

COLLATERAL SOURCE, DOUBLE JUDGMENT OR DOUBLE TROUBLE?

BY JOSEPH FRANCIS CUNNINGHAM

A typically erudite opinion by D.C. Superior Court Associate Judge Schweb in the recent case of *Taylor v. Dongias Distributing Corp.*, 112 Wash. L. Rptr., 1417 (7/18/84) on application of the collateral source rule in D.C. awakened some memories. While the collateral source concept is certainly not new, experience suggests that an understanding of its reach is not shared by all. Occasionally defense attorneys, and even judges, have been known to bristle at the idea that a plaintiff would dare to seek redress in money damages for a sum already partially or wholly reimbursed by the plaintiff's employer, insurance company, or other source. However, far from being a socialistic plot to enrich the plaintiff doubly, a second recovery from a tortfeasor of amounts already received from an independent payor is a well-sanctioned concept of our law, both here and in other jurisdictions.¹ Indeed, as the leading case in the District, *Jacobs v. H. L. Rust Co.*,² indicates:

The collateral source rule provides that when a tort plaintiff's items of damages are reimbursed by a third party who is independent of the wrongdoer, the plaintiff may still seek full compensation from the tortfeasor even though the effect may be doubled recovery.

The essence of this exception to the prohibition of double recovery in litigation is that the wrongdoer should not benefit from his bad conduct, simply because a plaintiff through foresight or good fortune is capable of obtaining reimbursement elsewhere.³ It is considered better that an injured party receive double recovery than that a wrongdoer be relieved of liability for damages, especially since one purpose of accessing damages is to deter negligent conduct and encourage due care in the future. *Reid v. District of Columbia*.⁴

As expressed above, the collateral source doctrine seems rational and intelligible. How then does one explain the Court of Appeals decision in *The Designers of Georgetown, Inc. v. E.D. Keys and Sons*?⁵ In this case the issue was whether the defendant was entitled to credit for a sum already paid to plaintiff by the defendant's insurance company for a business interruption loss. Such business interruption policies, of course, are rich sources of litigation, due to their complexity and the body of interpretive rules governing loss payment. See, for example the Maryland cases of *Hogley v. Middleton Tavern*,⁶ and *Polkes and Goldberg Insurance, Inc. v. General Insurance Co. of America*.⁷

In the *Keys* case the matter was compounded further by plaintiff's counsel, who failed to argue on appeal that the plaintiff had not been reimbursed by the carrier for lost profits, as the trial court concluded in denying recovery to the plaintiff for the amount paid to it by the insurance company. Profit, of course, is not the salient concern to the

insured under a business interruption policy. Emphasis should be placed instead on the policy definition of "earnings." The trial court's conclusion predicated on "profit" was not challenged on appeal, however, and the omission laid the groundwork for further mischief in the Court of Appeals opinion.

The appellant correctly stated controlling case law on the collateral source rule in the District and quoted from the Restatement of Torts, § 920, Comment e (1939) as follows:

... Usually the collateral contribution necessarily benefits either the injured person or the wrongdoer. Whether it is a gift or the product of a contract of employment or of insurance, the purposes of the parties to it are obviously better served and the interests of society are likely to be better served if the injured person is benefited than if the wrongdoer is benefited....

Surprisingly, and simplistically, the Court of Appeals' panel rejected this principle and upheld the trial court's allowance of a credit to plaintiff's award, reflecting the amount of insurance proceeds paid it for its business interruption loss. It based its decision on two points. First, the insured had agreed under the terms and conditions of its policy to subrogate its recovery to the modest amount paid by the carrier and, second, the recovery of "lost profits," already reimbursed by insurance, would amount to a double recovery. As to the latter point, it is not surprising that no cases were cited by the

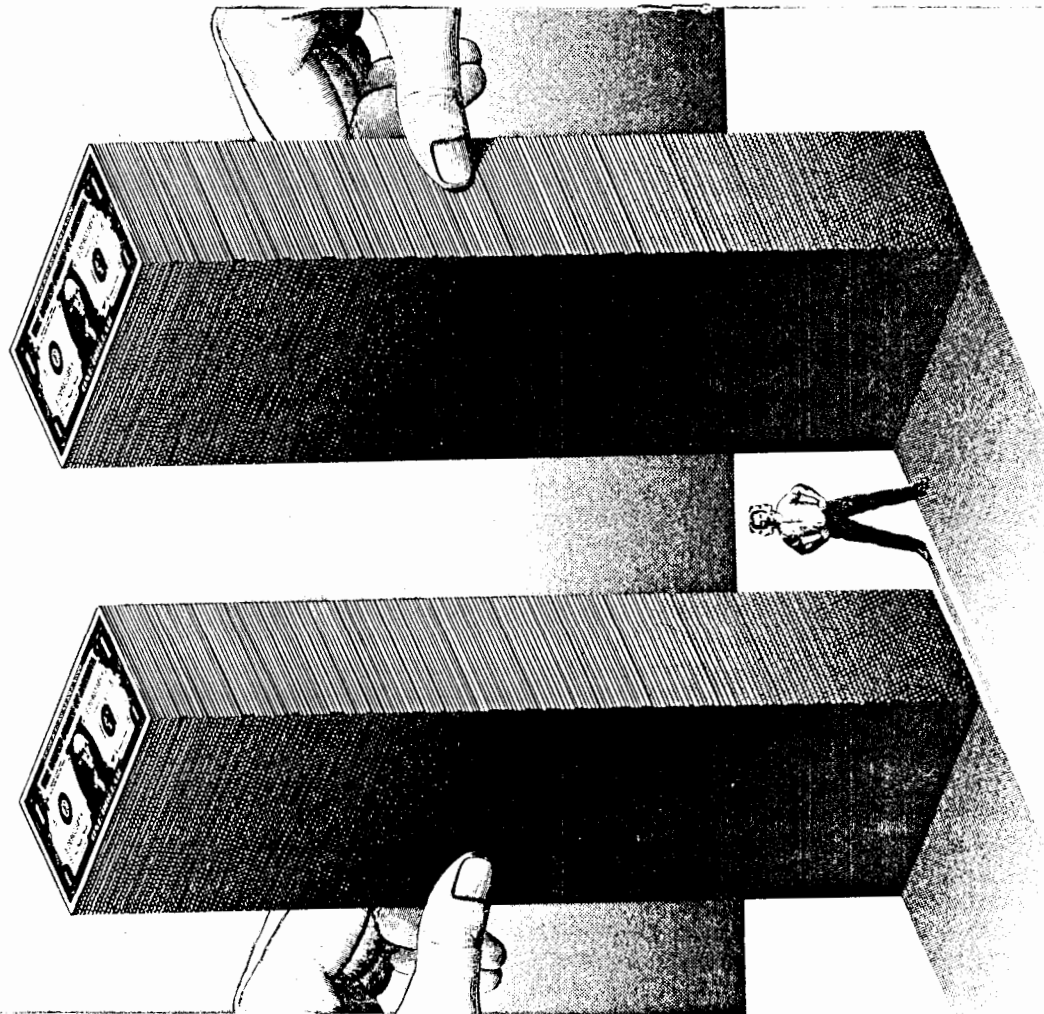
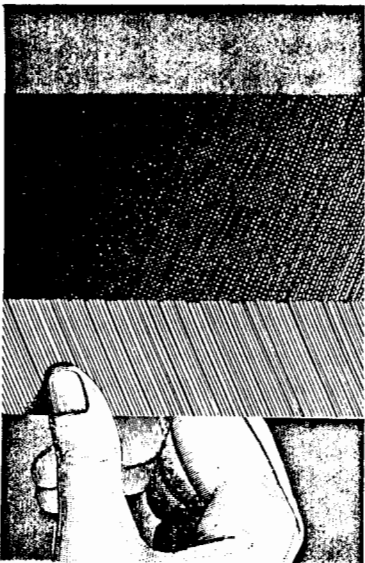


Illustration by John Peck.

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court in support of its conclusion since, as we have seen, double recovery has not an acceptable consequence when acknowledged insurance payments are made to a plaintiff. More interesting is the preference by the court to the standard subrogation clause in the policy as a bar to recovery by the insured plaintiff. The insured had argued in its brief that:

Finally, the collateral source rule is not affected by the fact that the insurer may be subrogated to the rights of the insured against the tortfeasor, as this is merely a matter of the ultimate right to recover the proceeds as between the insurer and the insured. *Reznord v. Konzas Power & Light Co.*, 192 Kan. 343, 388 P.2d 882 (1964). See 2d Ann. Jur. 2d *Damages*, Sec. 211, pp. 296, 296.

In *Barnes v. Peck*, 83 So.2d 783 (La. App. 1955), where the court answered this issue, stating [sic] as follows:

The party liable has no interest in the question of whether there is insurance, but is responsible to the owner of the damaged automobile to the extent of the damage. The other party and his insurer may adjust between themselves the question of how much each is entitled to recover out of the judgment against the party who is liable. 83 So.2d, at p. 784.

See also *Powers v. Ellis*, 2231 Ind. 273, 108 N.E.2d 132 (1952); *Maidl v. Peoples National Gas Co.*, 367 Pa.212, 154 A.2d 399 (1959); 22 Ann. Jur.2d, *Damages*, Sec.206.

The Designers anticipates that Appellate will argue in its brief that its subrogation settlement with The Casualty Co. included the business interruption loss, and that not to allow

the deduction would force said Keys to pay twice. This anticipated argument bears little weight because the court did not deduct the \$2,145.24 on the basis of a double payment by Keys, but rather, so to avoid a so-called "double recovery" by The Designers. (Memorandum Opinion, p.5).

Moreover, to the contrary of what Appellate Keys is expected to contend, the subrogation claim settlement did not include business interruption loss, but only the property damage. The burden of proof in the regard to provide mitigation of damages was on Keys, as defendant below, and no evidence on this factual issue was ever introduced.

All of the above suggests a fair basis for the proposition that insurance proceeds both legally and factually, were beside the point as to an ultimate damage award. In response, the Court of Appeals cited a single case, *Motors Insurance Co. v. Home Indemnity Co.*

However, it failed to indicate in any way why this case was dispositive on the issue. A short look at the case may suggest why it has little to do with the matter at hand. Rather than dealing with the collateral source doctrine in any significant way, the case turned on the efficacy of a release signed by the plaintiff's insurer. It held that one insurer's release of any and all claims against a defendant who reimbursed the subrogated insurer for payments it had made to the insured did not bar a second action by another insurer against the same defendant for monies that insurer had paid to its insured, thus gaining independent subrogation rights. Finding the court itself stated that, "the basic question on this appeal was whether the release involved relieved the tortfeasor of liability to a non-party to such release. In

concluding this issue in the negative, not only did the court avoid resting its decision on the collateral source rule, it failed to even mention it. So much for the precedent upon which the odd result in *Keys* is based!

It only remains to point out that the *Keys* decision flies in the face of other, well-reasoned decisions from the District and other jurisdictions, and also contradicts the premise upon which the collateral source doctrine rests. As to the former, Judge Schweb in *Taylor* cited the oft-referenced case of *Reznord v. Konzas Power and Light Co.*, supra, which concluded that the existence of an insurer's viable right of subrogation does not bar its insured's recovery against a tortfeasor—the right being personal to the plaintiff and the subrogation matter being one between insurer and insured. He also cited *Brown v. American Transfer & Storage Co.*,¹¹ for the sensible proposition that:

The insurer and the defendant are not joint debtors so as to make the payment or satisfaction by the former operative to the benefit of the latter; nor is there any legal privity between the defendant and the insurer so as to give the former the right to avail itself of a payment by the latter. The policy of insurance is collateral to the remedy against the defendant, and was procured solely by the plaintiff at his expense, and to the procurement of which the defendant was in no way contributor.... It cannot be said that the plaintiff took on the policy in the interest or behalf of the defendant, nor is there any legal principle which seems to require that it be ultimately appropriated to the defendant's use and benefit.¹²

It is also worth pointing out that the fact that benefits provided to a plaintiff for which the provider has a subrogated right to recover against the defendant, historically has not also barred recovery by a plaintiff in the federal court for the District of Columbia. *Hudson v. Lazzarini*,¹³ Apparently overruled the binding precedential effect of opinions by the D.C. Circuit Court.¹⁴ In the federal court here, when plaintiff's claim for recovery dovetails insurance proceeds paid to it for which the insurer is subrogated recovery against the defendant is not denied, as in *Keys*, giving the potential tortfeasor a windfall, but rather the case is viewed as being brought by the insured for the benefit of the insurer,

and so proceeds. *Link Aviation Inc. v. Downs*,¹⁵ Consequently the *Keys* decision, for whatever value it may have, has created a conflict of the governing case law in this jurisdiction between the local and federal courts—hardly a happy or public result.

As to its policy implications, those broader, common sense considerations inherent in resolving collateral source questions, it may be seen that *Keys* immunizes the tortfeasor from recovery by a plaintiff if the defendant can show that the plaintiff has been fully reimbursed by his own insurer (or arguably any provider of benefits). To force a tortfeasor to pay damages in such circumstances, the insurer/provider would be required either to join the suit as a plaintiff or to institute separate litigation itself—both courses breeding duplication and delay. This is especially so when one considers that were the plaintiff allowed recovery against the tortfeasor regardless of the monies paid by the insurer provider, the latter would face few problems in obtaining a pay-over of funds expended on its insured/beneficiary since it has an absolute right to recovery of such funds from the payee regardless of asserted contract defenses. *City Stores Co. v. Lerner Shops*,¹⁶ And ultimately, regardless of the unnecessary obstacles created by *Keys* to the insurer's recovery, the basic premise of collateral source recovery is clearly violated by the denial of recovery to an insured plaintiff simply because the protection he/she purchased from an independent source is provided in full by that source. Seen in this historical light, *Keys* is obviously an aberration.

However, a number of relatively current decisions from our Court of Appeals, ignored in *Keys* but certainly still good law, suggest that ample precedent exists for future decisions consistent with collateral source precedents here and elsewhere. *Cf. District of Columbia v. Jackson*,¹⁷ *Morgan v. District of Columbia*,¹⁸ *Reed v. District of Columbia*,¹⁹ et al for the present. *Keys* remains isolated and unexplained, and the course of the collateral source issue, uncertain.

An imaginative attempt to stretch the collateral source concept across the District's history from Burlington, Vermont in *Dowson* V. *Hery*,²⁰ *Masson v. American University*,²¹ 428 U.S. 805 (1975) where the Court of Special Appeals rejected a defendant's contention that his

point of D.C. worker's compensation benefits should not be set off against Maryland benefits. The Court correctly pointed out after review of the Maryland cases involving the risk, that it was inapplicable in a case not involving tort issues, such as the compensation claim.

The rule does not apply to reduction of verdict by the amount the plaintiffs earlier received in settlement with other alleged tortfeasors, even if the latter is subsequently determined to be free of fault. *Kasson v. American University*, 178 U.S. App. D.C. 263, 546 F.2d 1029 (1976).
939 A.2d 776, amended, 399 A.2d 1260 (D.C. App. 1978).
436 A.2d 1290 (D.C. App. 1981).
258 Md. 615, 421 A.2d 571 (1980), reversing 42 Md. App. 314, 400 A.2d 15 (1979).

70 Md. App. 162, 491 A.2d 508 (1984).
497 of Appellate, pp. 41, 42.
284 A.2d 38 (D.C. App. 1971).
1001 S.W.2d at 38.
1401 S.W.2d 931 (Tex. 1989).
1495 S.W.2d at 838.
1495 S.W.2d at 838.
**M.A.P. v. Ryan, 285 A.2d 310 (D.C. App. 1971).
Link Aviation Inc. v. Downs, 117 U.S. App. D.C. 41, 225 F.2d 613 (1956).
1933 U.S. App. D.C. 311, 419 (1952).
1451 A.2d 867 (D.C. App. 1982).
1449 A.2d 1102, vacated, 432 A.2d 1197, rehearing, 468 A.2d 1066 (D.C. App. 1982).
1991 A.2d 776, amended 399 A.2d 1260 (D.C. App. 1979).

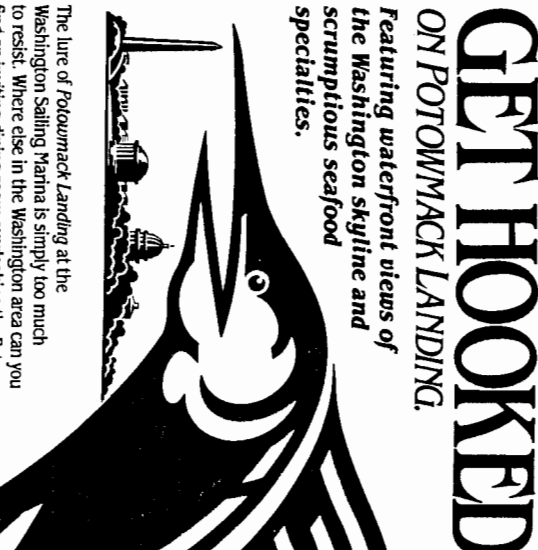
FOOTNOTES

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