

# A Multi-Perspective Critique of Indiana's Legislative Abrogation of the Collateral Source Rule

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## I. INTRODUCTION

From an early date in Indiana jurisprudence, courts have denied defendant tortfeasors the ability to present evidence that the plaintiff has obtained compensation for the injuries from other sources and avoid liability by arguing that the plaintiff has no need for compensation through the torts system. So, for example,<sup>1</sup> where the plaintiff's loss has been covered by a contract of insurance purchased by the plaintiff or the plaintiff's employer, Indiana courts, in accordance with a rule adopted in virtually every American jurisdiction, have steadfastly refused to permit the defendant, "by way of set-off, recoupment, or in mitigation of damages,"<sup>2</sup> to avoid compensating the plaintiff in an amount equal to the assessed value of the injuries.

Effective September 1, 1986, the "collateral source rule," as this judicial position has come to be known, no longer governs the trial of personal injury actions. By declaring a *new* collateral source rule which *requires* the admission of evidence of certain types of compensation payments to plaintiff from outside sources, and *permits* consideration of those payments in the assessment and review of damages, the Indiana

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<sup>1</sup>Other sources of benefits may be involved. The rule of exclusion discussed here applies to direct provision of benefits, such as disability payments from plaintiff's own carrier or plaintiff's employer's insurance, pension plans, free medical services, welfare benefits, social security benefits, and gifts. It also applies to benefits that are more indirect, such as tax savings from the nontaxability of judgments for damages or income and services of a second spouse. The justifications for excluding evidence of benefits may vary according to the type of benefit. See generally Averbach, *The Collateral Source Rule*, 21 OHIO ST. L.J. 231 (1960); Esdaile, *The Collateral Source Rule: A Proposal to Regulate Admission of Evidence to Avoid Prejudice*, 68 MASS. L. REV. 102 (1983); Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478 (1966); Hogan, *The Collateral Source Rule: Its Justification and Its Defense*, TRIAL, Feb. 1983, at 58; Lambert, *The Case for the Collateral Source Rule*, 1966 INS. L.J. 531; Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669 (1962); Peckinpugh, *An Analysis of the Collateral Source Rule*, 1966 INS. L.J. 545; Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741 (1966) [hereinafter *Unreason*]. Where significant, the differences will be treated below, but in most parts the discussion will proceed without distinguishing the various sources.

<sup>2</sup>*Sherlock v. Alling*, 44 Ind. 184, 199 (1873).

General Assembly has reversed the judicial rule of exclusion.<sup>3</sup> In this enactment, one of a series of important legislative modifications and abrogations of the common law in this state in recent years, the General Assembly has terminated an unbroken line of precedent extending back nearly to the middle of the 19th century. Any legislative rewriting of common law is significant, but when such a solidly established doctrine as the collateral source rule is overturned, the event is especially noteworthy. The rule has been under steady attack since it was first pronounced in the courts and has garnered severe criticism from commentators over the years. This Article will examine the enactment<sup>4</sup> in detail and comment upon its operation and apparent effect in the common law of torts from several perspectives. It will also briefly review the criticisms leveled at the rule and evaluate the statutory abrogation in light of those criticisms.

## II. COMMON LAW BACKGROUND OF THE COLLATERAL SOURCE RULE

The main justification offered in the early decisions for refusing to entertain defenses of this nature has been that the defendant has no interest in the transactions of the injured party. The view of the courts was clear: the mere fortuity that the defendant had injured someone who had obtained protection of personal fiscal resources from expenses occasioned by physical injury bore no relationship to the defendant's liability. As will be demonstrated below, the courts have been so resolutely opposed to defendants' arguments based on the premise that no net loss has occurred because of the collateral payments, that judicial analyses of this rule of exclusion have been truncated or nonexistent.<sup>5</sup> A logical framework for the judicial collateral source rule can be inferred, however, and an overall review of the common law history of its application reveals a shift in emphasis upon justifications for the rule, if not a shift in the essence of the rule itself. This section of the Article will examine the case law background of the rule and attempt to develop the inferred logical framework of the courts in applying the rule. This background will then serve as a basis for analysis of the effects of the statute.

Early in the rule's development in Indiana, the approach of the courts applying the rule began with an assumption that the defendant's

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<sup>3</sup>Act of March 11, 1986, Pub. L. No. 201-1986, 1986 Ind. Acts 1959 (codified at IND. CODE §§ 34-4-33-14; 34-4-35-1; 34-4-36-1 to -3 (Supp. 1986)).

<sup>4</sup>The act is entitled "Reductions of Subrogation or Lien for Collateral Benefits—Jury Instructions in Personal Injury Cases—Collateral Source Evidence." Senate Enrolled Act 394 (1986). It does not have a short title, but needs one badly. Some plaintiffs' attorneys have suggested "The Liability Insurance Relief Act," others think it might better be called the "Reduced Compensation Act," while some defense counsel have been calling it the "One Bite at the Apple Act."

<sup>5</sup>See *infra* note 8 and text accompanying notes 20-27.

attempt to mitigate was an attempt to address the issue of the defendant's culpability. Given that approach, the fact that the injured party had received some financial balm from another was viewed as *non sequitur*. The attempt to prove that a plaintiff, once injured, had been requited from another source would not serve as a premise for the offered conclusion that the defendant was not at fault in invading the plaintiff's interest.

The courts were concerned with the effect of recognizing a rule that would allow an interloper to profit from the contractual security arranged by others, as evidenced in the statement by the court in *Cunningham v. Evansville and Terre Haute R. Co.*:<sup>6</sup>

The payment of such moneys not being procured by the defendant, and they not having been either paid or received to satisfy in whole or in part his liability, he can derive no advantage therefrom in mitigation of damages for which he is liable. As has been said by another, to permit a reduction of damages on such a ground would be to allow the wrong-doer to pay nothing, and take all the benefit of a policy of insurance without paying the premium.<sup>7</sup>

Reduced to essential terms, the truth of this proposition is not self-evident. Nor does the court offer any further explanation, preferring instead merely to recite other holdings.<sup>8</sup> No reason in logic is suggested on the face of the statement why *C* cannot benefit from a transaction between *A* and *B*. Even beyond the explicit recognition of third-party beneficiary contracts, common experience teaches that members of a market society benefit daily from others' transactions. If considerations of fairness are adopted as the perspective, so long as *A* and *B* get what they bargained for, no reason is suggested for disallowing *C* to enjoy the fruits of the bargain as well. However, the quotation from the *Cunningham* court does demonstrate that the person seeking the mitigation was not simply a third-party interloper; he was not the neutral "*C*" in the abstract statement. The would-be interloper in the case was a "wrongdoer." So stated, the recitations take on a certain tone of moral indignation at the suggestion that someone clothed in fault could avail himself of the preparedness of another.<sup>9</sup>

The combination of a simply stated rule backed by an attitude of moral indignation proved to be a formidable obstacle to the rule's

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<sup>6</sup>102 Ind. 478 (1885).

<sup>7</sup>*Id.* at 484 (quoting 1 SUTHERLAND, DAMAGES 242 (1916)).

<sup>8</sup>The court quoted *Sherlock v. Alling*, 44 Ind. 184 (1873), and cited *The Ohio and Mississippi R.W. Co. v. Dickerson*, 59 Ind. 317 (1877), thereby establishing a pattern of substituting recitation for analysis by subsequent courts.

<sup>9</sup>One is reminded of Aesop's fable of the grasshopper and the ant.

opponents. The courts remained steadfastly unwilling to permit the tortfeasor to avoid paying reparation to the plaintiff on the ground that plaintiff had already recovered for the injuries.

Not long after the rule was first articulated, the courts applied it to bar evidence of gratuitous services rendered to the plaintiff.<sup>10</sup> This development is noteworthy because in such cases the justification that plaintiff's foresight and preparedness in dealing with contingencies that might place a burden on the plaintiff's fiscal fortunes was unavailable. That the rule was nevertheless applied to such situations demonstrates just how focused upon assuring that the defendant paid for the wrongful injury the courts were. Having emphasized the accountability of the tortfeasor as the justification for the rule, and having refused to inquire whether a debit upon the financial status of the plaintiff actually existed, the courts' application of the rule of exclusion to gratuitous benefits conferred upon the plaintiff was a simple application of the basic logical construct of the rule, not an extension or modification of it. In the view adopted by the judiciary, the nature of the source of compensation that the plaintiff had received was simply inconsequential to the issue of defendant's accountability for the injury.

This basis for the rule clearly has roots in a philosophy of corrective justice. An important element of a system pursuing the corrective model is retribution for wrongs.<sup>11</sup> If the view is adopted that a primary aim

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<sup>10</sup>City of Indianapolis v. Gaston, 58 Ind. 224, 227 (1877).

<sup>11</sup>In an attempt to lay out the "raison d'être of the law of tort," Professor Glanville Williams posited "four possible bases of the actions for damages in tort," which are:

1. Appeasement "By this means the victim is induced to 'let off steam' within the law rather than outside it."
2. Justice "Two variants of this theory may be perceived: (1) The first places emphasis upon the fact that the payment of compensation is an evil for the offender, and declares that justice requires that he should suffer this evil. This is the principle of ethical retribution, . . . (2) The second variant looks at the same situation from the point of view of the victim; it emphasizes the fact that the payment of compensation is a benefit to the victim of the wrong, and declares that justice requires that he should receive this compensation. We may call this ethical compensation."
3. Deterrence "Ranged against the theory of tort as part of the moral order are those who believe that it is merely a regime of prevention. The action in tort is a 'judicial parable,' designed to control the future conduct of the community in general."
4. Compensation ". . . according to which one who has caused injury to another must make good the damage whether he was at fault or not. This is the same as the theory of ethical compensation except that it does not require culpability on the part of the defendant."

Williams, *The Aims of the Law of Tort*, 4 CURRENT LEGAL PROBS. 137, 140-53 (1951).

These concepts are elements of a corrective theory of justice and form part of the backdrop for discussion of the enactment in the context of its satisfaction of the objectives

of the torts system in holding actors liable for the consequences of their actions is retribution, to permit a "wrongdoer" to elude accountability where the injured party turns out to have provided coverage for disability (or is the recipient of largess) would be dysfunctional. The system would be deprived of the opportunity to deal with a wrong, to correct the wrongdoer, and in so correcting deter that wrongdoer from further injurious conduct. It would also deny the system's objective of presenting the assessment of accountability as an example to others who would engage in like behavior, thereby impairing the wider deterrence goal of the system. For some courts, this view was so fundamental that to them the conclusion, embodied in the statement of the rule,<sup>12</sup> was obvious and required reference to no other principle.<sup>13</sup>

The early establishment of such a view did not quell the efforts of defendants subject to its effect to try to breach the logic of its foundation, however. Examples of bids to proffer evidence of compensation from collateral sources to reduce defendants' ultimate judgment debt are prevalent in the case law. For example, in a 1915 case, pointing to an Indiana statute pertaining to railroads, which conferred an insurable interest in lands along rail routes, one defendant railroad claimed that when it destroyed the owner's property, insurance proceeds collected by the owner inured to the defendant's benefit and reduced its liability to the owner's subrogated insurer by the amount paid.<sup>14</sup> The Indiana Su-

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of a system having components derived from such a theory. This is not to suggest that Professor Williams captures all of corrective theory; indeed, scholars have developed sophisticated variations and even (mildly?) disagree on some fundamental ideas. See generally Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUDIES 187 (1981), and authorities cited therein. However, complete explication of those variations and points of departure is beyond the scope of this article.

<sup>12</sup>The judicial treatment accordingly given to such cases became tautological in form: The defendant should not be permitted to reduce liability because it would be improper for wrongdoers to reduce liability. See, e.g., *infra* note 13 (quoted language of the court in *Cincinnati R. Co. v. McCullom*, 183 Ind. 556 (1915)).

The irreducibility of the principle prevented the courts adhering to it from expressing it any other way. Professor Williams explains: "Those who adopt the doctrine of ethical retribution do not, and cannot, refer it to any other principle. It is a postulate—an ultimate value-judgment which can only be accepted or rejected." Williams, *supra* note 11, at 141.

<sup>13</sup>E.g., *Cincinnati R. Co. v. McCullom*, 183 Ind. 556, 571 (1915), where the court said: "Under such an instruction [where the defendant had requested that the jury determine damages by crediting defendant with the amounts plaintiff had received from insurance proceeds] pecuniary benefit received by an injured party to which a defendant had not contributed could be used as a defense in mitigation of damages resulting from the wrongful act of such defendant. The impropriety of such an instruction can readily be seen." The court cited no authority.

<sup>14</sup>*Pittsburgh, C., C. & St. L. Ry. Co. v. Home Ins. Co.*, 183 Ind. 355, 362, 108 N.E. 525, 528 (1915).

preme Court, acknowledging the statutory creation of an insurable interest, nevertheless rejected the argument on the ground that the statute gave no rights to the defendant in the insurance contract procured by the land owner and did not affect the "ordinary rule" of exclusion of evidence of collateral sources of compensation.<sup>15</sup> Trying a reverse-twist variation on the theme of interests, a trucker defendant in a case brought nearly forty years later argued that because the plaintiff had received insurance benefits for the injury to his property caused by the defendant, and because the plaintiff had subrogated its rights to the carrier, the plaintiff was no longer the sole party in interest in the action.<sup>16</sup> The strategy was designed to compel the naming of the insurance carrier as a party, enabling the defendant to compel plaintiff to answer interrogatories pertinent to insurance proceeds received. The strategy failed with the theory, however, when the Indiana Supreme Court, reciting the "general rule," held that the defendant had no concern with the transaction between the plaintiff and the insurer, could not be subrogated to the rights of the insured, and was concerned only with having to pay double for the injury. Having obtained an adverse judgment, which when satisfied would "fully release the appellant from further liability to anyone," the defendant's rightful concerns had come to an end, and he would not be permitted to unseat the plaintiff as a party, interrogate the plaintiff, or join the carrier.<sup>17</sup> Eight years earlier, a defendant who had collided with a fire truck and injured the plaintiff argued that because the plaintiff was covered by a hospitalization plan of the city, which was mandated by statute, the city was thereby rendered primarily liable and defendant could not be liable for plaintiff's medical expenses.<sup>18</sup> Relying generally on the rule, the Indiana Court of Appeals refused to adopt the defendant's theory, stating "[w]here the wrongdoer is liable for damages, he is liable for all damages and it is no concern of such wrongdoer who ultimately gets the money."<sup>19</sup>

The language of the courts in resisting such persistent and creative attempts to overcome the rule is consistently couched in fundamental, unqualified terms, which probably explains in large measure the resiliency of the rule to attacks. In *Sherlock v. Alling*,<sup>20</sup> the first Indiana case to decide that a defendant could not offer evidence of the proceeds of insurance<sup>21</sup> to mitigate damages, the Indiana Supreme Court stated:

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<sup>15</sup>*Id.* at 362, 108 N.E. at 528.

<sup>16</sup>*Powers v. Ellis*, 231 Ind. 273, 108 N.E.2d 132 (1952).

<sup>17</sup>*Id.* at 281, 108 N.E.2d at 136.

<sup>18</sup>*Mullins v. Bollinger*, 115 Ind. App. 167, 55 N.E.2d 381 (1944).

<sup>19</sup>*Id.* at 171, 55 N.E.2d at 382.

<sup>20</sup>44 Ind. 184 (1873).

<sup>21</sup>The insurance proceeds were from a life insurance policy on plaintiff's decedent. *Id.* at 199.

To allow such a defence would defeat actions under the law, when the party killed had by his prudence and foresight, made provision or left means for the support of his wife and children, and the wrong-doer would thus be enabled to protect himself against the consequences of his own wrongful act.

. . . No case has been found recognizing the doctrine claimed, and we are not willing to be the first to sanction it.<sup>22</sup>

By 1893, the courts considered the rule to be "well settled" that the plaintiff could "recover his entire loss from [defendant] without regard to the amount of insurance he may have been paid thereon."<sup>23</sup> The rule remained "settled" everywhere but in the minds of defense counsel until the General Assembly reversed the rule in the 1986 session.

Modern courts have taken to simply quoting the encyclopedic statement of the rule, as was done in *Evans v. Breeden*:<sup>24</sup>

'Compensation for the loss received by plaintiff from a collateral source, independent of the wrongdoer, as from insurance, cannot be set up by the wrongdoer in mitigation of damages.'<sup>25</sup>

On these terms, to reach the opposite conclusion and permit reduction of defendant's judgment debt to plaintiff on the premise that plaintiff's loss has been covered, would require defendants to demonstrate some reason why they should be permitted to ride the beneficial coat-tails of the injured party's transactions. Having had no input into the transactions, and being cast as a "wrongdoer," the typical defendant is unable to make such a showing and is thereby counted out with two strikes. A case frequently relied upon is *Ohio and Mississippi Ry. Co. v. Dickerson*,<sup>26</sup> where the Indiana Supreme Court declared, in response to defendant's argument that the damages were excessive because of plaintiff's receipt of full salary after the injury:

This forms no ground for the reduction of the damages. In such cases, damages are assessed according to uniform principles, and are not to be affected by the mere accidental business relations of the party injured. The liberality of his employer forms no reason why the appellee should not be compensated for the injury he sustained.<sup>27</sup>

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<sup>22</sup>*Id.* at 200.

<sup>23</sup>*Lake Erie & W.R. Co. v. Griffin*, 8 Ind. App. 47, 50 (1893) (citing *Cunningham v. Evansville & Terre Haute R. Co.*, 102 Ind. 478 (1885)).

<sup>24</sup>164 Ind. App. 558, 330 N.E.2d 116 (1975).

<sup>25</sup>*Id.* at 561, 330 N.E.2d at 118 (quoting 9 I.L.E., *Damages* § 86 at 253).

<sup>26</sup>59 Ind. 317 (1877).

<sup>27</sup>*Id.* at 324.

Try as they might, defendants in this state and most others<sup>28</sup> have simply been unable to overcome this view of the rule.

Yet attempts to overcome it have recurred, and in some instances have succeeded in knocking some chinks loose by way of exceptions.<sup>29</sup> If the proposition is so fundamental, that is, if it is based upon an irreducible principle viewed as part of the fabric of our system of justice, one would expect opposition to it to wane, exceptions to be nonexistent, and efforts to overturn it eventually to stop. The fact that these expectations have not been fulfilled in the 115 years since the rule was first judicially pronounced in this country<sup>30</sup> suggests that perhaps the rule is not so fundamental after all; that even though the rule has been *taken* to be fundamental in nature, it may actually be further reducible to more fundamental parts; and that its resiliency is more attributable

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<sup>28</sup>See generally C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES 323 (1935); Averbach, *supra* note 1; Annotation, *Third Party Tortfeasor's Rights to Have Damages Recovered by Employee Reduced by Amount of Employee's Workers' Compensation Benefits*, 43 A.L.R.4th 849 (1986); Annotation, *Validity and Construction of No-fault Insurance Plans Providing for Reduction of Benefits Otherwise Payable by Amounts Receivable From Independent Collateral Source*, 10 A.L.R.4th 996 (1981); Annotation, *Collateral Source Rule: Injured Person's Hospitalization or Medical Insurance as Affecting Damages Recoverable*, 77 A.L.R.3d 415 (1977); Annotation, *Admissibility of Evidence That Injured Plaintiff Received Benefits from Collateral Source, on Issue of Malingering or Motivation to Extend Period of Disability*, 47 A.L.R.3d 234 (1973); Annotation, *Right of Tortfeasor or Liability Insurer to Credit for Amounts Already Disbursed to Injured Party Under Medical Payments or Funeral Expense Clause in Liability Policy*, 11 A.L.R.3d 1115 (1967); Annotation, *Collateral Source Rule: Right of Tortfeasor to Mitigate Opponent's Damages for Loss of Earning Capacity by Showing That His Compensation, Notwithstanding Disability, Has Been Paid By His Employer*, 7 A.L.R.3d 516 (1966); Annotation, *Collateral Source Rule: Injured Person's Receipt of Statutory Disability Unemployment Benefits as Affecting Recovery Against Tortfeasor*, 4 A.L.R.3d 535 (1965); Annotation, *Application of the Collateral Source Rule in Actions Under the Federal Tort Claims Act*, 12 A.L.R.3d 1245 (1962).

<sup>29</sup>*E.g.*, Jackson v. Beard, 146 Ind. App. 382, 398, 255 N.E.2d 837, 847 (1970) (admitted evidence of receipt of social security benefits on the grounds that plaintiff waived the collateral source rule by opening up testimony with respect to reduced income); *accord* Cox v. Winklepleck, 149 Ind. App. 319, 271 N.E.2d 737 (1971) (evidence through plaintiff's testimony of sick leave and vacation, failure to object to instructions, if given, relating to such compensation, failure to argue application of the rule in brief on appeal, constituted waiver). Some states have permitted an exception to the rule for the purpose of establishing that the plaintiff is a malingerer. See Hogan, *supra* note 1, at 58-59. *Contra* Eichel v. New York Central R. Co., 375 U.S. 253, 254-55 (1963). No case in Indiana has directly ruled on the matter, but in dictum the court in Cox, 149 Ind. App. 319, 271 N.E.2d 731, stated that the jury could properly consider whether the period of time that the plaintiff was off work was the "proximate result" of the defendant's tortious conduct. *Id.* at 322, 271 N.E.2d at 739.

<sup>30</sup>Harding v. Townshend, 43 Vt. 536, 538 (1871) has been said to be the first case where the rule was using the term "collateral." Averbach, *supra* note 1, at 233; *see also* Esdaile, *supra* note 1. The Propeller Monticello v. Mollison, 58 U.S. (17 How.) 152 (1854) is claimed to be the first case where the doctrine was applied. Maxwell, *supra* note 1, at 671.



to the courts' attitudes about it as well as a general resistance of a system based upon *stare decisis* to examine its commitment to pronounced rules. This further suggests that other principles of at least equal value have continued to underlie attempts to strike the rule from the system, and that while the assertions of these competing principles have fallen on judicial ears deafened by *stare decisis*, the legislature has listened to proponents of the competing principles.

Correcting the defendant is not the only aim of the common law torts system, however. The system also purports to correct the wrong by making the injured plaintiff whole, at least so far as monetary compensation will allow. This aspect has been, to date, the focus of defense-oriented attempts to overturn the rule. Reduced to their essence, the arguments have been that because the plaintiff has already received some compensation for the injury, the need to make the injury whole through torts compensation no longer exists, and defendant ought to be excused from accountability through that system. By placing the arguments on this foundation, the opponents of the rule have anchored themselves to an equally fundamental principle from which to gather the strength of conviction to reiterate their pleas for reform.

So cast, the competing arguments have placed the corrective system of justice in a position of internal conflict. To emphasize the retributive aim of the system and deny the mitigation is to ignore the possibility that the compensatory function will be duplicated. To recognize the duplication and allow the "wrongdoer" to escape liability through mitigation is to ignore the retributive and deterrent functions. The tensions created by this conflict have produced some stultification of policy in some instances, and judicial ground-shifting in others, as courts attempt to answer the repeated challenges. The next section of this Article will examine the criticisms of the rule and responses to those criticisms, with a view toward identifying the alternative justifications developed in support of the rule.

### III. CRITICISMS OF THE RULE

The earliest attempts to allow collateral sources to be considered in mitigation were grounded in good measure upon considerations of fairness. Defendants argued that to permit the plaintiff to benefit from a judgment that did not take into account the fact that the injury had already been compensated would permit a double recovery. Some judicial responses to that argument were as much bottomed upon the retributive function of the torts system and the moral position which refused to aid a tortfeasor as were the seminal statements of the rule itself: If a windfall is to result, better that the windfall be enjoyed by the innocent injured party than by a wrongdoer.<sup>31</sup>

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<sup>31</sup>No reported Indiana case has addressed this argument. For an example of a judicial

Critics of the rule have questioned the core idea of this proposition by suggesting that it may not be true in all cases that the plaintiff is the better recipient of the windfall. An inquiry into the bases of liability is central to this position, because in one form it is a direct attack upon the assumption that the tortfeasor is a "wrongdoer." Where the tortfeasor is subject to liability on a theory of strict liability, the status of the parties relative to the issue of fault is roughly equal. Thus in this application of the rule, the justification that it advances the retributive function of tort law is unavailable.<sup>32</sup> Making this observation, the critics have maintained that there is no indication that refusals to mitigate have been "sensitive to varying degrees of moral fault."<sup>33</sup> However, strict liability as a regime of accountability has seen the development of alternative justifications for imposing the burden on the tortfeasor at the outset that more directly address the question of who should bear the loss. Risk allocation, cost spreading, accident prevention, cost-benefit analysis, market forces, and related concepts are elements of the economic theories dominating discussions of accountability for injuries arising out of modern trade and transportation.<sup>34</sup> To the extent that imposition of the collateral source rule permits the allocation of costs in a manner consistent with the objectives and criteria of the regime within which the rule is applied, the rule is justified independent of the traditional notion that an injured party is to be favored over a "wrongdoer." To be certain, the courts no longer have the ability to declare the ruling upon a stark comparison between a *blameworthy* defendant and an *innocent* injured party, but the foundation for the objection to the moral justification will have disappeared as well. If the analysis of cheapest risk-avoider or most efficient cost-bearer has taken place independent of the question of who is to "blame," and has identified the tortfeasor as a proper person to subject to liability under the requirements of strict liability, then to suggest that the plaintiff's insurer ought to bear the cost because defendant is not a "wrongdoer" begs the question. The real issue becomes whether allowing the plaintiff to be compensated

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statement from another jurisdiction, see *Grayson v. Williams*, 256 F.2d 61, 65 (10th Cir. 1958); Annotation, *Admissibility of Evidence That Injured Plaintiff Received Benefits from Collateral Source, on Issue of Malingering or Motivation to Extend Period of Disability*, 47 A.L.R.3d 234 (1973).

<sup>32</sup>See *Unreason*, *supra* note 1, at 749.

<sup>33</sup>*Id.*

<sup>34</sup>Complete exploration of the economic justifications for and criticisms of the strict liability system of compensation is beyond the scope of this article. See generally P. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON TORTS* §§ 75, 97, 98 (5th ed. 1984); M. POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* ch. 13 (1983); R. POSNER, *ECONOMIC ANALYSIS OF LAW* §§ 6.5, 6.6 (3d ed. 1986). For a discussion of cost allocation in the context of theories of corrective justice and a proposal for a non-fault based system, see G. CALABRESI, *THE COST OF ACCIDENTS* (1970).

from two sources is an efficient allocation of resources. Nothing in the critical literature has explored that issue.<sup>35</sup> The legislative abrogation applies to "personal injury" actions and contains no exclusion for actions based upon strict liability. By permitting strictly liable defendants to shift the ultimate allocation of costs to the injured party's insurer, the Act may well have thrown the strict liability system into imbalance.

Even in the context of a fault-based theory of liability, the rule's critics have contested the moral basis for applying the rule. Arguments cast in this mold attack the rule using several premises,<sup>36</sup> but those having the greatest bearing upon Indiana's legislative abrogation are the related notions that no even-handed method of determination of damages exists in the law of torts, and that the method employed is subject to evaluations that are primarily affected by factors other than the tortfeasor's degree of culpability. As expressed in an ambitious student comment in the *Harvard Law Review*, the criticism is that no "norm of damages" for assessing the extent of liability exists, and the variables upon which the size of the judgment debt depends are "the extent of injury, the physical idiosyncracies and earning capacity of the injured person, and . . . the latter's own degree of culpability."<sup>37</sup> So long as the purpose of dispensing justice on an individualized basis remains a vital part of the torts compensation system, it is difficult to envision a mechanism that would not determine compensation according to factors

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<sup>35</sup>*Cf.* R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 278, 400-03 (1965). The authors' proposed no-fault plan provides "reimbursement limited to net loss" to avoid "wasteful overlapping of basic protection and benefits from other sources." The authors acknowledge that the plan "is based on a principle contrary to that underlying the collateral source rule of tort law." Compare the detailed approach of Professors Keeton and O'Connell in limiting reimbursement to net loss with the General Assembly's broad approach.

<sup>36</sup>*See Unreason, supra* note 1, at 749. One premise of such arguments is that "wrongdoers" are treated uniformly under the rule and are not so treated in the larger scheme of tort liability, pointing out that "[e]ven the most flagrant wrongdoer ordinarily is not liable for damages unless harm in fact results from his conduct." *Id.* Even assuming the validity of the statement, it is difficult to grasp its logic in the context of the argument that the rule should not be applied. The assertion seems to be that because the torts system operates so that those whose conduct has caused no harm, even though the conduct is "wrongful," are not subject to liability, those who have wrongfully caused harm should not be subject to liability for compensation to an already compensated plaintiff. So stated, it is susceptible to the interpretation that it means because some "wrongdoers" escape liability, others should too (an argument often heard by state troopers who have stopped speeding motorists). It makes sense only if the elements of "no harm" and "harm already compensated" are equated. Reduced to these terms, the argument becomes one that asks the courts to ignore the retribution function and concentrate on the need for applying the compensation function, something that the courts are bound not to do at common law. This suggests the prime issue of the legislative abrogation, about which see *infra* text accompanying notes 57-61.

<sup>37</sup>*Unreason, supra* note 1, at 749.

that vary with the peculiar make-up of the injured party. If "norms of damages" is translatable to a schedule of amounts recoverable arranged by category of injuries, the criticism seems more a disenchantment with the torts compensation system in general than a revelation of a fallacy of the collateral source rule.

Concern for an assurance of appropriate relationship between compensation and levels of culpability is legitimate. That concern has reshaped the face of the torts compensation system in the more than twenty years since the quoted criticism was written. Lawyers, judges, and juries working in tort cases in nearly every state now do so within the controlling principle of liability apportioned according to fault. With the adoption of a comparative fault system, the business of finding fault with the conduct that has led to the injury is not aimed exclusively in the direction of the named tortfeasor. This is not to say that cases will not still occur where the defendant is the only wrongdoer, but many cases are decided where fault is assessed to both the plaintiff and the defendant, and among those are some where the terms "plaintiff" and "defendant" are meaningful only to the extent of designating who was first to bring a lawsuit. In a system of comparative fault, the concept of culpability has changed significantly from the traditional notions of moral blameworthiness. However, the *degree* of culpability is certainly a focal point of the inquiry into who should bear responsibility, and juries are instructed to reach their verdicts by referring directly to the relative culpability of the parties. That fact alone, of course, does not provide a "norm of damages,"<sup>38</sup> but sensitivity to degrees of fault has been built into the system, and the assessor of fault and damages is charged with the responsibility for apportioning responsibility accordingly. This fundamental change in the system means that at least in some cases, the courts are no longer dealing with a blameless plaintiff, and the underpinnings for the moral assertion that windfalls should not be enjoyed by *the* wrongdoer have eroded away.

#### IV. A CRITIQUE OF THE LEGISLATIVE ABROGATION

Against this background, an assessment of the legislative abrogation should take into account the effect that proof of collateral benefits would have on the ultimate assignment of responsibility. To the extent

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<sup>38</sup>It is not precisely clear just what is meant by "norm of damages" in this context, but if it means something like a schedule of damages such as applied in the workers' compensation field, the reference for the norm would at any rate be the type of injury and not degrees of culpability. If it means a schedule of damages related to the type of conduct, it would resemble the system of fines and penalties employed in the criminal law. With the difficulty of categorizing the myriad of ways that negligent conduct manifests itself, such a schedule would seem to be infeasible beyond a general sweeping "fine" for conduct failing to satisfy the standard of the ordinary and prudent person.

that proof of collateral benefits will allow an admittedly culpable tortfeasor to escape liability altogether, it would appear to suffer from the same criticism leveled at the rule: it is susceptible to the charge that it remains insensitive to degrees of fault (it would actually run counter to the cardinal principle of the system). To the extent that it becomes operable only with respect to plaintiffs who had received outside payments and permits defendants to offset liability in direct one-to-one proportions, it remains vulnerable to the argument that such proof allows gross, one-sided results which would vary solely upon the idiosyncratic circumstances of the person injured.

However, the enactment does not permit the inclusion of evidence of collateral benefits on a wholesale basis. The legislature has been careful to limit its rule of inclusion by setting out an express list of exceptions. The court must permit offers of:

- (1) proof of collateral source payments, *other than*:
  - (A) payments of life insurance or other death benefits;
  - (B) insurance benefits for which the plaintiff or members of the plaintiff's family have paid for directly; or
  - (C) payments made by the state of Indiana or the United States, or any agency, instrumentality, or subdivision thereof, that have been made before trial to a plaintiff as compensation for the loss or injury for which the action is brought[.]<sup>39</sup>

To these exceptions must be added the separate section of the Act which requires the court, if requested, to "instruct the jury that the jury *may not* consider the tax consequences, if any, of its verdict."<sup>40</sup> The exceptions draw a rather tight boundary around the new rule's application, and the required jury instruction<sup>41</sup> even allows some assurance that the jury will not, through surmise, debit the verdict amount by assumed tax savings.

With respect to these exceptions, the common law rule remains in effect, presumably accompanied by all of the problems assigned to it by the critics. Reflective examination of the statute reveals that the new rule is not conceptually revolutionary, and may not even fully discharge the ambitious assertion of purpose that the General Assembly included in the Act.<sup>42</sup> The enactment by its own terms purports to open the door

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<sup>39</sup>IND. CODE § 34-4-36-2(1) (Supp. 1986) (emphasis added).

<sup>40</sup>*Id.* § 34-4-35-1 (emphasis added).

<sup>41</sup>The provision appears to be merely directory, but it states that "the court *shall*, if requested" give the instruction and the content is set out specifically. The instruction will be requested in every case, and the court does not have the usual discretion to refuse it. For further discussion, see *infra* notes 91-93 and accompanying text.

<sup>42</sup>The Act declares in the first section of the new chapter that:

The purpose of this chapter is:

to evidence of collateral source benefits, then promptly closes it to all but third-party purchased accident and hospitalization insurance proceeds, wage maintenance plans (excluding workers' compensation and governmental entitlements), gratuitous services, and gratuitous benefit payments. It seems not to have taken full leave of the important notion in *Sherlock v. Alling*<sup>43</sup> that the defendants ought not to avail themselves of plaintiffs' "prudence and foresight" in providing for future contingencies through insurance. Minimal departure in concept does not mean minimal difference in effect, however. Certainly, given the heavy incidence of third-party purchased accident and hospitalization insurance coverage and sick pay, most cases will be affected by the rule.

Given this adherence to the idea which supplied part of the foundation for the exclusionary common law rule, the statutory rule contains some flaws in language and logic which may present difficulties in application that will require judicial interpretation. The facial resemblance to the underlying concept of the common law rule of exclusion may lead to problems in application in doubtful cases. For example, the Act excepts from its coverage "insurance benefits for which the plaintiff or members of the plaintiff's family have paid for directly,"<sup>44</sup> while it excepts "payments of life insurance or other death benefits"<sup>45</sup> without reference to whether the life insurance benefits were paid for "directly" by the plaintiff or were received gratuitously. Opposition in the critical literature to excluding evidence of life insurance proceeds has been mild at best,<sup>46</sup> on the basis that in forms other than term-type policies, it is not a contract of indemnity transacted for the purpose of covering expenses in connection with a loss; rather, it represents an effort to save and invest part of the family finances; and that the wrongful conduct of the defendant only hastened the day on which the contract obligations of the carrier became due.<sup>47</sup> Without an official legislative history, it

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- (1) to enable the trier of fact in a personal injury or wrongful death action to determine the actual amount of the prevailing party's pecuniary loss; and  
 (2) to provide that a prevailing party not recover more than once from all applicable sources for each item of loss sustained.

Act of March 11, 1986, Pub. L. No. 201-1986, 1986 Ind. Acts 1959.

Considered against the exceptions clauses quoted above, it seems doubtful that the General Assembly has enabled the trier of fact to do much at all in some cases "to determine the actual amount of the prevailing party's pecuniary loss" or to prevent a plaintiff from recovering "more than once from all applicable sources for each item of loss sustained."

<sup>43</sup>44 Ind. 184 (1873). See *supra* text and quotation accompanying note 22.

<sup>44</sup>IND. CODE § 34-4-36-2(1)(B) (Supp. 1986).

<sup>45</sup>*Id.* § 34-4-36-2(1)(A).

<sup>46</sup>See Fleming, *supra* note 1, at 1500; *Unreason*, *supra* note 1, at 750-51.

<sup>47</sup>See Fleming, *supra* note 1, at 1500; *Unreason*, *supra* note 1, at 750-51. See generally 1 RHODES, COUCH ON INSURANCE 2d §§ 1:18, 1:30, 1:51, 1:60, 1:62, 1:72, 1:73, 1:74, 1:75 (1984).

cannot be known what persuaded the General Assembly to maintain the exclusionary rule with respect to such policies, but clearly the type of insurance is important in the legislative scheme. However, given the thrust of the Act, it seems incongruous generally to exclude life insurance of all types, stemming from all sources. Because the legislature has chosen to categorize insurance benefits by type and then, with respect to the general category of "insurance," further categorize on the basis of who paid for it, the sweeping treatment of life insurance is inconsistent and puzzling. Avoidance of complexity seems a weak explanation in light of the General Assembly's willingness to create the complexity of categories in the first instance.

Complexity cannot be avoided in any case where the gratuitously conferred policy has come from a family member. Section 2(3) of the Act permits "proof of the cost to the plaintiff or to members of the plaintiff's family of collateral benefits received by the plaintiff or the plaintiff's family."<sup>48</sup> The Act does not say that life insurance benefits *are not* collateral benefits. It acknowledges that they *are* collateral benefits but renders them exceptional by the use of the words "other than" in the operative clause.<sup>49</sup> Exclusion of the benefits with inclusion of the costs where a family member has purchased the policy is bound to lead to confusion.

The unfortunate choice of language in the two subsections has provided fertile ground for contention in the context of gratuitously conferred policies. A party might argue that even though life insurance is involved, the evidence of benefits received from the policy should nevertheless be admitted on the grounds that plaintiff has not paid for the benefits "directly" and subsection 1(B) thereby controls. Giving credence to the purpose clause, which emphasizes the actual pecuniary losses of the plaintiff and states the objective of a single recovery, no apparent reason exists for excluding evidence of life insurance benefits generally. Plaintiffs who have "indirectly" purchased life insurance benefits through employment plans or other means that satisfy the unstated "indirect" concept will have recovered for the pecuniary losses that concerned the legislature. Likewise, it is not clear, upon analysis, why those who have purchased term life policies should not be required to try to convince the trier of fact that the proceeds were not purchased as a hedge against accidental losses rather than as an investment strategy utilizing family finances. Perhaps the exclusion represents a sympathetic recognition that since life insurance proceeds are the bone of contention, loss of life will have occurred, and the survivors should be spared the humility of arguing over who should be credited with the assigned monetary value of the life of the deceased. Only the legislators know.

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<sup>48</sup>IND. CODE § 34-4-36-2(3) (Supp. 1986).

<sup>49</sup>*Id.* § 34-4-36-2(1).

The argument might be resolved by observing that the first subsection, 1(A), does not contain the word "or" following the semicolon ending the clause. If the legislature intended the omission, it might mean that the two clauses are not alternatives but are disjunctive and the first clause stands alone without modification or supersession by the other. However, drafting conventions indicate that when the disjunctive is intended, use of the word "or" is recommended.<sup>50</sup> Grammatical and typographical omissions and errors are not so rare in legislative codes, however, that a court can be sanguine about an interpretation that assumes an intentional omission, especially one that runs counter to drafting conventions. Interpretation of the effect of a statute on the basis of what is *not* present in the legislative language is tricky business, and opens the door to some rather sweeping arguments.

A court would have similar difficulty trying to interpret the statute adhering to the principle that a more specific statutory statement governs a general statement. If the type of insurance mentioned in the two clauses is the basis for comparison, the first clause is more specific by virtue of the inclusion of the modifier "life" to operate on "insurance." On the other hand, if the manner of purchase is the comparison, the phrase "for which the plaintiff or members of the plaintiff's family have paid for directly," makes the second clause more specific. Additionally, the third subsection, 1(C), seems even more specific than the previous two, because it appears that if the state or federal government is the source of the funds, it does not matter whether the funds could be characterized as from life insurance or otherwise, or whether the plaintiff purchased the benefits directly or otherwise. It might be argued on the strength of this observation that the three clauses are set out in ascending order of specificity. Again, without an official history, the courts are left to conjecture and surmise. The legislature could have been more cognizant of drafting conventions and stated clearly and affirmatively what evidence should be included. Interpreters should not be left to an analysis of a

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<sup>50</sup>See R. DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* 76-78 (1965). *E.g.*, COUNCIL OF THE DISTRICT OF COLUMBIA, *LEGISLATIVE DRAFTING MANUAL* 63 (Rev. ed. 1982).

<sup>51</sup>*E.g.*, *Commonwealth v. Kelly*, 177 Mass. 221, 58 N.E. 691 (1900). The court held that innkeepers could not sell intoxicating liquor to guests after 11 P.M. on the strength of a comma, which was included in the first publication of the statute in question, but was dropped in favor of a semicolon in later printings, and potential fortunes were lost. *See also Ex parte John Hill*, 172 Eng Rep. 397 (1827). The absence of the word "bull" in an enumeration which made it a crime to mistreat "any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep, or other cattle" rendered the enactment inapplicable to bull-baiting against the interpretive device employed by the judges, which excludes from the general words items of higher rank than the words enumerated. Thus the "sport" of bull-baiting was legally the attribution of many made and lost fortunes in merrye olde England.



series of exceptions to determine what limited types of benefits remain affected by the rule of inclusion. Legal lore and folklore contains stories about how fortunes were made and lost on the basis of the presence or absence of a word or a punctuation mark.<sup>51</sup> The point of the stories is always that precision of language is important in the law, but they also provoke negative reactions from those who think that the substance of the law, not its form, should control decisions. Indiana courts should not have been placed in the difficult position of determining accountability upon such a technical point by such an easily curable grammatical structure.

More generally, the exception for "directly" purchased benefits is curious and fraught with problems. In a hospitalization plan to which employer and employee both contribute, an issue is bound to arise in litigation whether evidence of benefits is to be included or excluded. Counsel handling such cases should be prepared to present arguments pro and con on the question of whether the trier of fact should divide the proceeds in proportion to the relative amounts paid by the parties to the employment contract and credit the defendant with only the amount "paid for" by employer contributions.

If the legislature intended to inject such complications into the trial of damages, it is a fair question whether it carefully considered the added administrative costs. The potential for confusion will be so great in some cases that the inquiry to determine the "actual amount of the party's pecuniary losses"<sup>52</sup> will come at greater administrative costs than the legislature may have contemplated. In light of the inconsistency with which the legislature has treated the criterion of actual pecuniary loss as a truly primary consideration in the two subsections, it is doubtful that it intended trials to delve so deeply into such a determination. Evidence that the legislature was motivated to avoid complications in the evaluation of damages is contained in another part of the enactment itself. In section 2 of the Act, the General Assembly declared: "In a tort action for personal injuries tried by a jury, the court shall, if requested, instruct the jury that the jury may not consider the tax consequences, if any, of its verdict."<sup>53</sup>

The Internal Revenue Code of 1954, section 104(a)(2) excludes from gross income "the amount of any damages received . . . on account of personal injuries or sickness."<sup>54</sup> In effect, the section produces the possibility that a person recovering for lost or impaired earnings will receive a net amount greater than if no injury had occurred, because plaintiff is entitled to receive the full amount of the damages without

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<sup>52</sup>IND. CODE § 34-4-36-1(1) (Supp. 1986).

<sup>53</sup>*Id.* § 34-4-35-1.

<sup>54</sup>26 U.S.C.A. 104 (a)(2) (1984).

the tax reduction that would occur if the same amount had been received as ordinary taxable income. If a jury were to take section 104(a)(2) into account and try to adjust the verdict to reflect the tax savings, it would be required to perform computations using estimates or evidence of the plaintiff's tax rate, which could get quite complicated. Furthermore, even though the amount of the verdict is not taxable, the *interest* generated by investments of the monies generated by the damages award *is* taxable, adding another layer of complication. Courts have, in general, refused to permit the jury to consider such evidence, some on the basis of the collateral source rule, and others simply because they were skeptical about juries' ability to make the adjustments.<sup>55</sup> If the jury instruction section of the Act is viewed as contrary to the general thrust of the Act's rule of inclusion, it represents strong evidence that the General Assembly preferred that the common law rule of exclusion remain intact where the inclusion of collateral benefit evidence would compel a complicated set of computations in order to adjust the verdict to reflect those benefits.

Furthermore, the significance of "direct" in the analysis of the transaction giving rise to the entitlement to benefits presents a potentially troublesome issue. An employee who has settled for a lower wage or salary in return for employer-paid accident and hospitalization insurance or wage maintenance is likely to assert with legitimate conviction that contributions have been directly made to the provision of the protection plans. The statute has made such arguments by plaintiff's counsel possible by virtue of the subsection permitting evidence of "proof of the cost to the plaintiff or to members of the plaintiff's family of collateral benefits received by the plaintiff or the plaintiff's family."<sup>56</sup>

No limitation on "direct" versus "indirect" cost is mentioned in the subsection. It is apparent from the inclusion of evidence of cost that the jury is to consider that evidence in some way in rendering its verdict for damages. Nothing in the statute explicitly says what *effect* that evidence is to have. It makes sense to assume that the section authorizes the jury to deduct the plaintiff's costs from the collateral benefits before deducting those benefits from the defendant's liability. That is not the only plausible interpretation of the clause, however. It may also be interpreted to mean that the jury should consider the existence of costs ("direct" or "indirect") to the plaintiff as determinative of whether the benefits should be deducted from the damages award at all. By pointing out the exclusion of evidence accomplished by the statute's first two exceptions, a bona fide argument could be offered that the legislature's

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<sup>55</sup>See *Unreason*, *supra* note 1, at 747 (citing *Highshew v. Kushto*, 235 Ind. 505, 134 N.E.2d 555 (1956), and other cases). *Contra Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490 (1980).

<sup>56</sup>IND. CODE § 34-4-36-2(3) (Supp. 1986).

choice of peculiar language has left it open to jury discretion whether to permit defendants to enjoy the beneficial effect of plaintiff's financial arrangements. The rule, after all, is only a rule of evidentiary inclusion. It does not dictate what conclusions the trier of fact must draw from that evidence. In a proper case, the jury, having found that the plaintiff has incurred costs for the benefits, might well decide to refuse to offset the damages by the amount of the benefits.

It might be counter-argued with some force that such an interpretation would place subsection 2(3) in conflict with subsection 2(1)(B), on the grounds that 2(1)(B) would be nullified if 2(3) were given such effect. However, the arguments cannot be settled on the face of the statute, and courts presented with such issues will have to decipher the language. Without a single definitive interpretation, the potential for inconsistency among courts is real, and a controlling pronouncement from the supreme court could be several years in coming.

Courts charged with the task of making some sense of the language might well be disposed to avoiding an interpretation that draws two parts into conflict, but if the legislature's basic design is the source of the conflict, the courts are limited in what they can do. The courts might be able to save a statute from minor errors of construction, but they should not be expected to repair major design flaws. When it is recalled that in addition to the difficulty between these two clauses, subsections 2(1)(A) and 2(1)(B) also contain conflicting terms and that interpretation is needed to apply them consistently, the statute's design becomes suspect.

Determining the principles of design that govern the statute is difficult because, as demonstrated, so much of the enactment is internally inconsistent. One thing is certain: in permitting a defendant to escape accountability completely, solely on the basis that the plaintiff's collateral benefits are large enough to have covered the "pecuniary losses," the legislature has eradicated the retributive and deterrent functions of the torts system, important justifications for the common law rule. Degrees of culpability are of no consequence; the effect can be the same whether the defendant is a mere bumbler or an intentional wrongdoer. Emphasis has now been shifted to the compensatory function, but only in a limited sense. The legislature has concentrated on the *need* for compensation, and has attempted to swing the balance of concern in the torts system in that direction. New emphasis does not necessarily mean expansive refinement, however. In concentrating the pursuits of the system upon recovery of "pecuniary losses," the General Assembly has allowed a much narrower concept of compensation to become operable than has previously characterized the common law. It goes beyond the mere mechanical difference between the common law rule of exclusion and the legislative rule of inclusion. The triers of fact and law are now to evaluate cases by concentrating upon and giving primacy to the "actual

amount of . . . pecuniary losses”<sup>57</sup> proven by the complaining party, and to assure that no more than one compensation is made, “from all applicable sources.”<sup>58</sup> In so doing, if it turns out that a proven wrongdoer escapes an obligation to pay for the wrong, then so be it; that effect is among the costs of seeing to it that the injured party gets no more than is due. This shift in emphasis clearly reflects the legislative preference for a torts system in which distributive theories of justice dominate corrective theories. This is not to say that corrective justice has been discarded, since “correction” includes compensation for the injury as well as retribution, and the enactment certainly allows for both in a proper case.<sup>59</sup> The compensatory correction is based upon an assessment of the injured party’s need, and establishing need becomes a threshold for determining whether the system will seek payment of retribution as a source of the compensation. In a general sense, this has always been true in the common law.<sup>60</sup> But now, the determination of need is confined by a pecuniary concept of loss or detriment, in contrast to the more abstract notion of loss or detriment in the common law, which would include not only those injuries evidenced by pecuniary harm, but also harms not directly translatable into pecuniary terms.<sup>61</sup>

This distinction between a requirement of concrete, limited-means establishment of need on the one hand, and a broader, more abstract and flexible means of assessing the appropriateness of compensation is important in understanding the thrust of the statute and evaluating its possible repercussions in the torts system. By focusing upon the compensatory side of the corrective justice equation using a pecuniary loss concept as the lens by which to ascertain “need,” the legislature may have given short shrift to both distributive and corrective functions even though it has expressed objectives grounded in distributive theory.

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<sup>57</sup>*Id.* § 34-4-36-1(1).

<sup>58</sup>*Id.* § 34-4-36-1(2).

<sup>59</sup>A “proper case” in this sense would be one where no collateral source benefits were received by the plaintiff or one in which collateral sources that were received fell within one of the statutorily excepted categories.

<sup>60</sup>It has been true at least in negligence law, which requires the plaintiff to establish a *prima facie* case by proving actual damages.

<sup>61</sup>This idea can be illustrated by the concept of “general” versus “special” damages in tort law. “General” damages are those damages recoverable for injuries expected or assumed to have resulted from the invasion of the defendant, and which are viewed as so usually accompanying the invasion that some courts do not require that they be specifically pleaded and proved. Pain and suffering, humiliation, fear, fright, and anxiety are usually counted among the harms for which “general” damages are recoverable. “Special” damages, on the other hand, are assessed for “natural” consequences of the conduct, but are not expected or assumed in the same sense of inevitability as those in the category of “general” damages, and hence must be specially pleaded and proved. See generally C. McCORMICK, *supra* note 28, at 32-39, 315-19.

A full description of the distributive theories of justice is beyond the scope of this Article. For this analysis it should be sufficient only to point out some elements in simplified form and their bearing upon this enactment. First, concerns of justice from a perspective of distributive principles are usually addressed on the "higher" order of things and people. The orientation is to matters social in scale: the rights, entitlements, powers, duties, and obligations of groups of society *qua* segments of that society in interaction. First principles, designed to order the interaction between groups and ensure that each operates at a level of benefits and burdens that is fair to all, guide the choice among alternative courses of action and establishment of relationships.<sup>62</sup> Those principles also establish the basic framework of institutions designed to maintain and adjust the apportionment and dispersal of social resources and provide the criteria for evaluating their work.<sup>63</sup> The "share" appropriate to each group is determined by reference to the particular content of the first principles, and so it follows that the "justness" of allocation can be ascertained by how closely it adheres to the principle of entitlement, not necessarily to the relative sizes of the shares. Because the content of the first principles varies across models, the "justness" of entitlement may be determined by whether (to present some examples): it tends to maximize the net of gains over losses in a utilitarian system; it is equal to the entitlements of others in an egalitarian system; it represents what society has chosen through some rational process of collective decisionmaking in, for example, a majoritarian democratic system; or it represents an accumulation brought about by conscientious effort in a system based upon moral desert.<sup>64</sup> Beyond this, distributive principles and the various theories for distributive justice are not generally concerned, so that what is actually produced as a result in a particular case is not generally addressed.<sup>65</sup> Further refinement of assessment within the respective systems is possible by examining what "losses" are to be measured against what "gains;" what counts as "equal" and how is it measured; who is entitled to vote or otherwise participate in the mechanism for collective choice; and what intermixture of effort and accumulated resources is "natural" or "moral."<sup>66</sup> But confined to the level

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<sup>62</sup>See generally J. RAWLS, *A THEORY OF JUSTICE* 4, 7, 84-85 (1971); Hoffman & Spitzer, *Entitlements, Rights and Fairness: An Experimental Examination of Subjects' Concepts of Distributive Justice*, 14 J. LEGAL STUD. 259, 262-67 (1985); Sadurski, *Social Justice and Legal Justice*, 3 LAW & PHIL. 329, 330-31, 334 (1984).

<sup>63</sup>J. RAWLS, *supra* note 62, at 274-80.

<sup>64</sup>*Id.* at 22-33, 221-34, 312-15; Hoffman & Spitzer, *supra* note 62, at 262-66.

<sup>65</sup>See Franaszek, *Justice and the Reduction of Litigation Cost: A Different Perspective*, 37 RUTGERS L. REV. 337, 350-60 (1985).

<sup>66</sup>J. RAWLS, *supra* note 62, at 22-33, 221-34, 312-15; Hoffman & Spitzer, *supra* note 62, at 262-66.

of distributive principles, any debate between competing theories can proceed no further than these issues and cannot address the matter of what is a just resolution of a controversy between individuals.<sup>67</sup> Thus, in a distributive system governed solely by the principle of "first-come-first-served," for example, the competing theories for distributive justice could come to different conclusions on the question of whether the system was "good" or "just," as measured by the doctrine of each theory, and so judge the result at that level.<sup>68</sup> But within a system that ratifies the "first-come-first-served" principle, the controversy between the late-comer who was shut out by the first-comer who takes all of the offered resources cannot be resolved in the context of the dominant distributive theory. That debate must take place in the context of corrective principles, which provide the justification for nonconsensual transfers to adjust maldistribution. The corrective principles may limit the distributive principle within certain circumstances that prevail between individuals. So, for example, the "first-come-first-served" principle could still operate in a system that included a corrective principle of allowing a late-comer to compel the transfer of the proceeds of the race upon a showing that the putative first-comer was not "really" first, or was "first" only because of some culpable behavior during the race. Pressed against this elementary, and perhaps oversimplified, framework of analysis, the Indiana statute contains features that are difficult to integrate into the common law of torts.

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<sup>67</sup>Professor Glanville Williams illustrated the problem in the context of his discussion of the deterrence function:

Lundstedt denies that there is necessarily a moral basis for the law of tort, even where liability is confined to cases of *culpa*. He seeks to prove this denial by an example. 'Through the negligence of a poor man a millionaire has suffered damage estimated at £500. Surely it would not be in accordance with the sentiment of justice that the poor man should eventually be forced to beg for his living in order that the millionaire might obtain his "satisfaction"?' In Lundstedt's opinion, not only is such a transfer unjust; it is, if regarded in isolation, socially undesirable. Only by taking a broad view can we discover it to be for the public good to maintain, without exception, a rule whereby damage ought regularly to be so transferred.

Williams, *supra* note 11, at 145.

<sup>68</sup>That is, a utilitarian would say that the principle and hence the system is just to the extent that it maximizes social utility, and the resulting distribution to a single individual would be irrelevant. An egalitarian would maintain that the principle (thereby the system) is unjust because it permits an unequal distribution, and the resulting distribution to a single individual demonstrates the injustice. A social choice theorist would say that so long as society rationally has chosen the principle to govern (perhaps on the basis that it "knew" such results were possible), the result is what society wanted and is therefore just, and so on.

The statute purports to establish the distributive principle of entitlement to compensation upon demonstration of need to repair a pecuniary loss. It purports to correct maldistribution (the burdens of personal injury) by requiring compensation, but from only one source among all "applicable sources." The definite shift in emphasis from corrective retributive and deterrent functions to distributive and corrective compensation functions will be difficult to harmonize with the established common law of torts.<sup>69</sup> For example, as demonstrated above,<sup>70</sup> the statement of the distributive principle does not help the triers of law and fact to ascertain "applicable sources" in doubtful cases, because the corpus of the Act in large part contradicts the principle.

From the perspective of distributive theories of justice on the "higher" order of coordination of lives and fortunes, the Act is not likely to bring about drastic change, because decisions about whether to insure oneself from accident or liability or both are affected more directly by other social and psychological forces. Likewise, persons will be no more able to predict whether they will hurt or be hurt by someone with insurance after the Act than they were before its enactment. But once the law of "personal injury actions" contained in the statute is invoked by those who appeal to the justice system to reorder their lives, the culmination of the corrective process as modified by the Act is bound to affect the view of those subject to it. As cognizance of the statute's inconsistent treatment of "direct" and "indirect" benefits grows, for

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<sup>69</sup>For the remainder of the article, the discussion will evaluate the statute using John Rawls' "fundamental social problems" of "coordination, efficiency, and stability" as the criteria. Rawls expressed his ideas in this way:

Some measure of agreement in conceptions of justice is, however, not the only prerequisite for a viable human community. There are other fundamental social problems, in particular those of coordination, efficiency, and stability. Thus the plans of individuals need to be fitted together so that their activities are compatible with one another and they can all be carried through without anyone's legitimate expectations being severely disappointed. Moreover, the execution of these plans should lead to the achievement of social ends in ways that are efficient and consistent with justice. And finally, the scheme of social cooperation must be stable; it must be more or less regularly complied with and its basic rules willingly acted upon; and when infractions occur, stabilizing forces should exist that prevent further violations and tend to restore the arrangement.

J. RAWLS, *supra* note 62, at 6.

In some respects the critique will directly apply Rawls' criteria and in the same context as he expressed them. In others, the critique will be more general; for example, with respect to coordination, Rawls speaks of the problem of *individual* plans fitting together. Here the problem of coordination will also be addressed as one of fitting the legislative declaration of "personal injury law" into the established common law of torts, which also involves the matter of coordinating the sometimes conflicting institutional powers of the legislature and the courts.

<sup>70</sup>See *supra* notes 44-61 and accompanying text.

example, and members of society assess the justice they and others have received against the distributive principle declared in the Act, some disappointment and disenchantment with the system will likely result. To the extent that the retributive and deterrent functions of the common law corrective theory of justice are ingrained in social attitudes about the litigation system for redressing tortious conduct, the statute will significantly change that system. Persons who seek corrective justice through the torts system must establish their claims by reference to concepts of fault. Many who successfully meet the requirements of a *prima facie* case will nevertheless see tortfeasors at every level of blameworthiness escape liability. When it is explained that the law dictated such a result *because* of the insurance planning of the injured party, some are apt to wonder if the principle of liability apportioned by "fault" is meaningful at all.<sup>71</sup>

The distributive principle declared by the Act is that one should be compensated based on need, which is determined by whether the person seeking compensation has received payment from one of the sources not excepted by the Act. The necessary corollary to that principle is a mirror image of another distributive principle, which maintains that one is entitled to benefits on the justification of conscientious effort and expenditure of one's resources. That is, under the Act, the defendant becomes entitled to benefit from someone else's planning and expenditure when he produces injury through conduct that society has otherwise deemed culpable. The potential for a system employing such a principle to satisfy those who believe the torts system is *also* for the purpose of correcting faulty conduct is minimal. It is likely to produce pressures for redistribution to permit injured parties to participate in the insurance planning of defendants on the grounds of an amalgam of principles of equalization and moral desert. The argument is likely to take this form: If defendant is able to participate in plaintiff's transactions on the basis of an assessment of need for corrective compensation, so too should the plaintiff be entitled to participate in defendant's insurance planning on the basis of an assessment of a need for corrective retribution and deterrence, and the balance should be struck by equalizing the competing claims. That could be done by allowing *partial* participation by both. Plaintiff would not receive full compensation because he would not deserve double recovery. Defendant would not be able fully to escape

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<sup>71</sup>To the extent that the enactment succeeds in transferring the burden of the cost of accidents to accident and health insurers, the effect will have been to move the torts compensatory system into a "no-fault" regime without modifying the substantive law requiring a showing of fault or other refinements. See generally G. CALABRESI, *supra* note 34; R. KEETON & J. O'CONNELL, *supra* note 35.



liability because he would deserve to pay some retribution and feel some effects of a deterrent sanction.<sup>72</sup>

Objection to the views just articulated is bound to arise on grounds of efficiency—yet another criterion for evaluating the system of justice. That objection, stemming from the distributive principle of the Act, would maintain that if a plaintiff were able to obtain more than the pecuniary value of the injury, the system would be requiring a corrective transfer of wealth from the defendant to the plaintiff where no correction was necessary. To the extent that the plaintiff would be getting more than the cost of the transaction contemplated, the argument proceeds, the system would be inefficient.

These efficiency arguments would bear a close relationship to the objections raised in the critical literature against the common law rule of exclusion and the responses to those objections. In that debate, the assertion has been that double recovery amounts to a windfall, and that plaintiffs are no more entitled to windfalls than defendants. The criticism was offered in the form of an argument grounded in concepts of moral desert, not so much as a challenge to the common law's moral assertion that blameworthy defendants deserve to pay, but that plaintiffs may not always deserve to get a windfall.<sup>73</sup> In a clash of moral claims, some tension is created that produces an impetus to identify a neutral principle with which to resolve the conflict. Here the assertion would be that who deserves the windfall can be decided by reference to the distributive principle that reflects society's desire to be efficient in allocations and transfers of pecuniary resources. The argument would continue that if the aim of the compensation function is to redress injury by putting the injured party back in the position enjoyed prior to the injury, and the best way to do that is to compel a transfer of defendant's assets to cover the plaintiff's pecuniary loss, a transfer greater in amount than the loss would be dysfunctional and inefficient.

The responses to the critics' challenge to the moral justification for applying the rule may be apt, even in the absence of a moral contrast between "wrongdoer" and injured party. In response to the assertion that the plaintiff may not be more entitled to a windfall than the

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<sup>72</sup>The justification for this result is grounded on both the distributive principle that one should receive no more than a fair share, and the corrective principle that involuntary transfers of wealth are necessary when one has injured another through culpable conduct. Neither principle is fully satisfied, but to the extent that full satisfaction of one means no satisfaction of the other, the two are in conflict and cannot coexist. The three possible alternatives in such situations are: (1) one principle is discarded in favor of the other; (2) the two alternate in applicability; or (3) a new principle synthesizing the two originals is developed. The result of this solution is an example of the exercise of the third option and maintains essential relationship to both competing principles.

<sup>73</sup>See Peckinpugh, *supra* note 1, at 550-51; *Unreason*, *supra* note 1, at 748-49.

defendant, the proponents of the basic rule have challenged the assumed truth of the assertion that plaintiff would receive a double recovery. Such responses take two forms: (a) a general recognition that contracts of insurance sometimes permit the insurer to be subrogated to the rights of the insured and entitle the insurer to reimbursement from the proceeds of the judgment; (b) a counter-assertion that the compensation received is frequently not "full."<sup>74</sup> This latter approach, in turn, branches to mean: (1) that accident insurance is not perfect, and some items of injury are usually not covered by the insurance policy, such as expenses governed by deductibles clauses, or pain and suffering; and (2) that other detriments to the plaintiff arose by virtue of having to resort to litigation to obtain recompense from the tortfeasor, such as time, trouble and aggravation, or attorney's fees, which traditionally are not compensable items in tort damages.<sup>75</sup>

With respect to the justification for the common law rule that plaintiffs are often required to repay insurance carriers from the proceeds of judgments, the General Assembly has responded to concern about the effect of the new rule of inclusion. The Act specifically makes admissible "proof of the amount of money that the plaintiff is required to repay, including workmen's compensation benefits, as a result of the collateral benefits received; . . ."<sup>76</sup>

Because the Act's purpose clauses establish pecuniary loss and a single recovery as the primary considerations for evaluating personal injury claims, admission of evidence of subrogation rights is clearly consistent with the distributive and corrective principles of the legislative declaration.<sup>77</sup> The jury may thereby take into account the fact that the

<sup>74</sup>See *Unreason*, *supra* note 1, at 750, where the author discusses the argument posed here. The argument is treated as a general justification for the rule rather than as a counter-assertion to opponents of the rule. See also *McWeeney v. New York, N.H. & H.R.R.*, 282 F.2d 34, 37-39 (2d Cir. 1960), *cert. denied*, 364 U.S. 870 (1960); *Hudson v. Lazarus*, 217 F.2d 344, 346 (D.C. Cir. 1954), *cert. denied*, 350 U.S. 856 (1954); 2 V. HARPER & F. JAMES, *THE LAW OF TORTS* § 25.22 (1956).

<sup>75</sup>See *Fleming*, *supra* note 1, at 1499; *Lambert*, *supra* note 1, at 542.

<sup>76</sup>IND. CODE § 34-4-36-2(2) (Supp. 1986).

<sup>77</sup>The Act also appears to adjust subrogation rights to more nearly reflect the jury's assessment of the pecuniary losses in the case. The first section of the Act provides:

In any action tried under this chapter, any subrogation or lien for collateral benefits received by the prevailing party shall be reduced by the ratio of the lower of the prevailing party's judgment or collected judgment to the amount of damages the trier of fact found the prevailing party to have sustained.

Act of March 11, 1986, Pub. L. No. 201-1986, 1986 Ind. Acts 1959 (codified at IND. CODE § 34-4-33-14 (Supp. 1986)).

It might appear that the General Assembly has enacted a duplication of an existing section which already affects subrogation claims, in light of the section of the Comparative Fault Act, IND. CODE § 34-4-33-12 (Supp. 1986), that reduces subrogation claims and liens in the same proportion as the claimant's recovery is diminished, and in some instances the two sections do operate identically.

subrogation rights of the insurer will offset any potential for double recovery by the plaintiff. This places a responsibility upon plaintiff's counsel to present clearly the obligation to repay and request instructions designed to assure that the jury understands the effect of that obligation in producing the net amount of pecuniary loss. Other problems with

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Important differences exist, however, as demonstrated below. The differences seem to indicate an intention to assure that injured parties not at "fault" will not be under-compensated as a result of the operation of the rule of inclusion in conjunction with subrogation rights.

The section is inartfully drafted, but seems to mean that when a plaintiff recovers less than the damages assessed in an action covered by the Comparative Fault Act, the subrogee or lien holder can recover only that amount that is in the same proportion to the original claim as the plaintiff's recovery bears to the assessed damages. That amount is determined mathematically by first finding the quotient of the recovery divided by the damages amount and then multiplying the amount of the original subrogation or lien by that quotient.

To demonstrate the effect of the provision, several illustrations are necessary, each with an increasing amount of complexity. The simplest will deal with the case where injuries are fully covered by insurance: Assume that Plaintiff incurred medical expenses in the amount of \$10,000, which were paid by Insurer. Insurer now has a potential subrogation claim in the amount of \$10,000. If Plaintiff's damages are assessed at \$10,000 and the jury also finds Plaintiff to be at fault by 50%, the verdict will be for \$5,000. If Plaintiff recovers the full \$5,000, Insurer's claim will be reduced by 50% ( $\$5,000 \div \$10,000 = .50$ ) to \$2,500. In this way, the enactment assures Plaintiff (and the triers of law and fact) that Insurer will not be able to recover more on the subrogation claim than Plaintiff has recovered. This arrangement prevents the possibility that Plaintiff will bear more responsibility for the injury than the jury's apportionment of "fault" would allow.

The more complicated version operates the same way: Again, assume that Plaintiff proved medical expenses of \$10,000, which were covered by Insurer's policy, but this time only to the extent of 80%. At that point, Insurer's subrogation rights would total \$8,000. Suppose further that the jury, after finding Plaintiff's damages to be \$10,000, also found Plaintiff to be 50% at fault, and rendered a verdict for \$5,000. If Plaintiff recovers the full \$5,000, Insurer's claim is reduced by 50% ( $\$5,000 \div \$10,000 = .50$ ) to \$4,000. In this illustration Plaintiff must bear responsibility for \$1,000 of the \$2,000 that the injury has cost.

The two previous illustrations have ignored the effect of the legislative rule of inclusion. Here is what happens when Defendant attempts to introduce evidence of Plaintiff's receipt of insurance benefits in the second illustration: Assume that the insurance cost Plaintiff \$1,000. If Plaintiff has "directly purchased" the insurance, the receipt of collateral benefits is inadmissible and the jury may not consider them. (Also, Defendant's counsel, being fair, did not first ask Plaintiff if any benefits were received from insurance and then ask how those benefits were purchased.)

If the transaction somehow falls outside the Act's exceptions and amounts to an "indirect" purchase, the importance of the effect of the new rule of inclusion becomes apparent: "damages" are no longer measured by simply using the concepts of "special" and "general" damages, but are a function of the determination of the "pecuniary losses" Plaintiff has suffered. The jury determines damages by offsetting the amount of the expenses by the amount of the benefits, less the cost to Plaintiff for those benefits. In determining Plaintiff's "pecuniary loss," the jury, doing the computation correctly, would start with the \$10,000 medical expenses. From that amount it would deduct the \$8,000 in collateral benefits. To

respect to this aspect of the statute will be discussed below,<sup>78</sup> but so long as the focus is upon avoiding the potential for recovering more than the economic cost of the injury, the Act squarely meets the common law rule's defenders' arguments for retaining the exclusionary effect; any allowance of damages greater than the actual pecuniary loss would represent an economically dysfunctional transfer of resources. Proponents of the equalized partial compensation/retribution approach would be required to justify the transfer on other grounds<sup>79</sup> which overcome this

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the \$2,000 remainder it would then add back the \$1,000 it cost Plaintiff to get those benefits. Plaintiff's "pecuniary losses" would then total \$3,000. The jury would then determine "damages" to be \$3,000. If it finds Plaintiff's "fault" to be 50%, the verdict would be in the amount of \$1,500. Insurer's lien would then be reduced by 50% ( $\$1,500 \div \$3,000 = .50$ ) to \$4,000. Plaintiff would be required to repay the subrogation claim, if at all, only to the extent of the judgment. A strong argument could be maintained that the subrogee cannot recover anything on the grounds that Plaintiff's recovery has not exceeded his actual losses, and he would therefore not be "unjustly enriched" by retaining the full amount of the proceeds of judgment. On the adjustment of subrogation rights which exceed the amount of judgment, see generally Wilkins, *The Indiana Comparative Fault Act at First (Lingering) Glance*, 17 IND. L. REV. 687, 740-46 (1984).

When Plaintiff is found to be free of "fault," the "ratio of the lower of the prevailing party's judgment or collected judgment to the amount of damages the trier of fact found the prevailing party to have sustained" is, of course, 1:1, or 100%. The operation of the enactment means that the subrogation rights or lien are reduced by 100%, and the faultless Plaintiff is not required to bear any of the cost of the injury. Thus, in this situation, the difference between the new subrogation reduction section and the original one can be seen: Under the original section, because "diminution" of Plaintiff's recovery is the triggering device, no reduction occurs unless such diminution occurs. Under the new section, reduction occurs "by the ratio" of (collected) judgment to damages, and if Plaintiff recovers full damages, that ratio is 100%.

<sup>78</sup>See *infra* notes 86-89 and accompanying text.

<sup>79</sup>Such an approach would have to maintain that what might appear to be a breach of the compensatory function is actually a cost imposed against the defendant and in favor of the plaintiff to reflect the corrective aims of the system. See *supra* note 34 and accompanying text for discussion of other aspects of this approach.

Professors Keeton and O'Connell have articulated the idea this way:

It is often stated that the principal objective of tort law, and of any automobile claims system, is to compensate for loss. More precisely, however, the objective is to determine whether to compensate, and if so, how. Tort law prescribes the negative of compensation—the circumstances under which compensation will not be awarded—as well as the affirmative. Underlying the whole body of tort law is an awareness that the need for compensation, alone, is not a sufficient basis for an award. When a plaintiff receives a defendant's payment in satisfaction of a judgment obtained in court, loss is not compensated in the sense that it is somehow made to disappear. It is only shifted: To the extent that the plaintiff gains, the defendant loses. Moreover, the machinery for adjudicating whether and how loss is to be shifted is provided at considerable economic cost to the community and to the parties. To the costs of courts to society and the costs of lawyers to the parties must be added other less tangible and direct costs; for example, the costs of missing work to testify in court, the discomfiture and even agony of recreating the accident at the trial, and the anger and frustration

economic efficiency argument or expand the scope of the economic efficiency inquiry to include consideration of other costs and benefits and directly refute the claim of efficiency.<sup>80</sup>

Considerations of efficiency in the system of justice include not only the efficiency of allocations and transfers of monetary resources, but also the efficiency of the legal processes by which those allocations and transfers are accomplished. On this plane of analysis, the enactment has reversed the emphasis of the common law rule of exclusion. Under the common law, the potential for loss of efficiency in the occasional case involving a plaintiff who was not obligated to repay was offset by the gain of efficiency in not requiring presentation to the jury of evidence and instructions concerning the existence of such an obligation. In order to assure that the occasional case will be captured by the distributive and corrective principles operative in the Act, the General Assembly has required that every other case include the evidence of repayment obligation. The marginal gains made possible under the new rule therefore are achieved at significant administrative costs,<sup>81</sup> and those costs are

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of a courtroom fight. When loss is shifted by way of an award, these costs of adjudication, tangible and intangible, produce a net loss from an over-all point of view unless advantages outweighing them are realized.

From a recognition of this truth emerges a basic principle underlying both tort law generally and that segment of tort law concerned with automobile cases: An award is not made unless there exists some reason other than the mere need of the victim for compensation. Otherwise, the award will be an arbitrary shifting of loss from one person to another at a net loss to society due to the economic and sociological costs of adjudications.

R. KEETON & J. O'CONNELL, *supra* note 35, at 242.

<sup>80</sup>Judge Richard Posner provides an analysis that would challenge the fundamental validity of the argument on the larger scale of economics, and one that is clearly grounded in corrective theory. In his text, he sets out the following analysis of the collateral source rule:

If an accident insurance policy entitles me to receive \$10,000 for a certain kind of accidental injury and I sustain that injury in an accident in which the injurer is negligent, I can both claim the \$10,000 from the insurance company and obtain full damages (which let us assume, are \$10,000) from the injurer, provided I did not agree to assign my tort rights to the insurer (subrogation). To permit the defendant to set up my insurance policy as a bar to the action would result in underdeterrence. The economic cost of the accident, however defrayed, is \$10,000, and if the judgment against him is zero, his incentive to spend up to \$10,000 (discounted by the probability of occurrence) to prevent a similar accident in the future will be reduced. Less obviously, the double recovery is not a windfall to me. I bought the insurance policy at a price presumably equal to the expected cost of my injury plus the cost of writing the policy. The company could if it wished have excepted from the coverage of the policy accidents in which the injurer was liable to me for the cost of the injury, or it could have required me to assign to it any legal rights that I might have arising from an accident. In either case my premium would have been less.

Some courts have had trouble when the collateral source benefit was not

imposed against the cases that would have come out the same under the common law rule as they will under the new rule anyway.

On this scale of efficiency, the new statute presents some serious problems that the General Assembly should address at its earliest opportunity. In addition to the problems discussed above, the statute contains other flaws which not only bring it into conflict with existing sections of the Comparative Fault Act, but which also turn the enactment on itself and present opportunities for results not in keeping with its objective.

First, with respect to the existing subrogation claims and liens reduction section of the Comparative Fault Act, the new enactment does not contain exceptions that are prominent in the former provision. Section 12 of the Comparative Fault Act reduces all such claims and liens "other than a lien under IC 22-3-2-13 [workers' compensation] or IC 22-3-7-36 [occupational disease]."<sup>82</sup> The new enactment applies to "any subrogation or lien for collateral benefits."<sup>83</sup> Whether this difference represents a shift in policy by the legislature to permit the imposition of some responsibility upon some employers who were at fault in producing a worker's injury, or is simply an oversight is not clear.<sup>84</sup> It is clear that courts will be faced with a dilemma concerning which section to apply.<sup>85</sup>

When juries begin to apply the new enactment against the background of the evidence that can now be admitted, some problems of coherency will result from its poor construction by the legislature. The source of this difficulty is subsection 2(3), which permits the fact-finder to hear

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rendered pursuant to a contract but was "gratuitous." However, most gratuitous benefits turn out to be ones for which the beneficiary has paid indirectly. If an employer gives his injured employees medical treatment free of charge, this means only that the employer pays for their labor partly in money and partly in kind, so that the money wage would be higher if the "gratuitous" benefits were lower. (What about social security benefits?)

R. POSNER, *supra* note 34, at 186.

<sup>81</sup>Those costs may be reflected in the complexity of the activity needed to evaluate the point in contention, and in the consequent potential for confusion and error, as well as in the more direct costs of time and expense. The Act may well involve such costs, as illustrated *supra* note 77 in the discussion of how the subrogation reduction section of the Act works.

<sup>82</sup>IND. CODE § 34-4-33-12 (Supp. 1986) (emphasis added).

<sup>83</sup>*Id.* § 34-4-33-14 (emphasis added).

<sup>84</sup>See generally Wilkins, *supra* note 77, at 751-56 for discussion of the workers' compensation lien exception in section 34-4-33-12.

<sup>85</sup>Conventional techniques of statutory interpretation would suggest an "implied repeal" of the earlier statute, if it is unavoidably in conflict with the later one. See Payne v. Buchanan, 238 Ind. 231, 238, 148 N.E.2d 537, 540 (1957); see also Schrenker v. Clifford, 270 Ind. 525, 387 N.E.2d 59 (1979); Lloyd v. State, 270 Ind. 227, 383 N.E.2d 1048 (1979).

evidence of "proof of the amount of money that the plaintiff is required to repay, including workmen's compensation benefits, as a result of the collateral benefits received; . . ."<sup>86</sup>

Because the statute provides no statement other than the general statements of purpose about *how* the newly admitted evidence is to affect the findings of fact, the jury might rationally conclude that an obligation to repay offsets the effect of reduction for receipt of the benefits. That is, a jury trying to compute its verdict might well decide that because the plaintiff is obligated to repay the benefits received, the amount of those benefits should be reflected in the recovery so that the plaintiff will not be required to incur further out of pocket expenses.<sup>87</sup> The problem is that the plaintiff's obligation to repay cannot be definitely ascertained until *after* the verdict has been rendered, and if a jury misapprehends the purpose of the evidence of the plaintiff's obligation to repay, in the manner suggested above, it may well inadvertently *change* the plaintiff's obligation.<sup>88</sup> Considering the statute as a whole, such a result would run directly counter to the apparent intent. The language of the enactment permits such a result, however, and unless the jury is carefully and completely instructed on the effect it is to give to such evidence, the statute will be permitted to cannibalize itself.<sup>89</sup> Even if no error occurs, the adjustment will have come at the expense of greater administrative costs.

Another form of the arguments critical of the common law rule in this context posits that the courts have been so concerned that juries would be "prejudiced" by the inclusion of evidence of collateral com-

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<sup>86</sup>IND. CODE § 34-4-36-2(3) (Supp. 1986).

<sup>87</sup>To illustrate:

The jury considers Plaintiff's \$10,000 expenses as the starting point. Hearing evidence that the Plaintiff received \$8,000 in benefits and charged that it is to determine Plaintiff's "actual pecuniary loss," it would then deduct that \$8,000 from the expense, leaving \$2,000. Having heard that Plaintiff is obligated to repay that \$8,000, however, the jury might well decide to adjust its findings to assure that Plaintiff does not have to repay those benefits out of pocket. If it adds back the \$8,000 and the verdict is \$10,000, the intended effect of having it consider evidence of collateral source benefits is frustrated.

<sup>88</sup>That would happen in this way:

In the example given *supra* note 87, the verdict was for full damages. When damages and the verdict are equal, the "ratio" is 1:1 or 100%, and the subrogation rights are extinguished. In its effort to give Plaintiff a source of funds out of which to satisfy the subrogation claim, the jury will have actually erased the obligation and would permit a double recovery, even though it believed, correctly at the time it began its adjustment, that Plaintiff was required to pay the benefits back.

<sup>89</sup>Given the indirectness of such evidence, the complexity of comparative fault in general, the complexity of subrogation claims and liens and the reduction factor, and the number of mathematical computations that the jury has to perform, it is doubtful that even the most careful instruction will be able to prevent errors.

pensation sources that the exclusionary effect of the rule must reflect a belief that juries applying common morality would find it unconscionable for the plaintiff to obtain double recovery.<sup>90</sup> This argument finds support in empirical studies conducted thirty years ago at the University of Chicago.<sup>91</sup> Proponents of the rule have not come forward with countering empirical evidence and (consequently?) have not directly responded to the argument. Of course the common law rule was well in place long before any empirical data on jury behavior were available. The judicial attitude may well reflect a concern for prejudice to defendants' interests as well as plaintiffs'. The justification that the rule was prejudicial to the plaintiff was a relatively recent development in Indiana, and supports the view that courts are concerned about the jury deciding issues of liability and damages in favor of defendant when it is presented evidence of collateral source benefits.<sup>92</sup> It is interesting to note, however, that the court in *Brindle v. Harter*,<sup>93</sup> which articulated this view, relied upon decisions that the admissibility of evidence of insurance was prejudicial to *defendants*, and applied this reasoning to collateral source evidence "by analogy."<sup>94</sup> The *Brindle* court's reasoning thereby reflects a judicial approach that is rooted as much in a concern about the prejudicial effect of evidence of insurance toward the defendant as the plaintiff. The legislative attitude reflected in the Act rejects that approach. It may be true that in this modern day of personal injury litigation, with financial responsibility laws inducing the purchase of automobile insurance and the widespread utilization of health and accident coverage plans, juries will assume that insurance protection is available.<sup>95</sup> If that is true, then the concern should be with what effect that assumption has on the dispensation of justice at the hand of the jury. No clear answer is available; the same empirical study that supports the rule of inclusion also suggests that where uncertainty about coverage exists, jurors operate somewhat erratically in the atmosphere of doubt about the appropriateness of taking it into account. Some people might see the "absence" of insurance as defendant's fault, while others might

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<sup>90</sup>Esdaile, *supra* note 1, at 105; Peckinpugh, *supra* note 1, at 550-51; *Unreason*, *supra* note 1, at 749.

<sup>91</sup>See Esdaile, *supra* note 1, and authorities cited therein. In his article, Mr. Esdaile cites an empirical study by Professor Harry Kalven, in which Professor Kalven provides a brief overview of the study conducted by The Jury Project of the University of Chicago Law School. In his article, Professor Kalven observes that the persons who participated in the study expressed a sensitivity to situations where the plaintiff has obtained compensation from other sources and tended to reduce damages in such cases. Kalven, *The Jury, The Law and the Personal Injury Award*, 19 OHIO ST. L. J. 158, 169 (1958).

<sup>92</sup>*Brindle v. Harter*, 138 Ind. App. 692, 311 N.E.2d 513 (1965).

<sup>93</sup>*Id.*

<sup>94</sup>*Id.* at 699-700, 211 N.E.2d at 517-18.

<sup>95</sup>See Kalven, *supra* note 91, at 171.



favor the plaintiff and attempt some rough "equity" at the risk of putting the burden on the carrier.<sup>96</sup> The modern torts system wrought by the "reform" of common law by the General Assembly places importance upon the efficiency of allocation and transfer of resources, while it also confers an increased responsibility upon the jury to evaluate the cases brought before it, on issues of liability as well as damages. In such a system, opening up matters of insurance coverage purchased by the plaintiff to jury consideration while keeping the matter of insurance coverage purchased by the defendant for protection in the event of liability seems to be giving the jury only half the facts it needs to decide the ultimate issue. That issue includes matters of correction in the retributive and deterrence sense as well as in the sense of needed compensation. The jury's input into the evaluation of the case ought to include its decision about which side of the controversy should bear the costs of the accident, and whose insurance fund should reflect them. An objection that such a system would be allowing the jury to get involved with "questions of law," when its proper function is to deal with "questions of fact," begs the question. The present system already lets jurors do that, and sends them off to deliberate in secret with only part of the facts and law involved in the case and the hope that they will properly do justice equipped with that partial knowledge. If the response is that this type of system is an adjustment too far the other way, then perhaps a middle-ground approach could be identified. A system that permitted instructions of law based upon the partial equalized compensation/retribution approach might help keep the jury in line and address both sides of the debate.<sup>97</sup>

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<sup>96</sup>*Id.*

<sup>97</sup>Professors Keeton and O'Connell recognized the advisability that the system address both sides of the controversy:

This principle is not a denial of the central importance in tort law of the need to compensate for loss. Rather it is a recognition that good rules of law for determining when and how losses are to be compensated must reflect concern for the interests of those who pay awards as well as those who receive them. Also, recognition of this basic principle of preserving the status quo when lacking good reason for change does not imply that the principle is ordinarily decisive. Doing justice, after all, is the main objective. Surely the costs of adjudication, calculated in even the most inclusive terms, are a modest price to pay if the system achieves this end. It has long been assumed that doing justice ordinarily requires a wrongdoer to compensate his innocent victim; and since it is so often concluded that there is good reason for regarding one party as a wrongdoer and the other as his innocent victim, the principle of preserving the status quo in order to save the costs of adjudication will rarely be controlling. The principle remains valid, however, for occasionally it will be decisive, and it serves also as a reminder that the search for defensible bases for shifting loss must be pressed beyond the simple need for compensation.

R. KEETON & J. O'CONNELL. *supra* note 35, at 243.

The third criterion for evaluating a system of justice, the social need for stability in that system, is also implicated in the interjection of the new rule of inclusion into the common law of torts. In shifting the business of courts and juries away from the traditional corrective approaches to resolving personal injury disputes and more narrowly focusing that business upon a distributive principle, the Act is likely to generate repercussions in the process of accommodating the system to the change.

Much of what has already been discussed is relevant in this consideration of stability. For example, to the extent that the new rule's potential for defeating the expectations of those who seek judicial dispute resolution is realized, satisfaction with the manner in which the system adjusts competing claims will wane. A realization of the possibility that the complexities in applying the new rule will produce higher economic and administrative costs or greater potential for error will also lower estimations of the quality of justice the system has to offer. Impetus for change or a search for alternatives might result from the decline in gratification or unwillingness to incur greater costs. Loss of the opportunity to obtain retribution against the background of requirements focused upon proof of "fault" might induce some pressure to modify those requirements. It is certainly too early to leap to any conclusions on these issues, but just as when a stone is thrown into a pond, the level of the pond is raised, and the ripples linger long after the stone has come to rest, the new rule will have a similar effect on the common law. The pond and the common law are flexible enough to find new points of equilibrium, thereby adjusting to accommodate the new part into the entire system. But the nature of the pond and the common law are nevertheless forever changed.

Recognition that the legislative rule emphasizes the compensatory function and that it does so by exclusive reference to pecuniary losses will possibly refuel efforts to induce the common law to recognize costs of personal injury litigation as compensable pecuniary losses. Arguments for the recovery of attorney's fees are to be expected on the grounds that such fees represent a pecuniary loss to the plaintiff, occasioned by the defendant's culpable conduct, effectively reducing the recovery amount, which the Act blithely treats as a refined method of identifying what the plaintiff has been required to give up as a result of the injury caused by the defendant.<sup>98</sup>

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<sup>98</sup>The General Assembly has already declared a policy in favor of recovery of attorney's fees, and has thereby established a position directly opposed to the common law rule. An enactment passed in the same session as the one here discussed provides:

In any civil action, the court may award attorney's fees as part of the cost to the prevailing party if it finds that either party:

(1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;

Less likely, perhaps, but still plausible, are arguments that the common law should recognize what the legislature has not, concerning other costs of litigation not reimbursed by collateral benefactors. Such arguments will ask the courts to permit awards reflecting the inconvenience, aggravation, or humiliation experienced by those forced to resort to litigation in order to obtain redress. To be certain, these items of damage were not arguable in the common law prior to the Act, but they were barred by other rules of exclusion which may come under new scrutiny in the atmosphere of change brought about by the adoption of the new rule of inclusion. The common law rules of exclusion were not pronounced and intended to be applied in a vacuum; they were developed within a coherent system. In such a system, modification of one rule is likely to produce secondary effects, placing pressure on other rules. The legislature's piecemeal change in the rules of the process will produce efforts to reassess the continued vitality of the other rules of exclusion.

The new roles and responsibilities imposed on juries by this enactment and the Comparative Fault Act perhaps signal a public view that juries ought to have more to hear and say in the adjustment of disputes between their peers. The legislature's readiness to open juries' eyes and minds to complex issues of percentages of "fault" and pecuniary losses reflects a greater faith in jurors' abilities than the common law's rules of exclusion have shown. The light of comparison casts an unflattering shadow of paternalism across the face of the common law. If the General Assembly's faith is fulfilled, perhaps it should not lie in the mouths of common law judges to refuse to consider whether they ought to give the jury all of the information it needs to decide how the disputants' resources and losses should be distributed.

Finally, inasmuch as the Act is another in a series of legislative incursions into the common law of torts,<sup>99</sup> stability is implicated on the scale of institutional coordination. On this scale, the perspective is that of concern with the relationship between the courts and the legislature as institutions of government in fashioning the law to be applied and

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(2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable or groundless; or

(3) litigated the action in bad faith.

Act of March 11, 1986, Pub. L. 193-1986, 1986 Ind. Acts 1944 (codified at IND. CODE § 34-1-32-1(b) (Supp. 1986)).

"Groundless" may be a relatively concrete standard by which to judge the appropriateness of actions and defenses. "Frivolousness" and "unreasonableness" are far more abstract and flexible standards, providing considerable leeway for assertion of the right to recover.

<sup>99</sup>The Comparative Fault Act, IND. CODE §§ 34-4-33-1 to -14 (Supp. 1986); the Medical Malpractice Act, IND. CODE §§ 16-9.5-1-1 to -10-5 (1984 & Supp. 1986); the Products Liability Act, IND. CODE §§ 33-1-1.5-1 to -8 (1984 & Supp. 1986); and the seatbelt statute, IND. CODE §§ 9-8-14-1 to -6 (Supp. 1986).

the manner of application in the trial of disputes involving personal injuries. The issue becomes whether a conflict exists between the legislature's exercise of power and that of the courts. To be certain, the legislature does have some power to affect the judiciary by adopting rules of procedure, jurisdictional requirements, limits on and bases of recovery, and the like. Mixed judicial and legislative functions are necessary complexities in ordering the system of justice in a complex society. But a dual role is not inescapable, and the courts have maintained an area of exclusivity with respect to procedural rules. As students of the law soon discover and are frequently reminded thereafter, deciding which rules are substantive and which are procedural is not always clear cut, however. The Indiana Supreme Court has attempted to state some guidelines in establishing the dividing line:

In general terms substantive law can be defined as including that body of rules which regulates the conduct and relationship of members of society and the state itself as among themselves apart from the field of litigation and jurisdiction. In general form procedural law can be defined as that body of law regulating the conduct and relationship of individuals, courts, and officers in the course of judicial litigation.<sup>100</sup>

Challenges to the constitutionality of this Act may not be inevitable, but to the extent that it is perceived to be a legislative declaration that goes beyond the bounds of that necessary area of mixed functions, it may induce a reaction on constitutional grounds. In the new chapter created by the Act entitled "Jury Instructions in Personal Injury Actions"<sup>101</sup> and in the first purpose clause,<sup>102</sup> the General Assembly has created the issue of whether the statute amounts to an impermissible legislative rule of procedure or merely a new statement of substantive law.<sup>103</sup>

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<sup>100</sup>State v. Gibson Circuit Court, 239 Ind. 394, 399, 157 N.E.2d 475, 478 (1959) (quoting 1 GAVIT, IND. PLEADING AND PRACTICE § 5 at 11 (1950)). The court expanded upon the treatise definitions by stating:

As a general rule laws which fix duties, establish rights and responsibilities among and for persons, natural or otherwise, are substantive in character, while those which merely prescribe the manner in which such rights and responsibilities may be exercised and enforced in a court are procedural.

The time, place and method of doing an act in court properly fall within the category of procedural rules and are appropriate subjects for such regulation. *Id.* (citation omitted). The court held that the rule of court pertaining to change of venue superseded a statute on the same subject, upon finding that the statute was a rule of procedure.

<sup>101</sup>IND. CODE § 34-4-35-1 (Supp. 1986).

<sup>102</sup>*Id.* § 34-4-36-1.

<sup>103</sup>According to case law, if the supreme court has not issued a rule on the matter, the legislature is within the proper exercise of its power to declare procedural rules, and

## V. CONCLUSION

The common law collateral source rule, being a rule of exclusion, has created tension in the trial of torts cases since its inception. Its definite, one-sided effect on the outcome of cases has provoked strong and polarized positions on both sides of the bar.<sup>104</sup> The approach of the courts to the rule was couched in fundamental terms giving the appearance that the rule itself was considered fundamental. So viewed, the need for further analysis seemed unnecessary to the courts, and the force of *stare decisis* perpetuated the rule's application for over a century

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may even declare such rules in an area where the supreme court has spoken, so long as the two rules are not in conflict. *State v. Bridenhager*, 257 Ind. 699, 279 N.E.2d 794 (1972). The supreme court has promulgated rule 51 of the Indiana Rules of Trial Procedure pertaining to jury instructions. That rule does not contain any language relating to the effect of tax consequences, of course, and the rule is stated generally in any event, so direct conflict between the Act's instruction and the trial rule does not exist. The striking feature of the trial rule is the discretion that it confers upon the judge in deciding whether and what to instruct the jury. The rule's mandatory effects are directed toward "the parties," and no part of the rule permits the parties to *compel* the reading of any instruction. *Cf. Hobby Shops, Inc. v. Drudy*, 161 Ind. App. 699, 317 N.E.2d 473 (1974). The new chapter of the Code created by the Act requires that the court "shall if requested, instruct the jury that the jury may not consider the tax consequences, if any, of its verdict." IND. CODE § 34-4-35-1 (Supp. 1986) (emphasis added). In contrast to trial rule 51, the statute removes the trial court's discretion, and the legislature has spelled out the content of the instruction. Clearly the General Assembly has taken a different approach and has gone further than the supreme court itself has to direct the conduct of the participants in litigation. Whether this direction will amount to an impermissible incursion into the exclusive realm of the courts will have to await review by the courts.

The first purpose clause of the Act purports: "to enable the trier of fact in a personal injury or wrongful death action to determine the actual amount of the prevailing party's pecuniary loss." IND. CODE § 34-4-36-1 (Supp. 1986). The provision is not clearly purely substantive or procedural, which gives rise to the issue. One might argue that "to enable" has a procedural connotation, but the remainder of the clause surely deals with the substantive content of the legislature's notion of the proper measure of damages (*quaere*, indeed, whether the *measure* of damages is substantive or procedural). *How* the jury determines "pecuniary losses," however, is surely a matter of procedure, and it is arguable that the limited rule of inclusion determines how the jury goes about determining what is counted as "pecuniary loss." The General Assembly has been careful in its language selection, however, steering clear of imposing mechanical requirements upon the jury. Furthermore, the rule is one of inclusion of evidence that the courts have not previously recognized. In *Johnson v. St. Vincent Hosp. Inc.*, 273 Ind. 374, 404 N.E.2d 585 (1980), the supreme court observed that the challenged statute (the Medical Malpractice Act) made evidence admissible rather than inadmissible, and that the evidence that had been made admissible had been "expressly sanctioned by rules of evidence as declared by the courts." *Id.* at 393, 404 N.E.2d at 598. From those observations, the court concluded that the statute did not "take away from the courts their judicial authority." *Id.* The factual distinctions in the case of the enactment under discussion may prove to be crucial.

<sup>104</sup>*E.g.*, the juxtaposed articles, Lambert, *The Case for the Collateral Source Rule*, 1966 INS. L.J. 531, and Peckinpaugh, *An Analysis of the Collateral Source Rule*, 1966 INS. L.J. 545.

in this state. Upon close examination, the rule can be seen to have been a means of addressing several, even competing, principles; and the common law position had given primacy to the retributive and deterrent functions of the torts system, giving double effect to the compensatory function in some cases. The legislature, in declaring a new rule of inclusion, has answered the pleas of those who opposed the rule on the strength of arguments stemming from principles driving the compensatory function, and in doing so has shifted the balance to the other side. Such a dramatic shift would, in any case, be difficult to accommodate in our system of litigation, because of ingrained habits of conduct, and familiar patterns of thought and speech, to say nothing of the existence of 113 years of unbroken precedent. But the legislative rule as declared contains conceptual and mechanical difficulties which will magnify the expected problems. Some were perhaps avoidable. Given the legislative preference for distributive and corrective principles apparent on the face of the statute, some of these difficulties were unavoidable. So the old tension has not been relieved; rather, the beneficiaries of institutional resolution of the controversies producing it have merely been reversed. Moreover, the enactment is merely the latest in a series of efforts by the General Assembly to transport tort law out of the common law and into a legislative conceptualization, thereby raising issues of institutional coordination within the system. Mobilization of opposition to the rule is to be expected, not only in the form of direct challenges to the rule itself, but also in the form of increasing demands for further modification of the common law to accommodate the interests given primacy by the abrogated rule. The resulting debates should prove to be interesting.