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GRATUITOUS NURSING SERVICES RENDERED BY EXTENDED FAMILY MEMBERS AND OTHER THIRD PARTIES: CAN INJURED PARTIES RECEIVE REIMBURSEMENT UNDER WISCONSIN'S COLLATERAL SOURCE RULE?

I. INTRODUCTION

In 1994, Jane Doe[1] underwent a mammogram that detected an abnormality in her left breast. Doe switched doctors shortly thereafter because of insurance reasons, but not before the doctor who administered the mammogram gave her strict instructions to have a follow-up mammogram in three to four months with her new healthcare provider. Doe's new doctor, however, did not perform a mammogram for over a year, delaying the diagnosis of what turned out to be a cancerous tumor. By the time the cancer was finally diagnosed, it had spread throughout her body and was untreatable. She remained severely ill and needed significant care until her death over two years after the cancer's discovery.

Doe's husband and three minor children brought suit against the second doctor, claiming that he negligently delayed the diagnosis of Doe's cancer. Their attorneys contended that if the doctor had ordered a follow-up mammogram, the cancer would have been discovered sooner and could have been treated.

The care that the woman received during her last two years turned out to be a controversial topic throughout the lawsuit because it was rendered gratuitously by her husband, children, and extended family members. The defense contended that, based on Wisconsin Civil Jury Instruction 1820, only the value of the spouse's donated services could be included in the damages.[2] Doe's attorneys, however, wished to

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1. This hypothetical is loosely based upon a Wisconsin medical malpractice case which this author worked on extensively while clerking at a personal injury firm the summer after his first year of law school. The facts have been reprinted with the permission of the attorneys who worked on the case, with the stipulation that none of the parties' names be disclosed.

2. The instruction, entitled "Injury to Spouse: Nursing Services: Past and Future," states:

Subdivision ___ of question ___ asks what sum of money will compensate (name) for

include the gratuitous nursing services donated by all the family members, even those in the extended family, in their petition for damages.

The above fact pattern, while only a hypothetical, raises an important question about the state of the law in Wisconsin regarding damages calculations: Does Wisconsin's collateral source rule permit plaintiffs to include the value of nursing services rendered gratuitously by extended family members or other third persons in their damage claims?

Wisconsin's collateral source rule has long been that the jury must consider the value of the nursing services rendered when formulating a damage award, not the billed or paid-for amount.[3] In other words, a plaintiff's damages cannot be reduced by the fact that the plaintiff received some of the care at a discount or for free. However, as previously mentioned, Wisconsin's jury instruction on the issue only includes services donated by a spouse, not extended family members. Because inclusion of services rendered by extended family members could dramatically increase many plaintiffs' damage claims, resolution of this question could have a far-reaching effect on personal injury litigation in Wisconsin.

This Comment discusses the collateral source rule in Wisconsin and how the rule treats nursing services rendered gratuitously by extended family members and other third parties. Part II of this Comment offers a general overview of the collateral source rule, analyzing criticisms of the rule and justifications for allowing a plaintiff to collect for gratuitous nursing services in light of the criticisms. Part III discusses the evolution

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> personal nursing care and services rendered to (his wife) (her husband). If you find that (name) performed services in nursing and caring for (his wife)(her husband) and that the services were necessarily rendered because of (her) (his) injuries, you should name such sum as you feel will fairly and reasonably compensate (name) for the personal nursing care and services, not exceeding the amount for which (name) could have employed others to do the work. If you find that for any foreseeable time in the future (he) (she) will be performing such necessary services, you should also make reasonable allowances for the future services.

WIS JI-CIVIL 1820 (1992).

3. McLaughlin v. Chicago, Milwaukee, St. Paul & Pac. Ry. Co., 31 Wis. 2d 378, 396, 143 N.W.2d 32, 40–41 (1966). In *McLaughlin*, the Wisconsin Supreme Court stated:

> The general rule is that a plaintiff who has been injured by the tortious conduct of the defendant is entitled to recover the reasonable value of medical and nursing services reasonably required by the injury. This is a recovery for their *value* and not for the expenditures actually made or obligations incurred.

Id. at 396, 143 N.W.2d at 40 (emphasis added) (citations omitted).

of gratuitous nursing services cases in Wisconsin and how the Wisconsin Supreme Court's recent decision in *Ellsworth v. Schelbrock*,[4] that discusses the collateral source rule, has affected Wisconsin law. Part IV proposes a new jury instruction for Wisconsin. Finally, this Comment concludes that the collateral source rule in Wisconsin permits plaintiffs to include the value of nursing services gratuitously rendered by extended family members and other third parties.

II. THE COLLATERAL SOURCE RULE

A. Common Law Overview

The collateral source rule has been recognized by the common law since the nineteenth century.[5] While some believe that the New York Court of Appeals case of *Althorf v. Wolfe*[6] is the earliest American decision applying the collateral source rule,[7] most legal scholars trace the development of the rule to the United States Supreme Court case of *The Propeller Monticello v. Mollison*.[8] In *Monticello*, the defendant-steamship rammed and sunk the plaintiff-schooner.[9] The defendant asserted that the plaintiff had insurance on the vessel and thus received full compensation for the damage from the insurance proceeds.[10] The Court rejected this argument, ruling that the defendant was not relieved from liability simply because the plaintiff was insured.[11] While never

4. 2000 WI 63, 235 Wis. 2d 678, 611 N.W.2d 764.

5. Richard C. Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669, 671 (1962); Banks McDowell, *The Collateral Source Rule—The American Medical Association and Tort Reform*, 24 WASHBURN L.J. 205, 205 (1985).

6. 22 N.Y. 355 (1860). In *Althorf*, the defendant instructed one of his servants to clear snow and ice from the roof of his house. *Id.* at 355. As the servant did so, some of the snow and ice struck a passerby and killed him. *Id.* at 356. At trial, defense counsel asked for a jury instruction that took into consideration the receipt of life insurance proceeds by the decedent's widow in the determination of damages. *Id.* at 358. The judge did not give the instruction, and the court of appeals affirmed the ruling without discussing the issue. *Id.* at 367. In his discussion of the case, one author commented: "Perhaps the court thought it too obvious to be worth discussing that the early accrual of benefits under a life insurance contract in which the deceased had invested was not a benefit which [a] widow must deduct when suing for [her husband's] wrongful death." Maxwell, *supra* note 5, at 671.

7. Maxwell, *supra* note 5, at 671 n.6.

8. 58 U.S. (17 How.) 152 (1854).

9. *Id.* at 153.

10. *Id.* at 154.

11. *Id.* at 155. "The contract with the insurer is in the nature of a wager between third parties, with which the trespasser has no concern. The insurer does not stand in the relation of a joint trespasser, so that satisfaction accepted from him shall be a release of others." *Id.*

explicitly defining the payment as a collateral source, the Court explained that the doctrine it applied in this case was well established at common law.[12] The term "collateral source" was not actually used in judicial discourse until 1870.[13]

Despite some states' attempts to modify or abolish the collateral source rule,[14] the rule is now applied in one form or another throughout the country.[15] The collateral source rule states generally that "if an injured person receives compensation for his injuries from a source wholly independent of the tort-feasor, the payment should not be deducted from the damages which he would otherwise collect from the tort-feasor."[16] Under this rule, an injured party may be compensated twice for the same injury.[17] For example, this means that an injured party in an automobile accident can recover once from a negligent tort-feasor and once from his or her automobile insurance.[18] Although the collateral source rule has both evidentiary and damages aspects,[19] this

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12. *Id.*

13. Albert Averbach, *The Collateral Source Rule*, 21 OHIO ST. L.J. 231, 233 (1960). *Harding v. Town of Townshend*, 43 Vt. 536 (1871), has been credited as the first case to use the term "collateral." *Id.* In ruling that the receipt of insurance proceeds must not be deducted from a plaintiff's damage award, the court stated:

> The policy of insurance is collateral to the remedy against the defendant, and was procured solely by the plaintiff and at his expense, and to the procurement of which the defendant was in no way contributory. It is in the nature of a wager between the plaintiff and a third person, the insurer, to which the defendant was in no measure privy, either by relation of the parties or by contract or otherwise. It cannot be said that the plaintiff took out 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.

Id. at 538.

14. *See* Linda J. Gobis, Note, Lambert v. Wrensch*: Another Step Toward the Abrogation of the Collateral Source Rule in Wisconsin*, 1988 WIS. L. REV. 857, 888.

15. Christian D. Saine, Note, *Preserving the Collateral Source Rule: Modern Theories of Tort Law and a Proposal for Practical Application*, 47 CASE W. RES. L. REV. 1075, 1077 (1997).

16. BLACK'S LAW DICTIONARY 262 (6th ed. 1990).

17. Saine, *supra* note 15, at 1076.

18. *See id.*

19. L. Timothy Perrin, Comment, *The Collateral Source Rule in Texas: Its Impending Demise and a Proposed Modification*, 18 TEX. TECH L. REV. 961, 961 (1987).

> As a rule of evidence, [the collateral source rule] precludes introduction into evidence of any benefits the plaintiff obtained from sources collateral to the defendant. As a rule of damages, it forces the defendant to pay for the entire loss he caused despite independent recoveries by the plaintiff for the same loss.

Id. In its capacity as both a rule of evidence and a rule of damages, the collateral source rule's

Comment will focus on the rule only as it pertains to damages.

In its discussion of the collateral source rule as a rule of damages, the *Restatement (Second) of Torts* states that "[p]ayments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable."[20] Furthermore, "it is the tortfeasor's responsibility to compensate for all harm that he [or she] causes, not confined to the net loss that the injured party receives."[21] Put differently, receipt of collateral source payments does not reduce a judgment against a defendant.[22] The *Restatement* categorizes collateral sources into four distinct groups: insurance policies, employment benefits, gratuities, and social legislation benefits.[23] Wisconsin considers these same benefits collateral sources.[24]

Wisconsin law has recognized the collateral source rule since 1908.[25] In describing the rule, the Wisconsin Supreme Court stated, "Wisconsin has long been committed to the collateral-source rule which provides that a plaintiff's recovery will not be reduced by the fact that the . . . payments were made by some source collateral to [the] defendant."[26] By placing the entire cost of the harmful conduct on the tort-feasor, Wisconsin courts hope to deter negligent conduct.[27] A tort-feasor must

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function is to screen from the jury evidence of collateral payments. John L. Antracoli, Note, *California's Collateral Source Rule and Plaintiff's Receipt of Uninsured Motorist Benefits*, 37 HASTINGS L.J. 667, 669 n.24 (1986) (citation omitted). If the jury does not hear evidence of collateral payments, the belief is that they will not take such payments into account and will not deduct them from damage calculations. *Id.*

20. RESTATEMENT (SECOND) OF TORTS § 920A(2) (1979).

21. *Id.* § 920A cmt. b.

22. Antracoli, *supra* note 19, at 669.

23. RESTATEMENT (SECOND) OF TORTS § 920A cmt. c (1979).

24. Gobis, *supra* note 14, at 861 n.36. For example, in *Campbell v. Sutliff*, 193 Wis. 370, 374–75, 214 N.W. 374, 376 (1927), the Wisconsin Supreme Court held that disability policies (insurance policies) were collateral sources. In *Ashley v. American Automobile Insurance Co.*, 19 Wis. 2d 17, 24, 119 N.W.2d 359, 363 (1963), the court held that a salary paid to an employee while he was out of work due to an injury (employment benefits) was a collateral source. In *Thoreson v. Milwaukee & Suburban Transportation Corp.*, 56 Wis. 2d 231, 243, 201 N.W.2d 745, 752 (1972), the court held that gratuitous medical services paid for by the state (gratuities) were collateral sources. Also, in *Merz v. Old Republic Insurance Co.*, 53 Wis. 2d 47, 54, 191 N.W.2d 876, 879 (1971), the court held that Medicare payments (social legislation benefits) were collateral sources.

25. Gatzweiler v. Milwaukee Elec. Ry. & Light Co., 136 Wis. 34, 39, 116 N.W. 633, 634 (1908) (holding that because an insurance contract is an investment contract, it gives a plaintiff an absolute right of action against a tort-feasor even after insurance benefits have been paid).

26. *Merz*, 53 Wis. 2d at 54, 191 N.W.2d at 879.

27. Am. Standard Ins. Co. v. Cleveland, 124 Wis. 2d 258, 264, 369 N.W.2d 168, 172 (Ct.

not be allowed to benefit "simply because the victim had the foresight to arrange, or good fortune to receive, benefits from a collateral source for injuries and expenses."[28]

B. Criticisms of the Collateral Source Rule and Justifications for its Application

1. Criticisms

Some critics have questioned the fairness of allowing plaintiffs to receive the value of collateral source payments in their damage awards.[29] Nursing services rendered gratuitously by extended family members, as collateral sources, must withstand these criticisms to be included in a damage award. While these concerns may be valid, such criticisms can be logically rebutted and do not justify reducing a plaintiff's damages simply because the services were donated.

One of the major criticisms of the collateral source rule is that it creates a windfall for plaintiffs because they receive a double recovery.[30] This criticism is based on the fact that even though injured plaintiffs who receive gratuitous nursing services do not have to pay for them, they can nevertheless recover for them from the tort-feasor in a damage award.[31]

Another criticism of the collateral source rule is that it "conflicts with the compensatory function of tort law."[32] The purpose of tort law is to make plaintiffs whole again after the accident occurs, or to put plaintiffs in the same condition as before the accident.[33] The collateral source rule, however, requires a tort-feasor to pay even though plaintiffs

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App. 1985).

28. Ellsworth v. Schelbrock, 2000 WI 63, ¶ 7, 235 Wis. 2d 678, 684, 611 N.W.2d 764, 767.

29. *See generally* David Fellman, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741 (1964); Charles W. Peckinpaugh, Jr., *An Analysis of the Collateral Source Rule*, 524 INS. L.J. 545 (1966); Robert Allen Sedler, *The Collateral Source Rule and Personal Injury Damages: The Irrelevant Principle and the Functional Approach*, 58 KY. L.J. 36 (1969).

30. Lee R. West, *The Collateral Source Rule Sans Subrogation: A Plaintiff's Windfall*, 16 OKLA. L. REV. 395, 413 (1963); *see also* Brian H. Sande, *Damages Recoverable for Past Medical Services*, THE VERDICT, Fall 1999, at 15.

31. *See* West, *supra* note 30, at 413; *see also* Sande, *supra* note 30, at 15.

32. Antracoli, *supra* note 19, at 670; *see also* RESTATEMENT (SECOND) OF TORTS § 901 (1979). "The rules for determining the measure of damages in tort are based upon the purposes for which actions of tort are maintainable. These purposes are: (a) to give compensation, indemnity or restitution for harms . . . ." *Id.*

33. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 2, at 7–8 (5th ed. 1984).

have already been compensated.[34] Such recovery is akin to the receipt of punitive damages,[35] and punitive damages do not compensate, but rather punish to discourage other similar offenses.[36]

A third criticism of the collateral source rule is that it conflicts with the damage mitigation principle.[37] This principle, as outlined in the *Restatement (Second) of Torts*, states:

> When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.[38]

Therefore, using this rationale, if plaintiffs receive nursing services for free, this amount should be used to offset the damages that tort-feasors are required to pay. Application of the collateral source rule, however, contradicts this principle because the receipt of collateral nursing service benefits does not mitigate the damages.[39]

2. Justifications

These criticisms of the collateral source rule, however, do not outweigh the justifications. Two primary rationales for the rule have been enunciated. First and foremost, if there is to be a windfall, the innocent plaintiff should so benefit, not the defendant.[40] In a situation where gratuitous nursing services have been rendered, a court can do one of two things. A court can either reward the tort-feasors by making them responsible for an amount less than the full amount of the plaintiff's medical services, or a court can award the entire amount of damages to the injured person even though the victim did not pay for the services.[41]

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34. *See supra* Part II.A.

35. *See* Antracoli, *supra* note 19, at 670. For example, in *City of Salinas v. Souza & McCue Construction Co.*, 424 P.2d 921, 926–27 (Cal. 1967), the California Supreme Court said that the double recovery that results from the collateral source rule is equivalent to punitive damages. *See* Antracoli, *supra* note 19, at 670 n.30.

36. KEETON ET AL., *supra* note 33, § 2, at 9.

37. Gobis, *supra* note 14, at 861.

38. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 920 (1979)).

39. *See supra* Part II.A.

40. West, *supra* note 30, at 413.

41. Sande, *supra* note 30, at 15.

A more just result occurs from the application of the latter of the two approaches,[42] and most jurisdictions have agreed.[43] Wisconsin is no exception, as the Wisconsin Supreme Court stated:

> [A] contrary conclusion would result in giving the tortfeasor a windfall: the tortfeasor would not have to pay the full amount of damages he would owe even after taking into account the amount of contributory negligence.... [T]he better result is to allow [the plaintiff] to recover that windfall, not [the tortfeasor]. Any windfall in benefits should inure to the injured party, not to the tortfeasor.[44]

The approach giving the plaintiff the benefit of the windfall of gratuitously rendered nursing services must prevail; otherwise tortfeasors will no longer be responsible for the full amount of the damages they cause.[45] This would undermine the deterrent effect of tort law and would encourage undesirable conduct.[46]

Second, allowing a plaintiff to recover collateral sources, such as gratuitous nursing services rendered by third parties, ensures that a plaintiff will be fully compensated.[47] For example, no injured party can truly be compensated for permanent injuries for the loss of a body part.[48] In addition, a substantial portion of the amount actually awarded to plaintiffs goes toward attorney's fees.[49] While it is true that the

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42. *See* West, *supra* note 30, at 413–14.

43. *See, e.g.*, Hudson v. Lazarus, 217 F.2d 344, 346–47 (D.C. Cir. 1954). The court in *Hudson* stated:

> 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 [through the receipt of a collateral source] than if the wrongdoer is benefited.

Id. Grayson v. Williams, 256 F.2d 61, 65 (10th Cir. 1958) ("If there must be a windfall [from the receipt of collateral source benefits] 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.").

44. Voge v. Anderson, 181 Wis. 2d 726, 733, 512 N.W.2d 749, 752 (1993).

45. Sande, *supra* note 30, at 15.

46. Perrin, *supra* note 19, at 989–90. Thus, the legal system would be deprived of the opportunity to correct the wrongdoer. *Id.*

47. *See* Gobis, *supra* note 14, at 862.

48. *See* Antracoli, *supra* note 19, at 672 (quoting *Hudson*, 217 F.2d at 346).

49. *See id.* The author expounded on the following language from *Hudson*:

> Legal "compensation" for personal injuries does not actually compensate. Not

collateral source rule allows plaintiffs to receive larger judgments than they appear entitled to, the amount that they actually receive more closely resembles the full compensation they deserve.

III. EVOLUTION OF GRATUITOUS NURSING SERVICES CASES AND THE COLLATERAL SOURCE RULE IN WISCONSIN

When injured parties use collateral sources such as insurance or funds from family members to pay for medical services, the Wisconsin Supreme Court has identified such resources as collateral sources and determined that they must not be used to diminish a plaintiff's damage award.[50] However, the issue becomes more convoluted when family members donate their services and time, instead of their money. In such instances, many defendants, including those in the hypothetical described at the beginning of this Comment, argue that plaintiffs cannot recover these amounts.

When looking at the evolution of gratuitous nursing services cases in Wisconsin, or any issue involving the collateral source rule, it is useful to draw a distinction between cases decided before and after the 1987 Wisconsin Supreme Court ruling in *Lambert v. Wrensch*.[51] While the pre-*Lambert* cases demonstrated a clear trend toward recognizing the value of donated third-party nursing services in a plaintiff's damage claim, *Lambert* appeared to severely restrict application of the collateral source rule.[52] However, in 2000, the Wisconsin Supreme Court's decision in the case of *Ellsworth v. Schelbrock* clarified the holding in *Lambert* and reaffirmed the collateral source rule in Wisconsin.[53]

*A. Pre-*Lambert *Cases*

1. *Verhelst Construction Co. v. Galles*[54]

Before *Lambert*, Wisconsin case law had set a relatively clear precedent that gratuitous services rendered by any third party were

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many people would sell an arm for the average or even the maximum amount that juries award for loss of an arm. Moreover the injured person seldom gets the compensation he "recovers," for a substantial attorney's fee usually comes out of it.

Id. (quoting *Hudson*, 217 F.2d at 346).

50. *See* McLaughlin v. Chicago, Milwaukee, St. Paul & Pac. Ry. Co., 31 Wis. 2d 378, 396, 143 N.W.2d 32, 40–41 (1966).

51. 135 Wis. 2d 105, 399 N.W.2d 369 (1987).

52. *See infra* Part III.B.

53. *See infra* Part III.C.

54. 204 Wis. 96, 235 N.W. 556 (1931).

indeed collateral sources, the value of which should be included in a plaintiff's recovery. This precedent started in 1931 with *Verhelst Construction Co. v. Galles*.

In *Verhelst*, a twenty-one-year-old male was killed during the course of his employment after being struck by an automobile driven by the defendant.[55] After paying the worker's compensation award, the employer brought suit against the defendant to recover the money paid.[56] The trial court held that the employer could not recover the $200 for funeral expenses because the amount was paid by insurance.[57] The Wisconsin Supreme Court reversed, stating that when one who is not legally responsible for damages pays for them, the wrongdoer is not relieved of liability.[58] While no gratuitous nursing services were actually rendered in this case by extended family members or other parties, the court alluded that such services also would be recoverable by a decedent.[59]

2. *McLaughlin v. Chicago, Milwaukee, St. Paul & Pacific Railway Co.*[60]

After *Verhelst*, the Wisconsin Supreme Court did not discuss the gratuitous nursing services issue again until the 1966 case of *McLaughlin v. Chicago, Milwaukee, St. Paul & Pacific Railway Co.* In *McLaughlin*, a priest was injured when a train collided with the car in which he was a passenger.[61] His religious order voluntarily paid his nursing and medical costs of $1931, and the trial court ruled that this amount could not be recovered by the plaintiff.[62]

The Wisconsin Supreme Court reversed this decision, holding that when medical and nursing services are rendered gratuitously to an injured party, the injured party is not precluded "from recovering the value of those services as part of his [or her] compensatory damages."[63] Therefore, a "'plaintiff's recovery will not be reduced by the fact that

55. *Id.* at 96, 235 N.W. at 557.

56. *Id.*

57. *Id.*

58. *Id.* at 102, 235 N.W. at 558.

59. *Id.* The court ruled that nursing services gratuitously rendered by family members are similar to voluntary payments of an injured person's expenses by those other than the tort-feasor. *Id.* The victim's damage claim cannot be reduced due to the receipt of these benefits because "[s]uch payment does not inure to the benefit of the party liable for the item of damage." *Id.*

60. 31 Wis. 2d 378, 143 N.W.2d 32 (1966).

61. *Id.* at 382, 143 N.W.2d at 33.

62. *Id.* at 395, 143 N.W.2d at 40.

63. *Id.* at 395–96, 143 N.W.2d at 40.

the medical expenses were paid by some source collateral to the defendant, such as by a beneficial society, by members of the plaintiff's family, by the plaintiff's employer, or by an insurance company.'"[64] Thus, the court in *McLaughlin* ruled that even if a party is not obligated to repay a source that gratuitously pays for medical bills, such payment is not deducted from the damage award.[65]

3. *Thoreson v. Milwaukee & Suburban Transportation Corp.*[66]

In 1972, the Wisconsin Supreme Court again ruled on the issue of gratuitous services in *Thoreson v. Milwaukee & Suburban Transportation Corp.* In this case, a bus struck a three-year-old boy when he ran into the street from in front of a parked automobile.[67] The boy suffered severe brain damage, and his mother sought compensation for past and future medical expenses and nursing services[68] even though they were paid for by the state because the boy's custody was transferred to the state five years after the accident.[69]

The defendants argued that because the woman did not pay for the services, the $28,000 paid by the government for the services did not fall under the collateral source rule.[70] The Wisconsin Supreme Court disagreed, holding that when medical or nursing services are rendered gratuitously to one who is injured, the injured party is entitled to recover the value of those services from the tort-feasor on the rationale that "the recovery has a penal effect on a tortfeasor and the tortfeasor should not get the advantage of gratuities from third parties."[71] The amount that a plaintiff could recover included not the amount that was

64. *Id.* at 396, 143 N.W.2d at 40–41 (citation omitted).

65. *Id.* at 395–96, 143 N.W.2d at 40. Similarly, in *Merz v. Old Republic Insurance Co.*, 53 Wis. 2d 47, 191 N.W.2d 876 (1971), the Wisconsin Supreme Court addressed the question of whether Medicare payments should inure to the benefit of the tort-feasor. It stated:

> Wisconsin has long been committed to the collateral source rule which provides that a plaintiff's recovery will not be reduced by the fact that the medical payments were made by some source collateral to defendant. Appellants advanced no cogent argument why Medicare payments should be exempted from the collateral source rule.

Id. at 54, 191 N.W.2d at 879 (citation omitted). Thus, damage awards will also not be reduced when government programs pay the bills. *Id.*

66. 56 Wis. 2d 231, 201 N.W.2d 745 (1972).

67. *Id.* at 233, 201 N.W.2d at 747.

68. *Id.*

69. *Id.* at 241, 201 N.W.2d at 751.

70. *Id.* at 243, 201 N.W.2d at 751.

71. *Id.* at 243, 201 N.W.2d at 752.

paid, but rather "the reasonable value of [the] medical costs reasonably required by the injury."[72] The actual charge is not always the proper amount on which to base damages, as the court said: "[T]he test is the reasonable value, not the actual charge, and therefore there need be no actual charge."[73]

4. *Redepenning v. Dore*[74]

The same year that the *Thoreson* decision was issued, the Wisconsin Supreme Court decided the case of *Redepenning v. Dore*, which did not specifically address gratuitous nursing services rendered by third parties but nevertheless added another element to the analysis—how to calculate the value of such services.[75] In this case, the driver of a pickup truck hit the plaintiff and her daughter as they drove to the hairdresser.[76] The daughter died,[77] and the husband spent five weeks after the accident caring for his wife.[78] The Wisconsin Supreme Court held that the plaintiff could include the value of these nursing services in her claim, as long as the value accurately reflected what the services would customarily and reasonably cost in the community.[79]

B. Lambert v. Wrensch

While never specifically addressing the issue, these five cases seemed to show a clear trend in Wisconsin law that gratuitous nursing services rendered by immediate family, extended family, and third parties were all collateral sources and therefore a plaintiff could include their value in a damage claim. However, the Wisconsin Supreme Court's decision in *Lambert v. Wrensch* altered this precedent and severely limited the application of the collateral source rule as it applied to nursing services and unreimbursed medical expenses.

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72. *Id.*

73. *Id.*

74. 56 Wis. 2d 129, 201 N.W.2d 580 (1972).

75. *Id.* at 137, 201 N.W.2d at 585.

76. *Id.* at 131–32, 201 N.W.2d at 582.

77. *Id.* at 132, 201 N.W.2d at 582.

78. *Id.* at 137, 201 N.W.2d at 585.

79. *Id.*; *see also* Moritz v. Allied Am. Mut. Fire Ins. Co., 27 Wis. 2d 13, 27, 133 N.W.2d 235, 243 (1965) (holding "that one who is injured and requires domestic and nursing services is entitled to recover for the same 'what is customarily charged for similar work' and to the extent that there is proof that establishes this item of damages to a reasonable certainty") (quoting Hommel v. Badger State Inv. Co., 166 Wis. 235, 245, 165 N.W. 20, 23 (1917)).

In *Lambert*, the plaintiff brought suit against her husband for injuries she sustained while a passenger in his car during an automobile accident.[80] The plaintiff also joined her husband's insurance company and the driver of the other vehicle as defendants.[81] The plaintiff received nearly $18,000 for medical expenses from her husband's insurance, as she was a dependent under the policy.[82] The insurance company could not receive subrogation for that amount because the statute of limitations had run, and the insurance company had not asserted its subrogation right in its answer to the complaint.[83]

The plaintiff's motion to exclude any evidence that the insurer had made payments for her medical expenses was denied by the trial judge.[84] After trial, the judge also refused to instruct the jury that such payments were a collateral source and should not be used to compute damages.[85] The Wisconsin Court of Appeals affirmed these rulings.[86]

On appeal to the Wisconsin Supreme Court, the plaintiff argued that the insurance company's payments were a collateral source.[87] Therefore, she believed she should have been able to recover all of her medical expenses, even those paid for by insurance.[88] The court disagreed, holding that the collateral source rule was inapplicable in this case because the insurance contract was an indemnity contract and the insurance company had a right to its subrogation interest.[89] Citing *Heifetz v. Johnson*,[90] the court stated:

80. Lambert v. Wrensch, 135 Wis. 2d 105, 109, 399 N.W.2d 369, 371 (1987).

81. *Id.*

82. *Id.* at 109–10, 399 N.W.2d at 371.

83. *Id.* at 110, 399 N.W.2d at 371–72.

84. *Id.* at 110, 399 N.W.2d at 371.

85. *Id.* at 110–11, 399 N.W.2d at 372.

86. *Id.* at 111, 399 N.W.2d at 372.

87. *Id.* at 113, 399 N.W.2d at 373.

88. *Id.*

89. *Id.* at 117, 121, 399 N.W.2d at 374–75.

90. 61 Wis. 2d 111, 211 N.W.2d 834 (1973). In *Heifetz*, the plaintiff was injured in an automobile accident. *Id.* at 113, 211 N.W.2d at 835. After receiving $2000 for medical expenses from his liability insurer, he commenced a personal injury action against the defendant tort-feasor. *Id.* The Wisconsin Supreme Court held that because the plaintiff accepted a payment from his insurer, this operated as an assignment of his claim even if the policy did not contain a subrogation agreement. *Id.* at 124, 211 N.W.2d at 841. Therefore, the plaintiff lost his right to sue for any amount received from the insurer and could not recover the amount that the insurance company paid from the tort-feasor. *Id.*

> "[S]ince the doctrine of subrogation was designed in part to prevent double recovery by the Plaintiff, the Plaintiff should not be allowed to recover the full amount free of the subrogation claim of the insurer which was extinguished by the running of the statute of limitations against the subrogated insurer. This inures to the benefit of the defendant in this case, but that is the public policy expressed in statutes of limitations."[91]

In other words, statutes of limitations are designed to benefit tortfeasors when plaintiffs fail to timely file suit.[92] Because the public policy underlying statutes of limitations favors defendants, a plaintiff should not be allowed to recover subrogated amounts for past medical expenses paid by a collateral source after the statute of limitations has run.[93]

C. Ellsworth v. Schelbrock

After the *Lambert* decision, speculation abounded that the collateral source rule did not apply to gratuitous nursing services and medical expenses paid by third parties because the ruling was seen as a step toward the complete abrogation of the collateral source rule in Wisconsin.[94] However, in 2000 the Wisconsin Supreme Court decided *Ellsworth v. Schelbrock*, which distinguished the *Lambert* decision and upheld the collateral source rule in Wisconsin.[95]

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91. *Lambert*, 135 Wis. 2d at 119, 399 N.W.2d at 375 (quoting *Heifetz*, 61 Wis. 2d at 124–25, 211 N.W.2d at 841). The court's holding in *Heifetz* created confusion within the Wisconsin legal system concerning the status of the collateral source rule in the state. Gobis, *supra* note 14, at 869. As Gobis explained:

> On the one hand, *Heifetz* could have been narrowly interpreted to mean that subrogation in favor of the insurer occurred in *any* case where a policyholder had been compensated by an insurer for his or her loss. This interpretation would have eliminated the collateral source rule. On the other hand, *Heifetz* could have been interpreted to hold that subrogation did not occur in *all* circumstances where an insurer made payments to its policyholder. This interpretation would not abandon the collateral source rule.

Id. at 869–70 (citations omitted). The *Lambert* decision only added to the confusion over subrogation and the collateral source rule. *See id.* at 889–90.

92. *See Lambert*, 135 Wis. 2d at 119, 399 N.W.2d at 375.

93. *Id.*

94. *See* Gobis, *supra* note 14, at 889. *Lambert* classifies personal insurance contracts as indemnity contracts to which subrogation applies. *Id.* Because the majority of personal insurance contracts now have subrogation clauses and reimburse insurance companies for their payments to injured plaintiffs, the collateral source rule no longer allows plaintiffs to keep such funds after recovering them in their damage awards. *Id.* Therefore, the *Lambert* decision drastically eroded the application of the collateral source rule. *Id.*

95. Ellsworth v. Schelbrock, 2000 WI 63, ¶ 22, 235 Wis. 2d 678, 693, 611 N.W.2d 764, 771.

In *Ellsworth*, the defendant struck the back of the vehicle that the plaintiff was driving early one morning in 1994.[96] The defendant was intoxicated at the time of the accident.[97] After the impact, the plaintiff's vehicle ignited into flames.[98] The plaintiff could not immediately remove herself from the vehicle and as a result, over half of her body received third-degree burns.[99] She also suffered other substantial and permanent injuries.[100] She required hospitalization for approximately four months, undergoing several surgical procedures and physical rehabilitation.[101] She subsequently sued the defendant and his insurer.[102]

At trial, the plaintiff had an expert testify that the amount of reasonable and necessary past medical services she received was $597,488.27.[103] The defendant did not introduce any expert testimony of his own to rebut this amount, but he asserted that the correct amount of past medical services was $354,941, the amount paid by Wisconsin Medical Assistance (MA) to the plaintiff's medical providers.[104] Because plaintiff's medical providers accepted this amount as payment in full for all of the expenses and the plaintiff was not responsible for the remaining balance, the defendant argued that the amount paid by MA was the reasonable value of services provided and that recovery for past medical expenses should be limited to this amount.[105] The plaintiff, on the other hand, argued that the amount MA had paid was a collateral source and could not be used to show the amount of damages.[106] The trial court found for the plaintiff.[107]

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96. Ellsworth v. Schelbrock, 229 Wis. 2d 542, 551, 600 N.W.2d 247, 251 (Ct. App. 1999). This Comment relies on the Wisconsin Court of Appeals' decision to relay the facts of *Ellsworth* because the Wisconsin Supreme Court only gives them cursory treatment.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. Ellsworth v. Schelbrock, 2000 WI 63, ¶ 3, 235 Wis. 2d 678, 682, 611 N.W.2d 764, 766.

102. *Id.* at ¶ 4, 235 Wis. 2d at 682, 611 N.W.2d at 766.

103. *Id.* at ¶ 4, 235 Wis. 2d at 682–83, 611 N.W.2d at 766.

104. *Id.* at ¶ 4, 235 Wis. 2d at 683, 611 N.W.2d at 766.

105. *Id.* at ¶ 16, 235 Wis. 2d at 689, 611 N.W.2d at 769.

106. *Id.* at ¶ 17, 235 Wis. 2d at 689–90, 611 N.W.2d at 769–70.

107. *Id.* at ¶ 4, 235 Wis. 2d at 682, 611 N.W.2d at 766.

The defendant argued before the Wisconsin Court of Appeals that the collateral source rule did not apply in this case because the county appeared to assert MA's subrogation interest.[108] The defendant reasoned that because the county had a subrogation claim, the correct amount of damages for the plaintiff's past medical expenses was the amount of the subrogated interest.[109] The defendant based this argument on *Lambert v. Wrensch* and *Heifetz v. Johnson*.[110] In those cases, the plaintiffs were not allowed to recover the full amount of the medical expenses incurred because the statute of limitations had expired.[111] The court of appeals limited *Lambert* and *Heifetz* to those cases where the statute of limitations had run and destroyed the subrogation interest.[112] Thus, the court of appeals held that the *Lambert* holding, which appeared to abrogate the collateral source rule, only applied in narrow circumstances and the collateral source rule still applied with donated medical service payments.[113]

The Wisconsin Supreme Court affirmed this ruling, adding that the collateral source rule places full responsibility for a tort-feasor's conduct upon the tort-feasor.[114] The court stated that the defendant must not be allowed to benefit from the fact that MA paid for the plaintiff's bills.[115] The amount proven by the plaintiff through expert testimony was the proper amount on which to base damages, not the value that MA decided to pay.[116] The court concluded:

> In keeping with precedent and well-established tort policy, we conclude that the collateral source rule applies to Medical Assistance benefits. The injured party may establish and recover the reasonable value of the medical services received gratuitously via Medical Assistance. The state's subrogated amount is deducted from this recovery, and the injured party is entitled to any remainder. As a result, the responsibility for the victim's injury remains fully on the wrongdoer.[117]

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108. Ellsworth v. Schelbrock, 229 Wis. 2d 542, 555, 600 N.W.2d 247, 253 (Ct. App. 1999).

109. *Id.*

110. *Id.* at 558, 600 N.W.2d at 254. *See supra* Part III.B for a discussion of the cases.

111. *Id.*

112. *Id.*

113. *See id.*

114. Ellsworth v. Schelbrock, 2000 WI 63, ¶ 17, 235 Wis. 2d 678, 689, 611 N.W.2d 764, 769.

115. *Id.*

116. *Id.* at ¶ 17, 235 Wis. 2d at 689–90, 611 N.W.2d at 769.

117. *Id.* at ¶ 22, 235 Wis. 2d at 693, 611 N.W.2d at 771.

With this holding, the court clearly and unmistakably upheld the collateral source rule's vitality in Wisconsin, specifically as it pertains to gratuitous medical service payments.

IV. THE PROPOSED SOLUTION: A NEW JURY INSTRUCTION FOR WISCONSIN

Based on the case law prior to *Lambert* and the Wisconsin Supreme Court's reaffirmation of the collateral source rule in *Schelbrock*, the Wisconsin Civil Jury Instruction concerning gratuitous nursing services should be changed to more accurately reflect the law. While the Wisconsin Supreme Court has never expressly ruled on the issue of whether nursing services rendered gratuitously by extended family members and third parties can be included in a damage claim, the holdings of all cases discussing gratuitous nursing services since 1931 clearly support such a proposition.[118]

For example, in *Verhelst*, no nursing services were ever actually offered by an extended family member.[119] However, the Wisconsin Supreme Court clearly held that if someone who is not responsible for an expense "voluntarily pays [for] the item for the benefit of the injured person . . . or [when] a member of one's family renders without charge services as a nurse for the value of which a tortfeasor is liable, this does not relieve the tortfeasor from liability for that item."[120] Thus, this holding intimates that had any services been rendered, they would have been recoverable by the decedent's estate.

Similarly, in *McLaughlin*, the priest's religious order did not actually donate nursing services, but rather it only paid for the medical expenses.[121] The court, however, made no distinction between nursing services paid by another party and nursing services gratuitously rendered by another party;[122] nor did the court limit recovery for services based on the people who rendered them.[123] Rather, the court looked at the value of such services and said that a plaintiff can recover the value,

118. *See* discussion *supra* Part III.A.

119. Verhelst Constr. Co. v. Galles, 204 Wis. 96, 102, 235 N.W. 556, 557 (1931).

120. *Id.* at 102, 235 N.W. at 558.

121. McLaughlin v. Chicago, Milwaukee, St. Paul & Pac. Ry. Co., 31 Wis. 2d 378, 395, 143 N.W.2d 32, 40 (1966).

122. *See id.*

123. *See id.* at 395–96, 143 N.W.2d at 40.

regardless of who donated the services.[124] Therefore, the Wisconsin Supreme Court is willing to recognize an injured party's recovery for nursing services that are voluntarily paid or donated by either third parties or extended family members.

The facts in *Thoreson* also do not directly concern services rendered gratuitously by extended family members, but rather those donated by the state.[125] However, the court once again did not limit the recovery for nursing services to a specific set of individuals, stating: "Under this theory of recovery, the fact that necessary medical and nursing services are rendered gratuitously to one who is injured should not preclude the injured party from recovering the value of those services as part of his compensatory damages."[126] Therefore, no matter who pays for or donates the services, the court held that plaintiffs can recover their reasonable value in the damage award, not merely the actual charge.[127]

Finally, even though *Redepenning* dealt only with a husband's nursing services, nowhere in the opinion did the Wisconsin Supreme Court state that the recovery was limited to a spouse's services. The court merely said: "The reasonable value of nursing services made necessary because of the injury is a compensable item."[128] Based upon this statement, one could argue that had an extended family member or another third party gratuitously rendered nursing services, the court would have recognized this in the award.

With this precedent as a guide, clearly a new jury instruction in Wisconsin on the topic of gratuitous nursing services must be written. This Comment proposes the following instruction using Wisconsin Civil Jury Instruction 1820 as a template, with the italicized words indicating the altered portions of the instruction:

> Subdivision ___ of question ___ asks what sum of money will compensate (name) for personal nursing care and services rendered to (*name of injured party*). If you find that (name) *or any other third party* performed services in nursing and caring for (*name of injured party*) and that the services were necessarily rendered because of (her)(his) injuries, you should name such sum as you feel will fairly and reasonably compensate (name) for

124. *Id.* at 396, 143 N.W.2d at 40–41.

125. Thoreson v. Milwaukee & Suburban Transp. Co., 56 Wis. 2d 231, 243, 201 N.W.2d 745, 751 (1972).

126. *Id.* at 243, 201 N.W.2d at 752.

127. *Id.*

128. Redepenning v. Dore, 56 Wis. 2d 129, 137, 201 N.W.2d 580, 585 (1972).

> the personal care and services, not exceeding the amount for which (name) could have employed others to do the work. If you find that for any foreseeable time in the future (he)(she) *or any other third party* will be performing such necessary services, you should also make reasonable allowances for the future services.[129]

Such a change in the instruction would not deviate drastically from how the Wisconsin Supreme Court views the topic. It would merely explicitly state the court's true intent, which has been implicit in every gratuitous nursing case decided before *Lambert*.

Recognizing a jury instruction that allows plaintiffs to recover for nursing services gratuitously rendered by third parties would be perfectly consistent with much of the case law in other jurisdictions.[130] While a minority of states still do not allow such recovery,[131] the majority view is that a plaintiff can recover the value of these services.[132]

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129. WIS. JI-CIVIL 1820 (1992) (alterations added).

130. *See* Annotation, *Damages for Personal Injury or Death as Including Value of Care and Nursing Gratuitously Rendered*, 90 A.L.R.2d 1323, 1334–35 (1963) [hereinafter *Damages*].

131. West, *supra* note 30, at 402. *See, e.g.*, Beckert v. Doble, 134 A. 154, 155 (Conn. 1926) (holding that a plaintiff suing for personal injuries inflicted by defendant's dog could recover the value of her husband's nursing services but not those donated by her daughter because the plaintiff "was [not] subjected to any expense or loss by reason of [the daughter's] temporary sacrifice . . . nor [did the daughter make a] claim upon the father for compensation for such services"); Indianapolis & Martinsville Rapid Transit Co. v. Reeder, 100 N.E. 101, 105 (Ind. Ct. App. 1912) (holding that a husband could not recover the value of services rendered to his wife by her mother and other relatives after she was struck by one of the defendant's cars and later died because the services were performed without a promise to repay); Laskowski v. People's Ice Co., 168 N.W. 940, 942 (Mich. 1918) (holding that the plaintiff could not recover for gratuitous nursing services rendered by him to his wife after she was injured by the defendant's runaway horse because he did not have a contract to be paid by them); Woeckner v. Erie Elec. Motor Co., 37 A.2d 936, 937 (Pa. 1897) (holding that the plaintiff could not recover for the services rendered to his infant child after she was run over by the defendant's automobile because "[t]he duties performed by them in the care of the injured child cost the plaintiff nothing, and caused him no pecuniary loss, and they cannot be made the ground of a recovery by him").

132. *See Damages*, *supra* note 130, at 1334–35. In classifying this view as the majority view, one legal scholar has stated:

> The general rule is that even though valuable services are rendered to the injured plaintiff by doctors, hospitals, nurses, members of the family and the like, entirely gratuitously, the plaintiff may still show the value of the services and claim such amount as a part of his damage, and the defendant is barred by the collateral source rule from showing that the plaintiff did not in fact pay for or incur liability for the services.

Peckinpaugh, *supra* note 29, at 548.

Some states, similar to Wisconsin, have not directly ruled on the issue but rather have suggested that such services can be included in the damage award.[133] For example, in a seminal Iowa case on the topic, *Scurlock v. City of Boone*,[134] the plaintiff's wife was seriously injured when she fell on the sidewalk.[135] The plaintiff brought suit against the municipality for his wife's personal injuries, claiming that the city negligently maintained an unsafe sidewalk.[136] The Iowa Supreme Court held that the husband could collect the reasonable value of the nursing services he rendered to his wife.[137] While no extended family members or any other third party performed services in this case, the court nevertheless noted that "where the nursing and attendance are furnished by the members of the injured one's family, it is the general holding that the jury may determine from its own knowledge of such matters what amount should be allowed as reasonable compensation for such service."[138] This dictum suggests that if services had been performed by extended family members, the plaintiff could have recovered their reasonable amount.

Some states, however, have directly ruled on the issue.[139] For example, in *Little v. State Farm Mutual Automobile Insurance Co.*,[140] the plaintiff's wife was injured in an accident, and her mother helped care for her and her children for five months.[141] Even though there was conflicting evidence as to whether the services were rendered gratuitously or with the expectation of payment,[142] the Louisiana Court of Appeals held that the husband was entitled to recover the value of the services rendered by his wife's mother.[143]

Similarly, in the Georgia case of *Howard v. Hall*,[144] the plaintiff's son was injured when he was hit by the defendant's automobile.[145] Most of the care the child received after the accident was performed by the

133. *See Damages*, *supra* note 130, at 1334–35.
134. 121 N.W. 369 (Iowa 1909).
135. *Id.* at 370.
136. *See id.*
137. *Id.* at 372.
138. *Id.*
139. *See Damages*, *supra* note 130, at 1334–35.
140. 136 So. 2d 457 (La. Ct. App. 1962).
141. *Id.* at 457.
142. *Id.* at 457–58.
143. *Id.* at 458.
144. 145 S.E.2d 70 (Ga. Ct. App. 1965).
145. *Id.* at 70.

child's mother and grandmother.[146] The Georgia Court of Appeals held that the father was entitled not only to the value of nursing care furnished by the mother, but also the care rendered by the child's grandmother.[147] A majority of states follow such practices.[148]

Based on the precedent established by Wisconsin case law and using the cases discussing the topic from other states as a guide, the Wisconsin jury instruction must be changed to accurately reflect the current law. Plaintiffs are clearly entitled to the inclusion of such services in their damage awards. The cases in Wisconsin, and most of the case law from other states, support this proposition. Logically, the next step is to change the instruction so plaintiffs like Jane Doe,[149] who have suffered injuries and consequently have received gratuitous nursing services from extended family members and other third parties, can recover.

V. CONCLUSION

After examining the case law in Wisconsin, this Comment concludes that nursing services rendered gratuitously by extended family members and other third parties can be included in a plaintiff's damage claim in Wisconsin. Like a majority of other states, Wisconsin clearly treats such reimbursements as collateral sources. After the Wisconsin Supreme Court upheld the collateral source rule in *Schelbrock*, there is no reason to believe that the court would not consider gratuitous services rendered by third persons collateral sources if such a question ever reached its courtroom. The many criticisms against such an approach, while seemingly valid, do not justify giving tort-feasors the benefit of gratuitous payments when they are the reason the care had to be rendered in the first place.

The Wisconsin Civil Jury Instruction on the topic must be changed to accurately reflect this trend in the law. This change would save plaintiffs like Jane Doe countless hours of time and money litigating the

146. *Id.* at 76.

147. *Id.*

148. *See, e.g.*, Dahlin v. Kron, 45 N.W.2d 833, 838 (Minn. 1950) (holding that a "parent suing for injuries to his minor child may recover the value of services rendered gratuitously by the other parent or by members of the family . . . [if] such services [are] necessitated by the injuries in question") (citations omitted); Drogmund v. Metro. St. Ry. Co., 98 S.W. 1091, 1094 (Mo. Ct. App. 1906) (holding that a father suing for injuries to his minor son could be compensated for nursing services rendered to the boy by family members); Degen v. Bayman, 241 N.W.2d 703, 709 (S.D. 1976) (holding that medical services donated by a hospital must not be deducted from a plaintiff's damage award).

149. *See supra* Part I.

topic. This change would also help to make these plaintiffs who suffered accidents through no fault of their own whole again.

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