



TORT TRENDS

The newsletter of the Illinois State Bar Association's Section on Tort Law

Editor's note

By John L. Nisivaco, Boudreau & Nisivaco, Chicago

The first article of this edition is written by Dennis Lynch. Mr. Lynch addresses the issue of whether an adult plaintiff may recover the reasonable value of past caretaking expenses that are provided by the plaintiff's parents and not a third party. The article provides a persuasive argument for recovery in such cases that was recently accepted by an Illinois trial court. This winning argument utilizes the IPI and current case law to apply the collateral source rule to adult plaintiffs who are cared for by their

parents.

The second article, written by Retired Judge Bruno Tassone, discusses the Harvard Negotiation Project's "principled negotiation concept." Judge Tassone explains the concept and provides useful guidance for settlement negotiations.

Thank you to all of the contributors. The articles are excellent and we hope you find the materials helpful. ■

Recovering the value of "free" caretaking by an adult's parents

By Dennis M. Lynch, The Healy Law Firm, Chicago

When an adult sustains serious injuries, such as a brain injury, paraplegia or quadriplegia, or other conditions that cause a lack of mobility or lack of ability to care for oneself, it is not uncommon that the adult continues to be permanently cared for by his parents or other relatives. This can mean that the adult moves back in with his parents, or continues to live with his parents after he had planned to move out. For the seriously injured, the parents will provide countless hours of caretaking. Typically, the parents will not "charge" for their time in caring for their own child. In a recent case involving a 30-year-old quadriplegic, our life care planner opined as to the reasonable value of those past caretaking services. At trial, the defense moved to bar the testimony and to bar the plaintiff from asking for that amount of past compensation from the jury. Based on the following argument, the court ruled the amount

was admissible.

Illinois law allows recovery for the "reasonable expense of necessary help which has been required as a result of his injury." I.P.I. (Civil) 30.09 (West 2006) p. 130-131. The Comment to I.P.I. 30.09 provides:

Incidental caretaker expenses resulting from personal injuries are appropriate elements of damages. *Hoobler v. Voelpel*, 246 Ill.App. 69, 77 (2nd Dist. 1927). Recovery is not limited to caretaking services incurred in the home, but rather extends to all caretaking services reasonably incurred as a result of the injury suffered. Plaintiff is entitled to recover all damages which naturally and proximately flow from the tort.

No Illinois case has addressed whether an adult plaintiff can recover for the reasonable

Continued on page 2

INSIDE

Editor's note 1

Recovering the value of "free" caretaking by an adult's parents..... 1

Shared interest negotiation 4

Upcoming CLE programs.. 6



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Recovering the value of “free” caretaking by an adult’s parents

Continued from page 1

value of past caretaking expenses provided by the plaintiff’s parents. However, in *Wills v. Foster*, 229 Ill.2d 393, 414-15 (2008), our Supreme Court held that a plaintiff could recover for free care for which no bill was generated. Similarly, whether a bill has been submitted has never been identified as a consideration in awarding a parent, or the child, for a parent’s caretaking services. See e.g. *Bauer v. Mem’l Hosp.*, 377 Ill.App.3d 895, 921-22 (5th Dist. 2007); *Worley v. Barger*, 347 Ill.App.3d 492, 496-98 (5th Dist. 2004) (holding reasonable value of services rendered, and not lost wages, was proper measure of damages).

Under the collateral source rule, benefits received by the injured party from a source wholly independent of, and collateral to, the tortfeasor will not diminish damages otherwise recoverable from the tortfeasor. *Wills*, 229 Ill.2d at 399. The collateral source rule protects collateral payments made to or benefits conferred on the plaintiff by denying the defendant any corresponding offset or credit; such collateral benefits do not reduce the defendant’s tort liability. *Arthur v. Catour*, 216 Ill.2d 72, 78 (2005). The collateral source rule is not limited to insurance payments received for medical expenses and includes situations where the plaintiff is paid for his loss from another source, see *Cummings v. Jha*, M.D., No. 5-08-0182, 2009 WL 3128596 (5th Dist. Sept. 25, 2009), and even where the services were rendered free of charge, see *Wills*, 229 Ill.2d at 414-15.

In *Cummings*, the appellate court held that a plaintiff was entitled to recover the full value of his time lost from work, even though the plaintiff was allowed to take sick leave from work for the entire amount of the loss. *Cummings*, 2009 WL 3128596 at *14-15. The court rejected the defendant’s argument that plaintiff suffered no loss, “let alone a compensable one.” *Id.* at *14. The court noted that “the wrongdoer should not benefit from expenditures made by the injured party or take advantage of contracts or other relations that may exist between the injured party and the third persons.” *Id.*

In *Wills*, our Supreme Court overruled its decision in *Peterson v. Lou Bachrodt Chevrolet Co.*, 76 Ill.2d 353 (1979), which had held that a plaintiff could not recover the

reasonable value of free medical services provided because the plaintiff did not incur an expense for the services, and instead received gratuitous services. *Wills*, 229 Ill.2d at 400-01, 414-15. The Supreme Court instead adopted the “reasonable value” approach to the collateral source rule, which allows an injured plaintiff to recover the reasonable value of services received regardless of whether they are free, unpaid or provided by the government or insurance. *Id.* at 407, 412-15. The plaintiff’s burden is merely to show the reasonableness of the service. *Id.* at 414.

In our case, the defendants attempted to distinguish *Wills* by pointing out that the Court repeatedly referred to “expenses” or the amount “paid” by other sources, and that somehow since plaintiff’s parents never submitted a bill to him, he cannot recover for their services. This distinction was specifically rejected by *Wills* and *Cummings*. Whether a bill has been submitted is of no consequence. A plaintiff may recover for the reasonable value of the services rendered. A tortfeasor cannot seek to shirk their responsibility for caretaking services because the caretaking was provided by the adult’s parents, and not by some third party. Clearly, a familial relationship is one of the “other relations” to which the collateral source rule applies. See *Wills*, 229 Ill.2d at 413. Illinois law does not allow tortfeasors to take advantage of the fortuity that the plaintiff’s caretaking was provided by his parents.

Notably, however, since the past care was not “charged for,” it will likely be necessary to present expert testimony as to the reasonable value of that care. Expert testimony is appropriate in determining the reasonable value of past services. See e.g. *Kunz v. Little Co. of Mary Hosp.*, 373 Ill.App.3d 615, 624-26 (1st Dist. 2007) pet. for leave to app. denied 225 Ill.2d 636 (2007) (Table No. 104919).

Cases involving seriously injured plaintiff’s can take years to get to trial, and the typical plaintiff cannot afford caretaking during that time. Allowing the jury to consider the value of this caretaking can help to properly compensate the plaintiff. ■

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2008 Edition



By Gino L. DiVito

Tabet DiVito & Rothstein LLC, Chicago
Retired Justice, Illinois Appellate Court, First District



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Illinois has a history of
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Shared interest negotiation

By Retired Judge Bruno J. Tassone

A few years ago I attended Harvard Law School's Negotiation Workshop for Lawyers. The ideas promoted in that workshop have stood up well in my professional practice as a mediator. The course dealt with the question: What is the most reasonable way to deal with issues between clients? The Harvard Negotiation Project developed the "principled negotiation concept." The method of "principled negotiation is to decide issues on their merits rather than through a haggling process focused on what each side says it will and won't do." Traditional bargaining is where each side takes a position, argues for it, and makes concessions to reach a compromise. It is common place to start with an exaggerated position and to hold to that idea with small concessions as the process continues. Almost without exception, much time, energy, and expense is spent in reaching an agreement.

A good agreement is one that is efficient, improves or at least does not damage the relationship, and meets the bona fide interests of each party. The "principled negotiation" focuses on the bona fide interests of the parties. The idea is to negotiate on the merits as follows:

- a. Separate the people from the problem;
- b. Focus on interest, not positions;
- c. Invent options for mutual gain; and
- d. Insist on using objective criteria

Let us not forget we are dealing with people in "real time;" we are not dealing with abstract representatives. We all have emotions, different viewpoints, and deeply held values. We, like them, are unpredictable. Separate the People from the problem. It is difficult, but resist being overly emotional. See each other as working side by side and not against each other. Avoid the word "YOU" and utilize phrases, such as, "I understand your viewpoint" or "I understand your problem," etc. A negative attitude will produce a negative result like each side leaving the negotiation feeling frustrated and more deeply embedded in their position.

Focus on interests, not positions, before, during, and after the negotiations. All negotiators want to reach an agreement that satisfies their substantive interests. Reconcile each party's interests rather than their positions. Attention to interests usually allows

for alternative solutions to the problem. You will meet, not only further, your interest and theirs as well. Shared interest is the building blocks for an efficient agreement.

Invent options for mutual gain. Creating options does not come easy. Our obstacles to inventing options begin with our own thinking. As negotiators we do not believe inventing options is ours job. We see our job as narrowing the gap between positions. We look for a single best answer. If we are going to reach an agreement that meets our interest, then we need to develop a solution that appeals to the desires of the other party. We need to avoid one-sided positions and one-sided arguments. The idea of "principled ne-

gotiation" is invent first and decide later.

Attempt to settle differences of interests on objective criteria. Without question the interest of each party will conflict. Talking of "win-win" will exacerbate the conflict. The solution is to negotiate on some basis independent of the entrenched position of each party. Negotiation must be based on reasonableness, fairness, and industry standards.

Principled negotiation applies to all negotiations. It is simply a common-sense method to decide issues on their merits rather than through a contest of will power. It enables you to be fair while protecting your client's interest. ■

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Thursday, 4/1/10 – Webinar—Advanced Research on FastCase. Presented by the Illinois State Bar Association. *An exclusive member benefit provided by ISBA and ISBA Mutual. Register at: <<https://www1.gotomeeting.com/register/458393744>>. 12-1.

Thursday, 4/8/10- Webcast—Durable Powers of Attorney. Presented by the ISBA. <<https://isba.fastcle.com/store/seminar/seminar.php?seminar=3564>>. 12-1.

Thursday, 4/8/10- Springfield, INB Building 307 E. Jackson—Key Issues in Local Government Law: A Look at FOIA, OMA, Elections and Attorney Conflicts. Presented by the ISBA Government Section. 12:30-4:45. Cap 55.

Thursday, 4/8/10- Chicago, ISBA Regional Office—Resolving Financial Issues in Family Law Cases. Presented by the ISBA Family Law Section. 8:30-4:30.

Friday, 4/9/10- Chicago, ISBA Regional Office—Civil Practice Update- 2010. Presented by the ISBA Civil Practice Section. 9-4

Monday - Friday, 4/12/10 - 4/16/10 – Chicago, ISBA Regional Office—40 hour Mediation/Arbitration Training. Master Series Presented by the Illinois State Bar Association and the ISBA Alternative Dispute Resolution Section. 8:30-5:45 each day.

Friday, 4/16/10- Chicago, ISBA Regional Office—Legal Trends for Non-Techies: Topics, Trends, and Tips to Help Your Practice. Presented by the ISBA Committee on Legal Technology ; co-sponsored by the ISBA Elder Law Section Council. 1-4:30 p.m.

Saturday, 4/17/10 – Lombard, Lindner Learning Center—DUI, Traffic, and Secretary of State Related Issues- 2010. Presented by the ISBA Traffic Law Section. 9-4. Cap 250.

Tuesday, 4/20/10- Bloomington, Double Tree Hotel—Intellectual Property Counsel from Start-up to IPO. Presented by the ISBA Intellectual Property Section. 8:30-

3:30. Cap 80.

Wednesday, 4/21/10- Bloomington, Double Tree Hotel—Construction Law-What's New in 2010? Presented by the ISBA Special Committee on Construction. 9-4. Cap 80.

Friday, 4/23/10- Champaign, I- Hotel and Conference Center—Practice Tips & Pointers on Child-Related Issues. Presented by the ISBA Child Law Section; co-sponsored by the ISBA Family Law Section. 8:25-4. Cap 70.

Tuesday, 4/27/10- Chicago, ISBA Regional Office—Construction Law- What's New in 2010? Presented by the ISBA Special Committee on Construction. 9-4.

Wednesday, 4/28/10- Chicago, ISBA Regional Office—Intellectual Property Counsel from Start-up to IPO. Presented by the ISBA Intellectual Property Section. 8:30-3:30.

Thursday, 4/29/10- Chicago, ISBA Regional Office—Key Issues in Local Government Law: A Look at FOIA, OMA, Elections and Attorney Conflicts. Presented by the ISBA Government Section. 12:30-4:45.

Friday, 4/30/10- Chicago, ISBA Regional Office—Anatomy of a Trial. Presented by the ISBA Tort Section Council. Time TBD.

May

Tuesday, 5/4/10- Chicago, ISBA Regional Office—Boot Camp- Basic Estate Planning. Presented by the ISBA Trust and Estates Section Council. 9-4.

Wednesday, 5/5/10- Chicago, ISBA Regional Office—Price Discrimination: Dead or Alive? Robinson Patman after Feesers. Presented by the ISBA Antitrust Council. 12-2 p.m.

Wednesday, 5/5/10- Chicago, The Standard Club—Tips of the Trade: A Federal Civil Practice Seminar. Presented by the ISBA Federal Civil Practice Section Council. 9-4:30.

Thursday, 5/6/10 – Chicago, ISBA Regional Office—Law Practice Strategies to Weather a Stormy Economy. Master Series Presented by the Illinois State Bar Association. 8:30-12:45.

Friday, 5/7/10 – Bloomington, Bloomington-Normal Marriott—Law Practice Strategies to Weather a Stormy Economy. Master Series Presented by the Illinois State Bar Association. 8:30- 12:45. Cap 130.

Friday, 5/7/10- Bloomington, Bloomington-Normal Marriott—DUI, Traffic and Secretary of State Related Issues-2010. Presented by the ISBA Traffic Laws/ Courts Section. Time TBD. Cap 125.

Wednesday, 5/12/10- Chicago, ISBA Regional Office—Mental Health Treatment in Illinois: Time for a Change. Presented by the ISBA Committee on Mental Health Law. Time TBD.

Thursday, 5/13/10- Friday, 5/14/10- Chicago, ISBA Regional Office—2010 Annual Environmental Law Conference. Presented by the ISBA Environmental Law Section. 8:30-5; 8:30-12:15.

Friday, 5/14/10- Chicago, ISBA Regional Office—Legal Ethics in Corporate Law. Presented by the ISBA Corporate Law Department Section. 1-5:15.

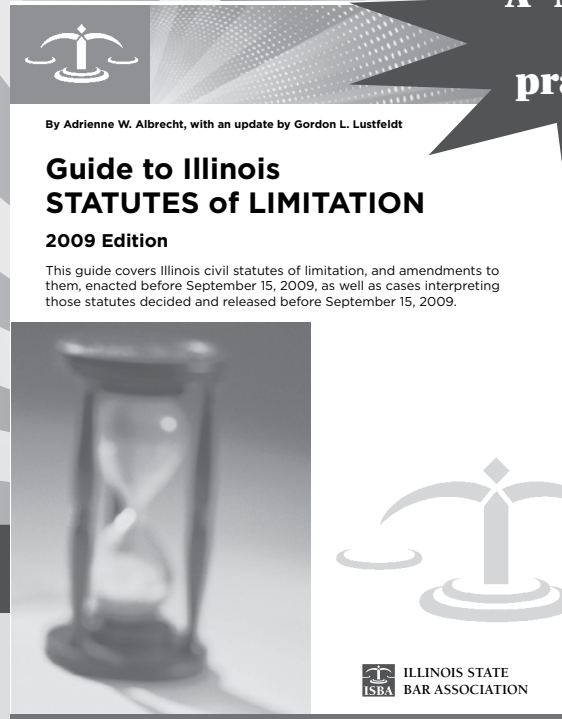
Thursday, 5/20/10- Bloomington, Hawthorn Suites—Resolving Financial Issues in Family Law Cases. Presented by the ISBA Family Law Section. 8:30-4:30.

Friday, 5/21/10- Chicago, ISBA Regional Office—2010 Labor and Employment Litigation Update. Presented by the ISBA Labor and Employment Section. 9-12:30.

Friday, 5/21/10- Chicago, ISBA Regional Office—Roth Conversions in 2010- A Window of Opportunity. Presented by the ISBA Employee Benefits Committee. 2-4 p.m.

Friday, 5/21/10- Moline, Stoney Creek Inn—Civil Practice Update- 2010. Presented by the ISBA Civil Practice Section. 9-4. Cap 100. ■

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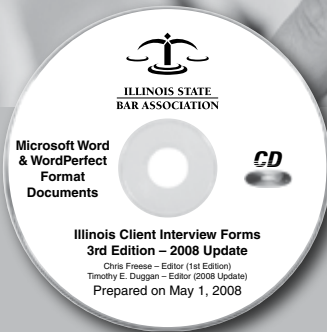
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