

BILL TEXT:

STATE OF NEW YORK

1544

2005-2006 Regular Sessions

IN SENATE

January 31, 2005

Introduced by Sens. VOLKER, FARLEY, JOHNSON, LARKIN, LEIBELL, LIBOUS, LITTLE, MCGEE, RATH -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the civil practice law and rules, in relation to equalizing the treatment of collateral sources in tort actions, to repeal subdivisions (a) and (b) of section 4545 of such law and rules relating to collateral sources in certain tort actions and to repeal subdivisions (d) and (e) of rule 4111 of such law and rules relating to itemized verdicts in certain tort actions

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Subdivisions (a) and (b) of section 4545 of the civil practice law and rules are REPEALED.
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3 § 2. Subdivisions (d) and (e) of rule 4111 of the civil practice law
4 and rules are REPEALED.
5 § 3. Subdivision (f) of rule 4111 of the civil practice law and rules,
6 as amended by chapter 100 of the laws of 1994, is amended to read as
7 follows:
8 (f) Itemized verdict in certain actions. In an action brought to
9 recover damages for personal injury, injury to property or wrongful
10 death, [~~which is not subject to subdivisions (d) and (e) of this rule,~~
11 the court shall instruct the jury that if the jury finds a verdict
12 awarding damages, it shall in its verdict specify the applicable
13 elements of special and general damages upon which the award is based
14 and the amount assigned to each element including, but not limited to,
15 medical expenses, dental expenses, loss of earnings, impairment of earning
16 ability, and pain and suffering. Each element shall be further item-
17 ized into amounts intended to compensate for damages that have been
18 incurred prior to the verdict and amounts intended to compensate for
19 damages to be incurred in the future. In itemizing amounts intended to
20 compensate for future damages, the jury shall set forth the period of

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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1 years over which such amounts are intended to provide compensation. In
 2 actions in which article fifty-A or fifty-B of this chapter applies, in
 3 computing said damages, the jury shall be instructed to award the full
 4 amount of future damages, as calculated, without reduction to present
 5 value.

6 § 4. Subdivision (b) of section 4213 of the civil practice law and
 7 rules, as separately amended by chapters 485 and 682 of the laws of
 8 1986, is amended to read as follows:

9 (b) Form of decision. The decision of the court may be oral or in
 10 writing and shall state the facts it deems essential. In [~~a medical,
 11 dental or podiatric malpractice action or in an action against a public
 12 employer or a public employee who is subject to indemnification by a
 13 public employer with respect to such action or both, as such terms are
 14 defined in subdivision (b) of section forty five hundred forty five, for
 15 personal injury or wrongful death arising out of an injury sustained by
 16 a public employee while acting within the scope of his public employment
 17 or duties, and in~~] any [~~other~~] action brought to recover damages for
 18 personal injury, injury to property, or wrongful death, a decision
 19 awarding damages shall specify the applicable elements of special and
 20 general damages upon which the award is based and the amount assigned to
 21 each element, including but not limited to medical expenses, dental
 22 expenses, podiatric expenses, loss of earnings, impairment of earning
 23 ability, and pain and suffering. In [~~a medical, dental or podiatric
 24 malpractice action, and in~~] any [~~other~~] such action [~~brought to recover
 25 damages for personal injury, injury to property, or wrongful death~~],
 26 each element shall be further itemized into amounts intended to compen-
 27 sate for damages which have been incurred prior to the decision and
 28 amounts intended to compensate for damages to be incurred in the future.
 29 In itemizing amounts intended to compensate for future damages, the
 30 court shall set forth the period of years over which such amounts are
 31 intended to provide compensation. In computing said damages, the court
 32 shall award the full amount of future damages, as calculated, without
 33 reduction to present value.

34 § 5. This act shall take effect immediately and shall apply to all
 35 actions and proceedings pending or commenced on or after such date.

SPONSORS MEMO:

**NEW YORK STATE SENATE
 INTRODUCER'S MEMORANDUM IN SUPPORT
 submitted in accordance with Senate Rule VI. Sec 1**

BILL NUMBER: S1544

REVISED

SPONSOR: VOLKER

TITLE OF BILL: An act to amend the civil practice law and rules, in
 relation to equalizing the treatment of collateral sources in tort
 actions, to repeal subdivisions (a) and (b) of section 4545 of such law
 and rules relating to collateral sources in certain tort actions and to
 repeal subdivisions (d) and (e) of rule 4111 of such law and rules
 relating to itemized verdicts in certain tort actions

PURPOSE: This bill will equalize the treatment of collateral sources
 in tort actions against public defendants by applying the same standard
 used in cases against private defendants. The bill would allow collat-
 eral sources to offset damage awards for future costs or expenses in
 actions against public employers (to prevent double recoveries).

SUMMARY OF PROVISIONS: To eliminate an anomaly in the treatment of collateral sources in tort actions, this bill amends Section 4545 of the Civil Practice Law and Rules by repealing subdivisions a and b, which govern the offset of damages for collateral sources in medical malpractice actions and against public defendants, respectively. The bill standardizes the treatment of collateral sources by leaving in effect subdivision c of the section, which governs "any action for personal injury, injury to property or wrongful death," and allows all defendants in such actions to offset against awards for past and future costs and expenses any amounts which have been or will be replaced by past or future payments from collateral sources, such as insurance. Currently, while past and future awards in cases against private defendants may be reduced by collateral sources, in cases against public employers, under subsection (b) only past awards may be so reduced.

The bill would standardize the treatment of collateral sources not only by requiring that they be set off as to past and future awards regardless of the identity of the defendant, but in certain other respects as well. Currently, personal injury awards in actions against public defendants are offset under subsection (b) only by collateral sources "provided or paid for, in whole or in part, by the public employer." The offset for collateral sources is reduced in such actions by the amount of any contributions made by the public employee for the collateral source benefit. This treatment would be replaced by the approach taken as to all other defendants under the current subsection (c), which requires an offset for the most common sources of collateral sources, whether or not funded by the employer, and reduces the offset by the amount paid by the plaintiff for premiums for the two year period immediately prior to the accrual of the action. The bill would make clear that Section 4545 applies in wrongful death actions alleging medical malpractice (as it does in all other wrongful death actions). The reference to subsection (c) will be eliminated since it will be the sole remaining provision of Section 4545.

In addition, this bill would repeal subdivisions (d) and (e) of Rule 4111 and amend subdivision (b) of Section 4213. These subdivisions currently differentiate among medical malpractice actions, actions against public employers and other tort actions in prescribing the requirements for itemized verdicts and judicial decisions. With the repeal of subdivisions (a) and (b) of Section 4545, the distinctions among such actions would no longer be necessary.

JUSTIFICATION: This bill is necessary to eliminate an anomaly created by the Court of Appeals' recent decision in

IAZZETTI V. CITY OF NEW

YORK, 94 N.Y.2d 183 (1999), which interpreted CPLR 4545 to deny a public employer (and no other defendant) the benefit of any collateral source offset, including accident disability pension benefits subsidized by the employer, against future economic damages awarded to employees in tort actions. All other defendants may continue to use employer-subsidized accident disability pensions and similar collateral sources to offset awards for future economic loss.

The various Sections of CPLR 4545 were enacted to eliminate the common law collateral source rule, which prohibited tortfeasors from reducing their obligations to plaintiffs by the amount of benefits the plaintiff receives from other sources, such as insurance. The statute's purpose is to eliminate the windfall of double recoveries to plaintiffs which often resulted from the common-law collateral source rule, while still ensuring that uncompensated losses are fully compensated.

CPLR 4545 has been repeatedly amended to expand its scope. Originally

enacted as CPLR 4010, to allow the admissibility of evidence concerning past collateral source payments in medical malpractice cases, it was amended effective July 1, 1981, to make such a reduction mandatory and to give the power to make that reduction to the court. CPLR 4010 was subsequently repealed, and its text transferred to CPLR 4545(q), along with the present text of (b), which extended the class of cases in which such an offset for past collateral sources was mandatory to cases brought against public employers. L. 1984, c. 701. Subdivision (a) of the section was amended by L. 1985 c. 294, extending the scope of the offset to future losses whose replacement or indemnification could be demonstrated "with reasonable certainty." This extension of the scope of the offset was expressly extended to "any action" in L. 1986, c. 220. Each amendment has expanded the applicability of the collateral source doctrine to further the policy determination that it is inequitable to allow a plaintiff double recovery, particularly of public monies.

Notwithstanding the trend to eliminate the windfalls that result from the common law rule, and to safeguard public monies, presently all defendants except public employers may offset against awards for future costs or expenses any amounts that would with reasonable certainty be replaced or indemnified.

Public employers' unique inability to offset future economic loss is a consequence of the Court of Appeals'

IAZZETTI decision, which holds that the proper statutory predicate for collateral source reductions in personal injury and wrongful death actions brought by public employees against their employers is CPLR 4545(b), rather than CPLR 4545(c). Section 4545 (b) permits an offset only as to past costs and expenses, in contrast to the subsequently enacted 4545(c), applicable to all other defendants, which requires an offset as to past and future costs and expenses. In

IAZZETTI, the Court of Appeals concluded that public employers are governed exclusively by CPLR 4545(b), and therefore are limited to an offset against past economic loss.

Three cases, including IAZZETTI, illustrate the harm public entities will be caused by this Court of Appeals' decision. In

IAZZETTI, plaintiff, a forty-year-old Department of Sanitation employee, slipped and fell on the floor of the garage where he worked, injuring his back. As a result, he was retired on an Accident Disability Retirement pension, which provides him with three-fourths salary benefits, tax free, for the remainder of his life. Based on plaintiff's life expectancy of 76, he will receive \$1,136,150 from his City pension. Then, from his personal injury suit against the City, plaintiff was awarded \$1.2 million dollars to compensate him for past and future lost earnings and loss of ordinary pension benefits, the very same loss that the City pension will replace. One million of the \$1.2 million was awarded in compensation for future lost earnings and future lost pension benefits. Since plaintiff was found 20% responsible for the happening of the accident, he will receive \$800,000 of the \$1 million awarded for future economic loss. Thus, as a result of the Court of Appeals' decision in this case, the plaintiff will now receive both \$1.1 million in tax-free pension benefits over the remainder of his life, and an \$800,000 tax-free jury award meant to compensate him for the same loss.

In CAIAZZO V. CITY OF NEW YORK, plaintiff, a forty-four-year-old Department of Sanitation employee, injured his back and knee due to the condition of the floor in his work area. As a result of his injuries, he was retired on an Accident Disability Retirement of \$10,680 annually. He also receives Social Security Disability payments of \$12,600 each year. In addition, the jury awarded him \$3,565,000 in his personal injury action against the City and allocated \$1.1 million, almost one-third of

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that award, to compensate plaintiff for future economic loss for 31 years. If the City were a private defendant, it would have been entitled to a set-off of \$721,680 (combined future pension and social security disability payments over 31 years) against the \$1.1 million award for future economic loss, leaving \$238,320 in future economic damages to be paid. Under

Iazzetti, the \$1.1 million jury award stands unreduced by the \$721,680 in tax-free payments plaintiff will receive from his pension and social security disability payments.

In

Herrera v. City of New York, plaintiff, an NYPD detective, was injured when he was struck by an unmarked police vehicle when he ran out onto the service road of the eastbound Grand Central Parkway in pursuit of robbery suspects fleeing on foot. Following the accident, he was retired on an Accident Disability Retirement pension of \$4,359.18 monthly. He also receives monthly Social Security Disability benefits of \$1,237. After a reduction by the trial judge, plaintiff recovered a verdict of \$3,483,000 in his personal injury action against the City. The future lost earnings award amounted to \$750,000 over a 10-year period. The total of future pension benefits and Social Security Disability payments to be paid over the same 10 years would be \$690,117. If it were a private defendant, the City would have been liable to pay \$59,882.

Under

Iazzetti, the Herrera plaintiff is compensated twice for the same loss and receives an additional \$750,000.

As demonstrated above, the Court of Appeals' decision in

Iazzetti will

be both unfair and costly. Solely because the defendant is a public employer, plaintiffs receive windfalls by double compensation for the same economic loss. The City pays twice, first through the pension, and then through the personal injury award.

Applying

Iazzetti to only the three cases discussed above results in an increase in costs to the City of \$2,271,680. There are approximately 938 cases brought by uniformed service employees currently pending against the City. These cases pose a potential liability of \$164 million, a substantial portion of which is for future economic losses

that doubly compensate city uniform workers who are also receiving accident disability pensions.

The Court of Appeals' decision in

Iazzetti, by narrowly construing the

1986 amendment to CPLR 4545, has left public employers, and thus the public fisc, in a position inferior to all other defendants. This result is solely attributable to the piecemeal enactment and amendment of this section. The Legislature should correct this anomaly and standardize the treatment of collateral sources.

LEGISLATIVE HISTORY:

2003-04, S.622/A.3483.

2001-02, S.2979-A.

2000, S.8037.

EFFECTIVE DATE: Immediately.