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Damages - Aggravation, Mitigation, and Reduction of Loss - Recovery of Medical Expenses under Both Medical Payments and Liability Coverages in Family Automobile Insurance Policy

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RECENT CASES

DAMAGES—AGGRAVATION, MITIGATION, AND REDUCTION OF LOSS —RECOVERY OF MEDICAL EXPENSES UNDER BOTH MEDICAL PAYMENTS AND LIABILITY COVERAGES IN FAMILY AUTOMOBILE INSURANCE POLICY —The plaintiffs, two passengers riding in an automobile driven by the defendant, were injured when the automobile overturned as a result of the defendant-driver's attempt to avoid a rear end collision. The plaintiffs then instituted a negligence action against the defendant to recover damages for personal injuries. The defendant was insured under an automobile policy which provided, *inter alia*, liability coverage and medical payments coverage. Before the negligence suit came to trial, the defendant's insurance company paid the two plaintiffs a sum of money pursuant to the medical payments coverage in the policy. At the trial each plaintiff proved his medical expenses and each received a damage verdict which included an amount for these medical expenses. The trial court denied the defendant-insured's motion for reduction of damages by the amount which had previously been paid to the plaintiffs by the defendant's insurer. The Court of Appeals of Maryland, affirming the trial court decision, *held* that the automobile insurance policy created separate coverages for medical expenses and for liability; and that the prior recovery under the medical payments coverage did not preclude recovery under the liability coverage. *Blocker v. Sterling*, 251 Md. 55, 246 A.2d 226 (1968).

In order to properly analyze this decision (as in any decision in which an insurance contract circumscribes the respective rights and liabilities of the insured and the insurer) it is necessary to examine the pertinent language in an attempt to ascertain the intention of the parties as to those rights and liabilities.[1] Here, the pertinent language involved was found in the policy under Part I, Liability, Coverage A, Bodily Injury Liability, and under Part II—Expenses for Medical Services, Coverage C, Medical Payments. Part I, Coverage A provided that the defendant's insurer agreed " 'to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages' by reason of bodily injury . . . sustained by any person . . . arising out of the ownership,

1. *See* Tomlyanovich v. Tomlyanovich, 239 Minn. 250, 58 N.W.2d 855 (1953). In Levine v. Accident & Cas. Ins. Co., 203 Misc. 135, 139, 112 N.Y.S.2d 397, 403 (N.Y. Mun. Ct. 1952), the court stated a "rule of construction" for insurance policies as follows:
> "It is not the construction or interpretation which the company gives to a policy that governs. *It is the plain meaning understandable to 'Joe Doakes', the average person, that counts.*"

maintenance or use of the insured's automobile."[2] Part II—Coverage C provided that the insurer agreed to pay " 'all reasonable expenses . . . for necessary medical, surgical, X-ray and dental services . . . and necessary ambulance, hospital, professional nursing and funeral services . . .' to or for the insured and each relative . . . and . . . any other person who sustains bodily injury caused by accident while in or entering or alighting from the owned automobile. . . ."[3]

Medical payments insurance is relatively new since it was first inserted into automobile liability insurance policies in the late 1930's.[4] By 1941 this particular insurance was being written in the then 48 states, Alaska and Hawaii[5] as an endorsement to the standard automobile liability policy.[6] It has been suggested that medical payments coverage grew out of that particular condition created by "guest statutes" in which the gratuitous guest has no cause of action for injuries sustained as a result of the host's lack of only ordinary care.[7] The suggestion is that the host is still bound to feel a certain "moral" responsibility for the guest's injuries regardless of the guest passenger's inability to recover from the host-driver in tort.[8] The Supreme Court of Louisiana in *Gunter v. Lord*[9] clearly stated the rationale of medical payments when it said:

> The protection afforded the 'other person who sustains bodily injury through accident,' even though the conduct of the insured be blameless, is understandably conducive to a feeling of satisfaction that some assistance is offered, since concern and regret for an injury, though unintentionally caused and without negligent conduct, is the usual, normal reaction. Moreover, the injury sustained is immediate and calls for instantaneous assistance; fault is often dependent on many considerations which cannot be quickly assessed. . . .[10]

From an examination of the appropriate language in the policy in the instant case, it can be seen that under the liability coverage

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2. Blocker v. Sterling, 251 Md. 55, 246 A.2d 226, 227 (1968).
3. *Id.* at 227.
4. Katz, *Automobile Medical Payment Coverage—A Changing Concept?*, 28 INS. COUNSEL J. 276 (1961).
5. *Id.* at 277.
6. 1955 WIS. L. REV. 483, 484.
7. *Id.* at 484.
8. *Id.*
9. 242 La. 943, 140 So.2d 11 (1962).
10. *Id.* at 15-16. Another succinct rationale was offered by an Illinois Appellate Court: "We think that the basic purpose of medical pay provisions . . . is to make available a fund to assure prompt and adequate medical care when injury is incurred, to relieve the physical suffering of the insured and to relieve the insured of the anxiety of not knowing from what source the money to pay the bills is coming." Jackson v. Country Mut. Ins. Co., 41 Ill. App.2d 300, 190 N.E.2d 490, 492 (1963).

the insurer is obligated to pay only such sums as the insured shall become "legally obligated to pay as damages." However, under the medical payments provision, the insurer is assuming responsibility up to a stipulated amount for reasonable expenses for medical relief—regardless of the negligence on the part of the insured.[11] Although the medical payments coverage is included in the same policy as the liability for bodily injury coverage, it has been held that the medical payments clause is in the nature of a separate and distinct "third-party beneficiary health insurance contract" for which the insurer charges a separable portion of the gross premium.[12] Indeed, the court here finds this to be the proper construction of the medical payments clause.[13] The justification for allowing the injured claimant recovery under both coverages is that since the liability and the medical payments coverages are separate and distinct; therefore, a separate and distinct claim can and should arise under each coverage.[14] In essence, the underlying concept is that the insurer's liability under the medical payments coverage is based on contract; whereas, the insurer's liability under the liability coverage is based on tort.[15]

As a further justification for the recovery of medical expenses under both coverages, the "Collateral Source Rule" is invariably invoked by the courts.[16] A good statement of the Collateral Source Rule was declared in *Hughes v. Clinchfield R. R. Co.*[17] as follows:

> This doctrine establishes an exception to the general rule that damages in negligence actions must be compensatory and render the beneficiary whole, by refusing to allow credit to the beneficiary of a wrongdoer for money or services received by the beneficiary *from sources other than the wrongdoer*.[18] (emphasis added).

While the Collateral Source Rule is overwhelmingly accepted in this country,[19] its wide acceptance has not been immune from a

11. Martinez v. Gulf Ins. Co., 68 N.M. 90, 358 P.2d 1003 (1961).
12. Nagy v. Lumbermens Mut. Cas. Co., 219 A.2d 396 (R.I. 1966).
13. "American's policy created separate coverages, one of indemnity for Blocker and one analogous to a personal accident policy for injured passengers in Blocker's car who became by virtue of being injured, third party beneficiaries of the medical expense coverage contract." Blocker v. Sterling, 251 Md. 55, 246 A.2d 226, 230 (1968).
14. Moorman v. Nationwide Mut. Ins. Co., 207 Va. 244, 148 S.E.2d 874 (1966); Severson v. Milwaukee Auto. Ins. Co., 265 Wis. 488, 61 N.W.2d 872 (1953); *Accord*, Hack v. Great Am. Ins. Co., 175 So.2d 594 (Fla. Dist. Ct. App. 1965). (*Hack* allowed recovery under both Uninsured Motorist coverage and Medical Payments coverage).
15. *See* Cockrum v. Travelers Indem. Co., 420 S.W.2d 230 (Tex. Civ. App. 1967); Williams v. Employers Mut. Cas. Co., 368 S.W.2d 122 (Tex. Civ. App. 1963).
16. Beschnett v. Farmers Equitable Ins. Co., 275 Minn. 328, 146 N.W.2d 861 (1966); Edmondson v. Keller, 401 S.W.2d 718 (Tex. Civ. App. 1966).
17. 289 F. Supp. 374 (E.D. Tenn. 1968).
18. *Id.* at 375.
19. Melson v. Allmon, 244 A.2d 85 (Del. 1968); Huenink v. Collins, 181 Neb. 195, 147 N.W.2d 508 (1966); Patusco v. Prince Macaroni, Inc., 50 N.J. 365, 235 A.2d 465 (1967); Bailey v. Jeffries—Eaves, Inc., 76 N.M. 278, 414 P.2d 503 (1966); Walker v. Missouri Pac. R.R. Co., 425 S.W.2d 462 (Tex. Civ. App. 1968).

wealth of criticism.[20] Basically this doctrine provides that . . . "[I]n computing damages against a tortfeasor, no reduction be allowed on account of benefits received by the plaintiff from other sources, even though they have partially or wholly mitigated his loss." . . .[21] The rationale for the doctrine is simply that it is better for the plaintiff to make a profit than for the "wrongdoer" defendant's responsibility to be lightened through a reduction of his liability. To illustrate, this means that in a tort action the defendant will not be entitled to have his special damages reduced to the extent that the plaintiff may have received compensation *from the plaintiff's* Blue Cross-Blue Shield policy,[22] from gratuitous medical services rendered by a fellow physician,[23] or from disability retirement pay.[24]

Having established what the doctrine is, the real question is whether or not it should even apply in this case where recovery is had under both medical payments and liability coverages. Is the recovery under the medical payments coverage really a collateral source? After all, when the defendant himself provides for medical payments coverage, can it truly be said that this is a source collateral to the defendant? There are decisions in which the facts are similar if not identical to those in the instant case and yet different results are reached.[25] In a recent decision on opposite result was reached and a set-off allowed against the tort recovery by the amount previously paid under "Medical Payments". The court simply was of the opinion that the Collateral Source Rule does not apply where the plaintiff's medical expenses are paid by the defendant directly *or by an insurance company under a policy procured by the defendant.*[26] The court's reasoning is persuasive:

> Under those circumstances no one gets a windfall and if a recovery were allowed under those circumstances the result would be that the plaintiff would receive a double recovery and that the defendant would be mulcted twice for the same item of damages. Suppose, for example, the defendant himself paid the plaintiff's entire medical bill

20. *E.g.*, Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478 (1966); Ghiardi, *The Collateral Source Rule: Multiple Recovery in Personal Injury Actions*, 535 INS. L. J. 457 (1967); Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669 (1962); Peckinpaugh, An Analysis *of the Collateral Source Rule*, 524 INS. L. J. 545 (1966).

21. *See* Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478 (1966). Fleming remarks at 1478 that: "Its sting lies in the corollary that the plaintiff may ordinarily keep both the damages as well as the collateral benefit and thus turn his plight into a bonanza."

22. Phillips v. Bennett, 21 Utah2d 1, 439 P.2d 457 (1968).

23. Oddo v. Cardi, 218 A.2d 373 (R.I. 1966).

24. Beaulieu v. Elliot, 434 P.2d 665 (Ala. 1967).

25. Adams v. Turner, 238 F. Supp. 643 (D.D.C. 1965); Dodds v. Bucknum, 214 Cal. App.2d 206, 29 Cal. Rptr. 393 (1963); Yarrington v. Thornburg, 205 A.2d 1 (Del. 1964); Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962).

26. Adams v. Turner, 238 F. Supp. 643 (D.D.C. 1965).

> prior to the institution of the action or prior to the trial. Obviously the plaintiff would not be paid twice for the same item and would not be permitted to recover his medical bills as an item of special damages. . . .
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> Here the defendant did not herself pay the medical bills but brought into being at her own expense an insurance policy out of which the medical bills were paid.[27]

A California Appellate Court in disallowing medical expenses in a tort action because they had been paid previously by defendant's insurer under the medical payments provisions[28] reasoned as follows:

> It thus appears that if defendant had gone to the doctor and hospital of plaintiff and had paid out of his own pocket the indebtedness that plaintiff had incurred on account of this accident, she could not have recovered them again from him. In other words, her recovery would be diminished by the amount personally paid by defendant. It can make no difference either in principle or in justice that defendant did not pay these bills out of his own pocket but that the source of such payments was insurance purchased by defendant with his own funds for such an eventuality.[29]

Those courts which allow a set-off from the damages by the amount previously paid by a defendant's insurer under the medical payments provision of the automobile policy make a valid distinction in the Collateral Source Rule. The distinction is this: The tortfeasor clearly has no interest in and no right to benefit from any money received by the injured person from sources collateral to and unconnected with the tortfeasor. However, the doctrine does allow the tortfeasor to obtain the advantage of payments made by himself *or from a fund created by him*; in such case the payments come not from any collateral source but from the defendant himself.[30] It follows that since the medical payments coverage is a fund created by the tortfeasor, the Collatral Source Rule simply should not apply in this particular factual situation.[31] It does appear clear, however, that even in those jurisdictions which allow a set-off, no set-off is possible if the later suit is for general damages only and no special damages are alleged.[32]

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27. *Id.* at 645.
28. Dodds v. Bucknum, 214 Cal. App.2d 206, 29 Cal. Rptr. 393 (1963).
29. *Id.*, 29 Cal. Rptr. at 397.
30. Yarrington v. Thornburg, 205 A.2d 1, 2 (Del. 1964).
31. *Contra,* Beschnett v. Farmers Equitable Ins. Co., 275 Minn. 328, 146 N.W.2d 861 (1966). "We subscribe to the view that medical-payment provisions in a liability policy constitute a collateral source *without reference to what party obtains and pays for the insurance.*" *Id.* at 865 (emphasis added).
32. Gandy v. Feazel, 155 So.2d 474 (La. Ct. App. 1963).

It should also be pointed out that in many cases the negligence action against the defendant may be instituted first and a subsequent action brought directly against the defendant's insurer for recovery of the medical expenses under the medical payments clause. (Perhaps this situation occurs because insurance companies do not always inform injured persons of the existence of a medical payments provision.)[33] It behooves counsel representing an injured claimant to investigate the possibility of medical payments coverage in the defendant's policy before concluding any settlement.[34] This is so, since otherwise a general release executed in favor of both the defendant and the insurer would preclude a subsequent action against the insurer for medical payments.[35] But where a release is given by the claimant only to the defendant and the insurer is not named, the plaintiff would not be prevented from bringing a later action against the insurer to recover his medical expenses under the medical payments coverage of the policy.[36]

Were this same case to come before a court in North Dakota one can only hazard a guess as to the outcome.[37] In *Gillis v. Farmers Union Oil Company of Rhame*,[38] the plaintiff who was a sergeant in the U. S. Army was severely injured when his automobile collided with the defendant's automobile. He sued for both general and special damages and was allowed full recovery despite the fact that his medical expenses were furnished by the U. S. Army.[39] (A true Collateral Source Rule Problem). This decision is not particularly helpful because it is certainly conceivable that North Dakota may adhere to the Collateral Source Rule and yet not apply it when this particular insurance issue at hand is presented.

If the purpose of our tort reparation system is still compensation for actual loss, it is difficult to perceive why a claimant should be entitled to double recovery under both coverages in the automobile insurance policy. What possible difference can it make if the defendant paid the plaintiff in cash or prudently set up an insurance fund to provide for the contingency? Why penalize (yes, penalize) the

33. 8 J. APPLEMAN, INSURANCE LAW AND PRACTICE 350 74.10 (1962).
34. *Id.*
35. Barbour v. State Farm Mut. Auto. Ins. Co., 141 A.2d 924 (D. C. Mun. Ct. App. 1958).
36. Beschnett v. Farmers Equitable Ins. Co., 275 Minn. 328, 146 N.W.2d 861 (1966).
37. Of course, a vital difference to any injured guest passenger in North Dakota (as opposed to Maryland) is the impact of the Guest Statute. In order for the guest-plaintiff to recover under this statute he must prove that his injury proximately resulted from intoxication, willful misconduct, or gross negligence of the owner or driver. N.D. CENT. CODE § 39-15-03 (1960).
38. 186 F. Supp. 331 (D. N.D. 1960).
39. "Apparently the Supreme Court of North Dakota has never passed upon the . . . issue of whether an injured . . . may recover from a negligent defendant the reasonable value of medical and hospital services rendered without charge by a . . . hospital . . . . This court is of the opinion that the Supreme Court of North Dakota, if and when such issue is presented, will follow the so-called 'modern rule' . . . ." *Id.* at 338. This "so-called rule" is, of course, the Collateral Source Rule.

person who was prudent and far-sighted enough to establish an insurance fund and yet allow credit for one who does not provide such a fund and yet happens fortuitously to have some cash on hand at the time of the injury with which he pays for all or part of the plaintiff's medical expenses? Also, might not this multiple payment of the same expenses indirectly contribute to increasing insurance costs to be borne by the general insurance premium-paying public? A simple solution (and one which would avoid the clearly erroneous application of the Collateral Source Rule by those courts which allow recovery under both clauses) would be an insertion of a specific exclusion in the automobile liability policy. This exclusion could be worded to the effect that any amount payable under the liability coverage should be reduced to the extent of any payments made under the medical payments coverage. It is clear that if an insurer inserts an exclusion of this type into the family automobile insurance policy, it would be upheld by the courts in order to prevent a double recovery.[40]

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INSURANCE—AVIATION EXCLUSION CLAUSE—WAR AS AN INTERVENING FORCE—Hostile ground fire struck the insured, a United States Marine Corps helicopter co-pilot, while he was on a flight over Vietnam. The helicopter returned safely to the base, where the insured died the next day.

The decedent was insured with the defendant, the life insurance policy providing in part:

> "This policy is issued under the express condition that should the death of the Insured occur as a result of operating or riding in, or descending from, any kind of aircraft if the Insured is a pilot, officer or member of the crew of such aircraft . . . the Company's liability shall be limited . . ." to a sum less than the face amount of the policy to be computed in accordance with the formula set forth therein."[1]

On suit by the policy beneficiary for the proceeds, the defendant contended that death resulted from operating or riding in an aircraft, within the scope of the exclusionary language, thus precluding recovery of the full face amount of the policy. The United States District Court (Eastern District of Virginia) disagreed, con-

40. Gunter v. Lord, 242 La. 943, 140 So.2d 11 (1962); Bowers v. Hardware Mut. Cas. Co., 119 So.2d 671 (La. Ct. App. 1960).

1. Mann v. Service Life Insurance Co., 284 F. Supp. 139 (E.D. Va. 1968).