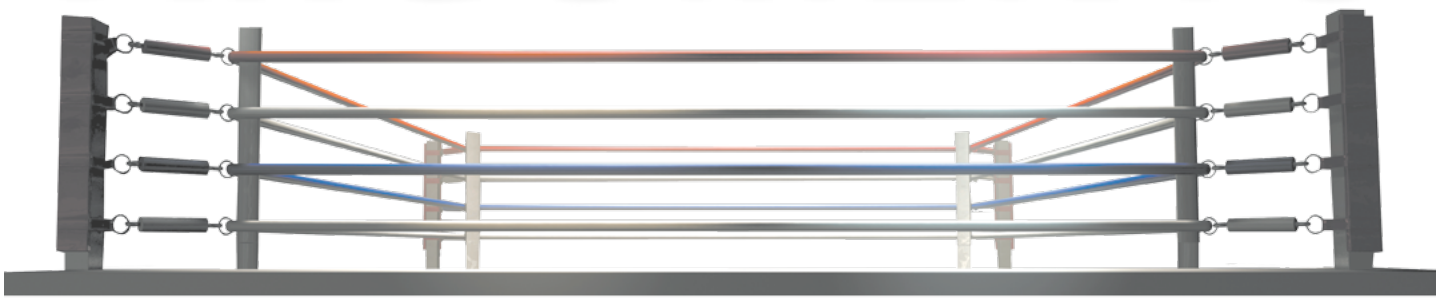
CLOSING ARGUMENTS



QUESTION:

Is Wisconsin's collateral-source rule worth preserving?

BACKGROUND: Wisconsin lawmakers this year are once again gave serious consideration to eliminating the state's collateral-source rule, a doctrine that has been around in Wisconsin for nearly a century and whose roots extend into common law.

The rule plays a particularly important role in personal-injury cases. Many times, health insurers will negotiate reductions in the amount billed on behalf of their insurees, creating a situation in which the amount paid by the insurer on behalf of an injured party is less than the amount billed by the provider.

The current collateral-source rules bars evidence of such reductions from being admitted in court. Lawyers are instead allowed only to introduce medical bills listing the amounts that were charged before being lowered through negotiations.

Opponents of the rule argue that it allows plaintiffs to recover "phantom damages." In other words, when defense lawyers are barred from showing that health insurers were able to secure cost reductions, plaintiffs are able to win more than they actually should.

Proponents, in contrast, argue that eliminating the collateral-source rule would do nothing more than benefit a perhaps underserving party: namely, a defendant who has been lucky enough to have injured someone who happens to have good health insurance.

COLLATERAL-SOURCE RULE OUTDATED, UNFAIR, SHOULD NOT BE PRESERVED

Wisconsin's collateral source rule is not worth preserving in its current form. In my opinion, the rule is outdated and flawed because it promotes deceit and injustice.

PAUL CURTIS

Jurors are charged with the serious and solemn task of deciding the fates of plaintiffs and defendants in a court of law. Our legal system demands that jurors seriously and thoughtfully consider all of the evidence and then render a fair and truthful verdict. "*Let your verdict speak the truth, whatever that truth may be*." Wis JI-Civil 190.

In a personal injury case, the jurors are charged with determining fault and money damages. However, under the current collateral-source rule, jurors are not entrusted with truthful, accurate information relating to medical expenses.

For nearly a century, Wisconsin jurors have been told to assume that the "truth" is that a plaintiff's reasonable medical expenses are reflected in the amount of services billed; i.e., the "sticker price." Of course, the truth is that the plaintiff's actual medical expenses are typically a fraction of the amount billed.

So why does Wisconsin law follow the collateral-source rule? The purported equitable policy is that the tortfeasor should not be relieved of his or her obligation to the victim simply because the injured party had the foresight to purchase insurance, and enjoy the benefits thereof.

However, the policy fails to account for the fact that automobile-liability insurance is now mandatory in Wisconsin. Even in non-auto accident cases, insurance companies often pay the verdict or settlement amounts. Tortfeasors are rarely held personally liable for the injured party's expenses.

Another policy set forth in the case law is that the collateral-source rule deters negligent conduct. I respectfully disagree. I am semi-confident that not a single human being has ever contemplated the effects of the collateral-source rule before committing a negligent act.

The policies, and the rule, are flawed and outdated. Other states that have done away with the collateral-source rule have found that it is unfair. Those foreign courts have reasoned that the defendant or tortfeasor should not be held liable for medical expenses that were never paid or actually incurred by the plaintiff. To impose liability on the defendant for those unpaid medical expenses is simply unfair and unjustified.

Wisconsin's collateral-source rule should be modified to permit jurors to consider both the amount billed and the amount paid when determining a plaintiff's reasonable medical expenses. A jury verdict cannot reasonably "*speak the truth*" if it based on inaccurate and incomplete facts.

The common goal is to reach a fair verdict such that an injured party is justly compensated and made whole — to the extent that money can achieve that goal. Defense lawyers and insurance companies are often unfairly portrayed as the enemy.

We are not the enemy. We have no interest in seeing a party, who is legitimately injured through no fault of their own, go uncompensated.

We too want justice to be served but we want it served on a level playing field. The collateral-source rule should be modified so as to be transparent with the jury regarding the actual medical expenses charged and paid.

We should trust the jury to weigh and consider all of the evidence and to reach a fair and truthful verdict.

Paul Curtis is a partner and liability-defense lawyer at Axley Brynelson.

COLLATERAL-SOURCE 'CURE' WORSE THAN SUPPOSED DISEASE

Those calling for changes to Wisconsin's long-held "collateral-source rule" suggest that it is "unfair" to allow injured parties to collect more than their out-of-pocket losses by allowing for recovery of the value of medical services provided.

In reality, legislation eliminating the collateral-source rule would lead to a sea change in the manner in which recoverable damages are determined by juries. The result would be unfair treatment for injured consumers, their health insurers and Wisconsin taxpayers.

Lawmakers' currently proposed bill would allow into evidence much more than just amounts paid by health insurers. As drafted, it in fact allows for the introduction of evidence of "any compensation for bodily injury received from a source other than the defendant to compensate the claimant for the injury. …"

Consequently, the collateral-source rule will no longer be an impediment to the introduction of disability-insurance recoveries or life-insurance recoveries, which might be submitted in an attempt to reduce a defendant's financial responsibility.

How is it remotely "fair" for negligent parties to reduce their legal responsibility to fairly compensate the one they injured or killed by allowing into evidence the fact that the plaintiff was responsible enough to carry decent medical, disability or life insurance?

ROBERT JASKULSKI

The unfairness of the proposed change is best illustrated by language in the bill that prohibits the introduction of "amounts paid or incurred by the claimant in recovering payment from a source other than the defendant." One cannot logically or fairly argue on the one hand that the jury is entitled to know the "true" economic loss suffered by an injured party, and on the other hand argue it is appropriate to preclude the introduction of the costs incurred by the injured party in procuring adequate medical, disability or life-insurance benefits.

The bill will inevitably result in reduced recovery by health insurers and, in cases involving Medicaid payouts, the state of Wisconsin. Anyone handling personal-injury litigation understands that subrogation liens are negotiated according to factors that include the total amount of money recovered in settlement by the plaintiff.

When that pool of money is reduced, which will inevitably occur when the plaintiff is not allowed to recover the full value of past medical expenses, all interested parties, including subrogated insurers and the state, will recover less from the wrongdoer. Pursuant to the ratio approach established by the U.S. Supreme Court in *Albhorn,* 547 U.S. 268 (2006), Medicaid subrogation recoveries will be significantly affected.

Shifting responsibility for the harm caused by negligent parties from property and casualty insurers to health insurers and taxpayers is bad public policy.

Finally, changing the law in the manner suggested will significantly increase costs to health care providers, who will now be called upon at trial to justify their billings and their contractually reduced insurance recoveries. In addition, health insurers will be forced to testify about the reasons for their reduced payments.

Increasing the cost and complexity of litigation in this manner makes no sense in an age when health care and health insurance costs are ever on the rise.

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EMPLOYMENT