THE BASICS OF TRIAL PRACTICE:
AFTER THE VERDICT -- -- REMAINING ISSUES, DECISIONS & PROCEDURES

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An Introduction to Collateral Source Reductions under CPLR §4545 and Set Offs under General Obligations Law §15-108

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Part I – CPLR 4545

I. Introduction

A. Under traditional common-law principles, a personal injury award may not be reduced or offset by the amount of any compensation that the injured person may receive from a source other than the tortfeasor. The collateral source rule, which is both a rule of evidence and a rule of damages, is based on the premise that a negligent defendant should not, in fairness, be permitted to reduce its liability by the proceeds of insurance or some other source to which that defendant has not contributed. *Oden v. Chemung County Industrial Dev. Agency*, 87 N.Y.2d 81, 661 N.E.2d 142, 67 N.Y.S.2d 67 (1995).

B. CPLR 4545, however, partially abolished the collateral source rule in tort actions in New York State. It allows the courts to consider evidence of collateral source payments in diminution of a portion of the damages relating to past, as well as future, expenses, which would with "reasonable certainty" be replaced or indemnified.

C. The admissibility of collateral source payments are permitted in any action brought to recover damages for personal injury, injury to property, or wrongful death.

D. The statute does not affect a plaintiff's right to prove to the jury all of his or her losses regardless of whether or not they are or will be compensated from collateral sources. Rather, both before and after the November 12, 2009 amendments to CPLR 4545 (discussed in more detail below), the effect of CPLR 4545 has been to permit a defendant to introduce evidence of such compensation to the court so that the court can make corresponding deductions from the jury's award. Notably, in the event that comparative fault has been

attributed to the plaintiff, the deduction for collateral source payments should precede the deduction for comparative fault. *Rodgers v. 72nd Street Associates*, 269 A.D.2d 258, 703 N.Y.S.2d 456 (1st Dept. 2000).

II. History

A. "Prior to the amendment of CPLR 4010 (the predecessor to CPLR 4545) in 1975, New York followed the common-law rule that jury verdicts cannot be reduced by the amount of payments made to the plaintiff from collateral sources. The common-law rule that defendants not receive the benefit of the plaintiff's receipt of medical expense or wage reimbursements gave way to the need to address the 'crisis' that had developed in the medical malpractice insurance industry." *Firmes v. Chase Manhattan Auto. Finance Corp.*, 50 A.D.3d 18, 29, 852 N.Y.S.2d 148 (2d Dept. 2008).

B. "Former CPLR 4010 (L 1975, ch 109) permitted juries in medical malpractice cases to consider collateral source payments when determining awards for economic loss. Collateral source reductions became mandatory in medical malpractice actions in 1981, with a transfer that year of the responsibility for calculating collateral source setoffs from the jury to the court (L 1981, ch 269)." *Id.* at 30.

C. "The common-law rule against collateral source setoffs was diluted further in 1984, when CPLR 4010 was repealed altogether and replaced by CPLR 4545(a), which extended the statutory reductions to all past work-related personal injury and wrongful death awards against public employers (L 1984, ch 701)." *Id.*

D. "The common-law rule was abrogated almost entirely in 1985 and 1986, when further amendments to CPLR 4545 extended collateral source reductions to all past and future awards in medical malpractice, dental malpractice, personal injury, and wrongful death actions where there is evidence that medical expenses, lost wages, or other economic loss have been or will be paid with 'reasonable certainty' (*see* L 1985, ch 294, § 8; L 1986, ch 220, § 36)." *Id.*

III. The Current Statute (effective Nov. 12, 2009)

§ 4545. Admissibility of collateral source of payment

(a) Actions for personal injury, injury to property or wrongful death. In any action brought to recover damages for personal injury, injury to property or wrongful death, where the plaintiff seeks to recover for the cost of medical care, dental care, custodial care or rehabilitation services, loss of earnings or other economic loss, evidence shall be admissible for consideration by the court to establish that any such past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source, except for life insurance and those payments as to which there is a

statutory right of reimbursement. If the court finds that any such cost or expense was or will, with reasonable certainty, be replaced or indemnified from any such collateral source, it shall reduce the amount of the award by such finding, minus an amount equal to the premiums paid by the plaintiff for such benefits for the two-year period immediately preceding the accrual of such action and minus an amount equal to the projected future cost to the plaintiff of maintaining such benefits. In order to find that any future cost or expense will, with reasonable certainty, be replaced or indemnified by the collateral source, the court must find that the plaintiff is legally entitled to the continued receipt of such collateral source, pursuant to a contract or otherwise enforceable agreement, subject only to the continued payment of a premium and such other financial obligations as may be required by such agreement. Any collateral source deduction required by this subdivision shall be made by the trial court after the rendering of the jury's verdict. The plaintiff may prove his or her losses and expenses at the trial irrespective of whether such sums will later have to be deducted from the plaintiff's recovery.

(b) Voluntary charitable contributions excluded as a collateral source of payment. Voluntary charitable contributions received by an injured party shall not be considered to be a collateral source of payment that is admissible in evidence to reduce the amount of any award, judgment or settlement.

(c), (d) [Redesignated]

IV. **November 12, 2009 Amendment**

A. The primary effect of the November 12, 2009 amendments to CPLR 4545 was to prospectively abrogate *Iazzetti v. New York*, 94 N.Y.2d 183, 701 N.Y.S.2d 332, 723 N.E.2d 81 (1999), and give public employers the same entitlement to setoffs as others under the statute. Before the amendment, the former CPLR 4545(b), which was applicable to personal injury suits by public employees against their employers, permitted collateral source reductions for past but not future economic losses. The amendments repealed both former CPLR 4545(b) and former CPLR 4545(a) (permitting collateral source reductions in medical, dental and podiatric malpractice actions), which became unnecessary once the different rules for different types of actions were eliminated.

B. For actions commenced on or after November 12, 2009, CPLR 4545 permits reduction of awards for past and future economic loss by amounts received from collateral sources in all personal injury, wrongful death, and property damage actions.

C. For actions commenced prior to November 12, 2009, medical, dental or podiatric malpractice actions are subject to the provisions of former CPLR 4545(a), while actions by public employees against their employers are governed by former

CPLR 4545(b) and other actions for personal injury, property damage or wrongful death are governed by former CPLR 4545(c).

V. Discovery

A. Discovery is a critical for:

i) determining the amount of any collateral source setoff(s);

ii) preserving your right to a request a collateral source hearing; and

iii) establishing the bases for a future collateral source hearing.

B. Discovery devices that may be utilized to obtain information regarding any potential collateral sources include:

i) Demand for Verified Bill of Particulars and/or Interrogatories

ii) Notice of Discovery and Inspection

iii) Authorizations

iv) Notice to Admit

v) Plaintiff's Deposition

vi) Post-Deposition Demands for Discovery and Inspection

C. Practice Point – A Notice for Discovery and Inspection should be served on plaintiff early in the case, prior to plaintiff's deposition, requesting that plaintiff identify any collateral sources and also provide an authorization permitting the release of records for each identified collateral source. After processing the authorizations and receiving the corresponding records, defense counsel will be prepared to question the plaintiff at his or her deposition regarding the collateral sources and any issues that may be presented based on a review of the records. Follow-up discovery demands can be made after plaintiff's deposition, if warranted. It is important to follow through on any authorizations for collateral source documents and records while the case is still in discovery. Should you later realize that additional information regarding potential collateral sources is needed, your adversary may resist any such requests as being late and/or waived.

VI. Preserving Right to Collateral Source Hearing – When to Request

A. A collateral source hearing will be held *after* the verdict. The court, not the jury, will hear evidence regarding any past and/or future collateral sources for the purpose of determining the amount of any setoff.

B. Various courts have addressed the issue of when a defendant needs to make an application to the court for a collateral source hearing. The rule is not entirely clear, although in the Second Department the rule is "at any time before the judgment is entered, unless the court directs otherwise." *Firmes v. Chase Manhattan Automotive Finance Corp.*, 50 A.D.3d 18, 852 N.Y.S.2d 148 (2d Dept. 2008), *leave to appeal denied*, 11 N.Y.3d 705 (2008) (emphasis added).

C. Regarding when the collateral source hearing needs to be requested, a trial level court in *Bongiovanni v. Staten Island Medical Group*, 188 Misc.2d 362, 728 N.Y.S.2d 345 (Sup. Ct. Richmond Co. 2001), held as follows:

> "any application for a set-off utilizing a collateral source of payments must be either requested verbally immediately after the jury renders a verdict which includes loss of earnings, or as part of the written single post-trial motion contemplated by CPLR 4406 which shall be made within 15 days of the jury verdict in accordance with CPLR 4405"

See also Wooten v. State of New York, 302 A.D.2d 70, 753 N.Y.S.2d 266 (4th Dept. 2002) (holding that the 15-day rule in CPLR 4405 did not apply; a request is timely if made before entry of judgment).

D. Notably, in *Wooten*, *supra*, the Fourth Department also held that the collateral source rule must be pleaded as an affirmative defense.

VII. Correspondence Requirement

A. CPLR 4545 "does not direct the setoff of collateral source payments against *all* damages awards, as the Legislature intended only to eliminate windfalls and duplicative recoveries. To assure that plaintiffs are fully compensated - but not overcompensated – a 'direct correspondence between the item of loss and the type of collateral reimbursement must exist before the required statutory offset may be made.'" *Fisher v. Qualico Contracting Corp.*, 98 N.Y.2d 534, 749 N.Y.S.2d 467, 779 N.E.2d 178 (2002), *quoting Oden v. Chemung County Indust. Dev. Agency*, 87 N.Y.2d 81, 87 (1995).

In other words, defendants must demonstrate that collateral source payments, both past and future, correspond to a particular category of loss for which the jury awarded damages.

B. In view of the Court of Appeals' holdings in *Oden* and *Fisher*, reduction should occur only with respect to those collateral source payments that "duplicate or correspond to" particular types of economic loss assessed as damages against the defendant at trial.

C. The burden of establishing this correlation is on the party seeking the reduction.

Krum v. Green Island Const. Co., 249 A.D.2d 730, 731, 671 N.Y.S.2d 563 (3d Dept. 1998).

D. Based on this "correspondence" requirement, the Court of Appeals in *Oden* held that a collateral source payment of $141,330 for disability retirement benefits should have been applied only as a deduction with respect to a $66,000 jury award for lost pension benefits, and not to the jury awards for future lost earnings and health and welfare benefits (which the disability retirement collateral source benefit did not duplicate or replace). *Id*. at 88-89.

E. Additional Noteworthy Cases:

i) *Bryant v. New York City Health & Hosp. Corp.*, 93 N.Y.2d 592, 716 N.E.2d 1084, 695 N.Y.S.2d 39 (1999) (award in a wrongful death action for the future lost earnings of the parent did correspond to certain social security survivor benefits for the child whose parent had died)

ii) Generally, courts have concluded that pension and retirement benefits do not "correspond" or "match" with a lost earnings award, although an award for lost pension benefits is properly reduced by disability pension benefits. *Hayes v. Normandie, LLC*, 306 A.D.2d 133, 761 N.Y.S.2d 645 (1st Dept. 2003); *Boshnakov v. Bd. of Education*, 277 A.D.2d 996, 716 N.Y.S.2d 520 (4th Dept. 2000)

iii) *Panattoni v. Inducon Park Assoc.*, 247 A.D.2d 823, 668 N.Y.S.2d 840 (4th Dept. 1998) (trial court erred in failing to reduce verdict by amounts paid by plaintiff's private health insurer for plaintiff's back treatment inasmuch as "[p]rivate health insurance benefits are collateral source payments to be deducted from damages awards")

iv) *Hayes v. Normandie, LLC*, 306 A.D.2d 133, 761 N.Y.S.2d 645 (1st Dept. 2003) (agreeing with lower court's decision that "Social Security payments received by plaintiff and his family members were intended to compensate for lost earnings and thus [were] properly treated as collateral source payments")

F. Excluded collateral sources (i.e., not enabling a set off)

i) Life insurance

ii) Medicare

iii) Charitable contributions (see CPLR 4545(b))

iv) Collateral source payor entitled by law to lien against any recovery by the plaintiff

VIII. Reasonable Certainty Test for Future Payments

A. The total collateral source offset for a plaintiff's past receipt of collateral sources is usually not too difficult to compute and parties will often stipulate to the amount.

B. Future offsets, however, are more difficult and provide more opportunities for disagreement among parties.

C. It is the defendant's burden to establish "with reasonable certainty" that plaintiff will receive the collateral source benefits in the future. "With reasonable certainty" has been interpreted as meaning "highly probable" and requiring proof by clear and convincing evidence. The interpretation of "reasonable certainty" applies in all four departments of the Appellate Division. *See Kihl v. Pfeffer*, 47 A.D.3d 154, 848 N.Y.S.2d 200 (2d Dept. 2007).

D. In addition to establishing reasonable certainty with respect to future payments, there also must be a finding by the court that a contract or other enforceable agreement entitles plaintiff to ongoing receipt of benefits, conditioned only upon the continued future payment of premiums and other financial obligations. *Kihl*, 47 A.D.3d at 164.

E. Future Social Security Benefits - Plaintiffs have not succeeded in arguing that it is not reasonably certain that Social Security benefits will continue in the future due to issues relating the Social Security Administration ("SSA") and its financial state. *See e.g. Caruso v. Russell P. LeFrois Builders, Inc.*, 217 A.D.2d 256, 635 N.Y.S.2d 367 (4th Dept. 1995).

F. Private Medical Insurance

i) Defendants may have more difficulty proving that private medical insurance payments are reasonably certain to continue into the future, especially when medical insurance is provided by the plaintiff's employer.

ii) An illustrative case is *Giventer v. Rementeria*, 184 Misc.2d 744, 705 N.Y.S.2d 863 (Sup. Ct. Richmond Co. 2000). In *Giventer*, the infant-plaintiff and his parents were awarded a significant jury verdict. The infant-plaintiff was severely brain damaged and defendants argued that the infant-plaintiff's mother's health insurance should be applied as a collateral source offset for future medical care. Notably, the health insurance had already paid for a large part of the infant-plaintiff's medical and nursing care. The court, however, disagreed, holding as follows;

"[The mother's] health insurance benefits will only be received if she continues in her current employment and her employer continues to

provide the insurance. There can be no assurances that the insurance will continue to benefit her son. If [the infant-plaintiff's mother] lost her job or the employer or insurance company changed the benefits, those factors would be beyond her control.

Moreover, reducing [the infant-plaintiff's] award based upon insurance his mother has through her job would force [his mother] to continue at her current employment without regard to her personal and professional goals and desires and irrespective of what is best for her and the rest of her family. [She] has a right to change jobs or stop working altogether. No one can force her to have to work. Treating her employee health insurance as a collateral source would require her to work in order to provide her son with the care which he requires which a jury has already found the defendants are obligated to provide.

Accordingly, since [the infant-plaintiff's mother] cannot be forced to work, the reasonable certainty standard of CPLR 4545 cannot be satisfied by the insurance benefits which are received through her employment and are not a collateral source offset." *Id.* at 748 (emphasis added).

iii) Another illustrative case is the *Kihl v. Pfeffer*, 47 A.D.3d 154, 166 (2d Dept. 2007), in which the defendant argued, based on the evidence, that there was a reasonable certainty that plaintiff would continue receiving health coverage toward her future medication expenses, warranting a collateral source reduction. The Supreme Court denied the request and the Appellate Division agreed. *Id.* In so holding, the Appellate Division relied on the following five factors:

(1) "the lack of reasonable certainty that [plaintiff's husband] will remain for 46 years with his current employer, through whom his health insurance is obtained."

(2) "the uncertainty of whether [the husband's] health benefits would, in fact, indefinitely cover any portion of the particular medication expenses that [plaintiff] will incur. The hearing evidence demonstrated that the identity of [the husband's] health care provider had changed three times in nine years and that the benefits package had changed each year."

(3) "[Plaintiff and her husband] would need to remain married for [plaintiff] to be continuously named as a dependent beneficiary on her husband's health insurance" and there was evidence that the marital relationship was "strained."

(4) "[N]o evidence was adduced at the hearing as to [the husband's] life expectancy or work-life expectancy, upon which [plaintiff's] health care coverage is dependent."

(5) "[Plaintiff] was otherwise uninsurable."

iv) Defendants will likely have an easier time establishing a collateral source offset for private medical insurance in cases where the plaintiff purchased his or her own private health insurance.

IX. Collateral Source Hearing

A. Establishing Right to Hearing: *see Firmes*, 50 A.D.3d at 36-37 (2d Dept. 2008), holding:

> We hold that for a defendant to be entitled to a collateral source hearing, the defendant must tender some competent evidence from available sources that the plaintiff's economic losses may in the past have been, or may in the future be, replaced, or the plaintiff indemnified, from collateral sources. We reject [plaintiff's] appellate argument that the defendants' post-trial collateral source motions were subject to the higher "clear and convincing evidence" standard to warrant the conduct of a collateral source hearing.

B. Procedure at Hearing and Proof Issues

i) Collateral source reductions are taken by the court outside the presence of the jury after a verdict.

ii) The hearing is usually conducted before the trial judge.

iii) Defendants have the burden of proof and, as such, call their own witnesses first. Potential witnesses include:

a) Plaintiff (including regarding the amount of collateral source benefits received, and expected to be received in the future)

b) Family members of plaintiff (who are receiving benefits)

c) Expert economist to project the total amount of future benefits

iv) Pertinent documents and records can be proffered at the hearing.

X. Lien Issues

A. CPLR 4545 excludes "those payments as to which there is a statutory right of reimbursement."

Part II – GOL § 15-108

I. Overview

A. New York General Obligations Law ("GOL") § 15-108 regulates the effect of a release of a settling tortfeasor upon a non-settling joint tortfeasor.

B. The Legislative history and case law makes it clear that the general purposes of the statute are twofold: (1) to encourage settlements; and (2) to assure that a nonsettling defendant does not pay more than its equitable share." *Williams v. Niske*, 81 N.Y.2d 437, 443-444 (1993).

II. The Statute

GOL § 15-108 provides as follows:

> (a) Effect of release of or covenant not to sue tortfeasors. When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest.
>
> (b) Release of tortfeasor. A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules.
>
> (c) Waiver of contribution. A tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person.
>
> (d) Releases and covenants within the scope of this section. A release or a covenant not to sue between a plaintiff or claimant and a person who is liable or claimed to be liable in tort shall be deemed a release or covenant for the purposes of this section only if:

(1) the plaintiff or claimant receives, as part of the agreement, monetary consideration greater than one dollar;

(2) the release or covenant completely or substantially terminates the dispute between the plaintiff or claimant and the person who was claimed to be liable; and

(3) such release or covenant is provided prior to entry of judgment.

III. Offset for Nonsettling Tortfeasors

A. Thus, "[i]n tort actions involving multiple defendants where a plaintiff settles with one or more defendants before trial, and proceeds to trial against the remaining defendants, GOL § 15-108(a) permits nonsettling defendants a monetary offset against the amount of the verdict.

B. As the statutory language reads, the permitted reduction is the greatest of three items:

i) the amount stipulated as consideration for the release;

ii) the amount actually paid for the release; or

iii) the settling tortfeasor's equitable share of plaintiff's damages.

Whalen v. Kawasaki Motors Corp., 92 N.Y.2d 288, 292 (1998).

IV. Effect of Settlement on Cross-Claims and/or Third-Party Claims

A. Contribution: Subdivisions (b) and (c) of § 15-108 provide that a settling tortfeasor is relieved from liability to any other person for contribution under article 14, and further prohibits the settling defendant from obtaining contribution from anyone.

B. Indemnification: The general rule is that cross-claims and third-party claims for both common-law and contractual indemnification survive settlement under § 15-108.

V. Preserving Entitlement to GOL § 15-108

A. A defendant must plead § 15-108 as an affirmative defense in its answer.

B. *See Whalen v. Kawasaki Motor Corp.*, 92 N.Y.2d 288, 680 N.Y.S.2d 435 (1998) (a party may amend its pleadings at any time to raise § 15-108 as a defense)

VI. When More than One Tortfeasor Settles before Judgment

A. § 15-108 does not provide a method for calculating setoffs when more than one defendant settles out.

B. An illustrative case, however, is *Williams v. Niske*, 81 N.Y.2d 437, 599 N.Y.S.2d 519 (1993), in which the Court of Appeals affirmed the Appellate Division's use of a "settlement first" methodology.

Facts: The infant-plaintiff was severely burned in a fire started by other children with whom he was playing. Plaintiff sued the other children and the manufacturers of the clothing he was wearing at the time.

Pre-Verdict Settlements: Four of the tortfeasors settled with the plaintiff before trial for a total of $900,000. Before the verdict, while the jury was deliberating, two additional settlements were reached - $100,000 and a high-low settlement of $100,000 to $400,000. As a result of those settlements, defendant BTK was the remaining nonsettling defendant.

Jury Verdict: $2.6 million, with an apportionment of fault to only three defendants, specifically, the non-settling defendants who had proceeded to trial. Defendant BTK was found 35% liable and the other two defendants 65% liable. Interestingly, the jury had not been called to apportion liability to the defendants who settled before trial.

Methodology Utilized: The trial court must first deduct the aggregate amounts of the settlement of the defendants whose equitable shares were not addressed by the jury. From the resulting net amount, the court must next deduct the higher of the equitable shares or the actual settlement amount of the setting defendant whose equitable shares were determined by the jury.

Using this method, the Court reduced the $2.6 million verdict by $900,000 (reflecting the settlement of the settling tortfeasors against whom no assessment of liability was made), amounting to $1.7 million. Next, the Court reduced that amount by 65% (reflecting the equitable share of the other two settling defendants) since that amount, $1,105,000, was greater than their actual $200,000 settlement. This left a sum of $595,000 – the share of BTK, the nonsettling tortfeasor. In sum, the total setoff was $2,005,000 and plaintiff recovered a total of $1,695,000.

VII. Seminal Cases

A. *Whalen v. Kawasaki Motor Corp.*, 92 N.Y.2d 288, 680 N.Y.S.2d 435 (1998)

B. *Pollicina v. Misericordia Hosp. Med. Ctr.*, 82 N.Y.2d 332, 604 N.Y.S.2d 879 (1993)

C. *In re New York City Asbestos Litigation*, 82 N.Y.2d 342, 604 N.Y.S.2d 884 (1993)

D. *In re Brooklyn Navy Yard Asbestos Litigation*, 971 F.2d 831 (2d Cir. 1992)