

HAWAII

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I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

1. Past Medical Expenses

“In an action to recover medical expenses caused by a defendant’s negligence, a plaintiff must show that the medical services obtained were necessary and the charges were reasonable as required for the injuries sustained.”

Bynum v. Magno, 101 P.3d 1149, 1154–55 (Haw. 2004).

2. Future Medical Expenses

In order to permit an award for future medical expenses, a plaintiff must show with reasonable certainty that particular medical expenses will be incurred in the future, and the amount recovered is based upon the reasonable value of those services. *See Kometani v. Heath*, 431 P.2d 931, 936 (Haw. 1967) (affirming trial court instruction “which allowed the jury to consider the reasonable value of future medical expenses reasonably certain to be required in the treatment of” the plaintiff); *Condron v. Harl*, 374 P.2d 613, 619 (Haw. 1962) (requiring plaintiff to show with “reasonable certainty” that his condition would require future treatment).

B. Collateral Source Rule and Exceptions

“The ‘collateral source rule,’ in general, provides that benefits or payments received on behalf of a plaintiff, from an independent source, will not diminish recovery from the wrongdoer.” *Bynum v. Magno*, 101 P.3d 1149, 1154 (Haw. 2004). This is founded upon the notion that, “although double

compensation may result to the plaintiff, such a benefit should redound to the injured party rather than ‘become a windfall’ to the party causing the injury.” *Id.*

C. Treatment of Write-downs and Write-offs

1. Medicare and Medicaid

“The collateral source rule prohibits reducing a plaintiff’s award of damages to reflect the discounted amount paid by Medicare/Medicaid.” *Bynum v. Magno*, 101 P.3d 1149, 1157 (Haw. 2004).

2. Private Insurance

Hawaii would likely rule that write-offs and write-downs should by private insurers should not reduce a plaintiff’s recovery. The proper measure of damages depends on the reasonable value of the services rendered, and not how much the plaintiff was actually charged by the health care provider. *Bynum v. Magno*, 101 P.3d 1149, 1160–61 (Haw. 2004) (“Jurors are thus instructed that plaintiffs are entitled to compensation for medical treatment, but these damages are not limited to out-of-pocket expenses.” (citing Hawai’i Civil Jury Instr. No. 8.9)).

It should be noted, however, Hawaii has a statutory scheme relating to payments made by insurers. Under H.R.S. § 663-10, a party that has a valid lien against damages received by a plaintiff through judgment or settlement can be reimbursed by the plaintiff out of the plaintiff’s corresponding special damages. Under the statute, such a lien includes “a lien arising out of a claim for payments made or indemnified from collateral sources, including health insurance or benefits” H.R.S. § 663-10(a). Thus, although a plaintiff may be able to recover from a defendant the full amount of damage suffered, the plaintiff may have to reimburse his medical insurer for collateral payments made by the insurer.

II. EX PARTE COMMUNICATIONS WITH NON-PARTY TREATING PHYSICIANS

A. Scope of Physician-Patient Privilege and Waiver: Hawaii codified its physician-patient privilege. The general rule is:

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient’s physical, mental, or emotional condition, including alcohol or drug addiction, among oneself, the patient’s physician, and persons who are participating in the diagnosis or treatment under the direction of the physician, including members of the patient’s family.

H.R.S. § 626-1, Rule 504(b) (Hawaii Rule of Evidence 504). The privilege may be claimed by the “patient, the patient’s guardian or conservator, or the personal representative of a deceased patient.” *Id.* at 504(c). Additionally, the physician may claim the privilege, but only on behalf of the patient. *Id.*

There are a number of exceptions, however. Most importantly in this context, “[t]here is no privilege under this rule as to a communication relevant to the physical, mental, or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient’s claim or defense” *Id.* at 504(d)(3).

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

“As to judicial proceedings, HIPAA applies only to the parties involved in the proceeding and to health information obtained in discovery directly from health care entities. HIPAA also requires such health information to be returned to health care entities or be destroyed at the end of the proceeding.” *Brende v. Hara*, 153 P.3d 1109, 1114 (Haw. 2007) (citing C.F.R. § 164.512). “[I]n Hawai’i, a medical information protective order issued in a judicial proceeding must, at a minimum, provide the protections of [] HIPAA.” *Id.*

In addition to HIPAA and Hawaii’s physician-patient privilege, the state also has a constitutional privacy provision that protects disclosure of private health information outside the scope of a litigation proceeding. *See id.* at 1115–16. The interplay between the federal law, and the state constitutional and evidentiary provisions results in a situation where, although a patient may waive the right to keep personal health information private, that waiver is strictly limited to the underlying proceeding wherein the patient put at issue the medical treatment he received. *See id.* at 1116 (“There being no present legitimate need outside of the underlying litigation for petitioners’ health information produced in discovery and, because any disclosure of such information outside the litigation would be in violation of petitioners’ constitutional right to information privacy, we believe petitioners have a clear and indisputable right to the revised protective order they seek”).

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

There is no Hawaiian law directly addressing this issue. In one unpublished decision in a case in which a party directly raised the issue, the court declined to address the point because the plaintiff had not made the argument to the trial court. *See Li v. Estate of Pershing*, No. 23009, 2003 WL 22906884, *1 (Haw. Dec. 10, 2003) (“On appeal, however, Plaintiffs argue that the trial court should have excluded Dr. Melish’s opinions on the basis that *ex parte* communications between a treating physician and defense counsel are prohibited. Having raised a grounds for objection at trial that differ from those now being pressed on appeal, Plaintiffs run afoul of Hawai’i Rules of Evidence Rule 103(a)(1).”).

However, in a ruling persuasive on the issue, a Hawaiian court held that a doctor did not breach any duty of confidentiality to a patient by disclosing treatment information to federal prosecutors who were investigating the patient, who had failed to appear at trial because he checked himself into a hospital. *See Dubin v. Wakuzawa*, 970 P.2d 496, 503–04 (Haw. 1999). The court based its decision on two grounds: (1) by checking into the hospital rather than appearing for his criminal trial and thus putting his physical condition at issue, the patient/criminal defendant waived the physician-patient privilege; and (2) the court, when the patient/criminal defendant failed to appear for trial, had ordered a physical examination, and under H.R.E. 504(d)(2), such information would not have been privileged. *See id.* The court thus held “that Dr. Wakuzawa’s communications with the United States Attorney, engaged in pursuant to the federal district court order requiring that Dubin be subjected to a physical examination, were not privileged.” *Id.* at 504.

Furthermore, many jurisdictions that have a similar rule regarding waiver of the physician-patient privilege when the patient puts his medical treatment and health condition at issue allow *ex parte* communications between opposing counsel and a plaintiff’s treating physician. *See, e.g.*, 50 A.L.R. 4th 714 § 3.

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

Again, there is no Hawaii law directly addressing this issue. However, the reasoning of the Hawaii Supreme Court in *Dubin v. Wakuzawa*, 970 P.2d 496 (Haw. 1999), is persuasive authority for the

proposition that ex parte communication with a physician pursuant to a court order is appropriate. *See id.* at 504.

E. Local Practice Pointers

Because of the privacy protections existing under both federal HIPAA law and Hawaiian constitutional law, a plaintiff's attorney should seek a broadly worded protective order to prevent the use of a plaintiff's medical information outside the scope of the litigation, such as that sought and granted by the court in *Brende v. Hara*, 153 P.3d 1109, 1117 (Haw. 2007) ("The responding judge is directed to revise the February 7, 2006 qualified protective order by . . . adding a provision stating that 'none of the plaintiffs' protected health information and/or medical information obtained in discovery from any source in [this case] shall be disclosed or used for any purpose by anyone or by any entity outside of [this case] without the plaintiffs' explicit written consent thereto.'").

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

Under Hawaii Rule of Civil Procedure 45, a subpoena to compel a non-party witness to testify "shall be issued by the clerk of the circuit court of the circuit in which the action is pending" H.R.C.P. 45(a). "A subpoena may be served at any place within the State. . . . Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to such person the fees for one day's attendance and the mileage allowed by law." *Id.* at 45(c).

B. Witness Fee Requirements and Limits

1. Statutes and Rules of Civil Procedure

Under H.R.S. § 607-12: Every witness attending and testifying, or subpoenaed and attending, upon the trial of any civil cause, in any court, shall be paid the sum of \$4 for each day's attendance in court, and traveling expenses at the rate of 20 cents a mile each way. Every such witness, coming to attend upon court from any island other than that upon which the court is holding session, shall be entitled to \$6 for each day's attendance in addition to the actual round trip cost of plane or ship travel and 20 cents

for each mile actually and necessarily traveled on the ground each way. The fees of witnesses may be taxed in the bill of costs as provided by section 607-9.

Other considerations are relevant if the treating physician is going to testify as an expert. A party wishing to depose an expert witness disclosed by the opposing party is generally required to pay the expert a reasonable fee for the expert's time spent in responding to discovery, whether it be written or oral discovery. H.R.C.P. 26(b)(5)(B).

2. Case Law:

“Generally, witness fees incurred during civil trials are taxable under H.R.S. § 607-12. However, expert witness fees are not taxable as costs, absent a statute specifically allowing such an expense.” *Mist v. Westin Hotels, Inc.*, 738 P.2d 85, 92 (Haw. 1987). Other costs, such as deposition costs, “are taxable when deemed reasonable, i.e., when the depositions were necessarily obtained for use in the case.” *Id.* (internal citations omitted).

C. Local Custom and Practice

My research turned up limited information on local custom and practice regarding the testimony of non-party treating physicians. However, one source notes that it is possible for a party to save money by relying on the testimony of a treating physician to establish standards of care.⁶⁸ However, because the Hawaiian medical community is small, [m]any qualified physicians are simply unwilling to work as expert witnesses. Of those that are, a substantial percentage are not willing to testify on behalf of a plaintiff in a medical malpractice case. Compared to large metropolitan areas on the Mainland, Honolulu, and especially the neighbor islands, have relatively small medical communities. Of the small percentage of physicians who are willing to testify on behalf of a plaintiff, many are not willing to do so when the defendant is a colleague in a small medical community. For all of these reasons, it can often be quite difficult, if not impossible, to find a qualified expert here in Hawaii who is willing to testify in support

⁶⁸ See http://www.medmalhawaii.com/supporting_your_case_with_expert.htm

your case. Consequently, many plaintiffs are forced to hire experts who reside and practice on the Mainland.”⁶⁹

⁶⁹ *Id.*