The Collateral Source Rule in Georgia: A New Method of Equal Protection Analysis Brings a Return to the Old Common Law Rule

Calvin R. Wright

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THE COLLATERAL SOURCE RULE IN GEORGIA:
A NEW METHOD OF EQUAL PROTECTION
ANALYSIS BRINGS A RETURN TO THE OLD
COMMON LAW RULE

INTRODUCTION

The collateral source rule, widely recognized throughout the
United States, generally provides that recoveries by a plaintiff
from sources other than the defendant tortfeasor are not to be
considered in determining the liability of the defendant or the
amount of damages. The rule operates both as a rule of
evidence barring collateral source information from reaching the
trier of fact and as a rule of damages preventing the reduction of
an award because of collateral source recoveries. The
application of this rule forces a tortfeasor to pay for all of the
harms caused by the tort without regard to the actual net loss
resulting to the injured party.

In 1885 the collateral source rule was recognized by the
Supreme Court of Georgia in Western & Atlantic Railroad v. Meigs. Following this recognition, Georgia courts applied
the collateral source rule to a broad variety of collateral source
recovery areas including property damage, wrongful death, and
personal injury.

1. Deborah Van Meter, Note, Louisiana's Collateral Source Rule: Time for a Change?, 32 Loy. L. Rev. 978, 980-82 (1987). However, payments to an injured plaintiff made by the tortfeasor, or from insurance covering the tortfeasor, are

2. Flynn, supra note 1, at 40-42. The term “collateral source” generally refers to
secondary sources from which the plaintiff may have recovered (such as various types
of insurance, public benefits, or compensation for lost income), which were not
contributed to directly by the defendant tortfeasor. Van Meter, supra note 1, at
980-81.

3. Flynn, supra note 1, at 42. For example, an injured party might recover
damages for medical expenses directly from a tortfeasor in spite of the fact that the
medical expenses were already covered by a private insurance policy paid for by the
injured party. Id. This is true regardless of whether the insurance company paying
for the expenses may claim reimbursement from the tortfeasor. Id.

4. 74 Ga. 857 (1885).


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In 1987, more than one hundred years after the courts of Georgia first recognized the collateral source rule, the Georgia General Assembly enacted Code section 51-12-1(b), abrogating the rule entirely in civil actions seeking special damages. This statute allowed a trier of fact to consider insurance and other collateral source recoveries in all actions in which the plaintiff sought special damages. However, Georgia courts only applied this new statute prospectively, retaining the rule in cases filed before the statute's effective date.

Georgia's legislative abrogation of the collateral source rule was unique in that the statute contained few limitations and applied to civil actions both in tort and in contract claims.

1970). The court, recognizing that the "collateral source rule" was applicable in Georgia, held that a "bailor's right of action" against a tortfeasor "was not affected by the" fact that the bailee had repaired the damaged property. Id. In doing so, the court cited numerous Georgia cases recognizing the collateral source rule in cases of property damage, wrongful death, and personal injuries. Id. at 246 n.2. This case continues to be cited for its comprehensive coverage of the collateral source rule in Georgia in a variety of situations. Polito v. Holland, 365 S.E.2d 273, 274 (Ga. 1988); Bennett v. Haley, 208 S.E.2d 302, 310 (Ga. Ct. App. 1974).


In any civil action, whether in tort or in contract, for the recovery of damages arising from a tortious injury in which special damages are sought to be recovered or evidence of same is otherwise introduced by the plaintiff, evidence of all compensation, indemnity, insurance (other than life insurance), wage loss replacement, income replacement, or disability benefits or payments available to the injured party from any and all governmental or private sources and the cost of providing and the extent of such available benefits or payments shall be admissible for consideration by the trier of fact. The trier of fact, in its discretion, may consider such available benefits or payments and the cost thereof but shall not be directed to reduce an award of damages accordingly.

Id.

7. Id. Special damages are "those that actually flow from a tortious act; they must be proved in order to be recovered." Denton v. Con-Way Express, Inc., 402 S.E.2d 269, 270 (Ga. 1991). By asking for general damages only, such as for pain and suffering, a plaintiff could presumably avoid O.C.G.A. § 51-12-1(b) altogether and thus keep information about collateral source recovery out of evidence. David N. Rainwater, Georgia's New Collateral Source Rule, 39 MERCER L. REV. 1, 5 (1987).

8. Polito v. Holland, 365 S.E.2d 273, 275 (Ga. 1988); United States Indus. v. Austin, 397 S.E.2d 469, 470 (Ga. Ct. App. 1990). The court in Polito held that the statute represented a substantive change in the law, and that substantive changes are generally applied prospectively unless a clear intent is shown to the contrary. Polito, 365 S.E.2d at 273, 275.

9. Rainwater, supra note 7, at 4-5. Statutes abrogating the collateral source rule in other states which applied only to specific types of cases, such as medical malpractice, had been found unconstitutional in violation of equal protection provisions. Doran v. Priddy, 534 F. Supp. 30, 37 (D. Kan. 1981); Graley v.
Because Georgia courts were comfortable with the collateral source rule and because the rule had become so entrenched in the tort system, the abrogation of the rule posed confusing problems in tort law and increased the complexity of litigation involving collateral source recoveries. In Denton v. Con-Way Express, Inc., a plurality decision in March of 1991, the Supreme Court of Georgia eliminated this confusion by finding Code section 51-12-1(b) unconstitutional.

The Denton holding was partially based on an examination under which the court abandoned the traditional method of equal protection analysis in favor of a newer and simpler test to determine whether the statute was "impartial and complete." Although the collateral source rule is again applicable in Georgia under Denton, this plurality decision by the Supreme Court of Georgia has itself caused additional confusion about the future use of collateral source evidence in Georgia courts, the appropriate method of analysis for equal protection challenges, and the impact Denton will have on other areas of the law. This Note will review the application and attempted abrogation of the collateral source rule throughout the United States.

11. 402 S.E.2d 269 (Ga. 1991). Denton was consolidated with another case, Georgia Power Co. v. Falagan. Id.; see comments infra note 131.
12. Denton v. Con-Way Express, Inc., 402 S.E.2d 269 (Ga. 1991). The statute was held to be in violation of the "provision of the Georgia Constitution which mandates that the paramount duty of government is the protection of person and property and that the protection shall be impartial and complete." Id. at 272. The majority opinion, written by Presiding Justice Smith, was joined by Justice Benham and Judge Sosebee. Id. at 269, 272. However, in the special concurrence by Justice Fletcher, which was joined by Judge Pope, O.C.G.A. § 51-12-1(b) was regarded as unconstitutionally vague in violation of due process. Id. at 273-74 (Fletcher, J., concurring specially).
14. Id. at 4, 5. Since constitutional principles of equal protection are an important concern in criminal law, there is speculation that this new method of equal protection analysis will have a much broader impact than just the effect on these civil cases and the voiding of this one statute. Id. But see Weathersby v. State, 414 S.E.2d 200, 202 (Ga. 1992) (Denton ruling does not diminish prior equal protection analysis finding strong government interest in the protection of children).
specifically examining Georgia's statute abrogating the rule and its application by the courts, and discuss the recent ruling by the Supreme Court of Georgia in \textit{Denton}.

I. HISTORY OF THE COLLATERAL SOURCE RULE

The collateral source rule originated in the common law and thus was subject to alteration by either judicial action or legislative enactment.\textsuperscript{15} The rule has been subjected to much criticism for many years, and since the 1980s it has been a popular target for those advocating tort reform.\textsuperscript{16} Some commentators have even suggested that the rule should be totally abolished.\textsuperscript{17} However, many courts have been reluctant to abandon the rule.\textsuperscript{18} The majority of jurisdictions which have abolished the collateral source rule have done so by statute.\textsuperscript{19}

The statutory abrogation of the collateral source rule is often intended to reduce damage awards and thereby result in a reduction in the cost of insurance.\textsuperscript{20} A tension has developed between courts, which are reluctant to abandon the collateral source rule, and legislatures, which are under pressure to abrogate the rule in an attempt to reduce insurance costs.\textsuperscript{21} This tension has resulted in a reexamination of the reasons for the common law rule in light of modern conditions.\textsuperscript{22}

\begin{footnotesize}
\begin{enumerate}
\item[15. \textbf{RESTATEMENT (SECOND) OF TORTS} § 920A cmt. d (1979)].
\item[17. Banks McDowell, \textit{The Collateral Source Rule—The American Medical Association and Tort Reform}, 24 WASHBURN L.J. 205 (1985)].
\item[19. Gobis, supra note 18, at 888. Although the courts would be free to abrogate or modify the common law rule, its long history and the resulting reliance upon the rule makes it better suited for legislative action where abolition of the rule is sought. McDowell, supra note 17, at 205].
\item[21. See Gobis, supra note 18, at 888].
\item[22. McDowell, supra note 17, at 206-08; see Flynn, supra note 1, at 42-43. The \textquotedblleft19th century fault concepts of tort law may not work well under 20th century compensatory concepts." McDowell, supra note 17, at 206. Since the 1960s, courts have moved more towards compensation for actual harm only, abolishing a number of traditional defenses and spreading the risk with less emphasis on fault. Ernest B. Lejeson, \textit{Collateral Source—An Outmoded Rule}, FOR THE DEFENSE, Oct. 1986, at 1].
\end{enumerate}
\end{footnotesize}
A. Recognition of the Collateral Source Rule

The collateral source rule was first recognized by the United States Supreme Court in 1854. The Court reasoned that the receipt of insurance benefits by the injured party was of no concern to the wrongdoer who had no direct relationship with the insurer. Therefore, the wrongdoer was "bound to make satisfaction for the injury." The collateral source rule has been "recognized and applied by all courts of the United States.

Since the collateral source rule has endured so long as a principle of tort law, many courts throughout the United States have been unwilling to abandon it. The rule was applied by Georgia courts as early as 1885 and has been applied in property damage, wrongful death, and personal injury cases. Georgia courts have also shown a reluctance to abandon the collateral source rule, finding ways to apply the rule even after the Georgia General Assembly passed legislation specifically abrogating the rule. In Denton, the Supreme Court of Georgia found a way to strike the statute completely by holding it unconstitutional.

B. Justifications for the Collateral Source Rule

The collateral source rule originated at a time when there were very few collateral source benefits available. Two primary reasons supported the original adoption of the collateral source

23. The Propeller Monticello v. Mollison, 58 U.S. (17 How.) 152 (1854). The Court refused to allow the fact that a party had collected from his own insurance to release a wrongdoer from liability, recognizing this as a common law doctrine which was well established. Id. at 155. This doctrine later came to be known as the "collateral source" rule. See Goldsmith, supra note 16, at 799 n.1.
25. Id.
26. Van Meter, supra note 1, at 981.
27. Gobis, supra note 18, at 857-58.
32. Van Meter, supra note 1, at 982. Sources such as employee benefits and insurance plans were practically nonexistent in the mid-nineteenth century when the collateral source rule first appeared. Id.
rule.\textsuperscript{33} The first was the recognition of the concept of compensation for injury as a means for restoration of the injured party.\textsuperscript{34} The second was the recognition that punitive measures against the tortfeasor would promote deterrence of tortious conduct.\textsuperscript{35}

The collateral source rule prohibits the introduction of any evidence showing that a plaintiff has recovered some or all of her damages from a source collateral to the defendant.\textsuperscript{36} Application of the collateral source rule is supported by reasoning that a tortfeasor should be forced to bear the full effect of the wrong, and that a party who has been injured should be the one to benefit from any other sources of compensation for the injury.\textsuperscript{37}

Without this protection, some rights of the injured party may be lost.\textsuperscript{38} Since damages for personal injuries are not usually fully compensated, the injured party should be the one to benefit from additional insurance or other recovery instead of allowing the benefit to go to the tortfeasor through a reduction of damages.\textsuperscript{39} The collateral source rule prevents the defendant from benefiting just because the plaintiff had the foresight to obtain insurance.\textsuperscript{40}

Holding the defendant at fault with no reduction for other sources of recovery is also intended to deter tortious conduct.\textsuperscript{41}

\begin{itemize}
  \item\textsuperscript{33} Id.
  \item\textsuperscript{34} Id. at 982-83.
  \item\textsuperscript{35} Id.
  \item\textsuperscript{36} James L. Branton, The Collateral Source Rule, 18 St. Mary's L.J. 883 (1987). The rule prevents introduction of evidence regarding collateral source recoveries, as well as the reduction of a judgment on account of collateral source recoveries. Id. The fundamental purpose of the rule in prohibiting this evidence is to allow the injured party to seek full damages from the tortfeasor without sacrificing the right to receive payments from insurance sources of her own. Flynn, supra note 1, at 40-41.
  \item\textsuperscript{37} Goldsmith, supra note 16, at 800-01. Another similar argument is that the foresight or fortune of the injured party in obtaining insurance should not be a benefit to the wrongdoer. Ferguson, supra note 20, at 1310.
  \item\textsuperscript{38} See Montandon v. Colehour, 469 S.W.2d 222, 228-29 (Tex. Civ. App. 1971). This is true because damages cannot practically be expected to compensate a plaintiff in full for all losses. Sally Mann Romano & Alan J. Winters, Collision of Contribution With Collateral Sources, 54 Tex. B.J. 228, 230 (1991).
  \item\textsuperscript{39} Romano & Winters, supra note 38, at 226. "If there must be a windfall certainly it is more just that the injured person shall profit therefrom, rather than the wrongdoer shall be relieved of his full responsibility for his wrongdoing." Grayson v. Williams, 256 F.2d 61, 65 (10th Cir. 1958).
  \item\textsuperscript{40} See Ferguson, supra note 20, at 1310. From a public policy view this also encourages persons to acquire insurance, a result which is highly desirable. Gobis, supra note 18, at 862.
  \item\textsuperscript{41} Goldsmith, supra note 16, at 801; Ferguson, supra note 20, at 1309-10. There
\end{itemize}
Double recovery by a plaintiff is therefore justified as a better alternative than reducing the liability of a defendant tortfeasor. Thus, the collateral source rule requires a defendant to be fully liable for the damages caused without reduction for recoveries the plaintiff has made from collateral sources.

The collateral source rule has also been justified on the basis that an injured plaintiff often incurs additional expenses, such as legal fees, which may be offset by any additional recovery received. Attorney's fees cannot normally be recovered as costs or as damages in tort actions. Since tort cases are frequently handled by attorneys on a contingency fee basis, a substantial portion of the plaintiff's judgment for damages may go toward attorney's fees or for other costs.

C. Criticisms of the Collateral Source Rule

The collateral source rule has received substantial criticism, primarily because it may be used to allow an injured party to receive double recovery for an injury. Critics argue that this overcompensation is unfair to insurance companies and that it defeats the purpose of tort law by allowing the plaintiff to be compensated for more than the actual loss incurred. This concern gains even greater support when the additional recovery comes from public funds, such as unemployment or disability benefits.

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42. Goldsmith, supra note 16, at 800.
43. Rome v. Rhodes, 68 S.E. 330 (Ga. 1910); see Branton, supra note 36, at 884.
44. Ferguson, supra note 20, at 1310-11.
46. Flynn, supra note 1, at 47.
47. Goldsmith, supra note 16, at 802-03. The main focus of concern is usually that the rule will encourage litigation and therefore increase the burden on the judicial system, or that higher insurance premiums will result because of increased damages and legal costs. Id.
48. Flynn, supra note 1, at 44-45.
This additional avenue of recovery may also encourage litigation in cases where the plaintiff has already been fully reimbursed by collateral sources for damages caused by the tortfeasor.\textsuperscript{50} Courts have also suggested that juries are likely to misuse collateral source information or be confused or prejudiced by collateral source evidence in evaluating liability and damages.\textsuperscript{51} This confusion and the introduction of additional evidence could also prolong the trial process.\textsuperscript{52} Most courts will therefore refuse to admit collateral source evidence, even when it is proposed for a limited purpose.\textsuperscript{53}

Critics have also argued that the courts have circumvented legislative action by using the collateral source rule to award what are essentially punitive damages.\textsuperscript{54} When the collateral source rule is used by courts to substitute for the absence of punitive damages, negligent tortfeasors are treated the same as if they intended their actions, or as though they are being held strictly liable for their actions.\textsuperscript{55} Justification of the collateral source rule on the basis of punishment and deterrence of tortious conduct has therefore been criticized as improper, particularly where the conduct of the wrongdoer was merely negligent as opposed to intentional.\textsuperscript{56}

The collateral source rule has also been criticized for hiding information from the jury regarding relevant benefits.\textsuperscript{57} Juries are then left to make decisions in the absence of all the facts, resulting in a decided advantage for a plaintiff who, unknown to the jury, has already recovered in full for her damages.\textsuperscript{58}

\begin{footnotes}
\footnote{50}{\textit{Id.} at 803.}
\footnote{51}{Eichel v. New York Cent. R.R., 375 U.S. 253 (1963); Goldsmith, supra note 16, at 800-01.}
\footnote{52}{Goldsmith, supra note 16, at 801.}
\footnote{53}{Id. at 801-02. For instance, if a plaintiff claims inability to obtain medical care for financial reasons, collateral source evidence might be offered to show that funds were available for the medical care. However, most courts will still refuse to allow the evidence due to its prejudicial impact, fearing that the jury might still use the collateral source evidence to reduce the plaintiff's recovery. Id.}
\footnote{54}{Id. This is supported by the concept that compensation, not punishment, should be the only goal of tort law. Flynn, supra note 1, at 47.}
\footnote{55}{Goldsmith, supra note 16, at 804. Again, the question is raised whether deterrence is a valid argument with respect to negligent conduct. Id.; see supra note 41.}
\footnote{56}{Goldsmith, supra note 16, at 804.}
\footnote{57}{Flynn, supra note 1, at 46.}
\footnote{58}{Id.}
\end{footnotes}
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Criticism of the collateral source rule has led to many changes in the application of the rule in the United States.\textsuperscript{59} Many states have restricted or totally abrogated the collateral source rule.\textsuperscript{60} This has caused inconsistent results between jurisdictions so that one plaintiff may receive a very different award than a plaintiff who is in a similar factual situation but a different state.\textsuperscript{61}

II. TORT REFORM MOVEMENTS IN THE UNITED STATES AND GEORGIA

A. Attacks on the Collateral Source Rule

Since the 1970s, insurance companies have responded to increased costs by calling for drastic changes in the law regarding tort damages.\textsuperscript{62} These calls for reform have included requests for abrogation of the collateral source rule.\textsuperscript{63} One reason the collateral source rule has been the target of attack by those interested in reforming tort laws is that modification of the rule is considered to be a less drastic method of reform and may be more easily accomplished.\textsuperscript{64} Yet many courts have continued to find ways to apply the rule in spite of disapproval by the public, the defense bar, and state legislatures.\textsuperscript{65}

The initial abolition of the collateral source rule by many states in the 1970s was limited to medical malpractice cases.\textsuperscript{66} After accomplishing this limitation of the rule in medical malpractice cases, proponents of tort reform argued that abolition of the rule was also needed in other kinds of tort cases.\textsuperscript{67} An insurance crisis in the 1980s resulted in renewed efforts in many

\textsuperscript{59} Goldsmith, supra note 16, at 805-06.
\textsuperscript{60} Id. at 806.
\textsuperscript{61} Id. The erosion and lack of consistency in the application of the collateral source rule can lead to uncertainty and unfair treatment as well as forum shopping among different jurisdictions. Id.
\textsuperscript{63} Id. In 1987 the idea that the collateral source rule would be abolished entirely was apparently regarded as "revolutionary." Id. at 977. Many states had only abolished the collateral source rule with respect to medical malpractice cases. Id.
\textsuperscript{64} McDowell, supra note 17, at 216.
\textsuperscript{65} Lageson, supra note 22, at 1.
\textsuperscript{66} Goldsmith, supra note 16, at 816; Ferguson, supra note 20, at 1304, 1312; Perrin, supra note 62, at 977.
\textsuperscript{67} Perrin, supra note 62, at 976-77.
states to pass statutes limiting the use of the collateral source rule in a broader range of cases.\footnote{Van Meter, supra note 1. Apparently, the insurance crisis was so severe that public transit systems, jails, and other municipal functions were placed in jeopardy of closing. \textit{Id}. at 978 n.5.}

Subrogation clauses, which provide the insurer the right to recover directly from the tortfeasor the amount paid to the plaintiff by insurance, have also been used to ease the impact of the application of the collateral source rule.\footnote{Flynn, supra note 1, at 49-50. Through subrogation, an insurance company may have the right to recover benefits paid from the tortfeasor, the insured, or both. \textit{Id}. at 50. However, because of the time and expense involved in pursuing a subrogation claim, many insurers may not enforce subrogation, particularly in cases involving medical insurance, but may instead turn to other methods such as contractual clauses which coordinate benefits between insurers to share costs. \textit{Id}.} Subrogation forces the repayment of collateral source funds from the award against the tortfeasor.\footnote{Perrin, supra note 62, at 991. The insurer pays the insured for the amount of her damages and then brings suit against the tortfeasor in the name of the injured party for repayment to the third party insurer of the damages already paid to the injured party. \textit{Id}.} Even if subrogation is not specifically included in contractual language, courts may imply subrogation rights in some instances.\footnote{Gobis, supra note 18, at 884-65. Implied subrogation rights are generally found in cases which involve property damage, as in the case of fire or property insurance policies, where the dollar value of the injury is clear; however, implied subrogation rights are not usually found in cases involving personal injuries. \textit{Id}.} Most state legislatures that have abolished the collateral source rule have agreed that the rule will still apply where a right of subrogation exists because the threat of double recovery is no longer present.\footnote{Goldsmith, supra note 16, at 808. However, Georgia’s statute abrogating the collateral source rule did not have a section describing how subrogation rights were to be treated. O.C.G.A. § 51-12-1(b) (Supp. 1991). “An ideal statute abolishing the collateral source rule would provide either that the rule not be abolished as to collateral sources that have subrogation rights or liens by law, or that providers of collateral sources considered by the trier of fact have no subrogation rights.” Rainwater, supra note 7, at 6.}

Treatment of the collateral source rule varies greatly between states because each state has dealt with tort reform in different ways.\footnote{Goldsmith, supra note 16, at 833-35. It has been suggested that state legislatures and courts should focus on achieving some degree of uniformity with other states when considering future modifications or limitations to the collateral source rule. \textit{Id}. at 834.} Some states have abrogated the rule entirely, while other states have only limited use of the rule to specific kinds of actions based on the amount, method, or source of recovery.\footnote{\textit{Id}. at 806-08. Some examples of limitations placed by states on application of

\footnote{\textit{Id}. at 806-08. Some examples of limitations placed by states on application of...}
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Although it is unreasonable to expect that all states will treat the collateral source rule uniformly, it is arguable that some effort should be made to achieve similar treatment of collateral source evidence in order to reduce the uncertainty of tort liabilities and damages.\footnote{75}{Id. at 834-35.}

B. Tort Reform in Georgia

In 1987 the Georgia General Assembly made "substantive and comprehensive" changes in Georgia tort law by passing the Tort Reform Act of 1987.\footnote{76}{1987 Ga. Laws 915. In addition, the legislature passed the Medical Malpractice Reform Act of 1987 affecting tort claims in medical malpractice actions. 1987 Ga. Laws 887; see Michael G. Frick & John E. Hall, Jr., Torts, 39 MERCER L. REV. 327, 359 (1987).} The evidentiary rule was changed, permitting the admission of collateral benefits, which were previously irrelevant, in actions seeking special damages.\footnote{77}{Polito v. Holland, 365 S.E.2d 273, 275 (Ga. 1988).} While reduction of damages was not mandated, the new law gave the trier of fact the discretion to consider such mitigating evidence.\footnote{78}{Id.}

Members of the insurance industry in Georgia were instrumental in supporting passage of the Tort Reform Act of 1987, ostensibly to facilitate settlements and stabilize insurance costs.\footnote{79}{Amicus Curiae Brief of the Georgia Liability Crisis Coalition at 2, 9, Denton v. Con-Way Express, Inc., 402 S.E.2d 269 (Ga. 1991). Although the insurance industry has often targeted the collateral source rule as being in need of reform to save the industry or reduce costs, some have claimed that there has been no showing that elimination of the collateral source rule would accomplish these objectives. See Branton, supra note 36, at 887-88. But see Katie Wood, Denton Retrial Yields 500% Larger Award, FULTON COUNTY DAILY REP., Sept. 13, 1991, at 1 (reporting that the 1991 retrial of Denton v. Con-Way Express, Inc., in which collateral source evidence was withheld, resulted in an award of over $66,000.00, compared to an award of $10,000.00 in 1990 at the previous trial when collateral source evidence was admitted).} Yet in the same year that the Georgia General Assembly finally yielded to the pressures of tort reform, similar laws were already being subjected to constitutional challenges and failing in other states.\footnote{80}{See Branton, supra note 36, at 888-89; Thomas F. Lambert, Jr., Tom on Torts, 30 ASS'N OF TRIAL LAW. OF AM. L. REP. 340, 340-41 (1987); Ferguson, supra note 20,}
III. Challenges to Limitations on the Collateral Source Rule

State statutes abolishing the collateral source rule have been challenged under both the federal and state constitutions on principles of equal protection and due process. Courts have taken many different approaches in analyzing the rule under varying standards of review. Some courts have found state statutes abrogating the collateral source rule to be constitutional. Others have used equal protection or due process guarantees to invalidate the abrogation of the common law rule. The Georgia statute abolishing the collateral source rule endured for nearly four years, but was ultimately ruled unconstitutional by the Supreme Court of Georgia in March of 1991.

A. Choosing a Standard of Review

Challenges under guarantees of due process have dealt with whether a statute arbitrarily deprives one of a property interest in a manner which is unrelated to a legitimate governmental interest. The primary difference in the methods of analysis courts have used in evaluating due process challenges to the rule has been in the choice of the appropriate standard of review. The particular standard of review chosen determines the level of scrutiny with which the court will review the legislative action.

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at 1306-07; Van Meter, supra note 1, at 1003-04.
82. Ferguson, supra note 20, at 1317. Most courts dealing with the statutory abrogation of the collateral source rule have used either a rational basis or an intermediate standard of review. Id.
84. Branton, supra note 36, at 888-89.
86. Silverstein v. Gwinnett Hosp. Auth., 861 P.2d 1560, 1568 (11th Cir. 1988). The court in Silverstein dealt with due process and equal protection claims under both the Georgia and the federal constitutions. Id. at 1564-68.
87. James J. Watson, Annotation, Validity and Construction of State Statute Abrogating Collateral Source Rule as to Medical Malpractice Actions, 74 A.L.R.4th 32, 38 (1989). Courts may choose a traditional moderate test, under which the statute is frequently upheld as constitutional, or a stricter test involving much closer scrutiny under which the statute is likely to fail. Id.
88. See Rainwater, supra note 7, at 6. Georgia courts have traditionally given
Courts using the traditional rational basis standard of review have largely found that abrogating statutes are valid, while courts using a substantive test, which requires a higher level of scrutiny, have found that abrogating statutes unconstitutionally violate due process requirements.\textsuperscript{89} A court's choice of the standard of review is therefore of vital importance since the standard chosen can ultimately be determinative of the outcome of the challenge.\textsuperscript{90}

Challenges under equal protection provisions are generally based on the principle that similarly situated persons should be treated similarly.\textsuperscript{91} Such challenges are reviewed by courts using different levels of scrutiny depending upon the nature of the classification and the goals of the legislature in passing the statute.\textsuperscript{92} Courts have given the highest level of scrutiny to statutes which concern "suspect" classifications or intrude on "fundamental" interests.\textsuperscript{93} Under this standard of review, the court must find a "compelling governmental interest" in order for the statute to be upheld.\textsuperscript{94}

Another standard of review used by the courts for equal protection analysis centers on finding a "rational relationship to some legitimate state purpose."\textsuperscript{95} This standard of review has been used where classifications are based on economic or social factors.\textsuperscript{96} Under this standard of review, courts will presume that a statute is valid and will uphold it if they can find any rational basis for the statute.\textsuperscript{97}

greater deference to the legislature when reviewing statutes under constitutional challenge. \textit{Id.}

\textsuperscript{89} Watson, \textit{supra} note 87, at 38.

\textsuperscript{90} \textit{Id.} at 42-43. This is true of both due process and equal protection challenges. \textit{Id.}

\textsuperscript{91} Ferguson, \textit{supra} note 20, at 1314-15.

\textsuperscript{92} \textit{Id.} The United States Constitution has not been held "to require absolute equality" in order to satisfy equal protection provisions. \textit{Id.} at 1314.

\textsuperscript{93} Plyler v. Doe, 457 U.S. 202, 216-17 (1982); Ferguson, \textit{supra} note 20, at 1315. For example, suspect classes include those based on race or national origin, and fundamental interests include rights of privacy, travel, and marriage. \textit{Id.} at 1315 n.42.

\textsuperscript{94} Plyler, 457 U.S. at 217; Ferguson, \textit{supra} note 20, at 1315-16.

\textsuperscript{95} Ferguson, \textit{supra} note 20, at 1316.

\textsuperscript{96} \textit{Id.}

\textsuperscript{97} \textit{Id.} The choice between strict scrutiny or a rational basis standard has been criticized as being too certain a factor for determining the outcome based on a court's choice of the method of analysis. \textit{Id.} at 1316 n.47.
Still another standard of review for equal protection challenges has utilized an intermediate level of scrutiny by looking for a “substantial relationship” between the classification used and the objective of the government.98 This intermediate standard of review has been used for classifications such as gender and illegitimacy.99

B. Application of Standards by the Courts

Courts which have found abrogation of the collateral source rule unconstitutional under equal protection principles have predominantly applied the “substantial relationship” test, which requires that legislative classifications be closely related to stated legislative goals.100 However, even within this intermediate standard of review, courts have varied in their approach to equal protection analysis.101 Some courts under this standard focus on whether the method chosen by the legislature “substantially furthers the goal of the legislation.”102 Other courts apply the higher intermediate standard of review because they consider recovery for personal injury to be a substantive right.103

Most courts upholding abrogation of the collateral source rule as constitutional have applied a “rational basis” test, which gives greater deference to the legislature in the determination of goals and the best means to attain those goals.104 These courts “defer to the legislatures’ identification of issues requiring statutory attention” and “recognize the legislatures’ latitude in developing a solution to a legislatively perceived problem.”105 The courts that have applied this standard of review have been relatively consistent in adopting the federal view of equal protection analysis and in applying it to similar provisions of their state constitutions.106

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98. Id. at 1316.
99. Id. at 1317.
100. Rainwater, supra note 7, at 6.
101. Ferguson, supra note 20, at 1321.
102. Id.
103. Id. at 1324.
105. Ferguson, supra note 20, at 1317-18.
106. Id. at 1327.
C. Other Challenges to Collateral Source Limitations

Statutes abrogating the collateral source rule have also been challenged on other bases including the injustices inherent in applying the principles of subrogation\textsuperscript{107} and in applying the statute retroactively.\textsuperscript{108} These other bases for challenge have frequently provided courts with alternative ways to apply or retain the collateral source rule following statutory abrogation.\textsuperscript{109}

In the case of subrogation rights, there is a real danger of a double reduction in the amount of the injured party’s recovery.\textsuperscript{110} For example, if collateral source information is admitted into evidence and the fact-finder reduces the award on that basis, the insurer, who still has subrogation rights, may then recover the amount of benefits it has paid out of the plaintiff’s already reduced award, effecting a double reduction for the plaintiff.\textsuperscript{111} A case resulting in double reduction could be used in support of an equal protection challenge to abrogation of the collateral source rule.\textsuperscript{112} This situation could be avoided if parties having subrogation rights are required to participate in the plaintiff’s action as necessary parties, or if collateral source evidence is treated as inadmissible when subrogation rights exist.\textsuperscript{113}

Other matters of statutory interpretation may be used to avoid the application of an abrogating statute and retain the collateral source rule in a particular case. For instance, a court may choose to avoid application of a new statute abrogating the collateral source rule if it finds that the statute is applicable only prospectively, and that the case before the court was initiated prior to the passage of the statute.\textsuperscript{114} Principles of statutory interpretation may also be argued to encourage courts to restrict the application of such statutes by focusing on whether the

\textsuperscript{107} The doctrine of subrogation, which may be included in a contract between parties such as an insurance policy, or may be imposed by law, allows one who has paid for damages caused by another to take the place of the injured party and recover from the tortfeasor. Gobis, supra note 18, at 863-65.
\textsuperscript{108} Rainwater, supra note 7, at 6-9.
\textsuperscript{109} Id.
\textsuperscript{110} Id. at 6.
\textsuperscript{111} Id. at 6-7.
\textsuperscript{112} Id. at 7.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
legislature truly intended the total abolition of the rule when it passed the abrogating statute.\textsuperscript{115}

IV. COURT RESPONSES TO GEORGIA'S STATUTORY LIMITATIONS ON THE COLLATERAL SOURCE RULE

Following the passage of Code section 51-12-1(b) in 1987, Georgia courts were faced with a number of issues regarding the interpretation and application of the statutory abrogation of the collateral source rule.\textsuperscript{116} The collateral source rule had “long been a part of Georgia law”\textsuperscript{117} and was relied upon to keep the issues simple.\textsuperscript{118} Removal of the collateral source doctrine created confusion and increased the complexity of collateral source issues for the courts and for all parties involved.\textsuperscript{119}

A. Application of Code Section 51-12-1(b)

The courts quickly faced the issue of whether the new Georgia statute would apply to actions filed prior to its passage. In \textit{Polito v. Holland},\textsuperscript{120} the trial court had ruled that evidence of collateral source benefits was now admissible under the new statute in a personal injury suit which had been filed prior to passage of the statute.\textsuperscript{121} The Supreme Court of Georgia reversed, holding that Code section 51-12-1(b) made “a substantive change in the law” regarding collateral benefits in Georgia, and that it should be applied prospectively only since the legislature did not indicate an intent otherwise.\textsuperscript{122} The

\textsuperscript{115} Romano & Winters, supra note 38, at 226-29. The Texas Legislature caused confusion in 1987 when it passed a law changing “comparative negligence” to “comparative responsibility,” causing a conflict with case law regarding the collateral source rule and raising the issue of whether the legislative intent was to abolish the rule. \textit{Id.} at 226.


\textsuperscript{117} Rainwater, supra note 7, at 2.

\textsuperscript{118} Id. at 10. With the passage of O.C.G.A. § 51-12-1(b), it was possible that another stage would be added to the trial process; in addition to liability and damages, the court would have to separately deal with a stage for analysis of collateral source evidence. \textit{Id.} at 9.

\textsuperscript{119} Id. at 10.

\textsuperscript{120} 365 S.E.2d 273 (Ga. 1988).

\textsuperscript{121} Id. at 273.

\textsuperscript{122} Id. at 273-75. When “a statute governs only procedure of the courts, . . . it is to be given retroactive effect absent an expressed contrary intention.” \textit{Id.} at 273.
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court regarded the statute as a substantive change because the law left consideration of collateral benefits and reduction of damages to “the discretion of the trier of fact” so that “damages may, under the statute, be reduced by collateral benefits, contrary to prior law.”123

The Georgia Court of Appeals further clarified the issue of prospective application in A. H. Friedman, Inc. v. Augusta Burglar Alarm Co.124 In Friedman, the court held that Code section 51-12-1(b) did not apply to causes of action which accrued125 before July 1, 1987, the effective date of the statute.126 The court further stated that the new statute would apply to property damage as well as to personal injury damages since the language of the statute used the term “tortious injury” without any further limitation.127

Another issue faced by Georgia courts was whether the admission of collateral source evidence should mandate a reduction in or a limitation on the amount of damages. The Supreme Court of Georgia held in J.C. Penney Casualty Insurance Co. v. Woodard128 that while collateral source benefits would be admitted for consideration regarding damages, there was no requirement that damages be offset because of such benefits.129 Therefore, “one who is bound by an absolute promise to pay any liability is not entitled to a set-off.”130

Otherwise, a statute is generally regarded as applying only to causes of action filed after passage of the statute. Id. 123. Id. at 275. The court also noted that the statute would work a substantive change even if it required a reduction of damages on account of collateral benefits. Id. 124. 368 S.E.2d 534 (Ga. Ct. App. 1988).
125. Id. In Polito, the cause of action had not only accrued, but the action also had been filed prior to passage of O.C.G.A. § 51-12-1(b). 365 S.E.2d at 273.
126. Friedman, 368 S.E.2d at 536-37. Thus the courts were able to retain the collateral source rule in cases for years to come as long as the right of action accrued prior to July 1, 1987. Watson v. Georgia Fed. Bank, 410 S.E.2d 387 (Ga. Ct. App. 1991) (automobile collision occurred prior to effective date of statute, so neither the 1987 statute nor the decision in Denton apply); United States Indus. v. Austin, 397 S.E.2d 469 (Ga. Ct. App. 1990).
127. 368 S.E.2d at 536.
129. Id. at 284. The insurance company was seeking to limit its liability by the amount of other insurance coverage which was available but not collected due to lack of diligence by the policy holder. Id.
130. Id.
B. Constitutional Challenges to Code Section 51-12-1(b)

Following passage of Code section 51-12-1(b), the Supreme Court of Georgia was not faced with a constitutional challenge to the statute for several years. Amid conflicting trial court opinions, the Supreme Court of Georgia finally had the opportunity to decide the constitutionality of Code section 51-12-1(b) in Denton v. Con-Way Express, Inc.\textsuperscript{131}

The court based its analysis in Denton on provisions of the Constitution of the State of Georgia.\textsuperscript{132} According to the Supreme Court of Georgia, the Georgia Constitution provides additional benefits and rights beyond those provided by the Constitution of the United States.\textsuperscript{133} The court found that "[t]he Georgia Constitution requires statutes to be 'impartial and complete.'"\textsuperscript{134} Although Georgia courts have traditionally applied the "rational basis" test in analyzing equal protection challenges,\textsuperscript{136} the court abandoned the traditional tests by choosing to simply decide whether the statute was "impartial and complete."\textsuperscript{136}

The Constitution of the State of Georgia also requires that statutes be "definite and certain" to comply with the due process clause.\textsuperscript{137} This provision requires the meaning of the statute

\textsuperscript{131} 402 S.E.2d 269 (Ga. 1991). The companion case is Georgia Power Co. v. Fulagan. Id. The Superior Court of Catoosa County in Denton upheld the statute as constitutional, while the Superior Court of Putnam County in Georgia Power declared it unconstitutional. Amicus Curiae Brief of the Georgia Liability Crisis Coalition at 2, Denton v. Con-Way Express, Inc., 402 S.E.2d 269 (Ga. 1991). Both cases involved personal injuries, in Denton resulting from an automobile accident, and in Georgia Power resulting from an accident at work. Wood, supra note 13, at 4, 5.

\textsuperscript{132} 402 S.E.2d at 270.

\textsuperscript{133} Colonial Pipeline v. Brown, 365 S.E.2d 827, 829-30 (Ga. 1988); see Poulos v. McMahan, 297 S.E.2d 451, 459 (Ga. 1982) (Weliner, J., dissenting). Denton has been cited in support of the principle that state courts are not limited by the federal approach to the standard of review applicable in determining rights under state constitutions. Moore v. Mobile Infirmary Ass'n, 592 So.2d 159 (Ala. 1992). Other states have also found state constitutional protection to be broader than federal protection. Watson, supra note 87, at 56; Ferguson, supra note 20, at 1325. Although there has been concern over how this might be extended to criminal cases, the Georgia Court of Appeals recently found that the additional protection provided under the Georgia Constitution as expressed in Denton does not violate constitutional due process rights where there is a rational basis for the legislative action. Rucks v. State, 410 S.E.2d 206, 208 (Ga. Ct. App. 1991).


\textsuperscript{135} Rainwater, supra note 7, at 6.

\textsuperscript{136} Denton, 402 S.E.2d at 270-72; Wood, supra note 13, at 4, 5.

\textsuperscript{137} GA. CONST. art. I, § 1, ¶ 1; Denton, 402 S.E.2d at 272 n.4.
and its application to be clear to persons of "common intelligence." 138 Since collateral source evidence has long been recognized as potentially prejudicial, a statute abrogating the collateral source rule would have to be drafted carefully to limit prejudice and satisfy due process requirements. 139

Tort law in Georgia provides that plaintiffs may recover damages resulting from torts committed against them. 140 Plaintiffs are allowed to recover for both general and special damages. 141 The wealth of either party is irrelevant in the determination of these damages. 142 Since wealth is irrelevant, evidence of the insurance of either party is highly prejudicial and, if admitted, can be grounds for a mistrial. 143

The Denton court criticized Code section 51-12-1(b) in that the law allowed the jury to consider "evidence which could be misused." 144 The court reasoned that where both a plaintiff and a defendant have insurance, the statute would only require admission of evidence regarding the plaintiff's insurance. 145 Therefore, the jury might "assume that only the plaintiff has insurance and the plaintiff's insurance should pay for the loss caused by the tortfeasor." 146 The court further criticized "[t]he statute's lack of standards, specific factors to be considered, and failure to offer guidance" as inviting "uncontrolled, intrinsically arbitrary, disparate, and unfair decisions." 147

According to the court, the Georgia General Assembly's abrogation of the collateral source rule in Code section 51-12-1(b)

139. Denton, 402 S.E.2d at 273 (Fletcher, J., concurring specially). Such a statute also "should be carefully scrutinized by the courts." Id.
140. Denton, 402 S.E.2d at 270. This is traced back to the early tort principles of preventing harm, deterrence, admonition of the tortfeasor, and compensation of the victim. Id.
141. Id. General damages are those presumed to result from the tortious conduct, while special damages are those which are not presumed but must be proven, such as medical costs. Id.
142. Id.
144. 402 S.E.2d at 272. Because the jury could consider collateral source insurance which is "inherently prejudicial evidence," the amount awarded for damages may be affected by this prejudice, thus resulting in damages being adjusted because of the plaintiff's financial condition. Id.
145. Id.
146. Id.
147. Id. at 272 n.4.
is therefore unconstitutional under the Constitution of the State of Georgia because it allows admission of prejudicial evidence regarding the plaintiff's sources of compensation only.\textsuperscript{148} Admitting evidence of a plaintiff's recovery from collateral sources, while denying evidence of collateral sources of the defendant, "could defeat the plaintiff's statutory right [under O.C.G.A. sections 51-1-6 and 51-1-9] to recover the damages that result from another's tortious acts, ... and also defeat the 'prophylactic' factor of preventing future harm."\textsuperscript{149}

In the concurring opinion, Justice Fletcher also noted that Code section 51-12-1(b) was not written precisely enough to limit "the prejudices inherent in admitting evidence of collateral sources" and to avoid "due process pitfalls."\textsuperscript{150} Under the constitutional requirements of due process, such a statute cannot give the trier of fact the discretion to consider collateral source evidence without providing guidance as to the purposes for which such evidence should be used.\textsuperscript{151} Justice Fletcher also noted that the statute was too broad in defining the kind of payments admissible for consideration by the trier of fact.\textsuperscript{152}

V. \textbf{AFTER DENTON: THE FUTURE OF COLLATERAL SOURCE EVIDENCE IN GEORGIA}

The ruling of the Supreme Court of Georgia, in \textit{Denton}, has again made evidence of collateral source recoveries inadmissible in actions seeking recovery for special damages.\textsuperscript{153} The court accomplished this result by using a new method of equal protection analysis under the Constitution of the State of Georgia.

\textsuperscript{148} Id. at 272.
\textsuperscript{149} Id.
\textsuperscript{150} Id. at 273 (Fletcher, J., concurring specially). Judge Pope also joined in this concurring opinion. Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id. The concurring justices note that even gifts from family members or other arbitrary amounts received, such as lottery winnings, might be included in the statutory language as being admissible collateral source evidence. Id.
\textsuperscript{153} 402 S.E.2d at 269. The Georgia Court of Appeals has now agreed that the \textit{Denton} holding may be applied retroactively. Anepohl v. Ferber, No. A91A1663 (Ga. Ct. App. Jan. 8, 1992); Katie Wood, \textit{Damages Landmark Applied Retroactively}, FULTON COUNTY DAILY REP., Jan. 15, 1992, at 1, 5. In \textit{Anepohl}, which was tried approximately six months prior to the \textit{Denton} decision, the trial judge directed a verdict for the plaintiff regarding liability, but the jury awarded no damages. Id. The \textit{Anepohl} jury had been told that the plaintiff already received reimbursement from insurance for medical expenses and time lost from work. Id.
and by abandoning the traditional two-tiered approach established by the United States Supreme Court. This new method for evaluating equal protection claims has therefore resulted in a return to the common law collateral source rule.

However, the opportunity may still exist for abrogation of the collateral source rule in Georgia through action by the Georgia General Assembly or the Supreme Court of Georgia. The Georgia General Assembly could draft a more specific and narrowly drawn statute and again abrogate the collateral source rule in Georgia. A new statute which provides for the admission of collateral source evidence for both plaintiffs and defendants may be held by the Supreme Court of Georgia as meeting the requirements of the equal protection clause in article 1, section 1, paragraph 2 of the Constitution of the State of Georgia.

In his concurring opinion in Denton, Justice Fletcher specifically indicates that the Georgia General Assembly could draft a statute abrogating the collateral source rule in Georgia.

154. Denton, 402 S.E.2d 269. The traditional two-tiered test, consisting of strict scrutiny and rational basis tests, has also been supplemented by a third tier, the intermediate standard of review. Ferguson, supra note 20, at 1315-17.


156. 402 S.E.2d at 274 (Fletcher, J., concurring specially). In the 1992 session, a proposal was introduced in the Georgia House of Representatives which would have restored the provision of the law abrogating the collateral source rule. H.B. 1247, 1992 Ga. Gen. Assem. As introduced, the only change proposed was to replace the word "same" with the words "such damages," clarifying the wording but leaving the substance of the law the same as it was prior to Denton. Id.; Paul Kvinta, Plaintiffs Lobby Plays Defense, Girls for Bills Aimed at Limiting Litigation, FULTON COUNTY DAILY REP., Jan. 15, 1992, at 1, 3. Representative Boyd Pettit, who introduced the legislation, would like to see it passed so the Supreme Court of Georgia could reassess the constitutionality of the law, hopefully based on facts different than those in Denton. Interview with Representative Boyd Pettit, House District No. 19, in Atlanta, Ga. (Feb. 3, 1992). However, in the committee discussion regarding this legislation, there were other proposals for changes in the law, as well as suggestions that the collateral source rule should be left intact and none of the proposals passed. Georgia House of Representatives Judiciary Committee Meeting, Feb. 3, 1992 (notes on file with the Georgia State University Law Review office); see Paul Kvinta, Generous Cap on Suits Against State, Also, Collateral Source Fee Plays to a Tough House, FULTON COUNTY DAILY REP., Feb. 19, 1992, at 1, 4-5.

157. GA. CONST. art. I, § 1, ¶ 2. The opinion of the Georgia Supreme Court in Denton indicates that O.C.G.A. § 51-12-1(b) violated the "impartial and complete" requirement of the constitution because it allowed evidence of collateral sources to be admitted only against the plaintiff. Denton v. Con-Way Express, Inc., 402 S.E.2d 269, 272 (Ga. 1991).
that would pass constitutional due process requirements. Justice Fletcher also references statutes from other states which limit the use of collateral source evidence or give guidance on the proper use of such evidence. Similar statutes abrogating the collateral source rule have been upheld as constitutional by courts in other states.

These statutes, which have been upheld as constitutional in other states, may provide a guide for drafting a Georgia statute “which would avoid the due process problems associated with vagueness.” For example, Florida’s statute deals specifically with actions involving motor vehicles and broadly defines collateral sources to include public programs, insurance benefits, and contractual agreements for coverage or reimbursement of wages. Indiana’s statute applies to actions for wrongful death

158. 402 S.E.2d at 274 (Fletcher, J., concurring specially).
159. Id. at 274 n.1. However, some of the statutes cited relate to collateral sources in medical malpractice or health care actions only, providing that a health care provider may introduce certain collateral source evidence in defending an action for medical malpractice. ARIZ. REV. STAT. ANN. § 12-565 (Supp. 1991); CAL. CIV. CODE § 3333.1 (West Supp. 1991). According to information provided to the Georgia House of Representatives Judiciary Committee by the Georgia Trial Lawyers Association, fifteen states have no statute authorizing admission of collateral source evidence, four states allow collateral source evidence to go to the jury, twelve states allow the judge to reduce the verdict on the basis of collateral source evidence, and eighteen states limit the admission of collateral source evidence to cases involving medical malpractice. Summary of State Laws Regarding Collateral Source Evidence, Georgia Trial Lawyers Ass’n (on file with the Georgia State University Law Review). However, there are numerous miscellaneous restrictions and special circumstances contained in these statutes. Id.
160. Rainwater, supra note 7, at 5-6.
161. 402 S.E.2d at 274 (Fletcher, J., concurring specially); see, e.g., FLA. STAT. ch. 627.7372 (1990); IND. CODE ANN. § 34-4-36-2 (Burns 1991); IOWA CODE § 688.14 (Supp. 1989).
162. FLA. STAT. ch. 627.7372 (1990). The full statute reads:

627.7372 Collateral sources of indemnity

(1) In any action for personal injury or wrongful death arising out of the ownership, operation, use, or maintenance of a motor vehicle, the court shall admit into evidence the total amount of all collateral sources paid to the claimant, and the court shall instruct the jury to deduct from its verdict the value of all benefits received by the claimant from any collateral source.

(2) For purposes of this section, “collateral sources” means any payments made to the claimant, or on his behalf, by or pursuant to:

(a) The United States Social Security Act; any federal, state, or local income disability act; or any other public programs providing medical expenses, disability payments, or other similar benefits.

(b) Any health, sickness, or income disability insurance; automobile accident insurance that provides health benefits or income disability...
or personal injury and more narrowly limits the definition of collateral sources to life insurance, other insurance paid for by the plaintiff or her family, and certain government payments.\textsuperscript{163}

Another way in which collateral source evidence could again be admissible in Georgia is if the Supreme Court of Georgia reconsiders application of the collateral source rule. Other states have limited application of the collateral source rule through judicial action even in the absence of action by the legislature.\textsuperscript{164} However, given the long adherence by Georgia

coverage; and any other similar insurance benefits except life insurance benefits available to the claimant, whether purchased by him or provided by others.

(c) Any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services.

(d) Any contractual or voluntary wage continuation plan provided by employers or any other system intended to provide wages during a period of disability.

(3) Notwithstanding any other provision of this section, benefits received under Medicare or any other federal program providing for a federal government lien on the plaintiff's recovery, the Workers' Compensation Law or the Medicaid program of Title XIX of the Social Security Act, or from any medical services program administered by the Department of Health and Rehabilitative Services shall not be considered a collateral source.


163. \textsc{Ind. Code Ann.} \textsection 34-4-36-2 (Burns 1991). The full statute reads:
34-4-36-2. Admissible evidence.

In a personal injury or wrongful death action the court shall allow the admission into evidence of:

(1) Proof of collateral source payments, other than:
(A) Payments of life insurance or other death benefits;
(B) Insurance benefits for which the plaintiff or members of the plaintiff's family have paid for directly; or
(C) Payments made by the state or the United States, or any agency, instrumentality, or subdivision thereof, that have been made before trial to a plaintiff as compensation for the loss or injury for which the action is brought;

(2) Proof of the amount of money that the plaintiff is required to repay, including worker's compensation benefits, as a result of the collateral benefits received; and

(3) Proof of the cost to the plaintiff or to members of the plaintiff's family of collateral benefits received by the plaintiff or the plaintiff's family.

\textit{Id.}

courts to the collateral source rule and its place in Georgia tort law, it is unlikely that any significant changes will be made by the courts.\textsuperscript{165}

The makeup of the court deciding \textit{Denton} has also been noted in considering its precedential value.\textsuperscript{166} The determination in \textit{Denton} was made by a plurality decision in which two of the court’s justices did not participate.\textsuperscript{167} A former justice of the court has cautioned against placing too much emphasis on \textit{Denton}.\textsuperscript{168} Others have also recognized that the present court might not agree with the result or the method of analysis used in \textit{Denton}.\textsuperscript{169}

Nevertheless, the opinion in \textit{Denton} currently controls tort law in Georgia\textsuperscript{170} and consequently may result in higher damage awards for injured plaintiffs in Georgia.\textsuperscript{171} Until additional case law or legislative action changes the status of admissibility of collateral source evidence in Georgia, plaintiffs who have recovered from collateral sources for special damages may again pursue actions against tortfeasors with the knowledge that collateral source recoveries cannot be considered by the jury.\textsuperscript{172}

**CONCLUSION**

The collateral source rule has long been accepted by courts in Georgia and throughout the United States. Georgia courts, along

\begin{itemize}
  \item 94.
  \item 165. Rainwater, \textit{supra} note 7, at 10.
  \item 166. Wood, \textit{supra} note 13, at 4, 5.
  \item 167. Justice Weltner did not participate in the decision in \textit{Denton} due to illness, and Justice Hunt was disqualified because a relative worked for one of the parties in the companion case; two judges from the Georgia Court of Appeals, Judge Hugh D. Sosebee, Jr. and Judge Thomas Pope participated instead. Denton v. Con-Way Express, Inc., 402 S.E.2d 269, 272-73 (Ga. 1991); Wood, \textit{supra} note 13, at 4, 5. The opinion of the court was written by Presiding Justice Smith, joined by Justice Benham, and Judge Sosebee; Justice Fletcher wrote a special concurring opinion which was joined by Judge Pope; Chief Justice Clarke and Justice Bell dissented. 402 S.E.2d at 272-73.
  \item 168. Wood, \textit{supra} note 13, at 4, 5.
  \item 169. \textit{Id.}
  \item 171. See Wood, \textit{supra} note 79, at 1, 7.
  \item 172. \textit{Denton}, 402 S.E.2d 269. \textit{Denton} has recently been retried, and the damages awarded by the new jury exceeded the previous award by more than five times—a $56,000 increase. Wood, \textit{supra} note 79, at 1. This shows “just how effective the now-invalidated collateral source statute might have been at reducing awards.” \textit{Id.} at 1, 7.
\end{itemize}
with courts in many other states, have shown extreme reluctance to relax the rule, prohibiting the admission of collateral source evidence in spite of legislative action and pressures for tort reform. The Supreme Court of Georgia has now apparently thwarted the efforts of a coordinate branch of government to abrogate the collateral source rule.\textsuperscript{173}

Georgia courts struggled with the application of the statute\textsuperscript{174} abrogating the collateral source rule for nearly four years. The novel method of equal protection analysis and the substitution of two judges for two of the court's regular justices yielded the Supreme Court of Georgia's plurality decision to void the statute as unconstitutional.\textsuperscript{175} For now, the ruling in \textit{Denton} has reinstated the collateral source rule in Georgia as it existed prior to the passage of Code section 51-12-1(b) in 1987. However, the new method of equal protection analysis used by the court in \textit{Denton} has not yet had any other adverse impacts on Georgia law.

Georgia courts are unlikely to modify or limit the application of the collateral source rule beyond the judicially recognized exceptions which existed prior to passage of the 1987 statute. These courts seem to be comfortable with application of the collateral source rule as it had existed for many years in Georgia prior to statutory interference. Therefore, if any additional tort reform efforts aimed at restoring the admissibility of collateral source evidence in Georgia are to be forthcoming, they will likely have to result from the actions of the General Assembly.

\textit{Calvin R. Wright}

\textsuperscript{173} \textit{Denton}, 402 S.E.2d at 269.
\textsuperscript{174} O.C.G.A. § 51-12-1(b) (Supp. 1991).
\textsuperscript{175} \textit{Denton}, 402 S.E.2d at 269.