

THE COLLATERAL SOURCE RULE IN ALABAMA: A PRACTICAL APPROACH TO FUTURE APPLICATION OF THE STATUTES ABROGATING THE DOCTRINE

I. INTRODUCTION

The collateral source rule, which has been called one of "the oddities of American accident law,"¹ states that "benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer."² The rule has been characterized as both a rule of damages and a rule of evidence.³ The substantive, or damages, aspect of the rule provides that payments received by a third-party payor are not credited against the tortfeasor's liability to the plaintiff for damages.⁴ "The justification for the rule lies in the philosophy that a wrongdoer should not be entitled to profit from the plaintiff's entitlement to benefits from a collateral source" that a plaintiff may have contracted to receive.⁵ Because collateral payments do not diminish the tortfeasor's liability, any evidence of such payments is irrelevant as having no "tendency to prove or disprove any . . . material issues" in a civil suit against the tortfeasor.⁶

The collateral source rule has come under much criticism in recent years because, in theory, it allows a plaintiff double-recovery for an injury.⁷ In response to this criticism, and as a part of tort reform

1. John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1478 (1966).

2. 22 AM. JUR. 2D *Damages* § 566 (1988).

3. Christian D. Saine, Note, *Preserving the Collateral Source Rule: Modern Theories of Tort Law and a Proposal for Practical Application*, 47 CASE W. RES. L. REV. 1075, 1076 (1997).

4. RESTATEMENT (SECOND) OF TORTS § 920A(2) & cmt. b (1977).

5. James L. Branton, *The Collateral Source Rule*, 18 ST. MARY'S L.J. 883, 884 (1987).

6. *Phoenix Ins. Co. of N.Y. v. Leonard*, 119 So. 2d 217, 219 (Ala. 1960).

7. See, e.g., Fleming, *supra* note 1; Julie A. Shafer, Note, *The Constitutionality of Offsetting Collateral Benefits Under Ohio Revised Code Section 2317.45*, 53 OHIO ST. L.J. 587 (1992); Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741 (1964). The result of double-recovery is to some extent only theoretical because in most, if not

movements, several state legislatures have enacted statutes that modify or abrogate the collateral source rule.⁸ In Alabama, the collateral source rule was abolished in all civil actions seeking damages for medical and hospital bills in 1987.⁹ Whether abolition of the collateral source rule in Alabama was either a necessary or a wise legislative decision is beyond the scope of this Comment.¹⁰ It is clear that, for now, the statutes abrogating the collateral source rule in Alabama will withstand constitutional challenges,¹¹ and trial courts in the state are now left to decipher what the statutes require. This Comment will address the ambiguity inherent in the statutes abrogating the rule in medical malpractice actions¹² and all civil actions (other than product liability actions) seeking damages for medical expenses.¹³ Part II of this Comment will examine the history of the collateral source rule in Alabama. Part III will discuss the constructional difficulty posed by the Alabama legislation abrogating the rule, which on its face appears to affect only the evidentiary aspect of the common-law rule. Finally, Part IV will provide a practical solution to the problems of construction by suggesting that the statutes should be read as implicitly requiring that any amounts paid or payable by a collateral source should be deducted from an award of damages assessed against a tortfeasor.

II. THE HISTORY OF ALABAMA'S COLLATERAL SOURCE RULE

A. Early Adoption of the Rule

The collateral source rule was first articulated in its modern form by the Alabama Supreme Court in *Long v. Kansas City, Memphis & Birmingham Railroad Co.*¹⁴ In *Long*, the court explained that:

If A. negligently or intentionally burns B.'s house, and B.

all cases, the insurer will have the right of subrogation. *Cf. infra* note 10.

8. Branton, *supra* note 5, at 883 n.4 (listing several states that have modified or abolished the rule by statute).

9. ALA. CODE § 12-21-45 (1995). See also ALA. CODE §§ 6-5-545, 6-5-522 (1993), which are applicable in medical malpractice and product liability actions, respectively.

10. For a discussion of the viability of the collateral source rule in today's tort system, compare Saine, *supra* note 3, with Fleming, *supra* note 1. One might argue that enforcement of insurers' contractual rights of subrogation in these cases would be an equally appropriate way to ensure that a plaintiff does not receive double-recovery for his injuries, especially in light of the fact that the made-whole rule may now be modified by contract in Alabama. See *Ex parte State Farm Fire & Cas. Co.*, 764 So. 2d 543 (Ala. 2000).

11. See *Marsh v. Green*, 782 So. 2d 223, 230-33 (Ala. 2000) (holding that section 6-5-545 does not violate the Alabama constitution).

12. ALA. CODE § 6-5-545 (1993).

13. ALA. CODE § 12-21-45 (1995).

14. 54 So. 62 (Ala. 1910).

sues him for damages, surely A. cannot defeat this action by pleading and showing that C. had paid B. the full value of his house under a contract of insurance between B. and C., as to which A. is a perfect stranger. It is no concern of A.'s that C. may be, by contract or otherwise, subrogated to the rights of B. in the matter. The question, to whom will the damages belong when recovered, is one in which the defendant has no interest. It does not even affect the measure of his liability; and is not a proper issue in the suit by B. against A. . . . The mere fact that the insurer has paid the insured cannot affect the action against the wrongdoer who has destroyed or injured the property, the subject of the insurance.¹⁵

Since *Long*, the court has developed and implemented the collateral source rule in a number of cases, often referring to both the evidentiary aspect of the rule and the rule's substantive effect on damages.¹⁶

B. Statutory Abrogation of the Rule

In 1979, the first piece of legislation abrogating the collateral source rule in Alabama became law.¹⁷ This statute "reversed the historic application of the collateral source rule under which the defendant is precluded from proving that the plaintiff's medical or hospital expenses were reimbursed by his insurer" in product liability actions.¹⁸ The statute provides, in pertinent part, that:

[i]n all product liability actions where damages for any medical or hospital expenses are claimed . . . for personal injury or death, evidence that the plaintiff's medical or hospital expenses have been or will be paid or reimbursed (1) by medical or hos-

15. *Long*, 54 So. at 63-64.

16. See, e.g., *Gribble v. Cox*, 349 So. 2d 1141, 1143 (Ala. 1977) (stating that the rationale for the exclusion of collateral source evidence even when offered for a purpose other than lessening plaintiff's damages "is that, weighing the prejudice to plaintiff from admitting that evidence against its value and weight to prove motive or malingering, its exclusion is warranted by the availability of better, less prejudicial evidence on this issue"); *Carlisle v. Miller*, 155 So. 2d 689, 691 (Ala. 1963) ("[T]he amount paid by an insurer to a plaintiff for damages . . . does not affect his measure of recovery [against the tortfeasor], and such evidence is not admissible in the trial of such cause."); *Vest v. Gay*, 154 So. 2d 297, 300 (Ala. 1963) (holding that "the settled rule in our jurisdiction" prevents admission of collateral source evidence for any purpose); *Phoenix Ins. Co. of N.Y. v. Leonard*, 119 So. 2d 217, 219 (Ala. 1960) (stating that "testimony as to where the appellee got the money to pay his hospital bill [has no] . . . tendency to prove or disprove any of [the] material issues" in a case by an insured against his insurer to recover amounts due under his policy); *Sturdivant v. Crawford*, 199 So. 537, 538 (Ala. 1941) (stating that "whether or not the insurance company . . . is entitled to the proceeds of the recovery, is of no concern to the defendants" and that "[t]he amount paid by the insurance company does not even affect the measure of recovery").

17. ALA. CODE § 6-5-522 (1993).

18. CHARLES W. GAMBLE, ALABAMA LAW OF DAMAGES § 12-5 (3d ed. 1994).

pital insurance, or (2) pursuant to the medical and hospital payment provisions of law governing workmen's compensation, shall be admissible as competent evidence in mitigation of such medical or hospital expense damages.¹⁹

Thus, the statute abrogates both the evidentiary aspect of the common law rule as well as the substantive aspect relating to damages.²⁰ The statute further provides that if such evidence is admitted, the plaintiff may then "introduce evidence of the cost of obtaining reimbursement or payment of medical or hospital expenses" which amount "shall be a recoverable item of such damages for medical or hospital expenses."²¹ Furthermore, the legislative scheme disabling the collateral source rule in product liability actions provides a mechanism for disallowing all such evidence when the plaintiff can show that he "is obligated to repay the medical or hospital expenses which have been or will be paid or reimbursed," thus protecting the right of subrogation of a collateral source payor.²²

The tort reform movement of the late 1980s²³ dealt another blow to the collateral source rule in Alabama. In 1987, the Legislature enacted statutes abrogating the collateral source rule in medical malpractice cases²⁴ and all personal injury or death cases seeking damages for medical or hospital expenses.²⁵ These statutes provide that "evidence that the plaintiff's medical or hospital expenses have been or will be paid or reimbursed shall be admissible as competent evidence."²⁶ Like the product liability statute, these statutes provide that the plaintiff is entitled to admit evidence of the cost of obtaining reimbursement by the collateral source.²⁷ The statutes also state that evidence of plaintiff's obligation to repay the collateral source payor is likewise admissible at trial.²⁸ However, in other respects, these statutes are markedly different from the corresponding section relating to product liability cases. The

19. § 6-5-522.

20. *See id.* (providing that such evidence "shall be admissible" for the purpose of "mitigation of . . . damages").

21. *Id.*

22. *Id.* § 6-5-524. *See also* Craig v. F. W. Woolworth Co., 866 F. Supp. 1369, 1371 (N.D. Ala. 1993), *aff'd without opinion*, 38 F.3d 573 (11th Cir. 1994) (interpreting section 6-5-524 "as precluding the admission of evidence regarding payment of medical expenses by an insurer where the insurer has subrogation rights and the plaintiff makes proof of these rights"). This feature of the statute seems to render it all but ineffective in abrogating the collateral source rule, as it is hard to imagine a collateral source payor of medical bills who will not be entitled, either contractually or in equity, to subrogate to the plaintiff's rights against the tortfeasor.

23. GAMBLE, *supra* note 18, § 12-5.

24. ALA. CODE § 6-5-545 (1993).

25. ALA. CODE § 12-21-45 (1995).

26. § 12-21-45(a); § 6-5-545(a).

27. § 12-21-45(a); § 6-5-545(a).

28. § 12-21-45(a); § 6-5-545(a).

1987 statutes provide that evidence of collateral source payment is "competent evidence" without providing a corresponding change in the substantive law of damages.²⁹ This difference could prove problematic in the construction and application of the statute.³⁰

C. American Legion Post No. 57 v. Leahey

In *American Legion Post No. 57 v. Leahey*,³¹ the Alabama Supreme Court held that Alabama Code section 12-21-45,³² which abrogates the collateral source rule in personal or death injury cases other than product liability cases, was unconstitutional under the equal protection and due process guarantees of the state constitution.³³ The court noted the differences between the section abrogating the rule in product liability actions and section 12-21-45, stating that the former "at least gives some guidance as to the purpose for which the collateral source evidence is to be admitted."³⁴ The court noted the confusion among, and conflicting results reached by, federal courts that had addressed the statute³⁵ and quoted two federal decisions criticizing the statute and finding it to be a rule of evidence inapplicable to cases brought in federal courts under their diversity jurisdiction.³⁶ The court indicated its agreement with these two decisions, stating that "while . . . the collateral source rule as a whole is a rule of substantive law, . . . the partial abrogation of it only as to admissibility of evidence affects only the procedural component of the collateral source rule, not its substantive component."³⁷

After canvassing the treatment of similar statutes in other jurisdictions,³⁸ the court began its somewhat unclear constitutional analysis, stating that "[t]hree aspects . . . of [section] 12-21-45 weigh heavily

29. Compare ALA. CODE §§ 12-21-45(a) (1995), and 6-5-545(a) (1993), with § 6-5-522 (1993).

30. See *infra* notes 65-78 and accompanying text.

31. 681 So. 2d 1337 (Ala. 1996).

32. By implication, the court held Alabama Code section 6-5-545 likewise unconstitutional, as the statutes are virtually identical.

33. *Leahey*, 681 So. 2d at 1346-47.

34. *Id.* at 1340.

35. *Bradford v. Bruno's, Inc.*, 41 F.3d 625 (11th Cir. 1995); *Craig v. F. W. Woolworth Co.*, 866 F. Supp. 1369 (N.D. Ala. 1993), *aff'd without opinion* 38 F.3d 573 (11th Cir. 1994); *Killian v. Mesler*, 792 F. Supp. 1217 (N.D. Ala. 1992); *Richards v. Michelin Tire Corp.*, 786 F. Supp. 964 (S.D. Ala. 1992). See also *infra* notes 72-78 and accompanying text.

36. *Leahey*, 681 So. 2d at 1341-42 (quoting *Craig*, 866 F. Supp. at 1373; *Killian*, 792 F. Supp. at 1219-21). But see *Southern v. Plumb Tools*, 696 F.2d 1321, 1323 (11th Cir. 1983) (holding that the collateral source rule is a matter of "state substantive law [that] . . . must be applied by federal courts in diversity cases").

37. *Leahey*, 681 So. 2d at 1343 (emphasis omitted).

38. *Id.* at 1343-45.

against the argument that the statute is constitutional."³⁹ These three aspects may be summarized as follows: (1) the statute purports to change the admissibility of collateral source evidence without providing for the intended effect on the law of damages;⁴⁰ (2) the statute does not sufficiently safeguard insurers' rights of subrogation;⁴¹ and (3) the statute allows the admission of evidence of the plaintiff's insurance without allowing evidence of the defendant's insurance⁴² (which is inadmissible under the Alabama Rules of Evidence when offered to prove the defendant's negligence⁴³). The court expressed concerns that the first problem might "lead [the jury] away from impartiality," an impermissible outcome under section 11 of the constitution.⁴⁴ Furthermore, the third problem, according to the court, raises concerns regarding the equal protection guarantee of the state constitution by "allow[ing] evidence of the plaintiff's insurance coverage but not of the defendant's."⁴⁵ The court went on to state that the statute violates equal protection by:

serv[ing] to diminish awards to plaintiffs with insurance, even if their insurer is subrogated to the recovery, but provides no diminution in awards to wealthier plaintiffs who are self-insured. . . . Section 12-21-45 also violates the equal protection rights of plaintiffs with injuries that require expenditures for medical or hospital treatments, as opposed to those with only property damage.⁴⁶

After providing a laundry list of "problems" attendant to the statute, the court concluded that the statute violated the equal protection guarantee of the state constitution, with no real analysis of the contents of the equal protection guarantee and without reference to any equal protection test that the statute failed to satisfy.⁴⁷

The court went on to state that the statute violates the guarantee of due process of law contained in Article I, section 6 of the constitution

39. *Id.* at 1345.

40. *Id.*

41. *Id.* at 1345-46.

42. *Leahey*, 681 So. 2d at 1346.

43. ALA. R. EVID. 411.

44. *Leahey*, 681 So. 2d at 1346 (quoting *Baader v. State*, 77 So. 370, 371-72 (Ala. 1917)). The Alabama Constitution states "[t]hat the right of trial by jury shall remain inviolate." ALA. CONST. art. I, § 11.

45. *Leahey*, 681 So. 2d at 1346.

46. *Id.*

47. *Id.* at 1346-47. It is also worthy to note that the existence of an equal protection guarantee in the Alabama Constitution is doubtful at this date, after the court's decision in *Ex parte Melof*, 735 So. 2d 1172 (Ala. 1999), in which an apparent majority of the court (in an opinion written by Justice Houston with four Justices concurring specially and two Justices concurring in the result) held that the constitution does not, in fact, contain an equal protection guarantee. *Melof*, 735 So. 2d at 1181.

insofar as the statute "is unduly vague, unreasonable, or overbroad."⁴⁸ This overbreadth stems from the fact that the statute does not provide for what effect, if any, the admission of collateral source evidence will have on the law of damages.⁴⁹ Finally, the court stated that the due process rights of the insurer could be violated if the statute were construed to require a reduction in damages by the amount of the collateral source payment.⁵⁰

Justice Houston, joined by two other justices, dissented from the decision in *Leahey*, stating that the statute does not violate the "phantom" equal protection guarantee of the constitution,⁵¹ that the due process guarantee contained in section 6 of the constitution applies only to criminal prosecutions,⁵² and that the due process guarantee applicable to civil trials requires only "notice, a hearing according to that notice, and a judgment entered in accordance with the notice and hearing, and restricts the legislature from making unreasonable, arbitrary, and oppressive modifications of fundamental rights."⁵³

D. Marsh v. Green

Four years after the decision in *Leahey*, the Alabama Supreme Court again considered the constitutionality of its statutory scheme abrogating the collateral source rule. That opportunity arose in the case of *Marsh v. Green*.⁵⁴ *Marsh* involved a claim of medical negligence, thus implicating the collateral source statute contained in section 6-5-545, rather than section 12-21-45 as in *Leahey*.⁵⁵ Nevertheless, the analysis in *Marsh* both implicitly and explicitly affects the viability of section 12-21-45, as the statutes are virtually identical.⁵⁶ The majority in *Marsh* began by attacking the validity of the three factors weighing against the constitutionality of section 12-21-45 enumerated in *Leahey*, stating that "[t]hese concerns deal with the wisdom of legislative policy rather than constitutional issues."⁵⁷ The court went on to quote, in its entirety, the

48. *Leahey*, 681 So. 2d at 1346-47 (quoting *Ross Neely Express, Inc. v. Alabama Dep't of Environmental Mgmt.*, 437 So. 2d 82, 84 (Ala. 1983); *Friday v. Ethanol Corp.*, 539 So. 2d 208, 215 (Ala. 1988)).

49. *Id.* at 1347.

50. *Id.* But see *infra* note 93.

51. *Leahey*, 681 So. 2d at 1347-48 (Houston, J., dissenting). Justice Houston maintained that there was no equal protection guarantee in the constitution, and this position was ostensibly adopted by the court in *Melof*. See *supra* note 47.

52. *Leahey*, 681 So. 2d at 1348 (Houston, J., dissenting).

53. *Id.* (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Ex parte Rice*, 92 So. 2d 16 (Ala. 1957); *Thompson v. Wilk, Reimer & Sweet*, 391 So. 2d 1016 (Ala. 1980)).

54. 782 So. 2d 223 (Ala. 2000).

55. *Marsh*, 782 So. 2d at 225, 230-33.

56. *Id.* at 232-33.

57. *Id.* at 231.

dissenting opinion of Justice Houston in *Leahey*, apparently adopting the language as its own.⁵⁸ The court concluded, rather summarily, that the constitution was misinterpreted in *Leahey*, thus rendering the doctrine of stare decisis less forceful than it otherwise would be.⁵⁹ Therefore, the court held that neither section 6-5-545 nor section 12-21-45 violate the constitution, overruling *Leahey* to the extent that it held otherwise.⁶⁰

In a strong dissent, Justice Cook argued that the statutes did, in fact, violate the due process guarantees of both the federal and state constitutions as they were "void for vagueness."⁶¹ Furthermore, the dissent found the statutes unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as well as the equal protection guarantee of the Alabama Constitution, in discriminating against those plaintiffs with insurance.⁶² Justice Cook found "neither a rational basis, nor a legitimate governmental purpose, for this disparate treatment."⁶³ Therefore, Justice Cook concluded, the finding of constitutionality by the majority, "with neither an explanation for holding the statute constitutional nor a suggested procedure for implementing the statute" was improper.⁶⁴

III. THE CONSTRUCTIONAL DIFFICULTY: SUBSTANCE V. PROCEDURE

As stated previously, the collateral source rule is both a rule of damages and a rule of evidence.⁶⁵ The Alabama statutes abrogating the rule in medical malpractice claims and all civil actions other than product liability cases, however, seem to only affect the evidentiary aspect of the rule, thus providing only a partial abrogation of the rule.⁶⁶ Because the statutes state that evidence of collateral payments "shall" be

58. *Id.* at 231-33.

59. *Id.* at 232.

60. *Marsh*, 782 So. 2d at 233.

61. *Id.* at 235 (Cook, J., dissenting) (quoting *Margaret S. v. Edwards*, 794 F.2d 994, 999 (5th Cir. 1986)).

62. *Id.* at 236-37. Justice Cook mentioned in a footnote that he understands that *Melof* "purports to hold that there is no such guarantee in the Alabama Constitution." *Id.* at 236 n.3. He went further to state "that in special writings, no fewer than 5 of the 8 Justices participating in that decision expressed either their disagreement with, or no opinion as to, that proposition." *Id.* Apparently the controversy over the equal protection guarantee of the Alabama Constitution has not been completely resolved yet.

63. *Marsh*, 782 So. 2d at 236-37 (Cook, J., dissenting) (describing the contents of the "least stringent of the three levels of equal-protection analysis required by the United States Constitution").

64. *Id.*

65. See *supra* notes 3-6 and accompanying text.

66. Compare ALA. CODE § 6-5-522 (1993) (stating that evidence of collateral payments "shall be admissible as competent evidence in mitigation of . . . damages" (emphasis added)), with §§ 12-21-45 (1995), and 6-5-545 (1993) (stating that such evidence "shall be admissible as competent evidence").

admissible,⁶⁷ the trial judge has no option but to admit such evidence.⁶⁸ Under the Alabama Rules of Evidence, admissible evidence must be relevant,⁶⁹ and relevant evidence is defined as "evidence having any tendency to make the existence of any fact *that is of consequence to the determination of the action* more probable or less probable than it would be without the evidence."⁷⁰ Thus, because evidence of collateral source payments is admissible, it must be relevant, and if it is relevant, it must relate to a material fact at issue in the action.⁷¹ The problem, however, is that the Alabama Supreme Court has provided no guidance as to what effect the statutes have on the substantive aspect of the collateral source rule, thus leaving open the question of what, exactly, this newly admissible evidence is relevant to prove.

At least two federal district court judges sitting in Alabama have struggled with the statutes and concluded that they abrogate only that part of the rule relating to admissibility, and not to damages. In *Killian v. Melser*,⁷² the court:

conclude[d] that the Alabama legislature [in enacting section 12-21-45] intended no more than to permit an alleged tortfeasor to muddy the water by requiring the trial judge to allow the jury to listen to evidence that, in reality, is irrelevant and prejudicial, and which the trial court, as it later instructs the jury, must describe as having nothing whatsoever to do with the true calculation of the possible recoverable damages.⁷³

The court went on to state that:

This court has held informal conversations with more than one Alabama trial judge on this subject and has learned that Alabama trial judges are routinely allowing the introduction of evidence rendered "admissible" by [section] 12-21-45 but thereafter charging the jury that it may "*consider*" the said evidence for whatever it may be worth. Such an ambiguous jury charge,

67. ALA. CODE § 12-21-45 (1995); ALA. CODE § 6-5-545 (1993).

68. *Hornsby v. Sessions*, 703 So. 2d 932, 939 (Ala. 1997) ("The word 'shall' is considered presumptively mandatory unless something in the character of the provision being construed requires that it be considered differently.").

69. ALA. R. EVID. 402.

70. ALA. R. EVID. 401 (emphasis added).

71. See, e.g., *Eason v. Comfort*, 561 So. 2d 1068, 1071 (Ala. 1990) ("Evidence is relevant when it tends to shed some light on an issue in the case."); *Sexton v. State*, 529 So. 2d 1041, 1050 (Ala. Crim. App. 1988) ("Whatever tends to shed light on the main inquiry, and does not withdraw attention from such main inquiry by obtruding upon the minds of the jury matters which are foreign, or of questionable pertinency, is, as a general rule, admissible evidence." (quoting *Richardson v. State*, 85 So. 789, 793 (Ala. 1920))).

72. 792 F. Supp. 1217 (N.D. Ala. 1992) (Acker, J.).

73. *Killian*, 792 F. Supp. at 1219.

while an understandable effort to comply with [section] 12-21-45, is tantamount to telling the jury that it can, with impunity, reduce any justifiable verdict by the amount of money plaintiff may receive from a collateral source, but that it need not do so, or, for that matter may punish a greedy plaintiff and give him nothing in an otherwise meritorious case. On the other hand, some Alabama trial judges are remaining silent on the subject and are simply ignoring [section] 12-21-45 in their jury instructions and then crossing their fingers. The fact that no suggested jury instruction on the subject can yet be found in *Alabama Pattern Jury Instructions* may provide an explanation for the latter approach. Meanwhile, the Supreme Court of Alabama has not spoken authoritatively on [section] 12-21-45.⁷⁴

The court's report of the discussions with Alabama trial judges on this question provides a disturbing commentary on the need for some guidance in this area. Without guidance as to its application, the statute's effect may vary greatly from courtroom to courtroom across the state. Indeed, it may provide plaintiffs with some reason to engage in forum shopping in cases involving diverse parties, as the *Killian* court held that section 12-21-45 "constitutes a rule of evidence not binding on this court"⁷⁵ under *Hanna v. Plumer*.⁷⁶

Another district court sitting in Alabama has also noted the difficulties inherent in the statutes abrogating the collateral source rule, stating that:

[s]ection 12-21-45 is contained in chapter 21 of title twelve which interestingly is entitled Evidence and Witnesses. This chapter is clearly the codification of the Alabama *state courts'* rules of evidence. . . . [S]ection 12-21-45 is clearly a rule of evidence and as such has no application in a case brought in federal court on the basis of diversity jurisdiction.⁷⁷

74. *Id.* at 1220.

75. *Id.* at 1221.

76. 380 U.S. 460 (1965). The Eleventh Circuit's position on the statutes is unclear at this time. One panel of the Eleventh Circuit affirmed a court holding the statutes procedural. *See* *Craig v. Woolworth Co.*, 866 F. Supp. 1369 (N.D. Ala. 1993), *aff'd without opinion*, 38 F.3d 573 (11th Cir. 1994). However, a subsequent panel of the Eleventh Circuit held that because the collateral source rule is a substantive rule, so too is a law abrogating it. *Bradford v. Bruno's, Inc.*, 41 F.3d 625 (11th Cir. 1995), *withdrawn and superceded by*, 94 F.3d 621 (11th Cir. 1996). The decision by the Eleventh Circuit in *Bradford* was withdrawn due to the Alabama Supreme Court's decision in *Leahey*, holding the statutes unconstitutional. Since *Marsh*, neither the Eleventh Circuit, nor any district court sitting in Alabama, has had the opportunity to consider the statutes.

77. *Craig v. Woolworth Co.*, 866 F. Supp. 1369, 1372 (N.D. Ala. 1993) (Guin., J.), *aff'd without opinion*, 38 F.3d 573 (11th Cir. 1994) (citing *Killian v. Melser*, 792 F. Supp. 1217 (N.D. Ala. 1992)).

These cases are well-reasoned, persuasive authority for the conclusion that the Legislature, in attempting to abrogate the collateral source rule, did nothing more than affect the evidentiary aspect of the rule without any corresponding facial change in the law of damages. Thus, otherwise irrelevant evidence is deemed "competent" evidence and forced into an action, apparently leaving to the individual trial judge the determination of what, if any, material fact the evidence is relevant to prove. Such an incomplete construction, as suggested by Justice Cook in his *Marsh* dissent, may present due process problems in addition to the practical problems of relevancy raised here.⁷⁸

IV. A SUGGESTED SOLUTION TO THE CONSTRUCTIONAL PROBLEM

This suggested solution begins with the proposition that the Legislature probably did not intend to enact a meaningless statute.⁷⁹ Without any indication as to what the substantive effect of the statutes will be, the statutes abrogating the collateral source rule in Alabama are at least problematic, and possibly meaningless, depending on the construction given to them by the state trial judges. As stated above, for evidence to be relevant (which this evidence must be as the statutes require its admission) it must be probative of some fact of consequence in the action.⁸⁰ Therefore, in order to ensure that this admissible evidence be relevant, it must speak to one or more of the issues in the case. The only element to which such evidence could logically be relevant is the plaintiff's injury or damages.

The Alabama Supreme Court:

adheres to the general common-law concept of damages, that damages are compensatory in nature and as such provide recovery to the injured party for the injury sustained and nothing more. The general rule is that damages are unrecoverable where the plaintiff has not paid *or is not liable* for such items.⁸¹

The collateral source rule traditionally provided an exception to this

78. See *Marsh v. Green*, 782 So. 2d 223, 235 (Ala. 2000) (Cook, J., dissenting) (quoting *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966), and stating that the statutes fail to meet federal due process standards because they leave "judges and jurors free to decide, without any legally fixed standards" what the substantive effect of the statutes will be).

79. See, e.g., *Ex parte Watley*, 708 So. 2d 890, 892 (Ala. 1997) (quoting *Druid City Hosp. Bd. v. Epperson*, 378 So.2d 696, 699 (Ala. 1979), and stating that "[t]he legislature will not be presumed to have done a futile thing in enacting a statute" and that "[i]t is presumed that the legislature does not enact meaningless, vain or futile statutes").

80. See *supra* notes 69-70 and accompanying text.

81. *Jones v. Crawford*, 361 So. 2d 518, 521 (Ala. 1978) (emphasis added) (citing *Alabama Farm Bur. Mut. Cas. Ins. Co., Inc. v. Smelley*, 329 So. 2d 544 (Ala. 1976); *Jones v. Keith*, 134 So. 630 (Ala. 1931)).

general rule, allowing the plaintiff to recover sums for which he was not liable, because to do otherwise would "relieve[] the wrongdoer of his full responsibility for his wrongdoing."⁸² Under the statutes abrogating the rule, then, the general rule providing that damages are unrecoverable where plaintiff is not liable for them (because a collateral source is obligated to pay these amounts) should apply in full force.⁸³

Assessment of special damages⁸⁴ in Alabama requires a jury to "include an amount at least as high as the *uncontradicted* special damages, as well as [a] reasonable amount as compensation for pain and suffering."⁸⁵ The admission of evidence of collateral source payments under sections 12-21-45 and 6-5-545 provides a contradiction in the amount of special damages that a plaintiff actually suffered. The plaintiff will claim damages in the amount of the entire injury sustained, including medical bills paid by an insurer, while the defendant will show that the plaintiff herself is not damaged to that extent as the insurer has assumed some of the amount owed plaintiff for her injury. Therefore, because under the statutes abrogating the collateral source rule the special damages as to medical bills are no longer uncontradicted, the jury is not required to compensate the plaintiff for the full amount of special damages claimed.

This raises another critical problem with the incomplete abrogation of the collateral source rule—a possible due process concern that individual judges and juries will determine, with no guidance from the statutes or the supreme court, whether the plaintiff should recover the medical expenses paid by her insurer (effectively reinstating the collateral source rule in individual cases), whether the plaintiff should recover only those sums for which she is personally liable (abrogating the damages portion of the collateral source rule in individual cases), or whether some amount between these two extremes should be awarded to the plaintiff (leaving doubt as to whether the collateral source rule is in effect in individual cases).⁸⁶ Therefore, the statutes should be read as implicitly requiring that a plaintiff may not recover for medical bills paid by a collateral source. Such a construction would save the statutes from the due process problem, and eliminate both the difficulty with the

82. *Jones*, 361 So. 2d at 522.

83. See *infra* notes 86-97 and accompanying text.

84. *GAMBLE*, *supra* note 18, § 2-2 (defining special damages as "such as naturally but not necessarily flow from the wrongful act").

85. *Jones v. Butts*, 646 So. 2d 104, 105 (Ala. Civ. App. 1994) (emphasis added) (citing *Carver v. Walden*, 602 So. 2d 426 (Ala. Civ. App. 1992)). See also *Lynch v. Rowser*, 597 So. 2d 227 (Ala. Civ. App. 1992); *Posey v. McCray*, 594 So. 2d 152 (Ala. Civ. App. 1992).

86. See *Marsh v. Green*, 782 So. 2d 223, 235 (Ala. 2000) (Cook, J., dissenting). Such a due process concern, is, of course, speculative, as the Alabama Supreme Court definitively ruled that the statutes did not violate the constitution in *Marsh*. However, as Justice Cook noted, such a concern may be well founded notwithstanding the court's holding in *Marsh*.

admission of evidence that is not otherwise relevant as required by the Alabama Rules of Evidence⁸⁷ and the practical problem judges will have in attempting to apply the statutes in trial.⁸⁸ The Alabama Court of Civil Appeals has gone part of the way towards this end. In *AMF Bowling Centers, Inc. v. Dearman*,⁸⁹ the court stated that:

when evidence is introduced showing that medical expenses have been paid by a collateral source, the plaintiff is not necessarily entitled to fully recover medical expenses. Instead, the jury must consider all evidence introduced regarding collateral payment of medical expenses to determine what amount the plaintiff is entitled to recover.⁹⁰

This construction at least provides that the jury is permitted to deduct the collateral payments from the amount of damages for medical expenses, solving the problem of relevance.⁹¹ This construction does not, however, solve the potential due process problems nor the practical problems associated with utilizing the statute at trial. Different trial judges may still give individual juries different instructions as to what they may or must do with evidence of collateral source payments.⁹² The solution to both of these problems lies in a construction of the statutes that provides mandatory deduction of medical expenses paid for by collateral source payors from the amount of damages the plaintiff receives.⁹³ In this way, all plaintiffs who have had their medical expenses

87. ALA. R. EVID. 401, 402.

88. See *Killian v. Melser*, 792 F. Supp. 1217, 1220 (N.D. Ala. 1992) (detailing the court's conversations with Alabama trial judges and concluding that judges are reaching a variety of results in their application of the statutes).

89. 683 So. 2d 436 (Ala. Civ. App. 1995).

90. *AMF Bowling Centers*, 683 So. 2d at 438 (citing *Senn v. Alabama Gas Corp.*, 619 So. 2d 1320, 1326 (Ala. 1993) (Hornsby, C.J., concurring specially)).

91. Because under the Court of Civil Appeals' construction, a jury may deduct the amount, the collateral payment is relevant to the issue of damages, and makes the proposition that the plaintiff's total damages are \$X "more probable or less probable than it would be without the evidence." ALA. R. EVID. 401.

92. This raises a potential equal protection problem in that different plaintiffs will have their medical expenses paid to varying degrees. However, the current position of the Alabama Supreme Court is that the state constitution does not contain an equal protection guarantee. See *supra* note 47. Any challenge to the statutes under the United States Constitution would probably entail an analysis of the statutes under the rational basis test, the lowest level of constitutional scrutiny applied by the Supreme Court. For a discussion of equal protection challenges to statutes abrogating the collateral source rule, see Faye L. Ferguson, Note, *Equal Protection Challenges to Legislative Abrogation of the Collateral Source Rule*, 44 WASH. & LEE L. REV. 1303 (1987).

93. It is clear that such a result necessarily deprives insurers of their rights of subrogation in these cases. However, as that is the necessary result of the complete abrogation of the collateral source rule, it can be argued that the Legislature may have intended to reach this result, although the fact that these sections make admissible evidence of a plaintiff's obligation to reimburse the collateral source payor indicate that may not have been the case. ALA. CODE § 12-21-45(c) (1995); ALA. CODE § 6-5-545(c) (1993). In any event, it is equally clear that "[t]he legislature . . . has the power to abolish subrogation rights by substantive statute." *Craig v. Woolworth Co.*,

paid for by an insurer or other collateral source payor are treated alike, and trial judges are left with no lingering questions as to what the jury is to do with such evidence.⁹⁴ Use of the following proposed jury instruction would accomplish this result:

In considering the issue of damages, you must decide whether plaintiff actually suffered the loss of (. . . medical expenses) that (he, she) claims. An award to plaintiff for . . . payment of (. . . medical expenses) must be only for the amount that plaintiff actually . . . paid or is required to pay. Plaintiff may not recover for any expense that was [or will be] paid [by any other person, insurance company, or other service].⁹⁵

Additionally, "[a] verdict form dealing specifically with collateral-source reimbursement" would allow a trial court reviewing a jury award to determine how the jury arrived at the plaintiff's award as well as the precise amount deducted from the award due to collateral source payments.⁹⁶

866 F. Supp. 1369, 1373 n.6 (N.D. Ala. 1993), *aff'd without opinion*, 38 F.3d 573 (11th Cir. 1994). Because the statutes abrogating the collateral source rule are clearly substantive statutes, this result is not impermissible.

94. Several other states' statutes abrogating the collateral source rule explicitly adopt this comment's approach, suggesting that the Alabama statutes should be construed to require deduction of collateral source payments from a plaintiff's award. *See, e.g.*, FLA. STAT. ch. 627.736(3) (1996). Chapter 627.736(3) states that:

[a]n injured party who is entitled to bring suit . . . shall have no right to recover any damages for which personal injury protection benefits are paid or payable. . . . [T]he trier of facts . . . shall not award damages for personal injury protection benefits paid or payable.

Id. *See also*, *e.g.*, IOWA CODE § 147.136 (1997). Section 147.136 states that, in a medical malpractice case:

the damages awarded shall not include actual economic losses . . . to the extent that those losses are replaced or are indemnified by insurance, or by governmental, employment, or service benefit programs or from any other source except the assets of the claimant or of the members of the claimant's immediate family.

Id. *See also*, *e.g.*, MINN. STAT. § 548.36 (2000) (stating that "[t]he court shall reduce the award by the amounts" of collateral payments to the plaintiff); N.Y. C.P.L.R. § 4545(a) (McKinney 1992) ("If the court finds that any [amount of plaintiff's damages] was or will . . . be replaced . . . from any collateral source, it shall reduce the amount of the award by such finding"); R.I. GEN. LAWS § 9-19-34.1 (1997). Section 9-19-34.1 states that, in medical malpractice actions:

the jury shall be instructed to reduce the award for damages by a sum equal to the difference between the total benefits received and the total amount paid to secure the benefits by the plaintiff or the court may ascertain the sum by special interrogatory and reduce the award for damages after verdict.

Id. *See also*, *e.g.*, TENN. CODE ANN. § 29-26-119 (2000) (stating that in a medical malpractice action "the damages awarded may include . . . actual economic losses . . . but only to the extent that such costs are not paid or payable . . . by insurance" or other collateral sources).

95. N.Y. PATTERN JURY INSTRUCTIONS CIVIL 2:300 (3d ed. 2000).

96. *Marsh v. Green*, 782 So. 2d 223, 233 n.2 (Ala. 2000). Such a verdict form could require the jury to state: (a) the total amount of damages sustained for medical and hospital expenses, (b) the amount that has been or will be paid by a collateral source, (c) the amount the plaintiff expended to obtain such reimbursement, and (d) a total amount due to the plaintiff, representing the

V. CONCLUSION

As the collateral source rule has come under fire in recent years, legislatures, including Alabama's Legislature, have begun to slowly erode the effect of the common-law doctrine. In Alabama, this was accomplished through the enactment of two poorly drafted statutes that appear to affect only the evidentiary aspect of the rule⁹⁷ and one statute that is arguably ineffective in practice.⁹⁸ After a rather complicated history, these statutes recently survived a challenge to their constitutionality,⁹⁹ leaving the bench and the bar in doubt as to what the practical effect of the statutes will be. The statutes that on their faces make evidence of collateral source payments admissible without providing what the effect on the law of damages will be,¹⁰⁰ should be read as implying a requirement that the amount of such payments is to be subtracted from the plaintiff's recovery. This construction will have the effect of giving full force to the Legislature's attempt to completely abrogate the collateral source rule, thus allowing the plaintiff to recover only damages that she has actually sustained and forbidding a double-recovery. If this construction is adopted by the courts, there will be uniformity of result; should the Legislature determine that such a result was unintended by the enactment of the statutes, it may rectify the situation through the passage of more clear legislation addressing the status of the collateral source rule in Alabama.

Danielle A. Daigle

amount reached at by subtracting (b) from (a) and then adding (c) to the result.

97. ALA. CODE § 12-21-45 (1995); ALA. CODE § 6-5-545 (1993).

98. ALA. CODE § 6-5-522; ALA. CODE § 6-5-524; *see also supra* note 22 (describing the ineffectiveness of the statute abrogating the collateral source rule in product liability actions).

99. *Marsh*, 782 So. 2d 223.

100. § 12-21-45; § 6-5-545.

