VIII

TORTS

A. Collateral Source Rule

Helfend v. Southern California Rapid Transit District[1] The court reaffirmed the collateral source rule and extended its application to public entities. At the present time in California an injured party is not required to deduct compensation for his injuries received from a source wholly independent of the tortfeasor from the damages that he collects from the tortfeasor, even when the collateral source does not have the right of subrogation or refund.

Helfend had stopped his automobile while the driver immediately in front of him was backing into a parking place. His left arm was extended in the familiar stop signal position. When the driver of defendant transit company's bus attempted to pass, the bus sideswiped Helfend's auto and crushed his arm.[2]

At the trial Helfend recovered *inter alia* slightly more than $2,700 in special damages, representing the entire amount of his medical expenses. The trial court rejected evidence offered by the Transit District to show that a significant percentage of Helfend's medical bills had been paid by Blue Cross and other health insurance.[3] On appeal the Transit District argned that the Supreme Court of California had abolished the collateral source rule in *City of Salinas v. Souza & McCue Construction Co.*,[4] and, alternatively, that *Souza* at least precluded the rule's application to defendant transit company, a public entity.[5] The supreme court affirmed:

> [W]e conclude that in a case in which a tort victim has received partial compensation from medical insurance coverage entirely independent of the tortfeasor the trial court properly followed the collateral source rule and foreclosed defendant from mitigating damages by means of the collateral payments.[6]

Helfend's insurance contract contained a provision requiring that benefits paid be refunded in the event of a tort recovery.[7] The court,

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1. 2 Cal. 3d 1, 465 P.2d 61, 84 Cal. Rptr. 173 (1970) (Tobriner, Acting C.J.) (6-0 decision).

2. *Id.* at 4, 465 P.2d at 62, 84 Cal. Rptr. at 174.

3. *Id.* at 5, 465 P.2d at 62-63, 84 Cal. Rptr. at 174-75.

4. 66 Cal. 2d 217, 424 P.2d 921, 57 Cal. Rptr. 337 (1967), *noted in* 55 CALIF. L. REV. 1163-65 (1967).

5. 2 Cal. 3d at 5-6, 465 P.2d at 63, 84 Cal. Rptr. at 175.

6. *Id.* at 14, 465 P.2d at 69, 84 Cal. Rptr. at 181.

7. *Id.* at 10, 465 P.2d at 67, 84 Cal. Rptr. at 179. Although the opinion does not so indicate, Helfend must not have been required to bring suit against the tortfeasor. If he was required to bring an action the "refund" clause would probably have

however, did not limit its opinion to these facts. Rather, in a strong sweeping dictum, it reaffirmed the application of the collateral source rule

> in tort cases in which the plaintiff has been compensated by an independent collateral source—such as insurance, pension, continued wages, or disability payments—for which he had actually or constructively . . . paid or in cases in which the collateral source would be recompensed from the tort recovery through subrogation, refund of benefits, or some other arrangement.[8]

In *Souza* the court had characterized the collateral source rule as punitive; in *Helfend* the court rejected that characterization, instead justifying the continued vitality of the rule as a reflection of several policy judgments: it protects the accident victim's insurance investment, manifests a policy of encouraging citizens to procure insurance, and provides a more nearly compensatory measure of damages.[9]

This Note analyzes *Helfend* in the light of the collateral source rule's history and purposes. The focus of inquiry is upon whether the collateral source rule should be recognized in cases involving health insurance payments,[10] which include the medical service plan payments at issue in *Helfend.* Part I examines the evolution of the collateral source rule and the closely related doctrine of equitable subrogation. Part II scrutinizes the reinforced California collateral source rule, including its extension to public entities, and suggests how the court might restrict unjustifiable plaintiff double recovery while retaining and enforcing the worthy policies underlying the rule.

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been characterized as a subrogation clause and then invalidated because a personal injury claim may not be subrogated. *See* Fifield Manor v. Finston, 54 Cal. 2d 632, 354 P.2d 1073, 7 Cal. Rptr. 377 (1960); *cf.* 34 OP. CAL. ATT'Y GEN. 247 (1960). See notes 119-24 *infra* and accompanying text.

8. 2 Cal. 3d at 13-14, 465 P.2d at 69, 84 Cal. Rptr. at 181.

9. *Id.* at 10-13, 465 P.2d at 66-69, 84 Cal. Rptr. at 178-81.

10. As used throughout this Note the term health insurance will be a generic one, encompassing such insurance businesses as accident insurance, health insurance, and hospitalization insurance. Insurance of these types will normally include coverage of such items as medical, hospital and nursing care, surgery, and, with the exception of hospitalization policies, loss of earnings while incapacitated. Benefits may also be paid for certain specified injuries, dismemberments and disfigurements—for example, loss of an eye—in fixed or optional amounts. The amount of coverage, if variable, is dependent on the total premium paid in by the insured or for his benefit.

Medical service plans, also included within the term health insurance for purposes of this Note, are technically to be distinguished from other health insurance contracts. These plans provide services for their subscribers, rather than making payments in cash, with the insured paying in advance for various types of hospital, surgical and medical services.

The terms accident and health insurance, essentially interchangeable at the present time, were originally distinguishable only in the sense that accident insurance did not include coverage for illness, whereas health insurance did. Modern policies uniformly contain coverage for illness as well as accidents, and are therefore more correctly

I. THE DEVELOPMENT, IMPLEMENTATION AND USE OF THE COLLATERAL SOURCE RULE

The collateral source rule has its roots in the doctrine of equitable subrogation which seems to have been established in 1782 in *Mason v. Sainsbury*.[11] The Kings Bench upheld the right of an insurer, in the name of the insured, to maintain an action against its insured's tortfeasors for the loss caused by the demolition of the insured's home. Characterizing the insurance policy as one of indemnity for loss of property, the court addressed itself only to the issue of loss allocation. If the tortfeasors did not bear the loss by indemnifying the insurer they would have the benefit of the insurance without paying the premiums.

Relying on *Mason*, two subsequent English cases[12] held that the insurance payment indemnifying the insured for the loss of property would not mitigate damages assessed against a tortfeasor in a suit brought by the insured. Although the insured rather than the insurer was the plaintiff, the issue before the court was the same as that presented in *Mason*: that is, who, as between the insurer and the tortfeasor, should bear the loss. For while the immediate result is payment for the loss by both the insurer and the tortfeasor, the insurer could assert a right of subrogation in a court of equity and recover its payment from the insured. Thus the ultimate loss fell upon the tortfeasor and double recovery by the plaintiff was prevented.

These early cases all dealt with insurance contracts that indemnified the insured for loss to his property. The insurer in each case had a right of subrogation and the actual loss suffered by the insured was the amount payable under the policy. The collateral source rule began to create problems only when applied in situations involving other types of insurance.

In *Hicks v. Newport, Abergavenny & Hereford Ry.*[13] the court held that the proceeds of a policy on the life of the deceased against accidents by railway received by the plaintiff must be deducted from the damages assessed against the defendant in a wrongful death action

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termed health insurance. *See* F. ANGELL, HEALTH INSURANCE 17-20, 207 (1963); 1 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 16 *et seq.* (1941).

11. 99 Eng. Rep. 538 (K.B. 1782).

12. Yates v. Whyte, 132 Eng. Rep. 793 (1838); Clark v. Blything, 107 Eng. Rep. 378 (K.B. 1823).

13. Unreported, but noted in Pym v. Great N. Ry., 122 Eng. Rep. 508, 510 n.(*a*) (Ex. 1863). The policy may have been an accident insurance policy insuring not only injuries but also against the possibility of the insured's accidental death on trains. If so, the policy is not a true life insurance policy because there is no certainty of payment and *Hicks* becomes indistinguishable from, and inconsistent with, Bradburn v. Great W. Ry., L.R. 10 Ex. 1 (1874), which held that accident policy benefits may not mitigate the defendant's damages. See note 19 *infra*.

brought under Lord Campbell's Act.[14] This Act required that damages be measured by the amount of the pecuniary loss that the family sustained by the death of the decedent. The court reasoned that the receipt of life insurance benefits lessened the family's pecuinary loss, hence its recovery must be reduced by a comparable amount. It would appear, however, that the damage computation should have been the same in the absence of the Act, for that portion of Lord Campbell's Act pertaining to damage computation is nothing more than a codification of the common-law theory of compensatory damages;[15] it therefore follows that the *Hicks* reasoning would be applicable to all collateral source benefits, not just life insurance. *Hicks* was noted with approval by the Exchequer Chamber,[16] but was abrogated by the Fatal Accidents (Damages) Act in 1908.[17] This Act prevented the wrongful death tortfeasor from mitigating the damages assessed against him with any insurance proceeds received by the plaintiff, thereby placing life insurance payment on a parity with payments received pursuant to a health insurance contract, which *Bradburn v. Great Western Ry.*[18] had, in 1874, held not available to the tortfeasor in relief of his liability for causing the accident.[19]

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14. Fatal Accidents Act, 9 & 10 Vict., c. 93 (1846) (popularly known as Lord Campbell's Act).

15. For analysis of the collateral source rule's effect ou the compensatory theory of damages see text accompanying notes 84-91 *infra.*

16. Pym v. Great N. Ry., 122 Eng. Rep. 508, 510 n.(*a*) (Ex. 1863).

17. Fatal Accidents (Damages) Act, 8 Edw. 7, c. 7 (1908) (re-enacted in modern form in 1959, Fatal Accidents Act, 7 & 8 Eliz. 2, c. 65 (1959)). For a detailed discussion of the treatment of benefits resulting from death see J. MAYNE & H. MCGREGOR, DAMAGES §§ 801, 835 *et seq.* (12th ed. 1961) [hereinafter cited as DAMAGES].

18. L.R. 10 Ex. 1 (1874). The court distinguished *Hicks* as being based on a statutory right of action, with the statute controlling the computation of damages, whereas *Bradburn* was a common-law personal injury case. However, it failed to note that *Hicks'* payment apparently included accident insurance benefits, and that the portion of Lord Campbell's Act pertaining to computation of damages seemed to be merely a codification of the common law compensatory damage theory. The *Bradburn* court also analogized to Dalby v. India & London Life-Assurance Co., 139 Eng. Rep. 465 (Ex. 1854), which held that life insurance is not indemnity, and asserted that the accident insurance at issue was similar to life insurance in that both are investment:

> [The insured] pays premiums for the purpose of insuring himself, pays on the footing that his right to be compensated when the event insured against happens is an equivalent for the premiums he has paid; it is a quid pro quo, larger if he gets it, on the chance that he will never get it at all.

L.R. 10 Ex. at 2.

19. It is not clear what type of payment was involved in *Bradburn,* since health insurance coverage may include lost earnings, lump sum payments for specified disabilities, and hospital and medical expenses. F. ANGELL, *supra* note 10, at 17-20. The facts as set out in *Bradburn* merely indicated that plaintiff had been injured while a passenger on defendant's line and "had received a sum of £31 on account of the accident upon an insurance effected by him . . . ." L.R. 10 Ex. 1.

Accident insurance was initially developed to protect the insured against railway

Thus, the Fatal Accidents (Damages) Act and *Bradburn* placed life and health insurance payments on a par with indemnity insurance payments for loss of property vis-a-vis the collateral source rule. The end result, however, is different since in the former cases the insurer did not have a common-law right of subrogation;[20] the insured could keep both the payment from the tortfeasor and from the insurer—double recovery.

England has since sharply restricted those situations in which the plaintiff may recover both collateral benefits and full, unmitigated damages from the tortfeasor.[21] Unlike most American jurisdictions, including California, in which the prevailing view is that recovery is for the *value* of reasonable medical services,[22] England requires that in order to recover the cost of medical treatment received the plaintiff must demonstrate that he has *actually incurred* a legal obligation to pay.[23]

Again contrary to California and the majority of states,[24] England in *Browning v. The War Office*[25] held that all benefits received, other than health insurance and the statutorily excluded life insurance, are to be deducted in computing the defendant's damages.[26] *Browning* stated that *Bradburn* was an "exceptional case" and implied that it

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accidents because traveling by rail was considered rather hazardous. These early policies probably did not contain the hospital and medical coverage common to modern policies, perhaps paying only lost earnings, and fixed sums for certain specified injuries, dismemberment and death. *Cf.* A. MOWBRAY, INSURANCE 193-94 (3d ed. 1947). If the policies involved in *Hicks* and *Bradburn* insured against railroad accidents only then it is not inconceivable that, as *Bradburn* suggested [L.R. 10 Ex. at 2], the insureds really were wagering their premiums on the chance of double recovery, much as is the current practice with airline trip insurance.

20. Browning v. The War Office, [1963] 1 Q.B. 750, 769 (dictum).

21. *See* J. FLEMING, THE LAW OF TORTS 218-20 (3d ed. 1965); Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478, 1495-98, 1539-42 (1966).

22. RESTATEMENT OF TORTS § 924, comment *f* at 636 (1939). Most American jurisdictions therefore permit recovery of the reasonable value of gratuitous medical care, or medical services received for which the recipient has not incurred an obligation to pay. For the contrary view see Coyne v. Campbell, 11 N.Y.2d 372, 183 N.E.2d 891, 230 N.Y.S.2d 1 (1962). *See* Fleming, *supra* note 21, at 1496 n.71.

23. 1 D. KEMP, M. KEMP & R. HAVERY, THE QUANTUM OF DAMAGES 14-19 (3d ed. 1967); H. STREET, DAMAGES 82-85 (1962). *See generally* Fleming, *supra* note 21, at 1496-97.

24. *See* Fleming, *supra* note 21, at 1496 n.70 and cases cited therein.

25. [1963] 1 Q.B. 750. The *Browning* plaintiff was a United States Air Force sergeant who had been injured in an automobile accident with one of defendant's vehicles. As a result of the accident plaintiff was medically discharged from the Air Force, at which time he commenced to receive a veteran's benefit disability pension. Plaintiff then sued defendant and received full damages for lost earnings without regard to his disability pension. *Id.* at 751. *See also* Parsons v. B.N.M. Laboratories, Ltd., [1963] 1 Q.B. 95.

26. [1963] 1 Q.B. 750, 759-60. *See generally* DAMAGES §§ 773-78.

should not be extended.[27] But in the 1969 case of *Parry v. Cleaver*,[28] the House of Lords, distinguishing *Browning* and relying on *Bradburn*, refused to allow the defendant to use a disability pension received by the plaintiff to mitigate his damages. This case injects a degree of uncertainty into England's current position, and just how solid *Browning's* underpinnings remain is a matter of conjecture. It is also noteworthy that Parliament enacted legislation with respect to compulsory national insurance to which the plaintiff has contributed that allows the plaintiff not to bring into account one-half of the social welfare benefits he would receive during the first five post-accident years.[29]

The development of the rule in the United States initially paralleled the English experience. In 1854[30] and again in 1856[31] the United States Supreme Court affirmed a property indemnity insurer's right of equitable subrogation. The first non-property damage case was an 1856 Connecticut decision[32] that denied to a life insurer the right to recover from the defendant who had caused the insured's death the amount paid to the insured's beneficiary under the policy. Since Connecticut had no wrongful death statute, the beneficiary, who would have been a potential plaintiff had there been such a statute, had no remedy for the insured's death; thus there was nothing to which the insurer could be subrogated. Nevertheless, the court went on to say that property insurers have the equitable right of subrogation because they "indemnif[y] another in pursuance of [an] obligation so to do."[33] This implied distinction suggests that life insurers do not indemnify, and hence could not be subrogated.[34]

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27. 1 Q.B. at 759.

28. [1969] 2 W.L.R. 821 (H.L.). The three-to-two decision started with the assumption that *Bradburn* was not only correctly decided, but also that it was "fair and just." Without considering whether *Bradburn* itself should have been disapproved and without considering loss allocation by subrogation, the court merely asserted that mitigation would be "unfair," thus failing to address itself to the legal issues underlying *Bradburn* and *Browning*.

29. Law Reform (Personal Injuries) Act, 11 & 12 Geo. 6, c. 41, § 2 (1948). This concession apparently was a political compromise in recognition of the plaintiff's own contribution to the plan. J. FLEMING, *supra* note 21, at 219; Fleming, *supra* note 21, at 1540. This legislation may also be simply a manifestation of a public policy more oriented to social welfare than is the United States'.

30. The Propeller Monticello v. Mollison, 58 U.S. (17 How.) 152 (1854).

31. Garrison v. Memphis Ins. Co., 60 U.S. (19 How.) 312 (1856).

32. Connecticut Mut. Life Ins. Co. v. New York & N.H.R.R., 25 Conn. 265 (1856). This case was cited as authority for the United States Supreme Court's refusal to permit a life insurer to maintain an action against the person responsible for the insured's death. Mobile Life Ins. Co. v. Brame, 95 U.S. 754, 757 (1877).

33. 25 Conn. at 277.

34. See text accompanying notes 69-79 *infra*. The court in Althorf v. Wolfe, 22 N.Y. 355 (1860), a case relied on by Harding v. Townshend, 43 Vt. 536 (1871), and noted approvingly in subsequent cases for the proposition that life insurance pro-

The most important case, and the first one to demonstrate the confusion surrounding the collateral source rule, is *Harding v. Townshend*,[35] an 1871 Vermont supreme court decision. There the court upheld the plaintiff's right to recover from the defendant the unmitigated full amount of his *personal injury* damages even though the plaintiff had received $130 from an accident insurance policy. The result was, for the first time, double recovery although the court apparently did not realize this. The court assumed the insurer had a right of subrogation,[36] which as a personal injury insurer it probably did not have.[37] The court relied on the English property damage cases,[38] the earliest United States Supreme Court case concerning a property insurer's right of subrogation,[39] and *Althorf v. Wolfe*,[40] a case in which a wrongful death plaintiff received both life insurance proceeds and unmitigated damages from the tortfeasor. The court noted *Hicks*' mitigation of damages, but simply stated that even if *Hicks* were not distinguishable from the other

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ceeds may not mitigate damages incurred in a wrongful death action, did not address itself to that issue at all. The court affirmed on other grounds the lower court's decision, which apparently included a determination that the defendant could not have his damages mitigated by the benefits plaintiff received from the decedent's life insurance. This case has been cited as the first example of the collateral source rule in the United States, but The Propeller Monticello v. Mollison, 58 U.S. (17 How.) 152 (1854), preceded it by six years.

35. 43 Vt. 536 (1871). From the sketchy facts it can only be ascertained that this was an action for damages sustained by the plaintiff by reason of an "insufficiency" of a highway maintained by defendant township. The trial court had deducted from the damages the plaintiff received the amount he received from "an accident insurance company on account of the injuries for which he claimed to recover. . . ." *Id.* at 537. This was the first case to refer to benefits of this type as "collateral." *Id.* at 538.

36. [I]t is the insurer, and not the town, that should be entitled to this benefit [subrogation]. It would seem to be a perversion of justice to subrogate the wrongdoer, who has caused the loss, to the rights of the injured party as to his remedy against the insurer. But it is not uncommon that the insurer, who has paid the loss, is put in place of the insured and subrogated to his right in respect to remedies against others for the injury.

Id. at 539. The *Harding* court was also concerned that the defendant should not receive the benefit of the plaintiff's insurance, which it characterized not as an investment, but as a wager. *Id.* at 538.

37. *See* W. VANCE, INSURANCE § 134 (3d ed. 1951). It is not clear whether the prohibition against subrogation of personal injury claims had been firmly established at the time of *Harding*. However, if the issue were undecided, it is difficult to explain why *Harding* was not used as authority in subsequent cases to permit such subrogation, and why subsequent cases accepted the prohibition unequivocally, as a long-standing fact. Aetna Life Ins. Co. v. Parker, 96 Tex. 287, 72 S.W. 168 (1903); Gatzweiler v. Milwaukee Elec. Ry. & Light Co., 136 Wis. 34, 116 N.W. 633 (1908).

38. Yates v. Whyte, 132 Eng. Rep. 793 (C.P. 1838); Clark v. Blything, 107 Eng. Rep. 378 (K.B. 1823); Mason v. Sainsbury, 99 Eng. Rep. 538 (K.B. 1782). See text accompanying notes 11-12 *supra*.

39. The Propeller Monticello v. Mollison, 58 U.S. (17 How.) 152 (1854).

40. 22 N.Y. 355 (1860). See note 34 *supra*.

English cases, it was nevertheless not controlling.[41] The court erred in failing to note that personal injury claims may not be subrogated.[42] In looking to English authority the court failed to recognize the significance and rationale of the *Hicks*' holding that a wrongful death tortfeasor was allowed set-off of the plaintiff's accident and life insurance benefits under a statute that merely codified the common-law theory of compensatory damages; and further, that the basis of the English property damage cases was subrogation. The court did imply that there was an inherent similarity between accident and property insurers by arguing that accident insurers, like property insurers, should enjoy a right of subrogation.[43] This argument led the court squarely into the double recovery trap,[44] since the right was apparently not then available.

The development of the collateral source rule culminated in the early 1900's with *Aetna Life Insurance Co. v. J. B. Parker & Co.*[45] and *Gatzweiler v. Milwaukee Electric Railway & Light Co.*,[46] both cases involving non-subrogatable health insurance payments. The Texas and Wisconsin supreme courts, respectively, argued that health insurance is an investment similar to life insurance and explicitly permitted double recovery.[47] In so doing the courts clearly abandoned the doctrine of equitable subrogation as the basis for the collateral source rule.

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41. 43 Vt. at 541.

42. According to Professor Fleming, "No principle [that personal injury claims may not be subrogated] is more uniformly and universally recognized throughout the world." Fleming, *supra* note 21, at 1501 n.85.

43. See note 36 *supra*. The general principle that accident and property insurance are inherently dissimilar is explored and refuted in text accompanying notes 69-79 and notes 110-17 *infra*.

44. In Drinkwater v. Dinsmore, 80 N.Y. 390 (1880), the court cited *Harding* and *Althorf* as authority for its dictum "that one sued for causing an injury . . . or the death of another, cannot show a life or accident insurance in mitigation of damages." *Id.* at 392. The court also analogized to the English property insurance cases [see text accompanying notes 11-12 *supra*] but failed to note that subrogation was the foundation of those decisions.

45. 96 Tex. 287, 72 S.W. 168 (1903).

46. 136 Wis. 34, 116 N.W. 633 (1908).

47. *Gatzweiler* relied primarily on *Aetna Life* for its authority, but also cited Scott v. Dickson, 108 Pa. 6 (1884), and Emerick v. Coakley, 35 Md. 188 (1871), both of which cited as sole authority Dalby v. India & London Life-Assur. Co., 139 Eng. Rep. 465 (C.P. 1854) [see note 14 *supra*], for the notion that life insurance is an investment, without further noting that England at that time required a plaintiff to off-set the proceeds he had received from life insurance on the decedent against the damages he would receive from a wrongful death tortfeasor. *Aetna Life*, on the other hand, cited for the proposition that there can be no subrogation of accident insurance Bradburn v. Great W. Ry., L.R. 10 Ex. 1 (1874) [see notes 18-20 *supra* and accompanying text], Mobile Life Ins. Co. v. Brame, 95 U. S. 754 (1877), and Connecticut Mut. Life Ins. Co. v. New York & N. H. R.R., 25 Conn. 265 (1856) [see notes 32-43 *supra* and accompanying text], but neither one of the latter two cases even addressed itself to that issue.

Implicit in these American cases is the reasoning of the Exchequer Chamber in *Bradburn v. Great Western Ry.*:[48]

> One is dismayed at this proposition [that the defendant's damages be mitigated by the amount of insurance benefits received by the plaintiff] . . . . [t]he plaintiff is entitled to retain the benefit which he has paid for in addition to the damages which he recovers on account of the defendant's negligence.[49]

The impact of such reasoning was that since only property insurers had a right of subrogation and the defendants must pay, the plaintiff was to be allowed a windfall.

Thus, in those jurisdictions not permitting subrogation of personal injury claims, the American development has permitted double recovery by a personal injury plaintiff. This was accomplished in one line of cases[50] by analogizing to the prohibition against showing the plaintiff's insurance in mitigation of damages in property damage suits; and in a second line of cases[51] by arguing that health insurance, in which payments are predicated on a contract and not on the insured's pecuniary loss, is, like life insurance, an investment of the insured, the benefit of which should not inure to the tortfeasor. But in the first situation the collateral source rule was originally invoked simply to implement the property insurer's right of subrogation; in the second, the wrongful death tortfeasor's damages in English cases were mitigated by the plaintiff's life insurance proceeds under a statute that merely codified the compensatory theory of damages.[52] Nonetheless, *Althorf, Harding, Aetna Life,* and *Gatzweiler* have established the pattern for the rule's application in subsequent cases that effects plaintiff's double recovery in personal injury claims.[53]

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48. L.R. 10 Ex. 1 (1874). See notes 18-20 *supra* and accompanying text.

49. L.R. 10 Ex. at 2.

50. See notes 35-44 *supra* and accompanying text.

51. See notes 45-49 *supra* and accompanying text.

52. England has since restrieted double recovery opportunities in Browning v. The War Office [1963], 1 Q.B. 750, with an exception for privately procured health insurance [Bradburn v. Great W. Ry., L.R. 10 Ex. 1 (1874)], and a statutory exception for life insurance [Fatal Accidents Act, 1959, 7 & 8 Eliz. 2, c. 65 (1959)]. Parry v. Cleaver, [1969] 2 W.L.R. 821 (H.L.), may, however, have revitalized the rule, although *Parry's* effect is unknown at this juncture.

53. Nearly all courts faced with the issue have failed to distinguish between the subrogatable property claim and the non-subrogatable personal injury claim. However, several cases have made this distinction, and have also tied invocation of the collateral source rule to the existence of the right of subrogation. In Mayor of N.Y. v. Pentz, 24 Wend. 668 (N.Y. Ct. Err. 1840), it was stated that

> if the underwriters are not entitled to be repaid the amount of damages which they make good, then it must follow that the amount which may have been, or may hereafter be received of them must so far diminish the total amount of damages, which the owners of the property destroyed have sustained.

Id. at 671; *cf.* Merrick v. Brainard, 38 Barb. 574, 589 (N.Y. Sup. Ct. 1860). The

California has long adhered to the *Harding* pattern of the collateral source rule, permitting plaintiff's double recovery in a number of different situations.[54] *Helfend* itself is a significant reaffirmation of the *Harding* pattern. California has refused to permit subrogation of personal injury claims,[55] and while the *Harding* court was unaware that its decision would lead to double recovery, *Helfend* recognized that double recovery would be possible. *Helfend*, however, asserts that double recovery will be infrequent,[56] and addresses itself to certain policy considerations that might justify double recovery when the only alternative is mitigation of the defendant's damages.

II. THE HELFEND ANALYSIS

a. Application to public entities

In extending the application of the collateral source rule to public entities, the California supreme court was faced with its recent opinion in *City of Salinas v. Souza & McCue Construction Co.*[57] In *Souza* the court had characterized the collateral source rule as punitive, not only in effect but also in theory.[58] Since California prohibits the levying of punitive damages against a public entity,[59] such a characterization pre-

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Washington supreme court in Consolidated Freightways, Inc. v. Moore, 38 Wash. 2d 427, 229 P.2d 882 (1951), held that "[t]he purpose of [the collateral source] rule is to implement the insurance company's right of subrogation and not to afford the plaintiff a double recovery." *Id.* at 430, 229 P.2d at 884. *See generally* Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669, 671-72 (1962).

54. *See, e.g.*, De Cruz v. Reid, 69 Cal. 2d 217, 444 P.2d 342, 70 Cal. Rptr. 550 (1968); Witt v. Jackson, 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961); Peri v. Los Angeles Junction Ry., 22 Cal. 2d 111, 137 P.2d 441 (1943); Dodds v. Bucknum, 214 Cal. App. 2d 206, 29 Cal. Rptr. 393 (2d Dist. 1968).

55. Fifield Manor v. Finston, 54 Cal. 2d 632, 354 P.2d 1073, 7 Cal. Rptr. 377 (1960); see text accompanying notes 102-18 *infra*.

56. 2 Cal. 3d at 10-11, 465 P.2d at 67, 84 Cal. Rptr. at 179.

57. 66 Cal. 2d 217, 424 P.2d 921, 57 Cal. Rptr. 337 (1967). Souza & McCue Construction Company recovered a judgment against Salinas for damages incurred through Salinas' material misrepresentation of soil conditions on which Souza relied in preparing a bid. Souza also was indemnified pursuant to a contract term with a materialman who had furnished pipe to the effect that the materialman guaranteed the pipe and would indemnify Souza for any loss. The supreme court held that although the collateral source rule may be invoked in contract actions where the gravaman is fraud, it may not be invoked in this case because punitive damages may not be levied against a public entity— Salinas—and the collateral source rule is punitive. Salinas was therefore permitted to offset its damages by the amount Souza received from its subcontractor.

58. *Id.* at 226-28, 424 P.2d at 925-27, 57 Cal. Rptr. at 341-43.

59. CAL. GOV'T CODE § 818 (West 1966): "Notwithstanding any other provision of law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant." CAL. CIV. CODE § 3294 (West 1966) authorizes punitive damages when a tort defendant has been guilty of fraud, oppression or malice.

cluded the *Souza* court from invoking the rule against public entities.[60] Moreover, this same characterization, if permitted to stand, would also effectively preclude application of the rule against the overwhelming majority of private tortfeasors as well, since California Civil Code section 3294[61] prohibits the imposition of punitive damages except in those rare cases where fraud, malice or oppression can be shown.[62] Thus the plaintiff in *Helfend* could not invoke the collateral source rule in his behalf unless that rule were non-punitive: Southern California Rapid Transit District is a public entity and the bus driver, joined personally in the suit, was not guilty of fraud, malice or oppression. The court recognized an anomaly that would result from exempting public entities completely while permitting the rule's invocation against a public employee in some cases. Under *Johnson v. State*,[63] the state must indemnify and defend its employees against civil liability incurred while those employees were within the scope of their employment.[64] If the collateral source rule were not applicable to public entities one of three results must occur: First, the employee, here the bus driver, would bear the extra damages, contrary to *Johnson*; second, the driver would bear the cost initially but the state would indemnify him under *Johnson*, thus bypassing *Souza* through *Johnson*;[65] or third, the collateral source rule would provide immunity for the driver, thus complying with both *Souza* and *Johnson*, but resulting in unfair discrimination against tort victims injured by public entities. Predictably the court solved this dilemma by disapproving the "punitive" rationale of *Souza* and extending the rule to public entities.[66]

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60. 66 Cal. 2d at 227-28, 424 P.2d at 926-27, 57 Cal. Rptr. at 342-43.

61. In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

CAL. CIV. CODE § 3294 (West 1966).

62. The court in *Helfend* made passing reference to this fact. 2 Cal. 3d at 13, 465 P.2d at 69, 84 Cal. Rptr. at 181.

63. 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

64. *Id.* at 790-93, 447 P.2d at 358-60, 73 Cal. Rptr. at 246-48, *construing* CAL. GOV'T CODE §§ 825-825.6 (West 1966).

65. In a companion case, Acosta v. Southern Cal. Rapid Transit Dist., 2 Cal. 3d 19, 465 P.2d 72, 84 Cal. Rptr. 184 (1970), the plaintiff, who had been injured through defendant's negligence and had received partial payments for her medical expenses from a collateral source, sued the public entity only. The *Helfend* plaintiff, on the other hand, sued both the public entity *and* its employee. If either of the first two alternatives were adopted Helfend could derive the benefits of the collateral source rule, but Acosta could not, simply because of the way each plaintiff pleaded his case.

66. 2 Cal. 3d at 14-16, 465 P.2d at 69-71, 84 Cal. Rptr. at 181-83. The court initially took the unnecessary step of distinguishing *Souza* on the grounds that the *Souza* plaintiff received payments from his subcontractor which, in the contractual setting of that case, did not constitute the truly independent source visualized by the rule. Having reaffirmed *Souza*, the *Helfend* court found itself still left with the problem of

b. *The theoretical basis of the collateral source rule*

The court rejected the punitive rationale of *Souza* by recognizing other policy bases for the application of the collateral source rule. Analysis of the court's reasoning, however, leads to the conclusion that these policies do not in fact support application of the rule to health insurance[67] when there is no provision for subrogation or refund.[68]

1. *Protecting the insured's investment*

According to the court, "[c]ourts consider insurance a form of investment, the benefits of which become payable without respect to any other possible source of funds."[69] But *Helfend* requires further analysis since the characterization of all insurance—and particularly health insurance—as an investment is misleading, if not erroneous.

Certain distinctions between various types of insurance must be noted. The life insurer under a life insurance policy other than a term policy agrees to pay a fixed sum upon the death of the insured. The only uncertainty is not as to the occurrence of payment but rather as to the time and place of payment. Because there is an absolute certainty that the life insurer will be required to make payment, a certain amount of the premiums collected must be retained in a reserve fund, either to pay out on the death of the insured or as a cash surrender value. Using actuarial tables the portion of the premiums to be retained is calculated to equal the face value of the policy on the death of the insured, which,

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Souza's characterization of the rule as punitive. *Id.* at 9, 465 P.2d at 65-66, 84 Cal. Rptr. at 177-78; *cf.* Laurenzi v. Vranizan, 25 Cal. 2d 806, 155 P.2d 633 (1945) (payment by one joint tortfeasor diminishes the amount of the claim against the other).

Helfend's determination that the rule is nonpunitive is consistent with the modern trend towards diluting the concept of fault in favor of facilitating recovery by accident victims. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 25.22, at 1345 (1956) [hereinafter cited as TORTS]. If the issue facing the court was simply whether to accept or reject altogether the collateral source rule, then the court took much the better course in reaffirming the doctrine and eliminating a potential anomaly by extending its application to public entities. Even given the complicating factors of subrogation and insurance as investment rationale, this, as far as it goes, is good.

67. For a definition of health insurance as used in this Note see note 10 *supra*.

68. If subrogation or refund provisions exist, the collateral source rule serves only its original purpose of redirecting the loss to the party at fault [see notes 11-56 *supra* and accompanying text], and double recovery is not an issue. Since there was a refund provision applicable in *Helfend*, the court could have limited its opinion to that situation and supported its holding on the allocation-of-loss rationale. Only the court's dictum that the collateral source rule is applicable to all instances in which a collateral source purchased by the defendant pays all or part of the costs incurred [see notes 3-9 *supra* and accompanying text] required the extended discussion of other policy grounds to uphold the rule. And it is only in this area that *Helfend* is subject to criticism.

69. 2 Cal. 3d at 10, 465 P.2d at 66, 84 Cal. Rptr. at 178. The court refers to all insurance as an investment, including Helfend's Blue Cross benefits.

of course, due to retained dividends and interest will exceed the amount of premiums the insured has paid in.[70] Characterizing a life insurance policy as an investment is justifiable because of its element of certainty of return. The life policy may also be regarded as an investment in the sense that the insured, if he owns the policy, may have a right to surrender the policy for its cash value[71]—a value based on the reserve fund but generally considerably lower—which value will, after a certain period, exceed the total amount of premiums paid in.[72] This feature is not present in health insurance because of the absence of the reserve fund. In the life policy there is speculation only as to the time of return and thus the amount of return on the insured's investment. This element of investment precludes the life insurance contract from being one of indemnity.[73] Payment is not pegged to the loss caused by the insured's death. Rather, the death is only the occasion for the return of the investment.

The health insurer, on the other hand, undertakes the risk of a misfortune which may or may not occur, and which in many instances never does occur. Since the health insurer may never have to make any payments there is "little of the investment feature that requires the preservation of the reserve fund which . . . plays so important a part in the conduct of life insurance business."[74] Conceptually, then, accident insurance is similar to property insurance since in both types the liability of the insurer is contingent upon an event that may never occur, and since there is no pecuniary return on the premiums in the likely event the misfortune insured against does not occur. This similarity to property damage insurance is even more compelling in Helfend's case, since his collateral source was a medical service plan which, like property insurance, paid only the actual economic loss suffered by the insured.[75] Helfend's Blue Cross benefits, which covered only a por-

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70. *See* W. VANCE, *supra* note 37, §§ 8, 15.

71. *See generally* 3A J. APPLEMAN, *supra* note 10, § 1951.

72. *See* W. VANCE, *supra* note 37, § 8, at 74.

73. *Id.* § 15. Traditionally the proceeds of a life insurance policy will not mitigate the wrongful death defendant's damages. *See* 1 J. APPLEMAN, *supra* note 10, § 2. But the rule in England was contra until changed legislatively. Hicks v. Abergavenny & H. Ry., unreported, but noted in Pym v. Great N. Ry., 122 Eng. Rep. 508, 510 n.(*a*) (Ex. 1863). See notes 13-17 *supra* and accompanying text.

74. W. VANCE, *supra* note 37, § 179, at 943.

75. *See* TORTS § 25.22, at 1351; James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U.L. REV. 537, 552-54 (1952); Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741, 750-51 (1964). *See generally* Fleming, *supra* note 21; Schwartz, *The Collateral-Source Rule*, 41 BOS. U.L. REV. 348, 353-54 (1961); *cf.* W. VANCE, *supra* note 37, § 134, at 796-97. Nellis argues persuasively that in wrongful death actions, since the plaintiff's pecuniary loss establishes the measure of his recovery, even life insurance proceeds should mitigate the defendant's damages. Nellis, *California Governmental Tort Lia-*

tion of his pecuniary loss, simply indemnified him. Since there is no possibility of economic gain there is no investment.[76]

With investment-type insurance the plaintiff would, if the defendant's liability is mitigated by the plaintiff's insurance payments, certainly "be in a position inferior to that of having bought no insurance, because his payment of premiums would have earned no benefit."[77] Money that he could justifiably expect to receive *in any event* would be taken from him to pay a loss caused by the defendant. In the case of health insurance, however, the insured can justifiably expect to receive money only in a *contingent event.* He is not denied his benefits under the policy because he has bargained for and received protection from economic loss; that is, he has bargained for the security of prompt payment without the need, inconvenience and uncertainty of litigation if his injury or illness should be tortious in origin.[78] If the tortfeasor pays, the insured has suffered no economic loss. Rather than a denial of benefits, the insured has received bargained for security.[79] Thus if set-off is allowed the plaintiff will still receive what he has bargained and paid for—the security earned by the payment of his premiums—and if set-off is not allowed the plaintiff will receive *more* than he has bargained for.

2. *Encouraging insurance procurement*

Justice Tobriner argues that "the collateral source rule expresses a policy judgment in favor of encouraging citizens to purchase and main-

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bility and the Collateral Source Rule, 9 SANTA CLARA LAW. 217, 234-35 (1969). Justice Traynor's dissent in Anheuser-Busch, Inc. v. Starley, 28 Cal. 2d 347, 355, 170 P.2d 448, 453 (1946), cited by *Helfend* [2 Cal. 3d at 11 n.17, 465 P.2d at 67 n.17, 84 Cal. Rptr. at 179 n.17] concludes that accident insurance is an investment, analogizing from life insurance. On this basis he distinguishes the right of equitable subrogation held by property insurers, because their contracts are indemnitory.

76. W. VANCE, *supra* note 37, § 14.

77. 2 Cal. 3d at 10, 465 P.2d at 66, 84 Cal. Rptr. at 178.

78. *See* Fleming, *supra* note 21, at 1500; Schwartz, *supra* note 75, at 354; Note, *supra* note 75, at 750-51; Note, 63 HARV. L. REV. 330, 332 (1949). It is, of course, not necessary for the insured to litigate to receive his security since the benefits are paid regardless of whether he seeks recovery from the tortfeasor.

79. It can be argued, of course, that the insured has bargained for the windfall gain of double recovery. *Cf.* Harding v. Townshend, 43 Vt. 536, 538 (1871); Bradburn v. Great W. Ry., L.R. 10 Ex. 1, 2 (1874); see notes 18-20, 35-44 *supra.* But this presumes not only that the insured knows that the collateral source rule permits double recovery, a conclusion that was in doubt until *Helfend,* but also that he has a working knowledge of the law of subrogation and refund. He must also have consciously weighed the odds of incurring a tortious injury. It seems extremely unlikely that a layman would even be aware of the existence of the collateral source rule. Moreover, accident policies and medical service plans protect against far more than just tortious injuries, and it is much more likely that if an accident or illness occurs for which benefits are payable it will be nontortious rather than tortious. So if he invested in insurance only to set up double recoveries the insured would be making a bad bet.

tain insurance for personal injuries . . . ."[80] Although it cannot be denied that such a policy exists,[81] it is not at all clear that the collateral source rule itself will act as an independent inducement, since the insured receives the protection he bargains for whether there is set-off or not. On the contrary, a person who voluntarily purchases health insurance probably desires to protect himself from the expense of nontortious injuries, since he probably assumes that a tortfeasor will pay the expenses of his tortious injuries. The insured desires to protect himself from loss from all accidents and it seems unlikely that denying him double recovery in the case of tortious injuries will lessen his motivation to protect himself regardless of the cause of his loss. Moreover, most present day health coverage is written as part of a broad insurance plan covering loss from illness as well as accident.[82] Again, the potential insured would be unlikely to forego this protection because of rejection of the collateral source rule. Finally, many participants in health and accident plans are compelled to participate as a condition of employment, for example union shops. Many plans are employment fringe benefits in which it would appear the volitional element is centered around securing employment rather than in securing insurance protection.

The factors just discussed no doubt play a larger role in encouraging citizens to obtain health and medical protection than does the collateral source rule. It therefore follows that to the extent the rule does not offer substantial encouragement to the procurement of health and medical protection, abrogation of the rule would have no significant discouraging effect. If, as the court suggests, double recovery encourages people to purchase insurance, the resultant increase in premium income would also lead the insurance industry to favor double recovery as well. But in practice insurers, when permitted to do so, insist on subrogation or refund of benefits paid, which destroys the alleged inducement to buy insurance. Thus the insurance industry itself apparently does not believe that the collateral source rule acts as a meaningful incentive to purchase insurance.[83]

3. *Augmentation of inadequate damages*

Although noting that reaffirmation of the collateral source rule will not give Helfend a double recovery because by policy provision

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80. 2 Cal. 3d at 10, 465 P.2d at 66, 84 Cal. Rptr. at 178.

81. *See, e.g.*, Barrera v. State Farm Mut. Ins. Co., 71 Cal. 2d 659, 456 P.2d 674, 79 Cal. Rptr. 106 (1969), *noted in* 58 CALIF. L. REV. 274 (1970).

82. *See* F. ANGELL, *supra* note 10, at 17-20.

83. *See generally* R. HORN, SUBROGATION IN INSURANCE THEORY AND PRACTICE 47-50 (1964).

he must refund to Blue Cross the amount of benefits he received,[84] the court recognizes that in some situations double recovery will occur. The court, however, views double recovery as desirable because it performs an entirely necessary function in the computation of damages.

The court argues that in spite of the compensatory theory of damages, such damages as a practical matter do not actually compensate.[85] Paramount among distorting factors that juries do not normally consider is the plaintiff's contingent fee arrangement with his attorney,[86] which may result in the attorney pocketing upwards of one-half of the recovery, the entire amount of which was arguably intended to do no more than compensate the victim for his loss. Reinforcing the court's position, although not noted by it, are two other considerations. Inflation higher than that anticipated, if any was anticipated at all, may cut into a damage award. More importantly, the compensatory theory of damages can never operate accurately in personal injury situations since monetary payment cannot adequately compensate for the loss, for instance, of an arm,[87] nor measure realistically such an intangible as pain and suffering. Nevertheless, our present law of damages is grounded on a theory of recompense, and perhaps it is partially due to the above mentioned factors that juries are allowed a wide discretion in fixing pain and suffering damages. It seems likely that the generosity of such awards must be due in part to allowance for legal fees and expenses, inconveniences, inflation, sympathy and a host of other intangibles. Moreover, the non-taxability of the award, which operates as a windfall for the plaintiff,[88] tends to counterbalance any "omissions" in the jury's award.[89] Important also is the fact that the amount and very existence of collateral benefits are merely a fortuity, and bear no relationship to the difference between the damages received from the tortfeasor and the victim's total loss.[90]

Nevertheless, there may well be a discrepancy between what the

84. 2 Cal. 3d at 10, 465 P.2d at 67, 84 Cal. Rptr. at 179. See text accompanying notes 119-126 *infra*.

85. 2 Cal. 3d at 12, 465 P.2d at 68, 84 Cal. Rptr. at 180.

86. *Id.*

87. Hudson v. Lazarus, 217 F.2d 344, 346 (D.C. Cir. 1954).

88. 2 Cal. 3d at 11-12, 465 P.2d at 68, 84 Cal. Rptr. at 180. INT. REV. CODE of 1954, § 104(a)(2) excludes from the plaintiff's gross income the amount of damages he received from a personal injury tort verdict or settlement. *See* McWheeney v. New York, N.H. & H. R.R., 282 F.2d 34 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960).

89. Justice Tobriner argues that mere mention of payment by a collateral source "might irretrievably upset the complex, delicate, and somewhat indefinable calculations which result in the normal jury verdict." 2 Cal. 3d at 11-12, 465 P.2d at 68, 84 Cal. Rptr. at 180. This argument, however, would not militate against set-off *after* the verdict.

90. *See generally* TORTS, *supra* note 66, § 25.22, at 1347-48; Note, *supra* note 75, at 750.

defendant has lost and what he finally ends up with from a tort damage award, in spite of the possible counterbalancing factors noted above. Because of its notoriety and the large piece of the recovery involved, the most obvious inequity is the attorney's share, which tends to make him a partner in his client's suit. Accordingly, the court's conclusion that the inaccuracies in the compensatory theory of damages will be partially remedied by the rule is defensible as a stop-gap measure. Still, real reform is needed, and, as Justice Tobriner points out, it must be legislative, not judicial. One remedial step would be to charge attorneys' costs to the defendant. Since attorneys' fees incurred in recovering damages are just as much a part of the plaintiff's loss as are medical expenses, such a step would not be inconsistent with the present compensatory theory of damages. This step would eliminate the strongest argument in favor of the double recovery aspect of the collateral source rule; it might also so counterbalance the other distortions that the award would be more nearly compensatory, thus perhaps eliminating the necessity for drastic legislative action.[91]

4. The tortfeasor deserves to pay

An important policy consideration, not alluded to by the court, competes with the court's conclusions. The traditional concept of compensatory damages is that the defendant should be required to pay only that amount necessary to render the plaintiff whole.[92] The defendant's damages have never been determined by his degree of culpability but instead by the extent of his victim's injuries, the victim's physical condition and his earning capacity at the time of the injury, as well as the victim's *own* culpability. If the system for measuring damages is at all efficacious the double recovery aspect of the rule permits the plaintiff to recover more than his loss. In such situations the yardstick for measuring damages has shifted from what is required to make the plaintiff

91. 2 Cal. 3d at 12-13, 465 P.2d at 68-69, 84 Cal. Rptr. at 180-181. The court argues persuasively that legislative reform in the law of damages is preferable to piecemeal judicial action. *Id.* at 13, 465 P.2d at 69, 84 Cal. Rptr. at 181. However, inserting the collateral source rule into the compensatory theory of damages is not a satisfactory starting point for eliminating that theory's inadequacies. "[S]uch a deficiency [in compensatory damages] should be remedied by a uniform and scientifically conceived plan of compensation rather than utilizing the vagaries of the collateral-source rule to fill the gap." Schwartz, *supra* note 75, at 351-52. *See generally* TORTS § 25.22, at 1347-48; James, *supra* note 75, at 549; Note, *supra* note 75, at 750. Analysis should instead focus on adjusting the compensatory nature of damages directly rather than the ad hoc adjustment achieved by the fortuity of a collateral source. The court has actually compounded the inadequacies of damages since now another factor dependent solely on the plaintiff—insurance or the lack thereof—is present. It would seem that reform in the law of damages should tend instead towards uniformity.

92. TORTS § 25.22, at 1347-48.

whole to a notion that the defendant must pay for *all* of the plaintiff's original loss.[93] This imparts a sense of punitiveness into the application, if not the theory, of the rule. The defendant's damages are now being measured by a sense of self-righteousness and culpability—a feeling that because the defendant is responsible for the plaintiff's injuries he simply ought to pay. But this is an anomaly because with the expansion of vicarious and enterprise liability, together with the increasingly prevalent use of liability insurance, the old common-law sense of culpability is being drastically reduced.[94] However, in *Helfend* there appears to be a punitive undercurrent, perhaps best expressed by the court's focusing on the inequity of the defendant's escaping full liability simply because the victim has insurance.[95] This suggests that the court in fact may have felt more comfortable with the *Souza* characterization of punitiveness, but recognized that such a rationale must be subordinated to the supposed necessity of extending the rule to public entities in order to avoid a potential anomaly.

c. *Subrogation and refund considerations*

Although the court in *Helfend* apparently believed that most insurance carriers can and do get reimbursed for benefits paid the victim through either subrogation or refund,[96] the court's ruling must for the present result in widespread double recovery.[97] California does not

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93. Traditionally the defendant takes his victim as he finds him, such "that a defendant would always get a 'windfall' however negligent his conduct, if he happened to kill a bachelor without family commitments, in constrast to a young *pater familias* with long prospects and even longer progeny." Fleming, *supra* note 21, at 1484. Harper and James view the application of the rule as an anomaly: "If therefore a feeling of revenge and resentment has any place in the law at all, it should certainly be banished as far as possible from the law of civil recovery. . . . In spite of this . . . it has played a large—though unrecognized—part in justifying plaintiff's double recovery." TORTS § 25.22, at 1346; *see id.* at 1345-46; Fleming, *supra* note 21, at 1483-85; James, *supra* note 75, at 546-47; Schwartz, *supra* note 75, at 349-51; West, *The Collateral Source Rule Sans Subrogation*, 16 OKLA. L. REV. 395, 411-12 (1963); Note, *supra* note 75, at 748-49; *cf.* United Protective Workers v. Ford Motor Co., 223 F.2d 49 (7th Cir. 1955); City of Salinas v. Souza & McCue Constr. Co., 66 Cal. 2d 217, 424 P.2d 921, 57 Cal. Rptr. 337 (1967); Dodds v. Bucknum, 214 Cal. App. 2d 206, 214, 29 Cal. Rptr. 393, 398 (2d Dist. 1963).

94. Fleming, *supra* note 21, at 1484. In *Helfend*, if there is any culpability it would be charged to the bus driver, yet the effect of the rule is to increase the damages paid by his employer and ultimately the innocent taxpayer.

95. 2 Cal. 3d at 10, 465 P.2d at 66-67, 84 Cal. Rptr. at 178-79.

96. *Id.* at 10, 465 P.2d at 67, 84 Cal. Rptr. at 179: "[I]nsurance companies increasingly provide for either subrogation or refund of benefits upon a tort recovery, and such refund is indeed called for in the present case."

97. The courts have invoked the collateral source rule in two broad areas outside the insurance field in order to permit double recovery. Harper and James classify these two areas as, one, compensation out of resources otherwise available to the plaintiff for other purposes; and, two, loss partly met by a gift occasioned by the accident.

provide for either legal or conventional subrogation[98] in personal injury and wrongful death actions[99] except when such right expressly exists by statute.[100] In the absence of statute, the only form of subro-

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TORTS § 25.22, at 1344. The first class is perhaps best illustrated by the situation in which a man meets the expenses of an accident from his own savings. Pensions or annuities payable without regard to the disability caused by the accident are of this type, as are wages or salary taken out of vacation or sick leave. *See, e.g.*, McCarthy v. Palmer, 113 F.2d 721 (2d Cir. 1940) (pension); Lewis v. County of Contra Costa, 130 Cal. App. 2d 176, 278 P.2d 756 (1st Dist. 1955) (sick leave); Hoobler v. Voelpel, 246 Ill. App. 69 (1927) (sick leave); Martin v. Sheffield, 112 Utah 478, 198 P.2d 127 (1948) (sick leave). Obviously the plaintiff is not rendered whole until these funds are replaced. The sources from which the funds emanate are not even collateral because the benefits emanate from the plaintiff himself. Hence, even were the collateral source rule abolished, full recovery must be permitted here. The "benefits" in a very real seuse are part of the victim's loss.

In the second type, mitigation of the defendant's damages may very well frustrate the donor's donative intent, since he probably intended the gift to be in addition to any tort recovery. According to Harper and James, reduction of the defendant's damages "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 of a moral responsibility to repay if damages are recovered." TORTS § 25.22, at 1349. This notion should not be extended to social insurance, such as hospital or other services provided free to certain people, unless there is a clear donative intent. In the absence of such a showing it seems only reasonable to assume that the government merely intends to insure fulfillment of certain needs and not to confer an additional bounty. *Id.* at 1350 n.32 and cases cited therein.

Thus, refusal to mitigate the defendant's damages in these two areas is based on considerations not applicable to cases involving insurance. The court in *Helfend*, however, failed to note this distinction, citing within a series of cases in which the collateral source is a medical service organization a case in which the "collateral source" is the victim's sick leave pay. 2 Cal. 3d at 10 n.14, 465 P.2d at 66 n.14, 84 Cal. Rptr. at 178 n.14.

98. Legal subrogation has its sources in equity and arises by operation of law. An example is the right of a property, fire or marine insurer to indemnity from the tortfeasor for benefits it paid the insured under the policy. *See, e.g.*, Offer v. Superior Court, 194 Cal. 114, 228 P. 11 (1924); Patent Scaffolding Co. v. William Simpson Constr. Co., 256 Cal. App. 2d 506, 64 Cal. Rptr. 187 (2d Dist. 1967). Conventional subrogation arises by contractual agreement between the insured and the insurer. A leading case is Michigan Medical Serv. v. Sharpe, 339 Mich. 574, 64 N.W.2d 713 (1954), which, unlike California's Fifield Manor v. Finston, 54 Cal. 2d 632, 354 P.2d 1073, 7 Cal. Rptr. 377 (1960), approved conventional subrogation of a personal injury claim. See text accompanying notes 110-116 *supra*. The former case is all the more significant because in a companion case, Michigan Hosp. Serv. v. Sharpe, 339 Mich. 357, 63 N.W.2d 638 (1954), subrogation of any kind was denied in the absence of an express agreement: that is, no legal subrogation permitted in a personal injury claim.

99. *See, e.g.*, Fifield Manor v. Finston, 54 Cal. 2d 632, 354 P.2d 1073, 7 Cal. Rptr. 377 (1960) (uo legal or conventional subrogation of personal injury claims); Peller v. Liberty Mut. Fire Ins. Co., 220 Cal. App. 2d 610, 34 Cal. Rptr. 41 (4th Dist. 1963). *See generally* Fleming, *supra* note 21, at 1498-1505; *c.f.* Block v. California Physicians' Serv., 244 Cal. App. 2d 266, 53 Cal. Rptr. 51 (2d Dist. 1966).

100. *E.g.*, CAL. LABOR CODE §§ 3852-53 (West Supp. 1971), 3856 (employer or his workmen's compensation insurer entitled to recover from a third party tortfeasor the value of workmen's compensation benefits paid the employee); CAL. INS. CODE § 11580.2(g) (West Supp. 1971) (automobile liability insurer who has paid

gation presently permitted is the property insurer's right of legal subrogation in property damage cases.[101]

The leading California case denying personal injury subrogation is *Fifield Manor v. Finston*,[102] in which the court struck down an express subrogation agreement in a life care contract[103] between plaintiff and insured. In addition, the court denied the plaintiff legal subrogation.[104] The court argued that both legal and conventional subrogation are assignments of causes of action. Since California Civil Code section 956[105] expressly prohibited the assignment of a personal injury cause of action, then that statute must also prohibit both legal and conventional subrogation of a personal injury claim.[106] The court did, however, recognize that a property damage claim may be both assigned and subrogated.[107] *Fifield Manor*, then, acts as a complete bar to any attempted subrogation, legal or conventional, of a personal injury claim.

Fifield Manor was grounded on the theory that subrogation, as a form of assignment of a cause of action, is prohibited both by the common law and by statute. The prohibition against assignments of personal injury claims has traditionally been based on a fear of champerty and maintenance—trafficking in personal injury claims.[108] Such dangers are not present in subrogation, which, unlike assignment, is not voluntary on the part of the victim and therefore is not dependent on the intentions of the assignor.[109] Additionally, since the subrogee is limited

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benefits pursuant to the uninsured motorists provision of its policy with insured subrogated to insured's rights against tortfeasor).

101. Meyers v. Bauk of America, 11 Cal. 2d 92, 77 P.2d 1084 (1938); Offer v. Superior Court, 194 Cal. 114, 228 P. 11 (1924); Patent Scaffolding Co. v. William Simpson Constr. Co., 256 Cal. App. 2d 506, 64 Cal. Rptr. 187 (2d Dist. 1967).

102. 54 Cal. 2d 632, 354 P.2d 1073, 7 Cal. Rptr. 377 (1960).

103. *Id.* at 638-41, 354 P.2d at 1076-79, 7 Cal. Rptr. at 380-83.

104. *Id.*

105. *Repealed*, ch. 657, § 1, [1961] Cal. Stat. 1867. However, the statutory rule that personal injury claims are nonassignable is still intact. CAL. PROB. CODE § 573 (West Supp. 1971) was amended at the same time that Civil Code section 956 was repealed to provide for the non-assignability of personal injury claims. Ch. 657, § 2, [1961] Cal. Stat. 1867.

106. The court in *Fifield Manor* pointed out that the reason for denying assignability to personal injury claims is historical. At common law property damage claims survived the death of the parties and therefore were assignable, but personal injury claims, since they did not survive, were not assignable. 54 Cal. 2d at 638, 354 P.2d at 1076-77, 7 Cal. Rptr. at 380-81. Before California Civil Code section 956, providing for the survivability but not the assignability of personal injury claims, was enacted [ch. 1380, § 2, [1949] Cal. Stat. 2400], the California supreme court had already declared California's adherence to the common law. Norton v. City of Pomona, 5 Cal. 2d 54, 62, 53 P.2d 952, 955 (1935).

107. 54 Cal. 2d at 638, 354 P.2d at 1076-77, 7 Cal. Rptr. at 380-81. *See generally* TORTS § 25.22; see text accompanying notes 30-53 *supra*.

108. 7 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 525 (1926).

109. Burkett v. Doty, 176 Cal. 89, 167 P. 518 (1917).

to the amount of the claim that it has paid the victim there cannot be any danger of a speculative market in subrogation of personal injury claims, and the prospect of collusion in payment of benefits seems no higher than in property damage subrogation.

Resting on the non-assignability of personal injury claims, *Fifield Manor* did not reach the more traditional argument for denying the accident or life insurer a right of subrogation—that only indemnity insurance may be subrogated.[110] Historically subrogation has been indissolubly intertwined with indemnity; since health insurance, as argued by the *Gatzweiler*[111] and *Aetna Life*[112] cases, is more analogous to life insurance with its investment features than it is to property insurance with its indemnity features, subrogation is denied.[113] However, health insurance is analogous to life insurance, if at all, not because of its investment features, which are nearly non-existent, but because of the difficultly in valuing the insurable interest. Property, fire and marine insurance arguably represent true indemnity because the pecuniary loss may be measured rather precisely. On the other hand, it is argued that health insurance lacks the necessary quality of indemnity because payments under the policy are not directly related to the insured's loss due to the supposed difficulty in attaching a monetary equivalent to the victim's insurable interest—an arm or a leg—and the difficulty in ascertaining that the insured has been adequately compensated.[114] This difficulty in valuing the insurable interest, however, is really nothing more than that encountered in determining the policy limit represented by the "agreed value" clauses common to many property insurance contracts. Both represent a genuine effort to estimate the loss likely to be sustained by the insured. In both situations if the event insured against occurs the insured receives not his economic loss but instead the pre-determined contractual payment.[115]

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110. *See generally* R. HORN, *supra* note 83, at 27-40.

111. Gatzweiler v. Milwaukee Elec. Ry. & Light Co., 136 Wis. 34, 116 N.W. 633 (1908).

112. Aetna Life Ins. Co. v. J.B. Parker & Co., 96 Tex. 287, 72 S.W. 168 (1903).

113. See text accompanying notes 30-53 *supra*. For analysis explaining why accident insurance should not be considered an investment see text accompanying notes 69-79 *supra*.

114. 3 J. APPLEMAN, *supra* note 10, § 1675; R. HORN, *supra* note 83, at 27-30; W. VANCE, *supra* note 37, § 134, at 796-97.

115. *See* TORTS § 25.22, at 1352-53; Fleming, *supra* note 21, at 1499-1500. Harper and James conclude that these considerations furnish

> no reason for refusing to apply the principle of indemnity to [accident insurance]. 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.

TORTS § 25.22, at 1352-53.

This standard argument against subrogating health insurance policies is even less persuasive when it is considered that nearly all modern health insurance contains provisions covering not only lost earnings and certain valued dismemberments and specified injuries, but also medical, hospital, surgical and nursing expenses.[116] Since these latter expenses actually reflect the insured's economic loss just as precisely as does property insurance, the conceptual bar to subrogation falls completely by the wayside. Similarly, medical service plans, such as Helfend's Blue Cross, are also strictly indemnitory, even more so than valued property insurance. As to these plans the traditional argument is wholly inapposite.

It follows, then, that there are no theoretical barriers to the overruling of *Fifield Manor*. Permitting subrogation of personal injury claims in conjunction with the invocation of the collateral source rule would allocate the loss to the tortfeasor, hold the plaintiff to one recovery while providing him full compensation under the prevailing theory of compensatory damages, reimburse the innocent insurer for its pecuniary "loss" caused by the tortfeasor's wrongful act and eliminate the indefensible distinction between property damage and personal injury claims.[117]

Until *Fifield Manor* is overruled, a contractual provision providing for refund to the insurer of benefits paid the insured if the insured recovers any damages from the tortfeasor is another possible avenue around the lack of personal injury subrogation. This route avoids the legal infirmities of subrogation because it is not an assignment of a cause of action; instead it is a lien on the proceeds of a successful suit which the victim is under no compulsion to bring.[118] Nevertheless, there is a roadblock here. The Attorney General of California has rendered an opinion[119] to the effect that such a refund provision is contrary to the

116. F. ANGELL, *supra* note 10, at 17-20; 1 J. APPLEMAN, *supra* note 10, §§ 16-19.

117. *See generally* TORTS § 25.22; Fleming, *supra* note 21, at 1498-1501.

118. The attorney's contingent fee arrangement is similar, having been determined to be a lien upon his client's recovery rather than the forbidden assignment of a cause of action. Bartlett v. Pacific Nat'l Bank, 110 Cal. App. 2d 683, 689, 244 P.2d 91, 94-95 (1st Dist. 1952); Cassetta v. Del Frate, 116 Cal. App. 255, 2 P.2d 533 (1st Dist. 1931).

119. 34 OP. CAL. ATT'Y GEN. 247 (1959) (rendered on request of the Insurance Commissioner). The portion of the opinion relevant to this discussion concerned the legality of a provision of a group disability policy relating to refund and subrogation of hospital and medical expenses recovered by settlement or legal action. This provision, referred to as the refund and subrogation clause, required the refund of "[e]xpenses to the exent that payment of reimbursement therefor has been or *may be received* by or for the account of the insured employee as the result of settlement or legal action." *Id.* at 248 (emphasis added). According to the opinion, a subrogation agreement provided that "if the expenses have not been paid as a result of settlement or legal action, when claim is made . . . the insurer will pay but is thereupon subrogated

letter and spirit of the California Insurance Code. Although this opinion, like all such opinions, does not have the force of law, and although it does appear to suggest a method for drafting a satisfactory refund clause,[120] it acts as an efficient deterrent since the issue has not been adjudicated at the appellate level. In *Block v. California Physicians' Service*[121] the court declared valid a reimbursement clause found in a group health service agreement.[122] The basis for this decision, however, was the supreme court's prior determination[123] that a non-profit corporation, such as California Physicians' Service, incorporated under California Civil Code section 593a,[124] is not engaged in the insurance business. The court avoided the Attorney General's ruling by simply holding that California Physicians' Service is not subject to regulation by the insurance statutes.

The supreme court's reliance on subrogation and refund as the means of avoiding plaintiff's double recovery is therefore misplaced, at least with respect to personal injury claims. There can be no subrogation, legal or conventional, except that which is permitted by statute, and only medical service plans not incorporated as insurers and therefore not subject to regulation by the Insurance Code may benefit from a refund provision.

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to *all* the insured's rights of action . . . or, if the insured is actually so reimbursed . . . then the insurer is entitled to a *pro tanto* refund . . . ." *Id.* at 252. The subrogation provision was disapproved because it violated California Civil Code section 956 [see note 45 *supra*] prohibiting assignments of personal injury causes of action. The refund provision was disapproved because it required "that moneys received [from the tortfeasor] for pain and suffering and for loss of earnings must be paid by the recipient for hospitalization and medical services, an entirely different source of damages. The California Supreme Court has stigmatized such a result as 'manifestly unfair'. . . ." *Id.* at 258. The provision is therefore ambiguous. More importantly, the Attorney General disapproved the refund clause as an apparent violation of 10 CAL. ADMIN. CODE § 2232.23-.25 (1956), which requires proof of loss within ninety days and payment immediately thereafter, because the refund provision may postpone for a significant period determination of whether or not the insurer is really liable for the loss. The two faults of the refund clause were obvious, and the opinion dealt only briefly with them enroute to its more detailed discussion of the subrogation clause. (*Fifield Manor* had not been decided at this time.)

120. A policy that provides for payment of proceeds immediately on proof of loss, with the expenses to be refunded *if and when* the insured recovers damages from a third party tortfeasor would seem to satisfy the Attorney General's objection to a provision making initial payment contingent on settlement or successful legal action. His other objection, to the ambiguity caused by provisions for refund of subsequently received reimbursement for pain and suffering and loss of wages, could easily be satisfied by providing for refund only of moneys received for medical and hospitalization expenses.

121. 244 Cal. App. 2d 266, 53 Cal. Rptr. 51 (2d Dist. 1966).

122. *Id.* at 270-73, 53 Cal. Rptr. at 53-55.

123. California Physicians' Serv. v. Garrison, 28 Cal. 2d 790, 172 P.2d 4 (1946).

124. CAL. CIV. CODE § 593a, *repealed*, ch. 1038, [1947] Cal. Stat. 2309; *re-enacted as* CAL. CORP. CODE § 9201 (West 1955).

The prohibition against subrogation of personal injury claims and the restrictions on refund set the stage for *Helfend.* Although the court did not discuss nor even cite *Fifield Manor,* that case may have been at least partially responsible for the court's rationalization that in those instances in which there could be no subrogation or refund there would really be no double recovery because the combination of collateral benefits and unmitigated damages serves only to make the plaintiff's total recovery more nearly approximate full compensation for his loss. The court in fact had only two alternatives—permit double recovery by the plaintiff or mitigate the defendant's damages. Any fault to be found with *Helfend* arises out of *Fifield Manor* coupled with the restriction on refund. Perhaps the court is reserving its judgment on both those issues until confronted with future cases squarely presenting them.

CONCLUSION

Although it appears that the collateral source rule was originally established in order to facilitate the property insurer's right of subrogation, the *Helfend* case seems to leave open the possibility of widespread double recovery because California has severely limited subrogation and refund of personal injury claims. These restrictions were an unnoted backdrop as the court reaffirmed and expanded the rule, perhaps best justifying its action by the fact that the rule helps compensate the plaintiff for the large slice of the damage award which finds its way into his attorney's pocket. The court felt disinclined from the outset to abolish the rule entirely, and it cannot be denied that abolition of such a firmly entrenched doctrine would be a bold judicial step. Moreover, abolition would have been inconsistent with the basic purpose of the rule, to implement the insurer's right of subrogation. The court also declined to take the intermediate step of reaffirming the *Souza* characterization of the rule as punitive, which would have limited its application to those situations involving malice, oppression or fraud. Such a ruling would have had the practical effect of virtually abolishing the doctrine, which may well have been why the court refused to take that step. It would also have resulted in a distorted allocation of loss. The court instead chose to save the collateral source rule and to extend its use.

Having preserved the collateral source rule, the next appropriate step would be to disapprove *Fifield Manor v. Finston*[125] in order to permit at least conventional subrogation or personal injury claims and, ideally, to permit legal subrogation as well. Three factors make such a step feasible: First, the dangers arguably present in an assignment of a personal injury claim are absent in subrogation; second, health in-

125. 54 Cal. 2d 632, 354 P.2d 1073, 7 Cal. Rptr. 377 (1960).

surance is not an investment, and medical service plans are strictly indemnitory; and, third, health insurance, with its strong indemnity features is more analogous to subrogatable property insurance than it is to non-subrogatable life insurance, with medical service plans directly analogous. Additionally, or at least alternatively, *Block v. California Physicians' Service*[126] should be expanded to approve refund clauses in insurance contracts. These steps would insure that the collateral source rule would be used, as it was intended, only to aid the insurer's right of subrogation. The possibilities of double recovery, reaffirmed and expanded by *Helfend*, would thus be eliminated. At present the plaintiff receives a windfall and the innocent insurer must absorb a loss caused by a third party's wrongful act. Of course, this loss will be passed on to the even more innocent policy holders and service plan members in the form of increased premiums or dues, a burden they should not have to assume.

D.A.O.

B. Strict Liability

Price v. Shell Oil Co.;[1] *Pike v. Frank G. Hough Co.*[2] In *Price* the supreme court held that the doctrine of strict liability in tort applies to bailors and lessors of personal property in the same manner as it applies to sellers of such property. In *Pike* the supreme court ruled *inter alia* that a manufacturer may be held strictly liable for defects in design which are unreasonably dangerous. Previously in California and most other jurisdictions, strict liability had been applied to products containing defects in their manufacture; few cases involved defects in design.

In *Price v. Shell Oil Co.* the plaintiff, an aircraft mechanic employed by Flying Tiger Line, Inc., sustained injuries when both legs of a ladder he was climbing split into segments. In 1958 Flying Tiger had leased from Shell a gasoline truck with a movable ladder designed for refueling aircraft. The terms of the lease required Flying Tiger to maintain the equipment in safe operating condition and to make certain repairs. In 1962, at Flying Tiger's request, Shell removed the original ladder from the truck and installed a new one which both Shell and Flying Tiger inspected. Two years later the plaintiff's accident occurred.

126. 244 Cal. App. 2d 266, 53 Cal. Rptr. 51 (2d Dist. 1966).

1. 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970) (Sullivan, J.) (unanimous decision).

2. 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970) (Mosk, Acting C.J.) (unanimous decision).

In California a manufacturer is strictly liable in tort for defective articles placed on the market;[3] a retail dealer is similarly liable since he is an "integral part of the overall producing and marketing enterprise."[4] The court has based its expansion of strict liability in tort on the risk distribution theory enunciated in *Greenman v. Yuba Power Products, Inc.*:[5] the cost of injuries resulting from defective products should be borne by the manufacturer or seller because he is in a better position to spread such costs throughout society through higher prices. In *Greenman,* a buyer recovered from the manufacturer. In later cases the court applied the *Greenman* rationale to permit a member of the buyer's immediate family,[6] a buyer's employee[7] and a mere bystander[8] to recover from the manufacturer.

In *Price,* Shell sought to avoid the imposition of strict liability by arguing that as a lessor, its duty differed from that of a manufacturer or seller; Shell contended that its duty consisted only of exercising ordinary care as provided by California Civil Code section 1955;[9] Shell also relied on the rule of the *Restatement (Second) of Torts* which holds a lessor liable only for negligence[10] while imposing strict liability upon sellers.[11] The court dismissed these arguments, holding that section 1955 is not an exclusive remedy and noting that the *Restatement* is not the dispositive authority.

In abandoning the distinctions between sellers and nonsellers in *Price,* the supreme court relied on the *Greenman* theory:

> Having in mind the market realities and the widespread use of the lease of personalty in today's business world, we think it makes good sense to impose on the lessors of chattels the same liability for physical harm which has been imposed on the manufacturers and retailers. The former, like the latter, are able to bear the cost of com-

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3. Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

4. Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 262, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899 (1964).

5. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

6. Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

7. Casetta v. United States Rubber Co., 260 Cal. App. 2d 792, 67 Cal. Rptr. 645 (1st Dist. 1968).

8. Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 74 Cal. Rptr. 652 (1969).

9. CAL. CIV. CODE § 1955 (West 1954) provides:

> One who lets personal property must deliver it to the hirer, secure his quiet enjoyment thereof against all lawful claimants, put it into a condition fit for the purpose for which he lets it, and repair all deteriorations thereof not occasioned by the fault of the hirer and not the natural result of its use.

10. RESTATEMENT (SECOND) OF TORTS § 408 (1965).

11. *Id.* § 402A.

> pensating for injuries resulting from defects by spreading the loss through an adjustment of the rental.[12]

With regard to the policies of risk spreading and loss allocation in this type of commerce, the court found no justifiable distinction between *sellers* of personal property and *non-sellers*, such as bailors and lessors: "[I]n each instance, the seller or non-seller places [an article] on the market, knowing that it is to be used without inspection for defects . . . ."[13] This new cause of action lies in tort[14] and liability depends solely on transfer of possession rather than transfer of title.

The court found support for its position in two recent decisions. In *Cintrone v. Hertz Truck Leasing & Rental Service*[15] the New Jersey supreme court held that a lessor of trucks is strictly liable in tort because

> [a] bailor for hire, such as a person in the U-drive-it business, puts motor vehicles in the stream of commerce in a fashion not unlike a manufacturer or retailer . . . [and subjects a leased vehicle] to more sustained use on the highway than most ordinary car purchasers. . . . [and by the very nature of his business exposes] the bailee, his employees, passengers and the traveling public . . . to a greater *quantum* of potential danger of harm from defective vehicles than usually arises out of sales by the manufacturer.[16]

Similarly, *McClaflin v. Bayshore Equipment Rental Co.*[17] held a bailor of maintenance equipment strictly liable when a leased stepladder collapsed, causing the bailee's death. The holdings in these cases reflect the fact that the parties can often achieve through a lease the same business ends that can be achieved by selling and buying; and in many instances the lessor "may be the only memeber of that enterprise reasonably available to the injured plaintiff."[18] By abolishing the distinction between sellers and non-sellers the court closed a blatant loophole in the application of strict liability, thereby advancing the policy of compensating persons injured by defective articles. The court emphasized that this new application of strict liability applies only to lessors of personalty who conduct a continuing course of business,[19]

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12. 2 Cal. 3d at 252, 466 P.2d at 726, 85 Cal. Rptr. at 182.

13. *Id.* at 251, 466 P.2d at 726, 85 Cal. Rptr. at 182, *quoting* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963).

14. *See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

15. 45 N.J. 434, 212 A.2d 769 (1965).

16. *Id.* at 450, 212 A.2d at 777.

17. 274 Cal. App. 2d 446, 79 Cal. Rptr. 337 (1st Dist. 1969).

18. 2 Cal. 3d at 252, 466 P.2d at 726-27, 85 Cal. Rptr. at 182-83, *quoting* Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 262, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899 (1964).

19. 2 Cal. 3d at 254, 466 P.2d at 728, 85 Cal. Rptr. at 184.

not to isolated transactions; this limitation accords with section 402A (a) of the *Restatement* and several California decisions.[20]

Pike v. Frank G. Hough Co.,[21] was a wrongful death action; a bulldozer struck and killed a dump-truck supervisor at the worksite. The plaintiffs, a decedent's widow and minor children, sought to hold that manufacturer of the machine liable on the theories of negligence and of strict liability in the design of the bulldozer. At the conclusion of the plaintiff's case, the defendant manufacturer was granted a nonsuit. The supreme court reversed, holding that a manufacturer may be found negligent in failing to install reasonable safety devices needed to eliminate an obvious danger and that a manufacturer is stricly liable for injuries resulting from an unreasonably dangerous design. Negligent design and unreasonably dangerous design, said the court, were jury questions; since the jury in the instant case could have found for the plaintiffs under the evidence adduced, a nonsuit was inappropriate.

Robert Pike was killed by a "Hough Model D-500 Paydozer" being used in the construction of the Oroville Dam. Pike was working the night shift as a "spotter" directing dump trucks to a fill site. Prior to backing up in order to position the machine for tamping in fill, the operator of the paydozer looked to the rear to ascertain if it was clear but did not see Pike, who was wearing a luminous jacket and was standing 30 to 40 feet behind the vehicle. On the witness stand the operator told of a substantial blind spot to the rear of the paydozer due to its design. He also testified that the lighting was clear enough so that he could see workers on the other side of the dam.[22]

The court held that these facts raised an issue of negligence which must be decided by the jury in accord with the *Restatement (Second) of Torts*' standard that a manufacturer of a dangerously designed product is liable for his failure to exercise reasonable care in the product's design.[23] In the present case, a jury could conclude that a manufacturer of a vehicle intended to go backward should know that its design created a 48 foot by 20 foot rectangular blind spot directly behind the vehicle. The jury could then conclude that a manufacturer who failed to correct this deficiency with two rearview mirrors or similar devices violated his duty to produce a product reasonably safe for its intended use. The court pointed out that two recent cases sup-

20. *See, e.g.*, Avner v. Longridge Estates, 272 Cal. App. 2d 607, 615, 77 Cal. Rptr. 633, 639 (2d Dist. 1969) (application of strict liability to a mass builder of homes); Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 227-29, 74 Cal. Rptr. 749, 752-53 (1st Dist. 1969) (same); Conolley v. Bull, 258 Cal. App. 2d 183, 195-97, 65 Cal. Rptr. 689, 696-97 (1st Dist. 1969) (no application to seller of a single parcel of real estate).

21. 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970).

22. *Id.* at 469, 467 P.2d at 231, 85 Cal. Rptr. at 631.

23. RESTATEMENT (SECOND) OF TORTS § 398 (1965).

ported the principle that vehicles whose design substantially obstructed the operator's vision were negligently designed.[24] Furthermore, several other California cases recognize a cause of action for a manufacturer's negligent design.[25]

The court rejected, on three bases, defendant's contention that the obviousness of the peril relieved it of the duty to install safety devices. First, the paydozer's poor visibility is not necessarily obvious to bystanders. Second, obviousness of peril is relevant to the manufacturer's defenses such as contributory negligence, not to the issue of his duty. Finally, the "modern approach" is opposed to denying liability solely because a danger is obvious to the injured party.[26]

The court went on to hold that the facts presented a jury issue on strict liability as well as on negligence.[27] Noting that the manufacturer of an unreasonably dangerous product is strictly liable for harm caused to users[28] and bystanders,[29] the court found no reason to distinguish between dangerously manufactured products and dangerously designed ones. Although few cases have imposed strict liability for design, the court found support for its decision in two recent decisions. In *Garcia v. Halsett*[30] the court of appeals held that a jury could find the owner of a launderette strictly liable for injuries sustained by a customer whose hand was inside a washing machine which suddenly began spinning. Since the accident could have been prevented had the machine been equipped with a common two dollar cut-off switch, a jury could find it to be an unreasonably dangerous design. Likewise, in *Wright v. Massey-Harris, Inc.*,[31] an Illinois court held that a manufacturer was strictly liable for defective design as well as defective manufacture. Thus, the California court found no bar in precedent or policy to extending strict liability to products unreasonably dangerous in design.

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24. Zahora v. Harnischfeger Corp., 404 F.2d 172 (7th Cir. 1968) (crane designed with inadequate visibility); Menchaca v. Helms Bakeries, Inc., 68 Cal. 2d 535, 439 P.2d 903, 67 Cal. Rptr. 775 (1968) (bakery truck lacked mirrors to correct a blind spot).

25. Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1961); Varas v. Barco Mfg. Co., 205 Cal. App. 2d 246, 22 Cal. Rptr. 737 (2d Dist. 1962); Reynolds v. Natural Gas Equip., Inc., 184 Cal. App. 2d 724, 7 Cal. Rptr. 879 (1st Dist. 1960); Darling v. Caterpillar Tractor Co., 171 Cal. App. 2d 713, 341 P.2d 23 (1959).

26. 2 Cal. 3d at 473-74, 467 P.2d at 234-35, 85 Cal. Rptr. at 634-35.

27. *See generally*, Nader & Page, *Automobile Design and the Judicial Process*, 55 CALIF. L. REV. 645 (1967); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965).

28. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

29. Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).

30. 3 Cal. App. 3d 319, 82 Cal. Rptr. 420 (1st Dist. 1970).

31. 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966).