Speacial Feature

The Need for Jury Instruction or Argument on Collateral Source

A Proposal for Change

by Brien Roche

The 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."[1]

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 skewered 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.[2]

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.

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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).

Maryland Pattern Jury Instruction 10:8

In arriving at the amount of damages to be awarded for past and future medical expenses and past loss of earnings, you may not reduce the amount of your award because you believe or infer that the plaintiff has received or will receive reimbursement for or payment of proven medical expenses or lost earnings from persons or entities other than the defendant, such as, for example, sick leave paid by the plaintiff's employer or medical expenses paid by plaintiff's health insurer.

Juries.

1987- *Caterpillar Tractor Co. v. Hulvey,* 233 Va. 77, 353 S.E. 2d 747

Virginia has adhered strictly to rule that testimony of jurors should not be received to impeach their verdict especially on grounds of their own misconduct. There is exception to this rule where such testimony might be admissible to prevent miscarriage of justice. In this case, evidence disclosed situation where two jurors were influenced by opinions of third, dominant juror who was attorney, a status which may have rendered him exempt from jury service but not incompetent to serve. Such circumstances do not justify nullification of verdict.

1971- *Oyler v. Ramsey,* 211 Va. 564, 179 S.E. 2d 904

Defendant complains, after verdict, that juror and plaintiff's counsel improperly stood silent when prospective jurors were asked about business relations. Since no objection was made before jury was sworn, it is incumbent upon defendant to show that he was injured by alleged irregularity. Not error to refuse to grant new trial.

1961- *Harris v. Hampton Rds. Tractor Co.*, 202 Va. 958, 121 S.E. 2d 471

Juror conversed with witness during recess. Private communications between jurors and third parties are forbidden and invalidate verdict unless their harmlessness is made to appear. No harm was shown in this case.

Closing and Opening Statements

1983- *Pullen v. Nickens,* 226 Va. 342, 310 S.E. 2d 452.

During closing argument of this personal injury action plaintiff's counsel argued that each defendant was liable for whole award and it was for courts and parties to determine apportionment, if any. He asked jury to leave that to operation of court and to contract. Objection was made to this argument at close of argument. Court held that objection had been waived because it had not been made contemporaneously with argument and, in addition, defense counsel had failed to object to admonition given by trial court after argument.

Inadequate Verdict.

1997- *Bowers v. Sprouse*, 254 Va. 428.

In personal injury action, jury awarded verdict for exact amount of plaintiff's medical special damages. That is inadequate as a matter of law. Verdict indicates that jury found plaintiff was injured and had incurred special damages, but failed to compensate for any other items of damages such as pain and suffering, or inconvenience.

1999- *Richardson v. Braxton-Bailey*, 257 Va. 61.

In this personal injury damages case, the dispositive issue was the quality of the evidence, not the proximity between the amount of the verdict and the special damages claimed. Based on this record, the jury was entitled to believe that not all damages claimed by the plaintiff were incurred as a result of the accident. Therefore, the trial court erred in setting the verdict aside. That judgment is reversed and the verdict reinstated.

1999- *Walker v. Mason*, 257, Va. 65.

The trial court in each of three cases improperly set aside damage verdicts for inadequacy. When the jury verdict is not in the exact amount of all the special damages claimed, the trial court must review the evidence under traditional principles relating to the adequacy of jury verdicts. In each of these three cases the judgment of the trial court is reversed and the jury verdict reinstated.

1998- *Shelby Insurance Co. v. Kozak*, 255 Va. 411.

Auto accident case tried before jury with verdict in amount of $50,000.00. Trial court set verdict aside as being inadequate and ordered new trial on damages alone. In cases where liability has probably exerted material influence on jury in determining amount of damages or where evidence warrants inference that instead of deciding question of liability jury has arbitrarily determined to make both parties bear part of burden then when court sets verdict aside it should grant new trial on all issues.

New Trials.

1992- *Davoudlarian v. Krombein*, 244 Va. 88, 418 S.E. 2d 868.
Medical malpractice case. Evidence on liability disputed. When record fails to indicate clearly that evidence on liability did not influence jury in its award of inadequate damages, trial court should order new trial on all issues.

1990- *Hall v. Hall*, 240 Va. 360, 397 S.E. 2d 829.
In citing *Rawle v. McIlhenny*, 163 Va. 735, Court stated that normally those cases that plaintiff seeks to overturn verdict on grounds of inadequacy are divided into five classes. One such class consists of cases in which clear preponderance of the evidence is in favor of right of recovery although there is sufficient evidence to support contrary verdict. Ordinarily, in such cases new trials are limited to issue of damages unless amount of damages recoverable is not clearly separable from question of liability. In this case verdict was in favor of plaintiff and damages are separable, therefore, on retrial, issue will be limited to damages.

Remittitur.

1983- *Hogan v. Carter*, 226 Va. 361, 310 S.E. 2d 666.
On appeal of remittitur Supreme Court does not sit to determine whether damage award is excessive as matter of law. When trial judge makes such finding it is sole function of Court of Appeals to determine whether he has abused discretion accorded to him by statutes and common law. In this case record made by trial court indicated there had not been abuse of discretion.

1977- *Campbell v. Hankins*, 217 Va. 800, 232 S.E. 2d 794.
When plaintiff is faced with orders of remittitur he may (1) grant unconditional consent to entry of final judgment on reduced award; (2) grant conditional consent and seek immediate appellate review; or (3) withhold consent altogether, submit to review on appeal from final judgment when entered.

Mistrials.

1989- *Clark v. Chapman*, 238 Va. 655, 383 S.E. 2d 885.
Mistrial is not appropriate unless there is manifest probability that objectionable evidence or statements before jury are prejudicial, not just minor irregularities which may be corrected by instruction from court. Statements by plaintiff that she did certain things because she needed money were not sufficient to justify mistrial.

1973- *Carter v. Shoemaker*, 214 Va. 16, 197 S.E.2d 181.
Mistrials should be declared where there is manifest probability that objectionable evidence of statements before jury prejudice adverse party. In such instances, error is not

cured by court's instruction. Statement by defendant's counsel in opening statement that plaintiff had been involved in several accidents while defendant had not was grounds for mistrial.

Additur.

1998-Supinger v. Stakes 255 Va. 198,

Jury returned verdict in amount of $515.50. Trial Court concluded that verdictwas inadequate and rather than granting plaintiff new trial held on its own that additur would be appropriate and increased award to $5,000.00 In remittitur trial court reduces excessive verdicts to amount supported by evidence. Amount of damage awarded by trial court is amount that jury actually passed upon in arriving at its verdict and therefore jury determines damages and court merely reduces verdict to an amount that represents full and fair award. In additur, however, increased award is not amount passed upon by jury thus ultimate award includes amount that was never assessed by jury. Use of additur without plaintiff's consent requires plaintiff to forego right to jury trial. In cases involving unliquidated damages Code § 8.01-383.1(B) violates Virginia Constitution because it fails to require plaintiff's consent to additur.

Reopening Case.

1961- *Fink v. Higgins Gas & Oil Co.*, 203 Va. 86, 122 S.E. 2d 539.

Trial court discretion to reopen case is liberally exercised to allow whole case to be presented.

Verdicts.

1991- *Johnson v. Smith*, 241 Va. 396, 403 S.E. 2d 685.

Unless parties otherwise agree, special verdict forms in negligence actions should not be utilized. In this wrongful death action, damages for various allowable elements should have been awarded in lump sum and should have been awarded to beneficiaries according to Va. Code § 8.01-54.

1946- *Atlantic Greyhound Corp. v. Shelton*, 184 Va. 684, 36 S.E. 2d 625.

Jury returned verdict against employer but not employee. It was duty of trial court to ascertain jury's true intent.

Costs.

1998- *Advanced Marine Enterprises v. PRC Inc.*, 256 Va. 106.

Trial court awarded cost for expert witness fees, express mail service, messengers, meals, law clerk temporaries, legal research, photo copies, parking, telephone calls and transcripts. Unless otherwise specified by statute trial courts discretion to award costs is

limited to those costs essential for prosecution of suit such as filing fees and charges for service of process.

Non-Suits.

1989- *Clark v. Butler Aviation,* 238 Va. 506, 385 S.E. 2d 847.
Plaintiff filed suit two days before limitation expired, effected service more than one year later and then non-suited. Apparent conflict in Rules and statutes resolved in favor of plaintiff to allow non-suit and refiling of action within six months thereafter.

1989- *City of Hopewell v. Cogar,* 237 Va. 264, 377 S.E. 2d 385.
Court granted parties time to brief issue. During that period plaintiff sought to non-suit. Case had not been submitted to court for decision. Therefore, non-suit should have been granted.

1991- *Dodson v. Potomac Mack Sales & Serv.*, 241 Va. 89, 400 S.E. 2d 178.
Tolling provisions of Virginia Code § 8.01-229 in event of non-suits do not apply to wrongful death actions.

1994- *Hilb, Rogal & Hamilton Co. v. De Pew,* 247 Va. 240, 440 S.E. 2d 918.
In this case plaintiff moved to non-suit during court's discussion of its proposed ruling but before it had ruled. Motion was timely.

1998- *Dalloul v. Agbey,* 255 Va. 511.
Non-suit statute only applies to actions and parties that are currently before court. Those parties or actions that have been dismissed out for whatever reason are not governed by non-suit.