

COLLATERAL DAMAGE

PROPOSED RULE CHANGE WOULD REDUCE VERDICTS, SETTLEMENTS IN PERSONAL-INJURY CASES

By Erika Strebel

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In defending a client in a personal-injury lawsuit, Paul Curtis now finds himself contending with a not unusual but still seemingly contradictory set of facts: The plaintiff in the case has more than \$60,000 in medical bills but, because of write-offs obtained by a medical insurer, no actual out-of-pocket expenses.

Even though evidence of those write-offs would no doubt bolster his case, Curtis, a defense attorney at Axley Brynson, can't introduce it. The reason? A century-old doctrine called the collateral-source rule.

Rooted in common-law doctrine, codified in state statute and backed by Wisconsin Supreme Court decisions since 1921, the collateral-source rule has two parts.

First, it is an evidentiary rule that prevents defendants in tort cases from presenting evidence of payments or benefits that a plaintiff received from a third party, such as health insurance payouts or discounts obtained from participation in a health care network. Second, it is

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Habush, Habush & Rottier
personal-injury lawyer

a rule of damages that prevents defendants from citing such third-party payments as reason to offset a judgment.

"Putting insurance to one side, the idea was that someone who was negligent and caused harm should have to pay for the whole amount of

Damage, continued on page 14



STAFF PHOTO BY KEVIN HARNACK

For Axley Brynson liability defense attorney Paul Curtis, a proposed change to the collateral source rule would even the playing field for his client. He said that the proposed rule change would let juries look at all the facts of a case before reaching a verdict.

GOP to defendants: Don't spit on the prosecutor

"The real concern is not just the gross nature of this, but communicable disease. When I'm handling these cases, I always kind of have to keep one eye on the defendant, and that's taking my focus away from the case at hand."

Kurt Klomberg,
Dodge County DA

By Bryna Godar
Associated Press

MADISON (AP) — Dodge County District Attorney Kurt Klomberg was delivering his closing argument in the prosecution of a man accused of spitting on prison guards when he heard a crumpling noise behind him. Moments later, a wad of paper hit his shoulder — filled with the inmate's saliva.

Klomberg recalled the incident last year as a reason to support a GOP proposal that would make it a felony for anyone to throw or expel bodily fluids at prosecutors, pun-

ishable by up to 3-½ years in prison and \$10,000 in fines.

"The real concern is not just the gross nature of this, but communicable disease," Klomberg said. "When I'm handling these cases, I always kind of have to keep one eye on the defendant, and that's taking my focus away from the case at hand."

It's already a felony for such an attack on police, prison guards, firefighters and first responders such as emergency medical technicians and ambulance drivers. Spitting at a prosecutor is currently only punishable as disorderly conduct, which

carries a penalty of up to 90 days in jail.

"Maybe somebody will think twice before they do this if they know they're going to get charged with a felony versus a disorderly conduct," said bill author Rep. Todd Novak, R-Dodgeville.

Democrats voted against the measure in the Assembly Criminal Justice and Public Safety Committee, arguing the enhanced penalty won't deter the behavior. The bill passed the committee on party lines and is headed to the Assembly floor Tuesday.

Supporters of the change don't have

Spit, continued on page 15

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Quarles and Brady's Sarah Coyne does legal work for hospitals, and the proposed change could put her clients in a better position when they are parties in a personal-injury suit, but also flood them with more requests for billing information.

DAMAGE

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the harm and should not be getting a free ride just because someone has insurance or disability insurance or something like that," said Peter Carstensen, law professor at the University of Wisconsin Law School.

Pending state legislation would make substantial changes to how the rule applies to personal-injury lawsuits. One likely effect of the proposal would be reductions in the verdicts and settlements that plaintiffs could recover in those sorts of suits.

"It's going to increase the cost of insurance for businesses. It's going to increase the obligation of Wisconsin taxpayers to fund programs like Medicaid because recoveries are going down if the money coming in is less than the money coming out."

Matt Falk,
Milwaukee trial attorney

The collateral-source rule exists in all states in some form or other. Some have codified it in their statutes whereas others, especially in the last 20 years or so, have put limits on its use. Wisconsin, for example, now prevents the collateral-source rule from applying in lawsuits concerning medical malpractice and negligence in long-term care.

The current legislation — contained in Assembly Bill 539 and Senate Bill 405 — would make admissible any payments that a plaintiff received in relation to a personal-injury claim. The last time such changes were proposed was in 2013.

"I wasn't very surprised by this," said Carstensen. "It's part of the broader tort-re-

form movement to try to limit tort claims. But it does it in a kind of perverse way. That is, it will actually have the potential to increase litigation rather than decrease it, especially with respect to the distribution of money."

A matter of fairness

As often happens with so-called tort reforms, lawyers tend to view the proposal either favorably or unfavorably depending on the types of clients they usually represent. Curtis contends that the proposed rule would strike a fairer balance for defendants in personal-injury cases.

"This appears to be a reasonable approach because we would stop lying to the jury," he said. "We would presume that they're smart enough to figure out how to come up with an appropriate verdict, and they would be told not only what the reasonable expenses were in a case, but they would also be told the truth about what expenses are out of pocket."

Plaintiffs' lawyers counter that the change would end up benefiting wrongdoers who have down nothing more than had the good fortune to harm someone who happened to have insurance.

"This really is a sea change in the law," said Rob Jaskulski, a personal-injury lawyer at Habush, Habush & Rottier. "We believe it's unfair basically because, in reality, it will allow a tortfeasor or wrongdoer to reduce what the law says is their responsibility based upon benefits paid for by the person who was injured."

On yet another side of the argument, some say the proposed change could prove both a boon and a stumbling block for hospital attorneys, who can find themselves on either end of a personal-injury lawsuit. In one way, said Sarah Coyne, a Madison hospital attorney with Quarles & Brady, the change would reduce damages and thus probably benefit clients whose doctors or employees are defendants in personal-injury suits.

If the client, though, is a hospital that

RE-TORTS

Here are other tort reform bills lawmakers have introduced this session. Several have already become law.

- Senate Bill 131/ Assembly Bill 174: immunity of private campgrounds;
- SB 126/AB 169: immunity from civil liability for certain equine activities;
- SB 315/AB 421: immunity from civil liability or exemption from civil liability related to the placement of certain structures in navigable waters and wetlands;
- SB 230/AB 308: exemption for liability from breaking into cars when there is reason to believe a child or pet is in danger;
- SB 110/AB 157: exemption from civil liability related to the placement of buoys or other markers in waterways;
- SB 286/AB 413: liability for damages caused by dogs;
- SB 383/AB 508: immunity for civil and criminal liability for health providers that perform body-cavity searches;
- SB 463/AB 596: limits some liability for ski-area operators under certain circumstances;
- SB 408/AB 540 : limits liability for adults who sponsor a minor in obtaining a driver's license;
- SB 149/AB 223: decreases statute of limitations for lawsuits involving vehicle-insurance claims, wrongful death and property damage involving an insured motor vehicle;
- SB 375/AB 456: changes statute of limitations to file lawsuits against real estate brokers or salespersons.

—Erika Strelbel

provided medical treatment to the plaintiff, the outcome could be quite different, Coyne said. Plaintiffs' ability to pay medical bills, for instance, might be impeded if verdicts and settlements were suddenly to become smaller. Moreover, defense lawyers' newfound ability to introduce collateral-source evidence would probably lead to a steep increase in requests for billing information.

There is already a constant battle, Coyne said, raging between hospitals and plaintiffs attorneys over access to medical records.

"And now the universe of what the plaintiff's attorney would be seeking — and also the defense attorneys — would be expanded to include all sorts of billing information that wasn't relevant before," she said.

Let it rain — paper and litigation

There could also be consequences for the state's court system.

Jaskulski noted that the collateral-source proposal was recently amended to push its effective date back 30 days from enactment. If the proposed changes were passed by the Legislature and signed by Gov. Scott Walk-

er, many clients would no doubt try to take advantage of the waiting period by filing suit before the law went into effect, Jaskulski said.

Nor do the possible unintended consequences stop at the court system. Jaskulski and Matt Falk, another Milwaukee trial attorney, argue the burden will also ultimately fall on taxpayers and businesses.

Falk often represents national and regional insurance companies, as well as companies that insure themselves. Such businesses are among those that stand to lose the most from the proposed changes to the collateral-source rule, largely because their clients are usually plaintiffs in personal-injury suits.

Insurance officials who were eager to make up the lost revenue would have few choices, Jaskulski and Falk said.

"It's going to increase the cost of insurance for businesses," Falk said. "It's going to increase the obligation of Wisconsin taxpayers to fund programs like Medicaid because recoveries are going down if the money coming in is less than the money coming out."