Relevant Medical Expenses at Trial: *Dyet v. McKinley* Remains Smart and Controlling Idaho Law

Joel Beck
Kurt Holzer
James Ruchti

Idaho district court judges have recently been asked with regularity to rule on the issue of whether the invoiced market value of a medical expense or an amount reflecting a negotiated contractual adjustment between the provider and a particular insurance carrier should be presented to the jury at trial. The majority have properly agreed that the process approved by our Supreme Court in *Dyet v. McKinley*, 139 Idaho 526, 81 P.3d 1236 (2003) and subsequently reaffirmed remains controlling Idaho law. *Dyet* instructs trial courts that: (1) jurors are shown the invoiced market amount of medical expenses and not shown evidence of contractual adjustments (the "write-offs"); and (2) in post-trial proceedings, the trial court considers the write-offs and reduces the jury's verdict accordingly.[1]

The Advocate recently published an article advocating a minority position in which district courts refuse to follow the Supreme Court's guidance in *Dyet and its progeny*[2]. But, Idaho law has not changed nor is *Dyet* on shaky ground. Idaho trial courts are actively following the guidance of *Dyet*.[3] Both because of *stare decisis* and because it is more consistent with public policy goals than the minority position.

The Idaho Supreme Court approved *Dyet* approach prevents any double recovery and limits the need for discussion of insurance in a manner that would be more prejudicial than probative under Idaho Rule of Evidence 403 or in contravention of Idaho Rule of Evidence 411. Further, it eliminates other significant proof issues.[4]

As a result, evidence of the enumerated collateral source payments is not admissible at trial but is considered by the judge after the fact-finder has rendered an award.[10] The court then reduces the award by the amount of the collateral source payments.[11] The statute's purpose is to prevent what is perceived to be a double recovery.[12]

Given that a minority of Idaho district court judges have deviated from the approved *Dyet* approach based on some misguided reasoning, this article explains why *Dyet* remains viable and appropriate Idaho law.

The collateral source rule and its legislative modification

Prior to 1990, Idaho adhered to the common-law collateral source rule.[5] The common-law collateral source rule prevented a defendant from receiving a windfall that allowed him to avoid the consequences of his behavior. It applied to preclude the defendant from receiving a credit reducing a verdict against it when an injured party received payments from third parties that were also intended to compensate the harm caused by the defendant.[6] The plaintiff was permitted to make a full recovery against the tortfeasor even though the plaintiff received a double recovery or recovery for losses the plaintiff never had.[7]

Therefore, under the collateral source rule, evidence related to compensation from a third party is irrelevant. It would be inadmissible at trial. This impacted medical expense recovery in injury litigation. Under the traditional collateral source rule, a plaintiff collects the invoiced market amount of medical expenses. This precludes the defendant from getting a benefit the plaintiff himself purchased via his own insurance. A plaintiff would recover amounts that were otherwise subject to write-downs.

The common-law rule was modified in 1990. Idaho Code § 6–1606, a sort of "anti-collateral source statute," was enacted to "modify the collateral source rule of evidence in certain circumstances to prevent people from being paid twice for the same damages."[8] Section 6-1606 "mandates that a tortfeasor is liable only for the damages that remain after most forms of collateral source payments are considered."[9] As a result, evidence of the enumerated collateral source payments is not admissible at trial but is considered by the judge after the fact-finder has rendered an award.[10] The court then reduces the award by the amount of the collateral source payments.[11] The statute's purpose is to prevent what is perceived to be a double recovery.[12]

The statute does not address how to treat medical expense adjustments made by the provider after receiving payments from Medicare, Medicaid, workers' compensation, medical payments coverage insurance, or private health insurance carriers. Payments made by these sources were not considered collateral sources in the statute.[13] The question, however, was addressed in *Dyet*.[14] The Idaho Supreme Court had to decide whether the pre-adjustment invoiced amount of the medical expenses was relevant evidence or if the jury should be shown only amounts paid by the insurance carrier after adjustments.[15]

The *Dyet* Decision

In *Dyet,* the district court rejected the defense's effort to present evidence regarding the amounts paid by the insurance carrier, in that case Medicare, to Dyet's medical providers.[16] Instead, it ruled the jury should consider the full invoiced amount of the medical expenses.[17] Post-trial, the district court reduced the jury verdict to reflect insurance adjustments so the plaintiff did not receive a double recovery.[18] It adopted the procedures outlined for collateral sources in Idaho Code § 6-1606 to these analogous payments.

On appeal, the Idaho Supreme Court considered "whether or not Medicare write-offs are a collateral source under I.C. § 6-1606 or, if not, if the write-offs should be treated the same as a collateral source."[19] Before launching into its analysis of Idaho Code § 6-1606, the Idaho Supreme Court perfunctorily recited the law governing statutory interpretation.[20] Included in this recitation was a standard from earlier case law allowing Idaho courts to reject the law as written by the Legislature if the plain meaning of the statute "leads to absurd results."[21] The Court's recitation of this standard, which it did not apply in *Dyet*, was the hook upon which present-day critics originally hung their hats to attack the case.

The Court then analyzed Idaho Code § 6-1606.[22] It concluded insurance adjustments are not a collateral source as defined by the statute.[23] It also recognized insurance adjustments were not included in the statute's non-collateral sources required by federal law, Idaho law, or contract to seek subrogation.[24] This means adjustments, whether contractual or statutory, are not addressed by Idaho Code § 6-1606.[25]

This resulted in something of a dilemma. The Idaho Legislature had remained silent on adjustments. Therefore, it was incumbent upon the Idaho Supreme Court to decide how they should be handled. In doing so, the Court approved a procedure consistent with the Idaho Legislature's previously adopted policies.

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The Court could have concluded that because Idaho Code § 6-1606 did not apply, the common-law collateral source rule would apply. The problem with that approach was that the Legislature had made clear it did not approve of the common-law collateral source rule. For the Court to apply it in this narrow set of circumstances would fly in the face of clearly articulated public policy expressed by lawmakers.

In assessing the situation, the Idaho Supreme Court looked to the approach taken by the trial court and wrote approvingly:

> By treating a Medicare write-off as a collateral source, the danger of prejudice contemplated in I.R.E. 403 is avoided, and the jury will not be influenced by the existence of Medicare. At the same time, the policy of I.C. § 6-1606 contained in both the statute and the legislative history to prevent a double payment for the damages is preserved. Although the write-off is not technically a collateral source, it is the type of windfall that I.C. § 6-1606 was designed to prevent.[26]

Thus, even though the Idaho Legislature had not provided statutory directives for handling evidence of insurance adjustments, the Court determined that had the Legislature done so, it would have looked just like the way the Legislature handled collateral sources under Idaho Code § 6-1606. At no point did the Idaho Supreme Court use its previously announced "absurd results" rule of statutory interpretation to come to its conclusion.

Why the *Dyet* decision matters

In cases involving medical expenses and write-downs, *Dyet* provides consistency, certainty, and predictability. Whether an attorney is putting on her case in Montpelier or Bonners Ferry, she now knows how the court would handle evidence of her client's medical expenses. Those attacking the decision have sown confusion.

It is widely recognized that the amount of medical expenses is relevant to the evaluation of the nature and severity of a person's injuries and to the impacts of the medical treatment required to treat those injuries.[27] It should be of no significance to an injury case presentation to the jury whether an injured person is insured under Medicare, by Blue Shield, Humana, Pacific Source, Medicaid, or uninsured/self-pay.

More than a few courts have expressly acknowledged that the amount of reasonable medical expenses is a relevant and important factor that influences juries in their assessment of general damages.[28] When a plaintiff's medical expenses increase or decrease, a corresponding effect on the award of general damages is often observed.[29] Because carriers negotiate and obtain different write-off amounts, which insurer the injured person happens to be covered by would have a direct effect on the damage evaluation. This factor of the influence of medical expenses on a jury's determination of general damages was one of the considerations discussed in *Dyet*.[30]

Dyet establishes that, as an evidentiary matter, billed amounts are admissible evidence. This is important for basic case presentation purposes. Representatives of providers simply will not testify that an adjusted amount is the reasonable value of the medical service. They cannot. If the contractual adjustment for Blue Shield is 20 percent and for Humana only 8 percent, how would the provider be able to offer such testimony? The reasonable value is the market or billed amount.[31]

No, the Idaho Supreme Court has not rejected *Dyet*

That the *Dyet* decision remains good law does not require much in-depth analysis. There are four relevant cases. First, the *Dyet* case itself. Second, about a year after *Dyet*, the Idaho Supreme Court decided *Slack v. Kelleher*.[32] In *Slack*, the Court upheld and reinforced *Dyet. It* rejected a request that it overrule *Dyet's* holding that insurance adjustments be treated like a collateral source.[33]

The *Carrillo* case cites to *Dyet* several times in several places in the opinion without any indication that any part of *Dyet* is not still viable law.[4]

The third case, and the one used by the anti-*Dyet* advocates to argue for *Dyet's* demise is *Verska v. St. Alphonsus Regional Medical Center*.[34] The argument for overturning *Dyet* based on *Verska* is supported by Shepard flags and not legal analysis. Because straightforward analysis shows *Verska* does nothing to cast doubt on the holdings in *Dyet* and *Slack*, a few similarly weak justifications were later proffered. But, unlike the argument that *Verska* rejects *Dyet*, none of those justifications attempt to provide a basis on which a district judge can properly avoid the Idaho Supreme Court's direct guidance.[35]

Verska had nothing to do with Idaho Code § 6-1606, collateral sources, or the admissibility of insurance adjustments at trial.[36] In addressing the interpretation of a statute in *Verska*, the Idaho Supreme Court acknowledged it had previously recited an absurd results rule existed, but then announced the rule was a misstatement of the law.[37] The Court offered a string cite to about 50 cases in which the absurd results rule was mentioned, which included the *Dyet* case.[38] This was the only time *Dyet* is mentioned in *Verska*. Then the Court goes on to make clear it had "never revised or voided an unambiguous statute on the ground that it is patently absurd or would produce absurd results when construed as written, and [it did] not have the authority to do so."[39] Courts apply statutory language. The Legislature fixes bad statutes.

Because of this, Westlaw places a "red flag" next to *Dyet* indicating it is no longer good law for at least one of the points of law in *Verska*. Attorneys who do not look beyond the "red flag" to see the limited impact of *Verska* have mistakenly used it as leverage to attack the vitality of the *Dyet* rule.

If *Verska* overturned the *Dyet* rule regarding how to handle insurance adjustments, then there would necessarily be a "red flag" next to *Slack*. *Dyet* and *Slack* stand for the same proposition. If *Dyet* is no longer good law regarding adjustments, then *Slack* is no longer good law regarding adjustments. Conversely, if *Slack* is still good law regarding adjustments, then *Dyet* is still good law regarding adjustments. *Slack* does not have a red or yellow flag. They both remain good law.

Furthermore (and this brings us to the fourth case), six months after issuing *Verska*, the Idaho Supreme Court issued *Carrillo*.[40] The *Carrillo* case cites to *Dyet* several times in several places in the opinion without any indication that any part of *Dyet* is not still viable law.[41] These references to *Dyet* show the Idaho Supreme Court was embracing the *Dyet* decision six months after it was supposedly overturned by *Verska*.

The bottom line is that *Dyet* did not rely on the absurd results rule in determining how to handle insurance adjustments and, therefore, was not abrogated by *Verska.*

Slack made the *Dyet* approach mandatory

The *Slack v. Kelleher*[42] case actually has the effect of mandating that courts use the *Dyet* approach. In that case, the jury returned a verdict for the invoiced bills presented at trial and the district court refused to reduce the verdict for the Medicare write-downs.[43] On appeal, *Slack* asked the Idaho Supreme Court to uphold the district court's decision and overrule *Dyet* to allow her to keep the entire verdict as part of her judgment.[44] The Court stated it was "not persuaded *Dyet* was incorrect."[45] It unequivocally ruled, "the district court erred in denying [defendant's] motion to treat the write-downs as a collateral source."[46] It described its earlier ruling in *Dyet* in mandatory language stating that in *Dyet* "we held that such write-downs are to be treated as a collateral source."[47]

Thus, the Idaho Supreme Court's only pronouncement on the issue after *Dyet* reverses a trial court's failure to use the *Dyet* approach. And it states plainly how write-downs "are to be treated."

Besides being mandatory, the *Dyet* approach is good public policy

There are several reasons why following the *Dyet* decision makes sense:

<u>*Dyet* is an objective standard.</u> IDJI 9.01 provides that the reasonable value of medical services is the measure of damages related to medical expenses. Medical providers will testify that the invoiced amounts are the objective standard to determine the value of medical expenses rather than fluctuating amounts based on whether there is insurance and which insurance program the patient contracts with at any given time.

<u>*Dyet* provides a more accurate presentation to the injury.</u> Allowing only proof of the written-down expenses means the jury does not have an accurate picture of what the plaintiff experienced. It creates confusion to require a jury to try to reconcile the severity of injuries with a paucity of payments. The result would be minimizing or even falsifying the injured party's experience.

<u>*Dyet* acknowledges the actual value of future medical needs.</u> Adjusted amounts can give the jury an artificial view of the cost of future medical treatment. The plaintiff may not have the same insurance coverage in the future, or any at all, and write-downs would improperly invite jury speculation. Similarly, if the jury sees one amount for adjusted past medical expenses and a different amount for unadjusted future medical expenses, it will confuse the jury and create unwarranted skepticism about the testimony concerning future treatment.

<u>*Dyet* provides equal protection under the law.</u> Restricting evidence at trial to an adjusted amount results in punishing people who acquire insurance. Health insurance programs often receive discounts for various treatments. The anti-*Dyet* approach rewards the uninsured. For example, an uninsured individual would introduce evidence of the full market value of medical expenses. In contrast, an injured party with insurance (including Medicare or Medicaid plaintiffs) would only be allowed to introduce the write-down amount. This will create inconsistent verdicts to parties with the same injuries since a jury will likely award the smallest general damages to the plaintiff with the smallest amount of medical expenses and will likely award the largest general damages to the plaintiff with the largest amount of medical expenses. Since the public policy of the State of Idaho is to encourage people to obtain insurance, rewarding the uninsured with larger verdicts by way of overturning *Dyet* would go against public policy.

<u>*Dyet* avoids an accounting nightmare.</u> Benefits from health insurance coverage are not free. If evidence of the adjustments is admitted to the jury, then the next step is to ask the jury to evaluate what portion of premium costs and benefits are applicable to the written off portion of medical costs. Diving into such an analysis would be confusing and create an accounting and actuarial nightmare. There is no need to add that level of complexity to the proof at trial.

Conclusion

The rule of *stare decisis* directs district courts to follow *Dyet* as controlling precedent. That is emphasized by the court's description of *Dyet* in *Slack*. It is important that parties and their counsel have predictability regarding the law so they may make informed decisions in the conduct of their affairs.

Endnotes

1. *Dyet v. McKinley*, 139 Idaho 526, 528-29, 81 P.3d 1236, 1238-39 (2003).

2. Idaho District Courts Are Divided: How Do We Treat Adjustments and Write-offs of Medical Charges, The Advocate Vol. 60,#2, p. 50, Schmitz, R.

3. The following chart on the next page is an informal compilation of Idaho decisions affirming the *Dyet* approach. There may well be others.

4. *Id.*

5. *Brinkman v. Aid Ins. Co.*, 115 Idaho 346, 352, 766 P.2d 1227, 1234 (1988) (overruled on other grounds by *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho*, 142 Idaho 589, 592-93, 130 P.3d 1127, 1130-31 (2006)).

6. *Carrillo v. Boise Tire Co.*, 152 Idaho 741, 753, 274 P.3d 1256, 1268 (2012).

7. *Brinkman*, 115 Idaho at 352, 766 P.2d at

Case	Date	Judge	Dist.
Joseph v. Robrahn (memo decision)	07-28-2015	Dale	U.S. Mag
Arave v. Kruckeberg (memo decision)	10-19-2015	Simpson	7th
Millsap v. State Farm (memo decision)	10-21-2015	Mitchell	1st
CW v. Schaefer (memo decision)	12-11-2015	Southworth	3rd
Olson v. State Farm (hearing transcript)	02-08-2016	Elgee	5th
Ramirez v. Beckstead (ruling from bench)	March 2016	Tingey	7th
Spencer v. Head Sport (memo decision)	05-13-2016	Hoagland	4th
Herrett v. St. Luke's (hearing transcript)	06-06-2016	Stoker	5th
Lien v. Baker (memo decision)	10-03-2016	Naftz	6th
Wetzel v. City of Idaho Falls (memo decision)	10-06-2016	St. Clair	7th
Crawford v. Tomey (memo decision)	11-01-2016	Greenwood	4th
McNear v. Morrison (ruling from bench)	12-1-2016	Owen	4th

at 1233.

8. 1990 Idaho Sess. Laws Ch. 131, House Bill No. 745, Statement of Purpose.

9. *Carrillo*, 152 Idaho at 753, 274 P.3d at 1268.

10. Idaho Code § 6-1606.

11. *Id.*

12. *Carrillo*, 152 Idaho at 753, 274 P.3d at 1268 (citing *Dyet v. McKinley*, 139 Idaho 526, 529, 81 P.3d 1236, 1239 (2003)).

13. Idaho Code § 6-1606.

14. *Dyet v. McKinley*, 139 Idaho 526, 81 P.3d 1236 (2003).

15. *Id.*

16. *Id.* at 528, 81 P.3d at 1238.

17. *Id.*

18. *Id.*

19. *Id.* at 529, 81 P.3d at 1239 (emphasis added).

20. *Id.* at 528, 81 P.3d at 1238.

21. *Id.*

22. *Id.* at 528-29, 81 P.3d at 1238-39.

23. *Id.* at 529, 81 P.3d at 1239.

24. *Id.*

25. *Id.*

26. *Id.* (emphasis added).

27. *Meek v. Montana Eighth Judicial District Court,* 2015 MT 130 at ¶ 14.

28. *Mascarenas v. Gonzalez*, 497 P.2d 751 (N.M. App. 1972); *Melaver v. Garis*, 138 S.E. 2d 435 (Ga. App. 1964); *Stanley v. Walker*, 906 N.E.2d 852, 860 (Ind. 2009) (Dickson, J., dissenting).

29. *Stanley* at 860.

30. 139 Idaho at 529.

31. *Van Brunt v. Stoddard,* 136 Idaho 681, 686, 39 P.3d 621, 626 (2001) (noting billed amount is evidence of reasonable value).

32. 140 Idaho 916, 104 P.3d 958 (2004).

33. *Id.* at 925, 104 P.3d at 967.

34. 151 Idaho 889, 265 P.3d 502 (2011).

35. For example, it has been argued the invoiced amounts are not admissible because they are not relevant. Of course, *Dyet* itself finds that billed amount invoices are in fact relevant and admissible.

36. 151 Idaho 889, 265 P.3d 502 (2011).

37. *Id.* at 507-08, 265 P.3d at 894-95.

38. *Id.* at 508-09, 265 P.3d at 895-96.

39. *Id.* at 509, 265 P.3d at 896.

40. 152 Idaho 741, 274 P.3d 1256 (2012).

41. *Id.* at 753, 756 n.5, 274 P.3d at 1268, 1271 n.5.

42. 140 Idaho 916, 104 P.3d 958 (2004).

43. *Id.*

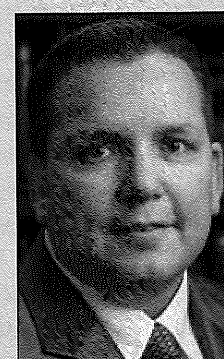
44. *Id.*

45. *Id.* at 925, 104 P.3d at 967.

46. *Id.*

47. *Id.*

Joel Beck *practices in Pocatello with Ruchti & Beck. Fluent in Spanish, he is a past member of the Board of Directors of the Community Council of Idaho, the largest Latino employer in Idaho. If not golfing, hunting or fly fishing he can be found spending time with his wife, Ann, and their three children.*



Kurt Holzer's *claim to fame is being race announcer for the annual Boise Twilight Criterium and a two-time Idaho criterium champion. To feed his cycling addiction, he practices law with Holzer Edwards in Boise. He has been honored as the 2011 Idaho Trial Lawyer of the Year and is a past President of the ITLA.*

James D. Ruchti *is a former law clerk to the Honorable B. Lynn Winmill, member of the Idaho Legislature, and Military Intelligence Officer. His practice in Pocatello at Ruchti & Beck focuses on personal injury, wrongful death, workers' compensation and employment law.*