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## Sequencing in Damages

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ARTICLE

## Sequencing in Damages

Edward K. Cheng, Ehud Guttel & Yuval Procaccia\*

**Abstract.** Tort law contains multiple doctrines governing the assignment of liability and the calculation of damages. But in what sequence should courts apply these doctrines? Does it matter, for example, whether a court applies comparative fault before or after mitigation of damages? The answer, rather surprisingly, is that sequencing does matter, and it can substantially affect the compensation that a tort victim ultimately receives. Yet the existing case law on sequencing is ad hoc, inconsistent, and undertheorized, and the issue has been entirely overlooked by the academic literature.

In this Article, we introduce and examine the question of sequencing. We offer three contexts in which the question arises in torts: failures to mitigate, damage caps, and collateral sources of funding. All of these contexts play a major role in determining liability and compensation, yet each demonstrates a different way in which attention to sequencing can improve legal analysis. Building on these examples, we develop a general theory of damages sequencing.

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## Introduction

Back in algebra class, all of us encountered the “order of operations,” the mathematical convention stating which operations take precedence in a calculation.<sup>1</sup> Some may even remember the mnemonic “Please Excuse My Dear Aunt Sally,” which reminds us that (P)arentheses are first, followed by (E)xponents, then (M)ultiplication and (D)ivision, and finally (A)ddition and (S)ubtraction. The fundamental idea behind the order of operations is simple: The sequence of calculations matters. If you perform subtraction before multiplication, you will get a different value than when you perform multiplication before subtraction.

But what does the order of operations have to do with law? While at first sight this mathematical concept may seem unrelated to legal thinking, the question of sequencing is in fact fundamental to how the legal system calculates damages. Failing to account for the order of operations—or more precisely, failing to consider the proper sequence of calculations—often leads courts into trouble. Take, for example, *Williams v. Jader Fuel Co.*<sup>2</sup> In *Williams*, the Seventh Circuit faced a tricky damage calculation and attempted to offer the following instructive example:

[A] plaintiff who suffers \$100,000 in damages because of an automobile accident for which he was forty-five percent at fault would recover \$55,000. If the jury were also to conclude that the plaintiff’s failure promptly to seek medical attention following the accident—perhaps the prototypical example of a failure to mitigate damages—was the cause of \$15,000 of his injuries, it would reduce the award to \$40,000.<sup>3</sup>

Straightforward, right? Far from it. This sequence is wrong as a matter of logic. If the plaintiff’s failure to seek medical attention caused an additional \$15,000 in injuries, then the original, jointly caused accident involved only \$85,000 in damages. Splitting this figure 55–45 based on comparative fault yields a reduced award of \$46,750, not \$40,000. The Seventh Circuit performed the multiplication for comparative fault before the subtraction for failure to mitigate. It should have done the subtraction before the multiplication. Any court following the Seventh Circuit’s example would therefore shortchange the plaintiff.

Unfortunately, the Seventh Circuit is not alone in making this kind of sequencing error. As we discuss below, many courts have made this exact error when accounting for failures to mitigate. Furthermore, the problem of

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1. See NAT’L GOVERNORS ASS’N CTR. FOR BEST PRACS. & COUNCIL OF CHIEF STATE SCH. OFFICERS, COMMON CORE STATE STANDARDS FOR MATHEMATICS 43-44 (2010), <https://perma.cc/XNB2-9YMD>.

2. 944 F.2d 1388 (7th Cir. 1991).

3. *Id.* at 1402.

sequencing is much broader than the mistake made in *Williams*. The problem arises whenever courts face multiple steps in calculating damages. For example, should damage caps be applied before or after the reduction for comparative fault? What about collateral sources—third parties who have paid the plaintiff for an injury or the costs of injury? When do (and how should) they figure into the damage calculation?

Court behavior related to sequencing tends to be ad hoc and inconsistent. Sometimes, courts unwittingly follow precedent from other contexts but fail to see that context changes the appropriate sequence. Sometimes they incorrectly take their cues from the structure of trial, in which liability issues (for example, comparative fault) precede damages issues (for example, failures to mitigate and damage caps). Sometimes they seek precision in statutory language where none can be found. And sometimes, we suspect, courts simply forget that the order of operations matters.

But the order of operations can matter a lot. Courts and scholars spend countless hours developing principles to ensure accuracy and precision in legal outcomes. Yet courts' improper sequencing at the end can easily undo all of the effort that precedes it. Remarkably, this issue has escaped focused scholarly attention.<sup>4</sup>

In this Article, we investigate the problem of sequencing. We offer three contexts in which the problem arises in torts: failures to mitigate, damage caps, and collateral sources of funding. Each of these examples demonstrates a different way in which attention to sequencing can improve legal analysis, and through careful examination we provide new insights on the proper sequence in all three contexts. Together, the three examples also enable us to develop an overall theory of sequencing, which can help courts and scholars address the sequencing problem generally.

The Article proceeds as follows. Part I discusses failures to mitigate, also known as the “doctrine of avoidable consequences.” Here, confusion reigns among courts, but as we show, attention to sequencing can help establish a uniform (and correct) procedure.

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4. See, e.g., DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *HORNBOOK ON TORTS* 385-91, 404-08 (2d ed. 2016) (discussing comparative negligence and mitigation of damages but not their proper sequence); DOUGLAS LAYCOCK & RICHARD L. HASEN, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* 86-94 (5th ed. 2019) (noting the resemblance between comparative fault and mitigation but not considering their interaction in a single fact pattern); see also JAMES EDELMAN, *MCGREGOR ON DAMAGES* 225-26 (20th ed. 2018); RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, *CASES AND MATERIALS ON TORTS* 334-52, 807-08 (12th ed. 2020); MARC A. FRANKLIN, ROBERT L. RABIN, MICHAEL D. GREEN, MARK A. GEISTFELD & NORA FREEMAN ENGSTROM, *TORT LAW AND ALTERNATIVES: CASES AND MATERIALS* 449-74 (11th ed. 2021); 4 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, *HARPER, JAMES AND GRAY ON TORTS* 578-85 (3d ed. 2007).

Part II considers damage caps of various kinds—not only the controversial noneconomic damage caps that are most salient today, but also less explored damage caps associated with government entities and charitable organizations. The case law on damage caps exhibits considerable uniformity, but an examination of sequencing reveals that courts could have reached a different, but equally legitimate, sequencing rule for caps. Which rule one chooses depends on one’s theoretical view of caps, as well as one’s policy preferences.

Part III analyzes how the law accounts for collateral sources given the abolition of the common law’s collateral-source rule. Here, courts are split on the appropriate procedure. Paying attention to sequencing enables us not only to explain this split, but also to realize that both extant rules are in tension with basic tenets of tort law. In response, we propose a novel, alternative rule to account for collateral sources.

Based on these three examples, Part IV takes a broader view of the sequencing problem. It first investigates and explains why courts make sequencing errors. It then considers the various costs—both to individuals and to society—associated with the confusion over sequencing. In addition to raising fairness concerns, miscalculating damages can exacerbate existing inequities and interfere with proper incentives. Part IV finally brings some much-needed clarity to this messy area of the law. It develops a conceptual framework for thinking about the sequencing problem and proposes an “order of operations” for calculating damages in the legal context.

## I. Mitigation

The doctrine of mitigation, which diminishes recovery based on the failure to mitigate avoidable harm, plays an important role in tort litigation. Whether the case involves medical malpractice, a slip-and-fall, or a defective product, how the victim behaves after the accident and whether the victim seeks proper medical treatment can have a sizable impact on the ultimate harm. Similarly, in many property-harm cases, victims may reduce losses after an accident by replacing the damaged property, repairing it, or switching to a substitute. Because victims (just like injurers) do not always behave reasonably, cases involving claims of victims’ failures to mitigate are commonplace.<sup>5</sup>

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5. Of course, failure to mitigate is but one way in which a victim’s unreasonable behavior can contribute to the realization of harm. Victims can also behave unreasonably prior to the harm by failing to take adequate care. One might therefore guess that interplay between the rules regulating victim fault (before and after the harm) would frequently arise. Yet such interactions are of a modern vintage. Victim duty to take care before harm has traditionally been subject to the doctrine of contributory negligence, which barred a victim’s claim entirely whenever he failed to take adequate precautions. Under that rule, if a victim behaved unreasonably before harm occurred, his claim would be denied, and the doctrine of mitigation would not come into play. The two doctrines  
*footnote continued on next page*

As we already saw in *Williams*, when both comparative fault and mitigation apply, a sequencing problem emerges. Suppose a victim suffers \$100,000 in injuries from a car accident. A jury finds the victim and the injurer equally at fault for the accident, but the jury also finds that the victim could have avoided \$20,000 of the injuries if she had sought proper medical treatment immediately afterward. How much should the victim recover? That is, should a court apply comparative fault or the mitigation doctrine first?

In this context, the correct sequence is to apply the reduction for failure to mitigate first and then apply comparative fault. The reason is that comparative fault operates on the amount of *joint* harm. Harm created by the victim's failure to mitigate is attributable to the victim alone, so it should be set aside before the court applies comparative fault. Thus, in this hypothetical, the joint harm is  $\$100k - \$20k = \$80k$ . That amount is then divided 50–50 for comparative fault, yielding a recovery of \$40,000. Reversing the order would yield a recovery of only \$30,000,<sup>6</sup> shortchanging the victim \$10,000. In other words, applying comparative fault before the doctrine of mitigation overcharges the victim. While the victim's failure to mitigate accounts for \$20,000 of her injuries, the reverse sequence effectively charges her \$30,000.

Applying comparative fault prior to mitigation can lead to absurd results in some situations. Suppose in the hypothetical above that the victim's failure to mitigate accounted for \$60,000 (rather than \$20,000) of her injuries. Applied first, comparative fault would reduce the injurer's liability to \$50,000. Further reduction for failure to mitigate would then lead the victim to *owe* \$10,000 to the injurer (or, at the very least, drop her damages to zero). This result is clearly erroneous considering that the injurer is responsible for 50% of the initial harm of \$40,000.

Unfortunately, like the Seventh Circuit in *Williams*, many courts have incorrectly sequenced comparative fault and mitigation—at considerable cost to victims. The mistaken sequence can be found in cases involving different types of harm (bodily injury, property damage, pure economic loss) and different forms of mitigation (neglecting to obtain medical treatment, failing to perform an alternative transaction). Consider *Truck Insurance Exchange v. Sullivan, Kelly & Associates*, a case involving professional malpractice.<sup>7</sup> There, a California appellate court affirmed the reduction of the cross-complainant's

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were therefore mutually exclusive. Things have changed as jurisdictions have increasingly abandoned contributory negligence in favor of comparative fault. In comparative fault jurisdictions, because a victim's inadequate care no longer functions as a complete bar, it does not preclude the applicability of the mitigation doctrine. See generally, e.g., DOBBS ET AL., *supra* note 4, at 384–86 (discussing the shift to comparative fault).

6.  $(\$100k * 50\%) - \$20k = \$30k$ .

7. No. D036534, 2002 WL 273826, at \*1 (Cal. Ct. App. Feb. 27, 2002).

\$2.35 million in damages by 40% for comparative fault before subtracting the \$440,000 “attributable to [the cross-complainant’s] failure to mitigate.”<sup>8</sup> This sequencing error shortchanged the cross-complainant by over \$175,000.<sup>9</sup> In *Hattem v. Smith*, the plaintiff suffered \$318,000 in damages as a result of legal malpractice.<sup>10</sup> The trial court reduced the plaintiff’s recovery by 35% for comparative fault, then subtracted \$90,000 for failure to mitigate.<sup>11</sup> This sequencing error shortchanged the plaintiff by over \$30,000.<sup>12</sup> Interestingly, the *Hattem* court praised the trial court’s erroneous method even though language in the jury verdict form suggested that the mitigation reduction should have taken place first.<sup>13</sup>

Plaintiffs sometimes do not even realize that a sequencing error has occurred. Consider *Gomez v. American Empress Partnership*, a case ultimately heard by the Ninth Circuit.<sup>14</sup> In *Gomez*, the trial court erroneously applied comparative fault before reducing the award for failure to mitigate.<sup>15</sup> Yet the

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8. *Id.* at \*2. For an additional example, see *Center Court Associates v. Maitland/Strauss & Behr*, No. CV-86-252381, 1994 WL 185595, at \*50 (Conn. Super. Ct. May 4, 1994) (reducing approximately \$350,000 in damages by 33.3% for comparative fault before subtracting approximately \$60,000 for the plaintiffs’ failure to mitigate, shortchanging the plaintiffs around \$20,000). *But see, e.g.*, 6 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS—CIVIL § 110.31.01.02 note on use (7th ed. 2019) (“[T]he verdict form should instruct the jury to reduce the amount of the plaintiff’s damages by whatever amount of such damage is attributed to the failure to mitigate. The apportionment of fault is then applied to the amount of damages specified in the jury’s answer on the verdict form.”).

9. The court calculated the cross-complainant’s recovery to be  $(\$2.35\text{m} * 60\%) - \$440\text{k} = \$970\text{k}$ . In reality, the cross-complainant’s recovery should have been  $(\$2.35\text{m} - \$440\text{k}) * 60\% = \$1.146\text{m}$ .

10. 52 N.Y.S.3d 172, 174 (App. Div. 2017).

11. *Id.* at 174, 176.

12. The court calculated the plaintiff’s recovery to be  $(\$318\text{k} * 65\%) - \$90\text{k} = \$116,700$ . In reality, the plaintiff’s recovery should have been  $(\$318\text{k} - \$90\text{k}) * 65\% = \$148,200$ .

13. *Compare Hattem*, 52 N.Y.S.3d at 176 (“[The] Supreme Court was lastly correct to issue a judgment that subtracted \$90,000 from the already apportioned damages instead of vice versa, as doing otherwise would have disregarded the distinction between awarding those damages that flow from a defendant’s negligent conduct and reducing set damages that would have been lower but for the subsequent unreasonable conduct of a plaintiff . . .”), with Joint Record on Appeal at 811, *Hattem*, 52 N.Y.S.3d 172 (No. 523068) (asking the jury by how much the *total* damages should “be reduced, because of [the plaintiff’s] unreasonable/imprudent actions”). At least with respect to the seatbelt defense, New York case law establishes the correct sequence. *See* N.Y. C.P.L.R. § 1411 practice cmt. C1411:1 (MCKINNEY 2021) (noting that damages should be reduced by harm due to the plaintiff’s failure to wear a seatbelt before the application of comparative fault). Having the correct guidance in that context, however, did not guarantee correct implementation in *Hattem*.

14. No. 97-35932, 1999 WL 595330 (9th Cir. Aug. 9, 1999).

15. *Id.* at \*2. Concluding that the plaintiff had suffered \$100,000 in damages (\$50,000 economic and \$50,000 noneconomic), the trial court found that the plaintiff was 75% at  
*footnote continued on next page*



plaintiff did not even argue the sequencing issue on appeal, and instead made a specious argument trying to separate economic from noneconomic damages.<sup>16</sup> The Ninth Circuit briefly remarked on the sequencing issue in dicta, commenting that “[t]here is something to be said for [the] contrary approach” of accounting for failure to mitigate first.<sup>17</sup> Nevertheless, the Ninth Circuit declined to find plain error,<sup>18</sup> citing the Seventh Circuit’s decision in *Williams* as persuasive authority and drawing a questionable analogy to the collateral-source doctrine.<sup>19</sup>

One curious aspect of this sequencing problem is that some courts seem to calculate damages correctly by accident. In some jurisdictions, jurors are asked to account for a plaintiff’s failure to mitigate through a percentage reduction rather than with a specific value.<sup>20</sup> This method is likely used for several reasons. For one, percentages may be a more natural reduction method for noneconomic damages like pain and suffering, where there is no precise numerical amount attributable to a failure to mitigate. Additionally, since comparative fault operates via percentages, juries may find it easier to use a similar format for mitigation. In any event, using a percentage reduction (rather than a specific value) fortuitously eliminates the sequencing problem. Since percentage reductions involve multiplication, and since multiplication is commutative and associative (that is, the order in which one carries out multiplication does not matter), sequencing becomes irrelevant.

For example, in *Sawicki v. New Britain General Hospital*, the court reduced the plaintiff’s \$6.9 million in damages by 50% for comparative fault and then

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fault and could have avoided 25% of the damages with proper mitigation. The trial court first applied comparative fault, reducing the recovery to  $\$100k * 25\% = \$25k$ , and then reduced it by a further \$25,000 for failure to mitigate, arriving at zero recovery. As we have established, this is the wrong sequence. Subtracting the failure to mitigate first, we determine that the jointly caused damage was \$75,000. The plaintiff should therefore have recovered  $\$75k * 25\% = \$18,750$ .

16. *See id.*

17. *Id.*

18. *Id.* (“But Mr. Gomez has not provided authority for this result, or made it clear whether we review for clear error, abuse of discretion, or *de novo* regarding the mode of calculation. In light of the reasonableness of the approach to calculation taken by the district judge, and the authority for it, we are unable to characterize the mode of calculation as error.”). We would argue, however, that improper sequencing is indeed plain error: Proper sequencing is a matter of logic, not policy.

19. *Id.* at \*2 & nn.7-8 (mentioning *Williams* and characterizing *Johnson v. United States*, 704 F.2d 1431 (9th Cir. 1983), a collateral-source case discussed in Part III below, as “somewhat analogous”).

20. *See, e.g.*, N.J. MODEL CIV. JURY CHARGE COMM., MODEL CIVIL JURY CHARGE 8.11B, at 3 & n.1 (2000), <https://perma.cc/T8J5-5SEJ> (noting that “[a]ny verdict to the plaintiff is reduced by the percentage” of the whole injury that resulted from the plaintiff’s failure to mitigate).

further reduced it by 13.5% for failure to mitigate.<sup>21</sup> Since both comparative fault and failure to mitigate are percentage reductions, the plaintiff's recovery would have been approximately \$3 million regardless of sequence.<sup>22</sup> Notably, the *Sawicki* court, like other courts that have benefitted from this mathematical property, performed the reductions in the conventionally problematic order: comparative fault first, then failure to mitigate.<sup>23</sup>

Is adopting a percentage-reduction system the solution to the sequencing problem? Unfortunately not. For one thing, percentages are an awkward method for calculating *economic* damages. If a plaintiff's failure to care for his broken leg results in a secondary infection, then the expenses associated with the infection should be excluded from recovery. These expenses will involve specific amounts, not percentages.

For another thing, even with percentage reductions, courts have made errors due to the confusing nature of percentages (which are always relative to a particular base value). Take, for example, *Strong v. State*.<sup>24</sup> Although the damage calculation in *Strong* involved several liability rather than plaintiff fault, the issues are ultimately the same. In *Strong*,

[t]he trial court found that Strong had sustained total damages of \$220,499.77. The court apportioned 50 percent of fault to the [defendant] and 50 percent to [a third party]. It further reduced the damages by five percent as a result of Strong's lack of mitigation efforts. The total award to Strong was \$99,224.90.<sup>25</sup>

So far, the calculation, which involves percentage reductions, appears to be sequence neutral. Whether one reduces by 50% first or by 5% first does not matter.

$$(\$220\text{k} * 50\%) * 95\% = (\$220\text{k} * 95\%) * 50\% = \mathbf{\$104.5\text{k}}$$

The careful observer, however, will note that this was not the value reached by the court. Instead, the *Strong* court apparently measured the 5% failure to mitigate off of the original damage amount rather than the reduced amount (in a sense treating it like a specific reduction rather than a percentage reduction).<sup>26</sup>

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21. No. HHDX07CV020818629S, 2014 WL 7156497, at \*1 (Conn. Super. Ct. Nov. 7, 2014).

22.  $(\$6.9\text{m} * 50\%) * 86.5\% = (\$6.9\text{m} * 86.5\%) * 50\% = \$2,984,250$ .

23. See, e.g., *Burman v. Fishing Co. of Alaska*, No. C10-1130, 2012 WL 2681812, at \*4-5 (W.D. Wash. July 6, 2012) (reducing the plaintiff's recovery by 25% based on comparative negligence, and further reducing some damages by 20% for failure to mitigate).

24. 201 Cal. App. 4th 1439 (2011).

25. *Id.* at 1448.

26. Another way of characterizing the *Strong* court's method is that it effectively added the percentage reductions:  $\$220,499.77 - ((50\% + 5\%) * \$220,499.77) = \$99,224.90$ . As anyone who has applied two percentage coupons at the store knows, this is typically  
*footnote continued on next page*

$$\begin{aligned} \$220\text{k} * 50\% &= \$110\text{k} \\ \$110\text{k} - (\$220\text{k} * 5\%) &= \mathbf{\$99\text{k}} \end{aligned}$$

This reintroduces the sequencing problem. If one calculates mitigation first and then accounts for several liability, rather than vice versa, one gets a different (and as we have argued, the correct) answer:

$$\begin{aligned} \$220\text{k} - (\$220\text{k} * 5\%) &= \$209\text{k} \\ \$209\text{k} * 50\% &= \mathbf{\$104.5\text{k}} \end{aligned}$$

Calculation details aside, our fundamental point is that percentages are rife with opportunities for confusion. Believing that courts can evade the sequencing problem by using percentage reductions is thus wishful thinking. Far better would be to have courts understand the sequencing problem and amend legal doctrine to address it precisely. As is typically the case, mindless application of formulas or algorithms can spell trouble.

One final point: In our calculations so far, we have (in part for simplicity) hewn to the common law view that failure to mitigate is the victim's fault alone. An alternative view, expressed in the Third Restatement of Torts, is that failures to mitigate should not be charged exclusively to the victim, since the need for mitigation arises from the tortious behavior of the injurer. Accordingly, the Third Restatement suggests that nonmitigated losses too should be apportioned according to relative fault.<sup>27</sup> But even if one accepts the Third Restatement's position, the sequencing problem remains. The comparative-fault analysis and the mitigation analysis concern two separate acts, so in determining their cumulative effect one must employ a calculation method that proceeds in some order. Here too sequencing matters, as choosing the incorrect sequence overcharges the plaintiff.<sup>28</sup> Thus, it remains the case

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impermissible. A 20% off coupon plus a 25% off coupon does not result in a 45% discount. One coupon is applied to the already reduced price created by the other. The order does not matter, but you cannot literally add the percentage reductions.

27. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 3 (AM. L. INST. 1999). Notably, the Third Restatement's approach seeks to charge victims for less than 100% of the cost of nonmitigated harm. By contrast, under a typical mistaken sequence, victims are charged for more than 100%.

28. The Third Restatement provides that a plaintiff's failure to mitigate "is a factor to consider when assigning [overall] percentages of responsibility." *Id.* § 3 cmt. b. As noted, however, a single calculation based on a "combined" percentage would be inappropriate given the differences between comparative fault and mitigation. Accordingly, courts following the Third Restatement could either: (1) deduct for the failure to mitigate first and then for comparative fault; or (2) apply the reverse sequence. For example, suppose that a victim suffers a harm of \$100 that could have been mitigated to \$80. The parties are equally at fault for both the avoidable component of the harm (\$20) and for the nonavoidable component (\$80). If the mitigation doctrine applies first, the victim will be charged  $\$20 * 50\% = \$10$  for the failure to mitigate, plus  $\$80 * 50\% = \$40$  for comparative fault, arriving at a total of \$50.

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that one must account for failures to mitigate before applying comparative-fault principles.

## II. Damage Caps

For a variety of reasons, legislatures impose caps on certain types of damages, the most notable and controversial in recent years being caps on noneconomic damages.<sup>29</sup> Damage caps, however, arise in other areas as well. For example, to protect the public fisc, caps often accompany waivers of sovereign immunity for tort claims.<sup>30</sup> Similarly, some states have capped damages against certain charitable organizations,<sup>31</sup> a compromise between the complete immunity found under the common law and abolition.<sup>32</sup>

The interaction of damage caps and comparative fault raises a sequencing problem. Should a court impose comparative fault before the damage cap, or the damage cap before comparative fault? Just as in the mitigation context, the resulting outcomes can be starkly different. Unlike the mitigation context,

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By contrast, if comparative fault applies first, the victim will be charged  $\$100 * 50\% = \$50$  for comparative fault, plus  $\$20 * 50\% = \$10$  for the failure to mitigate, arriving at a total of  $\$60$ . The second sequence is clearly erroneous, as it charges the victim for 60% of the harm even though she is only responsible for 50%.

29. See, e.g., David M. Studdert, Y. Tony Yang & Michelle M. Mello, *Are Damages Caps Regressive? A Study of Malpractice Jury Verdicts in California*, HEALTH AFFS., July/Aug. 2004, at 54, 54 (“As a medical malpractice crisis spreads across the United States, policymakers are responding with reforms aimed at curbing the cost and frequency of litigation. Caps on damages have emerged as the most common legislative response; they are also the most controversial.” (footnote omitted)). The constitutionality of damage-cap statutes varies from state to state, but this is not the focus of our discussion. See generally DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, DOBBS’ LAW OF TORTS § 486 (West 2021) (discussing arguments and cases).
30. See, e.g., KEVIN M. LEWIS, CONG. RSCH. SERV., R45732, THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW 6, 31-32 (rev. 2019).
31. See, e.g., MASS. GEN. LAWS ch. 231, § 85K (2021) (limiting the liability of charities to  $\$20,000$  in certain circumstances, and capping medical malpractice claims against nonprofit healthcare organizations at  $\$100,000$ ).
32. *DeVries v. Habitat for Human*, 676 A.2d 152, 154 (N.J. Super. Ct. App. Div. 1996) (“Many state courts, including New Jersey’s, developed a common-law charitable immunity doctrine in the early part of [the twentieth] century. Today, nearly every state has renounced or severely limited this common-law doctrine. Several states still grant at least partial immunity to charitable organizations, sometimes through statute.”), *aff’d per curiam sub nom. DeVries v. Paterson Habitat for Human*, 689 A.2d 142 (N.J. 1997). See generally Note, *The Quality of Mercy: “Charitable Torts” and Their Continuing Immunity*, 100 HARV. L. REV. 1382 (1987) (discussing the charitable-immunity doctrine).

however, here the correct sequence depends on the cap's specific underlying purpose.<sup>33</sup>

Consider *Collins v. Kentucky Natural Resources & Environmental Protection Cabinet*, a negligence suit against a government agency charged with inspecting strip mines.<sup>34</sup> The Kentucky Board of Claims determined the plaintiff's damages to be \$958,454, but found the plaintiff to be 80% at fault for the underlying accident.<sup>35</sup> The governing statute imposed a damage cap of \$100,000.<sup>36</sup> The Board of Claims imposed the cap before comparative negligence, resulting in a recovery of \$20,000.<sup>37</sup> After several appeals, the Kentucky Supreme Court held the reverse—that comparative fault should precede the damage cap—resulting in a plaintiff recovery of \$100,000.<sup>38</sup>

On the matter of damage caps, courts have almost unanimously imposed one sequence: apply comparative fault first, then the damage cap.<sup>39</sup> A few courts have relied on specific textual interpretations to arrive at this conclusion.<sup>40</sup> For example, the Ohio Court of Appeals in *Guiliani v. Shehata* focused on the word “recoverable” in the Ohio comparative fault statute, which requires the court to “diminish the total amount of the compensatory damages

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33. See *Regent Care Ctr. of San Antonio, L.P. v. Detrick*, 567 S.W.3d 752, 770 (Tex. App. 2018) (“The question here, then, is whether the statutory cap on noneconomic damages is a limitation on a plaintiff’s recovery or a limitation on a defendant’s liability.”).

34. 10 S.W.3d 122, 123 (Ky. 1999).

35. *Id.* at 124.

36. *Id.*

37. The \$958,454 in damages was capped at \$100,000, and  $\$100k * 20\% = \$20k$ . *Id.*

38.  $\$958,454 * 20\% = \$191,690.80$ , which was then capped at \$100,000. *Id.* at 124, 127.

39. *Monypeny v. Kheiv*, No. W2014-00656-COA-R3-CV, 2015 WL 1541333, at \*25 (Tenn. Ct. App. Apr. 1, 2015) (“[J]urisdictions that have addressed the interaction between a damages cap and principles of comparative fault have almost unanimously held that any reduction or allocation based on comparative fault must be done before applying the statutory cap . . .”). For examples, see *Guiliani v. Shehata*, 19 N.E.3d 971, 978 (Ohio Ct. App. 2014); *McAdory v. Rogers*, 264 Cal. Rptr. 71, 76 (Ct. App. 1989); *Brown v. Crown Equipment Corp.*, 960 A.2d 1188, 1195 (Me. 2008); *Rodriguez v. Cambridge Housing Authority*, 795 N.E.2d 1, 9 (Mass. App. Ct. 2003); *Alhilo v. Kliem*, 412 P.3d 902, 915-16 (Colo. App. 2016); *Hall v. Brookshire Bros.*, 848 So. 2d 559, 570-71 (La. 2003); and *Mahomes-Vinson v. United States*, 751 F. Supp. 913, 924-25 (D. Kan. 1990). We are only aware of one case in which damage caps were applied first, *Gilman v. Beverly California Corp.*, 231 Cal. App. 3d 121, 123 (1991). *Gilman*, however, involved a complicated interplay between damage caps and liability under Proposition 51, which concerns equity among joint defendants. *Id.* at 123, 126-30.

40. *Guiliani*, 19 N.E.3d at 979-80 (“Given our review of the language of the statute . . . we hold that the trial court did not err in applying [comparative fault first.]”); *Hall*, 848 So. 2d at 570-71 (focusing on the word “damages” as opposed to the “amount” that can be recovered).

that would have been recoverable by [proportional fault].<sup>41</sup> Yet nearly all courts have also relied on precedent, legislative purpose, and policy arguments because the applicable statutory language is invariably ambiguous on the sequencing question.<sup>42</sup>

The primary argument for imposing comparative fault first is that damage caps are motivated by a desire to limit defendant liability, not reduce plaintiff compensation.<sup>43</sup> This argument is best understood in the context of liability insurance. For example, the preamble of the Florida Tort Reform and Insurance Act of 1986 states: “[T]here is in Florida a financial crisis in the liability insurance industry, causing a serious lack of availability of many lines of commercial liability insurance.”<sup>44</sup> Imposing caps allows defendants to purchase (and insurers to sell) insurance policies with limits sufficient to protect themselves from liability.<sup>45</sup> By this reasoning, one only needs to apply caps at the end of the damage calculation because the goal is to prevent the ultimate liability from exceeding the cap (and likely the policy limit).

Courts have also expressed a desire to maximize plaintiff compensation and honor the role of the jury as factfinder. Both of these goals point toward applying caps second. The Colorado Court of Appeals argued that if a cap were applied first, then “the jury’s damages finding in most instances would be meaningless,”<sup>46</sup> presumably because most findings would exceed the cap. The Tennessee Court of Appeals similarly worried that applying a cap first “would

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41. 19 N.E.3d at 977-80 (emphasis omitted) (quoting OHIO REV. CODE ANN. § 2315.35 (West 2014)).

42. See, e.g., *Monypeny*, 2015 WL 1541333, at \*24 (policy); *McAdory*, 264 Cal. Rptr. at 76 (precedent); *Rodriguez*, 795 N.E.2d at 9 (precedent); *Alhilo*, 412 P.3d at 915 (purpose); *Hall*, 848 So. 2d at 571 (policy). For an example of a statute that leaves sequencing ambiguous, see FLA. STAT. § 766.207 (2021) (setting a damage cap in matters of medical negligence without specifying the cap’s underlying purpose).

43. See, e.g., *Gen. Elec. Co. v. Niemet*, 866 P.2d 1361, 1364-66 (Colo. 1994) (holding that the purpose of a damage cap statute was to “protect individual defendants from excessive noneconomic damage verdicts, not to deprive injured plaintiffs from recovering compensation for their damages”).

44. Ch. 86-160, p.mbl., 1986 Fla. Laws 695, 698; *Smith v. Dep’t of Ins.*, 507 So. 2d 1080, 1084 (Fla. 1987); see also *Miller v. Johnson*, 289 P.3d 1098, 1121 (Kan. 2012) (“The legislature enacted [the cap] in an attempt to reduce and stabilize liability insurance premiums by eliminating both the difficulty with rate setting due to the unpredictability of noneconomic damages awards and the possibility of large noneconomic damage awards.”).

45. Although one could argue against this analysis, our main point is that certain interpretative consequences follow from this legislative purpose.

46. *Alhilo*, 412 P.3d at 915 (quoting *Atkins v. Strayhorn*, 223 Cal. App. 3d 1380, 1393 n.8 (1990)). Note, however, that even if comparative fault is applied first, any nuance in the jury’s determination will still be rendered meaningless if the (reduced) award exceeds the cap.

undermine the autonomy of the jury and its role in the trial,”<sup>47</sup> and the Maine Supreme Judicial Court wanted to “honor the jury’s determination.”<sup>48</sup> The California Court of Appeal explained that under comparative fault, “[t]he plaintiff . . . is already recovering an amount less than the jury determined he or she was damaged,”<sup>49</sup> implying that minimizing the effect of the cap was preferable.

A final rationale for applying damage caps second is procedural. Since many statutes imposing caps prohibit the disclosure of those caps to juries (perhaps due to concerns about anchoring effects),<sup>50</sup> courts infer a natural sequence: The jury determines the damages and apportions them based on comparative fault, and then the court imposes the statutory cap.<sup>51</sup>

To be sure, the above rationales are reasonable. Yet once we view the problem as one of sequencing, we can clearly see an alternative line of interpretation. What if damage caps are not aimed at limiting a defendant’s liability directly, but rather at rationalizing noneconomic awards,<sup>52</sup> which are widely acknowledged to be subjective and untethered?<sup>53</sup> After all, it is difficult to ascertain the “worth” of pain in monetary terms.<sup>54</sup> Indeed, the preamble to the Florida Act discussed above offers another justification for damage caps: “[T]he Legislature desires to provide a rational basis for determining damages for noneconomic losses which may be awarded in certain civil actions . . . .”<sup>55</sup>

Under this view, damage caps represent an attempt by the legislature to define noneconomic damages and their scale. In effect, the legislature is stating

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47. *Monypeny*, 2015 WL 1541333, at \*24.

48. *Brown v. Crown Equip. Corp.*, 960 A.2d 1188, 1195-96 (Me. 2008).

49. *McAdory v. Rogers*, 264 Cal. Rptr. 71, 75 (Ct. App. 1989). One can also read cases like *McAdory* as viewing damage caps as a kind of special-interest legislation that should be narrowly construed.

50. *E.g.*, TENN. CODE ANN. § 29-39-104(a)(6) (2021); *see* John Campbell, Bernard Chao, Christopher Robertson & David V. Yokum, *Countering the Plaintiff’s Anchor: Jury Simulations to Evaluate Damages Arguments*, 101 IOWA L. REV. 543, 546-49 (2016) (discussing anchoring effects).

51. *Monypeny*, 2015 WL 1541333, at \*24 (suggesting that since the jury is not allowed to know about the cap, it must apply comparative fault first); *see also Brown*, 960 A.2d at 1195 (discussing the jury’s lack of knowledge of the cap).

52. *See supra* note 33.

53. *See, e.g.*, Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 175-76 (2004).

54. Some economists have tried to quantify pain through so-called “hedonic damages” calculations, but courts typically reject these efforts. *See* 5 DAVID L. FAIGMAN, EDWARD K. CHENG, JENNIFER L. MNOOKIN, ERIN E. MURPHY, JOSEPH SANDERS & CHRISTOPHER SLOBOGIN, *MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY* § 43:3 (West 2021) (“Most attempts to offer economic experts on the issue of hedonic damages are also rejected by courts.”).

55. Tort Reform and Insurance Act of 1986, ch. 86-160, pmbll., 1986 Fla. Laws 695, 699.

that the most that pain and suffering is worth is, for example, \$300,000.<sup>56</sup> This kind of legislative declaration may appear odd, if not a usurpation of the jury's role, but in reality it is neither. Legislatures set rational standards (or what they view to be rational standards) and constrain or displace jury determinations all the time. For example, a legislature can directly override substantive tort law by statute, and the doctrine of negligence per se replaces a jury's individualized determination of reasonableness with standards set by legislatures or agencies.<sup>57</sup>

Based on this "definitional" interpretation, the proper sequence for damage caps should be the reverse of the dominant rule. The court should impose the cap first, since the cap defines the limits of the injury. Only then should the court impose comparative fault. Any concerns about anchoring effects from a cap-first sequence can be handled by using special verdicts and having the court perform damage calculations after the jury deliberates.

Unlike with mitigation, our goal for this discussion on damage caps is not to argue whether the sequence used by courts is right or wrong. Rather, the correct sequence in this context depends on the purpose underlying the cap.<sup>58</sup> If the cap's purpose is to limit defendant liability, then the prevailing sequence is correct. If the cap's purpose is to define the nature and extent of damages recoverable by plaintiffs, then the current sequence should be reversed.

Compared to noneconomic damage caps, the proper sequence for government liability caps and charitable-organization caps is more straightforward. Government liability caps protect the public coffers; charitable-organization caps protect charitable funds.<sup>59</sup> As such, both caps should be imposed after comparative fault, since they are not aimed at accurately calculating harm, but rather at limiting an injurer's liability. In addition, courts should be wary of unthinkingly using analogies. Just because

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56. *Cf. Martin v. Herzog*, 126 N.E. 814, 815-16 (N.Y. 1920) (describing negligence per se as an exercise of legislative supremacy in defining reasonableness).

57. *E.g., Tedla v. Ellman*, 19 N.E.2d 987, 990 (N.Y. 1939) ("At times the indefinite and flexible standard of care of the traditional reasonably prudent man may be, in the opinion of the Legislature, an insufficient measure of the care which should be exercised to guard against a recognized danger . . .").

58. *See supra* note 33.

59. *See, e.g., supra* note 30 and accompanying text; *Keene v. Brigham & Women's Hosp., Inc.*, 786 N.E.2d 824, 835 (Mass. 2003) ("The Legislature's purpose behind the charitable cap was 'to protect the funds [and other assets] of charitable institutions so they may be devoted to charitable purposes.'" (alteration in original) (quoting *English v. New Eng. Med. Ctr., Inc.*, 541 N.E.2d 329, 333 (Mass. 1989))).



government liability caps should be imposed after comparative fault does not mean that noneconomic damage caps should be as well.<sup>60</sup>

### III. Collateral Sources

#### A. The Problem of Collateral Sources

Victims sometimes receive injury-related payments from third parties, such as the government or private insurers. The presence of these third-party payors complicates how damages are calculated. Suppose the victim has already had some medical expenses covered by health insurance, Medicare, or a personal injury protection (PIP) policy. Or suppose the victim has received Social Security disability benefits. Can the victim recover those medical expenses or the value of those disability benefits from the injurer? If so, would that not constitute double recovery?

The common law permitted such double recovery.<sup>61</sup> Historically, the collateral-source rule made evidence of collateral sources inadmissible, allowing victims to recover in excess of their actual damages.<sup>62</sup> Modern legislation, however, has largely abolished the collateral-source rule.<sup>63</sup> For example, Florida law states:

In any [tort] action . . . in which damages are awarded to compensate the claimant for losses sustained, the court shall reduce the amount of such award by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to the claimant, from all collateral sources . . . .<sup>64</sup>

But how—and more importantly, *when*—should the law account for the collateral source? As it should be clear by now, whether the court deducts the collateral source's value before or after applying comparative fault makes a difference.

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60. *Contra* Monypeny v. Kheiv, No. W2014-00656-COA-R3-CV, 2015 WL 1541333, at \*25-26 (Tenn. Ct. App. Apr. 1, 2015) (finding precedent from a case on government liability caps to be “instructive” for sequencing noneconomic damage caps).

61. See RESTATEMENT (SECOND) OF TORTS § 920A (AM. L. INST. 1979); 2 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES–EQUITY–RESTITUTION 493-94 (2d ed. 1993).

62. Bryce Benjet et al., *A Review of State Law Modifying the Collateral Source Rule: Seeking Greater Fairness in Economic Damages Awards*, 76 DEF. COUNS. J. 210, 210 (2009) (explaining that the collateral-source rule “prohibits both the reduction of a recovery by payments from collateral sources and the introduction of evidence of such payments”).

63. See generally *id.* (reviewing modifications to the collateral-source rule).

64. FLA. STAT. § 768.76 (2021) (including in its definition of “collateral sources” Social Security, disability, and health insurance payments but not workers’ compensation or Medicare payments).

To see the implications of sequencing here, consider the following example. Suppose that (1) the victim's harm is \$100,000; (2) the parties are equally at fault; and (3) the victim receives \$40,000 from a collateral source. If comparative fault applies first, the harm is divided equally, and then the collateral-source payment is deducted from the injurer's liability. This results in damages of  $(\$100k * 50\%) - \$40k = \$10k$ . By contrast, if the collateral-source deduction occurs first, then liability is initially reduced by \$40,000, and the remainder is split according to comparative fault. This approach results in damages of  $(\$100k - \$40k) * 50\% = \$30k$ . Thus, the second sequence results in damages that are three times higher than those obtained in the first.

Such a dilemma arose in *Johnson v. United States*, a Ninth Circuit case involving disability benefits under the Veterans Act.<sup>65</sup> In *Johnson*, the plaintiff, an Air Force sergeant, was paralyzed in a car accident and sued the government under the Federal Tort Claims Act.<sup>66</sup> The plaintiff suffered over \$3.5 million in damages, but was found to be 25% at fault and was also expected to receive approximately \$1.5 million in Veterans Administration benefits.<sup>67</sup> It was "well settled that recoveries by military personnel 'under the Tort Claims Act should be reduced by the amounts paid by the United States as disability payments under the Veterans Act.'"<sup>68</sup> But *how* should the recovery have been reduced? If comparative fault were applied first, the plaintiff would have recovered around \$1.125 million.<sup>69</sup> If the collateral-source reduction were applied first, the plaintiff would have recovered around \$1.5 million.<sup>70</sup> The Ninth Circuit chose the former option.<sup>71</sup>

A review of case law on the proper sequencing of collateral sources shows considerable confusion. For example, Ohio has adopted sequencing rules like those in *Johnson* for health benefits under Medicare.<sup>72</sup> By contrast, many other jurisdictions have adopted a collateral-source-first approach. Minnesota has done so by statute.<sup>73</sup> Courts in Florida, Colorado, and Hawaii have done so in

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65. 704 F.2d 1431, 1433-34, 1441 (9th Cir. 1983).

66. *Id.* at 1433.

67. *Id.* at 1434, 1441.

68. *Id.* at 1441 (quoting *United States v. Brown*, 348 U.S. 110, 111 n.\* (1954)).

69.  $(\$3.5m * 75\%) - \$1.5m = \$1.125m$ .

70.  $(\$3.5m - \$1.5m) * 75\% = \$1.5m$ .

71. *Johnson*, 704 F.2d at 1441.

72. *Lamb v. Village of Quincy*, 636 N.E.2d 412, 418 (Ohio Ct. App. 1993) (holding that the trial court should "deduct the benefits received by the complainant from insurance or any other source" after applying comparative fault).

73. MINN. STAT. § 548.251 subdiv. 3(c) (2021) ("In any case where the claimant is found to be at fault . . . the reduction required [for the collateral source] must be made before the claimant's damages are reduced [for comparative fault].").

cases involving PIP policies.<sup>74</sup> A New York court has done so with Social Security disability benefits,<sup>75</sup> and an Ohio court adopted a collateral-source-first approach in a case involving unspecified insurance benefits.<sup>76</sup>

## B. An Explanation

Close analysis of the above cases and the collateral-source problem itself provides a clearer picture and some guidance on sequencing.<sup>77</sup> The essential problem with collateral sources is one of distributing windfall. A third party is providing an additional source of compensation, and the questions are (1) who, as between the victim and the injurer, should capture the benefits of this additional source; and (2) to what extent. Under the common law's collateral-source rule, the victim captured the entire windfall. Abolition of that rule, however, has allowed courts to consider these distribution questions in more nuanced ways.

The sequencing of comparative fault and the collateral-source reduction changes the windfall distribution. Returning to the earlier example, recall that absent any collateral source, the injurer would be responsible for 50% of the total harm of \$100,000, or \$50,000. The collateral source, however, provides an extra \$40,000, and this windfall needs to be distributed. If a court applies comparative fault before the collateral-source reduction, then the injurer ultimately pays only \$10,000. The windfall is distributed entirely to the injurer (the opposite of the common law rule). If, on the other hand, the court applies

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74. *Norman v. Farrow*, 880 So. 2d 557, 560-61 (Fla. 2004); *Hickenbottom v. Schmidt*, 626 P.2d 726, 727 (Colo. App. 1981); *Weite v. Momohara*, 240 P.3d 899, 922-25 (Haw. Ct. App. 2010); *see also Ganley v. United States*, 878 F.2d 1351, 1354 n.5 (11th Cir. 1989) (applying Florida law prior to *Norman*); *Rivera v. Cincinnati Inc.*, No. 92-cv-04345, 1998 WL 898128, at \*1-2 (S.D.N.Y. Dec. 23, 1998) (adopting collateral-source reduction first, but without much explanation).

75. *Rodgers v. 72d St. Assocs.*, 703 N.Y.S.2d 456, 458 (App. Div. 2000) (“The deduction for collateral source payments should precede the deduction for comparative fault . . .”).

76. *Sferra v. Shonce*, Nos. 90CA51 & 90CA113, 1992 WL 198083, at \*1, \*3 (Ohio Ct. App. Aug. 11, 1992).

77. As in the damage-cap context, some courts have tried to explain their holdings through close textual analysis. But once again, the statutory language is almost always sufficiently ambiguous to support either sequence. For example, the Florida Supreme Court in *Norman v. Farrow* focused on language stating that the plaintiff “shall have no right to recover any damages for which personal injury protection benefits are paid or payable.” 880 So. 2d at 559-61 (emphasis omitted) (quoting FLA. STAT. § 627.736(3) (2003)). It then argued that the PIP reduction should precede comparative fault because “[t]hose amounts are not recoverable.” *Id.* at 560-61. But one could easily argue for the opposite sequence based on the same language. The statutory requirement and comparative fault are two separate grounds for restricting the victim’s damages, and the statute itself makes no reference to appropriate order. Hence, deducting for comparative fault first and PIP payments second would not contravene the statute.

the collateral-source reduction first, then the injurer ultimately pays \$30,000. Now the windfall is distributed between the victim and the injurer. Specifically, the injurer captures half of the benefit emanating from the collateral source (\$20,000).

To be clear, our definition of “collateral source” does not include instances in which a third party effectively stands in place of one of the parties. In these cases, the third party is not a collateral source, and courts have essentially ignored such third parties in damage calculations. For example, an injurer’s liability insurer might conceptually be another source of funding, but it essentially stands in place of the injurer.<sup>78</sup> Similarly, a victim’s health insurer, through standard indemnification and subrogation clauses, essentially stands in place of the victim.<sup>79</sup> Existing statutory schemes recognize this distinction.<sup>80</sup> The remainder of our analysis excludes these “privity” or “agency” cases.

With the above insights about windfall distribution, one can tentatively explain much of the existing precedent. The majority of cases apply the collateral-source reduction first, reflecting a deep reluctance to distribute the windfall exclusively to injurers. Most collateral sources involve government programs intended to benefit the victim (or at least the public at large): Social Security, Medicare, and so on. Transferring the windfall from these programs entirely to injurers would seem strange, if not perverse. More natural would be

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78. Accordingly, the correct approach in such cases is to apply comparative fault at trial, and then treat any payment to the victim by the injurer’s insurer as a payment from the injurer himself. This approach guarantees that the injurer, who acquired the insurance, fully captures the proceeds when the insured event occurs. For example, if the harm is \$100 and the parties are equally at fault, the injurer is liable for \$50. If the injurer’s liability insurer had already paid the victim \$50, however, the injurer should be absolved from any further liability. This conclusion is consistent with the general principle set forth in the Second Restatement of Torts: “If a tort defendant makes a payment toward his tort liability, it of course has the effect of reducing that liability. This is also true of payments made under an insurance policy that is maintained by the defendant . . . .” RESTATEMENT (SECOND) OF TORTS § 920A cmt. a (AM. L. INST. 1979).

79. In this case, the correct approach is to apply comparative fault at trial, and then treat any payment from the victim’s insurer as a payment made from the injurer to the victim. This approach is justified by the fact that the insurer can bring an indemnity or subrogation claim against the injurer and thus recover the payment from the injurer in a separate proceeding. A different approach would charge the injurer for more than 100% of the injury (as he would be liable to both the victim and the insurer for the same harm). The approach described above is also justified from the standpoint of the victim. By assigning the right of indemnity or subrogation to the insurer, the victim gives up her right to collect insurance payments in the event of a tort, presumably in exchange for a lower premium. *See generally* KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 249-54 (5th ed. 2017) (explaining the rationales behind subrogation and indemnification).

80. *E.g.*, FLA. STAT. § 768.76 (2021) (“[T]here shall be no reduction for collateral sources for which a subrogation or reimbursement right exists.”).

to split collateral-source windfalls in some way.<sup>81</sup> Even PIP payments, which at first appear to be personal to the victim (and thus a privity-type case), end up being split by courts through a collateral-source-first sequence.<sup>82</sup> PIPs are often mandated by states in an effort to reduce litigation surrounding motor-vehicle accidents,<sup>83</sup> and thus they are not intended to benefit the victim alone.

By contrast, many of the comparative-fault-first cases, which allocate the entire windfall to the injurer, involve harms by the government. These holdings can be explained by the same principle that motivates government damage caps: protecting the public coffers. The Ninth Circuit's *Johnson* case, which involved Veterans Administration benefits in a tort suit against the government, seems to apply this principle.<sup>84</sup> Another example is *Lamb v. Village of Quincy*, which involved an Ohio sovereign-immunity waiver that allowed governmental tortfeasors to deduct benefits that plaintiffs were "entitled to receive . . . from a policy or policies of insurance or any other source."<sup>85</sup> The *Lamb* court applied comparative fault first, giving the whole windfall to the government, because "[f]ailure to follow this procedure [would] contravene[] the legislative intent . . . to conserve fiscal resources of political subdivisions."<sup>86</sup>

### C. Recasting Collateral Sources

Understanding the policy implications of the sequencing rules clarifies and explains many of the collateral-source cases. The basic question is whether the

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81. Indeed, in a rather extreme case, the Alaska Supreme Court held that when the injurer's insurer made medical payments to the victim without specifying that they were related to liability, those payments were to be shared. *Jackman v. Jewel Lake Villa One*, 170 P.3d 173, 174-75, 179 (Alaska 2007) ("[I]t hardly follows that an insurer's unconditional and unexplained reimbursements of medical expenses should routinely be treated as having been paid on account of the defendant's fault.").
82. *E.g.*, *Norman*, 880 So. 2d at 560-61; *Hickenbottom v. Schmidt*, 626 P.2d 726, 727 (Colo. App. 1981); *Weite v. Momohara*, 240 P.3d 899, 923 (Haw. Ct. App. 2010). *But see* *Assi v. Fla. Auto Auction of Orlando, Inc.*, 717 So. 2d 588, 589-90 (Fla. Dist. Ct. App. 1998) (applying comparative fault first in a PIP case), *overruled by Norman*, 880 So. 2d 557.
83. *See, e.g.*, *Weite*, 240 P.3d at 923; HAW. REV. STAT. § 431:10C-301.5 (2021) (providing that PIP benefits should be deducted from a victim's compensation); *id.* § 431:10C-104 (mandating the purchase of PIPs in Hawaii).
84. *Johnson v. United States*, 704 F.2d 1431, 1441 (9th Cir. 1983); *see supra* notes 65-71 and accompanying text. While *Johnson* does not discuss this rationale explicitly, the desire to protect the public coffers could, at least in part, explain the outcome.
85. 636 N.E.2d 412, 415 (Ohio Ct. App. 1993) (quoting OHIO REV. CODE ANN. § 2744.05(B) (West 1993)).
86. *Id.* at 418. *But see* *Sferra v. Shonce*, Nos. 90CA51 & 90CA113, 1992 WL 198083, at \*3 (Ohio Ct. App. Aug. 11, 1992) (holding that the collateral-source reduction should be applied first, because "[t]o hold otherwise would provide a political subdivision with a windfall").

windfall should go to the injurer or be divided between the parties. Unless there is a particular reason to favor the injurer exclusively, courts have opted to split the windfall and account for the collateral source before applying comparative fault.

That said, something is still not right. In truth, the fact that the collateral-source-first sequence divides the windfall between the parties is just a coincidence. Conceptually, the existence of a collateral source has nothing to do with the joint *damages* created by the parties. As we have emphasized, the collateral-source payment is merely a *windfall* that needs to be allocated.

Worse yet, the collateral-source-first sequence divides the windfall in perverse ways. Splitting the windfall based on comparative fault means that the more culpable party captures more of the benefit!

Referring again to our earlier example, we can demonstrate this perverse result. Recall that the harm is \$100,000, the parties bear equal responsibility, and the third party's payment is \$40,000. As we have seen, if the court deducts the collateral-source payment first, and then applies comparative fault, the injurer pays \$30,000 in damages. Because the injurer is responsible for 50% of the harm, he captures half the benefit arising from the collateral source (\$20,000).

But what if the injurer were 90% at fault? Then, by the same procedure, his liability would be  $(\$100k - \$40k) * 90\% = \$54k$ . Note that, absent the collateral source, the injurer's liability would have been \$90,000. Hence, the injurer now captures 90% of the benefit arising from the payment made by the third party:  $\$90k - (\$40k * 90\%) = \$54k$ . Thus, paradoxically, the *more* culpable the injurer, the *greater* his share of the windfall.

From these observations, we can draw several conclusions about collateral-source reductions. Both sequences that courts currently employ suffer from fundamental weaknesses, though for different reasons. The comparative-fault-first approach distributes the entire benefit of the collateral-source payment to the injurer, a seemingly inequitable (and possibly perverse) result. The collateral-source-first approach splits the benefit between the parties but does so in a manner that rewards the more culpable party. This, too, seems inequitable and perverse.

Against this backdrop, a third (heretofore overlooked) possibility emerges. Recall that the collateral sources we have been discussing are unrelated to the joint damages created by the parties. Courts therefore should not account for these sources before the imposition of comparative fault. Thus, the correct sequencing rule should put comparative fault first. Yet to prevent injurers from capturing the entire windfall, courts should subsequently distribute the collateral-source payment using a separate analysis.

We propose a novel approach whereby the windfall is distributed according to the "inverse" of each party's comparative fault. If a party's relative

fault is 90%, that party should receive 10% of the windfall (while the other party, whose fault is 10%, should receive the remaining 90%). Applying this principle to our example: If the injurer is 90% at fault for a harm of \$100,000, and the collateral source provides \$40,000, after the application of comparative fault, liability should be reduced by  $\$40k * 10\% = \$4k$ , from \$90,000 to \$86,000.

Basing distribution of the windfall on the inverse of parties' relative fault is desirable in terms of both equity and incentives. From an equity perspective, it correctly allocates financial responsibility in accordance with comparative negligence. From an incentive perspective, it offers a greater reward to the party whose behavior is more in line with the applicable standard. In so doing, this approach better incentivizes both parties to act with optimal care.

Regardless of the exact rule chosen, the above account demonstrates that a careful analysis of sequencing can provide valuable insights. From the morass of rules governing collateral sources, we have again distilled that sequencing matters and can reflect different policy choices. More importantly, we have demonstrated that the problem of collateral-source payments is not exclusively a matter of sequencing, but also a matter of designing a distribution mechanism that addresses concerns of equity and efficiency.

#### D. An Extension: Settlement Rules

On a final note, our analysis of collateral sources accords well with settlement rules in cases involving multiple defendants. Conceptually, these cases are just another variant of the collateral-source problem. The Supreme Court case of *McDermott, Inc. v. AmClyde*<sup>87</sup> illustrates the issue. In *McDermott*, the plaintiff suffered \$2.1 million in damages due to a crane accident. A jury found defendants AmClyde and River Don to be 32% and 38% at fault, respectively.<sup>88</sup> The plaintiff had earlier settled with a different group of defendants (who, in combination with the plaintiff, were responsible for the remaining 30% of the harm) for \$1 million.<sup>89</sup> Note that \$1 million corresponded to almost half the harm, and therefore exceeded the proportional share of the settling parties' fault. The question facing the Court was how to account for the settlement windfall.

There are two principal ways to credit the prior settlement: either (1) reduce the judgment against the litigating defendants *pro tanto* by the \$1 million prior settlement (ensuring that the victim is made whole and preventing excessive or inadequate recovery); or (2) reduce the judgment proportionately by the settling defendants' 30% share (ensuring that each

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87. 511 U.S. 202 (1994).

88. *Id.* at 204-05.

89. *Id.* at 205-06.

defendant pays its relative share and preventing excessive or inadequate liability). The Supreme Court's analysis thus focused on this choice between the *pro tanto* and proportionate approaches.<sup>90</sup> Yet one can easily transform the question into a collateral-source sequencing problem. Here, the settlement is the collateral source, and the question becomes how the court should account for it. The *pro tanto* method effectively adopts a collateral-source-first approach. It reduces the damages (\$2.1 million) by the settlement (\$1 million), and then divides the remainder by comparative fault. As a result, River Don would be liable for about \$597,000.<sup>91</sup>

By contrast, the proportionate method effectively adopts a comparative-fault-first approach. The damages (\$2.1 million) are divided by comparative fault, resulting in River Don's liability being \$798,000.<sup>92</sup> The entire collateral-source payment is then given to the plaintiff. Under this approach, which the Supreme Court ultimately adopted, the settling defendants' contributions are effectively kept in a separate lane. If a settling defendant pays too much, the plaintiff keeps it; if a settling defendant pays too little, the plaintiff is out of luck.

By our analysis, *McDermott* is correct not only as a policy matter but also as a conceptual matter. The settlement has no bearing on the joint damage caused by the defendants, so comparative fault should be applied before accounting for the collateral-source payment. Thereafter, how the windfall (or shortfall) should be divided becomes a matter of policy. To one view, since the victim negotiated the settlement, he alone should receive the resulting benefit or bear the resulting loss. By contrast, policy goals such as the promotion of settlement may warrant distributing the windfall differently.

#### IV. Discussion

The preceding Parts have demonstrated the rank confusion among courts surrounding questions of sequencing. This Part turns to consider three related

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90. *Id.* at 208-17.

91.  $(\$2.1\text{m} - \$1\text{m}) * (38\%/70\%) = \$597,142.86$ .

92.  $\$2.1\text{m} * 38\% = \$798\text{k}$ . See *McDermott*, 511 U.S. at 210. The court of appeals reached an erroneous result by either standard. The court, in effect, counted the settlement twice: It initially found the defendants responsible for only 70% of the harm (thus crediting them for the 30% attributable to the settling party and the plaintiff); and it then reduced liability further by deducting the settlement amount of \$1 million (thereby crediting the defendants again for the same parties' share). Thus, under the court's calculation, the remaining liability was determined to be  $(\$2.1\text{m} * 70\%) - \$1\text{m} = \$470\text{k}$ . For contractual reasons not relevant here, the court of appeals found that AmClyde was not liable at all and imposed the \$470,000 sum solely on River Don. *McDermott*, Inc. v. Clyde Iron, 979 F.2d 1068, 1076, 1081 (5th Cir. 1992), *rev'd sub nom. McDermott*, 511 U.S. 202.



issues. First, it explores reasons why courts may overlook the importance of sequencing, which often results in the misallocation of liability. Second, it sheds light on the social costs of such errors, highlighting their adverse implications, particularly for vulnerable parties. Finally, it offers a comprehensive framework for addressing sequencing questions, sketching a general “algorithm” that can apply across different manifestations of the sequencing problem.

### A. Why Courts Err

If sequencing is so critical to the calculation of damages, why do courts so often get it wrong, or at least fail to fully account for its implications? In this Subpart, we offer four possible explanations: (1) an adherence to the chronological order of events; (2) the elusiveness of functional analogies; (3) a misguided reliance on conceptual framing; and (4) the ambiguity of legislative intent. While each of these explanations provides an independent account for the observed confusion, we suspect that their cumulative effect is what clouds the vision of courts.

The first explanation for courts’ confusion is the natural tendency to construct legal analysis (and indeed, any analysis) chronologically. Consider comparative fault and mitigation. A victim’s negligence (namely, her failure to take adequate care) precedes her failure to mitigate harm. Hence, it seems intuitive to examine comparative negligence first and mitigation second. Unless one is aware of the mathematical and policy implications of alternative sequences, aligning the “legal sequence” with the “chronological sequence” seems intuitive and appealing.

A second reason that courts err is the ill-considered use of analogies across sequencing contexts. Consider two sequencing cases from the Ninth Circuit that we have already discussed: *Gomez v. American Empress Partnership*<sup>93</sup> and *Johnson v. United States*.<sup>94</sup> In deciding how to sequence mitigation in *Gomez*, the Ninth Circuit relied in part on an analogy to *Johnson*, which addressed sequencing in the collateral-source context.<sup>95</sup> Yet as discussed above, the correct sequencing for collateral sources is inapposite to the correct sequencing for mitigation. Sequencing in the mitigation context involves the accurate calculation of joint damages; sequencing in the collateral-source context

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93. No. 97-35932, 1999 WL 595330 (9th Cir. Aug. 9, 1999); see *supra* notes 14-19 and accompanying text.

94. 704 F.2d 1431 (9th Cir. 1983); see *supra* notes 65-71 and accompanying text.

95. *Gomez*, 1999 WL 595330, at \*2 & n.7 (“The district judge’s method of calculation, first reducing total damages by [the plaintiff’s] percentage of fault, then reducing that subtotal by the money amount that [the plaintiff] could have avoided by reasonable mitigation, was consistent with [*Johnson*, a] somewhat analogous case in our court . . .”).

involves the distribution of a windfall. The two problems involve different conceptual issues and different policy questions.

Courts make a similar mistake when they analogize across different types of damage caps. Take, for example, *Monypeny v. Kheiv*, in which the Tennessee Court of Appeals found precedent on the proper sequence for government liability caps “instructive” in a case involving noneconomic damage caps.<sup>96</sup> While both contexts involve caps, the rationale behind government liability caps is quite different from the rationale that motivates noneconomic damage caps. Recall that government liability caps are intended to protect public funds, whereas noneconomic damage caps may be intended to define or rationalize the nature of noneconomic injury. Reasoning across the two contexts simply because they *appear* similar is traveling a primrose path.

In fairness to courts, the confusion in this context is understandable. Sequencing cases frequently appear enticingly similar. Yet small changes can result in the same sequence having markedly different ramifications for a victim’s compensation. Consider sequencing for mitigation and sequencing for damage caps. Both involve the ordering of (1) comparative fault; and (2) a rule reducing the damages award. Yet sequencing plays out differently in each. For mitigation, applying comparative fault first and mitigation second shortchanges the victim: It *decreases* the victim’s compensation as compared to her recovery under the reverse order. For damage caps, applying comparative fault first and the cap second *increases* the victim’s recovery as compared to the reverse order. In short, getting sequencing right is complicated. It requires an awareness of the sequencing issue itself and a meticulous dissection of the underlying context.

Sequencing errors are further exacerbated by their conceptual framing. Conventionally, tort rules fall into two distinct categories: those governing the assignment of liability and those determining the scope of damages. While comparative fault has traditionally been classified as a liability issue, the rules governing mitigation, damage caps, and collateral sources have been classified as damages issues.<sup>97</sup> Leading torts casebooks often discuss comparative fault in the “Plaintiff’s Conduct” chapter, whereas they discuss mitigation, damage caps, and collateral sources in the “Damages” chapter.<sup>98</sup> Similarly, remedies casebooks commonly discuss the latter three doctrines, but they rarely

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96. No. W2014-00656-COA-R3-CV, 2015 WL 1541333, at \*24-25 (Tenn. Ct. App. Apr. 1, 2015).

97. See, e.g., Yehuda Adar, *Comparative Negligence and Mitigation of Damages: Two Sister Doctrines in Search of Reunion*, 31 QUINNIPIAC L. REV. 783, 794 (2013) (“Anglo-American law treats mitigation and comparative negligence . . . as two utterly distinct legal institutions . . . [that] have little or nothing to do with each other.”).

98. E.g., EPSTEIN & SHARKEY, *supra* note 4, at 334-52, 807-08, 815-16, 845-50. For more examples, see Adar, *supra* note 97, at 795 & nn.45-46.

mention comparative fault.<sup>99</sup> This conceptual separation is perhaps useful for purposes of organization and presentation, but it has unfortunately taken on a more formal cast in the courts.<sup>100</sup> The New Jersey Supreme Court, for example, has expressly noted that “[c]omparative negligence is generally ‘viewed as a liability doctrine, rather than a damage doctrine.’”<sup>101</sup> The Fifth Circuit has emphasized that mitigation “is not considered a defense at all, but merely a rule of damages.”<sup>102</sup>

This dichotomy between liability and damages can easily seduce courts into a kind of procedural formalism that then dictates sequence.<sup>103</sup> After all, factfinders are normally supposed to determine liability first and damages second.<sup>104</sup> So, the fallacious argument goes, surely the court should apply comparative fault (that is, liability) before making “damage adjustments.” Indeed, in *Williams v. Jader Fuel Co.*, discussed in the Introduction above, the

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99. For examples, see *Adar*, *supra* note 97, at 795-96, 796 n.47.

100. The dichotomy may have its origins in contributory negligence, which, as a complete defense to liability, makes sense to resolve at the liability stage. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 458 (W. Page Keeton ed., 5th ed. 1984) (“[C]ontributory negligence is negligence of the plaintiff before any damage, or any invasion of his rights, has occurred, which bars all recovery. The rule of [mitigation] comes into play after a legal wrong has occurred, but while some damages may still be averted, and bars recovery only for such damages.”); *see also, e.g.*, *Fed. Ins. Co. v. Sabine Towing & Transp. Co.*, 783 F.2d 347, 350 (2d Cir. 1986) (distinguishing contributory negligence from failure to mitigate). But the modern rise of comparative fault, particularly in its “pure” form, has rendered this conceptual framework anachronistic. *See* Matthiesen, Wickert & Lehrer, S.C., *Contributory Negligence/Comparative Fault Laws in All 50 States 2* (2021), <https://perma.cc/9CY5-A4M5> (reporting that only Alabama, the District of Columbia, Maryland, North Carolina, and Virginia have yet to adopt some form of comparative negligence).

101. *Ostrowski v. Azzara*, 545 A.2d 148, 155 n.5 (N.J. 1988) (quoting Michael B. Gallub, Note, *A Compromise Between Mitigation and Comparative Fault?: A Critical Assessment of the Seat Belt Controversy and a Proposal for Reform*, 14 HOFSTRA L. REV. 319, 327 (1986)).

102. *Pennzoil Producing Co. v. Offshore Express, Inc.*, 943 F.2d 1465, 1474 (5th Cir. 1991) (quoting *Southport Transit Co. v. Avondale Marine Ways, Inc.*, 234 F.2d 947, 952 (5th Cir. 1956)).

103. A related, illustrative example is the Sixth Circuit’s holding that when a defendant in a bifurcated trial fails to plead the victim’s negligence in the liability phase, the pleading is considered waived and can no longer be raised in the damages phase. *Nilson-Newey & Co. v. Ballou*, 839 F.2d 1171, 1175 (6th Cir. 1988) (referencing previous case law for the view that comparative and contributory negligence should be regarded as relevant to the issue of “liability rather than to the issue of what the total damage amounted to”).

104. *E.g.*, *Swink v. Montgomery Ward & Co.*, No. 83 C 1842, 1985 WL 1478, at \*1 (N.D. Ill. May 22, 1985) (“[B]ecause plaintiff must first prove liability, it is premature to rule on the question of damages.”).

Seventh Circuit emphasized its desire to seal off comparative fault from mitigation in an attempt to simplify the questions asked of the jury.<sup>105</sup>

As we now know, however, the dichotomy between comparative fault and the other damages doctrines is false. It is emphatically not the case that comparative fault is a “liability” inquiry and thus should always be assessed first. Sometimes it should be assessed first, and sometimes it should not be. It depends on the context. Allowing the procedural formalism of a “liability phase” and a “damages phase” to dictate how we calculate damages is tantamount to the tail wagging the dog. Trial structure does not (or at least should not) dictate how we calculate damages. It is the need to calculate damages accurately that should drive how we structure trials.

Finally, legislatures exacerbate the sequencing problem by failing to provide clear messages about statutory purpose. Is the purpose of noneconomic damage caps to limit the defendant’s liability or to define the nature of noneconomic damages? Why have legislatures abolished the common law collateral-source rule? The answers to these questions affect proper sequencing. Yet as we saw in the context of the Florida Tort Reform and Insurance Act of 1986, statutes can be vague and broad regarding their purposes, leaving courts to their own devices.<sup>106</sup>

One might be tempted to say that legislatures should simply specify the sequencing rule in the statutory text itself, but such an attempt would probably be a fool’s errand. There are too many combinations of damage adjustments to comprehensively account for all of them *ex ante*. For example, one can easily imagine a car accident that involves a failure to mitigate, a noneconomic damage cap, and a collateral source. And that is based only on the examples that we have discussed. Rather than being rule based, the solution must inevitably be based on a general algorithm or set of principles. We explore this idea further in Part IV.C below.

## B. The Cost of Erroneous Sequencing

The costs of sequencing mistakes are varied and can be sizable. Most obviously, incorrect sequencing can carry alarming distributional

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105. Specifically, the Seventh Circuit feared that the jury might conflate comparative fault with mitigation, which could tip the plaintiff’s “fault” over 50% and bar recovery under Illinois law. *See Williams v. Jader Fuel Co.*, 944 F.2d 1388, 1401-02 (7th Cir. 1991). In line with this reasoning, the court stated that while “the issue of comparative negligence was appropriately resolved in the liability phase,” the question of whether the plaintiff’s “recovery should be reduced because of [the] failure to prevent the occurrence of avoidable consequences . . . related to the amount of . . . recovery and was properly addressed in the damages phase.” *Id.* at 1402.

106. Ch. 86-160, pmb1., 1986 Fla. Laws 695, 698-99 (providing many reasons for imposing damage caps).

consequences. As we have seen, the choice of sequence can mean the difference of hundreds of thousands of dollars for a single plaintiff. The choice of sequence also determines how collateral-source windfalls, often of considerable monetary value, are shared between the parties.

In the mitigation context, improper sequencing can exacerbate the obstacles faced by plaintiffs in idiosyncratic situations, many of whom come from marginalized groups. As is often the case in torts, the standard for mitigation is an objective one.<sup>107</sup> Members of groups whose preferences or capabilities do not accord with those of a “reasonable person” thus pay extra, because their unique attributes can cause them to violate the mitigation standard. For example, partly due to First Amendment concerns, courts have held that mitigation does not individualize to account for religious beliefs that require the refusal of certain medical treatments.<sup>108</sup> Victims who hold these beliefs are effectively penalized for their observance through the reduction of their award for failure to mitigate.<sup>109</sup> If a court uses the improper sequence, then these tort victims will suffer an even greater economic penalty.<sup>110</sup>

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107. RESTATEMENT (SECOND) OF TORTS § 918 cmt. c (AM. L. INST. 1979) (“The factors determining whether an injured person has used care to avert the consequences of a tort are in general the same as those that determine whether a person has been guilty of negligent conduct . . . . He is required to exercise no more than reasonable judgment or fortitude . . .”).

108. *Munn v. Algee*, 924 F.2d 568, 574-75 (5th Cir. 1991) (“We conclude that in an appropriate case, application of the case-by-case approach to religiously motivated refusals to mitigate damages can involve weighing the reasonableness of religious beliefs and thus arguably would violate the establishment clause.”); *Braverman v. Granger*, 844 N.W.2d 485, 496 (Mich. Ct. App. 2014) (per curiam) (holding that individualization on account of religion would result in excessive entanglement); *Corlett v. Caserta*, 562 N.E.2d 257, 262 (Ill. App. Ct. 1990) (declining to create an exception to the reasonable person standard for religious practices).

109. For a broader discussion of the case law, see generally Anne C. Loomis, Comment, *Thou Shalt Take Thy Victim as Thou Findest Him: Religious Conviction as a Pre-existing State Not Subject to the Avoidable Consequences Doctrine*, 14 GEO. MASON L. REV. 473 (2007).

110. Erroneous sequencing, which inflates the economic penalty imposed on the victim, can also distort the victim’s incentive to mitigate. If the inflated penalty is sufficiently high, a victim with idiosyncratic attributes may choose to mitigate even when mitigation is inefficient. Suppose, for example, that a victim can undertake medical treatment that would mitigate their harm by \$10. The treatment costs \$1 for an ordinary victim, but \$11 for a victim belonging to a special group. So long as victims are charged \$10 for failing to mitigate, victims belonging to the special group will (efficiently) bear the penalty and refrain from mitigating. Yet under an incorrect sequence, such victims will be charged a higher amount, and may therefore be induced to mitigate inefficiently. In this example, if the economic penalty exceeds \$11, ordinary victims will mitigate (efficiently) and will not bear the penalty, but victims belonging to the special group will be driven to mitigate inefficiently to avoid the inflated penalty. Thus, the combination of an objective standard and an incorrect sequence is particularly harmful for idiosyncratic victims.

This penalty enhancement occurs outside of the religious context as well. For example, citing the objective mitigation standard, courts have penalized smokers for their failure to stop smoking<sup>111</sup> and obese victims for their failure to reduce their body weight.<sup>112</sup> Courts have done so even when victims exerted effort to meet the mitigation standard but fell short due to subjective limitations.<sup>113</sup> These rules may already seem unfair; applying improper sequencing makes the situation even worse.<sup>114</sup>

Aside from these equity concerns, improper sequencing can have undesirable effects on behavior. In the damage-cap context, improper sequencing can overdeter potential defendants. This problem is of particular concern in the context of medical treatment, where caps are prevalent. Applying the wrong sequence overcharges medical providers,<sup>115</sup> resulting in an inflated cost of medical care and an unnecessary rise in malpractice premiums. These costs are ultimately borne by the public and are felt most by the poor, who already face unmanageable healthcare costs.

In the collateral-source context, the adverse impact on behavior is even more direct. At present, courts (unsurprisingly) prefer the sequencing rule that divides the collateral source between the parties rather than the rule that allocates it entirely to the injurer. But as we have demonstrated, the current rule creates perverse incentives and violates basic fairness by allocating the windfall in direct proportion to fault. The more culpable party captures more of the benefit. Courts cannot address issues like this without understanding the underlying sequencing questions.

The heavy cost of incorrect sequencing highlights the importance of addressing the sequencing problem. Considering the systematic distortions that incorrect sequences can produce, one cannot expect that erroneous decisions will cancel each other out, nor can one hope that other compensation

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111. *Schifino v. Geico Gen. Ins. Co.*, No. 11-cv-01094, 2013 WL 6533180, at \*12-13 (W.D. Pa. Dec. 13, 2013).

112. *Muller v. Lykes Bros. S.S. Co.*, 337 F. Supp. 700, 706-07 (E.D. La.), *aff'd*, 468 F.2d 951 (5th Cir. 1972); *see also* *Van Holt v. Nat'l R.R. Passenger Corp.*, 669 N.E.2d 1288, 1298-99 (Ill. App. Ct. 1996) (discussing whether losing weight qualifies as mitigation).

113. *See, e.g., Muller*, 337 F. Supp. at 706-07 (reducing compensation despite the plaintiff's past attempts to lose weight).

114. As in the religious context, victims facing the higher penalty can do one of two things. They can either fail to mitigate, resulting in an even higher penalty for their idiosyncratic position, or they can mitigate based on the enhanced price, and in doing so suffer more harm than necessary. Although they may capture the economic benefit of mitigating, they must endure the personal, emotional, or other noneconomic harms that led them to refuse mitigation in the first place.

115. As discussed in Part II above, when caps are set to reflect the upper bound of the harm, application of the wrong sequence (namely, comparative fault first and the cap second) results in excessive liability.

rules will somehow counter sequencing errors. In the next Subpart we consider a possible approach to address the problem of sequencing.

### C. Developing a General Theory

Throughout this Article, we have stressed that sequencing matters, and that courts frequently get sequencing wrong. We have also seen, however, that determining the correct sequence can be extremely complicated and can depend significantly on context. Just from our three examples, we find three different conclusions. In the mitigation context, courts should apply mitigation reductions first. In the damage-cap context, the sequence depends on the underlying policy of the cap. If the cap aims to limit the defendant's liability, then courts should apply comparative fault first; if the cap aims to define the plaintiff's injury, then courts should apply the cap first. In the collateral-source context, except for special circumstances involving governmental actors,<sup>116</sup> courts should apply neither existing sequence. Instead, they should apply comparative fault first and then divide the collateral source by the inverse of fault.

Is there a theory or algorithm we can derive from this disarray to help courts navigate the problem of sequencing? After all, while individual solutions may be well and good, a more general solution would be more ideal. We think that such a solution exists. Careful attention to the procedure we outline below will help courts determine the correct sequencing approach regardless of context.

**Step 1:** Determine the damages jointly caused by the parties.

The first step is to calculate the damages that were jointly caused by the parties. The key word here is "jointly." Mitigation comes first because avoidable consequences are not jointly caused: They are the plaintiff's responsibility alone and should therefore be kept separate from the comparative-fault calculation. Similarly, if the purpose of a damage cap is to delineate the boundaries of the plaintiff's recovery, then the cap should be imposed before comparative fault, because it effectively defines joint damages.

This principle also explains why courts should not account for collateral sources before comparative fault. Collateral sources are windfalls created by third parties which have no bearing on the joint harm caused by the parties themselves. We defer their accounting until later.

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116. *See supra* text accompanying notes 84-86.

**Step 2:** Apply comparative fault.

With the joint damages ascertained, it is time to impose comparative fault. The court divides the jointly caused damages between the parties proportionally based on fault.

**Step 3:** Apply doctrines that deal with individual or distributive issues.

With the damages split between the victim and the injurer, the court can apply doctrines that affect each party individually. For example, if a damage cap's purpose is to limit the injurer's liability, the court should apply it here to cap what the injurer *individually* must pay. This is also the correct time to distribute collateral sources, based on whatever distributional scheme the court chooses. Under our proposal, the court would in most cases divide the collateral-source windfall by inverse comparative fault and credit the parties accordingly.

Notably, the pivot of our sequencing framework is comparative fault. Doctrines that pertain to joint damages are applied before comparative fault, and doctrines that pertain to individual damages are applied after. To understand why comparative fault is the pivot, we need to go back to the order of operations. Comparative fault is a multiplicative operation, while nearly all other damages doctrines are additive (or subtractive).<sup>117</sup> That is ultimately the key to why sequencing matters. Typically, damages doctrines can be applied in any sequence because addition is commutative and associative: Addition calculations can be shuffled without ill effects. But multiplication cannot be shuffled with addition. That is why the lone multiplicative operation, comparative fault, becomes the axis on which sequencing turns. Some addition must be done before comparative fault and some addition must be done after, but never should the twain mix.<sup>118</sup>

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117. As noted, even when the failure to mitigate is expressed in terms of percentage reductions, a sequencing problem can arise if courts apply incorrect calculations like the one in *Strong*. See *supra* text accompanying notes 24-26.

118. While the pervasiveness of comparative fault will surely make it the primary pivot, damage caps by themselves can create a similar dynamic. Damage caps are ceiling functions, and therefore are sensitive to the sequencing that occurs around them. For example, sequence would matter in a case involving damage caps and collateral sources alone. Suppose the victim suffers \$300,000 in injuries, there is a \$250,000 cap, and the victim received \$50,000 from a collateral source. Suppose also that the injurer retains the entire collateral-source windfall. If the cap is applied first, the victim will receive  $\$250k - \$50k = \$200k$ . If the collateral-source reduction is applied first, the victim will receive  $\$300k - \$50k = \$250k$ .



### **Conclusion**

This Article has explored sequencing in three distinct areas of torts—mitigation, damage caps, and collateral sources—all of which play a major role in determining liability and compensation. As we have seen, the existing case law on sequencing is haphazard and undertheorized. Courts frequently disagree on the correct sequence, impose the wrong sequence, or fail to recognize the sequencing problem entirely. Occasionally, courts also analogize inappropriately across contexts and allow the structure of the trial to dictate the sequence of damages.

As we have noted, however, much of the confusion is understandable. For one thing, no one seems to have identified sequencing as a general problem. On this score, developing a broad, unified approach to sequencing is an advance in and of itself. For another thing, proper sequencing is hard. The right answer changes sharply depending on context and policy considerations, and two sequencing questions that appear similar may be quite different. We have seen instances in which sequencing should be one way, others in which sequencing should be the exact opposite, others in which it depends, and still others in which the two obvious possibilities are both wrong.

As difficult as sequencing may be, we have emphasized time and again that it matters. Getting sequencing right is not just an academic exercise. Doing so has substantial implications for victim recovery, distributional fairness, and behavioral incentives. This Article has not only highlighted sequencing as an area worthy of future study but has also provided some important real-world solutions. It has offered the correct sequences for failures to mitigate, damage caps, and collateral sources. Perhaps more importantly, it has offered a general framework, allowing for a more systematic analysis of sequencing problems going forward.