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SOCIAL INSURANCE AND TORT LIABILITY: THE PROBLEM OF ALTERNATIVE REMEDIES

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THE PROBLEM—INTRODUCTORY

Beginning with workmen's compensation in 1910 and getting great impetus from the depression of the 1930's, social insurance legislation has grown apace in America.¹ Such legislation is based on a faith that the general welfare is best served by protecting individuals from the consequences of pecuniary loss through such vicissitudes of life as accident, old age, sickness, and unemployment.² The chief pecuniary losses are destruction of earning power and the expenses of medical care and cure and rehabilitation.³ Under these schemes, such losses are met (or partly met) without regard to questions of personal fault in causing them and are distributed over a wide segment of society. So much all this legislation has in common, but beyond this there are differences. The broadest possible scheme would largely disregard the source of loss and distribute its cost either by general taxation or by tax

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¹ See, e.g., MILLIS & MONTGOMERY, *LABOR'S RISKS & SOCIAL INSURANCE* (1938); DAUGHERTY, *LABOR PROBLEMS IN AMERICAN INDUSTRY*, cc. XX, XXI (1941); *Symposium on Unemployment Compensation*, 55 *YALE L. J.* 1-263 (1945); Larson, *The Welfare State & Workmen's Compensation*, 5 *N.A.C.C.A.L.J.* 18 (1950); note, *Insurance Against Temporary Disability: A Blueprint for State Action*, 60 *YALE L. J.* 647 (1951).

² See authorities cited in note 1 *supra*.

For a legislative statement of this philosophy, see the statement of purpose of the New Jersey Temporary Disability Benefits Law. N. J. LAWS 1948, c. 110, § 2.

³ Most existing American schemes are concerned with wage loss, except that workmen's compensation provides hospital and medical payments. The question whether it is desirable to extend social insurance further along this line has no relevance to the present problem which is simply one of adjustment between present, and possible future, schemes as we find them. As illustrative of divergent points of view on the broader problem (here untouched) compare, e.g., DAUGHERTY, *op. cit. supra* note 1, at 798 *et seq.*, with Larson, *op. cit. supra* note 1.

contributions levied on a flat rate upon a very large group (*e.g.*, all employers).⁴ The philosophy of workmen's compensation, on the other hand, is that losses should be allocated to the enterprise that creates the hazards that causes the losses, and ultimately distributed among those who consume its products.⁵ Under such a system there is room for private insurance, and most of our states

⁴ Many of the older forms of caring for the human needs here under discussion, are financed by general taxation. This is true, for instance, of military pensions and of public hospitals and other institutions maintained for the care of certain groups. It is also true of "straight pensions" generally, such as those old age assistance legislation provides. See MILLIS & MONTGOMERY, *op. cit. supra* note 1, c. VIII. "Advocates of 'straight pensions' claim for them greater 'social justice'; the pensioners have by their service earned their pensions and these can be financed, not by taxes on the masses in the lower income groups, but by taxes levied according to ability to pay or by taxes needed to improve the distribution of wealth." *Id.* at 395.

With the growth of the trend towards more complete social insurance, the tendency in this country and England has been to get away from this kind of financing and to adopt contributory insurance schemes. The comprehensive New Zealand program, on the other hand, is financed by registration fees and income taxes. Larson, *op. cit. supra* note 1, at 32.

There is a marked difference, however, in contributory systems. Contributions may be levied at a flat rate on all members of a very wide group (*e.g.*, all employers), or they may be adjusted to the varying loss experience of different groups, or of individual enterprises within the group. See discussions in SOCIAL INSURANCE AND ALLIED SERVICES, REPORT BY SIR WILLIAM BEVERIDGE, CMD. No. 6404, ¶¶ 86-89, 305 (1942) (hereinafter BEVERIDGE REPORT); Larson, *op. cit. supra* note 1, at 32 *et seq.*

For present purposes, I have classed the former type of contributory scheme with those financed by general taxation, since under both those systems losses are far more broadly socialized than under one which seeks to allocate responsibility more nearly in accordance with individual differences in the creation of risks. Of course the distinctions are not sharp; and I recognize that for other purposes very different classifications may be called for.

The trend in England has been towards the more socialized type of contributory system, that in this country towards the more individualized type, at least in fields which lend themselves to such treatment, *e.g.*, workmen's compensation and unemployment compensation. See *e.g.*, National Insurance (Industrial Injuries) Act, 9 & 10 GEO., c. 62, § 2(a) and Second Schedule, Part I (1946); DAUGHERTY, *op. cit. supra* note 1, at 773; Larson, *op. cit. supra* note 1.

⁵ In addition to the material cited in note 1 *supra*, see COMMONS & ANDREWS, PRINCIPLES OF LABOR LEGISLATION 227 (4th rev. ed. 1936); Report of the Wainwright Commission referred to and quoted in *Ives v. South Buffalo R. Co.*, 201 N. Y. 271, 94 N. E. 431 (1911).

It was pointed out in note 4 *supra*, that similar notions have been carried out in many American unemployment compensation schemes. See Arnold, *Experience Rating*, 55 YALE L. J. 218 (1945); Schmidt, *Experience Rating & Unemployment Compensation*, 55 YALE L. J. 242 (1945).

permit it to be handled that way. Still a third type of scheme seeks to distribute its costs among its beneficiaries, much as voluntary accident or health insurance does.⁶ And these variant notions are often found in combination.⁷

Throughout this country's history, common law tort liability has been imposed upon an individual actor for personal injuries he causes to others under certain circumstances. For all the period that matters in this discussion the cardinal test of liability has been, at least theoretically, the actor's fault—negligence or something worse. Even where fault causes the injury, however, damages are for the most part compensatory⁸ and they may include such items as past and future loss of earning capacity and the cost of cure, care, and rehabilitation.⁹ Classically, the basic notions behind tort liability included something of a moral appraisal of the conduct of the individual actors in each case—a belief that it was fair to make the blameworthy compensate the blameless—and an attempt to deter unreasonably dangerous conduct coupled with a fear of inhibiting desirable activity too much.¹⁰ Originally

⁶ See, e.g., CAL. GEN. LAWS, Act 8780d, §§ 44, 300 (1949 Supp.) providing that the Unemployment Compensation Disability Fund shall be made up by contributions from employees, grants from the federal government, and earnings of the fund. Employer contributions go to the fund available for unemployment compensation which is separately administered. *Id.*, § 19. *Cf.*, R. I. Acts, 1942, c. 1200, § 4 (1). This pattern is rare in America.

⁷ This is the prevailing British pattern. See, e.g., *National Insurance (Industrial Injuries) Act*, 9 & 10 GEO. 6, § 2 and Second Schedule Part I (1946) providing for equal employer and employee contributions and a government contribution equal to one fifth of the sum of the other two.

Such combinations are less common in America. The direct cost of workmen's compensation and usually of unemployment compensation is here put wholly on the employer. See tables in MILLIS & MONTGOMERY, *op. cit. supra* note 1, at 152-159; DAUGHERTY, *op. cit. supra* note 1, at 763 *et seq.* But federal Old Age and Survivors' Insurance is financed by employer and employee contributions (in the form of taxes) without, however, any government contributions. 26 U.S.C. §§ 1400, 1410. The system is described in DAUGHERTY, *op. cit. supra* note 1, at 811 *et seq.*

⁸ Miller, *Assessment of Damages in Personal Injury Actions*, 14 MINN. L. REV. 216, 218 (1930); note, *Developments in the Law—Damages*, 61 HARV. L. REV. 113, 116 (1947); note, *Mitigating Effect on Damages of Social Welfare Programs*, 63 HARV. L. REV. 330 (1949); MINISTRY OF NATIONAL INSURANCE, FINAL REPORT OF THE COMMITTEE ON ALTERNATIVE REMEDIES, CMD 6860, ¶ 20 (1946) (hereinafter REPORT ON ALTERNATIVE REMEDIES); RESTATEMENT, TORTS § 901, comment *a* (1939).

⁹ MCCORMICK, DAMAGES §§ 86, 87, 90 (1935); Miller, *op. cit. supra* note 8, at 218; note, *Developments in the Law—Damages*, 61 HARV. L. REV. 113, 163 (1947); note, 63 HARV. L. REV. 330 (1949); RESTATEMENT, TORTS § 924 (1939).

¹⁰ See, e.g., HOLMES, THE COMMON LAW 94-96 (1881); SALMOND, LAW OF

there was no machinery for, nor any thought of, widely distributing losses. Payment was an individual matter. With increasing accumulations of capital and the coming of liability insurance, however, something of the philosophy of social insurance has crept into the thinking about tort liability, almost surreptitiously, so that the current philosophy of tort law is schizophrenic.¹¹

All these systems exist side by side in America today, and they are likely to do so for an indefinite time in the future. Obviously at important points they overlap and so present problems of cumulative or alternative remedies.¹² These problems call for an adjustment and reconciliation of the differences in the objectives and philosophies of the different schemes as they impinge on the areas of overlap. The solutions will often—perhaps increasingly—be provided by legislatures.¹³ But courts have worked out some solutions in the absence of legislation and there will always be for the courts questions of statutory interpretation. Here I shall try to analyze some of the factors I believe should be considered by both courts and legislatures in dealing with the overlap between social insurance benefits and tort damages.

THE SOLUTIONS

To the problems of cumulative or alternative remedies there is only a limited number of basic patterns of solution, although of

TORTS 13, 18 (10th ed. 1945); Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908); Smith, *Tort and Absolute Liability—Suggested Changes in Classifications*, 30 HARV. L. REV. 241 (1917).

¹¹ This is pointed up by the suggestive title of EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951), the body of which fulfills the promise of the title.

I am also indebted to Prof. Ehrenzweig for the phrase "enterprise liability".

¹² Occasionally a court tries to conceal the existence of this overlap by stressing the different purposes of social insurance and tort liability, e.g., that the benefits of the former are intended to make a claimant "secure in society," while the latter "is an attempted restorative alone." *Hetrick v. Reading Co.*, 39 F. Supp. 22 (D.N.J. 1941). But the fact that the purposes of the remedies may be different does not alter the fact that they may serve their diverse purposes by meeting the same economic loss, so that if claimant may have both he has "the same need met twice over." BEVERIDGE REPORT, ¶ 260.

¹³ This is particularly true as to questions of duplication between one social insurance program and another. See, e.g., CAL. GEN. LAWS, Act 8780d, §§ 207, 208 (1949 Supp.); N. J. LAWS, c. 110, § 6, (1948); N. Y. LAWS c. 600, § 206 (1949); *Pierce's Case*, 325 Mass. 649, 92 N.E.2d 245 (1950) 30 B. U. L. REV. 576; Larson, *Future of Workmen's Compensation*, 6 N.A.C.C.A. L. J. 18, 31-34 (1950). That question and the one treated here are obviously both aspects of the same larger problem. Compare treatment in the REPORT ON ALTERNATIVE REMEDIES.

course an infinite number may be had by various combinations of them. The basic patterns, it is submitted, are these:

- (1) abolishing one (or more) of the remedies;
- (2) compelling claimant to elect one from among the remedies, and forego the others;
- (3) allowing the claimant to have the cumulative benefits of two (or more) remedies;
- (4) allowing the claimant to pursue both (or all) remedies but limiting his total recovery to the maximum amount he could recover from a single source. If this solution is chosen it poses the further problem of how to adjust the matter as between the parties respectively liable under the different schemes. This in turn may be solved by (a) considering one of the parties primarily liable, so that he ultimately bears the full burden, the other party liable having indemnity or subrogation against him; (b) providing that the benefits to be had under one remedy diminish the amount to be had under the other.

It will be the thesis of this paper that, generally, the claimant should be allowed to pursue all remedies but that his total recovery should be limited to the maximum amount recoverable under any one of them, and the benefits to be had from social insurance should be set off against tort damages without subrogation or indemnity against the tort defendant. It is not contended, however, that any one solution should be applied under all circumstances, and special considerations which may (in my view) exceptionally justify alternative solutions will also be explored.

I.

Abolition of One of the Remedies

There are those, of course, who would like to abolish all social insurance but there is no practical likelihood that they will get their way. Abolition of the tort remedy for injuries compensated by some form of social insurance has much to commend it theoretically. For one thing it would, at a single stroke, practically eliminate calendar congestion in the courts of our larger cities. For another, it would do away with the speculation that inheres in tort litigation. To a limited extent this solution has been adopted in most workmen's compensation systems, where the common law action *against the employer* for compensable injuries has been

taken away and the statutory remedy made exclusive as to him.¹⁴ Conceivably, further extensions of that form of social insurance which puts responsibility for compensation directly upon the individual enterprises creating the risk, may also take away the common law liability of those individual enterprises. Thus an automobile compensation plan might be made the exclusive remedy against those liable to pay compensation under it.¹⁵ Any more general abolition of the tort remedy, as an across-the-board solution of our present problem, is most unlikely. This possibility was thoughtfully explored in England, and rejected, largely because of unwillingness to deprive injured people of the chance of the much greater recovery at common law.¹⁶ Tort suits were at first pretty much eliminated in Communist Russia but have reappeared even there, perhaps in part because of their admonitory value.¹⁷ And the Saskatchewan experiment extending the principle of compensation without fault to automobile cases, has preserved the action for negligence to recover damages in excess of the scheduled compensation.¹⁸

It is probably just as well that the tort action is to remain with us—not so much because it is needed as a deterrent to carelessness for I think that need has been greatly overemphasized, but because we may find we don't want to rip any more of the threads of individualism out of our social and economic fabric than we must in order to take adequate care of the basic human needs of all our people. Perhaps these threads are pretty closely tied to some of the civil and political liberties we cherish. Perhaps the

¹⁴ 1 SCHNEIDER, WORKMEN'S COMPENSATION, § 90 (Perm. ed. 1941).

¹⁵ The plan put forth as a result of the Columbia study, for instance, would have provided such exclusiveness of remedy. COLUMBIA UNIV. COUNCIL FOR RESEARCH IN SOCIAL SCIENCES, REP. COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS 143 (1932) (hereinafter COLUMBIA REPORT).

¹⁶ REPORT ON ALTERNATIVE REMEDIES, ¶¶ 23-30 (noting, *inter alia*, that not a single witness favored abolishing the tort remedy). The legislation that emerged left the personal injury action intact, but provided that one half of the amount of social insurance benefits accruing to plaintiff should be taken into account in assessing damages. Law Reform (Personal Injuries) Act, 11 & 12 GEO. 6, c. 41, § 2(1) (1948). See Friedmann, *Social Insurance of the Principles of Tort Liability*, 63 HARV. L. REV. 241, 255 (1949).

¹⁷ See Hazard, *Personal Injury & Soviet Socialism*, 65 HARV. L. REV. 545 (1952); Friedmann, *op. cit. supra* note 16, at 265.

¹⁸ The Saskatchewan plan is described in Grad, *Recent Developments in Automobile Accident Compensation*, 50 COL. L. REV. 300, 320-325 (1950).

problem of the constructive conservative is not so much one of blocking the trend towards social insurance and welfare legislation as it is of guiding an inevitable trend in ways to preserve as much as possible of all our liberties—economic as well as political and civil.

Election of Remedies

The law could leave all remedies intact but compel the injured person to elect one from among them, and forego the others. Although this possible solution has been occasionally chosen by a legislature¹⁹ and has, perhaps, the merit of simplicity, it has scant following and little else to commend it.

A cardinal purpose of all forms of social insurance is to provide a quick and a sure and a well-adapted remedy for the needs it seeks to alleviate. Among the evils of the older system are delays and many uncertainties (*e.g.*, as to the fact of recovery, as to amount, as to defendant's financial responsibility). Moreover successful litigation brings a lump sum recovery, which often throws the burden of providence and of wise investment on one ill fitted to meet it (while social insurance provides periodic payments to meet continuing needs). All these things bring real human hardship and a train of broader social consequences. Yet the older remedy with all its drawbacks, is potentially much greater. Thus to tempt the injured man—and to tempt others to tempt him—to renounce the benefits of social insurance may bring about the very evils the scheme was adopted to avoid. Benefits under a social insurance scheme (*e.g.*, workmen's compensation, disability payments) should, therefore, be payable forthwith, whatever is to happen later to the tort suit.²⁰

¹⁹ The statutes of every American jurisdiction are summarized in 3 SCHNEIDER, *WORKMEN'S COMPENSATION*, c. 15 (Perm. ed. 1941, and current supplement). See also note, 40 *COL. L. REV.* 1452 (1940).

A statute embodying the doctrine of election is found in *MASS. ANN. L.*, c. 152, § 15 (1932).

²⁰ See, *e.g.*, *Newark Pav. Co. v. Klotz*, 85 *N.J.L.* 432, 91 *Atl.* 91 (1914); *REPORT ON ALTERNATIVE REMEDIES*, ¶ 40; *BEVERIDGE REPORT*, ¶ 259. *But cf.* *CAL. GEN. LAWS*, Act 8780d, § 207 (b) (1949 Supp.); *N. Y. WORKMEN'S COMP. LAW*, § 206 (d), both of which provide that disability benefits shall not be payable for any period with respect to which benefits are paid *or payable* under state or federal employers' liability acts.

Letting the Claimant Cumulate Remedies

This has been a frequent common-law solution in non-statutory situations, and the lines of reasoning used in reaching it have often been invoked as guides for legislation. Thus the plaintiff who has been paid his salary²¹ or a pension²² during disability, or had his medical expenses paid for by another,²³ or out of the proceeds of an accident insurance policy,²⁴ may still recover full damages for these items from a defendant who is liable for the injury. To this extent, plaintiff may get double payment on account of the same items. The defendant wrong-doer should not, it is said, get the benefit of payments that come to the plaintiff from a "collateral source" *i.e.*, one "collateral" to the defendant).²⁵ The damages to be exacted, even of a wrongdoer, are to be sure "compensatory". But in these cases the courts measure "compensation" by the total amount of the harm done, even though some of it has been repaired by the collateral source, not by what it

²¹ Campbell v. Sutliff, 193 Wis. 370, 214 N.W. 374 (1927); McCORMICK, DAMAGES, 310 (1935). Note, *Developments in the Law—Damages*, 61 HARV. L. REV. 113, 163 (1947); Comment, 38 MICH. L. REV. 1073 (1940). This represents the weight of authority, but not the universal rule. See, *e.g.*, Ephland v. Mo. Pac. Ry. Co., 57 Mo. App. 147 (1894); Drinkwater v. Dinsmore, 80 N.Y. 390 (1880).

²² Wachtel v. Leonard, 45 Ga. App. 14, 163 S.E. 512 (1932); Mullins v. Bolinger, 115 Ind. App. 167, 55 N.E.2d 381, 56 N.E.2d 496 (1944); Rusk v. Jeffries, 110 N.J.L. 307, 164 Atl. 313 (1933); Geary v. Metropolitan St. Ry. 73 App. Div. 441, 77 N.Y.Supp. 54 (1st Dept. 1902); *cf.*, Chicago G. W. R. Co. v. Peeler, 140 F.2d 865 (8th Cir. 1944); Hetrick v. Reading Co., 39 F. Supp. 22 (D.N.J. 1941); comment, 38 MICH. L. REV. 1073 (1940).

²³ Denver & R. G. R. Co. v. Lorentzen, 79 Fed. 291 (8th Cir. 1897); Roth v. Chatlos, 97 Conn. 282, 116 Atl. 332 (1922); Clark v. Berry Seed Co., 225 Iowa 262, 280 N.W. 505 (1938). There is not uniformity among the decisions dealing with medical, hospital or nursing services which are furnished free, note, 31 YALE L. J. 776 (1922), and perhaps there is very good reason for some of these differences in treatment. *Cf.*, notes 48, 49, 52 *infra*.

²⁴ Bradburn v. Great W. R. Co., 10 Ex. Cas. 1 (1874); Roth v. Chatlos, 97 Conn. 282, 116 Atl. 332 (1922); Harding v. Townshend, 43 Vt. 536 (1871). On this proposition it has been said "[T]here appears to be no dissent." 18 A.L.R. 678, 683 (1922). *But cf.*, Sedlock v. Trosper, 307 Ky. 369, 211 S.W.2d 147 (1948); Nelson v. Pauli, 176 Wis. 1, 186 N.W. 217 (1922) and note, 13 A.L.R. 2d 355 (1950) (suggesting, without approval, a possible distinction between accident insurance and "hospitalization or medical insurance.")

²⁵ For the origin of the term, see Harding v. Townshend, 43 Vt. 536, 538 (1871); note, 38 MICH. L. REV. 1073 (1940).

Cases involving money from "collateral sources" (the subject of notes 21-24) are collected in 95 A.L.R. 575 (1935); 18 A.L.R. 678 (1922); *cf.*, 19 A.L.R. 2d 557 (1951); 13 A.L.R. 2d 355 (1950).

would take to make the plaintiff whole. It is "compensation" in a purely Pickwickian sense that only half conceals an emphasis on what defendant should pay rather than on what plaintiff should get.²⁶ Let us analyze this reasoning in the situations where it has been used, from the point of view of all the parties concerned, and examine its applicability to our present thesis.

From the defendant's point of view it is an evil to have to pay any damages, including those involved in plaintiff's double recovery. But there may be reasons for making him pay nonetheless. It should be noted, however, that if it is *payment by the defendant* that is desired, this may conceivably be had without plaintiff's double recovery by simply making defendant pay someone else. One way of doing this is to subrogate a third person to the claimant's right to so much of the damages as would represent double recovery. Some such solution could always be provided by the legislation which creates a social insurance scheme,²⁷ so that the problem of plaintiff's double recovery could logically be discussed without getting at all into the question of whether defendant ought to be made to pay in full. But while the common law too had developed devices like subrogation, their availability was so restricted and beset by technicalities that most of the common law thinking in this field was based on the assumption that if you did not let plaintiff have a doubling up included in what he got, you would have to subtract that amount from what defendant had to pay.²⁸ It will help us to understand and evaluate this think-

²⁶ This is neatly shown by the fact that if defendant himself is the one who has already repaired some of the damage, compensation is measured, as it should be, by what is still required to make plaintiff whole. Note, 63 HARV. L. REV. 330, 333 (1949) which correctly analyzes this aspect of the problem, on p. 331. For attempts to rationalize the collateral source rule in terms of "compensation," see *NLRB v. Marshall Field & Co.*, 129 F.2d 169 (7th Cir. 1942); *Roth v. Chatlos*, 97 Conn. 282, 116 Atl. 332 (1922); *Campbell v. Sutliff*, 193 Wis. 370, 214 N.W. 374 (1927) ("The extent of the liability of the wrongdoer is dependent on the extent of the injuries inflicted by his wrongful act, not by the question whether the employee receives wages during his disability."); McCORMICK, DAMAGES 310 (1935).

²⁷ Practically all workmen's compensation laws have provided for subrogation or its equivalent. See notes, 40 COL. L. REV. 1452 (1940); 2 STAN. L. REV. 810 (1950). So has the New York Disability Benefits Law. N. Y. WORKMEN'S COMPENSATION LAW § 227.

²⁸ Thus in *Campbell v. Sutliff*, 193 Wis. 370, 214 N.W. 374 (1927) the court saw no reason why ". . . one whose acts have caused the injury to another should reap the entire benefit that comes from the payment of wages made by an employer, either as a gratuity to a faithful employee or because such payments

ing, therefore, if we examine here what social gain or loss may come from making the tort defendant pay in full, then refer back to the present discussion when we come to evaluate subrogation.

It may be said that defendant *deserves* being made to pay in full because of the moral quality of his act. Now there can be no question here of who should fairly bear a loss, as between an innocent and a guilty party, for by hypothesis the innocent man's loss has been made whole and we are discussing a further payment beyond that. There may be mixed with this feeling of desert a desire to deter dangerous conduct, but that merits separate treatment. What is left under this head, then, springs from a feeling of indignation or resentment and a desire to punish as such. Surely there is no place for such a notion in any philosophy of social insurance. It has no acknowledged place even in tort liability based on fault, for the theory of damages here is purely compensatory.²⁹ And there is nothing in the context of modern accident law that would warrant bringing such a notion into the civil law at this late date. The whole trend has been towards diluting the concept of fault so as to ease recovery by accident victims.³⁰ Courts and juries have been increasingly willing to find legal fault with less and less moral blameworthiness on the part of the actor. Moreover the "wrongdoing" actor himself is less and less often the real defendant in these days of ever widening vicarious liability and ever growing insurance.³¹ If therefore a feeling of revenge and resent-

are required by contract. Such payments do not change the nature of the injury which the employee sustains through the wrongful acts of the tort-feasor. If either is to profit . . . it should be the person who has been injured—not the one whose wrongful acts caused the injury." Similar statements occur time and again in this connection. *Cf., e.g.,* Roth v. Chatlos, 97 Conn. 282, 116 Atl. 332 (1922); many of the excerpts quoted from the case are in the A.L.R. notes cited note 25 *supra*.

As to the technicalities of subrogation, *cf.* note 69 *infra*.

²⁹ See PROSSER, TORTS 27-28 (1941); REPORT ON ALTERNATIVE REMEDIES ¶ 44; authorities cited note 9 *supra*. The law of torts does, of course, recognize and allow punitive damages in some cases, but they are awarded in addition to compensatory damages and are not involved here. See RESTATEMENT, TORTS § 908 (1939).

³⁰ As indicating the existence of this trend, see EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951); Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROB. 476 (1936); Searl, *Automobile Liability Law Development and Trend*, 39 BESTS INS. NEWS 583 (Fire & Cas. ed. 1938); James, *Accident Liability: Some Wartime Developments*, 55 YALE L. J. 365 (1946).

³¹ See McNiece & Thornton, *Automobile Accident Prevention and Compensa-*

ment 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, I suggest, it has played a large—though unrecognized—part in justifying plaintiff's double recovery.³²

A more serious question is posed by the possible admonitory effect of unabated liability. Accident prevention is surely a legitimate objective both of social insurance and of tort liability. It is very doubtful, however, whether *undiminished* civil liability will make any significant contribution to the cause of accident prevention.

In the first place it is problematical just how much any civil liability effectively deters accidents. So far as individual participants in an accident are concerned, they often have the greatest incentives to be careful quite aside from any thought of civil liability.³³ Moreover, recent studies of accident-producing behavior have emphasized the relatively insignificant part which the individual's conscious free choice plays in causing or preventing accidents.³⁴ And what evidence there is at hand indicates that the protection of liability insurance which is being increasingly held (by individuals as well as by others) has not been responsible for any increase in the accident rate.³⁵ On the other hand there is substantial reason for thinking that liability exerts its most effective pressure towards accident prevention when it is directed to larger units (industrial, transportation, insurance companies, etc.³⁶)—on whose part, paradoxically enough, fault in the sense of moral shortcoming is often

tion, 27 N.Y.U.L.REV. 585 (1952); James & Thornton, *Impact of Insurance on the Law of Torts*, 15 LAW & CONTEMP. PROB. 431 (1950); James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L. J. 549 (1948).

³² See note 28 *supra*; *Mobley v. Garcia*, 54 N.M. 175, 217 P.2d 256 (1950) ("The right of redress for wrong is fundamental. Charity cannot be made a substitute for such right, nor can benevolence be made a set-off against the acts of a tort-feasor."); *Harding v. Townshend*, 43 Vt. 536 (1871) ("... the burden of making compensation to the injured party ought to be ultimately borne by the party thus in fault.")

³³ See James, *supra* note 31, at 558.

³⁴ Many of these studies are described in James & Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769 (1950).

³⁵ See McNiece & Thornton, *supra* note 31, at 595; James, *supra* note 31, at 561, 562.

³⁶ James & Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 779 *et seq.* (1950).

most attenuated.³⁷ But even with the larger units, civil liability probably plays a less important role in promoting safety than the host of other pressures, such as safety regulations, penal and licensing sanctions, and the economic waste that flows from accidents.

Let it be granted, however, that civil liability is an effective incentive to care, at least in some circumstances. The concession still does not necessarily reach the present problem. The choice here is not between liability and non-liability for the defendant, but simply whether his damages shall be diminished by what plaintiff gets from another source. And if that other source is a scheme of social insurance, the amount it provides is likely to be only a fraction of the damages recoverable at common law—perhaps a third, a quarter, or less.³⁸ Altogether it seems unlikely indeed that anticipation of such an abatement from the flexible and indeterminate damages in a tort action will materially dilute whatever admonitory value there is in civil liability.³⁹ It is submitted, therefore, that unless receipt of double benefits can be justified on claimant's side, it cannot be justified simply on the basis that social good comes from making defendant pay more.

What then are the considerations with regard to claimant's position? Let us assume that he has a good cause of action against a tortfeasor and that part of his damages would ordinarily represent loss of earnings, or earning capacity, and medical and other expenses of care and cure, and that he has received money from some collateral source to cover (or partly cover) the same items. What good or evil will result from letting him have both?

It is sometimes said that neither sum alone represents full compensation and that this lack will be repaired by allowing the

³⁷ The paradox is only seeming. It results from confusing a feeling of moral resentment at a blameworthy act with the objective of preventing accidents. The paradox serves to point up the fact that though the desire to punish and the desire to promote safety are probably *both* operative under the fault principle (one surreptitiously and the other avowedly) yet they are really quite different and often inconsistent things.

³⁸ See REPORT ON ALTERNATIVE REMEDIES ¶ 27 for estimates for Great Britain. It has been often said in Connecticut that as a rule-of-thumb recovery should run to "three times the specials." This would make the figures here about what the text indicates.

³⁹ This was the conclusion of a majority of the Committee on Alternative Remedies. REPORT ON ALTERNATIVE REMEDIES ¶ 46.

duplication.⁴⁰ What comes from the collateral source generally does not in fact represent full compensation for claimant's injuries. This is true of most forms of social insurance. But tort damages are supposed to represent full compensation for pecuniary loss as well as many intangible losses caused by the injury, except where the item of loss is thought too remote or too speculative. Of course in one sense no amount of money can compensate for the human suffering involved in serious injury. Moreover the law is often laggard in recognizing items of damage which could fairly and reasonably be measured in money with a little ingenuity.⁴¹ But any decision that the law in these respects falls short of expressing fully a desirable social policy should be implemented by a uniform and well thought out change in the law and not left to the chance of a double recovery in an occasional case.⁴²

If, then, the duplication in plaintiff's recovery does represent more than fair compensation, it is a question of justifying a wind-fall to him. In inquiring whether this may be done, it is well to keep in mind these basic distinctions which have often been lost sight of by the courts. Plaintiff's loss may have been partly met (1) out of resources that would otherwise have been available to him for other purposes; (2) by a gift occasioned by the accident; (3) by resources he had a right to (by contract, statute, etc.) but only in the event of the loss caused by the accident.

Cases of the first type are easiest to justify, but furnish no legitimate analogy for the other two. Thus if a man has put money in the savings bank, then uses it to defray the expenses of an accident, it is perfectly clear that he is not made whole until he

⁴⁰ This argument was presented to the Committee on Alternative Remedies. REPORT ON ALTERNATIVE REMEDIES ¶ 32.

⁴¹ This may happen, for instance, when the requirement of certainty of proof, McCORMICK, DAMAGES, c. 4 (1935), is overstrictly applied; or where the law refuses to put a value on an item (such as the *chance* of physical recovery). See *Kuhn v. Banker*, 133 Ohio 304, 13 N.E.2d 242 (1938).

⁴² This line of reasoning may possibly be inconsistent with positions I have taken elsewhere. See, e.g., James, *Contribution Among Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941); James, *Proof of the Breach in Negligence Cases*, 37 VA. L. REV. 179, 187, n. 27 (1951). The reader will, of course, make what he wants to of any inconsistency. I do not mean here to recant my former positions, but urge as justification for the difference in attitude that I regard the making of some substantial compensation in all accident cases as far more important than an assurance of the full outer reaches of compensation. Compare, *And Then—Sudden Ruin*, READER'S DIG. 79 (Sept. 1952).

again has that money to put back in the bank for his children, or his old age, or even to squander, as he had planned. Pensions or annuities that are payable to plaintiff without regard to the disability caused by the accident are of this type.⁴³ So are wages or salary taken out of vacation pay or sick leave that could otherwise be cumulated.⁴⁴ So, to a large extent, is life insurance because of its heavy investment features.⁴⁵ Compensation in these cases is not double in any true sense. It might be condemned under a system which would give to each only according to his need, but even the Marxists have put aside this part of their philosophy for their nirvana.⁴⁶ There is another situation also where compensation is not really double. Plaintiff may have insured against an item of possible loss that may not be included in common law damages, and if the insurance is valid plaintiff should have its benefit and full damages too.⁴⁷

The case of the gift—though different—also seems clear. Generally a man may give where he will on conditions of his own choosing so long as the gift and the conditions do not violate public policy. And if a generous man pays the medical expenses or wages of one who is injured, with the actual intention that the gift shall be in addition to all other recovery, there seems to be no good reason for denying effect to such intention or for diverting it to another beneficiary whether that other is a wrongdoer or not. Most of the cases do not subtract a gift from tort damages.⁴⁸ A few have done

⁴³ *McCarthy v. Palmer*, 113 F.2d 721 (2d Cir. 1940).

⁴⁴ *Hoobler v. Voelpel*, 246 Ill. App. 69 (1927); *Martin v. Sheffield*, 112 Utah 478, 189 P.2d 127 (1948).

⁴⁵ See VANCE, *INSURANCE* 32, 65, 105, 160 (3d ed. 1951).

The American cases seem to be uniform in holding that the proceeds of a life insurance policy are not to be subtracted from damages for wrongful death. See notes, 95 A.L.R. 575, 579 (1935); 18 A.L.R. 678, 686 (1922).

⁴⁶ See Hazard, *Personal Injury and Soviet Socialism*, 65 HARV. L. REV. 545, 555 (1952).

⁴⁷ As in *Standard Marine Ins. Co. v. Scottish Metropolitan Assoc. Co.*, 283 U. S. 284 (1931).

⁴⁸ *Denver & R. G. R. Co. v. Lorentzen*, 79 Fed. 291 (8th Cir. 1897); *Roth v. Chatlos*, 97 Conn. 282, 116 Atl. 332 (1922), 31 YALE L. J. 776; *Clark v. Berry Seed Co.*, 225 Iowa 262, 280 N.W. 505 (1938); *Campbell v. Sutliff*, 193 Wis. 370, 214 N.W. 374 (1927). Conflict appears where the services themselves are donated, e.g., by a member of the family. See note 49 *infra*.

In Missouri and Pennsylvania, wages or salary received during incapacity will be subtracted from damages, *unless it is made to appear that they were intended as a gift* (in which case plaintiff may have both his gift and his damages).

so, stressing the compensatory aspect of such damages,⁴⁹ but this result may ignore the donor's legitimate desire to add his gift to mere compensation. The subtraction seems proper only where the gift intent was merely to tide the claimant over the crisis without any thought either of adding to his wealth or of a moral responsibility to repay if damages are recovered. Often of course the intent was never even thought out by the donor, certainly not expressed. In these cases of private generosity the best solution seems to be a rule of thumb that would give greatest scope to the donor's generosity and to the adjustment of moral obligations within the more or less intimate relationships that usually bring such generosity into play. The gift should be disregarded in assessing damages.

The private gift cases find little analogy in social insurance. Pensions and other benefits—both public and private—were once widely regarded as matters of gratuity or bounty, but the philosophy of modern legislation involves a vehement repudiation of any such notion.⁵⁰ Governments do, however, often provide hospital or other services free to designated classes of people. In any of these cases if the legislative intent is to confer a bounty, that intent should be given effect.⁵¹ Unless such an intent is made fairly clear, however, it seems reasonable to suppose that statutory benefits and free services furnished by government to needy classes of people are meant simply to make sure certain of their needs will be fulfilled and not to confer an additional bounty on the recipient.

Moon v. St. Louis Tr. Co., 247 Mo. 227, 152 S.W. 303 (1912); Quigley v. Pennsylvania R. Co., 210 Pa. 162, 59 Atl. 958 (1904); 18 A.L.R. 678, 681 (1922). This makes sense.

⁴⁹ An example is *Daniels v. Celeste*, 303 Mass. 148, 21 N.E.2d 1 (1939) in which the injured husband was not allowed to recover the value of services rendered gratuitously by his wife, a registered nurse. Aside from any flaw in logical reasoning, such a result would operate most harshly against families least able to afford outside help. It was disapproved in a note, 24 *MINN. L. REV.* 280 (1940) and is against the weight of authority. Note, 128 A.L.R. 686 (1940) (collecting the cases).

⁵⁰ See, e.g., *MILLIS & MONTGOMERY, op. cit. supra* note 1, at 395 for the modern attitude that pensions are earned.

⁵¹ Some such notion seems in part responsible for the decision in *Cunnen v. Superior Iron Wks. Co.*, 175 Wis. 172, 184 N.W. 767 (1921) (benefits payable to sailor injured during period of his service were provided by Congress "by way of appreciation and gratitude of the great sacrifices made," and not to relieve "those who were engaged in wrongdoing towards anyone engaged in the military or naval service of the United States."). Cf., *Perry v. New England Tr. Co.*, 71 R. I. 352, 45 A.2d 481 (1946).

Thus a seaman who has been hospitalized free at a government marine hospital has not been allowed to recover the value of those services from a tort defendant.⁵²

The third type of case presents the hardest problem. Here the claimant has contracted for benefits which will cover certain losses in the event of a contingency (*e.g.*, fire, collision, disability from accident), but which will not be paid unless the contingency happens, and the defendant has brought about the contingency. To this problem the common law has yielded two solutions which are directly opposed to each other so far as the *claimant* is concerned. In property, fire, and marine insurance cases the claimant-insured is held to strict indemnity and may recover from all sources together no more than the amount of his loss.⁵³ But the claimant who has accident insurance may keep the proceeds of his policy and recover in full against the tort defendant as well.⁵⁴ And wages payable by contract during periods of disability are generally treated like the proceeds of accident insurance.⁵⁵

Because the rule in accident insurance cases is so often urged as a model for social insurance legislation,⁵⁶ it invites careful analysis. It

⁵² *Nelson v. Western S. Nav. Co.*, 52 Wash. 177, 100 Pac. 325 (1909). To similar effect are *City of Englewood v. Bryant*, 100 Colo. 552, 68 P.2d 913 (1937); *Di Leo v. Dolinsky*, 129 Conn. 203, 27 A.2d 126 (1942); RESTATEMENT, TORTS § 924, comment *f* (1939). *Cf.*, *Scolavino v. State*, 187 Misc. 253, 62 N.Y.S. 2d 17 (Ct. Cl. 1946). See note, 19 A.L.R.2d 557 (1951). *But cf.*, *Mobley v. Garcia*, 54 N.M. 175, 217 P.2d 256 (1950); *Klein v. Thompson*, 19 Ohio St. 569 (1869) (both assault and battery cases). Compare *Sainsbury v. Pennsylvania Greyhound Lines*, 183 F.2d 548 (4th Cir. 1950), with the sweeping dictum in *Standard Oil Co. v. U. S.*, 153 F.2d 958, 963 (9th Cir. 1946), which appear to be opposed to the view in the text.

⁵³ HEUBNER, PROPERTY INSURANCE 41, 156, 205 (1938); PATTERSON, ESSENTIALS OF INSURANCE LAW §§ 32, 33 (1935); VANCE, INSURANCE § 14 (3d ed. 1951).

⁵⁴ See authorities cited note 24 *supra*.

⁵⁵ MCCORMICK, DAMAGES 310 (1935). *Cf.*, notes 21 and 48 *supra*.

⁵⁶ This analogy was strongly pressed before the Committee on Alternative Remedies. REPORT ON ALTERNATIVE REMEDIES ¶ 32. A majority of the Committee rejected the analogy. The legislation that finally emerged was a compromise. See note 16 *supra*.

The analogy has often been urged successfully on courts in cases where plaintiff who had received benefits under statute was seeking full recovery in tort. *Chicago G. W. R. Co. v. Peeler*, 140 F.2d 865 (8th Cir. 1944) (disability benefits under Railroad Retirement Act not subtracted from recovery under Federal Employers Liability Act); *Wachtel v. Leonard*, 45 Ga. App. 14, 163 S.E. 512 (1913) (disability allowance provided by ordinance); *Merrill v. Marietta Torpedo Co.*, 79 W. Va. 669, 92 S.E. 112 (1917) (workmen's compensation pay-

is often justified on the ground that the insurance money is the product of the claimant's own thrift and foresight.⁵⁷ But I submit that precisely the same thing is true of property insurance in respect to each of the notions that may underlie the thrift and foresight argument. Let us examine them. (1) Accident insurance is sometimes likened to an investment and so to life insurance with its heavy investment features.⁵⁸ But the accident insurance premium buys only "straight protection" just as the fire or collision insurance premium does. If the event insured against does not happen during the term of the policy the premium has still been fully spent for the protection. Nothing comes back. There is no saving or investment feature at all. (2) The rule of double recovery may be thought a desirable inducement to insure. But the certainty and speed of insurance payments, and the fact that they will be made in many situations where there is no tort at common law,⁵⁹ operate as strongly here as in property insurance. Moreover it may be noted that this consideration is irrelevant in any scheme of insurance where participation is compulsory. (3) It may be thought that a man should be free to bargain and pay for double recovery if he wishes; and that he has done so in the case of accident insurance and has not in the case of property insurance. It is true that this may reflect the intentions of the parties today and that modern policies are so written.⁶⁰ But it is not as simple as that. The concept of strict indemnity in property insurance is not rooted in the intentions of the parties but in the policy to prohibit wagering that has found expression in the doctrine of insurable interest, and this limits the sphere within which parties are free to contract.⁶¹ The

ments). *Cf.*, *City of Philadelphia v. Philadelphia R. T. Co.*, 337 Pa. 1, 10 A.2d 434 (1940).

⁵⁷ See REPORT ON ALTERNATIVE REMEDIES ¶ 32; authorities cited and referred to in note 58 *infra*.

⁵⁸ In *Cornish v. North Jersey St. Ry.*, 73 N.J.L. 273, 62 Atl. 1004 (1906), the court said: ". . . the tortfeasor was no more entitled to be credited with the sums repaid to the plaintiff under such contracts, than it would be to his withdrawal of his accumulations in a savings bank." *Cf.*, *Campbell v. Sutliff*, 193 Wis. 370, 214 N.W. 374 (1927) ("in the nature of an investment"). The analogy of life insurance is more commonly invoked. See, *e.g.*, cases cited note 69 *infra*.

⁵⁹ See James & Law, *Compensation for Auto Accident Victims: A Story of Too Little and Too Late*, 26 CONN. B. J. 70, 77 (1952).

⁶⁰ Standard fire and property insurance policies have subrogation clauses in them. Accident insurance policies do not.

⁶¹ Thompson, *Insurable Interest* in READINGS ON INSURANCE NO. 10 (Howe

doctrine has two facets. First, only those may insure who have a recognized interest in the thing insured, and this applies to all the kinds of insurance dealt with here⁶² but is irrelevant to the present issue for, by hypothesis, the claimant has insured against his own loss from accident or other casualty. Second, the amount of legitimate insurance is limited to the value of the insured's interest.⁶³ This limitation is generally applied to all forms of property insurance, but not to life or accident insurance. One reason for the distinction in the case of life insurance—its savings and investment features⁶⁴—is absent from the case of accident insurance. But the difficulty in putting a money value on the thing insured is common to both life and accident insurance and may well justify letting the parties put their own value upon it by an agreement which the law will enforce between those parties.⁶⁵ Something of the same thing is frequently permitted for "valued policies" in property and marine insurance.⁶⁶ But this consideration furnishes no reason for refusing to apply the principle of indemnity to the present problem.⁶⁷ Whatever difficulty there is in putting a money value upon a personal injury must be met in any event in computing the tort damages, and the amount payable under the insurance is either fixed or determinable by familiar techniques. All that remains is a matter of arithmetic.

It is submitted that so far as *claimant* is concerned, the double

ed. 1928); HEUBNER, PROPERTY INSURANCE 20, 41 (1938); PATTERSON, ESSENTIALS OF INSURANCE LAW § 22 (1935); VANCE, INSURANCE §§ 14, 28 (3d ed. 1951). While the terms indemnity and compensation may not always be synonymous, it is clear they are used in the same sense here. Cf. also, RESTATEMENT, TORTS §§ 901 (a) and comment a, § 903 (1939).

⁶² Although the tests for insurable interest are by no means uniform in the different kinds of insurance. See, e.g., VANCE, INSURANCE §§ 29, 31 (3d ed. 1951).

⁶³ Thompson, *supra* note 61; HEUBNER, *op. cit. supra* note 61, at 156; PATTERSON, *op. cit. supra* note 61, § 32; VANCE, *op. cit. supra* note 61, §§ 14, 28. Where the insured's interest in the property is something less than full ownership, the principle of indemnity is not always strictly applied. See PATTERSON, *loc. cit. supra*.

⁶⁴ See note 45 *supra*.

⁶⁵ *Olmstead v. Keyes*, 85 N.Y. 593 (1881); VANCE, *op. cit. supra* note 61, at 159.

⁶⁶ See HEUBNER, at 156, 157, 417, 429; PATTERSON, § 32; VANCE, §§ 14, 157, all *op. cit. supra* note 61. Cf. also the treatment accorded to interests which are less than full ownership, note 63 *supra*.

⁶⁷ *Aetna Ins. Co. v. United Fruit Co.*, 304 U. S. 430 (1938).

recovery rule in accident insurance cases simply lets him wager.⁶⁸ He gambles a very small portion of his premium on the chance of a windfall in excess of indemnity.

But of course the claimant is not alone concerned and perhaps this has been the rub. The reluctance to apply notions of strict indemnity to accident insurance has meant an unwillingness—on reasoning that seems overtechnical—to let the accident insurer be subrogated to the rights of the insured.⁶⁹ The common law therefore saw no feasible way to withhold double benefit from plaintiff in these cases without giving defendant a windfall.⁷⁰ Distaste for this consequence probably had more to do with permitting the double recovery here than any belief in the merits of claimant's position.⁷¹ Yet as we have seen, it would be hard to justify giving a claimant more than compensation simply because it makes defendant pay more. So the double recovery result in the accident

⁶⁸ See *Harding v. Townshend*, 43 Vt. 536, 538 (1871) ("It is in the nature of a wager between the plaintiff and . . . the insurer").

⁶⁹ The question of non-statutory subrogation is discussed at length by Dobie, J., in *Crab Orchard Imp. Co. v. Chesapeake & O. R. Co.*, 115 F.2d 277 (4th Cir. 1940). He concludes that the principle of indemnity, upon which subrogation rests in fire insurance, etc., cases, is inapplicable to accident insurance or workmen's compensation payments because of "the difficulty of appraising human suffering," and because ". . . the loss insured against is not the same loss for which plaintiff [the insured] had a right of action against the wrongdoer, . . ." The last reason was quoted from the opinion in *Suttles v. Railway Mail Ass'n*, 156 App. Div. 435, 141 N.Y.Supp. 1024 (4th Dep't 1913). The latter opinion also stresses the discrepancy between the insurance proceeds, which are fixed by the contract without regard to pecuniary loss, and tort damages which depend on many factors irrelevant to rights under the policy. It also concludes that accident insurance is not indemnity, though more like it than life insurance is. *Aetna Life Ins. Co. v. J. B. Parkes Co.*, 30 Tex. Civ. App. 521, 72 S.W. 621 (1902) likewise stresses the lack "of that identity of damage or loss that would entitle the insurer to subrogation." The decision in this case on appeal added to this reasoning the thought that accident insurance is more like life than property insurance. 96 Tex. 287, 72 S. W. 168 (1903). *Mercer Co. v. Perlman*, 62 Ohio App. 133, 23 N.E.2d 502 (1939) states that the right to proceeds of accident insurance "does not depend on any elements of negligence or damages, and hence contains no element of indemnity."

While subrogation may often be undesirable on the merits, it is submitted that these reasons are not convincing. Cf., *Hardman, Common-Law Right of Subrogation Under Workmen's Compensation Acts*, 26 W. VA. L. REV. 183 (1920). See also text, *supra*, at notes 61 to 67.

⁷⁰ In *Harding v. Townshend*, 43 Vt. 536, 539 (1871), the court reasoned on the assumption that the insurer will be subrogated, but this is uniformly disallowed.

⁷¹ See note 32 *supra*.

insurance cases is hard indeed to justify on principle though perhaps it has done little harm in practice for, as practical claim men know, the beneficiary of an accident policy is usually willing to settle his tort claim for less than he otherwise would.⁷²

The implications of the foregoing discussion for the problem of social insurance seem fairly clear. To the extent that welfare legislation is concerned with compensation or indemnity, accident insurance furnishes a weak analogy, and there seems to be no basis for double recovery to the claimant whether the legislation is one providing for a contribution on his part or not. Presumably such schemes are not intended to provide windfalls.⁷³ Certainly there is little if any trace of such intent in the philosophy of the American legislation, and it is submitted that the courts should be exceedingly reluctant to find it. The only theory that would justify such a result is one which would seek to redistribute the wealth beyond the point that indemnity or compensation calls for, and we probably do not want to do that in our country, though such a notion may well lie behind the current British solution that lets a claimant get social insurance benefits in full and makes him credit only half of them against a possible tort recovery.⁷⁴ Moreover even if the wealth is to be redistributed, this would be a haphazard and capricious way to do it.

Private schemes for taking care of some of the losses from accident—such as blue cross insurance—should also be treated as providing indemnity or compensation rather than a windfall in these cases. The analogy to accident insurance is perhaps even closer here, but the quality of the analogy remains just as poor, and there seems to be a considerable tendency to get away from it.⁷⁵

⁷² This is gleaned in part from my earlier experience in the trial department of a railroad company. And see James & Law, *supra* note 59.

⁷³ See authorities cited notes 1 and 5 *supra*.

Of course a provision for subrogation completely negatives any such intent. But even in the absence of such a provision, the presumption should be against it. *Cf.*, cases cited note 52 *supra*. Moreover, there may be specific indications (other than a subrogation provision) of an intent to give the statutory benefits the character of indemnity rather than largess, such as the clauses providing for non-duplication of benefits in the California and New Jersey disability benefits legislation. See note 13 *supra*.

⁷⁴ Friedmann, *Social Insurance & the Principles of Tort Liability*, 63 HARV. L. REV. 241, 256 (1949).

⁷⁵ *Sedlock v. Trosper*, 307 Ky. 369, 211 S.W.2d 147 (1948); note, 13 A.L.R. 2d 355 (1950).

II

If a system of social insurance is designed so that claimant gets its benefits in full and also retains a common law action against a tort defendant, but must subtract the benefits from the damages, then the question comes up as to who will get the benefit of the amount subtracted.⁷⁶ It is submitted that the interest of society will generally be served best by leaving matters as they are at this point. Some of the objectives of the law have certainly been achieved.⁷⁷ The injured person has already been compensated, and at least a portion of his loss shifted to a party who has or will distribute it widely according to insurance principles and is peculiarly well equipped to perform that function. To this extent a condition of desirable equilibrium has been reached. Any further shifting of loss will disturb it by—(1) imposing a further burden on the state machinery and by (2) throwing a loss which has already been placed in channels of efficient distribution upon another who may or may not be able to distribute it as well—or even at all. The burden of proof then seems to be upon those who would disturb this equilibrium by allowing the social insurer to recover from the tort defendant payments which it has paid to claimant.

The proponent of subrogation might offer several arguments to meet this burden of proof:

(a) Since principles of strict indemnity or compensation have been applied to limit claimant's recovery, they require that the insurer be subrogated to the balance of his claim. But there is no principle which would compel this result as a mere matter of logic. Perhaps subrogation may not be had (in this context) unless the case is one of indemnity. But you can have indemnity without subrogation by the simple device of subtracting benefits received (or to be received) from the damages to be recovered in the tort action—a solution which is perfectly familiar to the law.⁷⁸

⁷⁶ While a rule allowing double recovery to plaintiff may have little to commend it, at least it generally avoids this problem. *Crab Orchard Imp. Co. v. Chesapeake & O. R. Co.*, 115 F.2d 277 (4th Cir. 1940); *Truscon Steel Co. v. Trumbull Cliffs Furnace Co.*, 120 Ohio 394, 166 N.E. 368 (1929). *But cf.*, *Midvale Coal Co. v. Cardox Corp.*, 152 Ohio 437, 89 N.E.2d 673 (1949), 2 *STAN. L. REV.* 810 (1950).

⁷⁷ *I.e.*, the portion represented by social insurance benefits. All legislative schemes provide for their wide distribution.

⁷⁸ See, *e.g.*, *Daniels v. Celeste*, 303 Mass. 148, 21 N.E.2d 1 (1939); *Drinkwater v. Dinsmore*, 80 N.Y. 390 (1880); cases cited in notes 48 and 52 *supra*, wherein double recovery was denied.

(b) The further burden on the state's machinery is negligible, since under modern procedure the social insurer and claimant join in a single action and a single decision fixes both their claims. Literally this is true if the matter goes to suit and judgment. Practically, however, many more tort claims are likely to be settled without suit or before judgment if there is a single plaintiff with a smaller claim and a loss already partly satisfied. So the extra burden here is likely to be material.

(c) The prospect of the greater liability will spur prospective defendants to greater care. This is the point we examined before in discussing whether double payment to a claimant could be justified because it made a defendant *pay* more,^{78a} and the same considerations apply to make the proposition just as doubtful here. Indeed there may be an additional one. The social insurer, whether it be government or a private institution, is usually in a peculiarly good position to promote accident prevention.⁷⁹ Any system of subrogation then will tend to *relieve* pressure where it will be effective. And if there is a corresponding increase of pressure (which is far from clear) it will put it either upon another large unit that is in no better position to prevent accidents, or upon individuals where it will do relatively little good in achieving this purpose.⁸⁰

(d) It may be urged that subrogation is no more than fair because the social insurer has been innocent and the tort defendant culpable. To the extent that this contention is based on a feeling

This point may become important in connection with those disability laws which have no provision for subrogation. See notes 13, 27, 73 *supra*. It is altogether likely that under them the courts will be unwilling to allow subrogation. This was the rule in workmen's compensation, absent a statutory provision. *Crab Orchard Imp. Co. v. Chesapeake & O. R. Co.*, 115 F.2d 277, 280, 281 (4th Cir. 1940); *McCullough v. John B. Varick Co.*, 90 N.H. 409, 10 A.2d 245 (1939). *Cf.*, *Standard Oil Co. v. U. S.*, 153 F.2d 958 (9th Cir. 1946), *aff'd on other grounds*, 332 U. S. 301 (1947); *U. S. Cas. Co. v. Hercules Powder Co.*, 4 N. J. 157, 72 A. 2d 190 (1950). *But cf.*, *Travelers Ins. Co. v. Northwest Airlines, Inc.*, 94 F. Supp. 620 (W.D. Wis. 1950), 35 MINN. L. REV. 684 (1951). It should be clear from the above that this result does not necessitate claimant's double recovery. Trouble may come, however, from the fact that courts and commentators have sometimes uncritically treated the theory of compensation (or indemnity) as inseparable from subrogation. *Cf.*, *Mercer v. Ott*, 78 W. Va. 629, 69 S.E. 952 (1916); notes 32 and 69 *supra*.

^{78a} See p. 545 *supra*.

⁷⁹ James & Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 779-781 (1950).

⁸⁰ *Ibid.*

of moral indignation over defendant's conduct, we have seen that it is inappropriate as a basis for civil damages. But it may be urged that there is more involved here than resentment, since subrogation would shift a loss from the innocent social insurer to the guilty defendant (a factor which was absent as between defendant and the claimant who was seeking *double* recovery). To this there are several answers. More and more often, as we have seen, the real defendant in these cases is not an actor in the accident at all, but an insurer or a party held vicariously liable, so the loss will be shifted to an innocent not a guilty party. To the extent, however, that the tort defendant is a "wrongdoing" individual, it should be noted (1) that his "wrong" is often the most trivial slip of human judgment, or the unsought curse of accident proneness;⁸¹ (2) that in any event it is poor loss administration to take a loss out of channels of broad and efficient distribution and throw it back on an individual who cannot distribute it at all, and that the social disutility of such a step is far greater than any possible advantage to be gained by a nice adjustment of civil damages to the deserts of the culpable.⁸² If that is thought important, for admonition or punishment, it can be better done through a system of fines that can be tailored to the requirements of such purposes (*e.g.*, to the degree of guilt), without further confusing the functions of compensation with those of admonition or revenge. (3) That this aspect of the discussion is pretty theoretical anyhow, because if there is no vicarious liability and no insurance, the individual actor seldom can or will pay anything substantial whether for damages or for subrogation claims.⁸³

Whoever the tort defendant is, it should be noted that the social insurer has not really borne the cost of benefits paid to claimant—it has simply been a conduit through which the cost has been distributed. This argument, however, does not dispose of the question of fairness. Rather it brings us to the crux of this question in its modern context. On what basis and among what groups should accident losses be distributed?

⁸¹ James & Dickinson, *supra* note 79.

⁸² *Cf.*, James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941).

⁸³ COLUMBIA STUDY, note 15 *supra*; James & Law, *Compensation for Auto Accident Victims: A Story of Too Little and Too Late*, 26 CONN. B. J. 70 (1952); both described in McNiece & Thornton, *Automobile Accident Prevention and Compensation*, 27 N.Y.U.L. REV. 585 (1952).

Some social insurance programs, it will be recalled, are based on the broad principle that society should meet certain economic losses to individuals and distribute them widely by taxation without regard to the source of the risk that caused the loss. Other such programs distribute the loss among the beneficiaries. Still others are based on the notion that losses should be allocated to the enterprises that create the risks which cause the losses. Tort liability is theoretically even more individualized; but with the growth of vicarious liability and of liability insurance it has become, in effect, a modified form of enterprise liability.⁸⁴

Now when social insurance benefits have been paid under the first type of scheme (and thereby put in the channels of effective distribution), the question really is whether the amount of this payment should be reallocated to enterprise. To point the case up, let us assume disability benefits paid from a fund recruited by general taxation.⁸⁵ In some cases the disability will be caused by automobile accidents. The insured motoring public will pay part of the cost of these accidents anyhow because of the individual claimants' residual tort claims. Is anything to be gained by also making this group pay back to government (*i.e.*, the taxpayers) the amount of the social insurance benefits it has paid these claimants? We have already examined the possibility that this would furnish a material additional inducement to care and have found this unlikely. What remains would be a feeling that these losses ought to be distributed entirely among the insured motoring public rather than in part among taxpayers, coupled perhaps with a preference for enterprise liability to broader notions of social insurance. The former, of course, assumes that the motoring public would not pay as great a share of these losses as taxpayers (if the broader scheme of distribution were chosen) as they would in increased insurance rates (if the government fund were given subrogation). This may be true, though it would certainly be less true of other classes of tort defendants such as transportation and industrial concerns. For my part, while I would keep enterprise liability as a permanent and important part of our total scheme, and prefer it (where appropriate) to the more complete socialization of losses, I do not think

⁸⁴ EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951).

⁸⁵ None of the four such schemes as yet enacted in this country is so financed nor, as we have seen (note 4 *supra*), is this the prevailing pattern for modern American legislation.

the considerations suggested above warrant the trouble it takes to carry the preference that far. After all, the hazards that befell were hazards of life in a mechanized society as well as hazards of motoring, so it seems quite appropriate to have part of these losses met on a broader basis (to which motorists also contribute as taxpayers) so long as a material part of them is borne by the enterprise as such.⁸⁶

Under a program in which the social insurance benefits are met by an enterprise (either as self-insurer or by premiums or contributions fixed upon individual or group loss experience) the question is perhaps more complex but these factors deserve serious consideration:

(a) Subrogation claims as between enterprises will very often cancel out in the long run. This will be particularly true as among enterprises which are heavily exposed to both social insurance and public tort liability. It will be less true where subrogation claims are against a group which is not largely composed of employers of labor (*e.g.*, the motoring public).

(b) Even where these claims do not cancel out, subrogation may serve very imperfectly to benefit the group intended to be favored because of the rating practices of the insurer. Fire insurance companies, for instance, make additions to the rate to cover the exposure hazard of the insured building.⁸⁷ Presumably the majority of subrogation claims arise with respect to such exposed buildings. Amounts recovered by subrogation are not, however, credited on these losses or these rates, but affect the rating structure only generally, if indeed they affect it at all. The experience rating system used in workmen's compensation insurance, on the other hand, credits subrogation recoveries against the losses of

⁸⁶ Under the British scheme, the Exchequer is not subrogated to the tort claims of those who get social insurance benefits. For discussion of this problem, see REPORT ON ALTERNATIVE REMEDIES ¶¶ 5, 41, 47, 52.

As we have seen, our own social insurance programs are generally paid for by the beneficiaries or the enterprises that create the risk rather than through a more complete socialization of the loss. Many legislative programs, however, which affect the present problem very much as social insurance does, are financed through general taxation. In such cases subrogation by the government is not the rule. See cases cited note 52 *supra*. But it is sometimes provided. See *Standard Oil Co. v. U. S.*, 153 F.2d 958, 963-4 (9th Cir. 1946); *Cunniën v. Superior Iron Works Co.*, 175 Wis. 172, 184 N.W. 767 (1921).

⁸⁷ See HEUBNER, *op. cit. supra* note 61, at 314, 324.

either an undivided enterprise or a group. Here subrogation is found at its best.

(c) In all these cases, by hypothesis, the loss resulted from hazards incidental to *both* the enterprises concerned. And if claimant's residual tort claim is allowed, and subrogation denied, each enterprise will pay a part of that loss. If, on the other hand, there is to be a subrogation claim, it will in fact generally be paid by one enterprise to another rather than by any individual wrongdoer. And as between innocent parties this further loss-shifting must be justified because the loss, though it is incidental to both enterprises, is *more* incidental to one than another. But this is a pretty tenuous basis for charging the already overloaded machinery for adjusting disputes,⁸⁸ with the burden of manifold subrogation claims.

To the extent that the cost of social insurance is distributed among its beneficiaries, the case for subrogation is perhaps strongest. That is true at least under a system which is set up so that the insured group gets the benefit of the subrogation recoveries.⁸⁹ But even here the trouble that subrogation entails may bring little net change. If, for instance, a disability program is financed from contributions of employees,⁹⁰ subrogation recoveries against the motoring public are not likely to bring those contributions down any more than they push automobile liability insurance rates up. But employees constitute a considerable part of the motoring public,⁹¹ so the money that goes into one pocket will often come out of another belonging to the same man. There would, however, be other situations where this was not so often the case.

The whole matter, I must concede, is not free from doubt and a good case can be made for subrogation in some instances within the framework of the present discussion—but not nearly so good a

⁸⁸ McNiece & Thornton, *Automobile Accident Prevention and Compensation*, 27 N.Y.U.L. Rev. 585 (1952).

⁸⁹ Cf. p. 560 *supra*. If the contributions of the insureds are on a fixed statutory basis which is not calculated to cover the full costs of the scheme, then subrogation will benefit the source from which the deficit is to be made up (the government or an enterprise) and the case falls under one of the heads just discussed rather than here.

⁹⁰ See note 6 *supra*.

⁹¹ It is true that only the *insured* motoring public will be adversely affected by such a rate change, so that the employee who has no car, or whose car is uninsured might benefit. It would be a doubtful policy indeed to confer a benefit in the latter case.

one as is generally supposed. Subrogation tends to be wasteful in a society whose judicial machinery is already overtaxed. It is often allowed in situations where it simply takes money from one of a man's pockets and puts it in one of his other's, or where cross-claims for subrogation will occur frequently and cancel out. It sometimes takes a loss out of machinery for distributing it and throws it back on an individual who cannot distribute losses at all. It probably accomplishes little of the admonitory function. It is an inappropriate weapon for punishment. Altogether it is a far, far thing from the fair-haired boy it is so often assumed to be.