sainsbury v. Penn Greyhound Lines*, 183 F.2d 548 (4th Cir. 1950); *Lewis v. County of Contra Costa*, 130 Cal.App.2d 176, 278 P.2d 756 (1955). Charity is not considered a substitute for the plaintiff's fundamental right of redress for a wrong and acts of benevolence should not be made a set-off against the tortious acts of a wrongdoer. *Mobley v. Garcia*, 54 N.M. 175, 217 P.2d 256 (1950). In a situation where the injured litigant received amounts from the United States and from his civic employer, it was held that these amounts could not be deducted from the amount of recovery from the wrongdoer, although these amounts were apparently in the nature of gratuities. *Audette v. New England Transport Co.*, 71 R. I. 420, 46 A.2d 570 (1946); *Perry v. New England Transport Co.*, 71 R. I. 352, 45 A.2d 481 (1946).

In some jurisdictions a plaintiff can recover from the tort-feasor where he has been compensated by a collateral source, as long as that source is not a charitable or gratuitous one. In *Daniels v. Celeste*, 303 Mass. 148, 21 N.E.2d 1 (1939), it was held that an injured person could recover the reasonable value of medical services only if he had paid for such services or had incurred liability therefor. *Accord, Drinkwater v. Dinsmore*, 80 N.Y. 390 (1880). Again it has been held that the plaintiff could not recover the value of hospital services when rendered free or at a reduced rate (except to the amount of that reduced rate) by a state supported or other public charity. *Di Leo v. Dolinsky*, 129 Conn. 203, 27 A.2d 126 (1942). *Accord, Nelson v. Pauli*, 176 Wis. 1, 186 N.W. 217 (1922). *But see Verhelst Const. Co. v. Galles*, 204 Wis. 96, 235 N.W. 556 (1931), which held by way of dictum without citing the earlier Wisconsin case that an injured party could recover for charitably rendered nursing services.

When considering gratuitously rendered nursing services, it is interesting to note *City of Englewood v. Bryant*, 100 Colo. 552, 68 P.2d 913 (1937), wherein it was held that albeit the plaintiff could not recover the value of hospital services which she neither paid or was expected to pay, nonetheless the plaintiff was allowed to recover the reasonable value of nursing services rendered by her mother, whether gratuitously performed or not. Whatever may be the Colorado situation, most states allow the recovery for nursing services even though rendered by a member of the family. *Johnson v. Rhuda*, 164 A.2d 675 (Me. 1960).

It is also interesting to note recent developments in Kentucky with regard to the collateral source rule. In *Sedlock v. Trostper*, 307 Ky. 369, 211 S.W.2d 147 (1948), that court held that a miner could not recover the medical expenses of his daughter when such services were furnished by his employer. *Taylor v. Jennison*, 335 S.W.2d 902 (Ky. 1960), questioned the soundness of the *Sedlock* decision, but distinguished that case on the grounds that in the *Taylor* case the plaintiff had actually incurred liability for the hospital services and was to be indemnified by his insurance carrier. *Conley v. Foster*, 335 S.W.2d 904 (Ky. 1960), expressly overruled the *Sedlock* case and held that in the absence of an assignment or express contractual subrogation the plaintiff could recover those amounts due him from the defendant by virtue of the negligently inflicted injury, at least to the expenses paid pursuant to an agreement based upon the payment of premiums or contributions by or on behalf of the injured person. The court said in effect that the injured party had suffered an expense in the nature of premiums or deductions from his wages. The language of the recent Kentucky cases indicates a hesitance by that court to follow the more liberal applications of the rule, i.e., Kentucky would probably not countenance a recovery for amounts which an injured person had received charitably.

The collateral source rule has also had extensive application where the plaintiff has received compensation from workmen's compensation acts or related social legislation. The majority holds that as long as the employer of the litigant is not a joint tort-feasor with the defendant, the plaintiff can recover from the defendant without regard to whether or not the injury was compensable under a statutory act. *Sheffied Co. v. Phillips*, 69 Ga. App. 41, 24 S.E.2d 834 (1943). The reasoning behind such decisions is that the right

of recovery of the employee against the employer under workmen's compensation, and the right of recovery against the tort-feasor under common law are so separate and distinct that satisfaction of the former cannot act as a reduction of the recovery from the latter. *Abbott v. Hayes*, 92 N.H. 126, 26 A.2d 842 (1942). Money received as the product of other types of social legislation, such as the Railroad Retirement Fund, is likewise not considered as being in mitigation of damages recoverable from the wrongdoer. *Sinovich v. Erie R.R.*, 230 F.2d 658 (3rd Cir. 1956); *New York, New Haven & Hartford R.R. v. Leary*, 204 F.2d 461 (1st Cir. 1953), cert. denied 346 U.S. 856 (1953); *Mullins v. Bollinger*, 115 Ind. App. 167, 56 N.E.2d 496 (1944).

The West Virginia cases seem to be limited to this area of application of the collateral source rule. In the recent case of *Jones v. Appalachian Electric Power Co.*, 115 S.E.2d 129 (W. Va. 1960), the West Virginia court held that the amount received by a widow under workmen's compensation was not the proper subject for a remittitur from the amount of recovery by the widow from the tort-feasor who had caused her husband's death. The court said that any amount received from workmen's compensation, health and accident insurance or otherwise would in no way mitigate the damages recoverable from the wrongdoer. The West Virginia court relied on the precedence of *Mercer v. Ott*, 78 W. Va. 629, 89 S.E. 952 (1916), and *Merrill v. Marietta Torpedo Co.*, 79 W. Va. 669, 92 S.E. 112 (1917). In the *Mercer* case it was held that where an employee was killed within the course of his employment and a tort-feasor other than the employer was responsible for the employee's death, the right to workmen's compensation was not lost merely because there had been a recovery in damages from the tort-feasor. In the *Merrill* case the West Virginia court said that an employee who received benefits from the workmen's compensation fund was not estopped from suing a third party, not his employer, whose negligence caused the injury. The *Merrill* case further said that it was well settled that a person could be protected by accident insurance and at the same time have a cause of action against the one who negligently produced the injury, but the court did not cite any authority in support of the last proposition. These last two decisions were questioned in *Hardman, Subrogation in Workmen's Compensation*, 26 W. VA. L. Q. 183 (1920), which said that the common law forbids a double satisfaction for an injury unless there was a concurrent right of subroga-

tion and that the cases which allowed a double recovery contravened well settled principles of the common law. However, Dean Hardman's article was in the main a criticism of the failure to include a subrogation provision in the West Virginia Workmen's Compensation Act, W. VA. CODE ch. 23 (Michie 1955), and was not concerned with the collateral source rule. See also *Crab Orchard Imp. Co. v. Chesapeake & O.R.R.*, 115 F.2d 277 (4th Cir. 1940), cert. denied 312 U.S. 702 (1941).

The West Virginia rule is apparently misapplied in *Frank v. Atlantic Greyhound Corp.*, 172 F.Supp. 190 (D.D.C. 1959), which said that the amount of recovery is subject to a reduction under the law of West Virginia equal to the amount received from workmen's compensation, even though the employer was not joined as a tort-feasor. The district court relied on *Brewer v. Appalachian Constructors Inc.*, 135 W. Va. 739, 65 S.E.2d 87 (1951). In order to avoid the misconception which occurred in the *Frank* case—it is necessary to consider the circumstances surrounding the *Brewer* case—that the record discloses that the parties had agreed, erroneously or not, that any recovery should be reduced by the amount received by the plaintiff from the workmen's compensation fund. Actually, the *Brewer* case came to the West Virginia Supreme Court on the demurrer of the employer who was found to have been mis-joined as a party defendant. Despite the apparent lack of any necessity for considering the question, the court said that a plaintiff could only have one recovery for his injury and that where partial payments for the injury had been made from workmen's compensation on account of one of the *joint tort-feasors* being a subscriber thereto, it was partial satisfaction of the plaintiff's recovery. This is merely a restatement of the limitation set out in the *Mercer* and *Merrill* cases.

It may be said, in accordance with the view expressed in the principal case, that the majority of American jurisdictions hold that an injured litigant may recover completely for his injuries from the wrongdoer, irrespective of whether or not the injury was compensable from some outside source unconnected with the wrongdoer. West Virginia is in line with this majority view. The majority is somewhat smaller when the compensation is received from a charitable source; however, it still is definitely the majority view. West Virginia's position in the charitable area is unknown and such a case might possibly be considered one of first impression

unless the court liberally applied the sweeping language of *Jones v. Appalachian Electric Power Co.*, *supra*. The principles of the collateral source rule have no application in cases involving breach of contract, *United Protective Workers of America v. Ford Motor Co.*, 223 F.2d 49 (7th Cir. 1955), and seem to be limited to the personal injury field.

Lee O'Hanlon Hill

Damages — Corporations — Corporate Liability for Exemplary Damages

In a wrongful death action against a corporate employer whose servant allegedly operated a motor vehicle in a willful and wanton manner resulting in death of *P's* decedent, the defense of the employer was that punitive damages were not recoverable under Indiana law because the allegations of the complaint, if proven, constituted a statutory violation for which the alleged wrongdoer was subject to criminal prosecution. *Held*, *P's* motion to strike the defense is granted. Under Indiana law, the rule barring exemplary damages, where the acts complained of also constitute an offense for which the wrongdoer could be criminally prosecuted, cannot be successfully raised to protect a corporate employer, which is itself not subject to any criminal prosecution for the acts of its servants. *Bingamen v. Gordon Baking Co.*, 186 F. Supp. 102 (N.D. Ind. 1960).

It appears that the West Virginia court has refrained from discussing the effect of criminal prosecution of the servant on the corporation's liability for exemplary damages. It is to be noted, however, that the West Virginia court has been presented with factual situations wherein the servant could have been subjected to criminal prosecution, but the issue was never raised. *Pendleton v. Norfolk & Western Ry.*, 82 W.Va. 270, 95 S.E. 941 (1918).

The general rule is that a corporation may be held liable for exemplary damages for the wrongful acts of its agents or employees. 19 C.J.S. *Corporations* § 1286 (1940). The courts seem to take two views on the question. By the federal and majority view, a corporation cannot be held for exemplary damages for the torts of its employees or representatives unless (1) it can be shown that