
Personal Injury

How to recover when the treating physician won't get on the bus

(or we can't all have the policy limits cases all the time**)

by Richard Armstrong

We've all been to CLE's and heard the mantra over and over again: "*Be selective in case selection. What you want to improve is not the volume of the work but the quality of the cases.*" Well, as much as we all try to live by that mantra, sometimes a dog slips through the screen door and before we know it, we have a trial scheduled on a case that sparks groans every time the file is opened and which won't settle because defense counsel wants her chance to get that defense verdict published in the *Virginia Lawyers Weekly*.

I am not embarrassed to admit that I have found myself in this position more than once. While we are all skilled at putting together the case where liability or damages are seriously in doubt, the real challenge comes when your client's treating physician abandons you. Some treaters are not particularly excited about participating in the tort process, but will reluctantly provide testimony if pressed. Sometimes however, the treating physician just will not help his patient, or worse, the medical record is riddled with doubts about causation or your client's sincere effort in getting better. Sometimes, your client has failed to establish any track record with a physician such that there is simply no doctor to call on to prove causation or damages. Whatever the cause, you know that you have problems. If you have to prove your case on the word of your client alone, will you be able to put on any evidence of causation? How do you surmount the hurdles posed by *McMunn v. Tatum* if you have no expert to state that the bills are reasonable and causally related to the injury and treatment? What about any diagnosis that your client may be aware of but is not qualified to testify to?

**Those of who never take cases like this should feel free to skip this article and continue polishing your Bruno Maglis and smoking your big cubans.

While we would all prefer to avoid confronting these issues, sometimes there is a way to revive the dead case-rare as it might be in your practice – and this article will attempt to show you how.

How do I get my client's medical bills before the jury when the defendant throws up a *McMunn v. Tatum* challenge?

In *McMunn v. Tatum*, 237 Va. 558, 379 S.E.2d 908, 379 S.E.2d 908 (1989), the Supreme Court held that if a defendant contests the medical necessity or causal relationship of medical bills and “further represents to the court that the defense will offer evidence on those issues, the bills will be insufficient in themselves to create a jury issue, and expert foundation testimony will be prerequisite to their admission.”¹ Thus, under *McMunn*, the plaintiff with no doctor in her corner faces an uphill burden to even get her medical bills before the jury.

Do not give up, however, because there *is* a way to get those bills admitted. While the medical bills not agreed to by the defense expert cannot be admitted for the purpose of proving financial damage, they are admissible to show that a plaintiff was treated for physical injuries and that she endured pain and suffering over a period of time.² As the court stated more recently in *Barkley v. Wallace*, 267 Va. 369, 595 S.E.2d 271 (2004):

Like the medical bills in *Parker*, the medical bills before us were relevant because they tended to establish the probability of Barkley's claim that she experienced pain and suffering as a result of the accident. Evidence of the medical bills also was relevant to establish the inconvenience that Barkley experienced because of Wallace's negligence.

These subjects were directly related to the central issue before the jury, the extent of Barkley's damages. Moreover, the fact that the bills had been discharged in bankruptcy was irrelevant to the question whether Barkley experienced pain, suffering, and inconvenience as a result of the accident. Thus, the circuit court erred in excluding the medical bills on the ground of Barkley's prior bankruptcy.³

Because a plaintiff has the burden of proving her damages, her medical condition is directly at issue in any case and the medical bills that she incurred are relevant to establish the probability of her claim that she experienced pain and suffering as a result of the accident. The bills also establish any inconvenience that arose from the accident.

McMunn v. Tatum is therefore inapplicable when the bills are being admitted for a purpose other than proving financial damage. Both *Parker* and *Barkley* were decided after *McMunn* and make clear that *McMunn* covered evidence sought to be admitted for an entirely different purpose. Of course, you

still need to be prepared to have the bills admitted as authentic and reasonable, but the presumption found in Va. Code §8.01-413.01 provides the road-map for doing that through the plaintiff.

Without expert medical testimony, can a plaintiff testify about physical condition?

While a plaintiff cannot recount her physician's hearsay opinions of what her medical condition is, a plaintiff is permitted to describe her physical condition without reference to what her physicians may have told her.⁴ As the court stated in *Pepsi-Cola Bottling Co. v. McCullers*:

In the case before us, the evidence complained of related merely to the physical condition of the plaintiff and not to the existence or character of a disease. It came from the plaintiff herself and the members of her family who had ample opportunity of judging her apparent physical condition. It requires no medical training to perceive that a person is nauseated, lacks appetite, or is losing weight. These physical characteristics are incidents of everyday life.⁵

This is not limited to the plaintiff's testimony but extends to the testimony of other lay witnesses.⁶ Thus, while your client cannot testify that she has a herniated disc at L5-S1, she can say that her lower back hurts, how the pain feels, that she never had such pain before the accident, and even that the accident caused this injury, (see below). She can also avoid the hearsay objection by stating that as a result of the MRI, she received epidural injections. This makes clear to the jury that the MRI was abnormal, without stating what the MRI actually said.

What about *John v. Im*? How can a plaintiff present causation testimony without a medical expert?

In *John v. Im*, 263 Va. 315, 559 S.E.2d 694 (2002), the Supreme Court held that a licensed psychologist was not qualified to offer opinion testimony that the plaintiff suffered a mild traumatic brain injury. “An opinion concerning the causation of a particular physical human injury is a component of a diagnosis, which is part of the practice of medicine.”⁷ Since the psychologist was not a medical doctor, he was not qualified to state an expert medical opinion regarding the cause of the injury.⁸

If a psychologist is not qualified to testify as to causation, how can a plaintiff possibly be? *Parker*, following the earlier case of *Todt v. Shaw*, 223 Va. 123, 286 S.E.2d 211 (1982), held that with regard to causation of a physical injury, expert testimony was not required and that “lay testimony of causal connection between an automobile accident and injury is admissible ... even when medical testimony fails to establish causal connection expressly.”⁹

“[L]ay testimony of causal connection between

an automobile accident and injury is admissible for whatever weight the fact finder may choose to give it.”¹⁰

A defendant may argue that the *McMunn* case conflicts with the holding in *Parker*. This argument is off-base. The *McMunn* court explicitly acknowledged the evidentiary difference between the admittance of medical bills and the admittance of lay causation testimony. As the *McMunn* court stated:

A plaintiff’s testimony that he sustained injury as a result of an accident and that he was disabled thereby, has consistently been held admissible without any requirement of expert testimony as to causal connection. *Todt v. Shaw*, 223 Va. 123, 126-127, 286 S.E.2d 211, 213 (1982). That rule, however, does not apply to bills for claimed medical expenses.¹¹

Thus, *Parker* and *McMunn* deal with separate evidentiary issues. The *McMunn* court limited its holding to the admission of medical bills only.¹²

Interestingly, a plaintiff’s ability to testify to the causation of her injury exists even where a defendant offers expert medical testimony to the contrary. Such conflicts in the evidence are explicitly left for the jury to decide. In *Sumner v. Smith*, 220 Va. 222, 257 S.E.2d 825 (1979), plaintiff himself testified inconsistently with his own medical records, yet the court held that this conflict went to credibility and weight which are issues for the jury to decide. As the court stated:

Sumner insisted that the pain resulting from the motor vehicle accident was in a different area of his back from his previous back pains. The hospital records and medical evidence indicated otherwise, but it is the jury’s function to resolve such conflicts and inconsistencies in the evidence. As the trial court noted in ruling on the motion to strike, although Sumner’s testimony connected his injuries with the accident, the testimony of the medical witnesses did not expressly establish the causal connection, and Sumner’s own testimony was inconsistent with some of the history which he gave to his doctors. ***But this is in effect a ruling on the weight of the evidence and the credibility of witnesses, matters that are left to the jury to resolve.***¹³

The point is perhaps most cogently stated in *McCullers, supra*, where the court wrote, “[t]he testimony of expert witnesses is not exclusive, and does not necessarily destroy the force or credibility of other testimony. ***The jury has a right to weigh the testimony of all the witnesses, experts and otherwise.***”¹⁴

What about the diagnoses of treating physicians?

This issue is more tricky. While your client can testify that she underwent a certain treatment after meeting with her treating physician, what the physician actually said is hearsay. To get this evidence before the jury, you may have to rely on the testimony of the defense expert. If the defense has set up a *McMunn* challenge, then they have necessarily represented that they will offer evidence on the issue of medical necessity or causal relationship. This opens the door for you to cross-examine the expert regarding the diagnoses of plaintiff’s treating physician[s]. While one can bet that the defense expert will not agree with the diagnosis of the treating doctor, persistent questioning can get the diagnosis and the prescribed treatment before the jury:

- Q. Doctor, based on the numbness and tingling in Mrs. Jones’ feet and ankles, Dr. Smith ordered an MRI?
- A. Well, Dr. Smith ordered an MRI, but I don’t agree that it was medically indicated by the objective symptoms your client exhibited.
- Q. In any case Doctor, that MRI showed a bulging disc at L5-S1, correct?
- A. Yes, it showed some degenerative changes in her spine.
- Q. Regardless of what you think of the cause, the MRI showed encroachment on the thecal sac and right neural foramen and mild impact on the right S1 root.
- A. Yes, but this accident was not the cause of that injury.
- Q. Right doctor, but it is true, isn’t it, that the S1 nerve root impacts the lower extremities, particularly the ankles and feet?

Again, this is not the ideal world, but does present a way to get around evidentiary objections when your client lacks doctors to support her claims.

Conclusion

When your client’s treating physician won’t go to bat for her, or when the treating physician gives you a surprise by testifying at his *de bene esse* deposition that he cannot vouch for the reasonableness of the bills of other physicians or hospitals, do not panic. Remember that there are ways to get around some of the evidentiary rules and while you may not be able to present the perfect case, you can at least get your case to a jury with a reasonable chance of recovery... and then start taking only those high quality cases that we all have heard about.

Endnotes

1. *McMunn*, 237 Va. at 570, 379 S.E.2d at 914.
2. *Parker v. Elco Elevator Corp.*, 250 Va. 278, 280, 462 S.E.2d 98, 100 (1995).
3. *Barkley v. Wallace*, 267 Va. 369, 595 S.E.2d 271 (2004) at 274.
4. *Pepsi-Cola Bottling Co. v. McCullers*, 189 Va. 89, 52 S.E.2d 257 (1949).
5. *Id.*, 189 Va. at 98-99, 52 S.E.2d at ____.
6. *See, Phillips v. Stewart*, 148 S.E.2d 784, 207 Va. 214 (1966) (“The opinions of lay or nonexpert witnesses who are familiar with a person whose physical condition is in question and have had opportunity for observing him are competent evidence on issues concerning the general health, strength, and the bodily vigor of such person, his feebleness or apparent illness, or changes in his apparent state of health or physical condition from one time to another.”)(citations omitted).
7. *Id.*, 263 Va. at ____, 559 S.E. 2d at 697.
8. *Id.*
9. *Parker*, 250 Va. at ____, 462 S.E.2d at 100.
10. *Todt*, 223 Va. at 127, 286 S.E.2d 213.
11. *McMunn*, 237 Va. at 571, 379 S.E.2d at ____.
12. *McMunn*, 237 Va. at 569, 379 S.E.2d at ____.
13. *Sumner*, 220 Va. at 225-226, 257 S.E.2d at 827, (emphasis added). *See also, Norfolk and Western Ry. Co. v. Chittum*, 251 Va. 408, 468 S.E.2d 877 (1996) (“Although much of the expert testimony reasonably could have produced a different result, Chittum’s own testimony was sufficient to create a jury issue regarding causation.”)
14. *McCullers*, 189 Va. at 99, 52 S.E.2d at ____, (citations omitted)(emphasis added).



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