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DANIEL R. MICHEL and JOSEPH W. O'NEIL

Ohio's Collateral Source Rule

I. INTRODUCTION

The purpose of compensatory damages is to "make the plaintiff whole," by returning the plaintiff to the position plaintiff would have been in absent the defendant's tortious actions.[1] The collateral source rule requires a tortfeasor to pay full compensatory damages to an injured party, regardless whether the injured party receives benefits from a collateral source.[2] The policy behind the collateral source rule is that a wrongdoer should not benefit from an injured plaintiff's access to collateral source recoveries.[3] The collateral source rule affects only the measure of damages, not the defendant's liability.[4]

Since its early recognition in Ohio jurisprudence, the collateral source rule has undergone subtle changes. It has been expanded to cover a variety of benefits; it has been the focus of legislative reform; and it has been repeatedly reaffirmed by Ohio Courts.[5]

This article focuses on the history of the collateral source rule, attacks on the collateral source rule, continued viability of the collateral source rule, and the present-day application of the collateral source rule. To a limited extent, this article will also address re-payment of collateral sources after a verdict or settlement (i.e., rights of subrogation, reimbursement, recoupment, etc.).

"The real party in interest argument has not been successful in most courts...."

II. HISTORY OF THE COLLATERAL SOURCE RULE

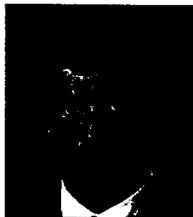
A. Function of the Collateral Source Rule

The collateral source rule is both a rule of damages and a rule of evidence.[6] It is a rule of damages inasmuch as an injured party is entitled to receive full compensation from the tortfeasor, regardless of any compensation received from an independent, or "collateral," source of recovery.[7] Thus, it is, to a certain extent, an exception to the general rule of damages that a plaintiff is entitled to be made whole (at least where the collateral source does not assert subrogation or reimbursement rights).[8]

The collateral source rule is also an evidentiary rule inasmuch as it prevents "prejudicial disclosures" about benefits that a plaintiff receives after having been injured.[9] There is a very narrow exception to the exclusion of evidence regarding collateral sources where such evidence clearly carries probative value on an issue not inherently related to the measurement of damages.[10]

Disclosure of collateral benefits is considered highly prejudicial, so the remedy for the erroneous disclosure of collateral benefits is usually reversal.[11] A corrective instruction may be insufficient to overcome the prejudicial effect of the disclosure of the collateral source.[12]

While disclosure of collateral benefits has been deemed highly prejudicial, in this day and age collateral sources are the proverbial "pink elephant." The lawyers know they exist, the judge knows they exist, and the jury almost certainly knows they exist. So, there is a risk that the jury will deduct the collateral benefits from its verdict even though evidence thereof was never introduced, unless the jury is informed of the purpose and effect of the collateral source rule. For example, the authors' town has a General Motors foundry in it, and the jury pool knows all injured G.M. employees have health benefits. Therefore, the authors have requested the following jury instruc-



Joe O'Neil is a partner with the Defiance, Ohio law firm of Arthur, O'Neil, Mertz & Bates Co. L.P.A. He received his bachelor's degree from the Ohio State University and his Juris Doctor from Capital University. He is a Board Certified Civil Trial Specialist by the National Board of Trial Advocacy. He is an occasional author for Ohio Trial magazine and has lectured several times at OATL and Ohio State Bar Association seminars. He has also authored amicus briefs in behalf of the Academy and participated in OATL's constitutional challenge of HB350.

Dan Michel is an associate with the firm. He received his bachelor's degree from Madonna University and his Juris Doctor from the University of Toledo. Dan has also presented at OATL seminars.

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tion more than two dozen times in courts throughout Northwest Ohio, and it has been invariably given:

> When you determine the amount to award [Plaintiff's name], you should not diminish his damages by reason of the fact, if it is a fact, that as a result of his injuries, [Plaintiff's name] may have received insurance benefits, benefits from his employer, workers compensation benefits, or a disability pension. You should consider the case as if he had received no such payments or benefits.[13]

When litigating personal injury cases, the attorney must decide whether to remain silent as to collateral benefits or concede their existence.[14] Regardless, it must be clear to the jury that the verdict may not be reduced by collateral source resources, so, in every case, the above mentioned instruction should be proposed. It may also be worth mentioning, in voir dire or closing, that any adjustment to the verdict for these benefits will be done by the judge in a separate proceeding.

B. Policy Behind Collateral Source Rule

The collateral source rule, as an exception to the general rule against double recovery, demonstrates the judicial refusal to credit the wrongdoer with money or services received from sources other than the wrongdoer, *i.e.*, collateral sources.[15] The wrongdoer should pay for his entire wrong -- if the plaintiff has the foresight to obtain insurance or benefits from his own work effort, the wrongdoer should not benefit from that foresight.[16] Because the tortfeasor has unclean hands, if anyone should benefit, it should be the injured party.[17] Simply put, collateral sources were intended for the benefit of the injured person, not the tortfeasor.

Critics of the collateral source rule contend that the plaintiff should be made whole, nothing more.[18] Critics also assert that damages which make the plaintiff more than whole are punitive in nature.[19] Because punitive damages are generally not available in negligence actions, critics suggest that the injured party should not be permitted to receive double recovery.[20] By allowing "double recovery" the critics assume that the plaintiff is in a better position than he or she would have been without the injury.

In theory, it may seem that plaintiff gets "double recovery." In actuality, after the plaintiff has paid attorney fees, litigation expenses, and subrogated parties, a double recovery is highly unlikely.[21]

C. What is a collateral source?

Payments by a tortfeasor, and payments by a tortfeasor's insurance company on the tortfeasor's behalf, are not collateral benefits, and plaintiff's recovery may be reduced by non-collateral benefits.[22] The tortfeasor bears the burden of proving that the benefits were not from a collateral source.[23]

The following are considered collateral sources: health insurance benefits, sick pay benefits, Medicare benefits, Social Security Disability, Workers Compensation benefits, medical payment benefits, and gratuitous services.[24] Collateral sources also include gratuitous medical care, such as a physician's services for which payment is not sought,[25] and gratuitous nursing services provided by a family member.[26] Likewise, discounts of physician bills should inure to the benefit of the injured person, not the wrongdoer.

A collateral source from which the wrongdoer should not benefit also includes the discount given to the injured person's health insurance company. For example, employer-provided group health plans often negotiate favorable arrangements with medical providers to pay less for care than the amount billed. For instance, an $800 MRI may cost the health plan $500. This type of arrangement is often called capitation, discount billing, or unit based billing. Whatever the name, the ability of any health plan to obtain a discount on the medical bills should inure to the benefit of the injured person, not the wrongdoer.[27] Therefore, the actual amount of the bills, not the reduced amount, should be placed in evidence, so long as there is testimony that the bills are reasonable and necessary. The fact that there is a discount in the doctor's charge is a result of negotiation by plaintiff's health plan; as such, the discount should not benefit the wrongdoer.

D. The History Collateral Source Rule

In Ohio, the Collateral Source rule has been repeatedly the target of legislative attack.[28] The collateral source rule, however, is firmly rooted in common law.[29] The Ohio Supreme Court long ago recognized a plaintiff's right to recover damages for losses even though those losses may have also been paid for by a collateral source. In *Klien v. Thompson*, the plaintiff sought damages from the defendant for beating him even though his medical bills were paid by Township Trustees.[30] At trial, plaintiff was permitted to introduce the surgeon's bill into evidence. The Ohio Supreme Court upheld the trial court's decision to admit the bill based on the collateral source rule.[31]

The Lucas County Court of Appeals amplified the *Klien v. Thompson* holding in *Ohliger v. Toledo*, in which care was gratuitously rendered to the plaintiff.[32] In *Ohliger*, the plaintiff fell through a city sidewalk resulting in injuries that required medical care for which the plaintiff was not charged. The trial court excluded evidence of the reasonable value of the medical services because the plaintiff had not actually incurred the expense. The Court of Appeals reversed, holding that the plaintiff's damages should not be reduced because the gratuitous services were intended to benefit the plaintiff, not the defendant.[33]

Likewise, in *Dernham v. Traction Co.*, the Superior Court of Cincinnati ruled that the trial court erred in holding that the plaintiff could not recover expenses paid voluntarily by the plaintiff's brother.[34] In *Dernham*, the plaintiff was injured by a derailment of one of defendant's railway cars in which plaintiff was a passenger. Plaintiff's expenses for medical care were voluntarily paid by the plaintiff's brother without creating any legal obligation upon the plaintiff to reimburse his brother. The Superior Court of Cincinnati held that plaintiff could recover the expenses paid by plaintiff's brother.[35]

More recently, the Tenth District Court of Appeals applied the same rationale in *Howard v. McKitrick*.[36] In *Howard*, the plaintiff's mother gratuitously rendered home nursing services to the plaintiff. The trial court barred the plaintiff from admitting into evidence the reasonable value of those services. The Court of Appeals reversed, holding that the collateral source rule permitted the jury to consider this evidence.

III. THE OHIO SUPREME COURT GIVES THE RULE A NAME: *PRYOR V. WEBBER*

Pryor v. Webber is the leading case in Ohio on the collateral source rule because the Ohio Supreme Court reaffirmed the rule and gave it the name by which it is known today.[37] At trial, the plaintiff testified that

she "lost" approximately $1,600.00 in wages.[38] The trial judge then permitted, the defense to introduce evidence of sick-pay benefits for purposes of impeachment.[39]

The Supreme Court held that the trial judge committed prejudicial error by allowing the introduction of such evidence, notwithstanding the defense argument that the so-called *false* testimony needed to be impeached. The Court held that the collateral source rule makes the receipt of collateral benefits irrelevant and immaterial on the issue of damages. Hence, not only are the benefits not to be deducted, but the receipt of such benefits should not be admitted in evidence or otherwise disclosed to the jury.[40]

IV. THE COLLATERAL SOURCE RULE UNDER ATTACK – AND REAFFIRMED

The Tort Reform Act of 1987 was the culmination of a purported insurance crisis. Among other things, the legislation sought to prevent *"double recoveries"*, which it was argued would make insurance more affordable and available. The fallacy was that there was no real insurance crisis.[41] Nevertheless, legislators attacked the collateral source rule by enacting a statute requiring plaintiffs to disclose to the courts all collateral benefits.[42] The trial court was then required to reduce the jury's verdict by the amount of the collateral benefits.

The Ohio Supreme Court struck down this legislative modification of the collateral source rule in *Sorrell v. Thevenir.*[43] Specifically, the Ohio Supreme Court held that R.C.§2317.45 violated various provisions of the Ohio Constitution including: Section 5, Article I (right to a jury trial), Section 16, Article I (due process, right to a remedy and open courts), and Section 2, Article I (equal protection).[44]

With regard to Article I, Section 5, the Ohio Supreme Court held that the legislation encroached upon the fundamental right to a trial by jury because R.C. §2317.45 required the trial courts to deduct collateral benefits from the jury's award regardless of whether the collateral sources were actually duplicated in the jury's verdict.[45] The jury verdict in *Sorrell*, after setoff, exemplified the injustice of former R.C. §2317.45. A jury had awarded the injured plaintiff $10,128.26 in compensatory damages, $5,000 of which was intended for pain and suffering. During the post-verdict hearing, the defendant argued that the statute required an off-set of the $14,000 that plaintiff had received in worker's compensation benefits. Thus, if the setoff had been granted in *Sorrell*, the plaintiff would not have received anything for pain and suffering because the collateral benefits exceeded the jury verdict.[46] The Tort Reform Act simply did not take into account that collateral benefits, such as Worker's Compensation benefits, may not be duplicated in a jury's award.

The Supreme Court also found a violation of Article I, Section 16 (the due process clause). Because the right to a jury trial is fundamental right, the Court applied a strict scrutiny standard of review.[47] On that basis, the Court held that R.C. §2317.45 did not bear a real and substantial relationship to the health, safety, moral, or general welfare of the public.[48] In support of this conclusion, although the Court found no evidence of any insurance crisis, it held that, even assuming an insurance crisis could be proven, there was no relationship between the tort reform legislation and the availability or affordability of insurance.[49] Further, the means by which the legislature chose to eliminate double recoveries, i.e., by reducing the jury verdict by the amount plaintiffs received from collateral sources, was both irrational and arbitrary.[50]

The Court specifically took exception with the fact that deductions were required to be made from jury verdicts regardless whether a collateral benefit was actually included in the jury verdict.[51] The Court further observed that "no double recovery from a tortfeasor occurs in the typical case involving collateral benefits, since ordinarily one of the supposed double recoveries is merely the plaintiff's benefit of his bargain with his own insurance company."[52]

Finally, the Court found that R.C. §2317.45 violated Article I, Section 2 (equal protection) because R.C. §2305.27 established two classifications of tort victims: medical malpractice tort victims and all other tort victims.[53] As such, jury awards in medical malpractice cases were subject to a collateral source rule different than all other tort cases.[54] The Court held that R.C. §2317.45 was not necessary to promote a compelling governmental interest, and that it treated similarly situated people differently based upon an illogical and arbitrary basis.[55]

V. THE REAR ATTACK – THE REAL PARTY IN INTEREST ARGUMENT

A. Real Party in Interest

With the reinstatement of the common law collateral source rule, defense attorneys began to use the real party in interest defense to prevent the introduction of medical bills paid by collateral sources. Relying upon Civil Rule 19, they argue that subrogated providers of collateral benefits must be joined in the lawsuit. Defense attorneys also file motions *in limine* to prevent the presentation of medical bills, arguing that the real party in interest is the insurance company which paid the bill and not the injured plaintiff. Initially, these arguments met with limited success.[56]

The real party in interest defense is premised upon the incorrect assumption that the injured plaintiff, whose bills were partially paid by a collateral source, is no longer the real party in interest. The fact that a plaintiff receives insurance benefits, however, does not mean that the plaintiff is no longer a real party in interest. As a preliminary matter, a plaintiff's bills are seldom entirely paid by insurance. Furthermore, there are co-pays, deductibles, uncovered items, and exhaustion of benefits,

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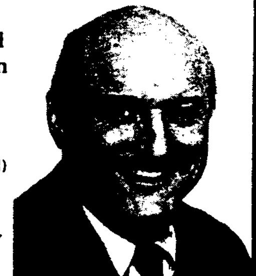

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such that, even assuming the validity of the real party in interest argument, the plaintiff would remain the real party in interest as to any such unpaid amounts. In short, the outside contract between the plaintiff and his or her insurer does not change the identity of the real party in interest. Instead, the contract merely delineates the duties and responsibilities among duly interested parties.

Even when the plaintiff has made a partial assignment of the claim to an insurance company, the plaintiff remains the real party in interest.[57] Arguments to the contrary fail to recognize that, even if the plaintiff has a subrogation or a reimbursement contract with an insurance company, the insurance company's right to subrogation or reimbursement may not vest until the plaintiff has been fully compensated. Under Ohio law, a plaintiff is entitled to full compensation before any claims of subrogation become ripe.[58] In *Blue Cross & Blue Shield of Ohio v. Hrenko*, the Ohio Supreme Court held, in its syllabus, that, where an insurance contract included a subrogation clause, the insurer may recover from the insured only **after the insured receives full compensation.**[59]

The real party in interest argument has not been successful in most courts, and in recent years, no appellate court in Ohio has been persuaded by it. For example, the Sixth District Court of Appeals reversed its prior acceptance of the real party in interest defense in *Bowers v. Johns,*[60] and reaffirmed the collateral source rule in *Spychalski v. State Farm*.[61] The Third Appellate District Court of Appeals is also in accord.[62]

Likewise, in *Carville v. Phillips*, the Second District Court of Appeals rejected the "real party in interest" argument in deference to the collateral source rule.[63] Citing the Ohio Supreme Court case of *Holibaugh v. Cox*, the Second District noted:

> According to the Ohio Supreme Court, [a]n insured who is injured by a tortious act retains his ownership of the resultant claim for damages against the tortfeasor in that he may, in the absence of a motion or a raising of the issue of joinder, maintain an action thereon in his own name for the full amount of damages, even though he has made a partial assignment of the claim to an insurer. *Holibaugh v. Cox* (1958), 167 Ohio St. 340. 345-346. 148 N.E.2d 677. Thus. in this case, we find that the trial court did not err in allowing Carville to maintain the complete action in her name, regardless of whether or not she had partially assigned her claim to the insurance company.[64]

Similarly, in *Curp v. Stone,* the Second District Court of Appeals noted that the plaintiff was a real party in interest because plaintiff had paid 20% of the medical expenses, had paid premiums which accounted for the payment by her insurer for 80% of the medical expenses, and, in accordance with the contract between plaintiff and her insurance company, the insurance company's right to reimbursement did not arise until after plaintiff received money from the tortfeasor.[65]

B. Plaintiffs' Right to Full Compensation

A consensus is forming in Ohio courts that an insurance company's right of subrogation arises only after plaintiff has been fully compensated.[66] Following a settlement or verdict, the collateral source may seek to recover payments made on behalf of the insured. It is important to know whether the collateral source has a right to share in the recovery, and further, the nature of the right to recover. Is it subrogation? Is it reimbursement? Is it recoupment? Is it something else? Does the insurance contract require subrogation, reimbursement, and/ or recoupment for this claim? What is the actual language of the contract? What have other courts interpreted the language of the contract to require? Until the answers to these questions are known, it is not possible to determine the collateral source's entitlement to a portion of the verdict or settlement.

Subrogation gives the insurer a cause of action against a third party tortfeasor for benefits the insurer paid due to the tortfeasor's negligence.[67] *Reimbursement* gives an insurer a cause of action against its insured to recoup the amount of benefits paid from a settlement or judgment actually received by the insured.[68] The right of *recoupment* means that the insurance company may still claim a right to receive the money from the plaintiff even if the insurer is not named in the suit under recoupment or repayment theory.[69]

An insurer may be entitled to priority over the insured's recovery even if the insured has not received full compensation when the insurance contract expressly so provides.[70] While this is still an ongoing issue in Ohio courts, the strength of insurance companies' claims to proceeds, when the plaintiff has not been fully compensated, has been greatly weakened since *Hrenko*.

VI. THE COLLATERAL SOURCE RULE AFTER HOUSE BILL 350

A. Application of the Collateral Source Rule Today

The collateral source rule has been a firmly rooted principle in Ohio jurisprudence for many years. But, in 1996, the Ohio legislature perceived the need to change the collateral source rule once again. This renewed legislative attempt to abrogate the collateral source rule failed two years later when Am.Sub.H.B. 350 was declared unconstitutional, in toto, and consequently, void *ab initio*.[71] A law which is void *ab initio* is treated as if it never existed. As such, the collateral source rule returned to the version prior to Am.Sub.H.B. 350.[72]

B. Governmental Subdivisions and the Collateral Source Rule

The Ohio Constitution recognizes the State's right to sovereign immunity, and the right of the State to waive it.[73] Indeed, the State was generally immune from suit until the enactment of the Court of Claims Act in 1975.[74] With the enactment of that statute, the legislature set forth a limited set of circumstances under which governmental subdivisions in Ohio could be sued. As it relates to collateral sources, the Act requires an injured plaintiff to disclose any benefits the plaintiff is entitled to receive, and the governmental subdivision is entitled to an off-set against any verdict in the amount of the disclosed benefits.[75]

When dealing with a claim of collateral off-sets based upon the defense of sovereign immunity, the case of *Buchman v. Wayne Trace Local School District Board of Education*[76] is required reading. *Buchman* teaches that a collateral benefit is deductible only to the extent that the loss for which it compensates is actually included in the jury's award.[77] Further, it is the political subdivision's burden to prove the extent to which it is entitled to deduct collateral benefits under R.C. §2744.05(B).[78]

C. Workers Compensation and the Collateral Source Rule

The collateral source rule applies in workers compensation cases.[79] In an action by

an employee against a third-party tortfeasor, R.C. §4123.931 grants the Ohio Bureau of Workers' Compensation a right of subrogation.[80] Several cases have challenged the constitutionality of R.C.§4123.931,[81] and, at the time of writing, this issue is pending decision before the Ohio Supreme Court in *Holeton v. Crouse Cartage Co.*[82] and *Yoh v. Schlachter*.[83] In the meantime, the harshness of the statute has at least been ameliorated, in part, by a guarantee that attorney fees and costs of litigation will not be subrogated under the statute.[84]

D. Medical Malpractice and the Collateral Source Rule

The collateral source rule is also in full force and effect in medical malpractice actions -- although R.C. §2305.27 provides that a plaintiff may not recover damages for losses paid by certain collateral sources, very few collateral sources fit within the statutory definition -- moreover, there is an additional statutory provision which may benefit the plaintiff. R. C. §2305.27 prevents all collateral sources from seeking subrogation in medical malpractice cases.[85] Ironically, the purpose of the statute was to protect the negligent doctor from medical insurers who might pursue medical malpractice claims even when the injured patient was unwilling to do so. Therefore, in order to limit litigation, the statute does not allow collateral source providers to bring subrogation claims in medical malpractice actions.

While the legislature has subsequently attempted to change this statute, these attempts have run afoul of the Ohio Constitution.[86] So, apart from statutory liens (*e.g.*, worker's compensation, Medicaid, etc.), certain collateral sources in medical negligence claims, and collateral sources based in federal law (*e.g.*, ERISA plans), the common law collateral source rule remains unchanged.

[1] See 2 Jerome H. Nates et al., *Damages in Tort Actions*, §17.00 at 17-3 (Release 1997).

[2] See *Id.* See also *Pryor v. Webber* (1970), 23 Ohio St.2d 104, 111, 263 N.E.2d 235, 238; The Restatement Second of Torts, §920A which states:

(1) A payment made by a tortfeasor or by a person acting for him to a person whom he has injured is credited against his tort liability, as are payments made by another who is, or believes he is, subject to the same tort liability.

(2) Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable.

[3] See *Pryor*, 263 N.E.2d at 238.

[4] See *Damages*, §17.00 at 17-12. See also *Pryor*, 263 N.E.2d at 238-239.

[5] See *supra* §§ I, IV, and V for changes in the collateral source rule. See also Damages §17.00 at §§17-15 through 17-19 (areas that the collateral source rule may be applied). See R.C. §2317.45 as enacted by Am.Sub.H.B. No. 1, in 1987; and Am.Sub.H.B. 350, 121st Leg., Ohio 1997 (legislative attack); See *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 633 N.E.2d 504 and *OATL v. Sheward* (1999), 86 Ohio St.3d 451, 715 N.E.2d 1062 (providing judicial support for the collateral source rule).

[6] See *Damages*, §17.00 at 17-6 through 17-8.

[7] See *Id.* See also *Pryor*, 263 N.E.2d at 238.

[8] See *Damages*, §17.00 at 17-6. See also *Pryor*, 263 N.E.2d at 238; *Sorrell*, 633 N.E.2d at 511.

[9] See *Damages*, §17.00 at 17-7. See also *Pryor*, 263 N.E.2d at 239, 242.

[10] See *Damages*, §17.00 at 17-3, 17-8.

[11] See *Damages*, §17.01 17-20 through 17-24. See also *Pryor*, 242 N.E.2d at 243 ("We are of the view that the error can be corrected only by the granting of a new trial on all issues.").

[12] See *Damages* §17.01 at 17-24. See also *Lugli v. Herschler* (Sept. 18, 1998), 1998 Ohio App. LEXIS 4345 Huron App. No. H-97-022, unreported.

[13] See *Sherer v. Smith* (1949), 85 Ohio App. 317, 88 N.E.2d 426; *Pryor v. Weber* (1970), 23 Ohio St. 104, 263 N.E. 2d 235.

[14] At least one appellate district has held that the introduction of collateral sources into evidence by a Plaintiff is invited error that does not require a curative instruction. *Nott v. Homan* (3rd Dist. 1994), 84 Ohio App.3d 372, 616 N.E.2d 1152, 1154. This decision fails to recognize that the Collateral Source rule is not only an evidentiary rule, but is also a substantive rule of damages that requires the Defendant to pay for the entire loss caused regardless of other independent sources of recovery available to the Plaintiff.

[15] See *Damages* §17.00 at 17-5. See also *Feeley v. United States* (3d Cir. 1964), 337 F.2d 924; *Pryor*, 263 N.E.2d 238.

[16] See *Damages*, §17.00 at 17-4, §17.03 at 17-31. See also *Pryor*, at 238.

[17] "The philosophy underlying the collateral source rule seems to be that either the injured party or the tortfeasor is going to receive a windfall, if a part of the pecuniary loss is paid for by an outside source and that it is more just that the windfall should inure to the benefit of the injured party than it should accrue to the tortfeasor." See *Id.* §17.03 at 17-31 (citing *Adams v. Turner* (D.D.C. 1965), 238 F. Supp. 643). See also *Pryor*, at 238.

[18] See *Damages*, §17.04 at 17-37.

[19] See *Id.* §17.04 at 17-37 through 17-38.

[20] See *Id.*

[21] See *Id.* §17.03 at 17-33, 17-38 through 17-40.

[22] See *Id.* §17.00 at 17-9 through 17-10.

[23] See *Id.* §17.00 at 17-8. See also *Pryor*, at 239.

[24] See *Id.* §17.00 at 17-15 through 17-19. See also *Sherer v. Smith* (1949), 85 Ohio App. 317, 88 N.E.2d 426 (medical expenses are a collateral source. "The court correctly charged the jury that, if plaintiff was entitled to recover, his damages should not be diminished by reason of the hospital benefits he might have received."); *Pryor v. Webber* (1970), 23 Ohio St.2d 104, 263 N.E.2d 235, 241 (medical insurance and sick-pay benefits are collateral sources. "The compensation which an employee receives when he is of work and performing no services for his employer, is comparable to the proceeds of a policy of insurance to which he has contributed. As with insurance proceeds, generally, such payments should not inure to the benefit of the wrongdoer and diminish his liability. We hold that the collateral source rule is applicable herein, and that the rule prohibits the introduction in evidence of the wages received by plaintiff during disability."); *Hodge v. Middletown Hosp. Ass'n* (1991), 62 Ohio St.3d 236, 581 N.E.2d 529 ("Medicare Part A benefits fall under the definition of "insurance" in R.C. 2305.27, and therefore do not reduce medical malpractice damage awards."); *Lugli v. Herschler*, 1998 Ohio App. LEXIS 4345 (Sept. 18, 1998) No. H-97-022 ("Medicaid and welfare benefits are collateral source benefits."); *Buchman v. Wayne Trace Local School District Board of Education* (1995), 73 Ohio St.3d 260, 265, 652 N.E.2d 952, 957, (social security and Medicare are collateral source benefits); *Trumbull Cliffs Furnace Co. v. Shachovsky* (1924), 11 Ohio St. 791, 796, 146 N.E. 306, 308 ("...the compensation provided by the Workmen's Compensation Law is in the nature of an occupational insurance, and, like general insurance, cannot be deducted and treated as an offset for damages for wrongful injury or death."); *Jarrell v. Woodland Manf. Co.* (1982), 7 Ohio App.3d 320, 324, 455 N.E.2d 1015, 1019 (worker's compensation benefits are collateral source benefits); *Klien v. Thompson* (1869), 19 Ohio St. 569, 571 (plaintiff's medical expenses paid gratuitously by town trustees are a collateral source); *Ohliger v. Toledo* (1900), 10 Ohio C.D. 762, 20 Ohio C.C. 142 (gratuitous physician services are a collateral source); *Dernham v. Cincinnati Traction Co.* (1919), 21 Ohio N.P., N.S., 418 (medical expenses paid gratuitously by a brother are a collateral source).

See also Restatement (Second) of Torts §920A which states, in relevant part: "The rule that collateral benefits are not subtracted from the plaintiff's recovery applies to the following benefits:

(1) Insurance policies, whether maintained by plaintiff or a third party.***

(2) Employment benefits. These may be gratuitous, as in the case in which the employer, although not legally required to do so, continues to pay the employee's ages during his incapacity. They may also be benefits arising out of the employment contract or a union contract. They may be benefits arising out of statute, as in worker's compensation or the Federal Employer's Liability Act. Statutes may subrogate the employer to the right of the employee, or create a cause of action other than by subrogation.

(3) Gratuities. This applies to cash gratuities and to the rendering of services. Thus the fact that the doctor did not charge for his services or plaintiff was treated in a veterans hospital does not prevent his recovery for the reasonable value of the services.

(4) Social legislation benefits. Social security benefits, welfare payments, pensions under special retirement acts, all are subject to the collateral-source rule."

[25] *Ohliger v. Toledo* (1900), 10 Ohio C.D. 762, 20 Ohio C.C. 142.

[26] *Rouse v. Riverside Methodist Hosp.* (1983), 9 Ohio App.3d 206, 459 N.E.2d 593, 600 ("We find no reason why Ohio should not follow the same rule as most other states which have considered the issue and allow a parent to recover from the wrongdoer the reasonable value of the care or attendance which he himself renders to his child as the result of a negligent injury.")

[27] *Pryor v. Webber* (1970), 23 Ohio St.2d 104, 263 N.E.2d 235; *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 633 N.E.2d 504.

[28] See §R.C. 2317.45 enacted by Am.Sub.H.B. No. 1, in 1987. See also modifications to R.C. §§ 2744.05(B)(1) and 2305.27 by Am. Sub. H.B. 350 in 1996.

[29] Nearly all states recognize and apply the collateral source rule. See *Damages*, §17.00 at 17-14. Some states limit the collateral source rule by statute in certain areas such as product liability cases, cases against a public employer, suits against the government, medical malpractice actions, and in no-fault actions. See *Damages*, §17.04 at 17-37. See also former R.C. 2305.27 as en-

acted by Am. Sub. H.B. 350 but later ruled unconstitutional in *Sheward, supra.*

[30] *Klien v. Thompson* (1869), 19 Ohio St. 569, 571.

[31] *Id.*.

[32] *Ohliger v. Toledo* (1900), 10 Ohio C.D. 762, 774, 20 Ohio C.C. 142.

[33] *Ohliger*, 10 C.D. at 774. (citing *Indianapolis v. Gaston*, 58 Ind. 224. *Ferryboat D.S. Gregory*, 2 Ben. 226, *Cunningham v. E. & T. H. R. R. Co.*, 102 Ind. 478).

[34] *Dernham, Guardian, v. Traction Co.* (1919), 21 N.S. 418, 419.

[35] See *Id.* at 419.

[36] *Howard v. McKitrick* (July 2, 1987), Franklin App. No. 87AP-148, unreported.

[37] *Pryor*, 23 Ohio St. 3d 104, 263 N.E.2d 235.

[38] *Id.* at 237.

[39] *Id.*

[40] *Id.* at 239.

[41] *Cook v. Wineberry Deli* (July 17, 1991), 1991 WL 131485, Summit App. No. 14841 at *7, unreported.

[42] See R.C.§2317.45(B)(1) as enacted by H.B.1 effective 1-5-1988, declared unconstitutional in *Sorrell, supra.*

[43] See *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 633 N.E.2d 504.

[44] See *Id.* at 510-513.

[45] See *Id.* at 510.

[46] See *Id.* at 506.

[47] *Id.* at 511.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* at 512.

[54] *Id.*

[55] *Id.*

[56] See *Smith v. Travelers Ins. Co.* (1977), 50 Ohio App.2d 349, 363 N.E.2d 750; *Bartram v. Edmonds* (Mar. 20, 1981), 1981 Ohio App. WL 6183, Richland App. No. 1873, unreported (medical insurance company was the real party interest; plaintiff prohibited from introducing evidence of medical and hospital expenses where the plaintiff had signed a subrogation agreement with the insurance company); *Bowers v. Johns* (Apr. 25, 1986), 1986 Ohio App. WL 4922 Lucas No. 84-0138 ("Appellant having not paid the medical bills suffered no injury and was not entitled to receive an award for the medical bills paid by the medical plan. The medical plan had the right to recover for the costs of the medical bills which were paid out of the medical plan's fund. The trial court did not err when it did not join the medical plan as a party to the action, nor did the court err when it refused to submit the costs of the medical bills to the jury for an award of damages.").

[57] See e.g., *Fantozzi v. Sikel Mfg. Co.* (April 12, 1991), Erie App., 1991 WL 53841.

[58] *Blue Cross Blue Shield v. Hrenko* (1995), 72 Ohio St.3d 120, 647 N.E.2d 1358. See also *Moellman v. Niehaus* (Feb. 5, 1999). 1999 Ohio LEXIS 300, Hamilton App. No. C-971113 at *3-4, unreported (where expenses such as economic loss, pain and suffering, and continuing medical expense far exceed the recovery available, plaintiff has not been fully compensated, and defendant is not entitled to be subrogated). *Porter v. Tabern* (Sept. 17, 1999), 1999 Ohio App. LEXIS 4289, Champaign App. No. 98-CA-26 at *5, unreported (where an insured has not interfered with an insurer's subrogation rights, the insurer may neither be reimbursed for payments made to the insured nor seek setoff from the limits of its coverage **until the insured has been fully compensated** for his injuries."); *James v. Michigan Mutual Insurance Comp.* (1985), 18 Ohio St.3d 386, 481 N.E.2d, note 1 syllabus ("Generally, where an insured has not interfered with an insurer's subrogation rights, the insurer may neither be reimbursed for payments made to the insured nor seek set off from the limits of its coverage until the insured has been **fully compensated for his injuries**. (*Newcomb v. Cincinnati Ins. Co.* (1872), 22 Ohio St. 382, followed)"). *Central Reserve Life Ins. v. Hartzel* (Nov. 30, 1995), 1995 Ohio LEXIS 6027, Tuscarawas App. No. 94AP120094 at *1, unreported (enforcing a subrogation agreement is counter to public policy if the insurance company is allowed to recover before plaintiff is completely subrogated).

Grine v. Payne (March 23, 2001), Wood App. No. WD-00-044, 2001 WL 279767, unreported (applying make whole doctrine to city employee's injury claim): *Hiney Printing v. Brantner* (6th Cir. (Ohio) March 16, 2001), ___ F.3d ___, 2001 WL 256366 (applying the make whole doctrine to plan's "remibursement" provision).

[59] See *Hrenko*. 72 Ohio St.3d 120, 647 N.E.2d 1358, syllabus.

[60] See *Bowers v. Johns* (Apr. 25, 1986), 1986 Ohio App. WL 4922 Lucas No. 84-0138 ("Appellant having not paid the medical bills suffered no injury and was not entitled to receive an award for the medical bills paid by the medical plan. The medical plan had the right to recover for the costs of the medical bills which were paid out of the medical plan's fund. The trial court did not err when it did not join the medical plan as a party to the action, nor did the court err when it refused to submit the costs of the medical bills to the jury for an award of damages.").

[61] See *Spychalski v. State Farm* (March 17, 1989), 1989 WL 25543 ("In light of *Holibaugh v. Cox* (1958), 167 Ohio St. 340, 345-346, we are disinclined to follow *Bowers v. Johns* (April 25, 1986), Lucas App. No. L-85-221, unreported (holding that an injured party could not recover from a tortfeasor those medical bills paid by the injured party's insurer.").

[62] *Chorman v. Gerster* (Sept. 22, 1995), 1995 WL 577813, Crawford App. No. 3-95-4, unreported ("[Defendant's] argument that [plaintiff] is not the real party in interest for recovery for her medical bills paid by her insurer begs the question. It is based on judicial decisions relating principally to disputed rights of recovery between insured and insurer *inter se* respecting contractually subrogated claims. Those decisions advance the policy of permitting an insurer to recoup its payments in behalf of an insured by subrogation. None of the decisions cited involve circumstances where, as implied by [Defendant] here, a tortfeasor solely for his own benefit attempts to avoid entirely a claimant's recovery on the ground that all or a portion of the amount recovered may be paid over to an insurer pursuant to contract.").

[63] See *Carville v. Phillips* (Aug. 25, 2000), Miami App. No. 99CA52, 2000 WL 1209272, unreported, at *2-3 (citing *Holibaugh v. Cox* (1958), 167 Ohio St. 340, 345-346, 148 N.E.2d 677).

[64] *Id.* See also *Sherwood v. Davis* (Dec. 15 2000), Miami App. No. 2000CA34, 2000 WL 1838743, unreported, at *5-6 (Plaintiff is the real party in interest and able to maintain the action in his name alone); *Permanent Ins. Co. v. Cox* (1995), 99 Ohio App. 389, 133 N.E.2d 627,630 ("Where an action is brought by the insured against the wrongdoer to recover the entire loss, and where the insurance company paid the insured only a portion of the loss and the insurance company joins as a party to protect its right of subrogation, the real party in interest in such action is the insured." *** "Where the amount of damages in an automobile collision case exceeds the amount due on an existing policy of insurance, the party to bring the action is the owner of the automobile who is permitted to recover the full amount of his damages; the insurer who has paid a part of the damages is a proper, but not a necessary party to the action." *** "In our opinion, the real party in interest was Rodgers, the insured. He had a right to pursue his cause of action independently of any rights of subrogation accruing in favor of the insurance company. The insurance company, being subrogated to only a part of the recovery, was not the real party in interest.").

[65] See *Curp v. Stone*, 1995 WL 65248, unreported, at *1-2.

[66] See *Blue Cross Blue Shield v. Hrenko* (1995), 72 Ohio St.3d 120, 647 N.E.2d 1358, 1359; see also *Porter v. Tabern* (Sept. 17, 1999), Champaign App. No. 98-CA-26, unreported; *Central Reserve Co. v. Hartzell* (November 30, 1995), Tuscarawas App. No. 94 AP 120094, unreported; *Copeland Oaks v. Haupt*.(April 7, 2000 6th Cir.), No. 99-3471; *Marshall v. Employers Health Insur. Co.* (Dec. 30, 1997), Nos. 96-6063, 96-6112, 1197 U.S. App. LEXIS 3679, unreported; *QualChoice, Inc. v. Williams* (March 13, 2000 6th Cir.), No. 1:99CV0701, 2000 U.S. Dist. LEXIS 7504, unreported.

[67] See *Damages*, §17.21[2] at 17-73 through 17-81.

[68] See *Id.* §17.21[3] at 17-82. See also 2 Alan I. Widiss et. al, *Uninsured and Uninsured Motorist Insurance*, §18.4 (2d ed 1999) "For example, in the forms drafted by the INSURANCE SERVICES OFFICE PERSONAL AUTO POLICY the insurer's rights are set forth as a General Provision which specifies that it the insurer makes payment under the policy and the person to whom or for whom payment is made recovers damages from another, that person shall: (1) Hold in trust for us [the insurer] the proceeds of the recovery; and (2) Reimburse us [the insurer] to the extent of payment."

[69] See *Damages* §17.21[1] at 17-72.

[70] See *Ervin v. Garner* (1971), 25 Ohio St.2d 231, 237, 267 N.E.2d 769, 773; *Peterson v. Ohio Farmers Ins.* (1963), 175 Ohio St.34, 191 N.E.2d 157; *Risner v. Erie Ins. Co.* (1993), 91 Ohio App.3d 695, 633 N.E.2d 588 (held that the rule that an insurer may not be reimbursed, pursuant to a right of subrogation, unless insured has received full compensation was not applicable where the insured failed to prove she had not been fully compensated and where the policy granted the insurer an unqualified right of subrogation).

[71] *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999) 86 Ohio St.3d 451, 715 N.E.2d 1062.

[72] A practitioner's guide which provides the statutes prior to Am.Sub.H.B. 350, as enacted by Am.Sub.H.B. 350, and subsequent amendments is available. See *Anderson's Ohio Tort Reform Guide after OATL v. Sheward*, 2000 Anderson Publishing Co.

[73] *Krause v. State* (1972), 31 Ohio St.2d 132, 60 O.O.2d 100, 285 N.E.2d 736 (held that the Article I Sec. 16, which permits suits to be brought against the state is not self-executing, and that the state is not subject to suits in tort without the consent of the General Assembly).

[74] See Revised Code 2743.

[75] See R.C. 2744.05(B).

[76] See *Buchman v. Wayne Trace Local School District Board of Education* (1995), 73 Ohio St. 3d 260, 652 N.E.2d 952.

[77] *Id.* at 960.

[78] *Id.* at 961.

[79] *Trumbull Cliffs*, 11 Ohio St. at 796, 146 N.E. at 308.

[80] See R.C.§4123.931 (eff. September 29, 1995)

[81] See *Landis v. BASF Corp.* (Jan. 31, 2000), 2000 WL 135072 No. 98-CV-56682, unreported; *Sanders v. Greater Regional Transit Authority* (Apr. 27, 2000), 2000 WL 502881, Cuyahoga App. No. CV-318174, unreported. *In re Estate of Stewart* (Jun. 28, 2000), 2000 WL 840512, Lorain App. No. 96ES1203, unreported; *In re Estate of Ross* (1997), 116 Ohio App.3d 402, 688 N.E.2d 303; *Erd v. Flower Hospital*, 2000 WL 797246 (Jun. 5, 2000) No. CI 98-1632.

[82] (2000), 90 Ohio St.3d 1421, 735 N.E.2d 899.

[83] (2000), 89 Ohio St.3d 1490, 734 N.E.2d 377.

[84] R.C. 4123.931(E).

[85] R.C. §2305.27

[86] See *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 633 N.E.2d 504 (holding Tort Reform Act of 1987 unconstitutional); *OATL v. Sheward* (1998), 86 Ohio St.3d 451, 715 N.E.2d 1062 (holding H.B. 350 unconstitutional and void). OT