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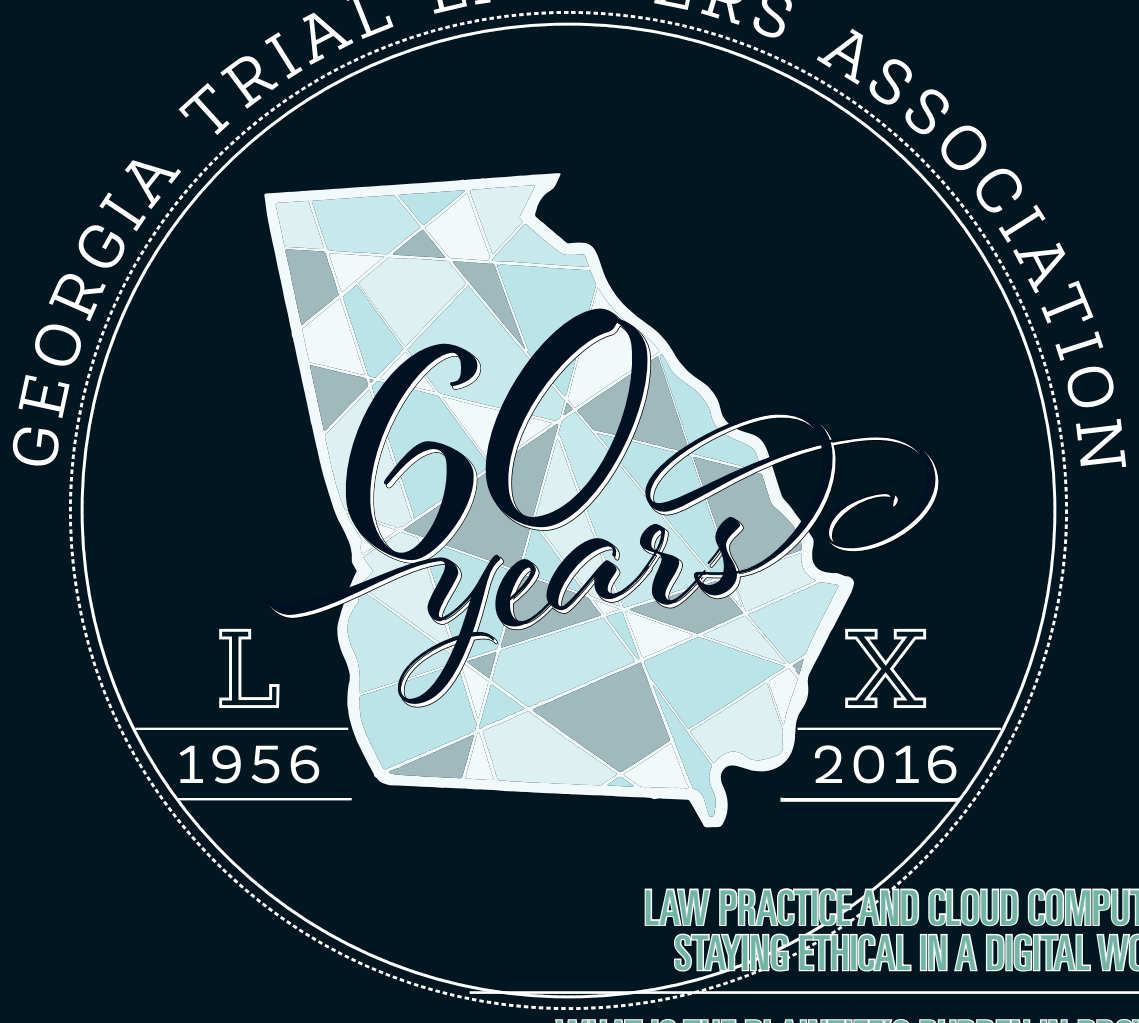


## LAW PRACTICE AND CLOUD COMPUTING: STAYING ETHICAL IN A DIGITAL WORLD

## WHAT IS THE PLAINTIFF'S BURDEN IN PROVING THE VALUE OF MEDICAL EXPENSES?

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# What is the Plaintiff's Burden in Proving the Value of Medical Expenses?

BY ASHLEY B. FOURNET

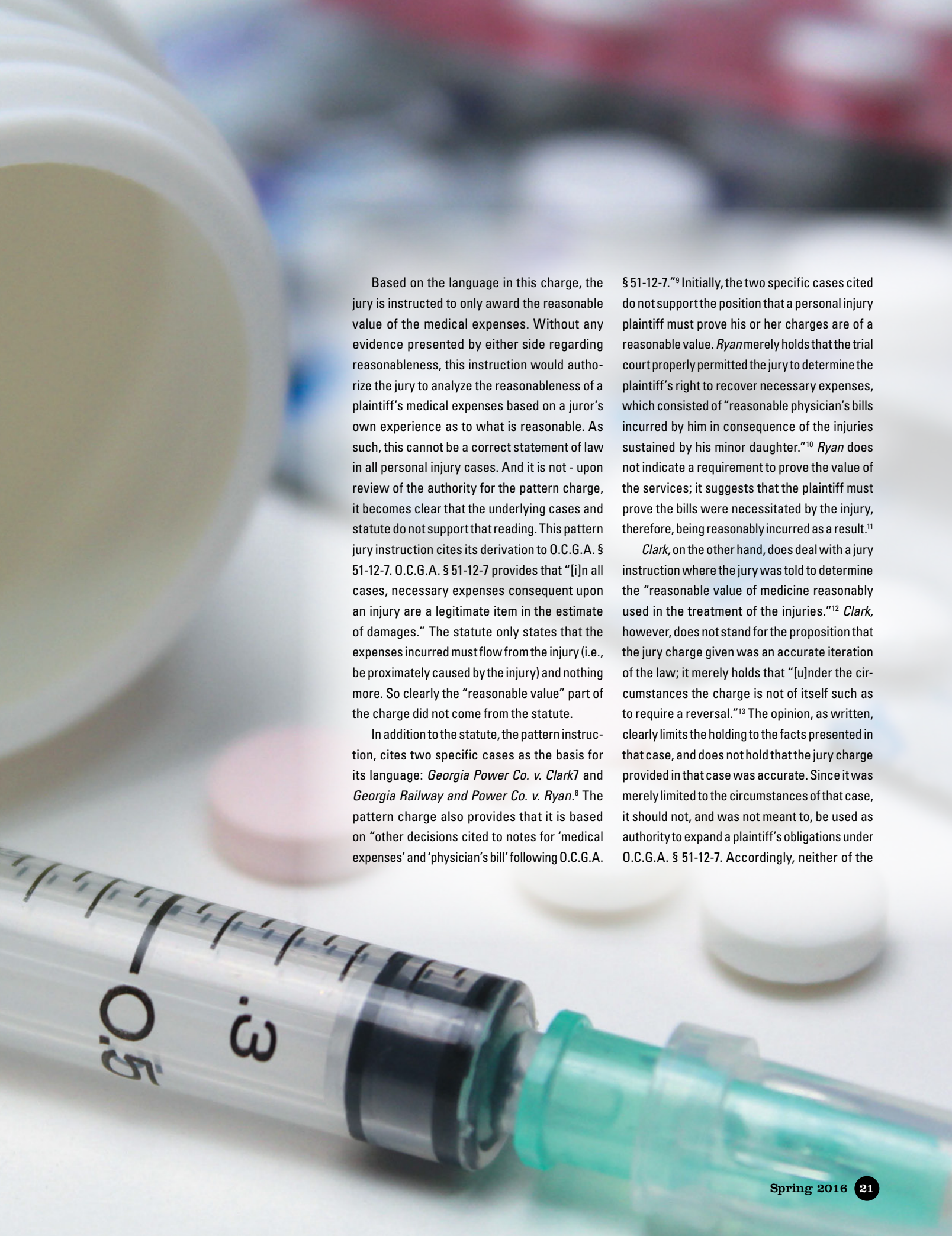
Increasingly, defense lawyers are challenging the reasonableness of medical charges incurred by plaintiffs in personal injury cases. These challenges were initially motivated by attempts to undermine medical funding companies' charges, but they now extend to cases involving other collateral source payments. In these cases, defense attorneys are seeking to claim that the reasonable value is the amount accepted by the provider as opposed to the amount charged. The impetus for these expanded challenges to the value of bills is the Supreme Court of Georgia's decision of *Bowden v. Medical Center, Inc.*,[1] a case involving the reasonableness of a healthcare lien pursuant to O.C.G.A. § 44-14-470. The challenges to the reasonableness of bills incurred beg the question, what is a plaintiff's attorney's obligation in proving the reasonable and customary value of bills? And has *Bowden* changed the manner in which bills can be undermined by defense counsel in tort cases?

In analyzing a plaintiff's obligations regarding medical expenses, it is useful first to review the history of the proof required and how the concept of the reasonable value of expenses entered through case law and a pattern jury instruction. The second part of this article addresses what impact *Bowden* may have on this burden, and the final section discusses some practical ways to handle defense challenges to the value of medical expenses.

### *THE PLAINTIFF'S BURDEN IN PROVING MEDICAL EXPENSES*

Historically, in proving medical expenses, a plaintiff need only prove the nature of the injury, character of the treatment, services rendered, and the amount billed to recover damages related to medical expenses.[2] Therefore, once a plaintiff properly put his or her bills into evidence, which were necessitated by the harm, that was all that was necessary for proving expenses.[3] But even in these early cases, it is clear that the reasonableness of the bills could be attacked by the defense.[4] Now, however, there appears to be precedent that a plaintiff must meet this burden at the outset, prior to attack. The current pattern jury instruction entitled "Medical Expenses"[5] provides that damages are limited to the reasonable value of medical expenses. It specifically provides as follows:

> In all cases, necessary expenses resulting from the injury are a legitimate item of damages. As to medical expenses, such as hospital, doctor, and medicine bills, the amount of the damage would be ***the reasonable value of such expense*** as was reasonably necessary.[6]



Based on the language in this charge, the jury is instructed to only award the reasonable value of the medical expenses. Without any evidence presented by either side regarding reasonableness, this instruction would authorize the jury to analyze the reasonableness of a plaintiff's medical expenses based on a juror's own experience as to what is reasonable. As such, this cannot be a correct statement of law in all personal injury cases. And it is not - upon review of the authority for the pattern charge, it becomes clear that the underlying cases and statute do not support that reading. This pattern jury instruction cites its derivation to O.C.G.A. § 51-12-7. O.C.G.A. § 51-12-7 provides that "[i]n all cases, necessary expenses consequent upon an injury are a legitimate item in the estimate of damages." The statute only states that the expenses incurred must flow from the injury (i.e., be proximately caused by the injury) and nothing more. So clearly the "reasonable value" part of the charge did not come from the statute.

In addition to the statute, the pattern instruction, cites two specific cases as the basis for its language: *Georgia Power Co. v. Clark*[7] and *Georgia Railway and Power Co. v. Ryan*.[8] The pattern charge also provides that it is based on "other decisions cited to notes for 'medical expenses' and 'physician's bill' following O.C.G.A. § 51-12-7."[9] Initially, the two specific cases cited do not support the position that a personal injury plaintiff must prove his or her charges are of a reasonable value. *Ryan* merely holds that the trial court properly permitted the jury to determine the plaintiff's right to recover necessary expenses, which consisted of "reasonable physician's bills incurred by him in consequence of the injuries sustained by his minor daughter."[10] *Ryan* does not indicate a requirement to prove the value of the services; it suggests that the plaintiff must prove the bills were necessitated by the injury, therefore, being reasonably incurred as a result.[11]

*Clark,* on the other hand, does deal with a jury instruction where the jury was told to determine the "reasonable value of medicine reasonably used in the treatment of the injuries."[12] *Clark,* however, does not stand for the proposition that the jury charge given was an accurate iteration of the law; it merely holds that "[u]nder the circumstances the charge is not of itself such as to require a reversal."[13] The opinion, as written, clearly limits the holding to the facts presented in that case, and does not hold that the jury charge provided in that case was accurate. Since it was merely limited to the circumstances of that case, it should not, and was not meant to, be used as authority to expand a plaintiff's obligations under O.C.G.A. § 51-12-7. Accordingly, neither of the

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cited cases support the position that plaintiffs must prove that the medical expenses are reasonable and customary.

The pattern instruction also indicates it is based on "other decisions cited to notes…following O.C.G.A. § 51-12-7."[14] When evaluating the cases that cite O.C.G.A. § 51-12-7, there are only 29 notes of decision (24 cases) according to Westlaw.[15] Almost all of the notes of decision under O.C.G.A. § 51-12-7 focus on whether there was a causal connection between the harm and the damages.[16] None of the cases indicate that a plaintiff is required to prove that his or her medical expenses were reasonable, other than arguably *Clark*, which as explained above provides a very limited holding that does not represent binding precedent. Therefore, the pattern charge is incorrect if interpreted as a requirement that plaintiffs prove that incurred medical expenses are reasonable and customary. In fact, there are no cases listed under O.C.G.A. § 51-12-7 where the reduction of a medical bill has been either discussed or authorized.[17]

However, if the pattern instruction is referring to value of services that were rendered to a plaintiff gratuitously or at a reduced rate, it would be a correct statement of the law. In 1904, the Georgia Supreme Court provided in *Nashville, C& St. L. Ry. v. Miller*,[18] that "the fact that medical attention and nursing have been rendered gratuitously [will not] preclude the injured party from recovering the value of such services…"[19] If the pattern instruction intended to capture gratuitous care, then it is a correct statement of the law under those circumstances. It is unclear, however, whether the pattern charge was written with this purpose in mind since it does not cite *Miller* or any other gratuitous service case as its support. But if a case's facts include services that were rendered without cost or at reduced cost, the pattern charge is correct for the purpose of allowing a plaintiff to prove the market value of a medical service in order to recover it.

Outside of the pattern jury charge itself and its underlying authority, there are numerous other cases using the term "reasonable" in relation to medical expenses; however, none of those cases support lowering or challenging the charged amount of a healthcare bill in a personal injury case.[20] Those cases hold that "[t]he law requires proof that the medical expenses arose from the injury sustained, and that they are reasonable and necessary before they are recoverable."[21] They do not require a plaintiff to show that the bills represent reasonable market value. So ultimately, there is no current binding authority, other than a poorly written jury charge, for the proposition that plaintiffs must prove that the charges are themselves reasonable.

### *THE IMPACT OF* BOWDEN V. THE MEDICAL CENTER, INC.

Last year, the Georgia Supreme Court issued an opinion in *Bowden v. The Medical Center, Inc.,*[22] a case involving a challenge to a hospital lien, that permits the discovery of pricing agreements between a hospital and health insurers as potential evidence to determine the reasonableness of the hospital lien. The Supreme Court in *Bowden* held that the pricing agreements were relevant in that case to determine if the bills were reasonable.[23] *Bowden* was not a tort case and should have no application in tort cases because of the collateral source rule. Nevertheless, defense lawyers are now seeking to use this opinion to seek discovery of the same types of agreements in personal injury cases as a way to challenge the reasonableness of medical bills. However, *Bowden* should not and cannot be extended to personal injury cases as it represents a circumvention of the collateral source rule.

In *Bowden*, an injured person recovered money from the settlement of a civil suit. After the civil suit was concluded, a hospital tried to collect on its hospital lien pursuant to the Hospital Lien Statute, O.C.G.A. § 44-14-470.[24] Based on the language in the Hospital Lien Statute, the injured party claimed that the amount of the hospital lien was unreasonable. In a hospital lien dispute, the reasonableness of the lien amount is relevant based on the specific language in the Hospital Lien Statute.[25] Specifically, the Hospital Lien Statute only allows recovery of reasonable charges; therefore, discovery related to hospital charges is relevant in that dispute. And because *Bowden* represents a contractual dispute involving a lien, the collateral source rule does not apply. Nothing in *Bowden* suggests, in any way, that the collateral source rule has been eliminated or limited in tort cases. The law relating to collateral source in tort cases, as opposed to contract cases, is still as follows:

> The collateral source rule is an absolute evidentiary bar. In holding that the collateral source rule is applicable only in tort cases, we do not suggest that collateral source evidence is always admissible in breach of contract cases. That collateral source evidence is not absolutely barred does not mean that it is absolutely admissible. Collateral source evidence may be admitted in breach of contract cases if it is relevant to demonstrate the extent of the plaintiff's actual loss that was caused by the breach.

*Amalgamated Transit Union Local 1324 v. Roberts*.[26] Since *Bowden* really represents a contract case, it was appropriate for the Supreme Court of Georgia to permit discovery of collateral source contracts with the hospital. The collateral source rule is not a bar in contract cases, but it remains an absolute bar in tort cases.[27] Therefore, *Bowden* should not be permitted as a conduit for defense lawyers to inject collateral source information into personal injury cases; it has zero applicability to personal injury cases.

### *IDEAS ON HANDLING THESE CHALLENGES*

As with all other affirmative defenses, the reasonable value of medical expenses should not be an issue in a case until a prima facie case has been made by opposing counsel that the

bills are unreasonable. As such, it is important to show that the defense must meet that burden before allowing the injection of "reasonable value" into a case. To preemptively head off this attack at the outset, it is vital, as many already routinely do, to lock down from a plaintiff's treating provider, when deposed or by medical narrative, that the charges incurred are reasonable and customary for the services rendered. Secondly, motions in limine need to be filed in every case to prevent defense counsel from commenting or implying that any of the charges are unreasonable when a prima facie showing for unreasonableness has not been made by the defense. In other words, a plaintiff has met his or her burden of proving expenses by submitting admissible bills, unless and until the defendant proves that the bills are not reasonable - only then should any evidence of reasonableness be introduced before a jury. This has to be the rule; otherwise, defense counsel can inject the reasonableness of bills in every case without any proof whatsoever.

Further, when introducing the pattern jury instruction, it needs to be altered to fit the facts of each specific case. The pattern jury instruction, as written, is not a correct statement of law if read to be a requirement of the plaintiff to prove reasonable value in every case. The trial court may resist this since the default position is to track the exact language of pattern instructions. However, under Georgia law, "[t]here is no requirement that only verbatim pattern charges are permissible."[28] And "jury instructions do not need to track, exactly, the language of pattern jury instructions."[29] Therefore, when putting the jury charge for medical expenses in, the second half should be excluded in most cases since as argued above, it is not grounded in proper authority. One should only acquiesce to the second part of the pattern charge if there was a reduced fee or gratuitous service rendered to the plaintiff in the case and, therefore, proof of the market value is required to recover the full value of the service. But even then, the pattern instruction should be re-worded to include "bills incurred and the reasonable value of services rendered to which bills are not available" or something along those lines.

And finally, motions in limine regarding collateral source evidence must be filed in every personal injury case and must make it clear that *Bowden* is a contract/lien case that does not apply to tort cases. Further, *Bowden* did not abrogate or diminish the collateral source rule in any way; the collateral source rule is still an absolute evidentiary bar in tort cases. Unfortunately, this misuse of *Bowden* by the defense is going to continue its expansion until the legislature or appellate courts provide clear guidance about the limitations of the *Bowden* decision. ●


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## FOOTNOTES

1. 297 Ga. 284 (2015).
2. "'In a suit for a personal injury, where the nature and extent of the injury, and the character of the treatment administered, the services rendered by physicians, and the amount paid therefor were fully proved, a charge to the effect that the plaintiff, if entitled to recover would be entitled to recover such reasonable amount of physician's bills and necessary expenses incurred in consequence of the injury as might have been proved to the satisfaction of the jury, was not without evidence to support it, although no witness expressed the opinion that the charges were reasonable.'" Limbert v. Bishop, 96 Ga. App. 652, 656, 101 S.E.2d 148, 152 (1957), quoting Georgia Railway & Electric Co. v. Tompkins, 138 Ga. 596 (1912). See also, O.C.G.A. § 51-12-7; and Georgia Railway and Power Co. v. Ryan, 24 Ga. App. 290 (1919).
3. See also, O.C.G.A. § 24-9-921 (formerly O.C.G.A. § 24-7-9) which provides that medical bills "need not be identified by the one who submits the bill, and it shall not be necessary for an expert witness to testify that the charges were reasonable and necessary.
4. Tompkins, 138 Ga. 596 (1912).
5. 66.040 Tort Damages; Expenses; Generally; Medical Expenses, Georgia Suggested Pattern Jury Instructions - Civil 66.040.
6. Id. (emphasis added).
7. 69 Ga. App. 273 (1943).
8. 24 Ga. App. 290 (1919).
9. 66.040 Tort Damages; Expenses; Generally; Medical Expenses, Georgia Suggested Pattern Jury Instructions - Civil 66.040.
10. *Ryan*, 24 Ga. App. at 290.
11. *Id.*
12. *Clark*, 69 Ga. App. at 95.
13. *Id.* at 95.
14. 66.040 Tort Damages; Expenses; Generally; Medical Expenses, Georgia Suggested Pattern Jury Instructions - Civil 66.040.
15. *See*, Notes of Decision for O.C.G.A. § 51-12-7 (Westlaw).
16. *Id. See, e.g., Food Lion, Inc. v. Williams*, 219 Ga. App. 352 (1995); *Taft v. Taft*, 209 Ga. App. 499 (1993); *Lamon v. Perry*, 33 Ga. App. 248 (1924); and *Georgia Railway & Electric Co.*, 133 Ga. 621 (1909).
17. *See*, Notes of Decision for O.C.G.A. § 51-12-7 (Westlaw).
18. *Miller*, 120 Ga. 453 (1904).
19. *Nashville, C. & St. L. Ry. v. Miller*, 120 Ga. 453 (1904).
20. *See, Allen v. Spiker*, 301 Ga. App. 893 (2009); *Barnes v. Cornett*, 134 Ga. App. 120 (1975); and *Taylor v. Associated Cab Co.*, 110 Ga. App. 616 (1964).
21. *Allen*, 301 Ga. App. at 896.
22. 297 Ga. 285,773 S.E.2d 692 (2015).
23. *Id.*
24. O.C.G.A. § 44-14-470 provides in relevant part: "Any person, firm, hospital authority, or corporation operating a hospital, nursing home, or physician practice or providing traumatic burn care medical practice in this state shall have a lien for the ***reasonable charges***..." (Emphasis added).
25. *Id.*
26. 263 Ga. 405, 408-09, 434 S.E.2d 450, 453 (1993). For a federal comparison applying the Federal Rules of Evidence, see *Eichel v. New York Central R.R. Co.*, 375 U.S. 253, 255, 84 S. Ct. 316, 317, 11 L.Ed.2d 307, 309 (holding that the admission of collateral source information was highly prejudicial to the plaintiff and upholding the long-standing rule that such information cannot be admitted.).
27. See, *e.g., Hoeflick v. Bradley*, 282 Ga. App. 123 (2006); *Olariu v. Marrero*, 248 Ga. App. 824 (2001); and *Bennett v. Haley*, 132 Ga. App. 512 (1974).
28. *Bailey v. Edmundson*, 280 Ga. 528, 534, 630 S.E.2d 396, 402 (2006).
29. *Potts v. State*, 331 Ga. App. 857, 863, 771 S.E.2d 510, 515 (2015) (citation omitted).