

Special Feature

# The Need for Jury Instruction or Argument on Collateral Source

## *A Proposal for Change*

by Brien Roche

**T**he collateral source rule is an evidentiary rule that has been much maligned over the years. Although some states have limited its breadth, the rule still is recognized in most states and stands for the proposition that the existence of collateral sources of indemnity or protection to a plaintiff (*i.e.*, insurance coverage) in a tort action are not relevant. The theory behind the rule is that the party obtaining the insurance coverage should not be exposed to any potential jury prejudice by revealing the existence of that coverage, that is, "one who by his negligence has injured another owes to the latter full compensation for the injury inflicted by him and payments for such injury from a collateral source in no way relieves the wrongdoer of his obligation."<sup>1</sup>

The collateral source rule is intended to balance the conflicting interest between that of a plaintiff who is entitled to compensation and a defendant who should be held liable for all the damages that resulted from his wrongdoing. If, under this scenario a plaintiff receives a double recovery for a single wrong, that obviously is a windfall to the plaintiff. If a defendant on the other hand escapes liability, then that is a windfall to that defendant. The collateral source rule in essence sanctions one windfall and denies the other in that it favors the victim of the wrong rather than the wrongdoer. This balance obviously is skewed when you

take into account the fact that the defendant typically is insured and quite frequently any recovery of the plaintiff from a collateral source is subject to a subrogation interest. In any event the Virginia Supreme Court has recognized the collateral source rule for more than a century.<sup>2</sup>

Years ago when my livelihood was based on insurance defense work, I always banked on the idea that juries in Northern Virginia would make two assumptions:

1. the plaintiff was insured and therefore incurred no out-of-pocket expenses; and
2. a high verdict against the defendant would raise their insurance rates.

Anyone who has ever talked to jurors after their deliberations in a personal injury case knows that jurors not only make these assumptions, but also in most cases openly discuss these issues in the jury room. This obviously is in direct contravention of the Court's instruction that the jury deliberations are to be based solely upon the evidence.

As long as our judicial system is going to engage in the practice of not using the "I" word (Insurance), plaintiff's lawyers must take the offensive in protecting their clients by requesting a jury instruction on the non-applicability of collateral sources or, in the alternative, arguing to the jury that collateral sources are not to be considered. This can be accomplished

without violating the prohibition against mentioning insurance.

A proposed jury instruction that I believe would address this problem is as follows:

The Court has previously given the instruction that your verdict must be based on the evidence. You cannot consider whether any of the plaintiff's medical bills or loss of income have been paid or reimbursed to the plaintiff. Likewise, you cannot consider whether any verdict you might render against the defendant will be paid or how it may be paid or the effect it may have on the defendant or on you financially. In making this latter statement, the Court is not expressing any opinion as to whether a verdict for the plaintiff should or should not be entered.

If you choose not to request an instruction or if the Court refuses such an instruction, then certainly argument to the jury in your closing on this issue is entirely appropriate. My argument to the jury on this issue goes much as follows:

I have told you now the matters that you must consider in terms of determining the amount of your verdict. There are also certain things that you must not consider. In regard to the

plaintiff's medical bills, you are not to consider whether any of these bills have been paid or not paid, who they may have been paid by, when they may have been paid, how they may have been paid or anything whatsoever about their payment or nonpayment. Likewise in regard to the plaintiff's loss of income, you are not to consider whether any of that loss of income may have been reimbursed, not reimbursed, how reimbursed, if reimbursed or when reimbursed. In regard to any verdict that you may enter against the defendant, how any such verdict will be paid, when paid, if paid, or how paid. Likewise, you are not to consider any impact that the verdict may have upon you financially. To consider any of those issues would be a direct violation of the Court's instruction that your verdict must be based upon the evidence and as such, you would be violating the law if you do consider any of those issues.

What I have seen over the years in some personal injury cases is that juries come back and award only the special damages. I recently had one case where a juror indicated after the trial was over that during the deliberations, one of the jurors "educated" the other jurors as to how a plaintiff can recover from three sources: health insurance, MedPay and then on the liability claim against the defendant. I can recall another case many years ago where the sheriff reported to me that my case was probably in trouble because he had heard the jurors arguing about what impact this verdict would have upon their own insurance rates. Obviously, any such discussions violate the prohibition against considering matters that are not in evidence.

Where liability is established and damages are not seriously in dispute, then obviously there is no basis whatsoever for a jury returning a verdict in the amount of the special damages. Instead, the argument must be made that those special damages are simply the foundation upon which their verdict must be built and that they then must consider all of the additional elements called for in the model instruction in terms of fully and fairly compensating the plaintiff. If this is clearly driven home to the jury, I am convinced that juries will understand their duties and deliver verdicts that in fact fully and fairly compensate deserving plaintiffs.

Although I have never offered the jury instruction proposed above there are arguments to be advanced as to why it should be given by the Court:

- a. Experienced trial judges and attorneys know that jurors discuss insurance during their deliberations. Without violating the prohibition against mentioning insurance, jurors

can still be told that the issue of payment of medical bills or lost wages are simply not to be considered since there is no evidence on that issue.

- b. In addition Virginia Code §8.01-379.2 expressly states that "a proposed jury instruction submitted by a party which constitutes an accurate statement of the law applicable to the case, shall not be withheld from the jury solely for its non-conformance with the model jury instructions." Some judges are inclined to rule that because an instruction is not in the model book that therefore should not be given. That obviously is inappropriate. (Add Justice Hassell's comments that Virginia Supreme Court hasn't adopted model instructions).

In speaking with other attorneys about this topic I can say I don't know of anyone who has actually proposed the type of instruction mentioned above although I have to say that the reaction that I have received from other trial attorneys has certainly been favorable. I have made the argument proposed above to the jury on the collateral source issue in three different cases. I can think of no good faith basis for defense counsel to object to this argument and indeed no objection has been raised in the cases that I have been involved in. My post-trial discussions with jurors in recent cases convince me that this argument on collateral sources has resulted in substantially increased verdicts.

A related legal principle is the evidentiary rule that prohibits the introduction of evidence of insurance coverage as to a defendant. Although this technically is not governed by the collateral source rule, the principle that underlies this evidentiary rule is essentially the inverse of the collateral source rule, i.e. the defendant should not be prejudiced by the fact that he has had the good sense to obtain insurance coverage to indemnify himself from personal exposure. The proposed instruction and argument set forth above are equally applicable to this issue and are designed to expressly instruct the jury that they are not to consider who has or will make payments as to damages incurred or damages awarded.

#### Endnotes

1. *Burks v. Webb*, 199Va 296, 304, 99S.E.2d 629, 636 (1957).
2. See *Baltimore & Ohio Railway Company v. Whiteman's Administrator*, 70 Va (29GRATT) 431,445-45 (1887).

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