This chapter was first published by IICLE® Press.

8 Proving Special Damages: Medical Expenses and Lost Wages

TIMOTHY J. REULAND
JULIE L. CIBULSKIS
Speers, Reuland & Cibulskis, P.C.
Aurora

V. Future Lost Earnings

I. [8.1] SCOPE OF CHAPTER

This chapter addresses proof of and attacks on the injured plaintiff's past and future medical expenses and past and future lost wages, including requisite elements of proving, means of proving, and defense approaches to medical expenses and lost wages. The discussion of wage loss in this chapter contemplates a plaintiff who is employed at an ascertainable salary or hourly wage. Other chapters deal with plaintiffs whose incomes are disrupted for so long that an economist's testimony is advisable (see Chapter 7 of this handbook) or whose incomes are subject to the potential wide variations sometimes experienced by self-employed persons or entrepreneurs (see Chapters 5 and 6 of this handbook).

II. PAST MEDICAL EXPENSES

A. [8.2] Requisite Elements of Proof

In order for the amount of medical expenses already incurred or a bill for past medical expenses to be admitted into evidence, the plaintiff has the burden of proving that he or she has paid for or become liable to pay a specific charge for medical expense, that the charge was reasonable for the services rendered, and that the charge was incurred due to injuries caused by the defendant's negligence. *Arthur v. Catour,* 216 Ill.2d 72, 833 N.E.2d 847, 853 – 854, 295 Ill.Dec. 641 (2005). Broken down, this three-pronged requirement means that the plaintiff must show the following:

1. the identity of the service provider (*Amann v. Chicago Consol. Traction Co.*, 243 Ill. 263, 90 N.E. 673, 674 (1909));

2. the fact that the service provider is in a recognized healthcare profession;

3. the amount of the bill or expense incurred by the plaintiff (*Arthur, supra; Amann, supra*, 90 N.E. at 674; *Thompson v. Dering Coal Co.*, 158 Ill.App. 289, 290 – 291 (3d Dist. 1910));

4. the reasonableness of the expense or bill (*Arthur, supra; Wills v. Foster,* 229 Ill.2d 393, 892 N.E.2d 1018, 1025, 323 Ill.Dec. 26 (2008));

5. the fact that the services were in fact rendered;

6. the fact that the services were necessary for the diagnosis or treatment of the condition (*Arthur, supra; Coffey v. Sutton,* 175 Ill.App. 331, 341 – 342 (2d Dist. 1912)); and

7. the fact that the condition for which the services were rendered was caused by the tort in issue in the case (*Arthur, supra; Sisti v. Barker*, 70 Ill.App.3d 734, 388 N.E.2d 1117, 1120, 27 Ill.Dec. 154 (2d Dist. 1979)).

These elements are enumerated not because each is expressly addressed each time a medical bill is introduced into evidence or because plaintiff's counsel need ask seven questions in order to introduce a medical bill, but because the absence of any of them provides the defendant with an easy opening to challenge the admissibility of a bill or expense.

B. Means of Proving the Requisite Elements

1. Testimony by the Plaintiff or Other Lay Witnesses

*a. [8.3] Pre-*Arthur *Rules*

Until the Illinois Supreme Court's decision in *Arthur v. Catour*, 216 Ill.2d 72, 833 N.E.2d 847, 295 Ill.Dec. 641 (2005), the simplest and most frequently employed means of introducing into evidence a past medical expense was testimony by the plaintiff or another lay witness (for example, the parent of an injured child) that a marked and identified medical bill was received from the provider of care for services rendered to the injured plaintiff and that the bill was in fact paid. Lay testimony on these foundational elements was proper, and proof of a bill's payment was prima facie proof of its reasonableness. *Barreto v. City of Waukegan*, 133 Ill.App.3d 119, 478 N.E.2d 581, 589, 88 Ill.Dec. 266 (2d Dist. 1985); *Flynn v. Cusentino*, 59 Ill.App.3d 262, 375 N.E.2d 433, 435 – 436, 16 Ill.Dec. 560 (3d Dist. 1978) (reasoning that lay testimony is permissible because medical expertise is not needed regarding these routine facts). The plaintiff was not required to know or prove who paid the bill. *Elberts v. Nussbaum Trucking, Inc.*, 97 Ill.App.3d 381, 422 N.E.2d 1040, 1043, 52 Ill.Dec. 831 (1st Dist. 1981).

b. [8.4] Arthur v. Catour *and* Wills v. Foster

The discounting of medical bills is now a common practice in the healthcare field. *Arthur v. Catour*, 216 Ill.2d 72, 833 N.E.2d 847, 863, 295 Ill.Dec. 641 (2005) (McMorrow, C.J., dissenting). Private health insurers and government programs routinely pay healthcare providers less than the face amount of medical bills, and providers accept discounted amounts as full and final payment. In *Arthur*, when the plaintiff's health insurer secured a $6,000 discount on the plaintiff's bills, the Illinois Supreme Court addressed a certified question of whether the plaintiff was entitled to recover the billed amount or the lesser amount actually paid by a private insurer. Because the plaintiff could not "truthfully testify that the total billed amount ha[d] been paid," the court held that the plaintiff could not "make a *prima facie* case of reasonableness based on the bill alone." 833 N.E.2d at 854. Rather, the court said that the plaintiff "must establish the reasonable cost by other means — just as she would have to do if the services had not yet been rendered, *e.g.*, in the case of required future surgery, or if the bill remained unpaid." *Id.* While the "other means" of proof were not specified, the court held that the plaintiff could "present to the jury the amount that her health-care providers initially billed for services rendered." *Id.*

Wills v. Foster, 229 Ill.2d 393, 892 N.E.2d 1018, 323 Ill.Dec. 26 (2008), addressed whether a different rule applied if the plaintiff's medical bills were satisfied by a government program, such as Medicare or Medicaid, or if the plaintiff was provided medical services gratuitously by an entity such as the Shriner's Hospital for Crippled Children. *Wills* held that relationships that may exist between the plaintiff and a third party, such as a government program or a physician providing free services, do not alter the plaintiff's right to seek recovery of the reasonable value

of medical services incurred due to injuries caused by the tortfeasor. 892 N.E.2d at 1030. As the *Wills* court stated: "All plaintiffs are entitled to seek to recover the full reasonable value of their medical expenses." 892 N.E.2d at 1033.

Neither *Arthur* nor *Wills* precludes the traditional approach (addressed in §8.3 above) allowing a plaintiff to make a prima facie case of reasonableness based on the bill alone if the plaintiff can truthfully testify that the total bill has in fact been paid. *See Arthur, supra,* 833 N.E.2d at 854; *Wills, supra,* 892 N.E.2d at 1025. Thus, a plaintiff claiming as medical expense damages a fully paid bill or only those amounts actually paid to providers and testifying to the amount paid is not precluded from claiming amounts actually paid.

The reasonableness of the full amount of unpaid or partially paid (discounted) bills can be proved by the testimony of a person knowledgeable about both "the services rendered and the usual and customary charges for such services." *Arthur, supra,* 833 N.E.2d at 853 – 854. *See also Wills, supra.* If a witness with the requisite knowledge testifies that the bills are fair and reasonable, the plaintiff has satisfied the proof requirement of reasonableness. *Arthur, supra,* 833 N.E.2d at 854. Types of witnesses who may have the requisite knowledge are discussed in §§8.6 – 8.8 below.

c. [8.5] Causation

Neither *Arthur v. Catour,* 216 Ill.2d 72, 833 N.E.2d 847, 295 Ill.Dec. 641 (2005), nor *Wills v. Foster,* 229 Ill.2d 393, 892 N.E.2d 1018, 323 Ill.Dec. 26 (2008), changed the plaintiff's burden of proving that the claimed medical expenses were caused by the tort in issue. Under limited circumstances, the plaintiff or other lay witnesses may testify as to causation.

If the plaintiff can clearly testify about his or her own injuries and the course of his or her medical treatment, medical testimony is not necessarily required for medical expenses to be introduced in evidence. *Mesick v. Johnson,* 141 Ill.App.3d 195, 490 N.E.2d 20, 27 – 28, 95 Ill.Dec. 547 (1st Dist. 1986); *Fisher v. Patel,* 93 Ill.App.3d 694, 417 N.E.2d 691, 693, 49 Ill.Dec. 1 (1st Dist. 1981). *See also Gubser v. Industrial Commission,* 42 Ill.2d 559, 248 N.E.2d 75 (1969); *Union Starch & Refining Co. v. Industrial Commission,* 37 Ill.2d 139, 224 N.E.2d 856 (1967). Lay witnesses are permitted to testify to subject matter within common knowledge, experience, or observation as long as the lay person is testifying based on personal perception or observation. *Rost v. F.H. Noble & Co.,* 316 Ill. 357, 147 N.E. 258, 261 (1925); *People v. Berkman,* 307 Ill. 492, 139 N.E. 91, 94 – 95 (1923); *DeYoung v. Alpha Construction Co.,* 186 Ill.App.3d 758, 542 N.E.2d 859, 866, 134 Ill.Dec. 513 (1st Dist. 1989). However, a lay witness may not be permitted to testify to what are, in the court's judgment, special, controversial, or unusual medical conditions that require medical expertise to diagnose. *Abrams v. City of Mattoon,* 148 Ill.App.3d 657, 499 N.E.2d 147, 152, 101 Ill.Dec. 780 (4th Dist. 1986); *Robinson v. Wieboldt Stores, Inc.,* 104 Ill.App.3d 1021, 433 N.E.2d 1005, 1009 – 1010, 60 Ill.Dec. 767 (1st Dist. 1982); *Pocahontas Mining Co. v. Industrial Commission,* 301 Ill. 462, 134 N.E. 160, 163 (1922).

Close proximity in time between injury and treatment may be enough for a bill to be admitted into evidence without other causation proof, particularly if coupled with testimony that the plaintiff was not hurt before the tort but was immediately thereafter. *Vilardo v. Public Taxi Service, Inc.,* 118 Ill.App.2d 62, 254 N.E.2d 653 (1st Dist. 1969); *Roewe v. Lombardo,* 76

Ill.App.2d 164, 221 N.E.2d 521, 526 (5th Dist. 1966). A bill for medical treatment even some days after an accident may be admissible on the theory that the treatment's proximity establishes at least prima facie proof of causation, particularly if the medical bill is for treatment that is part of a course of treatment initiated immediately after the occurrence. *Roewe, supra.*

Causation can also be established by circumstantial evidence. *Westlake v. C. House Corp.*, 2011 IL App (1st) 100653, 954 N.E.2d 256, 261, 352 Ill.Dec. 396. For example, the trier of fact can infer from a videotape of the occurrence that an injury occurred, that those injuries probably required medical treatment, and that the medical bills probably resulted from the tortfeasor's conduct. *Id.*

2. [8.6] Testimony by Treating Medical Professionals or Experts

The plaintiff's treating medical professional can render testimony establishing the requisite elements for the introduction into evidence of a medical bill or expense. Indeed, because the reasonableness of medical expenses claimed must be proven, this professional or expert testimony may be required for the admission of an unpaid medical expense (*Cooper v. Cox*, 31 Ill.App.2d 51, 175 N.E.2d 651, 655 (1st Dist. 1961)) or if the plaintiff claims an amount in excess of a discounted amount actually accepted by the provider in satisfaction of the provider's bill (*Arthur v. Catour*, 216 Ill.2d 72, 833 N.E.2d 847, 854, 295 Ill.Dec. 641 (2005)).

A treating medical professional's bill (paid, unpaid, or as initially rendered) may be admitted into evidence based on the professional's testimony to the requisite elements of proof. Medical service providers can competently testify to the bills incurred by the plaintiff within their particular specialty or area. Thus, testimony by a physician in *North Chicago St. Ry. v. Cotton*, 140 Ill. 486, 29 N.E. 899, 903 (1892), a chiropractor in *Voight v. Industrial Commission*, 297 Ill. 109, 130 N.E. 470, 472 (1921), and a physical therapist in *American National Bank & Trust Co. v. Peoples Gas Light & Coke Co.*, 42 Ill.App.2d 163, 191 N.E.2d 628, 635 (1st Dist. 1963), was received to admit their respective bills. Subject to the disclosure requirements of Illinois Supreme Court Rule 213, the testimony of duly qualified, non-treating experts may also be adduced to satisfy all of the requisite elements of proof for the introduction of a paid or unpaid medical expense. *See generally Sollars v. Review Publishing Co.*, 264 Ill.App. 207, 219 (3d Dist. 1931); *Wilson v. Clark*, 84 Ill.2d 186, 417 N.E.2d 1322, 1326 – 1327, 49 Ill.Dec. 308 (1981). The testimony of these experts need not necessarily be based only on their personal experience with medical billing but can be based on inquiries to medical colleagues and others. *See generally Walters v. Yellow Cab Co.*, 273 Ill.App.3d 729, 653 N.E.2d 785, 792, 210 Ill.Dec. 590 (1st Dist. 1995).

Testimony by persons connected to medical service providers or medical institutions may prove some but not all of the elements of proof requisite to admit a medical bill. For example, a hospital's records custodian or credit manager may testify to usual and customary hospital charges, thereby establishing a bill's reasonableness. *Hiatt v. Finkl*, 132 Ill.App.2d 92, 265 N.E.2d 690, 692 (2d Dist. 1971); *American National Bank & Trust, supra.* However, the witness must possess "knowledge of the services rendered and the usual and customary charges for such services." *Arthur, supra,* 833 N.E.2d at 853 – 854. If the witness does, then the witness' testimony that a bill is fair and reasonable satisfies the requirement necessary for admission. *Arthur, supra,* 833 N.E.2d at 854, citing *Baker v. Hutson*, 333 Ill.App.3d 486, 775 N.E.2d 631, 638, 266 Ill.Dec. 791 (5th Dist. 2002).

A post-*Arthur* example of the use of retained expert testimony to prove the reasonableness of unpaid past and future medical bills is *Kunz v. Little Company of Mary Hospital & Health Care Centers,* 373 Ill.App.3d 615, 869 N.E.2d 328, 311 Ill.Dec. 654 (1st Dist. 2007), *appeal denied,* 225 Ill.2d 636 (2007). *Kunz* was a medical malpractice case in which erroneously prolonged medication caused kidney failure requiring lifelong dialysis. The plaintiff retained a kidney expert from Northwestern University School of Medicine to testify as to the reasonableness of the plaintiff's unpaid past and future medical bills. The trial court barred the expert's testimony, apparently based on the defendant's foundation objection. 869 N.E.2d at 337. The plaintiff appealed. On appeal, the defendant argued that the expert had to be familiar with the billing practices of each and every provider involved. The appellate court disagreed, stating that "knowing the billing practices of each provider is not what is sought; rather, it is the reasonableness of the fees that is relevant." 869 N.E.2d at 338. The appellate court further found that the physician-expert had knowledge beyond that of the average juror, ample experience with the kinds of treatment involved in the plaintiff's unpaid past and future medical bills, and familiarity with customary charges in the geographic area of the plaintiff's treatments. The appellate court therefore reversed the trial court, ordered that the opinion testimony be admitted, and remanded for a new trial on the issue of past and future medical damages only.

3. [8.7] Testimony by Lienholders

Under the Health Care Services Lien Act, 770 ILCS 23/1, *et seq.,* licensed healthcare professionals (*i.e.,* physicians, dentists, optometrists, naprapaths, clinical psychologists, and physical therapists) and licensed healthcare providers (*i.e.,* hospitals, home health agencies, ambulatory surgical treatment centers, long-term care facilities, and emergency medical services personnel) may assert a lien on the claims and causes of action of injured persons. 770 ILCS 23/5, 23/10. Circuit courts are empowered to adjudicate these lien claims. 770 ILCS 23/30. In these proceedings, the trial court may determine the reasonableness of the lien amount claimed (*Temesvary v. Houdek,* 301 Ill.App.3d 560, 703 N.E.2d 613, 617, 234 Ill.Dec. 752 (2d Dist. 1998)), and may reduce a lien determined to be unreasonable (*Phillips v. DeCarlo,* 301 Ill.App.3d 680, 705 N.E.2d 113, 114, 235 Ill.Dec. 500 (2d Dist. 1998)). Furthermore, the treatment for which the lien is claimed must be proven to have been proximately caused by the tort in issue. *Anderson v. Department of Mental Health & Developmental Disabilities,* 305 Ill.App.3d 262, 711 N.E.2d 1170, 1174, 238 Ill.Dec. 509 (1st Dist. 1999); *Dollieslager v. Hurst,* 295 Ill.App.3d 152, 691 N.E.2d 1181, 1184, 229 Ill.Dec. 458 (3d Dist. 1998). Thus, a healthcare professional or provider who claims a lien should not be overlooked as a source of proof.

4. [8.8] Stipulations and Documentary Means of Proving Past Medical Expenses

The parties may elect to stipulate to the reasonable value of the medical services rendered to the plaintiff. Such a stipulation, entered without objection, relieves the plaintiff of the burden of establishing the reasonableness of bills. *Wills v. Foster,* 229 Ill.2d 393, 892 N.E.2d 1018, 1034, 323 Ill.Dec. 26 (2008).

Plaintiff's counsel also may consider establishing the requisite elements for the admission of medical expense by way of a request to admit facts and genuineness of documents under S.Ct. Rule 216. *Oelze v. Score Sports Venture, LLC,* 401 Ill.App.3d 110, 927 N.E.2d 137, 150, 339 Ill.Dec. 596 (1st Dist. 2010). Such a request to admit might read as follows:

1. Plaintiff's attached Exhibit 1 is a true, correct, and complete copy of a medical bill for services rendered to plaintiff, on the dates indicated on Exhibit 1, by Jane Doe, M.D., a Board-Certified orthopedic surgeon.

2. The services reflected on Exhibit 1 were necessary for the diagnosis and/or treatment of injuries sustained by plaintiff in the occurrence that is the subject matter of this case.

3. The amount of the bill is reasonable.

If the defendant provides boilerplate responses to the request to admit and claims to have insufficient information to admit or deny the facts, then the plaintiff may file a motion to deem the facts admitted. Such a motion will be granted when the responding party fails to explain why its resources are lacking to such an extent that the requests cannot be answered. *Oelze v. Score Sports Venture, LLC,* 401 Ill.App.3d 110, 927 N.E.2d 137, 150, 339 Ill.Dec. 596 (1st Dist. 2010).

Under S.Ct. Rule 236, the plaintiff's medical records may be introduced into evidence on the same conditions provided for the admission of other business records. Depending on their content, the plaintiff's medical records may establish that the subject bills were for services that were in fact rendered, were necessary for the plaintiff's diagnosis or treatment, or were treatment for injuries caused by the tort in issue. In order to introduce a medical record, counsel must prove that the record was made in the regular course of business, that making the record was part of the regular course of business, and that the record was made contemporaneously with or reasonably soon after the event recorded. When these prerequisites are met, the record "shall be admissible as evidence of the act, transaction, occurrence, or event." S.Ct. Rule 236(a). See generally Michael H. Graham, GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE §803.6 (10th ed. 2010). *See also Troyan v. Reyes,* 367 Ill.App.3d 729, 855 N.E.2d 967, 305 Ill.Dec. 451 (3d Dist. 2006) (easily understandable opinions and diagnoses in records of plaintiff's treating physicians should have been admitted and published to jury upon laying of proper foundation as business records even though medical providers were unable to testify; however, radiologist's report was inadmissible because of its complex medical terminology).

C. [8.9] Free Medical Services

The plaintiff may recover the value of free medical services, that is, services obtained without any expense, obligation, or liability provided by a recognized medical services provider. *Wills v. Foster*, 229 Ill.2d 393, 892 N.E.2d 1018, 1031, 323 Ill.Dec. 26 (2008), *overruling Peterson v. Lou Bachrodt Chevrolet Co.,* 76 Ill.2d 353, 392 N.E.2d 1, 5, 29 Ill.Dec. 444 (1979) (free medical services rendered by Shriners' Hospital for Crippled Children in performing surgery). However, *Wills* did not explicitly address gratuitous services rendered to a tort victim by a family member. Its analysis of the collateral-source rule (892 N.E.2d at 1025 – 1031) and its explicit reference to gratuitous services (892 N.E.2d at 1029) cast doubt on the 1907 holding in *Jones & Adams Co. v. George*, 227 Ill. 64, 81 N.E. 4, 6 (1907), in which the court denied recovery for the value of nursing services rendered by the plaintiff's family when the plaintiff had neither paid nor become liable to pay for nursing. Furthermore, an appellate court has held recoverable the reasonable value of caretaking services rendered by a parent who misses work to care for a child to the extent that these services would have been allowed as damages had a caretaker been employed to care

for the child. *Worley v. Barger,* 347 Ill.App.3d 492, 807 N.E.2d 1222, 1226 – 1228, 283 Ill.Dec. 381 (5th Dist. 2004). The reasonable value of the parent's services is not measured by the amount of wages lost by the parent. *Id.* See also Comment, I.P.I. — Civil No. 30.09.

D. Defense Attacks on Past Medical Expense

1. [8.10] Inexact Bill

Courts have stated that inexact proof of the amount of damage will not be sufficient to set aside a jury verdict. *See generally Tri-County Grain Terminal Co. v. Swift & Co.,* 118 Ill.App.2d 313, 254 N.E.2d 311, 315 – 316 (4th Dist. 1969); *First National Bank, Mattoon v. Standard Paving Co.,* 15 Ill.App.3d 7, 303 N.E.2d 29 (4th Dist. 1973) (abst.). However, this flexible approach to damage proof is generally not proper in the case of bills for past medical expenses, and the amounts of these bills should be proved with exactitude. *Schultz v. Gilbert,* 300 Ill.App. 417, 20 N.E.2d 884, 887 (4th Dist. 1939). The plaintiff cannot seek to prove as damages for medical expense an amount greater than the amount for which the plaintiff was billed or for which the plaintiff has become liable on the theory that some greater amount would be usual and customary. *Thompson v. Dering Coal Co.,* 158 Ill.App. 289, 291 (3d Dist. 1910). *See also Hinnen v. Burnett,* 144 Ill.App.3d 1038, 495 N.E.2d 141, 147, 99 Ill.Dec. 76 (5th Dist. 1986). *See generally Gill v. Foster,* 157 Ill.2d 304, 626 N.E.2d 190, 193 Ill.Dec. 157 (1993). The exactitude required for proof of past medical expense guards against speculative awards but does not impose on the plaintiff the burden of furnishing a detailed, itemized account of each element or aspect of a given medical bill. *Amann v. Chicago Consol. Traction Co.,* 243 Ill. 263, 90 N.E. 673, 674 (1909).

2. [8.11] Unnecessary Treatment or Overtreatment

A defendant may attack a past medical expense as being unnecessarily incurred or the result of unnecessary overtreatment. Use of this attack generally requires review of the plaintiff's medical records and perhaps an examination of the plaintiff by someone with medical expertise. With specific medical reasons or data on why certain aspects of the plaintiff's treatment might have been unnecessary, useful cross-examination of the plaintiff or the plaintiff's medical service providers becomes possible. Sometimes, but rarely, one treating physician in a chain of treating physicians may cast doubt on the necessity of earlier treatment. The defendant can also search out evidence of overtreatment by having the plaintiff undergo a medical examination under S.Ct. Rule 215 or, in the appropriate case, subject to the disclosure requirements of S.Ct. Rule 213, involve an expert to testify on behalf of this position.

3. [8.12] Unreasonableness of Expense

There is no presumption in Illinois "that a billed charge is a usual and customary charge for a reasonable and necessary medical service." *Bemis v. Safeco Insurance Company of America,* 407 Ill.App.3d 1164, 948 N.E.2d 1054, 1059, 350 Ill.Dec. 547 (5th Dist. 2011). Because of the collateral-source rule as set out in *Wills v. Foster,* 229 Ill.2d 393, 892 N.E.2d 1018, 1025 – 1033, 323 Ill.Dec. 26 (2008), defendants may not attack a bill's reasonableness simply by introducing evidence that the bill was settled or satisfied for less than its face amount. A bill in an exact amount, rendered for necessary medical treatment for the injury in issue, may nonetheless be an

inflated bill. Furthermore, juries are not bound to mechanically award the amount of a bill admitted into evidence and may award "none, part, or all of the bill as damages." *Arthur v. Catour,* 216 Ill.2d 72, 833 N.E.2d 847, 854, 295 Ill.Dec. 641 (2005), quoting *Baker v. Hutson,* 333 Ill.App.3d 486, 775 N.E.2d 631, 638, 266 Ill.Dec. 791 (5th Dist. 2002). *See also Snelson v. Kamm,* 204 Ill.2d 1, 787 N.E.2d 796, 817, 272 Ill.Dec. 610 (2003) (upward rounding on itemized verdict form of past medical expenses of $595,766 to $600,000 not against manifest weight of evidence). Section 8.6 above indicates the types of witnesses who can competently testify on the issue of reasonableness, and the same persons can be employed to attack an inflated bill. While such an attack is certainly theoretically available, defense counsel may wish to weigh the expense of such an attack against the amount of overcharge and to consider the utility of focusing on what may be a relatively minor element of the plaintiff's case, particularly if the plaintiff had nothing to do with causing the overcharge.

4. [8.13] No Causation: Subsequent Injury or Reinjury

A defendant can attack the plaintiff's medical expenses as unrelated to the tort in issue, provided a timely and appropriate objection or record is made and preserved. *Snelson v. Kamm,* 204 Ill.2d 1, 787 N.E.2d 796, 813 – 814, 272 Ill.Dec. 610 (2003). For example, the defendant may produce evidence of some other event, condition, or conduct involving the plaintiff that caused or contributed to all or some of the plaintiff's expense. See generally I.P.I. — Civil Nos. 12.04 and 15.01; *Gill v. Foster,* 157 Ill.2d 304, 626 N.E.2d 190, 193 Ill.Dec. 157 (1993). Thus, injuries that occur subsequent to the tort in issue may be raised by the defense.

Generally speaking, a defendant will not be liable for the consequences to the plaintiff of an event subsequent to and wholly unrelated to the original tort. *See generally Bak v. Burlington Northern, Inc.,* 93 Ill.App.3d 269, 417 N.E.2d 148, 150, 48 Ill.Dec. 746 (2d Dist. 1981). If the plaintiff is attempting to recover in the case at hand for medical expenses for unrelated events or reinjuries, the defendant may successfully argue causation and eliminate some of the claimed expenses as unrelated. *Robertson v. Smith,* 40 Ill.App.3d 174, 351 N.E.2d 576, 577 – 578 (4th Dist. 1976). *See also Kupcikevicius v. Fitzgibbons,* 41 Ill.App.3d 405, 354 N.E.2d 434, 439 (1st Dist. 1976), in which the plaintiff overcame this defense argument.

However, not all post-occurrence events or injuries are unrelated and therefore non-compensable. If the plaintiff's proof, particularly the medical proof, is that the subsequent event is part of, a manifestation of, or in part caused by the tort in issue, the expense related to the subsequent event is a proper element of damage. *See generally Bak, supra* (overdose of drug prescribed for original injury may be related); *Ostry v. Chateau Limited Partnership,* 241 Ill.App.3d 436, 608 N.E.2d 1351, 1355, 181 Ill.Dec. 877 (2d Dist. 1993).

If the subsequent event was medical malpractice during the course of the plaintiff's treatment for the tort in issue, the defendant tortfeasor is responsible for the consequences and damages incurred by the plaintiff in this treatment. I.P.I. — Civil No. 30.23; *Gertz v. Campbell,* 55 Ill.2d 84, 302 N.E.2d 40, 43 (1973); *Cram v. Showalter,* 140 Ill.App.3d 1068, 489 N.E.2d 892, 895, 95 Ill.Dec. 330 (2d Dist. 1986); *Kolar v. Ray,* 142 Ill.App.3d 912, 492 N.E.2d 899, 900 – 901, 97 Ill.Dec. 240 (1st Dist. 1986). *See also Kolakowski v. Voris,* 94 Ill.App.3d 404, 418 N.E.2d 1003, 1009, 50 Ill.Dec. 9 (1st Dist. 1981).

5. [8.14] No Causation: Prior Injury; Aggravation Issues

A defendant may contend that some prior injury or condition and not the tort in issue caused the plaintiff's damage. In general, evidence offered by the defendant of prior injury to the plaintiff has been held admissible on the issue of damages if there is a causal relationship between the prior injury and the plaintiff's condition after the tort in issue. However, the requirement of proving a causal relationship has been treated differently depending on whether the same or some different part of the body is involved in both the prior and current injuries. Even in the face of evidence of prior injury, the plaintiff may make a recovery if the tort in issue aggravated a preexisting condition. Injury to the same body area, injury to different body areas, and aggravation are treated in turn in §§8.15 – 8.17 below.

a. [8.15] Same Area of the Body

In *Voykin v. Estate of DeBoer,* 192 Ill.2d 49, 733 N.E.2d 1275, 248 Ill.Dec. 277 (2000), the Illinois Supreme Court resolved a conflict in the appellate courts about whether a prior problem in the same area of the plaintiff's body is admissible without proof of a causal connection between the prior problem and the injury claimed in the present suit. The *Voykin* court rejected what had come to be called the "same part of the body rule" (*see, e.g., Bailey v. Wilson,* 299 Ill.App.3d 297, 700 N.E.2d 1113, 1117, 233 Ill.Dec. 405 (4th Dist. 1998); *Wilson v. Granite City Steel Division of National Steel Corp.,* 226 Ill.App.3d 96, 589 N.E.2d 660, 670 – 671, 168 Ill.Dec. 260 (5th Dist. 1992)), which had automatically allowed evidence of prior injuries to the same part of the body at issue in the case at hand. *Voykin* requires the defendant tortfeasor to prove a causal connection between the prior and present problems claimed by the plaintiff as a condition of demonstrating the prior problem's relevancy to the plaintiff's present claims. Without proof of a causal connection, the prior problem is irrelevant and inadmissible. The requisite causation proof must usually be through competent expert testimony. 733 N.E.2d at 1280; *DiCosola v. Bowman,* 342 Ill.App.3d 530, 794 N.E.2d 875, 881 – 882, 276 Ill.Dec. 625 (1st Dist. 2003); *Hawkes v. Casino Queen, Inc.,* 336 Ill.App.3d 994, 785 N.E.2d 507, 518, 271 Ill.Dec. 575 (5th Dist. 2003).

However, the *Voykin* court allowed that some cases may involve past and present injuries of such a nature that "a lay person can readily appraise the relationship, if any, between those injuries without expert assistance." 733 N.E.2d at 1280. Such a situation was held to exist in *Felber v. London,* 346 Ill.App.3d 188, 803 N.E.2d 1103, 281 Ill.Dec. 482 (2d Dist. 2004). In *Felber,* for seven or eight months of the year prior to a rear-end collision, the plaintiff had been under chiropractic care for shoulder and neck pain, apparently first experienced while backing her car out of a garage. Approximately six months before the collision, the plaintiff developed a neck ache after a roller coaster ride. About five months before the collision, she began physical therapy for her neck and back. About four months before the collision, she had osteopathic manipulation, acupuncture, and nutritional supplements for her neck. About three months before the collision, the osteopath prescribed and the plaintiff began to wear a neck brace. In the six weeks before the collision, her neck had improved, but she still had problems. Two days before the collision, she saw the osteopath and was "feeling pretty good." 803 N.E.2d at 1105. The plaintiff was wearing the neck brace at the time of the collision. She continued with osteopathic care after the collision, and the osteopathic care she received before and after the collision was "[v]ery similar." *Id.* She

stopped using the neck brace in the month following the collision. While acknowledging that *Voykin* usually requires expert testimony, the *Felber* court concluded that the record before it presented a case in which jurors "could readily appraise the relationship" between the plaintiff's preexisting injuries and those claimed from the rear-end collision. 803 N.E.2d at 1107.

The *Voykin* court's shield against the defense counsel asking a plaintiff about a prior injury can be lost if the plaintiff's counsel opens the door by asking the plaintiff about the prior injury on direct examination. *Janky v. Perry,* 343 Ill.App.3d 230, 797 N.E.2d 1066, 1069 – 1070, 278 Ill.Dec. 148 (3d Dist. 2003). Illinois tort claimants trying their cases in federal court may face the argument that the Federal Rules of Evidence, not *Voykin,* control the admissibility issue addressed in *Voykin. Ueland v. United States*, 291 F.3d 993, 997 – 998 (7th Cir. 2002). The *Voykin* rationale has been applied to exclude evidence of a subsequent, post-tort injury to the same body part hurt by the tort. *Obszanski v. Foster Wheeler Construction, Inc.,* 328 Ill.App.3d 550, 765 N.E.2d 1193, 262 Ill.Dec. 585 (1st Dist. 2002).

b. [8.16] Different Areas of the Body

The ruling and reasoning of the court in *Voykin v. Estate of DeBoer*, 192 Ill.2d 49, 733 N.E.2d 1275, 248 Ill.Dec. 277 (2000), discussed in §8.15 above, apply a fortiori to defense attempts to prove prior injury to a different area of the body than involved in the suit at hand. Furthermore, by abrogating the "same part of the body" rule, *Voykin* also makes unnecessary efforts to classify body parts (*see, e.g., Wilson v. Granite City Steel Division of National Steel Corp.,* 226 Ill.App.3d 96, 589 N.E.2d 660, 168 Ill.Dec. 260 (5th Dist. 1992)), as "same" or "different" to determine the applicability of the rule. Even before *Voykin*, a prior injury to a different area of the body than that involved in the suit at hand was held not admissible without proof of causal connection between the prior and current injuries. *Marut v. Costello,* 53 Ill.App.2d 340, 202 N.E.2d 853, 855 – 856 (1st Dist. 1964). Thus, in *Marut,* cross-examination about prior upper back injuries was held improper when the case involved an injury to the base of the spine.

c. [8.17] Damages for Aggravation of Preexisting Condition

Proof of prior injury does not necessarily diminish a plaintiff's recovery or exclude all medical expense the plaintiff claims. A tortfeasor is liable for all injuries he or she causes even though the injuries consist of the aggravation of a preexisting condition. *Balestri v. Terminal Freight Cooperative Ass'n,* 76 Ill.2d 451, 394 N.E.2d 391, 393, 31 Ill.Dec. 189 (1979); *Soderquist v. St. Charles Mall Associates, Ltd.,* 177 Ill.App.3d 207, 532 N.E.2d 903, 912, 127 Ill.Dec. 74 (2d Dist. 1988). *See also Schultz v. Northeast Illinois Regional Commuter R.R.,* 201 Ill.2d 260, 775 N.E.2d 964, 974, 266 Ill.Dec. 892 (2002) (case under Federal Employers' Liability Act, 45 U.S.C. §51, *et seq.*). Liability attaches "even though the injuries might not have followed, but for the peculiar, pre-existing weaknesses of the injured person." *Pozzie v. Mike Smith, Inc.,* 33 Ill.App.3d 343, 337 N.E.2d 450, 453 (1st Dist. 1975). *See also Wojcik v. City of Chicago,* 299 Ill.App.3d 964, 702 N.E.2d 303, 312, 234 Ill.Dec. 137 (1st Dist. 1998).

If the plaintiff's injuries include an aggravation of a preexisting condition, the failure to instruct the jury in accord with the above legal principles is reversible error. *Balestri, supra; Wheeler v. Roselawn Memory Gardens,* 188 Ill.App.3d 193, 543 N.E.2d 1328, 1335, 135 Ill.Dec.

581 (5th Dist. 1989). A pattern jury instruction, I.P.I. — Civil No. 30.21, is provided for this purpose. However, the Illinois Supreme Court Committee on Jury Instructions withdrew I.P.I. — Civil No. 30.03, commenting that aggravation "has been deleted as a separate element of damage" (Comment, I.P.I. — Civil No. 30.03). Although aggravation is not a separate element of damage, the jury may consider aggravation of any pre-existing ailment or condition in determining damages. I.P.I. — Civil No. 30.01 (which provides for the mention of aggravation in its first paragraph). Including a line item for aggravation of any preexisting ailment or condition on an itemized verdict form has been held to be error because of "an overlap between aggravation of a preexisting condition and the other elements of damages." *Luye v. Schopper*, 348 Ill.App.3d 767, 809 N.E.2d 156, 166, 284 Ill.Dec. 34 (1st Dist. 2004). *See also Hess v. Espy*, 351 Ill.App.3d 490, 813 N.E.2d 270, 278, 286 Ill.Dec. 213 (2d Dist. 2004); *Compton v. Ubilluz*, 353 Ill.App.3d 863, 819 N.E.2d 767, 289 Ill.Dec. 271 (2d Dist. 2004).

6. [8.18] Plaintiff's Failure to Mitigate Damages

In general, a plaintiff may not sit idly by and allow his or her damages to increase without making reasonable efforts to avoid further loss. *Jensen v. Chicago & Western Indiana R.R.*, 94 Ill.App.3d 915, 419 N.E.2d 578, 591, 50 Ill.Dec. 470 (1st Dist. 1981); *Khatib v. McDonald*, 87 Ill.App.3d 1087, 410 N.E.2d 266, 273, 43 Ill.Dec. 266 (1st Dist. 1980). Thus, the plaintiff cannot recover damages caused by his or her voluntary refusal of recommended medical care. *Corlett v. Caserta*, 204 Ill.App.3d 403, 562 N.E.2d 257, 261, 149 Ill.Dec. 793 (1st Dist. 1990). In a tort action, a jury instruction is available if there is evidence that the plaintiff failed to exercise ordinary care to obtain needed medical treatment and if the plaintiff's damages from that failure are separable from the plaintiff's other injuries. Notes on Use, I.P.I. — Civil No. 33.01.

If the plaintiff has unduly delayed seeking medical care and thereby aggravated his or her injuries or the expenses flowing from the injuries or hampered recovery, then the defendant may argue that the delay, rather than the tort, caused some of the damages claimed and thus minimize the plaintiff's recovery. In Illinois, failure to mitigate damages is an affirmative defense, which the defendant has the burden of pleading and proving. *Casey v. Baseden*, 111 Ill.2d 341, 490 N.E.2d 4, 6, 95 Ill.Dec. 531 (1986); *Nancy's Home of the Stuffed Pizza, Inc. v. Cirrincione*, 144 Ill.App.3d 934, 494 N.E.2d 795, 800, 98 Ill.Dec. 673 (1st Dist. 1986).

While generally speaking a plaintiff has a duty to mitigate damages, including undergoing reasonable medical treatment, there is no duty to undergo surgery. *Hall v. Dumitru*, 250 Ill.App.3d 759, 620 N.E.2d 668, 673, 189 Ill.Dec. 700 (5th Dist. 1993). See also Comment, I.P.I. — Civil No. 33.01. A plaintiff may be excused from undergoing even nonsurgical treatment if there is a recognized risk, whether common or not, that the proposed treatment could result in an aggravation of the existing condition, the development of an additional condition of ill health, or if the treatment presents only a slight prospect for improvement. A plaintiff is not relieved of the duty to seek medical care "[i]f the risk is clearly remote," but if the risk is one recognized by the medical profession, "the risk need not be significant or even probable in order to trigger the exception" that the plaintiff need not seek the medical care. *Hall, supra*, 620 N.E.2d at 673.

7. [8.19] Collateral-Source Payment of Medical Expense

Evidence that the plaintiff received benefits from sources unrelated or collateral to the defendant is inadmissible, and this evidence will not be admitted to reduce the plaintiff's recoverable damages. *Wills v. Foster*, 229 Ill.2d 393, 892 N.E.2d 1018, 323 Ill.Dec. 26 (2008); *Arthur v. Catour*, 216 Ill.2d 72, 833 N.E.2d 847, 852, 295 Ill.Dec. 641 (2005) (applying collateral-source rule to private medical insurance payments); *Lang v. Lake Shore Exhibits, Inc.*, 305 Ill.App.3d 283, 711 N.E.2d 1124, 1128, 238 Ill.Dec. 463 (1st Dist. 1999) (evidence of disability payments by collateral source properly excluded even if offered as evidence of malingering). Defense counsel who cross-examines on the fact that the plaintiff's medical bills were paid by some person or entity other than the plaintiff may commit reversible error. *Arthur, supra; Phelan v. Santelli*, 30 Ill.App.3d 657, 334 N.E.2d 391, 398 (3d Dist. 1975). *See also Rylander v. Chicago Short Line Ry.*, 19 Ill.App.2d 29, 153 N.E.2d 225, 239 (1st Dist. 1958), *aff'd*, 17 Ill.2d 618 (1959); *Biehler v. White Metal Rolling & Stamping Corp.*, 30 Ill.App.3d 435, 333 N.E.2d 716, 723 (3d Dist. 1975) (suggesting that if this cross-examination occurs, it may be sufficient to sustain plaintiff's objection and instruct jury to disregard question and answer). The plaintiff, however, must not have "opened the door" to the subject matter during direct examination. *Hamrock v. Henry*, 222 Ill.App.3d 487, 584 N.E.2d 204, 210, 165 Ill.Dec. 25 (1st Dist. 1991).

While evidence of who paid the plaintiff's medical bills, or whether they were paid by a collateral source, is irrelevant as evidence at the trial, these facts may be relevant after a judgment in favor of the plaintiff. By statute, certain defendants may obtain relief from some elements of damage awarded the plaintiff. *See Wills, supra*, 892 N.E.2d at 1023. Since this handbook deals with trial proof and not post-judgment matters, a detailed discussion of these statutes is beyond the scope of this chapter. Counsel should nonetheless be familiar with 735 ILCS 5/2-1205.1 (pertaining to cases based on negligence or product liability based on strict tort liability) and 735 ILCS 5/2-1205 (pertaining to medical malpractice actions).

III. FUTURE MEDICAL EXPENSES

A. [8.20] Requisite Elements of Proof

The plaintiff must prove the following facts in order to prove future medical expenses: (1) the necessity of the anticipated future treatment; (2) the reasonableness of the expected bill, expense, or charge; (3) the fact that the condition to be treated in the future was proximately caused by the tort in issue; and (4) the reasonable certainty that money will be expended for future medical treatment. See I.P.I. — Civil No. 30.06; *Terracina v. Castelli*, 80 Ill.App.3d 475, 400 N.E.2d 27, 35 Ill.Dec. 890 (1st Dist. 1979).

The first, second, and third points above, the need for treatment, the reasonableness of expense, and causation, are essentially the same elements as discussed in §§8.2 – 8.8 above concerning past medical expenses. The fourth element, the reasonable certainty of future medical expense, is specific to the plaintiff's burden of proof for future medical expense and merits further attention at this point.

Future medical expenses are not recoverable if merely speculative. *See generally Kamp v. Preis,* 332 Ill.App.3d 1115, 774 N.E.2d 865, 871, 266 Ill.Dec. 426 (5th Dist. 2002).

The "reasonable certainty" requirement for future medical expense will not be met if the plaintiff's treating physician testifies only that it is possible that the plaintiff is a candidate for future surgery. *Terracina, supra* (so holding and striking this medical testimony). Even if the plaintiff's physician has recommended an operation, if there is no evidence that the operation is contemplated by the plaintiff or is required, reasonable certainty is not shown. *Chicago City Ry. Co. v. Henry*, 218 Ill. 92, 75 N.E. 758 (1905).

However, reasonable certainty is not necessarily destroyed simply because the plaintiff's damage proof does not pinpoint with definiteness the point in the future when the medical expense will occur. A plaintiff's medical witness may testify that permanent damage done to the plaintiff could be improved by future surgery, and even though this surgery may not be in the plaintiff's immediate future, it may still be held to be reasonably certain to occur and thus admissible. *Collins v. Interroyal Corp.,* 126 Ill.App.3d 244, 466 N.E.2d 1191, 1197, 81 Ill.Dec. 389 (1st Dist. 1984) (orthopedic surgeon for plaintiff with herniated disc testified that future surgery could improve plaintiff's condition, although no such surgery was then scheduled).

Similarly, reasonable certainty is not destroyed simply because there has been some discontinuity in the treatment of the plaintiff or because treatment has been postponed. *Cummings v. Chicago Transit Authority,* 86 Ill.App.3d 914, 408 N.E.2d 737, 42 Ill.Dec. 159 (1st Dist. 1980). In *Cummings,* two years after a plaintiff was injured, his physician scheduled him for a laminectomy, which the physician testified was necessary for relief of the plaintiff's back pain. This operation was postponed because of unrelated medical problems. Three years after the postponement, surgery was again discussed between the plaintiff and his physician because the plaintiff's condition was worsening. The surgery still had not occurred at the time of trial, and the physician testified that a decision to go forward with the surgery "would require a balancing of risks to the patient and potential anticipated benefits." 408 N.E.2d at 742. The appellate court upheld an award of future medical damages for the operation because the jury "could have concluded from this testimony that laminectomy surgery was reasonably certain to occur in the future." *Id.*

In the absence of a recent physical examination of the plaintiff by the plaintiff's medical witness, the plaintiff may be unable to satisfy the "reasonable certainty" requirement, just as the lack of a recent examination may compromise the plaintiff's ability to prove his or her prognosis or permanence of any injury. *See generally Knight v. Lord,* 271 Ill.App.3d 581, 648 N.E.2d 617, 207 Ill.Dec. 917 (4th Dist. 1995) (28-month-old exam insufficient basis for trial testimony concerning prognosis or permanency); *Henricks v. Nyberg, Inc.*, 41 Ill.App.3d 25, 353 N.E.2d 273 (1st Dist. 1976) (three-year-old exam by doctor who treated plaintiff for only three weeks held to be insufficient).

However, the time elapsed from the testifying doctor's last examination of the plaintiff will not alone determine the admissibility of the doctor's opinion. *See, e.g., Decker v. Libell,* 193 Ill.2d 250, 737 N.E.2d 623, 625, 250 Ill.Dec. 1 (2000), and *Soto v. Gaytan,* 313 Ill.App.3d 137, 728 N.E.2d 1126, 1133 – 1134, 245 Ill.Dec. 769 (2d Dist. 2000), in which the courts held that when ruling on the admissibility of medical opinion testimony on permanency, trial courts should

consider multiple factors including not only the recency of the testifying doctor's exam of the plaintiff, but also the nature of the injuries, duration and type of the treatment, number and frequency of the plaintiff's visits, the length of time between the plaintiff's last treatment and the formation of the witness' opinion, the length of time between the formation of this opinion and trial, and whether a substantial change in the patient's condition has occurred between the last exam and trial. *See also Thomas v. Johnson Controls, Inc.*, 344 Ill.App.3d 1026, 801 N.E.2d 90, 97, 279 Ill.Dec. 798 (1st Dist. 2003).

The Illinois Supreme Court's decision in *Dillon v. Evanston Hospital*, 199 Ill.2d 483, 771 N.E.2d 357, 264 Ill.Dec. 653 (2002), highlights the distinction between specific future monetary expenses and other future consequences of an injury. *Dillon* allows plaintiffs to recover the negligently caused risk of even low-probability future injuries arising out of the tort in issue. The *Dillon* court did not expressly address recovery of specific dollar amounts for anticipated or possible future medical procedures. The court's admonition that "a plaintiff must be permitted to recover for *all* demonstrated injuries" should not be overlooked by plaintiffs attempting to introduce evidence of possible future medical expenses. [Emphasis in original.] 771 N.E.2d at 370. See I.P.I. — Civil No. 30.04.03 and 30.04.04.

In *Diaz v. Legat Architects, Inc.*, 397 Ill.App.3d 13, 920 N.E.2d 582, 336 Ill.Dec. 373 (1st Dist. 2009), the treating physician's testimony regarding the cost of future treatment was properly stricken because, although the plaintiff was subject to the risk of future injury, the physician's testimony regarding future medical bills was not related to the risk of future injury but instead was speculative evidence regarding future treatment. The court nonetheless found that the jury award of $201,000 was supported by the evidence given the fact that the plaintiff's injury was permanent, that the plaintiff was at an increased risk of future harm, that he continued to have pain, that there were additional treatment options available, and that he incurred $132,000 in past medical bills over a six-year period, and he had a life expectancy of twenty-one years. 920 N.E.2d at 610.

B. [8.21] Means of Proving the Requisite Elements

Proof of the necessity for future treatment, the reasonableness of the amount of money being claimed by the plaintiff for future expenses, and the future treatment's causal relationship to the tort in issue may be made in the same fashion and with the same witnesses discussed above for past medical expenses. The reader may thus wish to refer to §§8.3 – 8.8 above.

As in §8.20 above, the "reasonable certainty" requirement again merits separate discussion. In certain situations, the reasonable certainty of future medical care can be proved by circumstantial evidence, which is inferred from the nature of the plaintiff's disability. *Rainey v. City of Salem*, 209 Ill.App.3d 898, 568 N.E.2d 463, 469, 154 Ill.Dec. 463 (5th Dist. 1991); *Scheibel v. Groeteka*, 183 Ill.App.3d 120, 538 N.E.2d 1236, 1248, 131 Ill.Dec. 680 (5th Dist. 1989). However, reliance on circumstantial evidence is often risky for the plaintiff, and caselaw suggests that three types of foundational evidence may permit proof of uncertain future consequences of present injury: (1) the state of medical knowledge; (2) the state of the plaintiff's body; and (3) the state of the plaintiff's mind.

Foundational use of the state of medical knowledge to prove possible future consequences of injury is illustrated in *Boose v. Digate,* 107 Ill.App.2d 418, 246 N.E.2d 50 (3d Dist. 1969). In *Boose,* despite the defendant's argument that the medical evidence was mere speculation, the appellate court held that the jury could properly consider a physician's testimony that the plaintiff's injured eye had a 50-percent chance of being removed in the next ten years. The court so held even though the plaintiff's physician admitted on cross-examination that there was some element of speculation and guess in his answer about whether the plaintiff's eye would in fact be removed. The appellate court distinguished between the physician's testimony about the consensus of medical opinion about eye injuries like that suffered by the plaintiff, and whether the physician could point to a particular aspect of the plaintiff's current physical condition to conclude whether the eye might be removed. The appellate court reasoned that the physician's speculation was limited to the physician's inability to pinpoint anything in the plaintiff's present physical condition that would suggest, one way or another, whether the eye should be removed. The court found no speculation in the physician's testimony about the state of medical knowledge, that is, "the general consensus of recognized medical thought and opinion concerning the probabilities of conditions in the future based on present conditions." 246 N.E.2d at 53. Because the doctor testified to the general consensus of recognized medical thought, reasonable certainty was established, speculation was overcome, and the testimony of a 50-percent chance of eye loss was permitted. Thus, a plaintiff may wish to prove that medical consensus and current treatment standards suggest that the plaintiff will need future treatment and will thus incur future medical expense.

A second foundation for proof of future expense, proof about the state of the plaintiff's body, is suggested by *Roman v. City of Chicago,* 134 Ill.App.3d 14, 479 N.E.2d 1064, 89 Ill.Dec. 58 (1st Dist. 1985). In *Roman,* the defendant objected as speculative to the plaintiff's medical testimony that arthritis in the plaintiff's ankle would gradually worsen so that the plaintiff would eventually, perhaps in a decade, need surgery costing $15,000. The appellate court allowed the testimony about the $15,000 future surgery. The appellate court did not rely on testimony about the state of medical knowledge. Rather, in approving the future consequences testimony, the court cited specific testimony by the plaintiff's medical expert about the state of the plaintiff's body (*i.e.,* two fractures and a partial dislocation in the ankle, early arthritic changes in the ankle, cartilage damage, etc.). For the appellate court, these facts about the plaintiff's body supported the future consequence evidence, including $15,000 for surgery perhaps a decade away. 479 N.E.2d at 1068. Thus, a plaintiff may wish to show by the medical evidence the exact nature of the plaintiff's injury, why such an injury will deteriorate in the future, what disability will follow upon the deterioration, and how and why future medical care (and thus expense) would impact the deterioration and disability. *See also Kamp v. Preis,* 332 Ill.App.3d 1115, 774 N.E.2d 865, 871 – 872, 266 Ill.Dec. 426 (5th Dist. 2002) (staph bacteria found in plaintiff's final culture supported admission of testimony about possible future osteomyelitis).

A third foundation for proof of future consequences, proof about the plaintiff's state of mind, is suggested by *Zitzmann v. Miller,* 194 Ill.App.3d 477, 551 N.E.2d 707, 141 Ill.Dec. 520 (5th Dist. 1990). In *Zitzmann,* the plaintiff's treating physician testified that based on his examinations of the plaintiff, there was a "strong possibility" of the plaintiff needing future care at a pain clinic. Because the doctor's testimony was based on his examination of the plaintiff, and for the additional reason that the plaintiff testified that he intended to seek treatment at a pain clinic, the defendant's speculation objection to this testimony was overcome, and support was found for a

jury award of future medical expense. *Zitzmann* therefore suggests that the treating physician should establish the need for future medical care, and the plaintiff should testify to his or her readiness and desire to undergo this care.

In cases in which future medical care will be continuous and cover a potentially long life expectancy (*e.g.*, in cases involving paraplegia or quadriplegia), detailed planning for a broad range of future medical expenses will be necessary, and a number of different types of experts may be required to itemize all of the plaintiff's future needs. Expert economic testimony may also be required to project and reduce to present cash value the amount of money required at various points in the future to cover those needs. See generally Chapters 5 – 7 of this handbook.

C. [8.22] Present Cash Value

Under Illinois law, future medical expenses must be reduced to present cash value. The jury may be so instructed. See I.P.I. — Civil No. 34.02.

D. [8.23] Defense Attacks on Future Medical Expenses

Virtually all of the attacks discussed in §§8.10 – 8.19 above as available for past medical expenses are available for future medical expenses. In addition, the defendant can argue that future medical care expense is merely speculative or merely possible. *Terracina v. Castelli*, 80 Ill.App.3d 475, 400 N.E.2d 27, 31, 35 Ill.Dec. 890 (1st Dist. 1979). Furthermore, if the plaintiff's medical witness has not recently examined the plaintiff, the defendant can argue that any testimony about future medical care should be barred or be accorded little, if any, weight by the trier of fact. *See generally Decker v. Libell*, 193 Ill.2d 250, 737 N.E.2d 623, 625, 250 Ill.Dec. 1 (2000); *Knight v. Lord*, 271 Ill.App.3d 581, 648 N.E.2d 617, 207 Ill.Dec. 917 (4th Dist. 1995); *Henricks v. Nyberg, Inc.*, 41 Ill.App.3d 25, 353 N.E.2d 273 (1st Dist. 1976); *Marchese v. Vincelette*, 261 Ill.App.3d 520, 633 N.E.2d 877, 199 Ill.Dec. 81 (1st Dist. 1994); *Molitor v. Jaimeyfield*, 251 Ill.App.3d 725, 622 N.E.2d 1250, 190 Ill.Dec. 933 (2d Dist. 1993). However, as discussed in §8.20 above, time between the examination and opinion, by itself, will not be a determination of the opinion's admissibility.

While the "speculation" argument may be appropriate to bar the admission of specific dollar amounts claimed for future medical services, evidence of future consequences to the plaintiff on account of the plaintiff's injuries may nonetheless still be admissible as another category of damage even though the future consequence has a low probability of occurring. Thus, the jury may properly consider proof that a plaintiff's injured eye has a certain percentage chance of being removed in the future even though the plaintiff's physician admits on cross-examination that there is some element of speculation and guess in this answer about whether the eye would be removed. However, the court must be satisfied that the doctor's testimony about the chance of removal reflects "the general consensus of recognized medical thought and opinion concerning the probabilities of conditions in the future based on present conditions." *Boose v. Digate*, 107 Ill.App.2d 418, 246 N.E.2d 50, 53 (3d Dist. 1969). *See also Redmon v. Sooter*, 1 Ill.App.3d 406, 274 N.E.2d 200, 204 (2d Dist. 1971).

One appellate court has gone so far as to say that even a one-percent possibility of a plaintiff losing a foot due to an injury is "an [unspecified] element of damage which should be considered by the jury." *Jeffers v. Weinger*, 132 Ill.App.3d 877, 477 N.E.2d 1270, 1276, 87 Ill.Dec. 742 (3d Dist. 1985). Another court, faced with a plaintiff at increased risk for future problems due to back trauma, recognized that the plaintiff should be compensated for bearing the risk of future complications and held that predisposition to future injury or increased risk of future injury "is properly compensable as comprising part of the pain and suffering recovery, and can be considered in its effect on the earning capacity of the plaintiff." *Harp v. Illinois Central Gulf R.R.*, 55 Ill.App.3d 822, 370 N.E.2d 826, 830, 12 Ill.Dec. 915 (5th Dist. 1977).

Therefore, depending on the testimony available in a given case, a defendant may be able to argue correctly that the plaintiff's future expenditure of or liability for specific amounts of money for future medical care is speculative and that specific dollar amounts for future care therefore should not be presented to the jury as future medical expenses per se. Nonetheless, the plaintiff may properly claim as damage increased risks, and even low-probability consequences, caused by the tort in issue, provided these increased risks or low-probability consequences are risks and consequences generally recognized by the medical community. *See generally Dillon v. Evanston Hospital*, 199 Ill.2d 483, 771 N.E.2d 357, 264 Ill.Dec. 653 (2002).

IV. [8.24] PAST LOST EARNINGS

The reader is reminded that this chapter concerns plaintiffs other than self-employed persons employed at the time of the occurrence in question. With unemployed plaintiffs, self-employed plaintiffs, or entrepreneurial-type plaintiffs, counsel are faced with issues dealing with impaired earning capacity or work-life expectancy, issues that are addressed in Chapters 5 – 7 of this handbook.

A. [8.25] Past Lost Earnings

The plaintiff is entitled to recover the full amount of all wages, commissions, bonuses, and all other earnings and fringe benefits lost as a result of the tort in issue. *Steele v. Brown*, 43 Ill.App.2d 293, 193 N.E.2d 352 (2d Dist. 1963) (abst.). Under current Illinois law, the plaintiff's recovery is of gross earnings even if the plaintiff might not have a positive net income after tax deductions. *McCann v. Lisle-Woodridge Fire Protection District*, 115 Ill.App.3d 702, 450 N.E.2d 1311, 1314, 71 Ill.Dec. 432 (2d Dist. 1983). Both evidence and jury instructions regarding the impact of taxes on the plaintiff's gross income have been held improper in Illinois courts. *Klawonn v. Mitchell*, 105 Ill.2d 450, 475 N.E.2d 857, 861, 86 Ill.Dec. 478 (1985). (The practice regarding jury instructions is different in actions based solely on federal law, for example, the Federal Employers' Liability Act. *See generally Norfolk & Western Ry v. Liepelt*, 444 U.S. 490, 62 L.E.2d 689, 100 S.Ct. 755 (1980); I.P.I. — Civil No. 160.25.) Note that P.A. 89-7, which had amended 735 ILCS 5/2-1107.1 to require the court to instruct the jury in writing, "to the extent that it is true, that any award of compensatory damages . . . will not be taxable under federal or State income tax law," was held unconstitutional in *Best v. Taylor Machine Works*, 179 Ill.2d 367, 689 N.E.2d 1057, 228 Ill.Dec. 636 (1997).

If the plaintiff was in fact employed when injured, the defendant cannot defeat the plaintiff's claim for lost wages by attacking the plaintiff's qualifications to hold the job that the plaintiff in fact had. Therefore, evidence will not be received that the plaintiff had his or her job only because of friendship with the employer (*Amann v. Chicago Consol. Traction Co.,* 243 Ill. 263, 90 N.E. 673 (1909)) or that the plaintiff was being overpaid at the job the plaintiff had at the time of injury, compared to prior jobs (*Illinois Steel Co. v. Ostrowski,* 194 Ill. 376, 62 N.E. 822 (1902)).

If the past earnings lost are those incurred by a parent taking care of an injured minor child, these lost wages, as such, are not recoverable. *Worley v. Barger,* 347 Ill.App.3d 492, 807 N.E.2d 1222, 1226 – 1228, 283 Ill.Dec. 381 (5th Dist. 2004). However, the reasonable value of the parent's caretaking services may be recoverable. *Id.* See §8.9 above.

B. [8.26] Means of Proving Past Loss Earnings

The plaintiff is competent to testify to his or her income before and after the tort in issue. *Saldana v. Wirtz Cartage Co.,* 74 Ill.2d 379, 385 N.E.2d 664, 670, 24 Ill.Dec. 523 (1978); *Henke v. Deere & Mansur Co.,* 175 Ill.App. 240, 243 – 244 (2d Dist. 1912). *See also Shiner v. Friedman,* 161 Ill.App.3d 73, 513 N.E.2d 862, 867 – 868, 112 Ill.Dec. 253 (1st Dist. 1987). The plaintiff's testimony alone is sufficient to make a prima facie case of past earnings lost. *See Casey v. Baseden,* 131 Ill.App.3d 716, 475 N.E.2d 1375, 1379, 86 Ill.Dec. 808 (5th Dist. 1985), *aff'd,* 111 Ill.2d 341 (1986). However, a plaintiff may not testify to higher wages that the plaintiff could have earned had he or she taken another available job. *Pinkstaff v. Pennsylvania R.R.,* 23 Ill.App.2d 507, 163 N.E.2d 728, 740 (1st Dist. 1959), *aff'd,* 20 Ill.2d 193 (1960), *cert. denied,* 81 S.Ct. 1029 (1961).

Testimony by the plaintiff's supervisor at work may be used to establish lost earnings or to corroborate the plaintiff's testimony concerning lost earnings. *Shiner, supra.* A coworker can also provide this proof so that when a wage-earner dies before his or her personal injury case is called for trial, a coworker employed in basically the same circumstances and at the same pay scale can properly testify to the decedent's lost income. *Illinois Steel Co. v. Ostrowski,* 194 Ill. 376, 62 N.E. 822, 824 (1902). An "independent" witness may be called to prove the plaintiff's employment. *Turner v. City of Chicago,* 95 Ill.App.2d 38, 238 N.E.2d 100, 102 (1st Dist. 1968). Evidence of the plaintiff's union's wage rates may also be received to show wage loss. *See Antol v. Chavez-Pereda,* 284 Ill.App.3d 561, 672 N.E.2d 320, 328 – 329, 219 Ill.Dec. 812 (1st Dist. 1996); *Wood v. Mobil Chemical Co.,* 50 Ill.App.3d 465, 365 N.E.2d 1087, 1096, 8 Ill.Dec. 701 (5th Dist. 1977).

The plaintiff's treating physician need not necessarily testify that the plaintiff could not carry out his or her work duties during the period for which the plaintiff claims lost wages. *See generally O'Leary v. Siegel,* 120 Ill.App.2d 12, 256 N.E.2d 127, 131 – 132 (1st Dist. 1970). However, plaintiff's counsel may wish to produce this medical proof in order to head off possible defense arguments.

Other types of witnesses, such as vocational rehabilitation experts, job placement experts, or personnel consultants, may aid in proving past lost earnings. However, these witnesses are usually called to prove future lost earnings or in the case of self-employed plaintiffs or plaintiffs suffering long-term injuries, such as those addressed in Chapters 5 – 7 of this handbook.

Documentary evidence may also be brought to bear to prove past wage loss. The plaintiff's tax returns may be received in evidence to support the claim for lost earnings. *Scheibel v. Groeteka*, 183 Ill.App.3d 120, 538 N.E.2d 1236, 1248, 131 Ill.Dec. 680 (5th Dist. 1989). Cross-examination of the plaintiff concerning the contents of tax returns, such as claimed deductions, is impermissible to the extent that the questioning concerns merely the returns and not the plaintiff's ability to perform physical acts. *See Pozzie v. Mike Smith, Inc.*, 33 Ill.App.3d 343, 337 N.E.2d 450, 453 (1st Dist. 1975). However, if no proof of actual past earnings is offered by the plaintiff, but the plaintiff's direct testimony creates the impression of substantial past income, cross-examination has been held proper as to whether the plaintiff filed tax returns. *Cerveny v. American Family Insurance Co.*, 255 Ill.App.3d 399, 626 N.E.2d 1214, 1223, 193 Ill.Dec. 663 (1st Dist. 1993). Furthermore, limited cross-examination of the plaintiff concerning income tax returns is proper when the plaintiff's testimony regarding the amount of lost income lacks certainty. *Fettson v. James*, 298 Ill.App.3d 77, 697 N.E.2d 1131, 1134, 232 Ill.Dec. 201 (1st Dist. 1997).

Just as discussed in §8.8 above for proving medical bills, the plaintiff's counsel may very well wish to request admissions concerning the plaintiff's lost earnings. Such a request, under Illinois S.Ct. Rule 216, might be couched in terms similar to the following:

1. At the time of the occurrence that is the subject of this case, plaintiff was employed at ABC Manufacturing Co. as a machine operator, at an hourly rate of _____ dollars per hour, and worked a 40-hour week.

2. As a result of injuries sustained in this occurrence, plaintiff was unable to work for _____ weeks, and thus lost total wages of $_____.

C. [8.27] Defense Attacks on Past Loss Earnings

The defendant usually will have some difficulty attacking the amount, as such, of the plaintiff's claim for past income lost because, in the context of the plaintiff being discussed in this chapter, the amount of the loss usually will be verifiable by employment records or income tax returns. The defendant may more fruitfully focus an attack on the length of time the plaintiff was off work. In this regard, the plaintiff's treating physician, a medical witness under S.Ct. Rule 215, or the defendant's own medical expert may provide helpful evidence. Lay witnesses may also be identified who will establish an activity level by the plaintiff consistent with that necessary for the plaintiff to return to work or to obtain a job. Furthermore, the plaintiff's own income tax returns may establish an income-producing "sideline" during the alleged period of disability, and this evidence is proper for cross-examination. *See Pozzie v. Mike Smith, Inc.*, 33 Ill.App.3d 343, 337 N.E.2d 450, 453 (1st Dist. 1975). The tax returns may also be used for impeachment or to refresh recollection (*Freehill v. DeWitt County Service Co.*, 125 Ill.App.2d 306, 261 N.E.2d 52, 59 (4th Dist. 1970)) and for other limited cross-examination purposes described in §8.26 above.

The general rule requiring the plaintiff to mitigate damages as discussed in §8.18 above pertaining to medical expenses is equally applicable to lost-earnings claims. Evidence of alternative income-producing possibilities may be relevant. *See Saldana v. Wirtz Cartage Co.*, 74 Ill.2d 379, 385 N.E.2d 664, 670, 24 Ill.Dec. 523 (1978).

Insurance benefits such as sick pay, disability, or similar items remain subject to the collateral-source rule excluding them as evidence at trial but may in some cases be offsets or credits against a judgment suffered by a defendant. See §§8.6 and 8.19 above.

V. FUTURE LOST EARNINGS

A. [8.28] Recoverable Elements

Just as a plaintiff is entitled to recover all pretrial earnings lost due to injury, so too is the plaintiff entitled to recover gross earnings that the plaintiff would have earned in the future had he or she not been injured. *LeMaster v. Chicago Rock Island & Pacific R.R.,* 35 Ill.App.3d 1001, 343 N.E.2d 65, 87 (1st Dist. 1976). To recover future lost earnings, the plaintiff should prove (1) the time period in the future for which the earnings loss will be sustained and (2) the gross amount of money that could have been earned during this period. *See generally Hollis v. R. Latoria Construction, Inc.,* 108 Ill.2d 401, 485 N.E.2d 4, 6 – 7, 92 Ill.Dec. 449 (1985). The fact that the plaintiff was voluntarily unemployed at the time of the accident may be irrelevant and does not preclude recovery for impairment of earning capacity. *Long v. Friesland,* 178 Ill.App.3d 42, 532 N.E.2d 914, 923, 127 Ill.Dec. 85 (5th Dist. 1988). Future lost earnings, like future medical expenses, may be the subject of a jury instruction concerning their reduction to present cash value. See §8.22 above.

B. [8.29] Means of Proving Future Lost Earnings

All of the witnesses and means suggested in §8.26 above for proving past lost earnings are applicable to prove future lost earnings. Testimony by the plaintiff as to the nature and duration of the injuries and that the injuries decreased his or her working capacity is adequate to support a claim for future lost earning capacity. *LaFever v. Kemlite Company, Division of Dyrotech Industries, Inc.,* 185 Ill.2d 380, 706 N.E.2d 441, 455, 235 Ill.Dec. 886 (1998); *Morris v. Milby,* 301 Ill.App.3d 224, 703 N.E.2d 121, 123, 234 Ill.Dec. 509 (4th Dist. 1998). Although the plaintiff need only present "some evidence" of future lost earnings, the evidence must be "reliable and grounded in more than mere possibilities." *LaFever, supra,* 706 N.E.2d at 456. In proving future lost earnings, medical testimony may not necessarily be required to prove, for example, the time period in the future for which the loss will be sustained. If the injury is obvious, the future loss may be equally obvious and thus circumstantially proved (*see generally Redmond v. Huppertz,* 71 Ill.App.2d 254, 217 N.E.2d 85, 88 (2d Dist. 1966)), especially when a minor child is permanently injured (*see Alvis v. Henderson Obstetrics, S.C.,* 227 Ill.App.3d 1012, 592 N.E.2d 678, 684 – 685, 170 Ill.Dec. 242 (3d Dist. 1992); *Huff v. Condell Memorial Hospital,* 4 Ill.App.3d 352, 280 N.E.2d 495, 498 (2d Dist. 1972)). However, plaintiff's counsel is usually well advised to introduce a medical opinion, based on a reasonable degree of medical certainty, regarding the period of the plaintiff's disability and unemployability. Furthermore, the plaintiff's future lost wages may be established by employers or coworkers who can testify as to the plaintiff's ambition, ability, and opportunity to advance. *Exchange National Bank of Chicago v. Air Illinois, Inc.,* 167 Ill.App.3d 1081, 522 N.E.2d 146, 149, 118 Ill.Dec. 691 (1st Dist. 1988). If the period of future wage loss is lengthy, other expert testimony may also be required as discussed in §8.21 above and in Chapters 5 – 7 of this handbook.

C. [8.30] Defense Attacks on Future Lost Earnings

In addition to the attacks discussed in §8.27 above for past lost earnings, as with future medical expenses, the defendant may wish to attack the speculative nature of the claim. *See generally York v. Grand Trunk Western R.R.*, 71 Ill.App.3d 800, 390 N.E.2d 116, 121, 28 Ill.Dec. 134 (1st Dist. 1979). The courts appear divided as to the quantum of proof necessary to avoid speculation, some requiring that future wage loss be reasonably certain to occur (*id.*), others only that a "fair degree of probability" of loss be shown (*Goldman v. Walco Tool & Engineering Co.*, 243 Ill.App.3d 981, 614 N.E.2d 42, 50, 184 Ill.Dec. 841 (1st Dist. 1993)).

Through witnesses with expertise in medicine, rehabilitation, employment opportunities, job placement, or vocational rehabilitation, the defendant may wish to prove the plaintiff's ability to return to work sooner than the plaintiff contends or the availability of specific alternative employment opportunities for the plaintiff. However, the defendant will not be permitted to speculate on the plaintiff taking alternative employment for which he or she is not qualified, either because of lack of education or experience or because of the injury sustained. *See generally Graham v. Mattoon City Ry.*, 234 Ill. 483, 84 N.E. 1070, 1071 (1908).