6/22/70

Memorandum 70-69

Subject: New Topic--The Collateral Source Rule

At the April 1970 meeting, the Commission tentatively determined that it would request authority from the 1971 Legislature to make a study of the collateral source rule as it applies to tort and contract actions.

This study originally arose out of the statement in the Souza case (Exhibit I--pink--attached) that implied that the collateral source rule did not apply in tort actions against a public entity. A study undertaken in response to the Souza case was discontinued when the California Supreme Court held in the Helfend case (Exhibit II--yellow--attached) that the collateral source rule does apply in tort actions against public entities. The Court pointed out that the rule is an essential part of our system of computing damages. (In jurisdictions where the collateral source rule does not apply, the plaintiff recovers his attorney's fees.)

When the Commission requests authority to study a particular topic, our report to the Legislature indicates why the topic needs study--that is, in what respect the law is deficient--and, usually, the scope of the topic. Before the staff attempts to prepare a statement requesting authority to study the collateral source rule, it would be helpful if the Commission would indicate the reasons that should be included in the statement why the study is needed, the particular problems with existing law that indicate the law is deficient, and the scope of the study. Attached (white) is a staff memorandum on the collateral source rule as applied to public entities. This memorandum generally points out the kinds of problems involved in the study. Professor Fleming, who appeared at one of our meetings, stated that he believed a study of the collateral source rule involved a study of the whole concept of damages and recoverable costs. (He is perhaps the outstanding expert in the United States on this matter.)

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I



[S. F. No. 22394. In Bank. Mar. 21, 1967.]

CITY OF SALINAS, Plaintiff, Cross-defendant and Appellant, v. SOUZA & McCUE CONSTRUCTION COMPANY, INC., Defendant, Cross-complainant and Appellant; AETNA CASUALTY & SURETY COMPANY, Defendant and Appellant; ARMCO DRAINAGE & METAL PRODUCTS, INC., Defendant, Cross-defendant and Respondent.

[1] **Building Contracts — Remedies Available: Fraud — Concealment—Condition of Property.**—Generally, an owner failing to impart knowledge of difficulties to be encountered in a building project will be liable for misrepresentation if the contractor is unable to perform according to contract provisions.

[2] **Public Works—Terms and Conditions Affecting Contract.**—General provisions in a public works contract directing bidders to examine subsoil conditions cannot excuse a governmental agency for its active concealment of such conditions.

[3] **Accord and Satisfaction—Requisites: Public Works—Terms and Conditions Affecting Contract.**—Modification of a public works contract to provide that the parties had decided to settle their dispute by agreement, could not be deemed to settle a dispute over problems of which the contractor was not then aware, and which, perforce, the parties could not intend to include in the agreement.

[4] **Fraud—Questions of Fact—Reliance: Public Works—Terms and Conditions Affecting Contract.**—Reliance generally is a question of fact; and a clause in an agreement modifying a public works contract, calling for and representing that the contractor has undertaken a full examination and inspection of all matters and things relating to the contract, did not bar the contractor's claim of reliance on the public entity's representation as to soil conditions for the project; any investiga-

**McK. Dig. References:** [1] Building and Construction Contracts, § 26; Fraud and Deceit, § 13(3)(b); [2, 5] Public Works, § 5; [3] Accord and Satisfaction, § 2; Public Works, § 5; [4] Fraud and Deceit, § 91(8); Public Works, § 5; [6] Damages, § 212; [7, 8] Damages, § 215; [9] Damages, § 217; Public Works, § 7; [10, 17] Public Works, § 7; [11] Damages, § 54; State of California, § 57; [12] Damages, § 136; State of California, § 57; [13] Damages, § 136; Municipal Corporations, § 437; [14] Discovery, § 6; [15, 16] Costs, § 46; [18, 20] Interest, § 19; [19] Interest, §§ 3, 18; [21] Costs, § 32; Municipal Corporations, § 328.

tion undertaken may have been imperfect because of pre-existing and continuing misrepresentation by the nondisclosure of known conditions.

[5] **Public Works—Terms and Conditions Affecting Contract.**—Exculpatory provisions for the benefit of a public entity in an agreement modifying its contract for the construction of a sewerline, to settle disputes with the contractor who encountered subsurface difficulties because of soil conditions, did not excuse the public entity's fraud of active concealment of further subsurface difficulties to be encountered because of soil conditions, known to the public entity but not known to the contractor at the time of the modification.

[6] **Damages—Findings.**—A trial court is not required to set out either its computations or the particular evidence on which it may have relied in determining the amount of damages.

[7] **Id.—Appeal.**—An appellate court is not concerned with the weight of testimony, particularly with reference to the amount of damages.

[8] **Id.—Appeal.**—In reviewing the evidence as to damages, the pertinent inquiry on appeal is whether there was substantial support in the evidence for the trial court's finding as to damages, and appellant has the burden to demonstrate error in the determination of the amount.

[9] **Id.—Appeal—Questions of Fact; Public Works—Rights of Contractor—Damages.**—An appellate court must accept as true all evidence tending to establish the correctness of the trial court's findings, taking into account all reasonable inferences; and it must be deemed sufficient evidence of damage that a public works contractor introduced business records and testimony of actual, reasonable costs, and estimated cost of a public works project prior to discovery of soil conditions misrepresented by the public entity, that the entity did not challenge the valuation of any particular item, and that it did not introduce any evidence to controvert the valuations by the contractor and its witnesses.

[10a, 10b] **Public Works — Rights of Contractor — Damages.**—Though an award of damages to a public works contractor fairly purported to represent the damages caused by a city's breach in misrepresenting soil conditions to be encountered in the construction project, the measure of damages was improperly determined where it could not be said that the amount of damages represented the uncompensated damages to the contractor in the absence of a determination as to whether the contractor received some reimbursement for loss from a

[5] See **Cal.Jur.3d**, Public Works and Contracts, § 48; **Am.Jur.**, Public Works and Contracts (1st ed § 105).

collateral source pursuant to an agreement of indemnity with its supplier of pipe used in the project.

**[11] Damages—Measure of Damages—Torts: State of California—Liability.**—Though generally an injured party's receipt of compensation for his losses from a collateral source, wholly independent of the tortfeasor, does not preclude or reduce the damages to which the injured party is entitled from the tortfeasor, this collateral source rule does not apply against a public entity.

**[12] Id.—Exemplary Damages: State of California—Liability.**—The levying of punitive damages against a public entity has not been authorized; to do so would impose an unjust burden on the innocent taxpayer without directly penalizing the wrongdoer.

**[13] Id.—Exemplary Damages: Municipal Corporations—Torts—Liability.**—The Supreme Court cannot impose on a city any measure of direct damages that are punitive in nature; it necessarily follows that the court is foreclosed from doing it by an indirect and collateral route.

**[14] Discovery—Matters Discoverable.**—Where a city sued a public works contractor and its supplier of products for breach of contract and the contractor filed a cross-complaint against the city, as well as the supplier, alleging the supplier's guarantee of piping for the project and its promise to indemnify the contractor for any losses, a proper resolution of the legal relationships and concomitant obligations, as between the contractor, its supplier, and the city could be reached only after full consideration of all the evidence bearing on those questions and its legal effect on the parties' position; accordingly, the trial court erred in refusing to permit disclosure of the agreement between the contractor and its supplier.

**[15a, 15b] Costs—Time of Filing—Relief From Default.**—A trial court's determination to grant relief to the prevailing parties for failure to file timely cost bills was not beyond its discretion where it appeared that responsible counsel, all being from different towns from that in which the court was located, expected notice of the signing and filing of the findings, conclusions, and judgment, that they were not unduly concerned about lack of notice, assuming the trial judge was on his annual vacation over the Labor Day holidays, that a telephone inquiry produced no response, that their notices of a motion for new trial indicated for the first time a judgment had been filed, and that they then diligently pursued their motion for relief from default.

**[16] Id.—Time of Filing—Relief From Default.**—In ruling on a motion for relief for failure to file timely cost bills, it is for

the trial court to determine all conflicts in the testimony or affidavits in support of or opposition to the motion; when there is a conflict, the trial court's determination is conclusive on appeal.

[17] **Public Works—Rights and Liabilities of Contractor.**—In a city's action for breach of contract against a public works contractor and its supplier, no error appeared in denying the city recovery from the supplier where sufficient evidence supported findings that the city's misrepresentations as to soil conditions were the sole proximate cause of the failure of the project; even if the alleged agreement between the contractor and its supplier for indemnity against losses could be construed as including, for the city's benefit, a guarantee of the adequacy of the supplier's piping for installation under soil conditions as represented, the city's misrepresentation of those conditions would relieve the supplier.

[18a, 18b] **Interest—Time From Which Interest Runs.**—Where a contractor's completion of a sewerline for a city was not acceptable on the completion date, though the contractor's performance could be deemed to have been prevented by the city's misrepresentations as to soil conditions, Civ. Code, § 3287, did not allow for the contractor's recovery of interest against the city prior to judgment.

[19] **Id.—Liability of Public Entity: Time From Which Interest Runs.**—Under Civ. Code, § 3287, concerning the recovery of interest from a debtor, including a public entity, by one entitled to damages, interest cannot be awarded from the day on which the right to recover is vested where the amount of damages cannot be ascertained except by the resolution of conflicting evidence.

[20] **Id.—Time From Which Interest Runs.**—In an action for breach of an express contract for the performance of services, interest is not recoverable prior to judgment where, because of defendant's prevention of performance, the amount due cannot be computed by the contract terms, thereby rendering the damages uncertain and incapable of being made certain by calculation.

[21] **Costs—Items Allowable—Attorney's Fees: Municipal Corporations—Contracts—Law Governing.**—In a city's action against the surety on the bond of a public works contractor, the city was neither a political subdivision nor an agency of the state from whom the surety might recover attorney's fees pursuant to Gov. Code, § 4207.

APPEAL from a judgment of the Superior Court of San Benito County. Edward L. Brady, Judge. Reversed in part with directions and affirmed in part.

Action by city for breach of contract and cross-action for damages for misrepresentation of soil conditions. Judgment for defendant affirmed in part and reversed in part with directions.

Donald A. Way, City Attorney, J. T. Harrington and William B. Boone for Plaintiff, Cross-defendant and Appellant.

Steel & Arostegui and Robert W. Steel for Defendant, Cross-complainant and Appellant and for Defendant and Appellant.

Thelen, Marrin, Johnson & Bridges as Amici Curiae on behalf of Defendant, Cross-complainant and Appellant.

Bradford, Cross, Dahl & Hefner and Loren S. Dahl for Defendant, Cross-defendant and Respondent.

PEEK, J.*—On these appeals the City of Salinas disputes findings that it misrepresented soil conditions to the damage of Souza & McCue Construction Company, its general contractor under a 1958 contract for the construction of a sewerline.

The action was commenced by the city for damages for Souza's alleged breach of the contract. The city also sought to recover from Souza's surety, the Aetna Casualty & Surety Company, and from Armco Drainage & Metal Products, Inc., a supplier of products to Souza. In a pleading denominated a cross-complaint, Souza set forth causes of action against the city for the recovery of the balance allegedly due under the contract, and a common count for goods and services. Souza also cross-complained against Armco, alleging that the latter guaranteed performance of piping it supplied and had promised to indemnify Souza for any losses. After the city answered the cross-complaint, the trial court refused to allow Souza to amend to include causes of action against the city for fraudulent misrepresentation and breach of implied warranty of site conditions. We granted a writ of mandate directing the trial court to allow the filing of such an amendment. (*Souza & McCue Constr. Co.* v. *Superior Court* (1962) 57 Cal.2d 508 [20 Cal.Rptr. 634, 370 P.2d 338].)

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

At the conclusion of the trial the court found that the city materially misrepresented soil conditions by failing to inform Souza and other bidders of unstable conditions known to it, that the city intended that Souza prepare its bid based on such misrepresentations, that Souza reasonably relied on the misrepresentations in bidding on the contract, and that Souza should recover damages in the amount of $124,106, as proximately caused by the city's fraudulent breach of contract. All other claims for relief were denied. On this appeal, the city's main contention is that the foregoing findings, and the judgment based thereon, are not supported by the evidence.

There was considerable testimony that the city's chief engineer in charge of the project, and other officials involved therein, had knowledge, from their general knowledge of the city and from past project experience, of highly unstable conditions existing in the subsoils along the plotted line of the sewer. They knew that particularly difficult conditions were likely to be encountered in an extensive slough area which the route crossed. There was also evidence that the chief engineer directed an independent testing firm to take borings at preselected spacings and locations which avoided the area of the greatest unsettled conditions; that the method of taking the tests was misleading; that the reports of these boring tests were sent to bidders only a few days before the opening of bids, and that while it would have been proper practice to warn bidders of anticipated difficult conditions, the city officials did not do so.

[1] It is the general rule that by failing to impart its knowledge of difficulties to be encountered in a project, the owner will be liable for misrepresentation if the contractor is unable to perform according to the contract provisions. (See *United States* v. *Spearin* (1918) 248 U.S. 132 [63 L.Ed. 166, 39 S.Ct. 59]; *United States* v. *Atlantic Dredging Co.* (1920) 253 U.S. 1, 11-12 [64 L.Ed. 735, 40 S.Ct. 423]; *Gogo* v. *Los Angeles Flood Control Dist.* (1941) 45 Cal.App.2d 334, 338, 341-342 [114 P.2d 65]; *A. Teichert & Son, Inc.* v. *State of California* (1965) 238 Cal.App.2d 736, 755 [48 Cal.Rptr. 225].)

In a factually similar case, the contractor encountered "unusual quantities of quicksand and extensive subsoil water conditions which had not been shown on the plans or specifications . . . information as to which, although known to it, had been withheld by the city." (*Valentini* v. *City of Adrian*

(1956) 347 Mich. 530, 533 [79 N.W.2d 885].) An award of damages was affirmed because, as stated at page 534: "The withholding by the city of its knowledge . . . resulting in excessive cost of construction, forms actionable basis for plaintiff's claim for damages."

Here, the city argues that provisions in the contract specifications requiring that the bidders "examine carefully the site of the work," and stating that it is "mutually agreed that the submission of a proposal shall be considered prima facie evidence that the bidder has made such examination," prevents a holding that the city is liable for the consequences of its fraudulent representation. [2] However, even if the language had specifically directed the bidders to examine *subsoil* conditions, which it did not, it is clear that such general provisions cannot excuse a governmental agency for its active concealment of conditions. (See, e.g., *United States* v. *Atlantic Dredging Co., supra*, 253 U.S. 1; *United States* v. *Spearin, supra*, 248 U.S. 132; *Christie* v. *United States* (1915) 237 U.S. 234 [59 L.Ed. 933, 35 S.Ct. 565]; *A. Teichert & Son, Inc.* v. *State of California, supra*, 238 Cal.App.2d 736.)

The city further argues that because it entered into a modification of the contract after Souza encountered initial subsurface difficulties, Souza waived any claim going to fraudulent representations. The modification provided for the use of imported soils for side support and backing material, extended the time and adjusted the contract price. This came about when the parties became aware that the native soils would not support the sewerline. At that time Souza, however, was still not aware of the city's knowledge, nor did it have knowledge of its own, of the unstable conditions that might be expected to become increasingly grave as the line was further extended.

[3] The modification provided that "the parties . . . have finally decided to settle and compromise all of their differences and settle their dispute by this compromise agreement." The only dispute that had arisen at that point did not involve the considerable quicksand problems that Souza was to face during the remainder of the project, and concerned chiefly the inability of native soils to meet the compaction requirements of the original contract. That agreement could hardly be deemed to have settled a dispute over problems of which the contractor was not yet aware, and which, perforce, the parties could not have intended to include in the

agreement. (See *Lemm* v. *Stillwater Land & Cattle Co.* (1933) 217 Cal. 474, 482 [19 P.2d 785]; *Warfield* v. *Richey* (1959) 167 Cal.App.2d 93, 98 [334 P.2d 101].)

The modification agreement also provided that "the contractor expressly agrees that it has now fully, thoroughly, and completely examined, inspected, and familiarized itself with all matters and things relating to said contract, and the specifications thereof." At the time of the modification the pipeline had not yet begun to encroach upon the areas of greatest difficulty. The trial court found that nothing that Souza had done on the job prior to that date, and no independent information then available to it, disclosed to Souza or reasonably should have disclosed the existence of the extensive unstable conditions soon to be encountered.

**[4]** The clause calling for and representing that the contractor had undertaken a full examination and inspection of "all matters and things relating" to the contract does not bar the contractor's claim of reliance. Reliance generally is a question of fact (see *Elkind* v. *Woodward* (1957) 152 Cal.App.2d 170, 179 [313 P.2d 66]), and any investigation undertaken may well have been imperfect *because* of the preexisting and continuing misrepresentation by nondisclosure. (See *Shearer* v. *Cooper* (1943) 21 Cal.2d 695, 704 [134 P.2d 764]; *Sanfran Co.* v. *Rees Blow Pipe Mfg. Co.* (1959) 168 Cal.App.2d 191, 203 [335 P.2d 995].)

The trial court could properly find that the misrepresentations of the city continued to be relied upon by the contractor during and subsequent to negotiations over the modification, despite the investigation clause, and despite the fact that the parties had engaged in a dispute involving the alleged falsity of another of the city's representations—the compactability of the native soils specified for use as backing material. (Cf. *Shearer* v. *Cooper*, *supra*, 21 Cal.2d 695, 703-704; *Sanfran Co.* v. *Rees Blow Pipe Mfg. Co.*, *supra*, 168 Cal.App.2d 191, 203.) **[5]** The exculpatory provisions in the modification agreement must fail for the same reasons that the provisions in the original contract could not excuse the fraud of active concealment. (See, e.g., *United States* v. *Atlantic Dredging Co.*, *supra*, 253 U.S. 1.)

The city next argues that the trial court did not properly find the amount of damages, asserting that there was no competent evidence to support the amount found. **[6]** There is no requirement that the trial court set out either its computa-

tions, or the particular evidence upon which it may have relied in determining the amount of damages. (See *Gollaher* v. *Midwood Constr. Co.* (1961) 194 Cal.App.2d 640, 649 [15 Cal. Rptr. 292].) **[7]** Nor is an appellate court concerned with the weight of testimony, particularly with reference to the amount of damages. (*Neel* v. *San Antonio Community Hospital* (1959) 176 Cal.App.2d 233, 235 [1 Cal.Rptr. 313].) **[8]** "The pertinent inquiry is whether there was substantial support in the evidence for the finding as to damages," (*Gollaher* v. *Midwood Constr. Co., supra,* 194 Cal.App.2d 640, 649) and the appellant has the burden of demonstrating that the determination as to the amount of damages was erroneous. (*Vineland Homes, Inc.* v. *Barish* (1956) 138 Cal.App.2d 747, 760-761 [292 P.2d 941].)

**[9]** Souza introduced business records and testimony as to actual, reasonable costs, and estimated cost of the project prior to its discovery of misrepresented conditions. The city objected to the introduction of some of the evidence, but did not challenge the valuation of any particular item, and did not introduce any evidence of its own to controvert the valuations by Souza and its witnesses. As an " 'appellate court must accept as true all evidence tending to establish the correctness of the finding[s] as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion' " (*Burke* v. *Chrostowski* (1956) 46 Cal.2d 444, 445 [296 P.2d 545]), in the instant case the evidence introduced by Souza must be deemed sufficient.

**[10a]** As to the actual damages, the trial court determined the fair and reasonable cost of the actual performance, and what it would have been in the absence of misrepresentation, and also determined that the difference was due to the misrepresentations of the city. To the fair and reasonable value of the services and materials the court added 10 percent thereof as compensation for the contractor's indirect overhead expenses, and in addition 15 percent of the total as compensation for the profit to which the contractor was deemed to be entitled. Such measure of recovery has been held proper in cases involving the misrepresentation of site conditions. (*Fehlhaber Corp.* v. *United States* (1957) 138 Ct.Cl. 571 [151 F.Supp. 817, 828-829]; *Pat J. Murphy, Inc.* v. *Drummond Dolomite, Inc.* (E.D. Wis. 1964) 232 F.Supp. 509, 526-527.)

However, for reasons which we now discuss the measure of damages was otherwise improperly determined.

During the trial the city asserted that evidence of damages should not have been admitted because discovery had been prohibited and evidence barred as to an alleged compromise agreement between Armco and Souza. That agreement is claimed to have compensated Souza in whole or in part for the damages it sustained due to the city's alleged breach. The city now maintains that recovery against it would amount to a double recovery for Souza.

[11] When an injured party receives compensation for his losses from a collateral source "wholly independent of the tortfeasor," such payment generally does not preclude or reduce the damages to which it is entitled from the wrongdoer. (See *Anheuser-Busch, Inc.* v. *Starley* (1946) 28 Cal.2d 347, 349-350 [170 P.2d 448, 166 A.L.R. 198]; see also *Lewis* v. *County of Contra Costa* (1955) 130 Cal.App.2d 176, 178 [278 P.2d 756].) It is the city's contention that because Souza cross-complained against both the city and Armco, alleging that each was liable for purported damages, any recovery by Souza from Armco would not be from a source wholly independent of the wrongdoer, and the so-called collateral source rule does not apply. (Cf. *Laurenzi* v. *Vranizan* (1945) 25 Cal.2d 806, 813 [155 P.2d 633].)

It is Souza's theory, however, that any recovery by it from the city will be for damages due to the fraudulent representation of conditions by the city, whereas the claim against Armco was not grounded in the city's misconduct. Although Armco was joined in the cross-complaint, it was sued on claims based on the breach of independent agreements between Souza and Armco, in that Armco as a supplier and subcontractor had furnished and supplied defective materials and workmanship in the laying of the sewer pipe, and has covenanted to indemnify Souza for losses resulting therefrom. The allegations of the cross-complaint against Armco, it is claimed, expressed completely severable theories of recovery and alleged wrongs completely different from those alleged against the city. (Cf. *Ash* v. *Mortensen* (1944) 24 Cal.2d 654 [150 P.2d 876].)

The collateral source rule has generally been applied in tort as distinguished from contract cases (see Maxwell, *The Collateral Source Rule in the American Law of Damages* (1962) 46 Minn.L.Rev. 669, 672, fn. 10; *United Protective Workers* v.

*Ford Motor Co.* (1955) 223 F.2d 49, 54 [48 A.L.R.2d 1285]), for the reason that in a contract setting it is intended only to restore the injured party to the position he would have occupied in the absence of the breach (see *Blair* v. *United States* (1945) 150 F.2d 676, 678), whereas such a policy would negate the deterrent effect of an award against a tortfeasor. We have already held that the nature of the cause here asserted by Souza is contractual. (*Souza & McCue Constr. Co.* v. *Superior Court, supra,* 57 Cal.2d 508, 511). However, the rule has nevertheless been applied in certain instances where the claim is basically in contract (*Gusikoff* v. *Republic Storage Co.* (1934) 241 App.Div. 889 [272 N.Y.S. 77]; *Waumbec Mills, Inc.* v. *Bahnson Service Co.* (1961) 103 N.H. 461 [174 A.2d 839]), particularly where the breach has a tortious or wilful flavor (*Martin White* v. *Steam Tug Mary Ann* (1846) 6 Cal. 462 [65 Am.Dec. 523]; *Kavalaris* v. *Anthony Bros., Inc.* (1963) 217 Cal.App.2d 737 [32 Cal.Rptr. 205]). In the instant case the gist of the city's conduct sounds in deceit, resulting in a fraudulent breach, and might, for some purposes, have been treated as an action for relief grounded on fraud. (*Gregory* v. *Spicker* (1895) 110 Cal. 150, 153 [42 P. 576, 52 Am.St.Rep. 70].) It is not necessary, however, that we reach the issue of whether the fraudulent breach of a contract in some settings would justify the application of the collateral source rule (see *United Protective Workers* v. *Ford Motor Co., supra,* 223 F.2d 49, 54; Note, 48 A.L.R.2d 1293), as we are compelled to conclude that the rule is not applicable against a public entity for the reasons which next follow. For these same reasons we express no views as to whether Armco, upon a full disclosure of all material facts, would be a collateral source within the meaning of the rule in a setting where it was applicable. (See *Anheuser-Busch, Inc.* v. *Starley, supra,* 28 Cal.2d 347, 351.)

It is manifest that a public entity normally does not act or make its functional decisions through the whole body of those who may be deemed to compose it. Rather it necessarily acts in the performance of its various functions through public officials and representatives who have no greater proprietary interest in the entity than does any citizen or taxpayer. Should the conduct of such official or representative cause damage to those with whom they are dealing the general rule has been that the public entity would incur no liability, under the doctrine of governmental immunity. [12] Although

many statutory and other inroads on this doctrine have been made (see *Muskopf* v. *Corning Hospital Dist.* (1961) 55 Cal. 2d 211, 216-218 [11 Cal.Rptr. 89, 359 P.2d 457]), the levying of punitive damages against a public entity has not been authorized.[1] To do so would impose an unjust burden upon the innocent taxpayer without directly penalizing the wrongdoer. The punitive purpose would thus be frustrated. We have seen that the collateral source rule is punitive in nature (*United Protective Workers* v. *Ford Motor Co., supra,* 223 F.2d 49, 54; 2 Harper & James, Law of Torts, § 25.22, p. 1345; Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law,* 54 Cal.L.Rev. 1478, 1482-1484), and the theory of its application in the instant case would be that because the city's actions were wilfully fraudulent, a desirable punitive and preventative effect may be obtained by making the wrongdoer pay damages for an injury which may have been already compensated in whole or part. **[13]** As we cannot impose on the 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.

**[10b]** Although the judgment herein fairly purports to represent the damages caused by the city's breach, nevertheless we cannot conclude that it represents the uncompensated damages to Souza, which generally is the proper measure of an award for breach of contract. (Civ. Code, § 3300; see *Chelini* v. *Nieri* (1948) 32 Cal.2d 480, 486-487 [196 P.2d 915].)

**[14]** A proper resolution of the legal relationships and concomitant obligations, as between Souza, Armco and Salinas can be reached only after full consideration by the trial court of all the evidence bearing on those questions and its legal

[1]A statutory expression of the then existing public policy is found in § 818, Gov. Code, effective shortly after the judgment herein. As a part of legislation extending the liability of public entities for the tortious conduct of public employees (Stats. 1963, ch. 1681), section 818 provides as follows: "Notwithstanding any other provision of law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant." (See also Gov. Code, § 825.) Section 818 is explained by the California Law Revision Commission on the ground that "such damages are imposed to punish a defendant for oppression, fraud or malice. They are inappropriate where a public entity is involved, since they would fall upon the innocent taxpayers." (4 Cal. Law Revision Com. Rep. (1963) Recommendation Relating to Sovereign Immunity, p. 817.)

effect on the position of the parties. Accordingly, it was error not to permit disclosure of the Armco-Souza agreement.

The city's further contention that evidence as to the compromise agreement should have been admitted for the additional purpose of impeaching some of Souza's witnesses need not be considered in view of our conclusion that the nature of the agreement must otherwise be disclosed for a proper determination of the measure of damages.

**[15a]** While a redetermination of the measure of damages will necessarily require the refiling of Souza's cost bill, should an award be made in its favor, it is nevertheless appropriate that we now consider the city's claim that the court improperly granted Armco's, Aetna's and Souza's motion for relief for failure to file timely cost bills (Code Civ. Proc., § 1033), as such claim is applicable to the instant judgments in favor of Armco and Aetna and may be reasserted in connection with filing for the same costs as a part of Souza's new cost bill. Code of Civil Procedure, section 473, permits relief when a party demonstrates "mistake, inadvertance, surprise or excusable neglect." It appears that special hearings were had on proposed findings, conclusions, and judgment; that revised findings, conclusions and judgment were sent to the trial judge and all counsel on August 10, 1963; that responsible counsel, all being from different towns from that in which the court was located, expected to be notified when the documents were signed and filed; that they were not unduly concerned when no notice was received over the Labor Day holidays as they assumed the trial judge was on his annual vacation; that a telephone inquiry produced no response; and that on September 16, 1963, they received notices of a motion for a new trial, indicating for the first time that judgment had been filed, and that thereafter they diligently pursued their motion to have their defaults set aside.

**[16]** While the foregoing matters are disputed and other facts were urged in opposition to the granting of relief, "It is for the trial court to determine all conflicts in the testimony or affidavits . . . and if there is a conflict the determination of the trial court is conclusive on appeal. . . ." (*Luz* v. *Lopes* (1960) 55 Cal.2d 54, 62 [10 Cal.Rptr. 161, 358 P.2d 289].) **[15b]** Under the circumstances the determination of the trial court was not beyond its discretion.

**[17]** The city finally contends that the court erred in concluding that Armco was not liable to the city. There is suffi-

cient evidence in the record to support findings that the city's misrepresentations were the sole proximate cause of the failure of the project. Even if the alleged agreement between Souza and Armco could be construed as including, for the benefit of the city, a guarantee of the adequacy of Armco's piping for installation under soil conditions as represented, the city's misrepresentation of those conditions would relieve Armco. No error appears.

**[18a]** Souza, as an appellant herein, contends that the trial court erred in refusing to award interest in the amount of damages found to be due. Although the damages must be redetermined, the contention now raised will bear on any new award. Souza claims that interest should run from September 18, 1959, the date of the amendment of Civil Code section 3287 allowing for the first time interest on an award against a public entity. That section provides in part: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day. . . ." **[19]** But where the amount of damages cannot be ascertained except by the resolution of conflicting evidence (see *Lincman* v. *Schmid* (1948) 32 Cal.2d 204, 212 [195 P.2d 408, 4 A.L.R.2d 1380]), interest cannot be awarded under section 3287. (*Coughlin* v. *Blair* (1953) 41 Cal.2d 587, 604 [262 P.2d 305].) **[20]** "Even if there is an express contract for the performance of services and the action is for a breach thereof, if, *because of defendant's prevention of performance*, the amount due cannot be computed by the contract terms, thereby rendering the damages uncertain and incapable of being made certain by calculation . . . interest is not recoverable . . . prior to judgment." (*Parker* v. *Maier Brewing Co.* (1960) 180 Cal.App.2d 630, 634-635 [4 Cal.Rptr. 825]; see also *Kingsbury* v. *Arcadia Unified School Dist.* (1954) 43 Cal.2d 33, 43-44 [271 P.2d 40].) **[18b]** Souza completed the line on a date certain, but the line was not then acceptable. Although that performance may be deemed to have been prevented by the city's misrepresentations, the statute, as construed, does not allow for the recovery of interest against the city prior to judgment.

**[21]** Aetna, also an appellant herein, contends that the trial court erred in refusing to grant recovery for its attorney's fees, claimed under Government Code section 4200 et seq. The cited sections provide for the posting of a contrac-

tor's bond when work is to be done "for the State, or any political subdivision or agency of the State." (Gov. Code, § 4200.) It is further provided that in any action against the surety upon the bond, the court shall award reasonable attorney fees to the prevailing party. (Gov. Code, § 4207.) It is conceded, however, that the section applies to the state only, or any political subdivision of the state, and that a municipal corporation such as the City of Salinas is not within those categories. (See *Abbott* v. *City of Los Angeles* (1958) 50 Cal. 2d 438, 467-468 [326 P.2d 484].) Aetna seems to contend that, because the Salinas City Charter is silent on the question of contracting conditions for sewer installations the general laws of the state may apply, and the city thus falls within the class of a "political subdivision or agency of the State." The contention clearly is without merit.

The judgment is reversed only for the limited purpose of redetermining and awarding to Souza the amount of compensable damages proximately caused by the city's fraudulent breach of its contract with Souza, in accordance with the views expressed herein. On remand the trial court, as to that limited issue, is directed to take additional evidence, make whatever findings and conclusions it may deem proper in accordance with the foregoing views, and to make its award accordingly. Souza may file its cost bill for all proper costs, including both those costs heretofore incurred and those costs incurred on retrial of the limited issue. In all other respects the judgment is affirmed. Each party is to bear its own costs on this appeal.

Traynor, C. J., McComb, J., Peters, J., Tobriner, J., Mosk, J., and Burke, J., concurred.

The petitions of the plaintiff and cross-defendant and the defendant and cross-complainant for a rehearing were denied April 19, 1967.

Memorandum 70-69

EXHIBIT II



[L.A. No. 29688. In Bank. Feb. 18, 1970.]

JULIUS J. HELFEND, Plaintiff and Respondent, v.
SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT et al., Defendants and Appellants.

**SUMMARY**

Plaintiff observed the car in front of him preparing to back into a parking space and signaled the traffic behind him of his intention to stop. A bus approaching in the same lane pulled out to pass and sideswiped plaintiff's vehicle, knocking off the rear view mirror and crushing plaintiff's arm, which had been hanging down at the side of his car in the stopping signal position. In a tort action against the transit district, a public entity, and the bus driver, the jury returned a verdict of $16,400 in plaintiff's favor. (Superior Court of Los Angeles County, Otto J. Menne, Judge.)

On appeal, defendants contended that the trial court committed prejudicial error in refusing evidence that a portion of plaintiff's medical bills were paid from a collateral source, and also that the trial court erred in denying defendant the opportunity to determine if plaintiff was compensated from more than one collateral source for damages sustained in the accident. The Supreme Court affirmed the judgment, concluding that when a tort victim receives partial compensation from medical insurance coverage entirely independent of the tortfeasor, it is proper for the trial court to follow the collateral source rule and foreclose defendant from mitigating damages by means of the collateral payments. It was also determined that the trial court correctly refused to permit defendant to inquire, within hearing of the jury, as to the nature and extent of plaintiff's insurance coverage in the absence of any proper offer of proof that such information bore a proper relationship to the issues in the case. (Opinion by Torbiner, Acting C. J., expressing the unanimous view of the court.)

## HEADNOTES

Classified to McKinney's Digest

(1) **Damages § 29—Compensatory Damages—Mitigation of Loss.**—As related to the collateral source rule, that compensation to an injured party from a source wholly independent of the tortfeasor should not be deducted from damages otherwise collectible from the tortfeasor, the origin of such compensation constitutes a completely independent source, where plaintiff in a personal injury action receives benefits from his medical insurance coverage only because he has paid the premiums to obtain them.

(2) **Damages § 29—Compensatory Damages—Mitigation of Loss.**—The collateral source rule, that an injured party's compensation from a source wholly independent from the tortfeasor should not be deducted from damages otherwise collectible from him, as applied to benefits from medical insurance coverage, embodies the concept that one who invested years of insurance premiums to assure his medical care should receive the benefits of his thrift. The tortfeasor should not garner the benefits of his victim's providence.

(3) **Damages § 29—Compensatory Damages—Mitigation of Loss.**—The collateral source rule, that an injured party's compensation from a source wholly independent of the tortfeasor should not be deducted from damages otherwise collectible from him, expresses a policy judgment in favor of encouraging citizens to purchase and maintain insurance for personal injuries and for other eventualities.

(4) **Insurance § 233—Subrogation.**—An insured plaintiff who recovers damages from the tortfeasor receives no double recovery, since insurance policies increasingly provide for either subrogation or refund of benefits on a tort recovery; and the collateral source rule, that an injured party's compensation from a source wholly independent of the tortfeasor should not be deducted from damages otherwise collectible from him, simply serves to by-pass the antiquated doctrine of nonassignment of tortious actions and permits a proper transfer of risk from plaintiff's insurer to the tortfeasor by way of the victim's tort recovery.

(5) **Damages § 29—Compensatory Damages—Mitigation of Loss.**—Even in cases in which subrogation or a refund of benefits is precluded or

waived, the collateral source rule, that an injured party's compensation from a source wholly independent of the tortfeasor should not be deducted from damages otherwise collectible from him, performs necessary functions in computing damages, in that the cost of medical care often provides a measure for assessing plaintiff's general damages and the rule partially serves to compensate for an attorney's share of plaintiff's recovery.

(6) **Evidence § 181—Admissibility—Insurance Against Loss.**—The trial court properly followed the collateral source rule, that an injured party's compensation from a source wholly independent of the tortfeasor should not be deducted from damages otherwise collectible from him, and foreclosed defendant from mitigating damages for personal injuries by means of collateral payments where plaintiff received partial compensation for his injuries from medical insurance coverage entirely independent of defendant.

[Right of tortfeasor or liability insurer to credit for amounts already disbursed to injured party under medical payments in liability policy, note, 11 A.L.R.3d 1115.]

(7) **Damages § 29—Compensatory Damages—Mitigation of Loss: State of California § 74—Actions—Collateral Source Rule.**—The collateral source rule, that an injured party's compensation from a source wholly independent of the tortfeasor should not be deducted from damages otherwise collectible from him, is not simply punitive in nature, and the rule applies to governmental entities, as well as to all other tortfeasors. (Disapproving any contrary indications in *City of Salinas* v. *Souza & McCue Constr. Co.*, 66 Cal.2d 217, 226-228 [57 Cal.Rptr. 337, 424 P.2d 921].)

[See Am.Jur.2d, Damages, § 206 et seq.]

(8) **Evidence § 181—Admissibility—Insurance Against Loss.**—In a personal injury action against a public transit district and its bus driver, the trial court correctly refused to permit any inquiry, within the jury's hearing, as to the nature and extent of plaintiff's insurance coverage, where the defense failed to make any proper attempt to invoke the court's discretion under Evid. Code, § 352, and offered no proper proof that such information bore a proper relationship to the issues in the case.

COUNSEL.

Victor Rosenblatt for Defendants and Appellants.

John D. Maharg, County Counsel (Los Angeles), and Peter R. Krichman, Deputy County Counsel, as Amici Curiae on behalf of Defendants and Appellants.

Caidin, Bloomgarden & Kalman and Newton Kalman for Plaintiff and Respondent.

OPINION

**TOBRINER, Acting C. J.**—Defendants appeal from a judgment of the Los Angeles Superior Court entered on a verdict in favor of plaintiff, Julius J. Helfend, for $16,400 in general and special damages for injuries sustained in a bus-auto collision that occurred on July 19, 1965, in the City of Los Angeles.

We have concluded that the judgment for plaintiff in this tort action against the defendant governmental entity should be affirmed. The trial court properly followed the collateral source rule in excluding evidence that a portion of plaintiff's medical bills had been paid through a medical insurance plan that requires the refund of benefits from tort recoveries.

1. *The facts.*

Shortly before noon on July 19, 1965, plaintiff drove his car in central Los Angeles east on Third Street approaching Grandview. At this point Third Street has six lanes, four for traffic and one parking lane on each side of the thoroughfare. While traveling in the second lane from the curb, plaintiff observed an automobile driven by Glen A. Raney, Jr., stopping in his lane and preparing to back into a parking space. Plaintiff put out his left arm to signal the traffic behind him that he intended to stop; he then brought his vehicle to a halt so that the other driver could park.

At about this time Kenneth A. Mitchell, a bus driver for the Southern California Rapid Transit District, pulled out of a bus stop at the curb of Third Street and headed in the same direction as plaintiff. Approaching plaintiff's and Raney's cars which were stopped in the second lane from the curb, Mitchell pulled out into the lane closest to the center of the street in order to pass. The right rear of the bus sideswiped plaintiff's vehicle, knocking off the rear-view mirror and crushing plaintiff's arm, which had been hanging down at the side of his car in the stopping signal position.

An ambulance took plaintiff to Central Receiving Hospital for emergency first aid treatment. Upon release from the hospital plaintiff proceeded to consult Dr. Saxon, an orthopedic specialist, who sent plaintiff immediately to the Sherman Oaks Community Hospital where he received treatment for about a week. Plaintiff underwent physical therapy for about six months in order to regain normal use of his left arm and hand. He acquired some permanent discomfort but no permanent disability from the injuries sustained in the accident. At the time of the injury plaintiff was 67 years of age and had a life expectancy of about 11 years. He owned the Jewel Homes Investment Company which possessed and maintained small rental properties. Prior to the accident plaintiff had performed much of the minor maintenance on his properties including some painting and minor plumbing. For the six-month healing period he hired a man to do all the work he had formerly performed and at the time of the trial still employed him for such work as he himself could not undertake.

Plaintiff filed a tort action against the Southern California Rapid Transit District, a public entity, and Mitchell, an employee of the transit district. At trial plaintiff claimed slightly more than $2,700 in special damages, including $921 in doctor's bills, a $336.99 hospital bill, and about $45 for medicines.[1] Defendant requested permission to show that about 80 percent of the plaintiff's hospital bill had been paid by plaintiff's Blue Cross insurance carrier and that some of his other medical expenses may have been paid by other insurance. The superior court thoroughly considered the then very recent case of *City of Salinas* v. *Souza & McCue Constr. Co.* (1967) 66 Cal.2d 217 [57 Cal.Rptr. 337, 424 P.2d 921], distinguished the *Souza* case on the ground that *Souza* involved a contract setting, and concluded that the judgment should not be reduced to the extent of the amount of insurance payments which plaintiff received. The court ruled that defendants should not be permitted to show that plaintiff had received medical coverage from any collateral source.

After the jury verdict in favor of plaintiff in the sum of $16,300, defendants appealed, raising only two contentions: (1) The trial court committed prejudicial error in refusing to allow the introduction of evidence to the effect that a portion of the plaintiff's medical bills had been paid from a collateral source. (2) The trial court erred in denying defendant the opportunity to determine if plaintiff had been compensated from more than one collateral source for damages sustained in the accident.

[1]The plaintiff claimed special damages of $2,747.99 of which $1,302.99 represented medical expenses, $35 repair of plaintiff's watch, about $1,350 expenses and costs incurred as a result of hiring another man to do the work plaintiff normally performed, and $50 plaintiff's share of the automobile repair costs.

We must decide whether the collateral source rule applies to tort actions involving public entities and public employees in which the plaintiff has received benefits from his medical insurance coverage.

2. *The collateral source rule.*

The Supreme Court of California has long adhered to the doctrine that if an injured party receives some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor. (See, e.g., *Peri* v. *Los Angeles Junction Ry. Co.* (1943) 22 Cal.2d 111, 131 [137 P.2d 441].)[2] As recently as August 1968 we unanimously reaffirmed our adherence to this doctrine, which is known as the "collateral source rule." (*De Cruz* v. *Reid* (1968) 69 Cal.2d 217, 223-227 [70 Cal.Rptr. 550, 444 P.2d 342]; see *City of Salinas* v. *Souza & McCue Const. Co.*, *supra*, 66 Cal.2d 217, 226.)

Although the collateral source rule remains generally accepted in the United States,[3] nevertheless many other jurisdictions[4] have restricted[5] or

[2]In *Peri* v. *Los Angeles Junction Ry. Co.*, *supra*, 22 Cal.2d 111, 131, a case involving a negligently caused automobile accident, this court said, "While it is true that he [plaintiff] received $2 per day compensation while he was unable to work, that sum may not be deducted from his loss of earnings, because it was received from an insurance company under a policy owned and held by him. 'Damages recoverable for a wrong are not diminished by the fact that the party injured has been wholly or partly indemnified for his loss by insurance effected by him, and to the procurement of which the wrongdoer did not contribute; . . .' [citations]."

[3]See West, *The Collateral Source Rule Sans Subrogation: A Plaintiff's Windfall* (1963) 16 Okla.L.Rev. 395, 397-410; see also Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law* (1966) 54 Cal.L.Rev. 1478, 1482-1483 and fn. 10; 2 Harper & James, The Law of Torts (1968 Supp.) § 25.22, at p. 152. There are many sorts of collateral sources and a great variety of contexts in which the "rule" might be applied. We expressly do not consider or determine the appropriateness of the rule's application in the myriad of possible situations which we have not discussed or which are not presented by the facts of this case.

[4]After a period in which it appeared that the courts of the United Kingdom, the country of the rule's origin, would disavow it (see *Browning* v. *War Office* (1963) 1 Q.B. 750), the *House of Lords in Parry* v. *Cleaver* (1969) 2 W.L.R. 821, has recently reaffirmed the rule and applied it to a case of a tort victim who, following the automobile accident in which he was disabled, received a pension. (See *Bradburn* v. *Great Western Ry.* (1874) L.R. 10 Ex. 1; Atiyah, *Collateral Benefits Again* (1969) 32 Mod.L.Rev. 397.) Most other western European nations have repudiated the rule. (See Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, *supra*, 54 Cal.L.Rev. 1478, 1480-1484, 1516-1523, 1535-1540.)

[5]The New York Court of Appeals has, for example, quite reasonably held that an injured physician may not recover from a tortfeasor for the value of medical and nursing care rendered gratuitously as a matter of professional courtesy. (See *Coyne* v. *Campbell* (1962) 11 N.Y.2d 372 [230 N.Y.S.2d 1, 183 N.E.2d 891].) The doctor owed at least a moral obligation to render gratuitous services in return, if ever required; but he had neither paid premiums for the services under some form of insur-

repealed it. In this country most commentators have criticized the rule and called for its early demise.[6] In *Souza* we took note of the academic criticism rule, characterized the rule as "punitive," and held it inapplicable to the governmental entity involved in that case.

We must, however, review the particular facts of *Souza* in order to determine whether it applies to the present case. The City of Salinas brought suit against Souza & McCue Construction Company, a public works contractor, and its pipe supplier for breach of a contract to construct a sewer pipe line. *Souza* cross-complained against the city, alleging fraudulent misrepresentation and breach of implied warranty of site conditions; and against the pipe supplier, alleging a guarantee of performance of the piping and a promise to indemnify *Souza* for any losses. The trial court found that the city materially misrepresented soil conditions by failing to inform *Souza* of unstable conditions known to the city, that with the city's knowledge *Souza* relied upon the misrepresentations in bidding, and that *Souza* should recover damages proximately caused by the city's fraudulent breach.

We held that the trial court improperly determined damages against the city by refusing to allow the city to show that the supplier had recompensed

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ance coverage nor manifested any indication that he would endeavor to repay those who had given his assistance. Thus this situation differs from that in which friends and relatives render assistance to the injured plaintiff with the expectation of repayment out of any tort recovery; in that case, the rule has been applied. (*Kimball* v. *Northern Elec. Co.* (1911) 159 Cal. 225, 231 [113 P. 156]; *Sykes* v. *Lawlor* (1874) 49 Cal. 236.) On the other hand, New York has joined most states in holding that a tortfeasor may not mitigate damages by showing that an injured plaintiff would receive a disability pension. (*Healy* v. *Rennert* (1961) 9 N.Y.2d 202 [213 N.Y.S.2d 44, 173 N.E.2d 777]; see *Hume* v. *Lacey* (1952) 112 Cal.App.2d 147, 151-152 [245 P.2d 672] (pension does not reduce recovery); *Benetich* v. *Market Street Ry. Co.* (1938) 29 Cal.App.2d 641, 647-648 [85 P.2d 556]; cf. *Groat* v. *Walkup Drayage & Warehouse Co.* (1936) 14 Cal.App.2d 350, 358-359 [58 P.2d 200].) In these cases the plaintiff had actually or constructively paid for the pension by having received lower wages or by having contributed directly to the pension plan.

[6]In recent years commentators have generally opposed the rule. (2 Harper & James, The Law of Torts (1968 Supp.) § 25.22, at p. 152; see, e.g., Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, *supra*, 54 Cal.L.Rev. 1478; James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies* (1952) 27 N.Y.U.L.Rev. 537; Schwartz, *The Collateral Source Rule* (1961) 41 B.U.L. Rev. 348; West, *The Collateral Source Rule Sans Subrogation: A Plaintiff's Windfall*, *supra*, 16 Okla. L.Rev. 395; Note, *Unreason in the Law of Damages: The Collateral Source Rule* (1964) 77 Harv.L.Rev. 741.) Of course, the rule constitutes a valuable weapon in the plaintiff attorney's arsenal. (Averbach, *The Collateral Source Rule* (1960) 21 Ohio St.L.J. 231.) One commentator has noted the criticism of the rule, but concludes: "For the present system, however, the rule seems to perform a needed function. At the very least, it removes some complex issues from the trial scene. At its best, in some cases, it operates as an instrument of what most of us would be willing to call justice." (Maxwell, *The Collateral Source Rule in The American Law of Damages* (1962) 46 Minn. L.Rev. 669, 695.)

*Souza* for some of the damages caused by the city's breach. In this contract setting in which the supplier did not constitute a wholly independent collateral source,[7] we held that the collateral source rule cannot be applied against public entities because the collateral source rule appears punitive in nature[8] and punitive damages cannot be imposed on public entities.[9]

[7]In *Laurenzi* v. *Vranzian* (1945) 25 Cal.2d 806, 813 [155 P.2d 633], this court held that "payments by one tortfeasor on account of a harm for which he and another are each liable, diminish the amount of the claim against the other whether or not it was so agreed at the time of payment and whether the payment was made before or after judgment. Since the plaintiff can have but one satisfaction, evidence of such payments is admissible for the purpose of reducing *pro tanto* the amount of the damages he may be entitled to recover." Hence, the rule applies only to payments that come from a source entirely independent of the tortfeasor and does not apply to payments by joint tortfeasors or to benefits the plaintiff receives from a tortfeasor's insurance coverage. (See *De Cruz* v. *Reid*, *supra*, 69 Cal.2d 217, 225-226; *Witt* v. *Jackson* (1961) 57 Cal.2d 57, 71-72 [17 Cal.Rptr. 369, 366 P.2d 641]; *Turner* v. *Mannon* (1965) 236 Cal.App.2d 134, 138-139 [45 Cal.Rptr. 831]; *Dodds* v. *Bucknum* (1963) 214 Cal.App.2d 206, 212-213 [29 Cal.Rptr. 393]; see 2 Harper & James, The Law of Torts (1968 Supp.) § 25.22, fns. 5-6, at pp. 153-154.)

[8]For the proposition that the collateral source rule is punitive, *Souza* cited *United Protective Workers* v. *Ford Motor Co.* (7th Cir. 1955) 223 F.2d 49, 54 [48 A.L.R. 2d 1285], which is clearly distinguishable from the present tort case because it involved the construction and application of a collective bargaining contract in which the court found neither bad faith nor wilful misconduct sufficient to justify a measure of damages other than the compensation the discharged employee would have received, punitive damages, or prejudgment interest on damages. *Souza* also cited Harper & James, The Law of Torts (1956), section 25.22, pages 1343-1354, which concluded: "If therefore a feeling of revenge and resentment has any place in the law at all, it should certainly be banished as far as possible from the law of civil recovery, practically as well as theoretically. In spite of this, we suggest, it has played a large—though unrecognized—part in justifying plaintiff's double recovery." Although we recognize that in the past a primitive moralism may have engendered the collateral source rule to serve punitive ends, we suggest below that the rule today still serves not mere punitive purposes, but legitimate objectives that may or may not survive the spread of a philosophy of social insurance. *Souza* also cites Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, *supra*, 54 Cal.L.Rev. 1478, 1482-1484. Professor Fleming seems concerned with the punitive nature of the collateral source rule in cases in which the plaintiff receives a double, treble, or multiple recovery. He notes, however, that "The theory of subrogation offers a neat and well-tried device for at once vindicating the principle of indemnity and reallocating the burden of the loss to the tortfeasor without, however, involving him in multiple liability." (*Id.* at p. 1498.) Professor Fleming also observes that arrangements for the refund of benefits, such as the one found in the present case, serve to avoid double recovery and reallocate risk from plaintiff's insurer to the tortfeasor or his insurer, and possesses certain advantages over subrogation. (*Id.* at p. 1526.) The plaintiff's Blue Cross coverage does not present a danger of double recovery because of its refund of benefits provision and thus does not fall within Professor Fleming's concern about the punitive nature of double recovery.

[9]See Government Code section 818. On the issue of whether liability recompensed by a collateral source can be imposed upon a public entity, plaintiff cogently points out that such liability is not imposed upon the innocent taxpayers as *Souza* assumes (see *City of Salinas* v. *Souza & McCue Constr. Co.*, *supra*, 66 Cal.2d 217, 227), but upon the entity's insurer. Of course the entity does pay the insurance premiums or

Although *Souza's* reasoning as to punitive damages might appear to apply to private tortfeasors[10] as well as public entities and to torts as well as contract actions,[11] we did not there consider the collateral source rule in contexts different from the specific contractual setting and particular relationship of the parties involved. We distinguished the present case from *Souza* on the ground that in *Souza* the plaintiff received payments from his subcontractor which, in the contractual setting of that case, did not constitute a truly independent source. Obviously, such a "source" differs entirely from the instant one, which derives from plaintiff's payment of insurance premiums. (1) Here plaintiff received benefits from his medical insurance coverage only because he had long paid premiums to obtain them. Such an origin does constitute a completely independent source. Hence, although we reaffirm the holding in *Souza*, we do not believe that its reasoning either compels the abolition of the collateral source rule in all cases or requires an unwarranted exemption from the rule of public entities and their employees involved in tort actions.[12] *Souza* does not even suggest that public employees should be charged with the extra liability which an exemption for public entities might imply.[13]

(2) The collateral source rule as applied here embodies the venerable concept that a person who has invested years of insurance premiums to

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the tort recovery, if it is a self-insurer. But such premiums or recoveries are the normal cost of maintaining an enterprise, and represent no grievous injury to taxpayers since the entity and its insurer are in an excellent position to spread the risk of loss and to take precautionary measures to prevent injuries.

[10]See California Recognizes Collateral Source Rule Exception (Oct. 1969) 10 For the Defense, pp. 61, 69.

[11]See Note (1967) *The Supreme Court of California*, 55 Cal.L.Rev. 1059, 1163-1165. Section 342 of the Restatement of the Law of Contracts (1932) provides that: "Punitive damages are not recoverable for breach of contract. *Comment*: a. Damages are punitive when they are assessed by way of punishment to the wrongdoer or example to others and not as the money equivalent of harm done. All damages are in some degree punitive and preventive; but they are not so called unless they exceed just compensation measured by the harm suffered." We do not decide whether the collateral source rule should apply in hybrid actions involving both tort and contract claims, because the present case involves only a negligent tort. (See *Patent Scaffolding Co.* v. *William Simpson Constr. Co.* (1967) 256 Cal.App.2d 506, 510-511 [64 Cal.Rptr. 187]; *Greenberg* v. *Hastie* (1962) 202 Cal.App.2d 159, 176-178 [20 Cal. Rptr. 747]; *Tremeroli* v. *Austin Trailer Equipment Co.* (1951) 102 Cal.App.2d 464, 480-483 [227 P.2d 923]; *American Alliance Ins. Co.* v. *Capital Nat. Bank* (1946) 75 Cal.App.2d 787, 791-795 [171 P.2d 449]; *Clark* v. *Burns Hamman Baths* (1925) 71 Cal.App. 571, 575 [236 P. 152]; cf. *City of Salinas* v. *Souza & McCue Constr. Co., supra*, 66 Cal.2d 217, 226-227; *Anheuser-Busch, Inc.*, v. *Starley* (1946) 28 Cal. 2d 347, 349-350 [170 P.2d 448, 166 A.L.R. 198].)

[12]Cf. Nellis, *California Governmental Tort Liability and the Collateral Source Rule* (1969) 9 Santa Clara Law. 227.

[13]Cf. Note (1967) 55 Cal.L.Rev. 1059, 1165.

assure his medical care should receive the benefits of his thrift.[14] The tortfeasor should not garner the benefits of his victim's providence.

(3) The collateral source rule expresses a policy judgment in favor of encouraging citizens to purchase and maintain insurance for personal injuries and for other eventualities. Courts consider insurance a form of investment, the benefits of which become payable without respect to any other possible source of funds. If we were to permit a tortfeasor to mitigate damages with payments from plaintiff's insurance, plaintiff would be in a position inferior to that of having bought no insurance, because his payment of premiums would have earned no benefit. Defendant should not be able to avoid payment of full compensation for the injury inflicted merely because the victim has had the foresight to provide himself with insurance.

Some commentators object that the above approach to the collateral source rule provides plaintiff with a "double recovery," rewards him for the injury, and defeats the principle that damages should compensate the victim but not punish the tortfeasor. We agree with Professor Fleming's observation, however, that "double recovery is justified only in the face of some exceptional, supervening reason, as in the case of accident or life insurance, where it is felt unjust that the tortfeasor should take advantage of the thrift and prescience of the victim in having paid the premium." (Fleming, Introduction to the Law of Torts (1967) p. 131.) As we point out *infra*, recovery in a wrongful death action is not defeated by the payment of the benefit on a life insurance policy.

(4) Furthermore, insurance policies increasingly provide for either subrogation or refund of benefits upon a tort recovery, and such refund is indeed called for in the present case. (See Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, *supra*, 54 Cal.L.Rev. 1478, 1479.)

[14]See *Thompson* v. *Matucci* (1963) 223 Cal.App.2d 208, 209-210 [35 Cal.Rptr. 741] (Blue Cross payment for hospital bills does not reduce plaintiff's recovery); *Gersick* v. *Shi ing* (1950) 97 Cal.App.2d 641, 649-650 [218 P.2d 583] (error to have admitted testimony that plaintiff's medical bills had been paid by Blue Cross or that plaintiff had received United States Employment Service disability payments). In *Lewis* v. *County of Contra Costa* (1955) 130 Cal.App.2d 176 [278 P.2d 756], the cou t he'd that the collateral source rule prohibited the trial court from admitting evidence that at the time of the accident p'aintiff had accumulated sufficient sick leave to cover the period of his disablement. The court reasoned that "In a very real sense of the term it is as if he had drawn upon his savings account in an amount equal to his salary during the period of his disablement." (130 Cal.App.2d at pp. 178-179. See also *Purcell* v. *Goldberg* (1939) 34 Cal.App.2d 344, 350 [93 P.2d 578] (association which provided in contract that members were liable for medical services only in case they recovered damages); *Reichle* v. *Hazir* (1937) 22 Cal.App.2d 543, 547-548 [71 P.2d 849] (collateral source rule applies only insofar as public hospital would receive reimbursement for its gratuitous services from the tort recovery).

Hence, the plaintiff receives no double recovery;[15] the collateral source rule simply serves as a means of by-passing the antiquated doctrine of non-assignment of tortious actions and permits a proper transfer of risk from the plaintiff's insurer to the tortfeasor by way of the victim's tort recovery. The double shift from the tortfeasor to the victim and then from the victim to his insurance carrier can normally occur with little cost in that the insurance carrier is often intimately involved in the initial litigation and quite automatically receives its part of the tort settlement or verdict.[16]

(5) Even in cases in which the contract or the law precludes subrogation or refund of benefits,[17] or in situations in which the collateral source waives such subrogation or refund, the rule performs entirely necessary functions in the computation of damages. For example, the cost of medical care often provides both attorneys and juries in tort cases with an important measure for assessing the plaintiff's general damages. (Cf., e.g., *Rose* v. *Melody Lane* (1952) 39 Cal.2d 481, 489 [247 P.2d 335].) To permit the defendant to tell the jury that the plaintiff has been recompensed by a collateral source for his medical costs might irretrievably upset the complex, delicate, and somewhat indefinable calculations which result in the

[15]In reaffirming our adherence to the collateral source rule in this tort case involving a plaintiff with collateral payments from his insurance coverage, we do not suggest that the tortfeasor be required to pay doubly for his wrong—once to the injured party and again to reimburse the plaintiff's collateral source—as *Smith* v. *City of Los Angeles* (1969) *276 Cal.App.2d —— [81 Cal.Rptr. 120], appears to require.

[16]In personal injury cases in which the tort victim is unwilling to sue, subrogation subjects the tort victim to additional trouble and incurs further cost. A provision for refund of benefits, such as in the present case, avoids these difficulties by permitting the tort victim to decide whether to undertake litigation against the tortfeasor. (See Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, *supra*, 54 Cal.L.Rev. 1478, 1526, 1536-1537.)

[17]"Certain insurance benefits are regarded as the proceeds of an investment rather than as an indemnity for damages. Thus it has been held that the proceeds of a life insurance contract made for a fixed sum rather than for the damages caused by the death of the insured are proceeds of an investment and can be received independently of the claim for damages against the person who caused the death of the insured. The same rule has been held applicable to accident insurance contracts. As to both kinds of insurance it has been stated: 'Such a policy is an investment contract, giving the owner or beneficiary an absolute right, independent of the right against any third person responsible for the injury covered by the policy.' [Citations.] . . . An insurer who fully compensates the insured, however, is subrogated to the rights of the insured against [or may receive a refund of benefits from] one who insured his property if the insurance was for the protection of the property of the insured, and was therefore an indemnity contract. [Citation.] In such cases subrogation [or refund of benefits] is the means by which double recovery by the owner is prevented and the ultimate burden shifted to the wrongdoer where it belongs. . . ." (*Anheuser-Busch, Inc.* v. *Starley*, *supra*, 28 Cal.2d 347, 355 (dissenting opn. of Traynor, J.).)

One Court of Appeal has, however, upheld the refund of benefits provisions in a Blue Shield medical insurance contract similar to the one at issue here. (*Block* v. *California Physicians' Service* (1966) 244 Cal.App.2d 266 [53 Cal.Rptr. 51].)

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normal jury verdict. (See *Hoffman* v. *Brandt* (1966) 65 Cal.2d 549, 554-555 [55 Cal.Rptr. 417, 421 P.2d 425]; *Garfield* v. *Russell* (1967) 251 Cal.App.2d 275, 279 [59 Cal.Rptr. 379].)

We also note that generally the jury is not informed that plaintiff's attorney will receive a large portion of the plaintiff's recovery in contingent fees or that personal injury damages are not taxable to the plaintiff and are normally deductible by the defendant.[18] Hence, the plaintiff rarely actually receives full compensation for his injuries as computed by the jury. The collateral source rule partially serves to compensate for the attorney's share and does not actually render "double recovery" for the plaintiff. Indeed, many jurisdictions that have abolished or limited the collateral source rule have also established a means for assessing the plaintiff's costs for counsel directly against the defendant rather than imposing the contingent fee system.[19] In sum, the plaintiff's recovery for his medical expenses from both the

[18]Section 104(a)(2) of the Internal Revenue Code of 1954 (26 U.S.C. § 22(b)(5)) permits the tort victim to exclude from his gross income the amount of damages he receives from a tort verdict or settlement on account of his personal injuries or illness. (See generally, as to the tax consequences of tort cases, Guardino, *Tax Aspects of Recoveries and Damages in Lawsuits* (April-May 1969) 5 Trial 34.) The plaintiff who had been in a high tax bracket and who recovers for loss of earnings on a pretax basis is placed in a better position than if he had earned the same income. (See Note (1964) 77 Harv.L.Rev. 741, 747.) The United States Court of Appeals for the Second Circuit recently observed that: "in 'the great mass of litigation at the lower or middle reach of the income scale, where future income is fairly predictable, added exemptions or deductions drastically affect the tax and . . . the plaintiff is almost certain to be under-compensated for loss of earning power in any event.' The undercompensation would arise from the erosion of the recovery due to the failure to award attorneys' fees, almost always high in this type of litigation because of their contingent nature, and to continuing inflation; . . . [I]n cases 'at the opposite end of the income spectrum,' failure to deduct for taxes would result in an award that 'would be plainly excessive even after taking full account of the countervailing factors we have mentioned.'" (*Petition of Marina Mercante Nicaraguense, S.A.* (2d Cir. 1966 (Friendly, C.J.)) 364 F.2d 118, 125; see *McWeeney* v. *New York, N.H. & H.R.R. Co.* (2d Cir. 1960) 282 F.2d 34, 38-39; *O'Connor* v. *United States* (2d Cir. 1959) 269 F.2d 578, 584-586; *Leming* v. *Oilfields Trucking Co.* (1955) 44 Cal.2d 343, 358 [282 P.2d 23, 51 A.L.R.2d 1071].) Of course, since the issue has been neither briefed nor argued by the parties in this case, we leave open the proper treatment of the tax consequences of tort verdicts.

[19]Under workmen's compensation subrogation normally prevents double recovery by shifting the loss to the tortfeasor. (See Lab. Code, §§ 3852-3854, 3856; *De Cruz* v. *Reid*, *supra*, 69 Cal.2d 217, 221-227; Cal. Workmen's Compensation Practice (Cont.Ed.Bar 1963) §§ 19.1-19.37, at pp. 593-622.) In actions to recovery against a tortfeasor, the court sets a reasonable attorney's fee. (See Lab. Code, §§ 3856, 3861; Cal.Workmen's Compensation Practice, *supra*, § 19.31, at pp. 617-619.) As to the practice of several European countries in which a master assesses attorney's fees directly against the tortfeasor, see generally Abel-Smith & Stevens, Lawyers and the Courts (1967) pp. 377-405; Goodhart, *Costs* (1929) 38 Yale L.J. 849; Quint, *Attorney's Fees—An Item of Damage* (1966) 41 Los Angeles Bar Bull. 367; Stoebuck, *Counsel Fees Included in Costs: A Logical Development* (1966) 38 U.Colo.L.Rev. 202, 206-207.

tortfeasor and his medical insurance program will not usually give him "double recovery," but partially provides a somewhat closer approximation to full compensation for his injuries.[20]

If we consider the collateral source rule as applied here in the context of the entire American approach to the law of torts and damages, we find that the rule presently performs a number of legitimate and even indispensable functions. Without a thorough revolution in the American approach to torts and the consequent damages, the rule at least with respect to medical insurance benefits has become so integrated within our present system that its precipitous judicial nullification would work hardship. In this case the collateral source rule lies between two systems for the compensation of accident victims: the traditional tort recovery based on fault and the increasingly prevalent coverage based on non-fault insurance. Neither system possesses such universality of coverage or completeness of compensation that we can easily dispense with the collateral source rule's approach to meshing the two systems. (Cf., e.g., *Bilyeu* v. *State Emp. Retirement System* (1962) 58 Cal.2d 618, 629 [24 Cal.Rptr. 562, 375 P.2d 442] (concurring opn. of Peters, J.).) The reforms which many academicians propose cannot easily be achieved through piecemeal common law development; the proposed changes, if desirable, would be more effectively accomplished through legislative reform. In any case, we cannot believe that the judicial repeal of the collateral source rule, as applied in the present case, would be the place to begin the needed changes.

Although in the special circumstances of *Souza* we characterized the collateral source rule as "punitive" in nature, we have pointed out the several legitimate and fully justified compensatory functions of the rule. In fact, if the collateral source rule were actually punitive, it could apply only in cases of oppression, fraud, or malice and would be inapplicable to most tort, and almost all negligence, cases regardless of whether a governmental entity were involved. (See Civ. Code, § 3294; Note (1967) 55 Cal. L.Rev. 1059, 1165.) We therefore reaffirm our adherence to the collateral source rule in tort cases in which the plaintiff has been compensated by an independent collateral source—such as insurance, pension, continued wages, or disability payments—for which he had actually or constructively

[20]Of course, only in cases in which the tort victim has received payments or services from a collateral source will he be able to mitigate attorney's fees by means of the collateral source rule. Thus the rule provides at best only an incomplete and haphazard solution to providing all tort victims with full compensation. Depriving some tort victims of the salutary protections of the collateral source rule will, short of a thorough reform of our tort system, only decrease the available compensation for injuries. (See *McWeeney* v. *New York, N.H. & H. R.R. Co.*, *supra*, 282 F.2d 34, 38; but cf. Schwartz, *The Collateral Source Rule*, *supra*, 41 B.U.L.Rev. 348, 351-352.)

(see fns. 5 and 14, *supra*) paid or in cases in which the collateral source would be recompensed from the tort recovery through subrogation, refund or benefits, or some other arrangement. **(6)** Hence, we conclude that in a case in which a tort victim has received partial compensation from medical insurance coverage entirely independent of the tortfeasor the trial court properly followed the collateral source rule and foreclosed defendant from mitigating damages by means of the collateral payments.

3. *The collateral source rule, public entities, and public employees*

**(7)** Having concluded that the collateral source rule is not simply punitive in nature, we hold, for the reasons set out *infra*, that the rule as delineated here applies to governmental entities as well as to all other tortfeasors. We must therefore disapprove of any indications to the contrary in *City of Salinas* v. *Souza & McCue Constr. Co., supra*, 66 Cal.2d 217, 226-228.

Defendants would have this court create a special form of sovereign immunity as a novel exception to the collateral source rule for tortfeasors who are public entities or public employees. (Cf. *Muskopf* v. *Corning Hospital Dist.* (1961) 55 Cal.2d 211, 221 [11 Cal.Rptr. 89, 359 P.2d 457].) We see no justification for such special treatment. In the present case the nullification of the collateral source rule would simply frustrate the transfer of the medical costs from the medical insurance carrier, Blue Cross, to the public entity. The public entity or its insurance carrier is in at least as advantageous a position to spread the risk of loss as is the plaintiff's medical insurance carrier. To deprive Blue Cross of repayment for its expenditures on plaintiff's behalf merely because he was injured by a public entity rather than a private individual would constitute an unwarranted and arbitrary discrimination.

Furthermore, if we were to follow without careful analysis the *Souza* characterization of the collateral source rule as punitive in nature, we would immediately face a dilemma as to the proper treatment of the public employee's liability. In order to encourage public employees to perform their duties without the threat of untoward personal liability, we held in *Johnson* v. *State of California* (1968) 69 Cal.2d 782, 791-792 [73 Cal.Rptr. 240, 447 P.2d 352], that a public entity must, under Government Code sections 825 to 825.6, indemnify and defend its employees against civil liability, except in cases of conduct outside the scope of employment or acts performed with actual fraud, corruption, or malice.

If we were to conclude that the collateral source rule cannot apply to public entities, we would be forced to reach one of three equally implausible results: (1) Since the public entity is immune from the rule and enjoys

a deduction in damages, but the driver possesses no such immunity, the driver must bear the cost of the extra damages equivalent to the collateral source increment, but under *Johnson* he would be indemnified by the public entity for all the plaintiff's tort recovery. Hence, by suing both the public entity and the public employee the plaintiff can bypass the purported *Souza* rule through the *Johnson* decision.[21] (3) Finally, since the public entity is immune from the rule and enjoys a deduction in damages, the only way to avoid untoward personal liability for the driver under *Johnson* would be for this court to extend the collateral source rule immunity from the public entity to the public employee.

The first alternative would patently conflict with this court's approach to the civil liability of public employees in *Johnson*. To fasten upon the public employee liability for damages to the injured party equivalent to the amount represented by the collateral source would be to subject him to an arbitrary charge. It would, perhaps, reduce his dedication to his work; the public employee should be free to perform his duties without fear of such an onerous obligation.

The second alternative would mechanically follow the rules established in *Johnson* and *Souza*, but would totally undermine the effect of *Souza* by indirectly imposing the rule upon the public entity by means of the indemnification process. We apparently foreclosed this indirect approach in the *Souza* opinion itself: "As we cannot impose on the [public entity] 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." (*City of Salinas* v. *Souza & McCue Constr. Co.*, *supra*, 66 Cal.2d 217, 228.) Rather than adopting this circumvention, we must confront the issues at stake in determining whether the collateral source rule should apply to public entities and their employees. As stated above, we conclude that the rule is not simply punitive in nature and applies to public entities to the same extent as to other tortfeasors.

The third approach would extend the collateral source rule immunity from the public entity to its employees and increase the unjustified discrimination against tort victims who happen to be injured by public entities rather than private individuals. In the present case the extension of this immunity to the bus driver would arbitrarily deprive the plaintiff's medical

[21] In the present case the plaintiff sued both the public entity and its employee bus driver, but in *Acosta* v. *Southern California Rapid Transit Dist.*, *post*, p. 19 [—— Cal.Rptr. ——, —— P.2d ——], the injured passenger sued only the public entity, alleging the negligence of the entity's employee bus driver. If we were to adopt either of the first two alternatives outlined above, our conclusion would unjustifiably create a difference in the result in *Acosta* and the present case simply because of a quirk in the way the plaintiff pleaded his case.

insurer of a repayment for the services it rendered to the plaintiff simply because the plaintiff was injured by a public entity rather than by some other private individual or corporation. The public entity or its insurer is in at least as advantageous a position to spread the risk of loss arising from automobile-bus accidents as is the plaintiff's medical insurer.

In view of the several legitimate and important functions of the collateral source rule in our present approach to the law of torts and damages, we find no appropriate justification for labelling the rule "punitive" or for not applying it to public entities and public employees, with the normal provisions for indemnification under Government Code section 825 and the *Johnson* decision.

4. *The trial court properly refused to permit the defendant to inquire whether plaintiff had been compensated by a collateral source in the absence of some allegation that such information bears a proper relationship to the issues in the case.*

Defendant attempted to inquire before the jury as to whether plaintiff had been compensated by a collateral source. Defendant first sought to ask about the collateral source payments on the basis of the *Souza* case and, as we have discussed above, the trial court properly refused to permit defendant to attempt to mitigate damages on that ground. Apparently, defendant also sought to inquire about the collateral source payments for the limited purpose of questioning the reasonableness and necessity of medical treatment costs or for showing that plaintiff was a malingerer. (See *Hoffman* v. *Brandt*, *supra*, 65 Cal.2d 549, 554-555; *Garfield* v. *Russell*, *supra*, 251 Cal.App.2d 275, 278-279.)[22]

*Hoffman*, *Garfield*, and Evidence Code section 352 require the trial court to assess the prejudicial effect of telling the jury about insurance coverage, even with appropriate cautionary instructions, against the probability that the party who seeks to present evidence of insurance coverage can show a proper relationship between the coverage and an issue in the case. (Cf. *Turner* v. *Munnon*, *supra*, 236 Cal.App.2d 134, 140.) In the

[22]The defendant's attorney so intertwined his arguments concerning the collateral source rule under *Souza* with his argument for using the plaintiff's medical insurance coverage for the purpose of showing malingering under *Garfield* that the record does not even clearly indicate that the defendant properly proposed this second basis for mentioning the insurance coverage before the jury. During the argument the defense counsel admitted that he did not have the facts upon which he could posit the claim of malingering but he failed to expose the whole situation to the trial court so that it could determine how to exercise its discretion under Evidence Code section 352. (See *Eichel* v. *New York Central R.R. Co.*, *supra*, 375 U.S. 253, 255-256 [11 L.Ed. 2d 307, 309-310, 84 S.Ct. 316]; *Garfield* v. *Russell*, *supra*, 251 Cal.App.2d 275, 278-279).

present case it would have been nearly impossible for defense counsel to show that plaintiff was a malingerer merely because he might have possessed multiple insurance coverage. Plaintiff sustained extremely severe injuries when defendant's bus crushed his arm.

Plaintiff remained in the hospital only one week. Considering the seriousness of his injury, the arduous nature of his employment, and his age, he remained away from work for only a short time. Furthermore, if the Blue Cross policy required the refund of nearly all the benefits from any tort recovery that plaintiff might receive, defendant could hardly show malingering.[20]

Defense counsel did not even attempt to inquire, out of the hearing of the jury, as to the nature and extent of plaintiff's insurance coverage, the cost of such coverage, the benefits plaintiff received, the arrangements for refund of benefits, or subrogation. Nor did he develop any of the other considerations which would be relevant to assessing the prejudicial effect of the introduction of the evidence of insurance coverage against any proper relationship, however limited, to the issues of the case. (8) In the absence of any proper attempt by the defense to invoke the discretion of the trial court under Evidence Code section 352, we certainly cannot say that the trial court abused its discretion. (See *Acosta* v. *Southern California Rapid Transit Dist.*, *post*, p. 10 [—— Cal.Rptr. ——, —— P.2d ——]; Evid. Code, §§ 352, 1155; *People* v. *Mosher* (1969) 1 Cal.3d 379, 399-400 [82 Cal.Rptr. 379, —— P.2d ——]; *MacDonnell* v. *California Lands Inc.* (1940) 15 Cal.2d 344, 346-349 [101 P.2d 479]; Witkin, Cal. Evidence (2d ed. 1966) §§ 633-634, 1310-1311, at pp. 595-598, 1211-1212.) Lacking any proper offer of proof as to these issues we must conclude that the trial court correctly refused to permit defendant to inquire within the hearing of the jury as to the nature and extent of plaintiff's insurance coverage.

The judgment is affirmed.

McComb, J., Peters, J., Mosk, J., Burke, J., and Sullivan, J., concurred.

[20]We are persuaded by the reasoning of the United States Supreme Court as to whether evidence of plaintiff's insurance coverage would ever be admissible to show the extent and duration of his disability or to indicate that he might be a malingerer: "In our view the likelihood of misuse by the jury clearly outweighs the value of this evidence. Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of a disability pension. Moreover, it would violate the spirit of the federal statutes if the receipt of disability benefits under the Railroad Retirement Act of 1937, 50 Stat. 309, as *amended*, 45 U.S.C. § 228b (a) 4, were considered as evidence of malingering by an employee asserting a claim under the Federal Employers' Liability Act. We have recently had occasion to be reminded that evidence of collateral benefits is readily subject to misuse by a jury. *Tipton* v. *Socony Mobil Oil Co., Inc.*, 375 U.S. 34 [11 L.Ed.2d 4, 84 S.Ct. 1]. It has long been recognized that evidence showing that defendant is insured creates a substantial likelihood of misuse; Similarly, we must recognize that the petitioner's receipt of collateral social insurance benefits involves a substantial likelihood of prejudicial impact. We hold therefore that the District Court properly excluded the evidence of disability payments." (*Eichel* v. *New York Central R.R. Co.*, *supra*, 375 U.S. 253, 255-256 [11 L.Ed.2d 307, 309-310]. (Fns. omitted.)

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 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 replacemen 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 judgmen were rendered. Presumably B and C would have a right of indemnity against Dsif a judgment is rendered against them.