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Collateral Source Rule in Missouri: Questioning the Double Recovery Doctrine, The

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Notes

The Collateral Source Rule in Missouri: Questioning the "Double Recovery" Doctrine

Washington v. Barnes Hospital[1]

I. INTRODUCTION

The collateral source rule provides that "in an action for compensatory damages the defendant will not be permitted to establish that the plaintiff did not actually sustain the amount of injury alleged, if diminution resulted from the conduct of a third person."[2] Missouri courts have consistently refused to admit evidence of collateral payments received by plaintiffs. Commentators consistently criticize the rule for providing plaintiffs with the windfall of a double recovery.[3]

In *Washington v. Barnes Hospital*,[4] the Missouri Supreme Court confronted the issue of the rule's applicability to free public special education benefits.[5] The issue had only been addressed by the courts of a few states and was one of first impression in Missouri.[6] Adopting the minority position on the issue, the court abrogated the collateral source rule where the mitigation evidence offered was of a free governmental benefit, available to all citizens.[7]

The court's decision marked a clear break with the traditional application of the rule and may indicate that the court advocates a more serious questioning of the rationale behind the proposed exclusion before applying the rule automatically to all mitigation evidence.

II. FACTS AND HOLDING

Valerie Washington and her son, Corey Washington, brought this medical malpractice action against Barnes Hospital and two attending physicians,

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1. 897 S.W.2d 611 (Mo. 1995).
2. David Fellman, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741 (1964).
3. *See id.*
4. 897 S.W.2d 611 (Mo. 1995).
5. *Id.* at 619.
6. *Id.* at 620.
7. *Id.* at 621.

Dr. Weinstein and Dr. Corteville.[8] The Washingtons alleged that the doctors were negligent in failing to promptly diagnose Valerie Washington's placental abruption[9] and to timely perform a caesarean section.[10] Plaintiffs contended that the negligence directly resulted in permanent brain damage to Corey Washington, and they sought damages for the injury.[11]

The events essential to the Washingtons' claim occurred on January 30, 1987, between the hours of 4:51 p.m. and 6:25 p.m..[12] While approximately 32 weeks pregnant with twins, Ms. Washington had experienced abdominal pain and was transported to the Barnes Hospital Emergency Room by ambulance.[13] Ms. Washington was then examined by Nurse Spiller, who observed Ms. Washington's uterus to be rigid.[14] Dr. Weinstein and Dr. Corteville examined Washington and performed ultrasound and fetal scalp monitor tests.[15] At that time, the patient was not experiencing any vaginal bleeding and her uterus was soft.[16] The doctors then observed a dramatic drop in heart rate for both babies.[17] Dr. Corteville witnessed Corey go limp[18] and a caesarian section was immediately ordered and performed.[19] Both babies were successfully delivered.[20] Subsequent investigation revealed that Corey had been deprived of oxygen as a result of a complete placental abruption.[21]

At trial, plaintiffs presented experts who testified that the doctors should have begun the caesarian section approximately 20 minutes earlier[22] and that their negligence had caused Corey to suffer permanent brain damage.[23]

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8. *Id.* at 612.

9. Symptoms of placental abruption include: abnormally intense contractions, rigidity of the uterus, vaginal bleeding, and signs of fetal distress. *Id.* at 613.

10. *Id.* at 613-14.

11. *Id.* at 614.

12. *Id.* at 613.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* Corey's heart beat had dropped into the 50's range (120 being normal).

18. *Id.*

19. *Id.*

20. *Id.* Initially, Valerie Washington refused to consent to the caesarean procedure; after three minutes she was convinced.

21. *Id.*

22. *Id.* at 614 (testimony of Dr. Hummer).

23. *Id.* at 617 (testimony of Dr. Walter Molofsky).

Defendants' experts asserted that abruption was not clearly indicated,[24] and that once fetal distress occurred, defendants acted properly.[25]

Plaintiffs demonstrated that although Corey was five years old, he operated with the mental capacities of a four-month-old infant, and he would never be able to sit up or walk independently.[26] Plaintiffs' expert, Alan Spector, explained Corey's future needs resulting from the injury.[27] These included: physical, occupational, and speech therapy; special education at a private school; weekly nursing visits; a full-time personal attendant; a lifetime supply of diapers, bedliners and bibs; remodeling of the family home; a van with a wheelchair lift; and a computer.[28] During his testimony, Spector repeatedly referred to plaintiffs' financial situation.[29] The expert testified that the Washingtons used a stroller to transport Corey because they could not afford a wheelchair, and they had no automobile, due to insufficient resources. The expert also revealed that the family had moved into a rental property as a result of financial constraints.[30]

As early as the pretrial conference, defendants had repeatedly requested to present mitigation evidence regarding the availability of free public special education.[31] After Spector's testimony, defendants argued that plaintiffs had "opened the door" to the presentation of evidence regarding public special education opportunities.[32] The trial court refused each request.[33]

The Circuit Court of the City of St. Louis entered judgment against all defendants in accordance with the jury's verdict.[34] The jury awarded $500,000 for Valerie Washington and $5,000,000 for Corey Washington.[35] Pursuant to Missouri Revised Statute § 538.210 (1994), the court reduced the jury awards of non-economic damages.[36] Defendants appealed the judgment

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24. *Id.* at 614. Defendant's experts cited the lack of vaginal bleeding, firm uterus, signs of fetal distress or complaints of abnormally intense contractions.

25. *Washington*, 897 S.W.2d at 614.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 614-15.

31. *Id.* at 613. A verbal motion *in limine* was made at the pretrial conference and denied. Defendants proceeded to file a written motion before the evidence was presented which was also denied.

32. *Washington*, 897 S.W.2d at 613.

33. *Id.*

34. *Id.*

35. *Id.* at 615.

36. MO. REV. STAT. § 538.210 (1994) reads in pertinent part, "In any action against a health care provider for damages for personal injury. . . , no plaintiff shall

to the Missouri Court of Appeals, Eastern District.[37] The court of appeals reversed the circuit court without addressing the collateral source rule issue.[38]

Upon transfer to the Missouri Supreme Court,[39] defendants challenged the circuit court's denial of their motions for directed verdict and judgment notwithstanding the verdict.[40] Additionally, they appealed the trial court's exclusion of evidence regarding the availability of public special education programs on two separate grounds.[41] Defendants argued that this evidence did not fall within the collateral source rule and that plaintiffs waived their right to assert the collateral source rule by invoking the issue of financial need.[42]

The Missouri Supreme Court reversed and remanded the case for a new trial on the issue of damages.[43] The court held that mitigation evidence of the free public special education was not barred by the collateral source rule[44] and that plaintiffs' expert testimony regarding financial distress permitted defendants to challenge that need on cross-examination by inquiring about access to public special education available to plaintiffs.[45]

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recover more than three hundred fifty thousand dollars per occurrence for noneconomic damages . . . ." Valerie Washington's non-economic damages were reduced from $480,000 to $446,000 while Corey Washington's were reduced from $1,209,000 to $446,000. *Washington*, 897 S.W.2d at 615.

37. Washington v. Barnes Hosp., No. 62364, 1993 WL 478944 (Mo. Ct. App. Nov. 23, 1993).

38. *Washington*, 1993 WL 478944, at *1. The court overruled the denial of the judgment notwithstanding the verdict over the objections of Gaertner, J., dissenting.

39. The Missouri Supreme Court had jurisdiction in this case pursuant to MO. CONST. art. V, § 10.

40. *Washington*, 897 S.W.2d at 615. Defendants also appealed the denial of a continuance during voir dire proceedings until Corey was available to attend. They asserted that the inability to question potential jurors on the sympathy felt after seeing Corey was prejudicial. *Id.* at 622. Additionally, Defendants challenged the sanction imposed for the failure to supplement prior interrogatory answers. The court denied the opportunity to present Dr. Corteville's testimony on two recently published articles. *Id.* Lastly, defendants appealed the verdict as a result of bias, passion and prejudice. *Id.* All of these arguments were rejected by the Court. *Id.*

41. *Id.* at 619.

42. *Id.*

43. *Id.* at 622.

44. *Id.* at 621.

45. *Id.*

III. LEGAL BACKGROUND

Missouri courts define the collateral source rule as:

> a well-established rule in the law of damages, a wrongdoer is not entitled to have the damages to which he is liable reduced by proving that plaintiff has received or will receive compensation or indemnity for the loss from a collateral source, wholly independent of him, or, stated more succinctly, the wrongdoer may not be benefitted by collateral payments made to the person he has wronged.[46]

The rule is a significant deviation from the general proposition that tort damages should be compensatory only.[47] The collateral source rule "enables a plaintiff to reap a double recovery in certain circumstances."[48] This doctrine has been extensively criticized by commentators[49] and has come under attack in the efforts to reform the tort system.[50] Many states have passed legislation altering the collateral source rule in a variety of situations.[51]

In the American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury,[52] the Reporters examined several alternatives to the present application of the collateral source rule; however, they concluded:

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46. Collier v. Roth, 434 S.W.2d 502, 506-07 (Mo. 1968).

47. Overton v. United States, 615 F.2d 1299, 1306 (8th Cir. 1980).

48. Joel K. Jacobsen, *The Collateral Source Rule and the Role of the Jury*, 70 OR. L. REV. 523, 528 (1991).

49. *See generally* David Fellman, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741 (1964); Robert A. Sedler, *The Collateral Source Rule and Personal Injury Damages: The Irrelevant Principle and the Functional Approach (Part I)*, 58 KY. L.J. 36 (1970); Charles W. Peckingpaugh, *An Analysis of the Collateral Source Rule*, 524 INS. L.J. 545 (1966); Lee R. West, *The Collateral Source Rule Sans Subrogation: A Plaintiff's Windfall*, 16 OKLA. L. REV. 395 (1963).

50. *See* Dana A. Goldsmith, *A Survey of the Collateral Source Rule: The Effects of Tort Reform and Impact on Multistate Litigation*, 53 J. AIR L. & COM. 799, 827-29 (1988); *see also id.* at 809-23 for discussion of legislative attempts to modify the collateral source rule.

51. AMERICAN LAW INSTITUTE, 2 ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: REPORTERS' STUDY 161, 166 (citing GA. CODE ANN. § 51-12-1 (Supp. 1990); IOWA CODE ANN. § 147.136 (West 1989); PA. STAT. ANN. tit. 42 § 8553(d) (Purdon 1982); ALASKA STAT. § 9.17.070 (Supp. 1990); DEL. CODE ANN. tit. 18 § 6862 (1989); FLA. STAT. § 768.76 (Supp. 1990)).

52. AMERICAN LAW INSTITUTE, REPORTERS' STUDY, *supra* note 51, at 161.

> We recommend virtually complete reversal of the collateral source rule wherever such an approach is feasible. A plaintiff's tort recovery should be reduced by the amount of present and estimated future payments from all sources of collateral benefits except life insurance. In tandem with this reduction in the size of the award payable to the plaintiff, there must be a bar to any subrogation or reimbursement rights exercised by loss insurers against the tort award.[53]

Commentators who support the rule have offered several policy rationales.[54] Emerging as the most cogent motivation for the rule is the "benefit of the bargain" rationale.[55] In the case of benefits for which plaintiff has contracted, courts have held that plaintiff deserves to realize the "benefit of the bargain" made.[56] In such an instance, plaintiff has paid consideration for these benefits in the form of premiums, committing resources which otherwise could have been put to an altogether different use.[57] One advocate states, "[c]ontract and insurance benefits, being products of plaintiff's own thrift, foresight, and sacrifice, would clearly seem immune from mitigation. Indeed allowing plaintiff a partial windfall in these cases may be viewed as a salutary inducement to insure."[58] Even some supporters of abrogating the rule suggest a two-year premium credit for plaintiffs who have paid for private insurance benefits that have reduced the amount of their recovery.[59]

Another rationale for the rule is to punish the tortfeasor and to assure that he or she pays for the full impact of the wrongdoing.[60] Advocates of this view believe that if there is to be a windfall, it should go to the innocent party, not the tortfeasor.[61] This justification has been acutely questioned as

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53. AMERICAN LAW INSTITUTE, REPORTER'S STUDY, *supra* note 51, at 182.

54. *See generally* Richard C. Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669 (1962); Thomas F. Lambert Jr., *The Case for the Collateral Source Rule*, 524 INS. L.J. 531 (1966); Jacobsen, *supra* note 48, at 523.

55. *See* Helfend v. Southern Cal. Rapid Transit Dist., 465 P.2d 61, 66-67 (Ca. 1970); Kickham v. Carter, 335 S.W.2d 83, 90 (Mo. 1960); Goldsmith, *supra* note 50, at 800.

56. *See supra* note 55.

57. *See Overton*, 619 F.2d at 1306.

58. Lambert, *supra* note 54, at 544.

59. AMERICAN LAW INSTITUTE, REPORTERS' STUDY, *supra* note 51, at 176-77.

60. *See* Hubbard Broadcasting, Inc. v. Loescher, 291 N.W.2d 216, 222 (Minn. 1980); Roth v. Chatlos, 116 A. 332, 334 (Conn. 1922); Jacobsen, *supra* note 48, at 528.

61. *See* Lambert, *supra* note 54, at 543; Grayson v. Williams, 256 F.2d 61, 65 (10th Cir. 1958); Hudson v. Lazarus, 217 F.2d 344, 346 (D.C. Cir.), *cert. denied*, 350

inconsistent with the overall policy of tort recovery to be compensatory and not punitive.[62]

Supporters of the collateral source rule maintain that legal remedies are insufficient to compensate for plaintiff's injuries.[63] Legal fees and expenses incurred in seeking relief will come out of any recovery gained.[64] However, critics maintain that this is a "backdoor" method of providing additional compensation. In addition, such method is unavailable to non-tort plaintiffs and tort plaintiffs not fortunate enough to have benefitted from a collateral source.[65]

Missouri courts have employed the rule in a variety of circumstances.[66] As the court points out in *Washington v. Barnes Hospital*, Missouri has consistently applied the rule to bar mitigation evidence pertaining to insurance policies held by plaintiffs.[67] An often-cited Missouri Supreme Court case, *Kickham v. Carter*,[68] applies the "benefit of the bargain" rationale and maintains that defendant should not receive credit from an insurance agreement that plaintiff had made and for which plaintiff had paid consideration.[69] *Iseminger v. Holden*[70] also reinforces this idea declaring "there would be no logical reason for defendant to receive the benefit . . ."[71] Employment benefits are another collateral source in Missouri. Courts have protected these benefits by applying the collateral source doctrine whenever the employee's work has entitled him or her to benefits.[72]

U.S. 856 (1954).

62. *See* Fellman, *supra* note 49, at 748.

63. *See* Sedler, *supra* note 49, at 46, 58.

64. *See Hudson*, 217 F.2d at 346; Lambert, *supra* note 54, at 542.

65. *See* Sedler, *supra* note 49, at 60; Fellman, *supra* note 49, at 750.

66. *Washington*, 897 S.W.2d at 619-20.

67. *Id.* (citing Iseminger v. Holden, 544 S.W.2d 550, 553 (Mo. 1976) (en banc) (finding that plaintiffs did not waive collateral source rule protection when they admitted an exhibit revealing insurance coverage); Kickham v. Carter, 335 S.W.2d 83, 90 (Mo. 1960) ("[I]nsurance payments received by the plaintiff cannot ordinarily be set up by the wrongdoer in mitigation of damages."); Protection Sprinkler Co. v. Lou Charno Studio, Inc., 888 S.W.2d 422, 424 (Mo. Ct. App. 1994) ("When an insured does not assign its claim, the insured retains title to the action."); Blessing v. Boy Scouts of America, 608 S.W.2d 484, 488-89 (Mo. Ct. App. 1980) ("Evidence which shows that an injured party has received insurance payments is presumed to be prejudicial. . . To permit such evidence would tend to deny to an injured party recovery benefits to which he or she would be entitled from some other source.")).

68. 335 S.W.2d 83 (Mo. 1960).

69. *Id.* at 90.

70. 544 S.W.2d 550 (Mo. 1976) (en banc).

71. *Id.* at 553.

72. *See Washington*, 897 S.W.2d at 619-20 (citing Douthet v. State Farm Mut.

The Missouri Supreme Court has also supported the theory that defendant should pay for the full impact of his tortious act, no matter how plaintiff comes out financially.[73] The state of the rule in regard to gratuitous benefits is less clear.[74] Courts in Missouri have split where plaintiff was nursed gratuitously by a family member.[75] Because the protection of plaintiff's investment is not involved, to prohibit the admission of this evidence, the court must subscribe to a rationale oriented more toward punishing the defendant.[76]

Missouri courts have applied the rule to block defendants from introducing mitigation evidence of plaintiff's receipt of public governmental benefits.[77] Until *Washington*, all of the governmental benefits evaluated had been dependent on plaintiff's special status or financial need.[78]

The collateral source rule implications for free public special education benefits had only been addressed by four states prior to the decision in *Washington*.[79] Three of those states concluded that these benefits are subject to the collateral source rule and cannot be admitted as mitigation evidence by

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Auto Ins., 546 S.W.2d 156, 159-60 (Mo. 1977) (en banc)); Leake v. Burlington N. R. Co., 892 S.W.2d 359, 363 (Mo. Ct. App. 1995); Mateer v. Union Pac. Sys., 873 S.W.2d 239, 245 (Mo. Ct. App. 1993); Beck v. Edison Bros. Stores, Inc., 657 S.W.2d 326, 330-31 (Mo. Ct. App. 1983); Siemes v. Englehart, 346 S.W.2d 560, 563-64 (Mo. Ct. App. 1961).

73. *See Collier*, 434 S.W.2d 502, 507 (Mo. 1968).

74. *See* Gibney v. St. Louis Transit Co., 103 S.W. 43, 48 (Mo. 1907) (plaintiff could not recover for the gratuitous nursing services of her daughter); Morris v. Grand Ave. Ry. Co., 46 S.W. 170 (Mo. 1898) (court held that plaintiff could not recover for services for which he did not pay); Kaiser v. St. Louis Transit Co., 84 S.W. 199, 200 (Mo. Ct. App. 1904) (plaintiff recovered for damages after gratuitous nursing by wife and daughter); Aaron v. Johnston, 794 S.W.2d 724, 726-27 (Mo. Ct. App. 1990) (employer's continuation of plaintiff's wages constituted collateral source); *see also* West, *supra* note 49, at 402.

75. *See supra* note 74.

76. *See Kaiser*, 84 S.W. at 200.

77. *Washington*, 897 S.W.2d at 620 (citing Cornelius v. Gipe, 625 S.W.2d 880, 882 (Mo. Ct. App. 1981)); Hood v. Heppler 503 S.W.2d 452, 454-55 (Mo. Ct. App. 1973); Weeks-Maxwell Const. Co. v. Belger Cartage Serv., Inc., 409 S.W.2d 792, 796 (Mo. Ct. App. 1966).

78. *Washington*, 897 S.W.2d at 620.

79. These states included Alabama, Connecticut, North Carolina and Florida.

the defense.[80] Only Florida held that evidence of these benefits is admissible for defendant to prove plaintiff's opportunity to mitigate damages.[81]

In *Healy v. White*, the Connecticut Supreme Court addressed the applicability of the rule to public education benefits.[82] The case involved a seven-year-old plaintiff suffering from brain damage and permanent epilepsy resulting from a motor vehicle accident with defendant.[83] Plaintiff was enrolled in public special education provided to him as of right from his municipality.[84] Defendant disputed plaintiff's evidence regarding the uncertainty of the continuance of the program.[85] The court held that the reliability of the evidence regarding the program's future was irrelevant under the collateral source rule.[86] Citing the traditional majority position,[87] the court held that the collateral source rule applied to free state services, provided they are truly collateral.[88]

Adopting the position of the *Healy* court, the Alabama Supreme Court held that the collateral source rule applied to free education opportunities in *Ensor v. Williams*.[89] In this medical malpractice action, plaintiff sued to recover damages for injuries from premature birth that resulted in brain damage and retardation.[90] Applying the majority view that the collateral source rule bars evidence of free government services, the *Ensor* court held that defendants were precluded from introducing evidence of plaintiff's entitlement to free public special education.[91] The court emphasized the uncertainty of the continued existence of the public program and the truly

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80. *See* Williston v. Ard, 611 So. 2d 274, 278 (Ala. 1992); Ensor v. Wilson, 519 So. 2d 1244, 1266-67 (Ala. 1987); Cates v. Wilson, 361 S.E.2d 734, 736 (N.C. 1987); Healy v. White, 378 A.2d 540, 546 (Conn. 1977), *overruled on other grounds* Petriello v. Kalman, 576 A.2d 474 (1990).

81. Florida Physician's Ins. Reciprocal v. Stanley, 452 So. 2d 514, 515-16 (Fla. 1984).

82. 378 A.2d 540, 545 (Conn. 1977), *overruled by* Petriello v. Kalman, 576 A.2d 474, 484 (Conn. 1990).

83. *Id.*

84. *Id.* at 546.

85. *Id.* Plaintiff had presented evidence that the program may be discontinued within his age of minority.

86. *Healy*, 378 A.2d at 546.

87. *See* RESTATEMENT (SECOND) OF TORTS § 920(2)A; 22 AM. JUR. 2D, *Damages*, 206 ("benefits received by a plaintiff from a source wholly collateral to and independent of the tortfeasor will not diminish the damages otherwise recoverable").

88. *Healy*, 378 A.2d at 545.

89. 519 So. 2d 1244 (Ala. 1987).

90. *Id.* at 1246.

91. *Id.* at 1266-67.

collateral nature of the free services.[92] Later, applying the *Ensor* decision in *Williston v. Ard*,[93] the Supreme Court of Alabama affirmed the trial court's refusal to permit testimony by defendant's expert as to the public special education opportunities available to plaintiff.[94]

North Carolina also adopted the majority position in its leading case, *Cates v. Wilson*.[95] This medical malpractice action involved defendant's failure to diagnose the pregnancy of an obese woman.[96] As a result of the alleged negligence, the baby was born with cerebral palsy and mental retardation.[97] The *Cates* court addressed the applicability of the collateral source rule to both future Medicaid benefits and free public special education benefits.[98] The court set forth three primary justifications for affording these benefits the protection of the collateral source rule.[99]

The *Cates* court's first explanation illustrated the right of plaintiffs not to be forced to depend on public charity and recognized plaintiffs' right to prefer private care.[100] Next, subscribing to the view of the other majority courts, the court relied on grounds accentuating the instability of the public programs and their dependence on legislative approval.[101] The court recognized that there may very likely be a termination of these benefits in an effort to balance the budget.[102] The court's third basis for denying the admission of these benefits into evidence was the cognizance that the benefits were dependent upon continued indigency and that even a small damage award would disqualify them from the protection of the program.[103] This pretense does not apply to public education, however, which is free to all persons as

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92. *Id.*

93. 611 So. 2d 274 (Ala. 1992).

94. *Id.* at 278.

95. 361 S.E.2d 734 (N.C. 1987).

96. *Id.* at 736.

97. *Id.*

98. *Id.* at 737. The court also analyzed the collateral source issues presented by past Medicaid payments and gratuitous home services. On the past Medicaid benefits issue, the court applied the collateral sources for two reasons. First, it is the equivalent of health insurance and should be treated as such for collateral source purposes. Secondly, in North Carolina, Medicaid is equipped with a right of subrogation and can recover from the plaintiff the result of any judgment. *Id.* at 737-78.

99. *Id.* at 738-39.

100. *Id.* at 738.

101. *Id.*

102. *Id.* at 739. The court emphasized the lack of wisdom in placing plaintiff's future in the hands of uncertain government programs. It likens this to the "foolish house builder in the parable, to rebuild lives on shifting sands. The floods may come, and the winds blow, and great will be the fall." *Id.*

103. *Id.*

a matter of right.[104] In summation, the *Cates* court stated ". . . as between defendants who tortiously inflict injury and innocent taxpayers who fund programs such as Medicaid, we think it better that the loss fall on the tortfeasor."[105]

The *Cates* court indicated in dicta that perhaps the evidence would have been admissible if plaintiffs had "opened the door" to financial need.[106] Despite the fact that defendants won on the issue of liability, the *Cates* court highlighted the significance of erroneously admitting evidence barred by the collateral source rule. The court noted that such an error most likely had a substantial prejudicial affect on plaintiffs, making them appear as though trying to attain a double recovery.[107]

The minority position was adopted by the Florida Supreme Court in *Florida Physician's Insurance Reciprocal v. Stanley*.[108] In this case, like *Washington v. Barnes Hospital*, the plaintiff suffered injuries as a result of a failure to diagnose oxygen deprivation just before birth.[109] The *Stanley* court determined that the collateral source rule will protect only those benefits earned by the plaintiff.[110] Quoting an Illinois case, *Peterson v. Lou Bachrodt Chevrolet Corporation*,[111] the court rejected the notion that the collateral source rule should be applied to punish defendants.[112] It asserted that an unjustified windfall to the plaintiff "borders too closely on approval of unwarranted punitive damages . . ."[113]

Further explaining its position, the *Stanley* court stressed that the inapplicability of the collateral source rule here does not bar plaintiff from presenting additional evidence on the inadequacy of the public benefits and the lack of certainty of their continued availability.[114]

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104. *Id.* at 737.

105. *Id.* at 739.

106. *Id.*

107. *Id.* at 740.

108. 452 So. 2d 514 (Fla. 1984).

109. *Id.* at 515.

110. *Id.* at 515-16.

111. 392 N.E.2d 1 (Ill. 1979). This issue in *Peterson* was whether plaintiff could recover for free medical services already obtained at a charitable hospital. The court held "[t]o permit mitigation does not deprive the plaintiff of all benefit, since he did have the services when he needed them and without cost. Awarding him the monetary value of the services in a judgment probably rendered several years later seems an unanticipated windfall." *Id.* at 5 (citing David Fellman, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741, 752 (1964)).

112. *Stanley*, 452 So. 2d at 516.

113. *Id.*

114. *Id.*

The dissent in *Stanley*[115] asserted that the majority's reliance on the *Peterson* case was misplaced.[116] The dissent distinguished charitable assistance previously received and future care dependent on public welfare.[117] Believing the majority had "transfer[ed] the responsibility for the tort from the tortfeasor, where it legally and morally belongs, to the victim and the community,"[118] the dissent expressed disdain with the concept of forcing the plaintiff to depend on public welfare.[119]

In this context, the Missouri Supreme Court examined the applicability of the collateral source rule to education as a matter of right that is free to all regardless of wealth or status. *Washington v. Barnes Hospital*,[120] a medical malpractice case, first presented the issue to the court.[121]

IV. INSTANT DECISION

In *Washington v. Barnes Hospital*,[122] the court first addressed the denial of defendants' motion for judgment notwithstanding the verdict.[123] The court noted the strength of defendants' case on the negligence issue,[124] but nevertheless determined that there was sufficient evidence to support the jury's verdict in favor of plaintiffs.[125]

The court then addressed the issue of whether the mitigation evidence of free public school education should have been admitted at trial.[126] In its approach to the collateral source rule issue, the court noted the difficulty of confining the rule to one broad definition. The court determined that it "is not a single rule but rather, a combination of rationales applied to a number of different circumstances to determine whether evidence of mitigation of damages should be precluded from admission."[127]

The court then explored the various justifications that have been used by several courts for applying the rule.[128] In its analysis, the court recognized

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115. 452 So. 2d 514, 516 (Shaw, J., dissenting).
116. *Id.*
117. *Id.* at 516-17.
118. *Id.* at 517.
119. *Id.*
120. 897 S.W.2d 611 (Mo. 1995).
121. *Id.* at 620.
122. *Id.* at 611. Judge Price wrote the unanimous opinion for the court.
123. *Id.* at 615.
124. *Id.* at 618.
125. *Id.*
126. *Id.* at 619.
127. *Id.*
128. *Id.*

the following rationales: entitlement to the benefit of plaintiff's bargain; punishment of the tortfeasor; windfalls created should go to the plaintiff; inadequacy of public benefits and uncertainty of their future availability; gratuities were intended for plaintiff, not defendant; compensation of plaintiff for legal fees and expenses; and, avoidance of prejudicing plaintiff in minds of the jury.[129]

After enumerating the various rationales, the court explored the general use of the collateral source rule in Missouri.[130] In light of the facts in the instant case, the court focused more narrowly on the rule's application to governmental benefits.[131] In examining Missouri's previous use of the collateral source rule in cases involving Medicaid and Medicare benefits, social security and veteran's benefits, the court classified these benefits as "contingent upon plaintiff's financial need or special status" or "at least partially contingent upon plaintiff's former service or payments."[132] Consequently, the court recognized the split in Missouri authority on whether or not the collateral source rule should apply to bar evidence of gratuitous services received by the plaintiffs.[133]

Recognizing the issue as one of first impression, the court looked to the decisions of four other states which had previously addressed the specific application of the collateral source rule to evidence of free public special education.[134] The court first explored the reasoning of the majority, which had determined that education benefits, like other government benefits, are subject to the collateral source rule and that they are inadmissible.[135] It characterized the analysis of these courts in deciding the issue.[136] The court stated that the majority courts contemplated whether the free public special education was "truly independent" of plaintiff and upon determining it was, the courts mechanically applied the collateral source rule and barred evidence of the educational programs.[137] The *Washington* court identified additional rationales of the majority courts including the lack of certainty of the continued availability of the public benefits and the fact that some of these benefits require a plaintiff's continued troubled financial status.[138]

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129. *Id.*

130. *Id.* at 619-20.

131. *Id.* at 620.

132. *Id.*

133. *Id.*

134. *Id. See also Williston*, 611 So. 2d at 278; *Ensor*, 519 So. 2d at 1266; *Healy*, 378 A.2d at 545; *Cates*, 361 S.E.2d at 736; and *Stanley*, 452 So. 2d at 515.

135. *Washington*, 897 S.W.2d at 620.

136. *Id.*

137. *Id.*

138. *Id.*

In exploring the minority approach as applied in Florida, the court cited the decision in *Florida Physician's Insurance Reciprocal v. Stanley*.[139] The *Washington* court quoted from a passage in *Stanley* asserting that the collateral source rule does not apply in the context of public special education.[140] The *Stanley* court determined that "the policy behind the collateral source rule simply is not applicable if the plaintiff has incurred no expense, obligation, or liability in obtaining the services for which he seeks compensation."[141] The court explained that the *Stanley* court upholds the justification of the collateral source rule's applicability in situations where a tortfeasor stands to benefit from expenditures made by the injured party in incurring an insurance policy.[142] The court then noted that the Florida Supreme Court went on to reject the view that the collateral source rule should be applied solely to insure a detriment to defendant.[143]

The *Washington* court agreed with the rationale articulated in the *Stanley* decision.[144] The court explained that none of the valid justifications for applying the collateral source rule were present in the instant case.[145] The court emphasized that educational benefits are available to everyone regardless of special status.[146] The court conceded the fact that plaintiff had contributed tax dollars to this fund but maintained that the defendant had contributed to the revenue fund as well. Therefore, no undue windfall results for either.[147]

The court concluded that the collateral source rule should not be utilized for the sole purpose of impacting the defendants and insisted that damages in Missouri's tort system are compensatory rather than punitive.[148] The court further justified its decision in noting that on remand plaintiffs would have the opportunity to challenge the adequacy and continued availability of the free public special education programs available.[149]

In addition to holding that the evidence of free public special education was not subject to the collateral source rule, the court provided another

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139. 452 So. 2d 514 (Fla. 1984).

140. *Washington*, 897 S.W.2d at 620-21.

141. *Stanley*, 452 So. 2d at 515 (quoting Peterson v. Lou Bachrodt Chevrolet Co., 392 N.E.2d 1, 5 (Ill. 1979)).

142. *Id.* at 515-16.

143. *Id.* at 516.

144. *Washington*, 897 S.W.2d at 621.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

justification for reversal on the issue of damages.[150] Defendants had argued that the testimony of plaintiffs' expert, Alan Spector, "opened the door" to the issue of alternatives to expensive private education.[151] Spector testified regarding Corey Washington's future needs as a result of the injury.[152] As to whether Spector's repeated references to the Washingtons' financial need[153] justified cross-examination as to opportunities for free public special education, the court applied a fairly recent decision, *Moore v. Missouri Pacific Railroad Company*.[154] The court noted that in *Moore*, plaintiff described his inability to afford continuation of therapy for his injury during direct examination.[155] The *Washington* court also recognized the *Moore* court's holding that "there is an exception to the general collateral source rule of inadmissibility where a plaintiff voluntarily injects his financial condition."[156] Regardless of the plaintiff's intent, it was improper for the trial court to deny the defendant the right to cross-examine as to collateral benefits received.[157] Although the standard of review for issues involving the scope of cross-examination is abuse of discretion,[158] the *Washington* court held that the trial court's failure to permit defendants to admit mitigation evidence after Spector's repeated references to the financial status of the plaintiffs was such an abuse.[159]

The court affirmed the judgment as to liability. However, the court reversed and remanded on the issue of damages[160] holding that evidence of free public special education does not fall within the collateral source rule.[161]

V. COMMENT

Determining the correct scope of the collateral source rule is difficult and vigorously disputed. With the expanding influence of governmental benefits, it is difficult to determine what role these benefits should play in tort recovery. In the face of extensive criticisms of the outrageous recoveries in tort law, it has become increasingly difficult to justify the collateral source

150. *Id.*
151. *Id.* at 619.
152. *Id.* at 614.
153. *See id.* at 614-15.
154. 825 S.W.2d 839 (Mo. 1992) (en banc).
155. *Id.* at 841-42.
156. *Id.* at 842-43.
157. *Id.* at 843.
158. *Id.*
159. *Washington*, 897 S.W.2d at 622.
160. *Id.*
161. *Id.* at 621.

rule and the "double recovery" it invariably produces.[162] In *Washington v. Barnes Hospital*,[163] the court successfully avoided awarding the plaintiff with a windfall, yet failed to address the additional burden that educating Corey Washington will place on state taxpayers.

To avoid the unfairness of shifting the costs of Corey's injury onto Missouri taxpayers, Missouri should be permitted to recover the additional costs of educating Corey. Allowing collateral sources to collect would ensure full payment of the harm caused, without overcompensating plaintiffs.

The Missouri Supreme Court adopted a minority view in its decision in *Washington* on an issue addressed by very few states.[164] In the limited situation where a public benefit is available to all regardless of status, the court refused to use the collateral source doctrine to keep the information from the jury.[165] It implicitly decided that juries are capable of hearing evidence regarding the collateral source and determining whether it provided adequate compensation, or whether additional damages are necessary to fully compensate for the harm caused.

The majority position justifies the exclusion of such evidence through a fairly rigid application of the rule.[166] The *Washington* court here rejected "blind adherence"[167] to the collateral source rule and factually distinguished education benefits from those deserving the rule's protection.[168] Additionally, its ruling emphasized that plaintiffs would have an opportunity to present the inadequacies of the public benefits and the lack of certainty of their continued existence.[169] This will allow the finder of fact to have all the information necessary to weigh the evidence and correctly determine the adequacy of the public program and the needs of the injured party.[170]

The decision in *Washington* will not apply in the vast majority of collateral source issues because it is distinguishable based on the unique benefit it addresses. The distinctive nature of free education makes it unlikely

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162. *See* Goldsmith, *supra* note 50, at 802.

163. 897 S.W. 611 (Mo. 1995).

164. *See* RESTATEMENT (SECOND) OF TORTS § 920 (2)A (1979).

165. *See* Jacobsen, *supra* note 48, at 541 ("Courts should not stretch the [collateral source] rule so as to interfere with the jury's calculation of damages in situations not involving the exchange of consideration, such as the provision of governmental benefits").

166. *See Stanley*, 452 So. 2d at 516 (calling the application a "blind adherence").

167. *Id.*

168. *Washington*, 897 S.W.2d at 621.

169. *Id.*

170. *See* Jacobsen, *supra* note 48, at 525 (when relevant information on the issue of damages is withheld, "[t]he jury may indeed overcompensate the victim, but it does so unknowingly").

that Missouri courts will drastically change the application of the rule to other collateral source benefits.

In its examination of the use of the rule, the Missouri Supreme Court acknowledged cases involving governmental benefits like social security, welfare or veteran's benefits which depend upon plaintiff's wealth or special status.[171] Social security and veteran's benefits are funds into which plaintiffs have usually contributed in one form or another. In the case of welfare benefits, it is more difficult to justify the benefit of the bargain rationale. All taxpayers contribute to these funds, and they are available to all who qualify. The concern with excluding welfare benefits from collateral source rule protection may stem from the fact that any judgment made in favor of the plaintiff, no matter how small, may disqualify him or her from future welfare benefits. With each of these governmental benefits that Missouri courts have addressed, the fact that they are dependent upon some unique characteristic of the plaintiff usually justifies collateral source rule application.

Where the decision may have its greatest influence is on the applicability of the rule to gratuitous benefits. The *Washington* court recognized the split of authority among Missouri appellate courts in this area.[172] The court strongly advocated use of the "benefit of the bargain" rationale in analyzing the implications of collateral sources. In siding with the minority, Missouri agreed with Florida, a state which has already modified the common-law collateral source rule by statute.[173] In quoting the *Stanley* court, the *Washington* court apparently subscribed to the view that where the "injured party incurs no expense, obligation or liability, we see no justification for applying the [collateral source] rule." This would seem to indicate that plaintiff should not recover for gratuitous nursing services provided for family and friends. However, later in the opinion, when distinguishing the instant case from cases where use of the collateral source rule would be valid, the *Washington* court appeared to protect these gratuitous benefits. The court stated, "[n]or are these benefits provided as a gift by a friend or family member to assist plaintiffs specifically, such that it would be inequitable to transfer the value of the benefit from the plaintiffs to defendants."[174]

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171. *Washington*, 897 S.W.2d at 620.

172. *See supra* note 63.

173. FLA. STAT. ANN. § 768.76 (West Supp. 1995) ("In any action . . . in which damages are awarded to compensate the claimant for losses sustained, the court shall reduce the amount of such award by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to him, from all collateral sources; however, there shall be no reduction for collateral sources for which a subrogation or reimbursement right exists . . .").

174. *Washington*, 897 S.W.2d at 621.

It is unclear how the court would rule in a purely gratuitous service case. In examining the issue more squarely from the "benefit of the bargain" perspective, the court may be hesitant to permit a double recovery in the case of gratuitous benefits. Recovery in those instances would permit plaintiff to recover for losses not actually sustained. However, the *Washington* court emphasized that gratuities are intended to benefit the plaintiff, not to lessen the defendant's liability. The windfall problem in this instance could be substantially averted by creating a right of subrogation in the person administering the gratuitous services.

In the present case, the court did not address the fact that, although defendant may benefit from the admission into evidence of the existence of these programs, the cost will be borne by the public. Problems with the collateral source rule could be greatly lessened with wider subscription to subrogation rights for the collateral sources themselves.[175]

Here, it is inequitable that the taxpayer must take on the additional cost of educating a child with demanding special needs. This is especially true when the cost of educating Corey Washington would have been significantly lessened had he not been injured by the negligent defendant. If defendant were accountable to taxpayers for these expenses, the courts could avoid the "windfall" situation altogether.

Expanding the right of subrogation is not the perfect solution. Although theoretically increased subrogation rights are a good idea in practicality, they are not very effective. The American Law Institute Reporters' Study points to difficulties with the expansion of subrogation.[176] They note "the daunting task of developing procedures for effectively implementing subrogation and reimbursement of collateral sources."[177] In order for subrogation rights to work effectively several procedures would have to be solidified. The Reporters stress the necessity of: notice provisions to collateral sources, formulas for allocating settlements and recoveries between plaintiff, attorney and collateral source, and methods for preventing fraud on collateral sources in the allocation of settlements. Unless the above complex and specific procedures are implemented, collateral sources may not have notice of the litigation, or receive their fair share of plaintiff's recovery. The complexity of the proposed changes may make this method too impractical for implementation.

The Missouri legislature should follow the lead of other states[178] and abrogate the rule's application to free public education benefits in addition to

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175. *See* West, *supra* note 49, at 414. ("Why not allow the person who provided the collateral source benefits to be reimbursed to the extent of his expenditures?")

176. AMERICAN LAW INSTITUTE, REPORTERS' STUDY, *supra* note 51, at 179.

177. *Id.*

178. *See supra* note 51.

eliminating subrogation rights in compliance with the recommendations of the American Law Institute.[179] However, until the rule is changed through legislation, increased execution of subrogation rights remains the best alternative. Despite possible problems, a wider application of subrogation rights is dictated to prevent the rising cost of health care and governmental benefits. Properly exercised, defendant would not escape paying full compensatory damages for the harm caused by his or her tortious behavior, nor would plaintiff be unjustly enriched.[180] Those parties who contributed to the compensation of plaintiffs whether they be employers, family, or the government, should be entitled to reimbursement by the defendant responsible for the injury. This system would relax strain on these "collateral sources," yet not subject defendant to pay unwarranted damages.

The *Washington* court does not address the additional burden on taxpayers that educating a child with Corey Washington's special needs will have. While avoiding a windfall to plaintiff, the Missouri court has placed a substantial burden on the government.

VI. CONCLUSION

Washington v. Barnes Hospital[181] is a first step for the Missouri Supreme Court in examining the collateral source rule more closely, and putting a new faith in the jury's ability to determine the adequacy of collateral recovery. In its support of the "benefit of the bargain" rationale, the court may be entering a phase questioning the rule's application in cases involving purely gratuitous benefits or unearned governmental entitlements that do not rely on plaintiff's unique, specific characteristics.

While avoiding a windfall to the Washingtons in this case, the court placed an undue burden on Missouri taxpayers. The defendants in this case will not be paying for the additional costs of educating Corey, which resulted from his injuries. Is avoiding a windfall to the Washingtons and apportioning the costs of defendants' negligence on the public really a superior outcome to having defendants fully compensate plaintiffs for the injury?

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179. AMERICAN LAW INSTITUTE, REPORTERS' STUDY, *supra* note 51, at 182. However, it should be noted that a statutory abrogation of the collateral source rule may face equal protection and due process challenges based on federal and state constitutions. *See, e.g.*, O'Bryan v. Hedgespeth, 892 S.W.2d 571 (Ky. 1995); *see also* Faye L. Ferguson, Note, *Equal Protection Challenges to Legislative Abrogation of the Collateral Source Rule*, 44 WASH. & LEE L. REV. 1303 (1987) and Craig L. Farrish, *Restoration of the Collateral Source Rule in Kentucky: A Review of* O'Bryan v. Hedgespeth, 23 N. KY. L. REV. 357 (1996).

180. AMERICAN LAW INSTITUTE, REPORTERS' STUDY, *supra* note 51, at 182.

181. 897 S.W.2d 611 (Mo. 1995).

The *Washington* decision will hopefully encourage courts to ensure that there is a sound justification for withholding relevant information regarding collateral source payments from the jury. Courts in the future will not be able to simply apply the rule as a matter of habit without somehow rationalizing the exclusion of pertinent evidence.

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