

Beyond Bates: What is the true measure of damages for an injured party who has incurred medical bills?

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“Discounting is a reality of modern medical economics and it does no violence to the collateral source doctrine to bring the tort compensation system the same intended savings. By allowing the plaintiff to show the discounted medical expenses as evidence of his damages, even though he paid no part of them, but refusing any evidence of the write-offs that no one incurred, there is a proper balance of the competing interests at issue.”

Mitchell v. Hayes, 72 F.Supp.2d 635, 637 (W.D. Va. 1999).

Nearly 90 percent of Americans with health insurance are covered by HMOs and/or other managed-care plans. Theoretically, the reason for the shift from traditional fee-for-service systems to managed care was to improve the quality of health care and hold down medical costs. One way managed care providers attempted to reduce health costs was to negotiate with doctors and other medical providers for discounted fees.

As the prevalence of managed care increased, the tort compensation system was forced to reevaluate the proper measure of damages for injured persons requesting payment of medical expenses incurred as a result of accidental injury. The primary purpose of awarding tort damages is to make an injured party whole by restoring that party to the position he or she was in prior to injury. Horsch v. Terminix Intern. Co., Ltd., Partnership, 19 Kan.App.2d 131, Syl. 11, 865 P.2d 1044 (1993). Damages are not allowed to grant or create a windfall to the injured party. Service Iron Foundry, Inc. v. N.A. Bell Co., 2 Kan.App.2d 662, 679, 588 P.2d 463 (1978). However, one

who commits a tortious act is liable for the injury and loss that are the natural and probable result of his or her wrongful act. Foster v. Humburg, 180 Kan. 64, 68, 299 P.2d 46 (1956).

In the State of Kansas, this issue was first addressed in 1996 in the matter of Bates v. Hogg, 22 Kan.App.2d 705, 707, 921 P.2d 249 (1996). Bates involved a motion in limine filed by Hogg seeking to limit Bates' evidence of economic damages to the amount of medical bills paid by Medicaid on her behalf. On appeal, Bates argued that she should be permitted to present the full value or market value of the medical treatment she received as a result of the accident. According to plaintiff, limiting her recovery to the amounts paid by Medicaid would do violence to the collateral source rule thereby permitting the tortfeasor to gain an advantage by way of Medicaid's contractual arrangements with her medical providers.

The Bates Court first reviewed the collateral source rule and determined that it was inapplicable to the issue presented. Bates at 705. The collateral source rule prevents a tortfeasor from introducing evidence that an injured party's medical bills or other damages have in fact been paid by a third party. In this instance, defendant Hogg was not intending to introduce evidence of the payment but rather to seek a pretrial declaration of law from the court that plaintiff's recovery was limited to the amount paid by Medicare after write-offs. Thus, the Court concluded that the collateral source rule was inapplicable to the issue raised by the defendant.

The Bates Court next considered whether the proper measure of damages for medical expenses under the circumstances presented was the total amount charged by providers before write-offs, or the net amount remaining after reductions for Medicaid. The Court noted that a medical provider by contract could not charge Medicaid patients for the difference between their customary charges and the amount paid by Medicaid. Since the plaintiff could not be financially

required to pay the difference between the provider's customary charge and the amount paid by Medicaid, the Bates Court concluded that it would be improper to allow the plaintiff to recover the difference between the charges and "pocket the windfall." Bates, 22 Kan. App. 2d at 706, citing Gordon v. Forsyth County Hospital Authority, Inc., 409 F.Supp. 708, 719 (N.D.N.C. 1976).

Overall, the Bates opinion concluded that Kansas litigants could not recover the difference between the amounts paid by Medicaid and the amounts charged by medical providers. The Bates decision, however, did not suggest whether this rule of law would extend into contractual arrangements agreed between medical providers and private health insurance companies such as Blue Cross Blue Shield, PPOs or HMOs.

Kansas courts' next opportunity to comment on this issue was in Jackson v. City of Kansas City, 236 Kan. 143, 947 P.2d 31 (1997). Jackson involved an individual who had been handcuffed and seated on a sidewalk by police officers during a domestic disturbance. The individual eventually sued the city for damages including medical care he incurred as a result of his treatment. During trial, the defendant argued that plaintiff should not be permitted to recover the full amount of partially paid medical bills. In considering the issue, the Jackson court noted the following:

"The city claims that it should only be required to pay damages to Jackson in the amount that Jackson himself actually paid towards the bills. However, there is no evidence in the record that the hospital has settled for less than the amount due or has written-off the remaining portions of the bill ... in this case, there is no evidence that any of the amounts remaining due on the medical bills have been written-off by medical providers ... the city did not offer any evidence from the medical providers to indicate that the remaining amounts due on the bills have been written-off ... the law does not require that Jackson's damage for medical expenses be reduced to the amount he actually paid since no evidence

indicates the amount still owing on the bills have been written-off by medical providers. Instead, the evidence indicates that Jackson is still responsible to pay the full amount of the bills.

Jackson, 236 Kan. at 152.

Thus, the Jackson decision suggested that the Bates analysis extends beyond governmental health insurance programs. Also, the opinion suggests that an injured party could maintain a claim for unpaid balances which have not been formally written-off by a third-party provider. Most importantly, the opinion implies that the defendant city failed to offer evidence that the remaining amounts due on the bills had actually been written-off. The implication to be drawn is that the party seeking the reduction in the bills must supply the court with at least some information tending to establish the amount of write-offs, although the opinion does not formally address which party bears the burden of proof concerning the ultimate totals associated with write-downs or write-offs.

In the ensuing years, litigants battled over whether the Bates analysis was strictly limited to the context of write-offs mandated by governmental reimbursement programs. However, the United States District Court for the District of Kansas recently extended the analysis first articulated in Bates to private health care insurance. In the matter of Strahley ex rel. Strahley v. Mercy Health Center of Manhattan, Inc., 2000 W.L. 1745291 (D.Kan. 2000). Strahley involved a medical malpractice action brought by plaintiffs concerning the birth of their son. The defendant filed a motion in limine to exclude medical expenses written-off by health care providers, arguing that Bates required the exclusion of write-offs concerning plaintiff's medical expenses. Noting that this was an evidentiary question intertwined with state substantive policy (the collateral source doctrine) the court applied Kansas law. Judge Vratil noted that the collateral

source rule permits injured parties to recover full compensation for damages caused by a tortfeasor irrespective of payment of such damages by a source independent of the tortfeasor. Thus, the collateral source rule renders evidence concerning payments made by Medicaid and/or private health insurance inadmissible. Strahley at 1.

Citing to Bates, the court concluded that:

“Although Bates addressed only a Medicaid write-off, the same reasoning applies to amounts written-off in conjunction with private health insurance. No one, including plaintiffs, is liable for the amount of the write-offs. Therefore, they do not represent actual losses.”

Strahley at 1. Thus, the federal courts have extended Bates to write-offs from private health insurance carriers.

Kansas courts still have not clarified which parties has the burden of establishing the nature and extent of any write-offs contained within plaintiff’s medical bills. Neither Bates nor Strahley discussed the issue. In Jackson, the court seems to suggest in dicta that the defendant has the initial burden of producing some evidence that the bills in question have been written-down or written-off. The Jackson opinion does not discuss which party bears the ultimate burden of persuasion concerning the actual amount of net medical expense. On the one hand, there is little doubt that an injured party bears the burden of proof of establishing that his or her medical expenses are reasonable, necessary and related to a motor vehicle accident. Once the court determines that the proper measure of damages is in fact the net amount remaining after any contractual adjustments (a question of law), the burden of proof would then require the injured party to produce evidence that the remaining fees were reasonable in price.

On the other hand, an injured party could argue that the defendant is actually seeking the benefit of a collateral source. Since the defendant appears to have the burden of initially producing evidence that the bills in question had been adjusted, there is little harm in requiring the defendant to thereafter produce evidence specifically ascertaining the amount of such write-offs.

Overall, the law relative to evidence of contractual adjustments of an injured party's medical expense is still emerging. Although the Jackson dicta appears to suggest that the Kansas appellate courts will likely join the Federal Court's extension of Bates into private health insurance, the issue has yet to be formally resolved. In the future, Kansas courts will have to come to grips relative to the distinction to be drawn between the burden of production and the burden of proof in regards to contractual adjustments. In the interim, practitioners representing injured parties should make special note during the initial investigation into personal injury claims as to whether the injured party has private health insurance or Medicaid which may have affected the total amount of bills incurred. In instances where a potential client has been injured in a motor vehicle accident or other circumstances exist in which medical payments coverage may be available, it may be more advisable to ensure that initial medical care and treatment is paid through liability insurance as opposed to relying on private health insurance to provide payment. Most liability carriers do not have contractual agreements with treating medical providers which would require write-offs or adjustments.

Those defendant potential claims and suits involving personal injury should also investigate whether contractual adjustments are present. Interrogatories can be utilized to require that plaintiffs identify not only the total amount of charges for medical expense but also reveal

any information the plaintiff possesses about the amounts of bills which may have been written-down or adjusted. Requests for production, business records subpoenas or medical authorizations can be utilized so as to permit the defense to identify possible contractual adjustments. However, it is important to note that information regarding such adjustments is not normally contained within the patient's individual file. With the rise of computerization, many providers will keep records concerning adjustments in their computer. Practitioners should follow-up with each provider to ensure that they receive documentation of any adjustments, together with any balances remaining due.

Overall, the recent legal developments surrounding the Bates decision require close scrutiny. Since litigants have historically linked the value of personal injury cases to the amount of medical expenses, significant contractual adjustments reducing an injured party's medical bills may have a dramatic effect on a case.