Damages for Medical Expenses: Review of the Judicial Split on Admission of Medical Services Billed vs. Paid

By Jessica S. Smith, Esq. There has been a longstanding discussion in the Maine legal community surrounding the recoverability and, therefore, the admissibility, of medical expenses billed by a provider versus those that are actually paid by the patient, her insurer, or the government. The argument stems from the fact that third-party payers such as Medicare and private insurers pay less than the expenses reflected in medical bills, either by contract or law. Plaintiffs argue to exclude evidence of the lesser amount actually paid, while defendants argue for its admission. In the right case, the difference can add up to hundreds of thousands of dollars in medical expenses that the jury gets to see and award as damages. The Law Court has yet to decide whether the amount billed or the lesser amount paid is admissible as evidence of the reasonable value of the medical services rendered to the patient. The Superior Court has addressed the issue, but little consensus has been reached, leading to a split amongst the Justices. This article addresses the debate, the legal doctrines involved, and the various approaches taken by the Superior Court Justices. The Debate The courts and parties often look to the *Maine Jury Instruction Manual* for guidance on what is recoverable. Prior to 2004, the *Manual's* jury instruction stated, "The reasonable value, *not exceeding actual cost to the plaintiff*, of examination and care by doctors and other medical personnel..." *Eastman v. Eastern Maine Medical Center*, 2003 WL 26559786 (Me.Super.), 2. This jury instruction appeared to decide the question in favor of the defense, at the time, by making the amount actually paid, and not the higher amount billed, recoverable. However, in approximately 2004, the *Manual* was amended and now states, "Medical expenses includes the reasonable value of medical services...shown by the evidence to have been reasonably required and actually used in treatment..." Alexander, *Maine Jury Instructions Manual* §7-108 (2017 ed). This version of the instruction removed the limit on recovery and left open the question of how one proves and recovers the reasonable value of medical services rendered to the plaintiff. Whether reasonable value is proven best by the amount medical providers billed for their services or the reduced amount paid by the patient or third parties and accepted by the providers remains the debate. The Collateral Source Rule The Collateral Source Rule commonly is cited in this debate about admissible and recoverable medical expenses. As the argument goes, if medical bills were paid by someone other than the plaintiff or were a gift to the plaintiff, the Rule prohibits the admission of evidence of the payment so that the jury does not limit the award of damages. *Hoitt v. Hall,* 661 A.2d 669, 673 (Me. 1995). This is based on the reasoning that the intent of awarding damages is to make the Plaintiff whole for her injury, and any benefit to the plaintiff from a third party should not also benefit the defendant. In addition, in many instances, third-party payers of medical expenses are entitled to reimbursement from damage awards, thereby preventing a windfall double recovery by the plaintiff. On the other hand, the argument against recovering the amount billed for medical services, when a lesser amount was accepted by the provider, is that the Collateral Source Rule is not implicated. When a provider accepts a negotiated rate or a regulated rate from a third-party payer, the plaintiff is never liable for the higher amount originally billed. The lesser amount paid is in full satisfaction of the amount due for the medical services provided. Since the plaintiff never incurs liability to pay the higher amount billed, the plaintiff does not suffer any loss related to the difference in payment and the Rule is never implicated. The Supreme Court of

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California best summarized this reasoning: Having never incurred the full bill, plaintiff could not recover it in damages for economic loss. For this reason alone, the collateral source rule would be inapplicable... The rule does not speak to losses or liabilities the plaintiff did not incur and would not otherwise be entitled to recover. Certainly, the collateral source rule should not extend so far as to permit recovery for sums neither the plaintiff nor any collateral source will ever be obligated to pay... *Howell v. Hamilton Meats & Provisions, Inc.*, 257 P.3d 1130 (Cal.2011), reh'g denied (Nov. 2, 2011). Since the amount paid is admissible, it can be considered by the jury as *evidence* of the reasonable value of the medical services provided to the plaintiff. The jury never knows the identity of the payer, the amount billed, or that there was a difference between the amounts billed and paid, so the rationale for the Collateral Source Rule does not apply. The jury is only aware of the amount the provider was willing to accept as payment in full for its medical services. The jury ultimately weighs that evidence and determines what the reasonable value of the medical service is and awards damages. The Maine Health Security Act When it comes to medical malpractice claims, the Legislature has considered the windfall a plaintiff may receive when the amount of medical expenses actually paid is not admitted in evidence and used by the jury to award damages. The Maine Health Security Act provides for an adjustment of the plaintiff's recovery if a third-party collateral source exercises its right to subrogation in order to recoup the cost of the medical expenses it has paid within thirty days of receiving notice of the plaintiff's verdict. 24 M.R.S.A. § 2906(2). If a third-party payer seeks to recover the money it paid for medical bills on the plaintiff's behalf, then the court will not reduce the plaintiff's damage recovery. However, if the third-party payer does not seek to recover from the plaintiff's damages award, then the court will reduce the damages awarded by the amount that has been paid or that is payable by a collateral source. 24 M.R.S.A. § 2906(2). The Act does not expressly address the admissibility of medical expenses billed or paid during trial. The statute only enables a judge to reduce damages for medical expenses awarded by a jury. The Split in the Superior Court There have been a handful of orders from the Superior Court Justices deciding the admissibility of medical expenses, typically in the context of motions *in limine*. There are three, sometimes conflicting, outcomes the Justices have reached: (1) to admit only the actual amount paid and accepted by the provider; (2) to admit only the amount billed by the provider; (3) and lastly, to admit both, the amount billed and the amount actually paid and accepted by the provider. Admitting Evidence only of the Amount Paid is the Best Result Damages awarded for the expense of medical services are "compensatory" damages. The purpose is to put the plaintiff in the position she would have been if she never were injured. *Wendward Corp. v. Group Designs, Inc.*, 428 A.2d 57, 61-62, (Me. 1981). "While the measure of damages should avoid a windfall to either party, it should compensate the Plaintiff as precisely as possible for the loss without recourse to speculation and conjecture." *Cote Corp. v. Thom's Transport Co., Inc.,* 2000 WL 762076, * 3 (D. Me) (citing *Wendward Corp. v. Group Designs, Inc.*, 428 A.2d 57, 61-62, (Me. 1981). By awarding money for an expense the plaintiff (or a third party source) never incurred or paid, it would leave the plaintiff better off than if the accident had never happened. Damages for medical services should precisely compensate the plaintiff for medical services costs. The best evidence of the reasonable value of the medical services rendered is the amount the providers accept in final payment. The amount billed is typically an unusually inflated value because providers are looking to recoup funds lost from defaulting patients or compensate for lesser government or insurance payments. Therefore, the amount billed is not reliable evidence of the reasonable value of a provider's medical services. Courts outside of Maine have decided that the amount paid and accepted by the provider is proper evidence of the reasonable value of the medical expenses recoverable by a plaintiff. Most notable in *Hanif v. Housing Authority of Yolo County*, reasonable value was found to be a "term of limitation, not of aggrandizement" noting that compensatory damages should compensate the plaintiff for actual injuries sustained and no more. 200 Cal.App3d 635, 641 (Cal.Ct.App. 1988). Conclusion When and how the Law Court will rule on this issue is

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unpredictable. Until then, the outcome in Superior Court will depend on which Justice is sitting on the bench.

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