52 6/26/68

Memorandum 68-66

Subject: Study 52 - Sovereign Immunity (Collateral Source Rule)

The attached memorandum indicates the many problems that must be taken into account in any attempt to specify by statute the extent to which the so-called "collateral source rule" applies to an action against a public entity. We believe that the memorandum clearly demonstrates that there is a great deal of uncertainty in existing California law and that the enactment of legislation to clarify the law would be desirable.

If the Commission concurs in the staff's conclusion, the staff will attempt to persuade a law review that this subject is an appropriate one for law review analysis. Hopefully, we can obtain the necessary background study by this means if it appears likely that the Commission will be making a recommendation on the subject. If we cannot persuade a law review to write a student note on the subject, we will submit a recommendation at a future meeting as to whether we should prepare a staff study on this problem or should retain a research consultant to make the background study.

Please read the attached memorandum prior to the meeting. We do not plan to discuss it at the meeting. The only decision to be made at the meeting is whether the Commission concludes that the matter is one on which legislation appears to be needed to clarify the law.

Respectfully submitted,

John H. DeMoully
Executive Secretary

MEMORANDUM ON COLLATERAL SOURCE RULE AS

APPLIED TO PUBLIC ENTITIES

BACKGROUND

Under the so-called "collateral source rule," compensation received by a plaintiff from a source wholly independent of the defendant-wrongdoer does not reduce the damages recoverable from the wrongdoer. The rule has been stated as follows:

> Where a person suffers personal injury or property damage by reason of the wrongful act of another, an action against the wrongdoer for the damages suffered is not precluded nor is the amount of the damages reduced by the receipt by him of payment for his loss from a source wholly independent of the wrongdoer. [Anheuser-Busch v. Starley, 28 Cal.2d 347, 349, 170 P.2d 448 (1946).]

The rule is generally applicable only in tort cases although the Supreme Court recently indicated that the rule might be applicable in a contract case if the breach has a tortious aspect. Salinas v. Souza & McCue Constr. Co., 66 Cal.2d 217, 57 Cal. Rptr. 337, 424 P.2d 921 (1967)(dicta).

The rule is based on the premise that the defendant should not escape from liability, nor should his liability be diminished, by reason of special benefits which the plaintiff obtains through the kindness of others or his own past foresight or efforts. Thus, the defendant is required to pay the full amount of damages even though the plaintiff has received items such as disability payments from an insurance company, wages from his employer, or pension payments from a public agency. The rule is clearly applicable where the plaintiff has bargained for the benefit, as in hospitalization insurance and continued wage benefits. However, gratuities receive a varied treatment. California law is unclear on the problem. In some states,

gratuities are the only source that is considered collateral. Maxwell, The Collateral Source Rule in the American Law of Damages, 46 Minn. L. Rev. 669 (1962). See also Fleming, The Collateral Source Rule and Allocation in Tort Law, 54 Cal. L. Rev. 1478 (1966); Note, Unreason in the Law of Damages: The Collateral Source Rule, 77 Harv. L. Rev. 741 (1964). In other states, gratuities are excluded from the collateral source rule. Thus, it has been held that a husband is precluded from recovering for nursing care because his wife, a registered nurse, gratuitously cared for him.. Maxwell, The Collateral Source Rule in the American Law of Damages, 46 Minn. L. Rev. 669 (1962). In another decision, a doctor who was gratuitously treated by another doctor as a matter of professional courtesy was not allowed to recover reasonable medical expenses even though he contended that he might be forced to render similar services in the future. Coyne v. Campbell, 11 N.Y.2d 372, 183 N.E.2d 891, 230 N.Y.S.2d 1 (1962). See discussion in [1963] Annual Survey of American Law 273, 373.

In Salinas v. Souza & McCue Constr. Co., supra, it was held that the collateral source rule does not apply in California to an action against a public agency. Souza & McCue Company won the contract for the construction of a Salinas sewer line. Armco was a supplier of equipment to Souza. Salinas sued Souza for breach of contract. Souza cross-complained against the city for damages for breach of warranty of site conditions and against Armco for supplying defective equipment and on an indemnity agreement. Souza and Armco reached a compromise agreement during the trial. Souza was awarded substantial damages and the city appealed, contending that evidence of the settlement between Armco and Souza should have been admitted for the purpose of

deducting the amount of the settlement from the damages awarded against the city. Souza contended that its claim against the city was based on fraud, whereas that against Armco was based on the liability of a supplier and indemnitor. Therefore, argued Souza, the different wrongs and theories of recovery made the collateral source rule applicable.

In reversing the judgment on the issue of damages, the court first observed that the city's liability for breach of warranty of site conditions was contractual but that the collateral source rule might apply because the breach was a tortious one. No determination of that issue was made because the collateral source rule was held inapplicable in an action against a public entity. The court reasoned that since the collateral source rule is punitive in its effect--because it makes a wrongdoer pay damages for an injury that may already have been compensated in whole or in part--application of the rule in this case would be to allow punitive damages against the city. Punitive damages are not recoverable against a public entity under the California Tort Claims Act of 1963, ostensibly because the punishment would fall on innocent taxpayers. As stated by the court:

> As we cannot impose on a city any measure of direct damages which are punitive in nature, it necessarily follows that we are foreclosed from doing it by an indirect and collateral route. [66 Cal.2d at 228.]

DISCUSSION OF SPECIFIC PROBLEMS

The following material indicates the major policy questions and the problems involved in an attempt to generalize the Souza decision and provide a general statutory provision precluding the application of the collateral source rule against a public agency. Following the discussion of the problem areas is an example indicating the complexities involved in drafting a comprehensive statute dealing with the problem.

What collateral sources should be included in or excluded from the computation of damages?

There are many sources of collateral benefits that might come to a particular claimant. The policy involved in determining whether or not a particular type of benefit should be either included or excluded in the computation of damages is discussed below.

Insurance. The types of insurance that usually are involved are (1) fire or property insurance, (2) disability insurance (including income protection and medical insurance), and (3) life insurance.

1. Fire or property insurance. The proceeds received from fire or property insurance clearly should be deducted from the final judgment. Most states already hold that the collateral source rule does not apply to fire and property damage policies; the tortfeasor may prove the existence of a subrogee in mitigation of damages. Vance, Insurance 786-788 (3d ed. 1951).

2. Disability insurance. There are several different types of policies that can be involved in this category. First, a disability policy may provide for the payment of hospital and medical expenses. Such benefits clearly should be deductible from any judgment including medical expenses. To provide otherwise would allow the claimant to recover more than is necessary to compensate him for his injuries.

Second, the policy may provide for income protection or disability payments to be made the claimant while he is not able to work. Since such payments take the place of wages, the claimant should be required to deduct such sums from his recovery for loss of wages.

Third, the policy may provide for a lump sum payment for the specific loss of a particular body part, such as a leg or foot. Such a

provision is often included as an alternative to periodic payments. 15 Couch, Insurance § 53.9 at 29 (2d ed. 1966). The benefits provided in a loss schedule are calculated to be the average amount which would be payable under a loss-of-time benefit for the same injury. McCahon, Accident and Sickness Insurance 32 (1954). Both dismemberment benefits and the optional or elective schedule are a projection of the income replacement idea but contain the added feature that the insured may elect to receive lump sum payment rather than periodic payments over the term of his disability. Id. Since the benefits are income protection oriented, the lump sum recovered should be deducted from the amount recovered for future earnings. If the claimant is not actually disabled but still can recover under the policy--as, for example, where a writer loses both feet but still has the ability to work--it would seem that the lump sum recovered should be applied against any other damages recovered because the loss of the limbs will be taken into account by the jury in its verdict for pain and suffering and the inability of the claimant to perform tasks other than his vocation.

3. Life insurance. It does not seem that life insurance should be taken into account in an action involving wrongful death. Although the insurance benefits are paid because of the death of the claimant, they are not "compensation" for his death in the same sense that medical benefits and disability payments compensate for injury. Rather than being sums received because of medical expenses or loss of income to the injured party, they are benefits received by others that the deceased has paid for during his lifetime to protect their future. The Commission should realize that a strong argument can be made for deducting life insurance on the theory that the deceased has meant the payments to constitute a replacement of his wages and other income to support his family on his death.

Included within the category of life insurance are other benefits, such as mortgage protection and burial insurance. Mortgage protection insurance benefits should not be deducted from the wrongful death recovery. That is a specific type of insurance meant to provide a home for the wife and children of a decedent and in no way relates to the compensation received by the wife for wrongful death.

Burial insurance, on the other hand, probably ought to be deducted if the funeral and burial expenses are included in the judgment. However, since such expenses are often minimal compared to the size of the judgment and because introduction of evidence of life insurance containing a burial expense clause would be highly prejudicial to the plaintiff, the staff feels that the evidence of such coverage should not be allowed into evidence unless those provisions are severable from the policy of life insurance.

Prepaid health plans. A prepaid health plan differs from insurance in that the beneficiary pays for his future medical care at the beginning of the insurance period rather than submitting a claim after the care has been required. A claimant should not be able to recover for the medical treatment that he has not paid for under such a plan; the claimant should not be allowed to recover for reasonable costs of medical care if he has such a health plan. However, the claimant should be entitled to recover the cost of the plan for the immediate period under which he is insured as well as any expenses actually incurred. The difference between this case and medical or disability insurance is a matter of semantics. Here the claimant has actually paid for his medical care for a specified period; in the insurance case, he has not paid for his medical treatment but for insurance to help defray the cost of

medical care if it is needed. It also must be noted that prepaid health plans often require the member to pay for the treatment if damages for the injury are recovered. See Purcell v. Goldberg, 34 Cal. App.2d 344, 93 P.2d 578 (1939).

Accumulated sick leave or vacation time. When a claimant has continued to receive his salary during his disability because of accumulated sick leave or accumulated vacation time, it should not be deducted from the overall recovery. The wages do not represent a net benefit to the plaintiff, for he is being forced to diminish sick leave and vacation time which he would otherwise be entitled to. This is especially true if the claimant could collect salary at the end of the year or at the time of the termination of his employment for the accumulated time.

Pension plans through employer. A pension is meant to provide a continuation of income when a person is no longer considered able to work or when a person has fulfilled his obligation to his employer. If the claimant is totally disabled by the negligence of the entity and his pension starts earlier than it normally would have started, it would seem that the amount he receives under the plan should be deducted from his ultimate recovery. However, the fact that the claimant has paid a substantial portion of the price of the pension means that the payments do not represent a net benefit to him. Therefore, pension plan benefits should not be deducted or should only be deducted to the extent that the claimant has not contributed to the plan. Otherwise, the claimant would be forced to compensate himself for his injury.

Social security benefits. If the claimant was fully disabled by the occurrence, his social security benefits will start prematurely. In this situation, the claimant has contributed to the income from his wages

prior to the injury. As in the case of the pension, the benefits should not be deducted except to the extent that the claimant did not contribute to the plan.

Workmen's compensation. If the claimant was injured while on the job--as, for example, where a truck driver is injured in a collision negligently caused by a public employee in the course of his employment--he will be entitled to workmen's compensation benefits. The amount of this compensation should be deducted from his ultimate recovery. This is especially important since the employer or his insurer will have a right to recover the cost of the workmen's compensation from the tortfeasor under Labor Code Sections 3850-3864 and Insurance Code Section 11662 as the subrogee of the employee.

Disability compensation under unemployment laws. Under certain conditions, a claimant may receive disability benefits under the California Unemployment Insurance Code. These benefits are meant "to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom." Unemp. Ins. Code § 2601. Therefore, it appears that any such benefits should be deducted from the ultimate recovery against the tortfeasor. However, as with pension plans and social security, the beneficiary has paid into the fund. It would therefore appear that only the amount not representing his contribution should be deducted.

Death benefits. Disability insurance, pension plans, and other sources often supply death benefits to the survivors. In such a case, the benefits are meant to supply an income to the surviving family to partially replace the injured party's salary. In these cases, the

decedent has contributed to the plan and it would seem that there should be no deduction. This conclusion is supported by Assembly Bill No. 1452 which would permit survivors of a state employee to retain both wrongful death recovery and Public Employees' Retirement System survivor benefits despite the subrogation provisions in Government Code Sections 21380 to 21455.

Debt forgiveness. If a debt or future payment which is or will become payable by the plaintiff is forgiven because of the injury or damage suffered, that should be deducted from his net recovery. The most common occurrence of this would be the waiver of premiums on a life insurance policy with disability provisions when the claimant is rendered totally disabled. Where a waiver of premiums occurs, the injured party is receiving a direct benefit from the injury which ought to be deducted.

Income tax savings. The present practice in the United States is to ignore income tax savings in assessing damages even though the damages will not be taxable. See Note, Unreason in the Law of Damages: The Collateral Source Rule, 77 Harv. L. Rev. 741 (1964). The British House of Lords has reached the opposite result. British Transp. Comm'n v. Gourly, [1956] A.C. 185 (1955). If the plaintiff's income tax liability will be lowered because of the lump sum judgment for future earnings, that should be taken into account even though the computation is difficult. Otherwise, the award more than compensates him for his lost future wages.

Gratuities. Gratuities come up in at least four different contexts. First, a public charity may render services to the claimant gratuitously. In this case, the Restatement of Torts, Section 924, comment f (1939),

suggests that the damages should be reduced. The courts in most states have not accepted this suggested exception to the collateral source rule. See Note, Unreason in the Law of Damages: The Collateral Source Rule, 77 Harv. L. Rev. 741 (1964). However, for our purposes, it would seem that the claimant should not recover a windfall against a public entity for any services rendered it gratuitously by a charitable organization.

Second, services may be rendered gratuitously by the member of an association of which the claimant is a member. In Coyne v. Campbell, 11 N.Y.2d 372, 183 N.E.2d 891, 230 N.Y.S.2d 1 (1962), a doctor was injured and a member of his medical association rendered medical services to him gratuitously. The New York court held that the doctor could not recover for the reasonable cost of the treatment even though he might be required to render a similar service in the future. This rule would seem to be applicable to our situation, and no recovery should be allowed.

Third, one spouse may render gratuitous services to an injured spouse. In this situation, there probably should be no deduction. The typical case is where the wife is a registered nurse and cares for her husband or where the husband is a doctor and treats his wife. In this case, the marital community has lost an asset--the ability of the uninjured spouse to use the time spent caring for the injured spouse to earn for the community. In such a situation, it seems most equitable to allow the injured party to recover for the reasonable value of medical expenses without a deduction for the services so that the community will be made whole.

Finally, a gratuity may be conferred on the injured claimant by someone not included in the above group. A close relative or perhaps even a compassionate employer may augment the claimant's income during the period of disability. In these cases, it seems unfair to allow the public entity to set off any payment received by the employee even where the employer has continued his wages. The English courts have reached a middle ground in the latter situation and allow the claimant to recover for lost wages if he agrees to repay the gratuity to his employer. See Note, Unreason in the Law of Damages: The Collateral Source Rule, 77 Harv. L. Rev. 741 (1964).

Recovery of damages from another. In the Souza case, in order to reduce the judgment against the entity, the public entity was allowed to show that the claimant had settled his suit against the supplier of materials and indemnitor. This decision clearly indicates that the public entity would be able to set off the recovery in a tort suit against one who was not a joint tortfeasor as, for example, where the entity is liable in negligence and the other party is liable for an intentional tort. See Code Civ. Proc. § 875(d).

However, as will be discussed later, multiparty litigation involving joint tortfeasors entitled to contribution raises a special problem. In such cases, it does not appear that the entity should be able to set off the judgment against the other tortfeasor since that would result in the other party's having to pay the entire judgment.

Should the collateral source rule also be inapplicable against a public employee?

It would appear that the operation of the collateral source rule

should also be precluded against a public employee. This result does not follow from Souza because there is no rule preventing the recovery of punitive damages from a public employee. However, it is necessary because of the provisions of Government Code Sections 825 to 825.6.

Section 825 requires public entities to pay claims and judgments against public employees that arise out of their public employment where the public entity has been tendered the defense. However, if the public entity provides the defense pursuant to a reservation of rights, it is required to pay a judgment, compromise, or settlement only if the plaintiff establishes that the employee was in the scope of his employment at the time the claim against him arose. However, Section 825 expressly provides that it does not authorize a public entity to pay any part of a claim or judgment representing punitive damages.

Section 825.2 provides that, if the employee pays a claim or judgment against him that the public entity is required to pay under Section 825, he is entitled to recover that amount from the entity.

Sections 825.4 and 825.6 provide that a public entity cannot get indemnity from a public employee unless he acted or failed to act because of actual fraud, corruption, or actual malice.

If an injured party is allowed to recover the full amount of his damages from a public employee without being allowed to deduct benefits received from a collateral source, the judgment against him is going to be well in excess of the amount that the public entity will be required to pay. Normally, punitive damages are only allowed against a defendant in limited circumstances. Civil Code Section 3358.

However, as the court indicated in Souza, damages awarded in a tort action that do not take into account collateral sources are punitive in effect because they are not strictly compensatory. Thus, the public employee may be made liable on a judgment for a type of punitive damages that were not meant to be included in the prohibition in the Government Code. The public employee should not be made to meet this obligation without indemnity.

It is also clear that the solution is not amending the Government Code to require indemnity by the public entity. A public entity can only commit a tort through the act of an employee, and therefore the employee could invariably be sued. In such case, the entity would be required to pay the judgment which would include those damages deemed punitive by the Supreme Court. Such a result would negate the Souza decision and any attempted codification of the Souza rule. Therefore, the only solution would appear to be to include the public employee in the provision limiting the amount of recoverable damages.

Multiparty litigation

It is good policy to encourage a plaintiff to bring a single action to settle all facets of a controversy. A strict application of the Souza rule, however, would require the plaintiff to sue the public entity in a separate action from the other defendants to avoid the introduction of prejudicial evidence. Such a practice would bar contribution among the public entity and the other defendants because contribution requires a joint judgment.

At what time during trial should evidence of collateral sources be admissible? Suppose that P is injured by the negligence of A, a private litigant, and B, an employee of D public entity, acting in the scope of his employment. P sues A, B, and D in a single action for his total damages of $100,000 despite the fact that he has already recovered $75,000 from collateral sources. As a result of the joinder, P will be required to allow admission of evidence of the collateral source benefits even though such evidence is usally inadmissible and considered highly prejudicial. As a result, his recovery against A will probably be diminished.

If P sues A separately from B and D, it is not clear whether the defendants' motion for consolidation of the trials should be granted. Under Code of Civil Procedure Section 1048, actions may be consolidated, in the discretion of the court, whenever it can be done without prejudice to a substantial right. The discretion of the trial court will not be reversed except in a case of palpable abuse. Jud Whitehead Heater Co. v. Obler, 111 Cal. App.2d 861, 245 P.2d 608 (1952). Furthermore, the fact that evidence in one case might not have been admissible in the other case does not, by itself, bar a consolidation. Id. Thus, it might be possible for the defendants to obtain a consolidation and thereby subject a plaintiff, who intentionally sued each defendant separately to avoid the prejudicial effect of evidence of collateral sources, to suffer the admission of that evidence.

The Commission should consider adopting a procedure whereby evidence of benefits from a collateral source are not considered until after a judgment has been brought in by the jury. Under such a provision, the judge would make the proper adjustments in the judgment

after the jury's function has been performed. This would prevent highly prejudicial evidence of insurance and other compensation from influencing the jury in reaching its verdict against the public entity and would also prevent prejudicing the plaintiff against a private litigant.

Contribution. A statute precluding the application of the collateral source rule against a public entity should provide that a judgment against another tortfeasor cannot be deducted from the judgment against the public entity if the parties are jointly and severally liable. Otherwise, the private litigant would have to pay the entire damage even though the public employee, and therefore the public entity, was equally at fault in inflicting the injury.

The statute should also provide rules for contribution among the public and private litigants. Once a final judgment is rendered in a joint trial, the judgment against the entity will be smaller than that against the private party because the entity can deduct collateral benefits. Thus, in our example, D would be liable for only $25,000 while A would be liable for $100,000. If A pays the entire judgment, it would seem that D should contribute a full share of $50,000 even though part of that could be considered "punitive damages." The statute should provide that the public entity is not liable for damages already compensated from a collateral source unless fairness to a codefendant requires that the entity pay more than that amount in contribution. In such a situation, the entity should be regarded as a private litigant with respect to the rights between wrongdoers.

As under private law, if P sues each defendant separately, there would be no right of contribution even though each is liable for the entire amount. See Guy F. Atkinson Co. v. Consanti, 223 Cal. App.2d 342, 35 Cal. Rptr. 750 (1963)(private litigants). Although this rule is burdensome on the private litigant--because if, for example, the entity in the example pays its entire liability of $25,000, the private litigant will still be liable for $75,000--it constitutes present law and is beneficial to the public entity. Assuming that the amount of the recovery will always be greater against the private litigant, the public entity would rarely benefit from contribution because the collateral source benefits would reduce its liability far below one hundred percent of the judgment.

EXAMPLE OF APPLICATION OF SOUZA RULE IN ABSENCE OF STATUTE

Problem

P was driving to a construction site in a company truck. The truck had recently been serviced by A, an independent contractor. A had negligently left the brake fluid line loose. As P approached an intersection, the brakes on his truck suddenly gave out and he could not slow down. B, a public employee on business for D public entity, drove through a stop sign and hit P's truck, severely injuring P. The brakes on B's vehicle were faulty due to the negligence of C, an employee of the agency, who had repaired the vehicle at the entity's yard. The evidence was conflicting as to whether the braking difficulties prevented B from stopping.

Assuming that D proves that the following compensation has already been received by P from other sources, what part of it may be deducted from its liability? What cross-actions will lie and what recovery will be allowed in the cross-actions?

1. P has received benefits for his hospitalization from a personal medical insurance policy.

2. P has received benefits for his hospitalization from a company medical insurance policy..

3. P had a prepaid health plan with a local clinic that treated him after his release from the hospital.

4. P was taken to a charitable emergency hospital where he received free medical treatment before being transferred to another hospital.

5. While P is disabled, a rich sister is paying his rent for him on his apartment.

6. Another sister of P, a practical nurse, has taken a leave of absence from work and is gratuitously caring for him during his disability so that P will have someone who cares close to him.

7. Since P could no longer work, his pension went into effect even though his retirement age was ten years in the future.

8. P received disability benefits from the social security office because of his total disability.

9. Since P was on the job when injured, he is receiving workmen's compensation benefits.

10. P had built up 73 days of sick leave and 10 days vacation time prior to the accident, and was paid for 83 days as though he were working.

11. P's fellow union workers chipped in and set up a small trust fund to help support him during his disability.

12. Under P's life insurance policy, he no longer had to pay the premiums because of the disability; P was also excused from paying dues in several organizations such as the union and his fraternal group.

13. P recovered a personal injury settlement against A.

14. D can prove the P will pay much less in income tax because of the injury since most of the recovery, being for future wages, will be tax free and because most of the disability payments will be tax free.

Analysis

What should be deducted?

1. The personal hospitalization insurance benefits should be deducted. The only question is whether P should be reimbursed for the cost of the insurance for the period of coverage. Since P would have paid for the insurance whether or not it was used, it would seem that it should not be compensated even though P theoretically is out of pocket that amount.

2. The company hospitalization benefits should be deducted.

3. The prepaid health insurance benefits should be deducted. However, since they are prepaid, P might get a recovery for the cost of the plan for the present period of coverage.

4. P should not be able to recover for the free medical services provided by the hospital.

5. D should not be able to deduct the rent paid by the sister although theoretically it is a payment to P because of the injury suffered and P will have fewer expenses during his disability because of the payments by the sister.

6. Logically speaking, P should not be able to recover for the reasonable cost of a nurse's care although one might imagine that P would feel obligated to pay any such recovery to his sister. The family gratuity situation is one of the hardest on which to reach a policy decision because, by allowing the deduction of the value of the services, something the family spent because of the injury is

being taken insofar as the time spent would be otherwise compensable.

7. Apparently the value of the first ten years of the pension should be deducted since it represents a substitute for wages. However, it would appear that a conversion factor would have to be reached that would take into account the fact that P has already paid substantial sums into that fund. A reduction of the amount of benefit deducted would also have to be reached to compensate for the fact that neither P nor his employer will be paying into the fund for the next ten years and that, therefore, the amount to be paid to P upon his reaching retirement will be smaller.

8. This should be adjusted the same as the pension plan benefits.

9. The workmen's compensation benefits should be deducted.

10. Since P had earned the sick leave and vacation time before he was injured, the amount of wages paid to him during that period should not be deducted. This time will be lost to P if he should eventually return to work. This result would be especially true if P would have received compensation for this accumulated time when his work terminated.

11. This gratuity from a private source should not be deducted from P's recovery. If the persons who make such gratuities know that an injured party will have his benefits from other sources reduced because of the gratuity, they will no longer make them. This is not good social policy.

12. All of these things should be deducted, especially the insurance premiums. However, it can be argued that the waiver of premium was a benefit purchased by P in his insurance contract and that he should not be deprived of the benefit of that bargain. It can also be argued that the club and union dues are so unrelated to the injury as to be not deductible.

13. The settlement is clearly deductible under the rule of Souza.

14. The lower income tax liability is a benefit flowing from the injury. It should be considered in the ultimate judgment against D despite the complicated problems in proof.

Cross-actions

1. P v. A, P v. B, P v. C. Unless a special rule is provided for public employees, A, B, and C, are liable to P for the injury to him. This liability includes the cost of reasonable medical care, whether or not P has actually had to pay medical bills.

2. P v. D. Because of the large amount of deductions for the benefits P has received from other sources, D, the public entity, will be liable for very little.

3. D v. B, D v. C. D has no right of indemnity against B or C.

4. B v. D, C v. D. A public entity must indemnify its employees if they pay a claim or judgment under Section 825.2 if the public entity would be required to pay the judgment under Section 825. Section 825 provides that the public entity shall not pay any part of the judgment representing punitive damages. Since the recovery against B and C will not be reduced by collateral sources unless a special rule

is adopted, D will only have to pay that part of the damages representing the uncompensated loss by P. Thus, without a change in the law, the public employees would not be able to obtain full indemnity from their employer.

5. A v. D, D v. A. In a suit joining A and D as joint tortfeasors, there would be two problems. First, evidence prejudicial to A would be admitted to mitigate the liability to D. As previously noted, this result probably would cause P to sue A separately from D. If he did so, A or D would probably move for consolidation. Consolidation would depend on the discretion of the judge.

Second, if a joint judgment is rendered, A and D would each have the right to contribution. However, the judgment would be for a different amount as to each. At present, there is no method of computing contribution where the amount of the judgment differs among the defendants.

6. P's employer v. A, B, C, and D. The company employing P, or its insurer as a subrogor, would have a right of indemnity against the tortfeasors for the amount paid on the workmen's compensation claim to P. Since D has already set this amount off in the action by P, it will be liable for that amount only once. However, A may be liable for that amount twice. Presumably, the right of contribution between A and D would also exist in this suit if a joint judgment were rendered. Presumably B and C would have a right of indemnity against D if a judgment is rendered against them.