

ACADEMY OF TRIAL LAWYERS
The 59th Annual Seminar
Admissibility of Medical Expenses
Henry J. Bevel III

A. Introduction.

In personal injury actions, plaintiffs may be entitled to recover damages for past pain and suffering, future pain and suffering, past loss of function of the body, future loss of function of the body, lost wages, loss of earning capacity, past medical expenses and future medical expenses. Since September of 2004, one of the first questions asked in discussing past medical expenses and in evaluating claims, has been “What is the PEXA number?” PEXA refers to the case of *Pexa v. Auto-Owners Insurance Company*. In discussing the admissibility of medical expenses, it is helpful to review *Pexa*.

B. *Pexa v. Auto-Owners Insurance Company*, 686 N.W.2d 150 (Iowa 2004).

Pexa v. Auto-Owners Insurance Company was an action for underinsured motorist benefits. Raymond Pexa, who was 77 years old at the time of the accident giving rise to the lawsuit, sustained injuries that included confusion, bruises to his forehead, a small laceration on his nose, and a nondisplaced pelvic fracture. Pexa was hospitalized for six days, followed by 28 days in a skilled nursing facility after the accident. The charges for the medical treatment provided to Pexa totaled \$41,544. Pexa’s health insurer and Medicare paid \$15,950.29 to satisfy the medical charges. The remaining amount of the medical charges were written off by the hospital and the medical providers.

At trial, Auto-Owners filed a motion in limine, which included a request for the trial court to prohibit evidence of the charged amount of the medical expenses. In ruling on this portion of Auto-Owner’s motion in limine, the trial court directed that the amount of the medical bills could be disclosed to the jury, but the plaintiff’s recovery would be limited to the amount actually paid to the medical providers.

The special verdict form submitted in the case required the jury to make two factual findings. First, whether the plaintiff had proved his damages were proximately caused by the accident. Second, the amount of the damages for five separate categories, including past medical expenses.

The trial court’s jury instruction for past medical expenses instructed the jury that in determining the amount of Pexa’s damages, it should consider, among other things,

[t]he reasonable value of necessary hospital charges, doctor charges and prescriptions from the date of injury to the present time. It is stipulated that the total amount of these bills is \$41,544.34 and that, due to adjustments, the amount the plaintiff may recover for this item is \$15,950.39.

Pexa, 686 N.W.2d 150 (Iowa 2004).

Before submitting the special verdict form to the jury, the trial court entered \$15,950.39 on the line provided for past medical expenses.

The amount of the verdict returned by the jury was less than the amount of the tortfeasor's automobile liability policy's limits and the court entered judgment in favor of Auto-Owners.

One of the grounds urged by the plaintiff on appeal was that the trial court erred in limiting the plaintiff's maximum recovery for past medical expenses to the amount actually paid for medical care.

In addressing the issue of whether the trial court's rulings and instructions improperly limited the evidence and incorrectly calculated the loss, the Supreme Court examined the rules governing the measurement and proof of an injured person's medical expenses. The items noted by the Court included the following:

1. An injured plaintiff may recover only the reasonable and necessary costs of medical care. Therefore, the plaintiff has the burden to prove the reasonable value of the services rendered.
2. The reasonable value of medical services can be shown by evidence of the amount paid for such services or through the testimony of a qualified expert witness."
3. The amount charged, standing alone, is not evidence of the reasonable and fair value of the services rendered.
4. The billed amount is relevant only if the figure was paid or an expert witness has testified to the reasonableness of the charges.

Pexa at 156.

The Supreme Court of Iowa agreed with Pexa that the trial court erred in limiting Pexa's proof of the reasonable value of Pexa's past medical expenses to the amount paid to and accepted by the medical providers. However, the Supreme Court concluded that this was harmless error because even if Pexa had been awarded the total of the charged medical expenses, the total of his compensatory damages would have been less than the amount Pexa had recovered from the tortfeasor and he would not have been entitled to recover underinsured motorist benefits.

It should be noted that the Supreme Court of Iowa rejected Auto-Owner's argument that an injured party's recovery for past medical expenses should be limited to the amount actually paid for those medical services. The opinion states, "[t]his position is contrary to the longstanding principle that such damages are measured by the reasonable value of medical services, and the amount paid is but one form of probative evidence on this issue. In addition, this argument fails to account for the possibility that medical charges may be

compromised for reasons other than the unreasonableness of the billed amount.” *Pexa*, 686 N.W.2d at 157.

C. Iowa Code §622.4. Medical Expenses.

Effective July 1, 2021, Iowa Code §622.4 provides:

Evidence offered to prove past medical expenses shall be limited to evidence of the amounts actually paid to satisfy the bills that have been satisfied, regardless of the source of payment, and evidence of the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied. Evidence of the amounts actually necessary to satisfy the bills that have been incurred shall not exceed the amount by which the bills could be satisfied by the claimant’s health insurance, regardless of whether such health insurance is used or will be used to satisfy the bills. This section does not impose upon any party an affirmative duty to seek a reduction in billed charges to which the party is not contractually entitled.

Note: The “regardless of the source of payment” language in §622.4 appears to abrogate the prohibition of the introduction of collateral payments pursuant “to a state or federal program or from access of the claimant or the members of the claimant’s immediate family” under Iowa Code 668.14.

D. Iowa Code §668.14. Evidence of Previous Payment or Future Right of Payment.

Iowa Code §668.14 provides:

1. In an action brought pursuant to this chapter seeking damages for personal injury, the court shall permit evidence and argument as to the previous payment or future right of payment of actual economic losses incurred or to be incurred as a result of the personal injury for necessary medical care, rehabilitation services, and custodial care except to the extent that the previous payment or future right of payment is pursuant to a state or federal program or from assets of the claimant or the members of the claimant’s immediate family.

2. If evidence and argument regarding previous payments or future rights of payment is permitted pursuant to subsection 1, the court shall also permit evidence and argument as to the costs to the claimant of procuring the previous payments or future rights of payment and as to any existing rights of indemnification or subrogation relating to the previous payments or future rights of payment.

3. If evidence or argument is permitted pursuant to subsection 1 or 2, the court shall, unless otherwise agreed to by all parties, instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating the effect of such evidence or argument on the verdict.

4. This section does not apply to actions governed by section 147.136. [Scope of recovery - medical malpractice actions].

E. Iowa Code §668.14A. Recoverable Damages for Medical Expenses.

Iowa Code §668.14A provides:

1. In an action brought to recover damages for personal injury, the damages that may be recovered by a claimant for the reasonable and necessary cost or value of medical care rendered shall not exceed the sum of the amounts actually paid by or on behalf of the injured person to the health care providers who rendered treatment and any amounts actually necessary to satisfy the medical care charges that have been incurred but not yet satisfied.

2. This section does not apply to actions governed by section 147.136.

F. Medical Expenses.

Medical expenses are the reasonable cost of necessary hospital charges, doctor charges, prescriptions, and other medical services.

G. *Foster v. Schares*, 766 N.W.2d 649 (Table), 2009 WL 606232 (Iowa Ct. App.).

Foster v. Schares, an unreported case from the Court of Appeals of Iowa, involved the defendant's appeal of a trial court's order granting the plaintiff a new trial on the issue of damages. In this case, the plaintiff cross appealed the order denying the plaintiff's motion for a new trial on all issues.

Foster arose from a pedestrian / motor vehicle collision that occurred on the campus of Hawkeye Community College. At trial, the plaintiff testified that she still had pain in numerous areas of her body that affected her daily activities and work activities. Her family physician opined that her pain was permanent in nature, that the plaintiff would require medical care and treatment for the rest of her life, and would have pain in her neck, left shoulder, rib cage, hip, thigh and right ankle areas. Physicians also testified that the charges for the plaintiff's medical treatment were fair and reasonable. The defendant did not call any medical experts at the trial. The parties stipulated that the charges for the medical bills for the plaintiff's treatment totaled \$23,368.86 and that

\$14,943.54 was the amount actually owed for the charges. The parties did not stipulate to causation.

In *Foster*, the jury assigned 49% of the fault to the plaintiff, awarded the plaintiff \$10,000.00 for past medical expenses and \$1,500.00 for past pain and suffering. The jury did not award the plaintiff damages for future medical expenses or return a verdict in favor of the plaintiff for any other damages. The damages were reduced for comparative fault, and judgment was entered in favor of the plaintiff for \$5,865.00.

In affirming the trial court's grant of a new trial on the issue of damages, the Court of Appeals of Iowa stated:

Upon our review, we cannot say Foster's medical testimony was "so contrary to natural laws, inherently improbable or unreasonable, opposed to common knowledge, inconsistent with other circumstances established in the evidence, or contradictory within itself" so as to be the subject of rejection by the jury. *Kaiser v. Stathas*, 263 N.W.2d 522, 526 (Iowa 1978). While it is true a jury is not absolutely bound by the testimony of experts, the experts' opinions are intended as an aid to the jury, and the jury may not arbitrarily, without cause, disregard them. See *Larew v. Iowa State Highway Comm'n*, 254 Iowa 1089, 1093, 120 N.W.2d 464, 464 (1963).

Foster, 2009 WL at *4.

H. *Penney v. Praxair, Inc.*, 116 F.3d 330 (8th Cir. 1997).

Penney arose from a motor vehicle accident that occurred in a construction zone. Plaintiff, Leonard Penney, was sleeping in the front passenger seat of a car when it was struck by a loaded tanker traveling at five to ten miles per hour. Mr. Penney claimed that he continued to suffer from headaches, sore neck, ringing in his ears, dizziness, vertigo and other assorted problems. This case was tried in the United States District Court for the District of South Dakota under diversity jurisdiction. The accident giving rise to the lawsuit occurred in Iowa, and Iowa law was applied. The jury returned a verdict awarding the plaintiffs \$14,602.00 for past medical expenses and \$20,000.00 for future medical expenses. The jury awarded no damages for loss of function or for pain and suffering. The plaintiffs appealed the trial court's denial of a motion for new trial and the exclusion of evidence of Leonard Penney's PET scan. Defendant, Praxair, Inc., cross appealed the district court's denial of judgment as a matter of law as to future medical expenses. The defendant claimed there was insufficient evidence in the record to support an award for future medical expenses.

In affirming the trial court's denial of the motion for judgment as a matter of law on the award of future medical expenses, the Eighth Circuit noted that the jury was presented with evidence of Leonard Penney's need for additional medical attention. This evidence

was in the form of testimony from Mr. Penney and Ms. Penney that Leonard Penney continued to suffer symptoms from the accident and that they intended to continue seeking treatment for his pain, in spite of their previous lack of success. Additionally, several of the plaintiff's doctors testified that they would require medication and treatment in the future.

In finding the record contained sufficient evidence to sustain the jury's award of future medical expenses, the court stated, "In determining the amount of future damages, the jury was presented with itemized bills of past medical expenses and instructed to consider the reasonably necessary medical expenses to be incurred in the future. From this evidence, the jury could reasonably estimate the cost of future medical expenses." *Penney*, 116 F.3d at 334.

I. *Nesbit v. Myers*, 576 N.W.2d 613 (Iowa Ct. App. 1998).

This case arises from a motor vehicle accident that occurred when a car driven by Cara Nesbit was rear ended by a truck owned by Wal-Mart and driven by William Myers. This accident occurred on December 6, 1994. Cara Nesbit received medical treatment between December 1994 and April 1995. She received no medical treatment after March 31, 1995. The plaintiff's past medical expenses totaled \$873.00. The plaintiff claimed neck injuries which continued at the time of the trial which occurred in August 1996.

Nesbit's treating physician testified that the December 1994 accident was the cause of her injuries and that his charges were fair and reasonable. This physician also opined that based on the plaintiff's continuing complaint of discomfort or dysfunction of the neck since March 1995, it was his opinion that she could expect to have a similar pattern of discomfort for the next 18 months, and in all probability it would continue in the future. The physician stated that if the plaintiff experienced discomfort, he would recommend future treatment of home therapies of exercise and ice or heat and over-the-counter anti-inflammatory medications. The physician also testified that if the plaintiff's symptoms lasted two to three days, plaintiff might require professional intervention to get the cycle stopped and suggested possible chiropractic treatment or an orthopedic surgical specialist. There was no opinion that any such treatments would be necessary and there was "absolutely no evidence of the cost of any anticipated treatments." At the close of the case, defendants moved for directed verdict on future medical expenses and also objected to the submission of future medical expenses to the jury. The motion for directed verdict was denied, as was the objection to the submission of future medical expenses to the jury.

The jury returned a verdict awarding the plaintiff a total of \$25,845.95. This amount included \$10,000.00 for future medical expenses.

In affirming the trial court's denial of the motion for directed verdict, the Court of Appeals of Iowa stated that "[w]hile a plaintiff does not necessarily have to accurately determine the cost of future medical expenses, there should be one or more qualified witnesses giving such an opinion on which a jury may reasonably fix an allowance."

Nesbit, 576 N.W.2d at 614 (citation omitted). The court of appeals held that the medical evidence in this case was sufficient enough to support a finding the plaintiff would have future problems and that these problems could be treated with over-the-counter remedies. The court of appeals held that the cost of over-the-counter remedies is a fact within the knowledge of the lay juror and a jury can fix an allowance for the future expenses of over-the-counter remedies without specific testimony to their cost.

Note that the defendants' claim that there was not substantial evidence to support an award in the amount of \$10,000.00 was not preserved for appeal, as the defendants did not file a motion for judgment notwithstanding the verdict.

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