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I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

1. Past Medical Expenses

In Massachusetts, a plaintiff can recover for "reasonable expenses incurred by him for medical care and nursing in the treatment and cure of his injury." *Rodgers v. Boynton*, 315 Mass. 279, 280 (1943). To recover for medical expenses, a plaintiff must prove that he has paid the medical expenses or that he has incurred liability to pay for them. *Arwshan v. Meshaka*, 288 Mass. 31, 34 (1934) (finding "a plaintiff may recover for obligations incurred whether he has satisfied them or not"). *Cf. Daniels v. Celeste*, 303 Mass. 148, 152 (1939) (finding that "the plaintiff cannot recover for the services of his wife in nursing him . . . ").

A plaintiff can prove his medical expenses by having providers submit itemized bills and reports, including hospital records and examination reports, subscribed to under penalties of perjury. Indeed, under Mass. Gen. Laws. c. 233, § 79G, itemized bills and reports "shall be admissible as evidence of the fair and reasonable charge for such services or the necessity of such services or treatments. . . ." However, under this statute, the defendant can summon the plaintiff's physician to cross-examine him about the reasonableness of his charges.

2. Future Medical Expenses

A plaintiff can recover a reasonable amount for medical expenses that are likely to arise in the future. *Cassidy v. Constantine*, 269 Mass. 56, 57-59 (1929). Traditionally, past and future medical expenses must be claimed in a single action; a plaintiff cannot bring the same claim twice for different medical expenses. *Cole v. Bay State St. Ry. Co.*, 223 Mass. 442, 443 (1916). However, a recent Massachusetts Supreme Judicial Court ("SJC") decision set forth an exception to this "single controversy rule" in the context of toxic torts. *Donovan v. Philip Morris USA, Inc.*, Civ. Action No. SJC-10409, 2009 WL 3321445 (Oct. 19, 2009). In this tobacco case, the SJC ruled that a plaintiff could bring one action against a cigarette manufacturer for a substantially-increased risk of contracting cancer and a separate, subsequent action if and when that plaintiff actually contracts cancer. *Id*. at *8. Moreover, the *Donovan* case sets forth the foundation for medical monitoring, a new type of future medical expense in Massachusetts, which takes the form of a program for medical surveillance. *Id*. at *7-8. However, medical monitoring may be challenging to obtain because to succeed, a plaintiff must prove:

> (1) The defendant's negligence (2) caused (3) the plaintiff to become exposed to a hazardous substance that produced, at least, subcellular changes that substantially increased the risk of serious disease, illness, or injury (4) for which an effective medical test for reliable early detection exists, (5) and early detection, combined with prompt and effective treatment, will significantly decrease the risk of death or the severity of the disease, illness or injury, and (6) such diagnostic medical examinations are reasonably (and periodically) necessary, conform with the standard of care, and (7) the present value of the reasonable cost of such tests and care, as of the date of the filing of the complaint.

Id.

B. Collateral Source Rule and Exceptions

Massachusetts courts follow the traditional collateral source rule - that a defendant may not show that the plaintiff has received other compensation for his injury. For example, the following amounts will usually be excluded from evidence: (a) what the plaintiff receives from an accident insurance policy; (b) what an employee receives from his employer while he is recovering; or (c) worker's compensation benefits. The purpose of the rule is to prevent jurors from finding that the plaintiff's claims are

unimportant and to prevent jurors from reducing an award for fear of a double recovery. *See Corsetti v. The Stone Company*, 483 Mass 1, 16-17 (1985); *Goldstein v. Gontarz*, 364 Mass. 800, 809-10 (1974).

However, there are exceptions. A judge may admit collateral source evidence if it is "probative of a relevant proposition." *Goldstein*, 364 Mass. at 812. For example, collateral source evidence may be allowed to impeach the plaintiff's credibility or to show a reason, other than the injury, for why the plaintiff had a prolonged absence from work. *Corsetti*, 483 Mass. at 17-18. Moreover, Mass. Gen. Laws. c. 231, § 60G contains a statutory exemption to the traditional rule by stating that the collateral source rule does not apply to special damages awarded against health care providers in medical malpractice cases.

C. Treatment of Write-downs and Write-offs

1. Medicare and Medicaid

In the medical malpractice case *Sylvestre v. Martin,* No. SUCV2003-05988, 2008 WL 82631 (Mass. Super. Jan. 4, 2008), the Superior Court examined how to treat a Medicaid write-off under Mass. Gen. Laws. c. 231, § 60G, which abolished the collateral source rule in malpractice cases. The court found that "although paid Medicaid benefits are a collateral source whose right of subrogation is based in federal law, a Medicaid writeoff is not an amount received by the plaintiff from a collateral source for purposes of § 60G(c) and therefore may be deducted from a damages award." *Sylvestre*, 2008 WL 82631 at *4. The court relied on the fact that the Medicaid write-off is an amount which was extinguished by operation of federal law, and to exempt the write-off amount from the collateral source damage reduction would defeat the legislative purpose of preventing excessive medical malpractice awards. *Id*. at *5.

2. Private Insurance

In *Scott v. Garfield*, 454 Mass. 790 (2009), the SJC found that the collateral source rule bars the introduction of discounted payments to providers. In this personal injury case involving a fall from a porch, the Court affirmed the trial judge's decision to show the jury the amounts billed by health care providers, but not show the amounts actually paid to the health care providers. *Id*. at 801 ("The collateral source rule required that the amounts actually be paid to the health care providers by the health insurer be

redacted on the medical bills admitted into evidence.”). Though the jury was not allowed to see the actual amounts paid, the Court added that “the defendants nonetheless could have instead sought to challenge the reasonableness of the amounts billed (in and of themselves) by summoning [plaintiff’s] medical providers for cross-examination with respect to the bills” in accordance with Mass. Gen. Laws. c. 233, § 79G. *Id*. at n.11. The SJC also noted that the defendants failed to offer any evidentiary proof that “the health care providers had agreed to accept as full payment some amount less than the amount billed that would have laid the foundation for such a challenge to the application of the collateral source rule.” *Id*. at 801.

However, in a concurring opinion in the *Scott* case, Judge Cordy, joined by Judge Botsford, suggested that the treatment of write-downs in Massachusetts is still open to debate:

> The judge's rulings were based largely on the jurisprudence of other jurisdictions. Massachusetts appellate courts have not had occasion to decide whether evidence of a discount from the initial charges for medical services is barred by the collateral source rule, or whether the discounted amount paid and accepted in full satisfaction of those charges is relevant and admissible on the issue of the reasonable value of the medical services for which plaintiff is entitled to recover. Because the defendants did not make a sufficient offer of proof to preserve and present the issue in this case, . . . I would hold that for future cases such evidence is not barred by the collateral source rule and may be admitted (together with the initial medical bills) for the jury's consideration of the reasonable medical expenses incurred by the plaintiff.

Id. at 802-03.

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

A. Scope of Physician-Patient Privilege and Waiver

Although a general physician-patient evidentiary privilege does not exist in Massachusetts, “a duty of confidentiality arises from the physician-patient relationship and . . . a violation of that duty, resulting in damages, gives rise to a cause of action, sounding in tort against the physician.” *Alberts v. Devine*, 395 Mass. 59, 69 (1985). As a result, e*x parte* communications with a plaintiff’s treating physicians are *prohibited* in Massachusetts. *See Schwartz v. Goldstein*, 400 Mass. 152, 154 (1987) (stating that “an opposing party should not be free to engage in clandestine, unauthorized conferences

with a plaintiff's physician"); *see also Goldstein v. United States*, 1995 WL 96959, at *1 (D.Mass. Feb. 6, 1995) (applying same rule in federal court).

The first Massachusetts case to address defense counsel's *ex parte* contact with a plaintiff's treating physician was *Tower v. Hirschhorn*, 397 Mass. 581 (1986). In this case, the SJC sustained a jury verdict against the doctor, concluding that "the jury were warranted in finding that the defendant divulged confidential medical information without the plaintiff's consent to either [personal injury defendant's counsel] or [his expert witness], or both. The jury also were warranted in finding that her actions in doing so constituted an unreasonable, substantial or serious interference with the plaintiff's privacy." *Id*. at 588. Subsequent cases addressed the legal consequences of breaching physician-patient confidentiality. For instance, in *Schwartz v. Goldstein*, the SJC decided that "[t]he remedy for breach of physician's duty of confidentiality lies in an action for damages against the physician, not in the extreme sanction of the exclusionary rule." *Schwartz*, 400 Mass at 154.

The SJC has held that a person who induces a physician to wrongfully disclose information about a patient may be held liable to the patient. *Alberts*, 395 Mass. at 70. In such a case, the plaintiff must prove that

> (1) the defendant knew or reasonably should have known of the existence of the physician-patient relationship; (2) the defendant intended to induce the physician to disclose information about the patient or the defendant reasonably should have anticipated that his actions would induce the physician to disclose such information; and (3) the defendant did not reasonably believe that the physician could disclose that information to the defendant without violating the duty of confidentiality that the physician owed the patient.

Id. at 70-71.

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

The Health Insurance Portability and Accountability Act ("HIPAA") expressly preempts a contrary state law, except when the contrary state law is more stringent than HIPAA. Therefore, until the courts provide a detailed explanation of which laws are more stringent, practitioners must conduct their own analysis. For instance, while both HIPAA and Massachusetts law require patient authorization for disclosure of records, HIPAA authorization requirements are likely to be seen as more stringent than

Massachusetts authorization requirements because HIPAA requires very specific elements in an authorization for the disclosure of patient health information for purposes other than payment, treatment, and health-care operations. *See* 45 C.F.R § 164.508(c). On the other hand, some Massachusetts privacy laws may be viewed as more stringent than HIPAA. For instance, although HIPAA generally allows medical practices to release health information in response to a subpoena without written patient authorization, some Massachusetts physicians or hospitals demand written patient authorization or a court order to release subpoenaed medical information.

C. Authorization of Ex Parte Physician Communication by Plaintiff or Courts

Though courts strongly discourage *ex parte* communications with treating physicians, a court might allow *ex parte* communications if the plaintiff authorized it. In the absence of relevant case law on the topic, practitioners are urged to reach agreement with opposing counsel before attempting this strategy.

D. Local Practice Pointers

Ex parte communications between defense counsel and plaintiff's treating physicians are not permitted. Massachusetts places a high value on confidentiality and privacy in the physician-patient relationship. A plaintiff has a cause of action against any doctor who violates that privacy, and probably against any attorney who induces him to do so.

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

Under Mass. R. Civ. P. 30(a), depositions may be taken of any of any person, regardless of whether they are a party. In general, depositions can be taken without involvement of the court. Circumstances when leave of court is required are set forth in Mass. R. Civ. P. 30(a) and 26(b) and include cases in which there is no reasonable likelihood of recovery in excess of $5,000.

There are certain exceptions, however. Communications between patients and psychotherapists are protected from disclosure by statute. *See* Mass. Gen. Laws. c. 233, § 20B. The psychotherapist-

patient privilege does have limits; for example, the privilege does not apply to circumstances in which the patient's mental or emotional condition is an element of the claim or defense. *Id.*

Mass. R. Civ. P. 45 governs the service of deposition subpoenas generally. Although practitioners typically coordinate the time and manner of service to avoid antagonizing a non-party treating physician, a subpoena should be used even if the physician has agreed to appear. This is advisable because if a subpoena is not served and the non-party treating physician fails to appear, the party who noticed the deposition may be ordered by the court to pay the reasonable expenses incurred by any party and their attorneys in attending the deposition, including reasonable attorney's fees. *See* Mass. R. Civ. P. 30(g)(2). The court clerk, a justice of the peace or a notary public may issue a deposition subpoena. The subpoena cannot be served prior to service of notice to take the deposition on all parties. *See* Mass. R. Civ. P. 45(d)(1).

B. Witness Fee Requirements and Limits

1. Statutes and Rules of Civil Procedure

Unlike the Federal Rules of Civil Procedure, Massachusetts does not impose any limits on the number of depositions that can be taken or the length of a deposition. Under Mass. R. Civ. P. 30(b)(1), however, every party must be given seven days notice before a deposition. In addition, when the subpoena is served, the fees for one day's attendance at the deposition and mileage allowed by law must be delivered to the witness. *See* Mass. Gen. Laws. c. 233, § 3; Mass. Gen. Laws. c. 262, § 29. There are limits regarding where a deposition can take place. A resident of Massachusetts cannot be required, without a court order, to attend a deposition more than fifty air miles from either his residence or his place of employment or business – whichever is closer to the place he was subpoenaed. Mass. R. Civ. P. 45(d)(2). Non-residents who are served with a subpoena in Massachusetts are only required to attend a deposition in the county where they were served the deposition subpoena or within fifty air miles of the place of service, or at such other convenient place fixed by the court. *Id.*

Under the Federal Rules, a non-party cannot be compelled to travel more than one hundred miles from the place where the person resides, is employed, or regularly transacts business in person. However,

the Local Rules of the District of Massachusetts state that Boston is a convenient place for any person who resides in the eastern counties, and that Springfield is a convenient location for any person who resides in the western counties. *See* D. Mass. Loc. R. 30.1.

2. Case Law

The SJC found traditional witness fees to be a necessity as early as 1868: "[A] person is not bound to attend court, or remain in attendance, as a witness, unless his fees have been paid or tendered to him." *Atwood v. Scott*, 99 Mass. 177, 179 (1868). The Massachusetts Rule of Professional Conduct 3.4(g) provides some general guidance on what fees are appropriate:

> A lawyer shall not . . . pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his or her testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of: (1) expenses reasonably incurred by a witness in attending or testifying; (2) reasonable compensation to a witness for loss of time in attending or testifying; (3) a reasonable fee for the professional services of an expert witness.

In addition to statutorily required appearance fees, in Massachusetts it is common practice that physicians will be paid for expenses incurred and time lost in both preparing and testifying. As a practical matter, this means that a treating physician may expect to be paid an hourly rate for time spent in deposition.

C. Local Custom and Practice

Massachusetts (and Greater Boston in particular) has earned its reputation as a major medical center in part because of the stature of its treating physicians. Perhaps for this reason, local custom and practice finds both courts and attorneys to be quite solicitous in dealing with the schedule of a practicing physician. When scheduling the deposition of a treating physician, most practitioners first contact the physician's office by phone. The doctor's secretary or office manager often acts as the gatekeeper to the doctor's calendar and is usually very familiar with the process of setting up depositions. The secretary or office manager typically works directly with you in scheduling the deposition or will notify you that you need to speak with the legal department or the physician's counsel. From this interaction, you quickly learn if physician's counsel will be involved. Of course, if you know the physician's attorney, it is best to contact the attorney first.

When speaking with the doctor's office, it is good practice to clearly explain that you represent the defendant in this lawsuit and that you are only interested in the doctor's time as a treating physician. It is also courteous to acknowledge that the doctor is very busy with patients and other obligations, so you want to pick a date, time, and place that accommodates him or her. By speaking with the doctor's secretary or office manager, you often learn some valuable information such as the specific days and hours that the doctor generally makes himself available for depositions and the days and hours that generally will not work. If you are trying to coordinate the doctor's deposition with multiple attorneys in different firms, this helps save time in the scheduling process, as you do not waste time gathering dates from other counsel that just will not work for the doctor. The secretary or office manager also will know the fee the doctor charges to attend depositions and whether they require payment in advance. Many physicians prefer that the deposition be held in their office rather than a law firm and such courtesy is routinely granted. If your treating physician practices at a Boston area hospital, most are equipped to handle depositions in a conference room that mirrors the facilities of a typical law firm.