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Collateral source rule has to go

By Donald P. Eckler

Donald “Pat” Eckler is a partner at Pretzel & Stouffer focusing on professional liability defense, insurance coverage litigation, and general tort defense. He is the legislative chair of the Illinois Association of Defense Trial Counsel. His views are his own and not those of his firm or its clients.

Justice is about what one is entitled to; what one deserves. Fair civil procedure is essential because without it, justice cannot be achieved. In the tort context, justice means using the award of money as the means to place the plaintiff back in the position they would have been had the tort not been committed.

It was for this reason that the common law never developed wrongful death and survival claims as tort claims were seen to abate with the death of the injured person. Beginning in the mid-19th century statutes were passed to provide for causes of action where the injured person had died. It was then up to the beneficiaries of the estate of the deceased to bring the cause of action so that they could be placed back in the position they would have been had the injured person not died.

Once liability has been proved, the focus in the civil justice system is on compensating a plaintiff, or their heirs, for what was allegedly lost because of the action of the tortfeasor. In derogation of that central principle, the collateral source rule allows a plaintiff to reap a windfall when the amount billed is allowed to be presented to the jury, even if the medical provider accepted a fraction of that amount to satisfy the bill or even if the medical services were entirely gratuitous.

In the landmark case *Wills v. Foster*, 229 Ill.2d 393 (2008), the Illinois Supreme Court (1) adopted the reasonable value approach to medical bills, (2) precluded defendants from presenting the actual amount paid to satisfy the medical bills and (3) overruled its opinion in *Peterson v. Lou Bachrodt Chevrolet*, 76 Ill.2d 353 (1979) which had held that the plaintiff could not recover for free medical services.

Among its reasons for coming to these conclusions, the court held that to rule otherwise would be a windfall to the defendant. As should be obvious to anyone who has spent a moment reviewing most medical bills, they often bear no relationship to the actual value provided. From the laughable charges for disposable mucus recovery system (tissue) and thermal therapy (ice) to fraudulent charges for services not rendered to the more common circumstance of amounts being billed that the provider has no expectation will ever be paid, a medical bill is hardly a reliable measure of the reasonable value provided. Taking the court’s reasoning on its own terms, the best measure of the value provided is what someone was willing to pay for it. Allowing the plaintiff to recover the difference between what was billed and what was paid is an unjustifiable windfall to the plaintiff.

It is a windfall to the plaintiff because the plaintiff, whether the plaintiff had private insurance or if their bills were paid by Medicare or Medicaid, was never directly exposed to or expected to pay the bills (or only ever a very small amount of them). The reasoning it is prejudicial to allow the jury to be presented with the amounts actually paid to satisfy the bills is belied by the available remedy in the context of medical bills paid by private insurance: present to the jury the costs in premiums, co-payments, and the like paid by the plaintiff and claim those as damages for the defendant to pay plus the amounts actually paid.

With regard to those whose bill are paid by Medicare and Medicaid, the *Wills* court expressed concern that not adopting the collateral source rule as it did, there would be two classes of plaintiffs, those with private insurance and those without. However, neither Medicare nor Medicaid are contracted for by the plaintiff nor are insurance in any sense (they are not rated risks, but defined fee for service programs). Further, both are government-provided benefits, and in the case of Medicare, a mandatory one. The defendant, like every other taxpayer, pays into these programs, and it is hardly a windfall for the defendant to only be liable for what was actually paid to satisfy the medical bills when those are paid by the government.

The remedy sought by the defendant in *Wills*, and rejected by the Supreme Court, of having the judge reduce the recoverable medical bills to the amount paid, though better than no reduction at all, is also unsatisfactory because presenting the bills to the jury increases the value of the medical services in the juror's minds and raises the value of the case. The plaintiff should be required to present what was actually paid to satisfy the medical bills and ask the jury to award that amount.

An additional reason raised by the *Wills* court was that the total billed amount should be awarded because there is often a lien on the recovery that would reduce the plaintiff's recovery. However, the total recovery for medical lienholders are capped at 40% if there are multiple such lienholders and capped at one-third if there is only one such lienholder. 770 ILCS 23/10(a). The bills can also be reduced further if the total medical liens exceed 40% of the amount recovered. 770 ILCS 23/10(c). As a result, the law already ensures that the medical lienholders do not take a disproportionate amount of any judgment.

The collateral source rule should be legislatively abolished because to continue under the current procedure creates unjustifiable awards that lead to inflated settlements. Justice requires that plaintiffs who prove they were injured by a defendant are entitled to compensation, but only compensation that reflects the actual loss suffered, nothing more.