# Best's Insurance Law Podcast

## Measuring Medical Expenses in Malpractice Cases: Time for an Overdue Course Correction - Episode #227

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**Hosted by:** John Czuba, Managing Editor
**Guest Expert:** Dan Thompson from DeeGee Rehabilitation Technologies, Ltd.
Qualified Member in *Best's Insurance Professional Resources* since: 2011

**John Czuba:** Welcome to "Best's Insurance Law Podcast," the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, Managing Editor of *Best's Insurance Professional Resources*.

We're very pleased to have with us today expert service provider Dan Thompson, President and CEO of DeeGee Rehabilitation Technologies, Ltd., with offices in Ontario, Canada and Arizona. Dan has worked within the litigation arena for over 25 years. He is a Registered Rehabilitation Professional, Registered Vocational Professional, and a Certified Life Care Planner.

His company's services include providing expert opinions to insurance carriers, attorneys, and medical professionals by assessing the needs and vocational capabilities for people with disabilities. Dan, it's always a pleasure to have you with us on our podcast.

**Dan Thompson**: John, thanks again. It's always my pleasure to be on the show.

**John**: Today's discussion is on measuring medical expenses in medical malpractice cases. Dan, it's my understanding that you just had a recent joint article published in the American Academy of Economic and Financial Experts "Journal of Legal Economics" entitled, "Measuring Past and Future Medical Expenses in Personal Injury and Medical Malpractice Cases -- Time for an Overdue Course Correction."

Why is it important to measure past and future medical expenses when acting as an expert witness in personal injury cases?

**Dan**: Wow. That's a bit of a mouthful; can you say that three times? First, John, I would preface that my coauthor, Dr. Tom Wickizer, he's the real expert in this area. However, John, I'm sure that you and your listeners will appreciate that it is imperative I should say, to determine what real past costs are, for several reasons that we'll get into later in our discussion today.

It also determines that if an alleged injured person is claiming future goods and services, such as diagnostic testing or therapies, and yet they've never availed themselves or required those services for several years prior to reaching a settlement, then why would those costs be put into a future care cost analysis or a life care plan.

Above and beyond that, we have to determine what constitutes reasonable value for assessing economic damages. Now, past and future medical expenses are considered special economic damages that are potentially recoverable, as long as they reflect the reasonable value of medical care, or the RVMC.

However, it should be emphasized that US courts have never really defined what the RVMC is. That continues to be a subject of wide debate.

Our paper provides a thorough discussion of how to think about and measure those past and future medical expenses in ways that are consistent with the legal principle of the RVMC, or as I said, the reasonable value of medical care. I encourage your listeners to read our papers for those details.

**John**: The courts really haven't defined what reasonable value is, and that remains a subject of a lot of disagreement. Can you tell us your understanding of reasonable value and how does it apply to past and future medical expenses?

**Dan**: You're absolutely right, John. The concept of reasonable value continues to be the subject of much debate.

My colleague, Tom Wickizer, wrote an earlier paper, published in 2002, in that same Journal of Legal Economics, or the JLE, which sets forth the principle of what that reasonable value of medical care should have in the relationship or link of the underlying value of resources used to provide plaintiffs with treatment or used to project future cost of those treatments as they are needed.

As we showed in our 2024 JLE paper, billed charges fail to meet that test by a wide margin. For example, often, the hospital charges are marked up by 300% to 2,500% or more, above the cost of providing treatment. The reason hospital charges are so high is mainly because hospitals negotiate with insurance carriers when they renew their contract, and they perceive it's in their financial interest to inflate their charges.

Insurance carriers pay about 25 percent of the billed charges, so hospitals believe it's in their financial interest to inflate charges, knowing that they will only receive a fraction of what those charges are.

I can speak about this firsthand, John. As a Canadian, I remember being hospitalized overnight for getting the flu. In essence, the total bill exceeded $16,000. Yet, as the redheaded stepchild from the north, I was able to negotiate and bring that bill down to a much more reasonable charge of $2,500.

Having fair damage awards requires the reasonable value to be defined and measured in ways that reflect the actual value of those resources used for past or future treatment. Bill charges, in my opinion, fail to meet those tests by a wide margin. Having damage your words based on billed charges guarantees plaintiffs in tort cases will receive an undeserved windfall.

**John**: Dan, over the past 30 years or so, attorneys and legal scholars have argued about whether billed charges for medical care or the amounts paid by health insurers for medical care received by plaintiffs constitute reasonable value in tort cases. This question remains largely unanswered.

What's your understanding of the collateral source rule and how that has played into the issue and the determination of economic damages that may potentially be recoverable by plaintiffs?

**Dan**: The collateral source rule, or the CSR, underlines much of the argument and disagreement related to assessing economic damages in tort cases. The CSR has been around since 1854, when the US Supreme Court made its decision in the Propeller Monticello v. Mollison case. I encourage the lawyers who are listening to this to look up that case.

In brief, the CSR stipulates that payment for damages by a collateral source, such as health insurance or workers' compensation, should not be considered in assessing economic damages that may be recoverable.

In personal injury cases and medical malpractice cases, the question involving the CSR often is an evidentiary question regarding what evidence to admit in court for a jury to hear.

For example, if the billed charges are $100,000 and the health insurance company, just as we talked about, kicks in $20,000 and the plaintiff pays $5,000 to settle the bill in full, what should the damage award be? $100,000, $20,000, or the $5,000 that they paid?

In my opinion, the $100,000 does not in any way reflect a "reasonable" value, so it should be argued that the damage award should not be that amount. The CSR may limit introducing evidence regarding the amount paid by the insurance company, which was the $20,000 that we just talked about.

What's the alternative? Tom and I have argued that there are ways to assess the value of medical care that doesn't violate the CSR, and that are consistent with the principles of reasonable value of medical care, but that debate continues.

**John**: Dan, for past medical expenses, how should we assess the reasonable value of medical care in order to determine what is fair damage awards?

**Dan**: John, I think that's a very complicated question. Wickizer, my colleague, developed a cost-based approach to the evaluation, I should say, of past medical charges and physician charges. This approach for determining past hospital expenses requires that billed charges for a plaintiff be adjusted to reflect the actual cost of treatment.

Every hospital has to submit an annual cost report to the Centers for Medicare & Medicaid. Those reports are publicly available. Data in those reports allows one to determine the actual cost of treatment and to obtain other financial measures, such as the billed charge markup. Determining the actual cost of the medical care is necessary for determining that reasonable value of medical cost.

The two papers published in 2022 and in 2024 in the JLE discuss in detail how to define and measure those past medical expenses. I encourage your listeners to look up our articles to see if they're interested in getting more details.

**John**: Dan, the assessment of economic damages for future medical expenses raises different questions. Can you explain what the questions and issues are related to assessment of economic damages for future medical expenses?

**Dan**: Future medical expenses projected in life care plans must also reflect the reasonable value of medical care that may be needed in the future. Plaintiff life care planners always use billed charges to project future medical expenses. I think this violates the principle that past and future medical expenses should be based on reasonable value.

Courts have allowed future medical expenses to be based on what will be paid by a claimant's health insurance, such as Medicare, but public data is available to determine what is paid by Medicare and what those amounts can always be adjusted to reflect a particular circumstance of each case.

Alternatively, data is available from FAIR Health and other resources as a benchmark of the local billed charges, such as using the 75th percentile. In other words, if we take 100 vendors and we use the 75th percentile, what that means is, up to 75 of those 100 vendors will meet that price. It's only the 25 percent that would be above that price.

Tom and I worked on a project called the Andary project in Michigan. This was for health insurance carriers in Michigan facing exorbitant sums to pay for costly long-term care. They wanted a tool to provide their adjusters going into negotiations with service providers. They felt that a lot of the local providers were in collusion to mark up these prices.

Yet when you reconciled it with other sources, such as Medicare, and then marking that price up by 50 percent or using the 75th percentile from sources like FAIR Health, there's no way that those costs were even in the ballpark.

Obviously, I think that provided a more reasonable benchmark for their adjusters to determine what the actual value of services from the providers going forward so that they could use that before bringing in their lawyers and incurring even more costs before even doing the payout.

Other issues arise, such as determining what the work life expectancy or even the life expectancy and future medical care is needed over a claimant's lifespan or what that lost income is going to include in their damages.

Plaintiff experts don't take into account a claimant's health status. They rarely, I think, come up with an adjustment taking account of the plaintiff's health status. Instead, they basically assume every claimant is healthy. That's usually not the case.

As I'm sure you can appreciate, John, many people have pre-existing diabetes or other conditions that can shorten their life expectancy by many years and thus reduce damages awards for future medical expenses.

Our 2024 JLE paper discusses issues related to measuring the reasonable value of future medical expenses. Again, I encourage your listeners to look up those articles to get more details.

**John**: Dan, what would be your thoughts about how the legal system can improve legal processes and procedures so that damage awards for past and future medical expenses better reflect the reasonable value of medical care?

**Dan**: John, that's a great question. In its current system, I think it doesn't work. For me, courts and state legislatures must have a better understanding of how the medical care system operates and how health insurance affects billed charges.

The fact that billed charges do not meet the reasonable value test and therefore, in my opinion, should not be used alone to determine assessed damages. The legal system is slow to change, as I'm sure you know, so more scholarship is needed to advance the understanding of how courts can arrive at fair damage awards without violating the collateral source rule.

Obviously, that's probably above my pay grade, but at least we're trying to invoke thought processes that are going to make that change. In my opinion, it's time for new thinking about how the collateral source rule should be applied by the courts in determining the reasonable value of past and future medical expenses.

Some states, such as California and Texas, now limit the damage awards to the amount paid for medical care. Other states, such as Alabama and Arizona, depending on the type of case, if it's a medical malpractice case or just in general damages, will consider collateral sources to compensate for future care, but those states are the exceptions.

Many other states need to update their policies. In Canada, myself being Canadian, most care is subsidized by the government. Therefore, only threshold items, such as van modifications and home modifications, are included in life care plans because most of the care, like diagnostic testing, overnight stays, are going to be covered, so why put them into a life care plan?

**John**: Dan, one final question. What do you see for the future?

**Dan**: Unfortunately, John, I don't see any quick fixes or magic bullets. Case law needs to reflect the reality of how medical care is delivered and how health insurance operates. State legislatures have revised statutes to make application of the collateral source rule. If you recall, John, that was implemented back in the 1800s. They need to be more flexible.

Obviously, more changes need to continue. Legal appeals need to be filed to challenge outdated legal doctrine in regard to assessing economic damages in tort cases. This will not happen overnight.

We hope our work, in some small way, will contribute to the goal of improving our legal system and how it assesses economic damages, leading to a fair damage award. Thank you very much for your time.

**John**: Dan, thank you for joining us today and for sharing key aspects of the paper with our audience.

**Dan**: Thank you very much.

**John**: You just listened to Qualified Member expert service provider Dan Thompson from DeeGee Rehabilitation Technologies, Ltd., with offices in Ontario, Canada and Arizona. Special thanks to today's producer, Kim Bjorheim.

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I'm John Czuba, and now this message.

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