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The Collateral Source Rule in Ohio

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COMMENT

THE COLLATERAL SOURCE RULE IN OHIO

I. INTRODUCTION

The collateral source rule pertains to the element of damages in tort law.[1] It applies in cases where the injured plaintiff receives benefits from a third party who is not connected with the defendant.[2] The rule ensures that any benefits the plaintiff receives from a source wholly independent of and collateral to the defendant will not diminish the damages otherwise recoverable from that defendant.[3] One practical effect of the rule is to allow an injured plaintiff to receive a greater recovery than the amount for which the defendant is adjudged to be liable. In theory, however, the rule is designed to deny the defendant the benefit of the plaintiff's vigilance in insuring himself.

The collateral source rule traditionally has been the majority rule in the United States.[4] It remains so today.[5] In 1970, the Ohio Supreme Court signaled the continued viability of the collateral source rule in *Pryor v. Webber*.[6] Citing one of the traditional theories behind the rule, the court reasoned that " '[t]he defendant wrongdoer should not, it is said, get the benefit of payments that come to the plaintiff from a 'collateral source' . . . .' "[7]

By the mid-1980's, liability insurance had become a major concern of many businesses due to the development of the so-called insurance crisis.[8] A combination of poor loss experience with less than expected investment returns caused liability carriers not only to substantially in-

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1. *See* 2 S. SPEISER, C. KRAUSE & A. GANS, THE AMERICAN LAW OF TORTS § 8:16, at 526 (1985).

2. *Id.*

3. *Id.* at 527.

4. Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741 (1964).

5. 2 S. SPEISER, *supra* note 1, at 526-27.

6. 23 Ohio St. 2d 104, 113, 263 N.E.2d 235, 241 (1970).

7. *Id.* at 108, 263 N.E.2d at 238 (quoting 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 25.22, at 1344 (1956)).

8. Litan, Swire & Winston, *The U.S. Liability System: Background and Trends*, in LIABILITY PERSPECTIVES AND POLICY 1 (1988).

crease premiums, but also to refuse coverage for what were considered to be undesirable risks.[9] Entities as diverse as municipalities and day care centers found themselves unable to purchase liability insurance.[10]

The availability and affordability problems in the liability insurance marketplace caused lawmakers to consider possible solutions to the growing insurance crisis.[11] One apparent solution was to effect an overall reduction in liability claim costs, which conceivably would have a concomitant effect on liability insurance rates.[12] An obvious starting point was to mitigate the broad scope of the collateral source rule. In 1987, the Ohio General Assembly enacted Ohio Revised Code section 2317.45,[13] abrogating the traditional collateral source rule to a significant extent. The statute applies to "any tort action, defined as 'a civil action for damages for injury, death, or loss to person or property.' "[14] The statute does not cover medical malpractice actions, actions against the state, and actions against political subdivisions.[15] These areas are covered respectively by Ohio Revised Code sections 2305.27, 2743.02(D), and 2744.05(B).[16]

This article examines the traditional rationales supporting the collateral source rule and the extent to which these rationales still apply in today's legal environment. The discussion then turns to Ohio law, where the above statutes partially abrogating the collateral source rule with respect to medical malpractice claims and actions against the state are examined. The article concludes with an examination of Ohio Revised Code section 2317.45. The scope of coverage includes the purposes underlying the statute, its major provisions, and the manner in which the statute operates to fulfill the legislative purposes. Potential problems with the constitutionality of the statute are also addressed.

II. THE RATIONALES SUPPORTING THE COLLATERAL SOURCE RULE AND THEIR VALIDITY TODAY

This section discusses various arguments offered in support of the collateral source rule. The section's purpose is to determine whether the theories traditionally offered in support of the rule are still applicable

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9. *Id.*
10. *Id.*
11. *Id.* at 2.
12. *Id.*
13. OHIO REV. CODE ANN. § 2317.45 (Baldwin 1988).
14. Volkema & Darling, *An Exception to the Rule*, OHIO LAW., Jan. - Feb. 1990, at 6, 7 (quoting § 2317.45).
15. *Id.*
16. *Id.* In addition, Ohio Revised Code section 3345.40 has been enacted to abrogate the collateral source rule partially in actions against state universities. *See infra* text accompanying

today. The section concludes with a discussion of selected developments that have led some state legislatures to abrogate the collateral source rule.

A. Moral Blameworthiness of Defendant's Conduct

The most pervasive and deep-rooted argument in favor of the collateral source rule is that the defendant, as a wrongdoer, should not benefit at the expense of a prudent plaintiff who had the foresight to protect himself against the risk of injury by purchasing insurance.[17] "If there must be a windfall certainly it is more just that the injured person shall profit therefrom, rather than the wrongdoer shall be relieved of his full responsibility for his wrongdoing."[18] This idea is rooted in the archaic notion that tortious conduct connotes moral blameworthiness.

Because tortious conduct was considered morally blameworthy, liability insurance was generally not available when the collateral source rule came into existence in the latter part of the nineteenth century.[19] The very notion was considered contrary to public policy, with the argument being that the consequences of one's morally blameworthy conduct should not be diminished through the risk-spreading concepts of insurance.

Today, of course, society has no difficulty in accepting the notion of liability insurance.[20] In fact, the modern tort liability system is, to a large extent, insurance driven.[21] Losses today are not as much shifted to individuals as they are distributed through the insurance mechanism.[22] Thus, the argument that the defendant should not receive a windfall no longer holds true. The great majority of tort claims now involve liability insurance.[23] Without the collateral source rule, any "windfall" would not inure to the wrongdoer's benefit, but to the defendant's liability insurance carrier.[24] Therefore, the aggregate effect of abrogating the collateral source rule would be to reduce insurance

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17. *See* Fleming, 12 *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478, 1483 (1966).

18. Note, *supra* note 4, at 748 (quoting Grayson v. Williams, 256 F.2d 61, 65 (10th Cir. 1958)).

19. *See* Sedler, *The Collateral Source Rule and Personal Injury Damages: The Irrelevant Principle and the Functional Approach*, 58 KY. L.J. 36, 39 (1969-1970).

20. *Id.* at 40.

21. *See generally* W. KEETON & W. PROSSER, PROSSER AND KEETON ON TORTS § 82 (1984).

22. Sedler, *supra* note 19, at 40.

23. *Id.* at 46.

24. Note, *supra* note 4, at 749.

claim costs. This, arguably, would serve to apply a downward pressure on insurance rates.

An additional problem with the "morally blameworthiness" premise of the collateral source rule is that the rule itself fails to take into account the varying degrees of blameworthy conduct.[25] The mechanics of the collateral source rule do not change when applied to an intentional tort, a negligence action, or an action based on strict liability.[26] Advocates of the collateral source rule could not seriously contend, however, that a defendant adjudged to be liable in a negligence action shares the same degree of moral blameworthiness as one who has committed an intentional tort, such as battery.

The problem of varying degrees of blameworthiness is further illustrated by the way in which the modern legal system has evolved to temper the consequences of any negligence by the plaintiff. Many jurisdictions have gone from a system of contributory negligence[27] to one of comparative negligence,[28] apparently rejecting the idea that plaintiff's own morally blameworthy conduct (plaintiff's contributory negligence) should *completely* bar recovery. Some states have gone so far as to adopt a "pure" type of comparative negligence.[29] For example, a plaintiff whom the jury finds to have been sixty percent at fault may still recover forty percent of his damages from the defendant. Assuming that this same plaintiff has fully recovered an item of his special damages from his own insurer, the collateral source rule would allow him to recover forty percent of this item again from the defendant. If indeed the concept of moral blameworthiness justifies the collateral source rule, such a plaintiff should be precluded from recovering any portion of this insured item of damages from the defendant because the plaintiff's conduct has been adjudged morally blameworthy to a greater degree than the conduct of the defendant.

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25. *See* Note, *The Texas Collateral Source Rule: A Critical Survey*, 54 TEX. L. REV. 791, 806 (1976).

26. *See id.*

27. "Contributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection." W. KEETON & W. PROSSER, *supra* note 21, § 65, at 451. The doctrine of contributory negligence is one of the two predominant common law defenses in a negligence action. *Id.*

28. Under comparative negligence, "a plaintiff's contributory negligence does not operate to bar his recovery altogether, but does serve to reduce his damages in proportion to his fault." W. KEETON & W. PROSSER, *supra* note 21, § 67, at 472.

29. *See id.* "There is at least one major substantive objection to the pure system of comparative negligence, and that is that by its nature it permits the major wrongdoer to recover against the minor one." *Id.* For this reason, most states which have adopted comparative negligence have done so through a modified system, under which a plaintiff's contributory negligence does not bar recovery so long as it remains below a specified proportion of total fault. *Id.* at 473.

In cases where a defendant's conduct is deemed to have been truly blameworthy, punitive damages are available as a means of both punishing and deterring such conduct.[30] Although punitive damages are awarded with increasing frequency,[31] the deterrent aspect is being diminished because states are finding that punitive damages can be covered by insurance.[32] If society wants to effectively deter truly blameworthy tortious conduct, it should punish such conduct by imposing punitive damages while denying the tortfeasor the right to spread his cost of punitive damages through insurance.

Therefore, modern developments within the American legal system demonstrate that the moral blameworthiness argument is no longer a viable rationale in support of the collateral source rule.

B. The Evidentiary Problem

Even where evidence of a collateral source is not offered to mitigate the amount of damages, the rule still holds that such evidence is inadmissible.[33] The rationale is that the jury might consider such evidence in calculating damages.[34] However, there is another dimension to the evidentiary problem. Evidence of a collateral source may unduly influence a jury's decision as to the liability aspect of the case.[35] If such evidence were admitted, a jury might lean toward resolving doubts as to liability in favor of the defendant[36] because the plaintiff's loss will have been at least partially compensated by the collateral source.

Because of the potential evidentiary problems, the proponents of the collateral source rule are justified in demanding that evidence of a collateral source be kept from the jury. The solution that would satisfy both is to exclude all evidence of collateral sources available to the plaintiff until after the jury returns its verdict. In the event of a verdict in the plaintiff's favor, the court would then subtract from the jury's award the amounts that the plaintiff recovered from all relevant collateral sources.[37]

C. The Paid Consideration Issue

Proponents of the collateral source rule have argued that a plain-

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30. Lorentzen & Rankin, *The Collateral Source Issue: Forging a Middle Ground*, 35 FED'N. INS. COUNS. Q. 3, 6 (1984).

31. Litan, Swire & Winston, *supra* note 8, at 10.

32. Adler, *N.Y. Ruling's Impact Muted*, BUS. INS., Feb. 5, 1990, at 2, 21.

33. 2 S. SPEISER, supra note 1, § 8:16, at 528.

34. *Id.*

35. *Sedler, supra* note 19, at 47.

36. *Id.* at 48.

37. *See infra* note 137 and accompanying text as to how this idea was adopted in section 2317.45 of the Ohio Revised Code.

tiff who has paid consideration for a contract is entitled to the full benefits of the collateral source contract without the possibility of offset against an eventual jury award.[38] An extension of this argument is that, without the collateral source rule, the defendant would actually receive the benefit of the consideration which the plaintiff has paid for the collateral source contract. This line of reasoning seems firmly grounded in the traditional legal view of contract rights.

Those who oppose the collateral source rule generally look beyond contract theory in the abstract and examine the nature of the contract producing the collateral source. Consider a plaintiff who has purchased a personal accident policy to insure against the risk of loss due to accident.[39] While proponents of the rule would argue that the plaintiff has a contractual right to benefits under the accident policy without offset against an eventual judgment obtained against a tortfeasor, this ignores the fact that the plaintiff's primary reason for purchasing insurance was to provide security, not to wager on the possibility of a double recovery.[40] Moreover, the plaintiff paid consideration in order to cover potential losses arising from both tortious and non-tortious accidents.[41] The odds are overwhelmingly on the side of non-tortious accidents.[42] Therefore, even when viewed from the traditional context of consideration, the assertion that abrogation of the collateral source rule would allow the tortfeasor unfairly to divert the plaintiff's expenditure to his own benefit is highly questionable.[43]

The consideration issue may also be illustrated by those types of employee benefits for which the employee does not pay a premium per se. An example is the benefit of sick leave.[44] It is difficult to measure how much an employee sacrifices in terms of reduced wages in order to obtain the sick leave benefit.[45] Yet, that which is given up can arguably

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38. *See* Sedler, *supra* note 19, at 85.

39. *See id.* at 86.

40. Fleming, *supra* note 17, at 1500.

41. *Id.*

42. *Id.; see also* Peckinpaugh, *An Analysis of the Collateral Source Rule*, 32 INS. COUNS. J. 32, 38 (1965).

> Further, it is axiomatic that the premium in the case of insurance, or the contribution or value of the fringe benefit in the case of employment plans, is geared not to the occasional occurrence where a wrongdoer is involved, but to accidents, injuries and illnesses generally, so the consideration paid by the plaintiff which is allocable to the occasional incident where a wrongdoer is involved is the minimal part of the consideration and hardly sufficient to warrant an exception to the basic proposition that a plaintiff should be compensated only for his actual losses.

Id.

43. Sedler, *supra* note 19, at 194.

44. *Id.* at 193.

45. *Id.* at 192.

be deemed consideration. Where an injured plaintiff must take leave from work under a benefit program in which sick leave is accumulated, clearly the plaintiff has lost something.[46] He should thus be entitled to recover from the defendant without offset. However, where the same plaintiff is entitled to an unlimited number of "sick days," to recover again from the defendant would be tantamount to a windfall. Opponents of the collateral source rule would therefore object to its operation in this latter instance, since the plaintiff would still be entitled to unlimited sick leave for future illnesses, without incurring any additional cost.

Therefore, assuming that the plaintiff has paid some type of consideration for protection from a collateral source, it would seem equitable to limit the plaintiff to his bargain.[47] Where the plaintiff has actually paid a premium for the benefit, an award that he receives as a result of a tortfeasor's liability could be increased to reflect the amount that the plaintiff has expended for the protection of the collateral source.[48]

D. Plaintiff Is Rarely Fully Compensated

Those who support the collateral source rule argue that legal compensation cannot be equated to full compensation for the plaintiff's injuries.[49] It is proper to allow the presumably undercompensated plaintiff any windfall inuring to his benefit through a collateral source.[50] This position is based in part on the effects of the so-called American Rule, whereby every party to an action is obligated to pay his own attorney's fees.[51] A plaintiff who prevails on the merits of the case will usually pay his attorney out of the award for compensatory damages. The net effect leaves the plaintiff less than fully compensated.

The plaintiff's presumed undercompensation would appear to be more a criticism of the American legal system than a justification for the collateral source rule.[52] It implies an inherent bias in the legal compensatory scheme against those plaintiffs who do not have the benefit of a collateral source. This presumption ignores the fact that juries frequently consider factors such as inconvenience, legal fees and inflation.[53] It is easy enough to disguise awards for such noncompensable

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46. Peckinpaugh, *supra* note 42, at 38.
47. *See id.*
48. *Id.* at 37.
49. *Id.*
50. Comment, *A Survey of the Collateral Source Rule: The Effects of Tort Reform and Impact on Multistate Litigation*, 53 J. AIR L. & COM. 799, 805 (1988).
51. Peckinpaugh, *supra* note 42, at 37.
52. Comment, *supra* note 50, at 805.
53. *See* Note, *supra* note 4, at 750.

items as general damages by increasing the amount of the award for pain and suffering.[54] Furthermore, in order to ensure equal treatment for plaintiffs both with and without the benefit of collateral sources, the answer lies in revising the compensation system so as to provide relief of universal application to all litigants.[55]

The collateral source rule is of particular importance to attorneys who handle personal injury cases on a contingent fee basis. One author has noted that "[p]erhaps no rule of damages is so important to the personal injury lawyer as the collateral source rule."[56] Under the American Rule, an attorney who is successful and who has agreed to a contingent fee will have to recover his or her fee from the plaintiff's award.[57] Any collateral source will provide the plaintiff with an additional source of funds to help cover his attorney's contingent fee, assuming that the collateral source has no right of subrogation. The question remains whether the importance of the collateral source rule to personal injury attorneys justifies the rule itself. As with the issue of plaintiff's undercompensation generally, the collateral source rule discriminates between those to whom a collateral source is available from which they may pay their attorneys and those without a collateral source.[58] The discriminating effect of the rule would seem to outweigh its importance to personal injury attorneys insofar as providing a theoretical basis for the rule itself.

Another aspect of the undercompensation argument can be seen by re-examining the legal concept of injury. A general rule of tort law is that the defendant "takes his victim as he finds him."[59] The rule finds its traditional application with respect to a plaintiff's pre-existing physical condition, thereby resulting in greater injury to a particular victim as opposed to someone without such a predisposition.[60] The result is that the defendant is required to pay in excess of what would be considered normal compensation for a particular type of injury due to the special susceptibility of the plaintiff.[61] By extending the traditional concept of injury to include resulting economic harm, the rule that the tortfeasor takes his victim as he finds him should work both ways.[62] Where a defendant has injured a plaintiff whose pre-existing economic

54. *See id.*
55. Peckinpaugh, *supra* note 42, at 37.
56. Hogan, *The Collateral Source Rule: Its Justification and Its Defense*, 19 TRIAL, Feb. 1983, at 58.
57. *See id.*
58. *See* Peckinpaugh, *supra* note 42, at 37.
59. Lorentzen & Rankin, *supra* note 30, at 9.
60. *Id.*
61. *Id.*
62. *See* https://ecommons.udayton.edu/udlr/vol16/iss2/6

conditions include a collateral source of recovery, logically the axiom should be extended to relieve the defendant accordingly.[63] The collateral source rule discriminates against those plaintiffs to whom collateral sources are not available. Equity could be achieved by refining the traditional legal view of what constitutes injury. Therefore, the assumption that the plaintiff is rarely fully compensated for his injuries does not appear to be a viable theoretical justification for the collateral source rule.

III. Developments That Have Led Some Legislatures To Abrogate The Collateral Source Rule

The foregoing discussion demonstrates that the arguments traditionally offered in support of the collateral source rule are of questionable validity today. Furthermore, specific trends have developed that have exacerbated the problematic effects of the collateral source rule. A 1964 study showed that collateral sources accounted for almost half of the compensation received by injury victims.[64] A later study published in 1979 estimated that nearly eighty percent "of all claimants in the study had at least one collateral source from which to seek reimbursement after a personal injury."[65] Therefore, where the provider of a collateral source is not entitled to subrogation, the odds today are that an injured plaintiff will receive a windfall.[66]

It has been estimated that "a substantial number of accident victims receive from two to five times their tangible losses as a result of the collateral source rule."[67] This situation creates what is known in the insurance field as a "morale hazard." The basic idea is that if an injured plaintiff knows that he can eventually recover each dollar he spends for medical bills from multiple collateral sources without offset, malingering is rewarded and tacitly encouraged. This contributes to the already existing trend of increasing jury awards.

In 1986, the United States Attorney General's office published the results of a comprehensive study on the insurance availability crisis.[68] The report demonstrated "a tremendous increase in the number of tort lawsuits and in the level of damage awards."[69] Tort law was found to be the major cause of the unavailability of insurance as well as the high

63. Lorentzen & Rankin, *supra* note 30, at 9.
64. *Id.* at 12.
65. *Id.* at 13.
66. *See id.*
67. Note, *supra* note 25, at 792.
68. Comment, *supra* note 50, at 827.

costs of insurance.[70] One offered solution was to reduce plaintiffs' awards by the amount of benefits received from collateral sources.[71]

IV. THE OHIO GENERAL ASSEMBLY'S RESPONSE: PARTIAL ABROGATION OF THE COLLATERAL SOURCE RULE

The Ohio General Assembly responded to the aforementioned developments by enacting five statutes that partially abrogate the collateral source rule.[72] The most recently enacted statute is Ohio Revised Code section 2317.45, passed in 1987 as part of House Bill 1, the Ohio Civil Justice Reform Act.[73] The scope of the statute's application is much broader than the statutes that preceded it. Section 2317.45 applies to tort actions generally. The other statutes apply to specific legal contexts, such as medical malpractice actions and actions against the state.[74]

This section first examines the four statutes which have abrogated the collateral source rule in those areas excepted under section 2317.45, and addresses the issues which have arisen in their application. The focus then shifts to section 2317.45, where the major provisions of the statute are explained. The analysis primarily covers the constitutional issues that could arise in the context of section 2317.45, and concludes with a brief discussion of how the statute reflects a balancing of competing interests and social policies.

A. Ohio Revised Code Section 2305.27 - Medical Malpractice Claims

Section 2305.27 was enacted as part of the Ohio Malpractice Act in 1975.[75] The Act was passed as emergency legislation to respond to the crisis that had developed in the medical malpractice insurance marketplace.[76] The exorbitant increase in malpractice insurance rates threatened the continued availability of adequate health care.[77] The legislature responded with Section 2305.27.

With respect to medical malpractice claims, the statute provides that:

> [A]n award of damages shall not be reduced by insurance proceeds or

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70. *Id.* at 828.

71. *Id.*

72. OHIO REV. CODE ANN. §§ 2305.27 (Baldwin Supp. 1990); 2317.45 (Baldwin 1988); 2743.02; 2744.05; 3345.40.

73. H.R. 1, Ohio Gen. Assembly, 117 Sess., 1987 Ohio Laws 142.

74. §§ 2305.27 (Baldwin Supp. 1990); 2743.02.

75. H.R. 1, *supra* note 73; *see* Note, *Ohio's Attempts to Halt the Medical Malpractice Crisis: Effective or Meaningless?*, 9 U. DAYTON L. REV. 361, 373 (1984).

76. *See id.* at 363.

77. *See id.* at 362.

> payments or other benefits paid under any insurance policy or contract where the premium or cost of such insurance policy or contract was paid either by or for the person who has obtained the award, or by his employer, or both, or by direct payments from his employer, but shall be reduced by any other collateral recovery for medical and hospital care, custodial care or rehabilitation services, and loss of earned income. Unless otherwise expressly provided by statute, a collateral source of indemnity shall not be subrogated to the claimant against a physician, podiatrist, or hospital.[78]

The statute responds to the contractual issue of consideration by allowing a plaintiff to obtain fully the benefit of any collateral source, without offset, when either the plaintiff or his employer has paid a premium for the benefit.

The constitutional issue that emerges from this partial abrogation of the collateral source rule is whether the statute violates the equal protection clause by conferring benefits on medical malpractice defendants that are not available to other tort defendants.[79] Until recently there had been a split of authority on this issue.

The equal protection issue was raised in *Graley v. Satayatham*.[80] The court issued a joint opinion covering separate medical malpractice actions against this defendant, one filed by Graley and one by Ahlgrim.[81] Graley filed on October 14, 1975, and alleged that his last treatment with the defendant was in November of 1974.[82] Ahlgrim filed on August 13, 1975, and alleged the date of the defendant's malpractice to be August 13, 1974.[83] The court found that section 2305.27 "confer[s] benefits on the medical practice defendant unavailable to other defendants in tort cases; correspondingly, it deprives plaintiffs in these cases of benefits available to others."[84] The issue before the *Graley* court was " 'whether there [was] an appropriate governmental interest suitably furthered by the differential treatment.' "[85] The court could find "no satisfactory reason for this separate and unequal treatment."[86] Therefore, the court held that section 2305.27 violated the equal protection clause.[87]

In *Graley*, the cause of action accrued prior to the effective date of

78. § 2305.27 (Baldwin Supp. 1990).
79. Note, *supra* note 75, at 374.
80. 74 Ohio Op. 2d 316, 343 N.E.2d 832 (C.P. 1976).
81. *Id.* at 317, 343 N.E.2d at 834.
82. *Id.*
83. *Id.*
84. *Id.* at 319, 343 N.E.2d at 836.
85. *Id.* at 320, 343 N.E.2d at 837 (quoting Police Dept. v. Mosley, 408 U.S. 92, 95 (1972)).
86. *Id.*
87. *Id.* at 321, 343 N.E.2d at 839.

the statute.[88] Therefore, the threshold issue in *Graley* was whether the statute applied retroactively.[89] The court held that it did not, based upon Ohio Revised Code section 1.48, which states: "[a] statute is presumed to be prospective in its operation unless expressly made retrospective."[90] Because the court found that the statute had no application to the facts of *Graley*, the precedential value of the equal protection interpretation is highly questionable.

The retroactivity issue arose in *Seoane v. Ortho Pharmaceuticals*[91] where the plaintiff's wrongful death action was based upon the alleged medical malpractice of the defendant. The parties looked to cases in other jurisdictions in order to interpret a Louisiana statute requiring pre-suit review of all medical malpractice claims by a review panel.[92] One of the cases cited by the *Seoane* court was *Graley*.[93] Because the Ohio court had held that the statutes at issue were not effective retroactively, the court stated that the sections of the *Graley* opinion "purporting to deal with constitutional issues are clearly dicta."[94]

Equal protection was again the issue in *Holaday v. Bethesda Hospital*.[95] In *Holaday*, the plaintiff brought a medical malpractice action against the hospital.[96] The Ohio Department of Human Services had previously paid medicaid benefits to the plaintiff.[97] The state was entitled to subrogation rights against the defendant-tortfeasor pursuant to Ohio Revised Code section 5101.58.[98] The statute obligated the plaintiff to give notice of settlement to the state.[99] The statute further provided that if the plaintiff, as a recipient of medicaid benefits, failed to give such notice, she would be "liable to reimburse the department for the recovery received to the extent of medical payments made by the departments."[100]

The Court of Appeals for Montgomery County thus had to construe both statutes together. First, the court held that section 2305.27 did not violate the equal protection clause because the statute "represents a rational response by the General Assembly to a compelling state

88. *Id.* at 317, 343 N.E.2d at 834.
89. *Id.*
90. OHIO REV. CODE ANN. § 1.48(1) (Baldwin 1990).
91. 472 F. Supp. 468, 469 (E.D. La. 1979).
92. *Id.* at 468, 471.
93. *Id.* at 471-72 n.2.
94. *Id.*
95. 29 Ohio App. 3d 347, 505 N.E.2d 1003 (1986).
96. *Id.* at 347, 505 N.E.2d at 1004.
97. *Id.*
98. *Id.* at 348, 505 N.E.2d at 1005.
99. *Id.* at 348 n.1, 505 N.E.2d at 1005 n.1.
100. *Id.* at 348-49, 505 N.E.2d at 1005 n.1.

interest in the malpractice crisis and is therefore constitutional."[101] Second, the court found that the state qualified as an indemnitor under this statute,[102] thereby precluding its recovery from the defendant through its subrogation rights. Finally, the court held that Ohio Revised Code section 5101.58 entitled the state to recover the amount of its subrogation claim from the *plaintiff*,[103] because the plaintiff had acted so as to prejudice the state's subrogation rights.[104] The overall effect of the decision is not only a windfall for the defendant but also a penalty for the plaintiff. Even the court seemed to recognize the incongruity of its decision. "We further recognize that R.C. 2305.27 has a harsh and seemingly illogical effect on Holaday who must repay the medical benefits extended by the department, but is precluded from recovering the same expenses from appellees who may be responsible for the expenses."[105]

In summary, the *Graley* holding of unconstitutionality is of questionable precedential value. The contrary holding in *Holaday* must be questioned because of the illogical result obtained in that case. Therefore, whether section 2305.27 violates the equal protection clause appears to be an unresolved issue.[106] A recent court of appeals decision, however, resolved this issue by upholding the constitutionality of the statute.

In *Hodge v. Middletown Hospital Association*,[107] the plaintiff in a medical malpractice action appealed the trial court's application of section 2305.27 in reducing his recovery by the amount of his collateral medicare benefits. The court first determined that medicare benefits fall within the statutory category of "other collateral recovery," and that medicare is not an insurance policy or contract in which the premium is paid by either the plaintiff or his employer. Therefore, section 2305.27 applies so as to reduce the plaintiff's recovery.

The court also held that section 2305.27 does not violate the equal

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101. *Id.* at 349, 343 N.E.2d at 1006.

102. *Id.* at 350, 343 N.E.2d at 1006.

103. *Id.*

104. *See id.* at 348-49 n.1, 505 N.E.2d at 1005 n.1.

105. *Id.* at 349, 505 N.E.2d at 1006.

106. The constitutionality of section 2305.27 was alluded to briefly by the Ohio Supreme Court in Griffey v. Rajan. 33 Ohio St. 3d 75, 514 N.E.2d 1122 (1987). The primary issue concerned a motion for relief from a default judgment entered against the defendant physician in a medical malpractice action. *Id.* at 77, 514 N.E.2d at 1124. The court noted *Graley*'s holding of unconstitutionality, but did not discuss its precedential value. *Id.* at 80, 514 N.E.2d at 1127. The court also cited the *Holaday* holding that the statute was constitutional. *Id.* Yet, the court declined to consider the constitutionality of section 2305.27, stating that the constitutional issues were not properly before the court. *Id.* at 81, 514 N.E.2d at 1127.

107. Case No. CA89-09-120 (Ohio Ct. App. Dec. 17, 1990) (LEXIS, Ohio library, App

protection clause, and is therefore constitutional. The court framed the equal protection issue as follows:

> We first note that O.R.C. 2305.27 creates a statutory distinction between prevailing medical malpractice plaintiffs who receive partial recovery from insurance companies supported by their own or their employer's premium payments, and those medical malpractice plaintiffs who receive benefits from a collateral source. However, this does not mean that equal protection interests have been violated. "A statutory classification which involves neither a suspect class nor a fundamental right does not violate the Equal Protection Clause of the Ohio or United States Constitutions if it bears a rational relationship to a legitimate governmental interest."[108]

Applying a rational basis test, the court concluded as a threshold matter that section 2305.27 "was formulated to address a legitimate governmental interest."[109] The court determined that the statute is rationally related to that interest, and provided the following rationale:

> By limiting recovery amounts in medical malpractice awards, the statute serves to reduce insurance premiums and stabilize the risks to physicians (citing Mominee v. Scherbarth, 20 Ohio St.3d 270, 275 (1986)). Because we find that O.R.C. 2305.27 bears a rational relationship to a legitimate state interest, we hold that the statute does not violate the Equal Protection Clauses of the Ohio or United States Constitutions. In so holding, we are in agreement with at least one other Ohio Appellate Court.[110]

The problem with the court's rationale is that it neglected to explain the reason for the statutory classification at issue. The court failed to explain just how the "statutory distinction between prevailing medical malpractice plaintiffs who receive partial recovery from insurance companies supported by their own or their employer's premium payments, and those medical malpractice plaintiffs who receive benefits from a collateral source"[111] serves to further the legislative goal of limiting recovery in medical malpractice awards. Therefore, section 2305.27 may still be vulnerable to a constitutional attack premised on the equal protection clause.

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108. *Id.* (quoting Menefee v. Queen City Metro, 49 Ohio St. 3d 27 (1990)).

109. The court identified the state interest as protecting the availability of health care services. *Id.* "The legislature took action due to a perception that the medical malpractice 'crisis' was in danger of jeopardizing the availability of health care services across the state." *Id.*

110. *Id.* (citing Holaday v. Bethesda Hosp., 29 Ohio App. 3d 347, 349 (1986)).

111. *Id.*

B. Ohio Revised Code Section 2744.05 - Actions Against Political Subdivisions

Section 2744.05 applies to political subdivisions, which are defined in section 2744.01(F) to include municipal corporations, townships, counties, school districts, and similar political divisions.[112] The statute was enacted after the Ohio General Assembly had abolished governmental immunity. It was passed in an effort "to permit all victims of a political subdivision's negligence to recover their damages and at the same time conserve scarce municipal resources."[113]

Section 2744.05 states that in an action against a political subdivision:

> (B) If a claimant receives or is entitled to receive benefits for injuries or loss allegedly incurred from a policy or policies of insurance or any other source, the benefits shall be disclosed to the court, and the amount of the benefits shall be deducted from any award against a political subdivision recovered by that claimant. No insurer or other person is entitled to bring an action under a subrogation provision in an insurance or other contract against a political subdivision with respect to such benefits.[114]

The first sentence applies to the claimant's rights. Two items are particularly noteworthy. First, this section applies not only to benefits that the plaintiff has received, but also to benefits that the plaintiff is entitled to receive, whether or not the plaintiff has actually collected such benefits. Second, this section applies to all collateral sources, whether or not the plaintiff has paid a premium for such collateral benefits. The second sentence applies to the provider of the collateral source. It essentially prohibits subrogation actions against political subdivisions in order to recover for payments made to the plaintiff.

The litigation surrounding this statute has centered on the prohibition against subrogation. A split in authority on the equal protection issue was recently resolved in *Menefee v. Queen City Metro.*[115] The defendant bus company was found liable for the damage to the plaintiff's car. The plaintiff carried collision insurance with a two-hundred fifty dollar deductible. Although the plaintiff was entitled to recover his $250 deductible, the plaintiff's insurer was barred from recovering the collision payment that it had made on the plaintiff's behalf. The Ohio Supreme Court held that the prohibition of subrogation contained in section 2744.05 was constitutional and reversed the judgment of the First District Court of Appeals. The court applied a rational basis test

112. OHIO REV. CODE ANN. § 2744.01(F) (Baldwin 1990).

113. State Farm v. Keefe, No. 57035 (Ohio Ct. App. July 20, 1989) (LEXIS, Ohio library, App file).

114. § 2744.05(B).

115. 49 Ohio St. 3d. 27, 550 N.E.2d. 181 (1990).

and found that the subrogation prohibition furthers two legitimate state interests: (1) "to conserve the fiscal resources of political subdivisions by limiting their tort liability," and (2) to permit uninsured plaintiffs "to recover for a tort committed by the political subdivisions."[116] The court reasoned that when the Ohio General Assembly abolished sovereign immunity, it elected to carve out "limited classifications"[117] of plaintiffs who still would be able to bring actions against political subdivisions. The court found that there was a rational basis for a statutory classification that functions so as to prohibit subrogation actions against political subdivisions.

Of greater general interest is *Waite v. Youngstown*,[118] where the statute's abrogation of the collateral source rule was tested. The defendant's employee had caused collision damage to the plaintiff's vehicle. After recovering from her insurer, the plaintiff sued the city for the amount of her deductible. The plaintiff based her case in part on the statutory language which defines a collateral source so as to include available benefits not actually received. She argued that had she not recovered from her insurer but had proceeded directly against the state, she would have been barred from any recovery. In effect, the plaintiff was "forced" to proceed against her own carrier, thereby resulting in a probable rate increase. The court rejected this argument on the basis of the plaintiff's lack of standing, because the plaintiff offered no proof that her insurance rates would in fact be increased as a result of her claim.[119] Thus the court found no equal protection violation in the abrogation of the collateral source rule.[120]

The Ohio Supreme Court recently addressed the issue of the retrospective application of section 2744.05 in the case of *Vogel v. Wells*.[121] An amendment to this statute declared that section 2744.05 was applicable to actions that arose before the effective date of the statute but which had not yet been brought to trial.[122] The court determined that the abrogation of the collateral source rule set forth in section 2744.05 is substantive in nature, and not merely remedial.[123] Because "Section 28, Article II of the Ohio Constitution prohibits the legislature from retroactively applying laws that affect substantive rights,"[124] the court

116. *Id.* at 29, 550 N.E.2d at 182.
117. *Id.*
118. No. 88-CA-25 (Ohio Ct. App. Jan. 27, 1989) (LEXIS, Ohio library, App file).
119. *Id.*
120. *See id.*
121. 57 Ohio St. 3d 91 (1991).
122. OHIO REV. CODE ANN. § 2744.05 (Baldwin 1990).
123. *Vogel*, 57 Ohio St. 3d at 99.
124. *Id.*

held that the application of section 2744.05 (B) to actions arising before the effective date of the statute is unconstitutional.[125]

C. Ohio Revised Code Section 2743.02 - Actions Against the State

Section 2743.02(A) indicates the state's waiver of immunity and its consent to be sued in the court of claims.[126] Subsection (D) abrogates the collateral source rule.

> (D) Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant. This division does not apply to civil actions in the court of claims against a state university or college under the circumstances described in section 3345.40 of the Revised Code. The collateral benefits provisions of division (B)(2) of that section apply under those circumstances.[127]

It should be noted that subsection (D) applies only where the plaintiff has actually received a collateral recovery. This interpretation was confirmed in *Teteris v. Ohio State University*.[128] This result is in direct contrast to the operation of section 2744.05, that applies to all collateral benefits which the plaintiff is entitled to receive, regardless of whether or not the plaintiff has actually received such benefits.[129]

Although decided on different grounds, the court in *Graley* made reference to section 2743.02. The court justified the abrogation of the collateral source rule in actions against the state, "since the State's waiver of immunity and its consent to be sued may be subject to such restrictions or limitations as the Legislature imposes."[130] Perhaps it is for this reason that there have been no cases to date which have held section 2743.02(D) to be violative of the equal protection clause.

D. Ohio Revised Code Section 3345.40 - Actions Against State Universities

Subsection (B) states generally that in a negligence action against a state university or college:

> (2) If a plaintiff receives or is entitled to receive benefits for injuries or loss allegedly incurred from a policy or policies of insurance or any other source, the benefits shall be disclosed to the court, and the amount of the benefits shall be deducted from any award against the state university or college recovered by the plaintiff. No insurer or other person is entitled

125. *Id.*
126. OHIO REV. CODE ANN. § 2743.02(A)(1) (Baldwin 1989).
127. *Id.* § 2743.02(D).
128. No. 86-01418-AD (Ct. Cl. Feb. 6, 1987).
129. § 2744.05 (Baldwin 1990).
130. 74 Ohio Op. 2d at 319, 343 N.E.2d at 836.

> to bring a civil action under a subrogation provision in an insurance or other contract against a state university or college with respect to such benefits . . . .[131]

The same two potential problems arise as were found in section 2744.05(B). First, it is not necessary for the plaintiff to actually receive the collateral benefit. As long as the plaintiff is entitled to the benefit, the court will deduct it from the eventual award. Second, subrogation actions by the provider of the collateral source are excluded. There have been no cases deciding the constitutionality of section 3345.40(B)(2).

E. Ohio Revised Code Section 2317.45 - Abrogation of the Collateral Source Rule in Most Tort Actions

This legislation was enacted as part of the Ohio Civil Justice Reform Act.[132] Ohio Revised Code section 2317.45 was designed to achieve the three goals of: avoid double recovery; consider the plaintiff's cost of a collateral source; and avoid unduly complicating the jury's job of computing damages.[133] The statute has a very broad application. It applies to all tort actions except for those instances covered by the statutes described in the preceding discussion.

The statute defines "collateral benefits" so as to be highly inclusive.[134] Such benefits include social security, medicare, and other government-provided health and medical benefits. Worker's compensation and other similar disability programs are also included. Private health, medical and accident programs are also included within this definition. Finally, collateral benefits include not only those benefits that the plaintiff has already received, but also those benefits that the plaintiff is entitled to receive within the next sixty months following entry of judgment.[135] The statute operates only where a collateral source has no "rights of recoupment," which includes a subrogation clause in the collateral source contract.[136]

An important safeguard of a plaintiff's rights is the procedure of disclosing the collateral source. No evidence of a collateral source will be introduced until after the jury renders its verdict.[137] In the event of

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131. § 3345.40(B)(2) (Baldwin 1988).
132. *See* Darling, *Ohio Civil Justice Reform Act, Author's Comment*, at 130 (1987).
133. Volkema & Darling, *supra* note 14, at 6-7.
134. § 2317.45(A)(1)(a) (Baldwin 1990).
135. *Id.*
136. *Id.* § 2317.45(A)(1)(b).
137. *Id.* § 2317.45(B)(3).

an award to the plaintiff, the court will make the appropriate deduction of the collateral sources from the award.[138]

While the court *subtracts* the total of applicable collateral source benefits from the plaintiff's award, it must also *add* an amount equivalent to the plaintiff's costs of procuring the collateral source for a three year period.[139] This provision reflects the legislature's intent to give the plaintiff some credit for collateral benefits received which are subject to offset, while at the same time preventing a complete windfall to the tortfeasor.

A recent Ohio Court of Appeals decision clarifies how section 2317.45 affects the plaintiff's recovery in a case where a court finds comparative negligence on the part of the plaintiff. In *Jeffers v. Phillips Ready Mix*,[140] the plaintiff argued on appeal that "the collateral benefits should be damages assessed by the jury *before* factoring in his comparative negligence."[141] The court of appeals disagreed, citing the plain language of the statute. Ohio Revised Code section 2317.45 (B)(2)(c)(i) requires that the collateral benefits be deducted from the "compensatory damages that the plaintiff otherwise would be awarded."[142] The jury therefore determines the extent of the plaintiff's comparative negligence as a threshold matter after which the court reduces the award by the amount of the collateral benefits.

The effect of the *Jeffers* decision is illustrated by the following example. Assume a damage award of $100,000, a finding of forty percent comparative negligence on the part of the plaintiff, and collateral benefits of $30,000. If the collateral benefits are subtracted first, $70,000 ($100,000 minus $30,000) would be reduced due to the plaintiff's comparative negligence by forty percent, resulting in a net recovery of $42,000. This result reflects the position advocated by the plaintiff in *Jeffers*. According to the court's holding, however, the comparative negligence factor would be applied first, reducing the verdict by forty percent to $60,000. The collateral recovery of $30,000 would then be deducted, for a net recovery of $30,000 ($60,000 minus $30,000).

V. ANALYSIS - *OHIO REVISED CODE* SECTION 2317.45 - CONSTITUTIONAL ISSUES; AN EFFECTIVE COMPROMISE

Ohio Revised Code section 2317.45 will probably be subject to similar constitutional attacks as have been the other statutes previously discussed. In attempting to forecast whether or not such challenges will

138. *Id.* § 2317.45(B)(2)(c)(i).
139. *Id.* § 2317.45(B)(2)(b); § 2317.45(B)(2)(c)(ii).
140. No. 90-CA-0057 (Ohio Ct. App. Jan. 8, 1991) (LEXIS, Ohio library, App file).
141. *Id.* (emphasis added).
142. § 2317.45(B)(2)(c)(i).

be successful, one might examine the constitutional arguments presented with respect to each of the other statutes partially abrogating the collateral source rule. These arguments on either side of the constitutional issue could then be analogized to the context of section 2317.45. Before attempting such an analogy however, one must recognize a fundamental difference between the medical malpractice statute and the other statutes discussed previously. Ohio Revised Code sections 2744.05(B), 2743.02(D) and 3345.40 were enacted based upon a similar underlying assumption. Because state governmental entities had waived immunity for tort liability, abrogation of the collateral source rule was seen as a trade-off for the right to sue the state, a local governing body, or a state college or university. In simple terms, rights were relinquished on both sides. This trade-off principle is absent in section 2305.27, which applies to medical malpractice actions.

Ohio Revised Code section 2317.45 is more closely aligned in principle to the medical malpractice statute than to the others mentioned above. Therefore, the same equal protection argument will likely be offered to challenge the constitutionality of section 2317.45 as was posed in the cases challenging section 2305.27. Because of the major differences in the ways in which collateral sources are treated under both statutes, however, one issue likely to arise is whether there is a rational basis for such disparate treatment of collateral sources under section 2317.45 as opposed to section 2305.27. For example, under section 2305.27, where either the plaintiff or his employer has paid for a collateral source, the plaintiff is entitled to recover the benefit fully *without offset*.[143] Under section 2317.45 such benefits are subject to offset, though the plaintiff is given what amounts to a three year premium credit.[144]

In the recent case of *Cook v. Wineberry Deli, Inc.*,[145] the Summit County Court of Common Pleas held that section 2317.45 was unconstitutional as violative of the plaintiff's equal protection rights, among other reasons. The rationale of the court is not at all clear, however, as the court simply incorporated by reference the plaintiff's brief in opposition to the defendant's motion for determination of collateral benefits. The court stated:

> Adopting the arguments set forth in the plaintiff's briefs, the court agrees that any determination of a setoff by the court of any collateral benefits received or which are "reasonably certain" to be received by the plaintiff from the jury determined compensatory award, would be tanta-

143. *Id.* § 2305.27.
144. *Id.* § 2317.45.
145. No. CV88-08-2737 (Ohio Ct. App. Oct. 8, 1990) (LEXIS, Ohio library, App file).

> mount to the type of arbitrary and unreasonable decision-making which is blatantly in violation of the plaintiff's right to substantive due process. The court finds that any award the court would make as a collateral benefit set off violates the plaintiff's rights to a jury trial, their right to an open court and a fair and impartial remedy, their right to due process, their right to equal protection under the law, and is therefore unconstitutional.
>
> The court finds the arguments and case references as set forth in the plaintiff's memorandum to be persuasive and adopts and incorporates the same by reference.[146]

The court gave no explanation as to why section 2317.45 violates a plaintiff's equal protection rights, nor did the court explain its alternative bases for finding the statute to be unconstitutional. It is perhaps for these reasons that the decision has been appealed.[147]

Another constitutional challenge which has been suggested is based upon the contracts clause.[148] The idea here is that abrogation of the collateral source rule impairs the value of contracts entered into while the rule was still the law.[149] The underlying premise of this argument is that a collateral source contract without a subrogation clause is worth more to the plaintiff than a contract with a subrogation clause. In the former instance, the insurer will have no subrogation rights, resulting in a windfall to the plaintiff if the event that gave rise to his claim was caused by a third party tortfeasor.[150] There are at least two responses to this challenge under the Ohio statute. First, the statute has prospective application only. Most insurance and benefit contracts that would fall within the definition of collateral source are subject to annual renewal. Therefore, at the time of the first renewal after the effective date of section 2317.45, the insured would presumably be on notice of the abrogation of the collateral source rule. At that point if the insured continues to purchase coverage without a subrogation clause, he should know that in the event of an accident resulting in his recovery from a third party tortfeasor the collateral benefit will be deducted. Second, the statute addresses the consideration issue by providing the plaintiff with a premium credit.

Constitutional issues aside, section 2317.45 does respond to the viable arguments in support of the collateral source rule. The evidentiary problem is resolved by not admitting evidence of the collateral source

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146. *Id.*

147. The appeal of this case is pending as of the time of this writing.

148. *See* Barrow, *The Contracts Clause and the Collateral Source Rule*, TRIAL, July 1988, at 33.

149. *Id.*

150. *Id.*

until after the jury returns its verdict. The consideration issue is treated by essentially giving the plaintiff a three year premium credit. Section 2317.45 thus is effective in balancing the competing interests so as to fully compensate the plaintiff, while at the same time minimizing the potential for double recovery and its concomitant upward pressure on liability insurance rates.

VI. CONCLUSION

Social and legal conditions have changed such that several of the arguments traditionally offered in support of the collateral source rule are no longer tenable. Some arguments in support of the rule do retain their validity, however. Therefore, an abrogation of the collateral source rule must be implemented so as to address these legitimate positions, which are premised on the plaintiff's right to a full recovery. Although constitutional questions remain, section 2317.45 operates so as not to impinge upon this right of full recovery, while at the same time eliminating areas of potential waste within our tort compensation system.

James P. Nolan II