

## CALIFORNIA

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### I. MEDICAL EXPENSES

#### A. Requirements for Recovery of Medical Expenses

- 1. Past Medical Expenses - To recover damages for past medical expenses, a plaintiff must prove the reasonable cost of reasonably necessary medical care that he has received.**

California law allows a plaintiff to recover the “reasonable value of medical care and services reasonably required and attributable to the tort.” *Hanif v. Housing Authority of Yolo County*, 200 Cal. App. 3d 635, 640 (1988) (internal citations omitted). It is not necessary that the amount of the award equal the amount of medical expenses incurred. *Dimmick v. Alvarez*, 196 Cal. App. 2d 211, 216 (1961). It has long been the rule in California that the costs alone of medical treatment and hospitalization do not govern the recovery of such expenses. *Id.* Rather, a plaintiff must also show that the services were attributable to the accident, that they were necessary, and that the charges for such services were reasonable.” *Id.*

A plaintiff’s recovery is limited to the amount he actually paid, even if the amount was less than the prevailing market rate. *Nishihama v. City and County of San Francisco*, 93 Cal. App. 4th 298 (2001); *Hanif*, 200 Cal. App. 3d at 639-41. The amount paid or liability incurred is not conclusive as to the amount of recovery for past medical expenses. *Caufield v. Market S. R. Co.*, 20 Cal. App. 2d 220, 221 (1937). Because the measure of the damages is the reasonable value of the services, the damages awarded may be less than the actual cost of the medical care and services. *Dimmick*, 196 Cal. App. 3d at

216. This is true even if there is expert opinion testimony that the amount charged for treatment was reasonable and the services were necessary. *Harris v. L.A. Transit Lines*, 111 Cal. App. 2d 593, 598 (1952) (“While the amount charged for medical treatment is some evidence of its reasonable value, the court is not required to allow the full amount charged even though the doctor testifies that in his opinion such amount is reasonable and necessary.”) (citation omitted); *Gimbel v. Laramie*, 181 Cal. App. 2d 77, 80-81 (1960); *see also Dimmick*, 196 Cal. App. 2d at 216 (jury may reject uncontradicted testimony of witness as to reasonable value of service).

When a plaintiff recovers less than the actual costs of his medical care, the total costs may still be admissible as evidence of the nature of a plaintiff’s injuries. In *Nishihama*, one of the leading California cases limiting recovery to the amount of expenses actually incurred, the court stated that evidence of the total costs of care “gave the jury a more accurate picture of the extent of the plaintiff’s injuries.” 93 Cal. App. 4th at 309. Thus, a trial court may allow in evidence of the reasonable cost of a plaintiff’s care while reserving the propriety of a reduction until after the verdict. *Greer v. Buzgheia*, 141 Cal.App.4th 1150, 1157 (2006).

A verdict for less than the amount of the doctors and hospital bills has been upheld despite expert testimony that they were reasonable and necessary on the basis that the jury could have concluded the charges were not entirely related to the accident. *Greer*, 141 Cal. App. 4th at 1158-59. If the bill for medical expenses includes some items unrelated to the accident, the failure to segregate out the expenses unrelated to the accident may lead to the disallowance of the award for all medical expenses included in the bill and exclusion of the entire bill from evidence. *Rodriguez v. McDonnell Douglas Corp.*, 87 Cal. App. 3d 626, 662 (1978).

The intervention of a third party in purchasing a medical lien does not prevent a plaintiff from recovering the amounts billed by a medical provider for care and treatment, as long as the plaintiff legitimately incurred the expenses and remains liable for their payment. Moreover, the rule that a plaintiff cannot recover more than the amount of medical expenses he paid or incurred, even if the reasonable value of those services might be a greater sum, does not forbid the jury from considering the

amounts billed by the provider as evidence of the reasonable value of the services. *Katiuzhinsky v. Perry*, 152 Cal.App.4th 1288, 1291 (2007). For example, if a health care provider had an agreement with Blue Cross to accept a lesser amount as payment in full for services provided to that particular plaintiff, the amount that the plaintiff may recover for those past medical expenses is limited to the amount actually charged. However, if a medical provider sells plaintiff's account and lien to a third-party financial services company at a discount, but plaintiff remains liable to the financial services company for the full amount charged for the medical services, plaintiff may recover as damages the full amount charged if that is a reasonable amount for the services rendered. *See Katiuzhinsky*, 152 Cal. App. 4th at 1296-98.

If a health care provider has agreed to accept a compromise amount as payment in full for the services provided, but evidence of the reasonable value of the services is admitted at trial to provide a more complete picture of the extent of the injuries, it is incumbent on the defendant to ensure that the jury's verdict specifies what damages, if any, are being awarded for past medical expenses. This specification will make it possible for the court, on proper motion, to reduce the jury's award for past medical expenses to the amount that was actually paid for the health care services. *Greer*, 141 Cal. App. 4th at 1158-1159.

If services are rendered gratuitously, a plaintiff can recover their reasonable value. *Rodriguez v. McDonnell Douglas Corp.*, 87 Cal. App. 3d 626, 662 (1978). Moreover, if a plaintiff has paid for past medical services out of his or her own pocket, evidence of this payment is admissible to prove damages. *Smalley v. Baty*, 128 Cal. App. 4th 977, 984-987 (2005). It is not a bar to recovery that the plaintiff's bill for medical services remains unpaid. *See Reichle v. Hazie*, 22 Cal. App. 2d 543, 547-548 (1937).

With regard to the treatment itself, it need not be medically necessary in the sense that the injured plaintiff had no choice regarding whether or not to take the treatment. There may be an element of volition or choice with regard to whether to undergo the medical procedures. For example, the California Court of Appeal upheld a \$600,000 compensatory damages award for a woman injured by an IUD. *Hilliard v. A. H. Robins Co.*, 148 Cal. App. 3d 374 (1983). Before her injury was diagnosed and corrected, the woman had two abortions and a hysterectomy. *Id.* The court rejected the argument that the

medical expenses for the voluntary abortions and hysterectomy should be excluded, reasoning that there was substantial evidence that the expenses were proximately caused by the IUD. *Id.* Likewise, the expenses of restorative plastic surgery, even if repeatedly unsuccessful, may be recoverable. *Id.*

A plaintiff may still recover if the medical care was rendered by members of the plaintiff's family and without an agreement or expectation of payment. *Hanif*, 200 Cal. App. 3d at 644. Where services in the way of attendance and nursing are rendered by a member of the plaintiff's family, the amount for which the defendant is liable is the amount for which reasonably competent nursing and attendance by others could have been obtained. *Id.* The fact that the injured party had a legal right to the nursing services (as in the case of a spouse) does not prevent recovery of their value. *Id.* at 644-45.

Of particular note in California is the Medical Injury Compensation Reform Act, or MICRA, enacted in 1975, which limits jury awards in medical malpractice cases to \$250,000 for pain and suffering. Plaintiffs are limited to a maximum of \$250,000 for noneconomic damages even if there is more than one defendant being sued for medical malpractice. Furthermore, the surviving spouse and children of a deceased patient are also limited to \$250,000 for noneconomic damages in a medical malpractice wrongful death case. However, the spouse of an injured plaintiff suing for his or her own emotional distress as a "direct victim" of the physician's malpractice, or for loss of consortium, is entitled to a separate \$250,000 limit for noneconomic damages. Accordingly, the jury in a medical malpractice case should be asked to render a special verdict that separately identifies the amount in damages being awarded for noneconomic damages.

**2. Future Medical Expenses - To recover damages for future medical expenses, a plaintiff must prove the reasonable cost of reasonably necessary medical care that he is reasonably certain to need in the future.**

A plaintiff may be compensated for medical care and treatment that is reasonably certain to be necessary in the future as a result of the injury in question. *Calhoun v. Hildebrandt*, 230 Cal. App. 2d 70, 73 (1964). The requirement of reasonable certainty with respect to future damages is embodied in California Civil Code Section 3283, which provides that that damages may be awarded for detriment certain to result in the future. An award of expenses for future medical treatment has been disallowed as

erroneous when there was no evidence that future medical treatment would be necessary as a result of the plaintiff's injuries or when there was no evidence of the cost of such treatment. *Gimbel v. Laramie*, 181 Cal. App. 2d 77, 81-82 (1960) (denying recovery for hospital bill because of stipulation regarding amount of bill, but not evidence of reasonableness or necessity).

Although some California courts have sustained awards for past medical expenses without requiring expert opinion testimony, it is unlikely that an award for future medical expenses could be sustained without expert testimony. The cases have not, however, clearly set forth the degree and nature of testimony and proof required for an award of future medical expenses. For example, one court upheld a jury instruction on future medical expenses despite a claim that there was no showing the plaintiff would need future medical care when a doctor testified that plaintiff's condition would likely lead to degenerative arthritic changes, "inferentially meriting medical attention." *Hilliard*, 148 Cal. App. 3d at 413-14.

The requirement of reasonable certainty is one that must be reached by the fact finder based on all the evidence. The fact finder evaluates and determines the weight to be given to the evidence and bases its award on the conclusion that the claimed loss is reasonably certain to occur. *Johnston v. Long*, 30 Cal. 2d 54, 77 (1947). Testimony by a properly qualified physician that future damages might occur or would not be surprising is admissible, and may be considered by the jury in determining whether or not future damages are reasonably certain to occur. *Mendoza v. Rudolf*, 140 Cal. App. 2d 633, 637 (1956).

Pursuant to MICRA, awards of \$50,000 or more for future medical expenses and wage loss may be paid at regular intervals over the life of the injured plaintiff. Periodic payments of awards for future loss can result in significant cost savings for defendants because the gross value of the award for future economic damages to be paid over the life of the plaintiff can be significantly more than the present value of that award. Furthermore, periodic payments for future medical expenses cease upon the death of the plaintiff.

## **B. Collateral Source Rule and Exceptions**

The Collateral Source Rule is firmly established as the California rule. *Helfend v. Southern Calif. Rapid Transit Dist.*, 2 Cal. 3d 1 (1970). However, MICRA abrogates the rule in actions for professional negligence against health care providers. In a malpractice action, a defendant may introduce evidence of Social Security payments, state or federal disability or compensation payments, health or income disability payments, and benefits received under group health plans. Cal. Civ. C. 3333.1(a). A public entity, in a post-trial hearing, may obtain a reduction of the judgment where the plaintiff has already received partial pretrial compensations. Govt. C. 985.

For the rule to apply, the collateral source from which the injured person receives compensation must be a source wholly independent of the tortfeasor. Thus, collateral recovery is not allowed where a joint tortfeasor is involved because the source of recovery is not “wholly independent.” *See Kardly v. State Farm Mut. Auto. Ins. Co.*, 207 Cal. App. 3d 479 (1989) (plaintiff’s insurer could be sued as independent source for bad faith denial of claim; insurer’s fraud was so distinct from defendant driver’s negligence that it could not be considered a joint tortfeasor).

Although the rule precludes the introduction of a plaintiff’s having been additionally compensated for the purpose of reducing damages, this evidence may be introduced for other purposes, such as to impeach a plaintiff’s claimed inability to work. *Helfend*, 72 Cal. App. 4th at 1015.

California law sets specific limitations on the amount that may deducted or reimbursed from a plaintiff’s recovery. For example, in no event may the total dollar amount deducted from the verdict, paid to lienholders, or reimbursed to all collateral source providers, exceed one-half of the plaintiff’s net recovery for all damages after deducting for attorneys fees, medical services paid by the plaintiff, and litigation costs. Govt. C.985(g). However, the court may order no reimbursement or verdict reduction if the reimbursement or reduction would result in undue financial hardship on the person who suffered the injury. *Id.*

## **C. Treatment of Write-downs and Write-offs**

### **1. Medicare and Medicaid**

Where a provider has relinquished any claim to additional reimbursement, a Medicaid beneficiary may only recover the amount payable under the state Medicaid plan as medical expenses in an action against a third party tortfeasor. *Olszewski v. Scripps Health*, 30 Cal.4th 798, 827 (2003).

### **2. Private Insurance**

If a defendant's insurer pays the plaintiff, a credit must be given. *See Dodds v. Bucknum*, 214 Cal. App. 2d 206, 213. (1963). The fact that an insurance company does not pay until after judgment is immaterial. *Jones v. California Cas. Indem. Exchange*, 13 Cal. App. 3d Supp. 1, 5 (1970).

## **II. EX PARTE COMMUNICATIONS WITH NON-PARTY TREATING PHYSICIANS**

### **A. Scope of Physician-Patient Privilege and Waiver**

Under California Evidence Code section 990 *et seq.*, the physician-patient privilege extends to all "confidential communications," a statutory term of art defined to include "information obtained by an examination of the patient." *Hale v. Superior Court*, 28 Cal. App. 4th 1421, 1424 (1994). The definition of "physician" includes medical corporations and their physician employees. *See Evid. C.994.*

A physician may disclose protected information when such disclosure is reasonably necessary to accomplish the purpose for which the physician was consulted. *Rudnick v. Superior Court*, 11 Cal. 3d 924, 933 (1974). For example, if a physician reports to a pharmaceutical provider the adverse effects of a drug on a patient so as to obtain assistance in the use of the drug in treating the patient, such disclosure does not constitute a waiver of the privilege, even if consented to by the patient. *Id.* at 930. In such a situation, the third party pharmaceutical company becomes a person who is authorized to claim the privilege. *Id.* at 932. If, however, such disclosure was not made in confidence or was not reasonably necessary to accomplish the purpose for which the physician was consulted, then defendants cannot claim the privilege on behalf of the patient. *Id.* at 933. A trial court on its own motion or on defendants' motion may, in its discretion, protect the physician-patient privilege of an absent patient who has not waived the privilege. *Id.*

If a patient expressly or impliedly consents to disclosure, the patient has waived the privilege and the communications are subject to discovery. *Id.* at 932. The privilege hinges on the reasonable belief of the patient. In *Kramer v. Policy Holders' Life Insurance Association*, the court held the privilege applicable where a patient was justified in believing that he was giving information necessary to diagnosis or treatment, even though the doctor was there simply as a scientific observer for a medical foundation to study the effects of a cancer treatment administered by other doctors. 5 Cal. App. 2d 380, 384 (1935). However, a California court has held that the privilege did not apply to senior interns taking the history of a patient for hospital records. *Frederick v. Federal Life Ins. Co.*, 13 Cal. App. 2d 585, 590 (1936).

The patient-litigant exception applies in California. *Palay v. Superior Court*, 18 Cal. App. 4th 919 (1993); Evid. C. § 996(a). That is, the disclosure of records protected by the physician-patient privilege is compelled in cases where the patient's own action initiates the exposure. This exception results in a limited waiver of the privilege. Thus, parties to an action may not in discovery proceedings withhold information that relates to any physical or mental condition they put in issue by bringing the action, but they are entitled to retain the confidentiality of all unrelated medical or psychotherapeutic treatment they may have undergone in the past. *Britt v. Superior Court*, 20 Cal. 3d 844 (1978). The mere filing of a lawsuit does not trigger application of the patient-litigant exception against disclosure by discovery of confidential communications. In determining whether communications sufficiently relate to the physical or mental condition at issue to require disclosure, California courts heed the basic privacy interest involved in the privilege, which is generally to be liberally construed in favor of the patient. *Patterson v. Superior Court*, 147 Cal. App. 3d 927, 930-31 (1983).

## **B. Interaction of Waiver of Physician-Patient Privilege and HIPAA**

California courts have not shed much light on the interaction of state privilege law and HIPAA or attempted to reconcile the two areas of law. In cases in which such clarification might have been addressed, courts have decided motions to compel medical records on other grounds. *See, e.g., Planned Parenthood Fed'n of Am. v. Ashcroft*, 2004 WL 432222, at \*1 (N.D. Cal. March 5, 2004) (denying

government's motions to compel patients' medical records on grounds of undue burden to the providers and privacy interests of the patients without addressing HIPAA or applicable state privilege laws).

**C. Authorization of Ex Parte Physician Communication by Plaintiff**

A plaintiff may expressly or impliedly authorize access to his treating physician or the relevant medical records. *See, e.g., Rudnick v. Superior Court*, 11 Cal. 924, 930 (1974). But if a patient does not consent by word or deed to disclosure, he has not waived the physician-patient privilege, authorized *ex parte* communication with his physician, or consented to disclosure of confidential information. *Id.* at 932.

**D. Authorization of Ex Parte Physician Communication by Courts**

California courts have noted that it may be appropriate for pretrial communications between defendants and a patient's former treating physician who is a prospective defense expert to be restricted to formal discovery so that the patient has a reasonable opportunity to preclude improper violation of the physician-patient privilege. *Torres v. Superior Court*, 221 Cal. App. 3d 181, 188 (1990) (disapproved of on other grounds by *Heller v. Norcal Mutual Ins. Co.*, 8 Cal. 4th 30 (1994)) (disapproved by *Heller* to the extent that it can be read to prohibit all *ex parte* contact between a physician and his or her attorneys or insurers).

**E. Local Practice Pointers**

California is stricter than many states in barring a defense attorney's *ex parte* contact with a treating physician. It is advisable to interact cautiously with a plaintiff's physician, so as to limit any appearance of impropriety. For example, always have a legal assistant communicate with the physician with respect to scheduling a deposition; even a paralegal's *ex parte* communication with a treating physician may be questionable.

**II. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS**

**A. Requirements to Obtain Testimony of Non-Party Treating Physician**

If personal records of a consumer are sought in connection with obtaining testimony of a non-party physician, the deposition subpoena must be accompanied by either the consumer's written release of

the records or proof of service of a special notice to the consumer that the records are being subpoenaed. Cal. C. Civ. Pro. § 1985.3. Service of the notice to the consumer must be completed at least ten days before the date set for production of records and at least five days before service of the subpoena on the records custodian. Cal. C. Civ. Pro. § 1985.3(b)(2), (3). The purpose of this rule is to give the consumer a chance to seek orders protecting the privacy of such records. Cal. C. Civ. Pro. § 2020.510(c), 1985.3(e).

The term “personal records” includes not only a custodian’s own records pertaining to its dealings with the consumer, but also to documents and records held for safekeeping on behalf of the consumer. *Sasson v. Katash*, 146 Cal. App. 3d 119, 124 (1983). The term “consumer” means basically any noncorporate party and can include an individual partnership of five or fewer persons, an association, or a trust. Cal. C. Civ. Pro. § 1985(a)(2).

#### **B. Witness Fee Requirements and Limits**

Witnesses subpoenaed for any deposition or hearing are entitled to fees and mileage, payable in advance. Witnesses are entitled to a \$35 fee for each day’s actual attendance and to mileage actually traveled, both ways, of twenty cents (\$.20) per mile. Gov. C., § 68093. Ordinary witness fees and mileage are allowable as costs. *See People v. MacFarlane*, 71 Cal.App.2d 535 (1945); *People v. Bowman*, 173 Cal.App.2d 416 (1959).

The matter of expert witness fees for attendance at a deposition is strictly limited by Government Code section 68092.5, subdivision (a): “A person who is not a party to the action and who is required to testify before any court . . . or in the taking of a deposition, in any civil action or proceeding, solely as to any expert opinion which he holds . . . shall receive reasonable compensation for his entire time required to travel to and from the . . . place of taking such deposition . . . . [S]uch fees shall be paid by the party requiring such witness to attend, but such fees shall not be allowable costs or disbursements.” Section 68092.5 applies to a witness’s status as an expert without regard to who called him to testify. *See, e.g., Rose v. Hertz Corp.*, 168 Cal. App.3d Supp. 6 (1985). *See also* Cal. Expert Witness Guide (Cont.Ed.Bar April Supp.1989) § 6.30, 136-37.

## **1. Statutes and Rules of Civil Procedure**

Under California Code of Civil Procedure section 1033.5, subdivision (a)(7), the prevailing party in tort litigation may recover as costs the ordinary witness fees, as defined in Government Code section 68093 and Code of Civil Procedure section 1986.5, which were incurred in deposing a witness.

## **2. Case Law**

California courts have held that ordinary witness fees do not include a treating physician's reasonable and customary hourly or daily fees that must be paid under section 2034, subdivision (i)(2) in order to take the deposition of the treating physician. *See, e.g., Baker-Hoey v. Lockheed Martin Corp.*, 111 Cal. App. 4th 592, 594 (2003). Accordingly, treating physicians who appear as witnesses are only entitled to \$35 a day, instead of their customary hourly and daily fees. *Id.* at 596.

In the absence of an order of the trial court appointing an expert witness, the fees of an expert witness are not recoverable as costs under California Code of Civil Procedure section 1032. *See Sanchez v. Bay Shores Medical Group*, 75 Cal. App. 4th 946, 950 (1999); *Desplancke v. Wilson*, 14 Cal.App.4th 631, 635-36 (1993). "The fact that an expert is necessary to present a party's case does not mean that expert has been ordered by the court for purposes of recovery of expert witness fees as costs." *Sanchez*, 75 Cal.App.4th at 950.

## **C. Local Custom and Practice**

Although a payment of more than \$35 is not required, in practice a witness fee is typically negotiated with the physician ahead of time. The fee usually represents the hourly rate a physician would earn were he not taking time off from work to provide testimony. In rare circumstances, if a witness is hostile and demands an unreasonably high witness fee, defense counsel may have to seek a court order requiring the physician to testify for a more reasonable rate.