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EDITORS’ PREFACE

The two-volume Damages was originally published in 1973. Over the past 43 years, this deskbook has been supplemented and revised numerous times. This fifth edition completely replaces the 1998 revision and 2007 cumulative supplement and reflects the many changes in the law that have occurred over the years. The Damages deskbook provides comprehensive coverage of the law governing the recovery of money damages. The deskbook covers a wide variety of legal actions giving rise to money damages, discussing the applicable elements of the claims, the requisite pleading and proof of each, and the damages recoverable. Practice tips, suggested jury instructions, and references to relevant statutory and case law are included.

We are indebted to the many authors who contributed their valuable time and expertise in revising this deskbook. We also thank the dedicated Legal Publications staff, who provided extraordinary editorial, administrative, and production services. We have enjoyed working on Damages and hope that you will find it to be an invaluable resource.

Richard A. Lee
Hon. Karsten H. Rasmussen
Heather Bowman
Editors
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§ 7.1 SCOPE OF CHAPTER

This chapter discusses the recovery, in a civil action, of damages for medical and medically related expenses incurred by an injured party. In general, a plaintiff is entitled to recover the reasonable value of all services and supplies reasonably necessary and actually provided for the diagnosis and treatment of an injury. A plaintiff may also recover an amount to compensate for those future medical and medically related services and supplies that are reasonably probable to become necessary as a result of a defendant’s conduct.

§ 7.2 RECOVERABLE MEDICAL EXPENSES

§ 7.2-1 Economic versus Noneconomic Damages


The statute defines economic damages as “objectively verifiable monetary losses,” which include “reasonable charges necessarily incurred for medical, hospital, nursing and rehabilitative services and other health care services, burial and memorial expenses.” ORS 31.710(2)(a). Damages are “objectively verifiable” when they are comprised of a monetary loss in an amount “capable of verification through objective facts,” as opposed to subjective losses incapable of empirical confirmation. DeVaux v. Presby, 136 Or App 456, 463, 902 P2d 593 (1995); see also Kahn v. Pony Express Courier Corp., 173 Or App 127, 160, 20 P3d 837, rev den, 332 Or 518 (2001) (noting that “because the legislature used the word ‘verifiable’ rather than ‘verified,’ the statute does not impose a particular quantum of proof for recovery of such damages”).

Noneconomic damages, on the other hand, are defined as “subjective, nonmonetary losses,” which include “pain, mental suffering, emotional distress, humiliation, injury to reputation, loss of care, comfort,
companionship and society, loss of consortium, inconvenience and interference with normal and usual activities apart from gainful employment.” ORS 31.710(2)(b).

By definition, medical expenses incurred up to the time of trial are economic damages. ORS 31.710(2)(a); see, e.g., State v. Haines, 238 Or App 431, 437, 242 P3d 705 (2010) (“A person incurs economic loss when the person becomes subject to an economic obligation, such as medical expenses . . .”); White v. Jubitz Corp., 219 Or App 62, 70, 182 P3d 215 (2008), aff’d, 347 Or 212, 219 P3d 566 (2009) (concluding that “reasonable charges necessarily incurred,” as used in ORS 31.710(2)(a), are those charges to which a plaintiff becomes liable or subject when the plaintiff received treatment”).

Although not specifically mentioned in the statutory definition, future medical expenses are also economic damages, because the cost of future treatment constitutes a monetary loss that will be incurred and is verifiable, at least with reference to present costs. White, 219 Or App at 70, n 6. For further discussion on recovery of future medical expenses, see § 7.2-3.

§ 7.2-2 Recovery of Medical Expenses Generally

In general, a plaintiff can recover as economic damages medical expenses incurred as a result of a defendant’s conduct, including expenses for doctors, hospital care, nursing care, and medicine. ORS 31.710(2)(a) (“reasonable charges necessarily incurred for medical, hospital, nursing and rehabilitative services and other health care services”); Mathews v. City of La Grande, 136 Or 426, 430, 299 P 999 (1931) (discussing recovery at common law); White v. Jubitz Corp., 219 Or App 62, 68–70, 182 P3d 215 (2008), aff’d, 347 Or 212, 219 P3d 566 (2009) (discussing recovery under ORS 31.710); see also Restatement (Second) of Torts § 924(c) & comment f (1979) (supplemented periodically). Recovery may include expenditures for treatment and tests performed in a reasonable effort to rule out or avert further harm, such as taking x-rays to discover or rule out bone fractures. Restatement § 919(2) & comment b.

To recover, a plaintiff must show that the medical supplies or services were actually provided, reasonable in amount, and necessary for
the treatment of conditions related to the injury. *Tuohy v. Columbia Steel Co.*, 61 Or 527, 532, 122 P 36 (1912) (“The rule is that a plaintiff in a case involving personal injuries can recover, as a part of his damages, his reasonable expenses for medicines and medical treatment, but there must be some evidence that the charges are reasonable.”); *Mathews*, 136 Or at 430 (applying the rule); *White*, 219 Or App at 68 (application of the rule remains consistent under ORS 31.710); see also *Herrell v. Johnson*, 136 Or App 68, 74, 899 P2d 759 (1995) (evidence introduced at trial sufficient to support jury’s finding that plaintiff’s chiropractic treatment was not necessitated by injury in question).

A plaintiff can recover the reasonable cost of medical care regardless of whether a bill for that care has been actually paid. *White*, 219 Or App at 68–69 (“a plaintiff seeking damages for medical expenses must establish the reasonableness of medical costs, through testimony or other evidence, beyond the existence of a medical bill,” no matter whether the expenses “were actually paid or billed”). For further discussion on issues related to proof of medical expenses, see § 7.3-4.

Aside from the obvious medical expenses, such as medical doctor, hospital, and medicine bills, a plaintiff may recover for a variety of other medically related expenses upon a showing that the expenses were actually incurred, reasonable in amount, and necessary. Such expenses may include the following:

• Physician fees for preparing medical reports for lawyers or insurance companies. *Chopp v. Miller*, 264 Or 138, 142, 504 P2d 106 (1972).

• Nursing care if shown to be “reasonably certain to be necessarily incurred in the future.” *Harris v. Hindman*, 130 Or 15, 23, 278 P 954 (1929); see also *Simpson v. Sisters of Charity of Providence in Oregon*, 284 Or 547, 565–67, 588 P2d 4 (1978) (discussing plaintiff offering evidence to establish cost of nursing care in future as element of damages).

• In some jurisdictions, a plaintiff may recover the reasonable cost of nursing care, even when gratuitously rendered by a friend or family member. See, e.g., *Johnson v. United States*, 510 F Supp 1039, 1045–46 (D Mont 1981), *aff’d in part, rev’d in part*, 704 F2d 1431 (9th Cir 1983) (victim who required 24-hour home nursing care awarded amount necessary to provide nursing care for 12 hours a day for remainder of his life, in recognition of care being given to him by his wife); *Pressey v. Patterson*, 898 F2d 1018, 1026 (5th Cir 1990) (plaintiff awarded damages representing reasonable value of equivalent unlicensed medical care by his mother, who was not a trained care giver). *But see* J.A. Connelly, Annotation, *Damages for Personal Injury or Death as Including Value of Care and Nursing Gratuitously Rendered*, 90 ALR2d 1323 § 2 (1963) (supplemented periodically) (noting “a substantial division of authority as to whether the value of nursing care or services gratuitously rendered by some person other than the injured party's spouse may be recovered”).


• Expenses for transportation, such as ambulance fees, *McDonald*, 518 NW2d at 87, and traveling to and from a physician’s office for treatment. *Blisett v. Frisby*, 249 Ark 235, 458 SW2d 735, 741 (1970) (allowing recovery of
expenses for family members visiting injured plaintiff during treatment).

- Expenses for prosthetic devices, special home equipment and furnishings, and specially equipped vehicles. See ORS 656.245 (allowing recovery of such expenses in the workers’ compensation context).

QUERY: Will a plaintiff be able to recover expenses incurred for treatment by traditional providers, such as ophthalmologists or dentists, and nontraditional providers, such as acupuncturists or spiritual healers? A plaintiff’s ability to recover for such expenses will depend on whether the specific facts of the case prove the expenses were actually incurred, reasonable in amount, and necessary.

§ 7.2-3 Future Medical Expenses

A plaintiff may recover as economic damages compensation for medical expenses that may be incurred in the future. White v. Jubitz Corp., 219 Or App 62, 70 n 6, 182 P3d 215 (2008), aff’d, 347 Or 212, 219 P3d 566 (2009). To recover for future medical expenses, a plaintiff must show that it is reasonably probable the expenses will be incurred in the future. See Harris v. Hindman, 130 Or 15, 23, 278 P 954 (1929) (“an injured party is entitled to recover for medical attention and nursing which is reasonably certain to be necessarily incurred in the future”); see also UCJI 70.03 (“Economic damages are the objectively verifiable monetary losses that the plaintiff has incurred or will probably incur.” (emphasis added)).

NOTE: For a discussion of cases specifically analyzing proof of future medical expenses resulting from back, neck, and spine injuries, see Danny R. Veilleux, Annotation, Sufficiency of Evidence to Prove Future Medical Expenses as Result of Injury to Back, Neck, or Spine, 26 ALR5th 401 (1995) (supplemented periodically).

In awarding noneconomic damages, juries may consider evidence of future complications, including future medical treatment the need for which is merely possible rather than reasonably probable. Feist v. Sears, Roebuck & Co., 267 Or 402, 410, 517 P2d 675 (1973) (allowing jury to consider plaintiff’s future susceptibility to meningitis, a disease which
evidence indicated “was not probable, but was no more than a possibility”); *Pelcha v. United Amusement Co.*, 44 Or App 675, 678, 606 P2d 1168, *rev den*, 289 Or 275 (1980) (when testimony showed future surgery was only 30 to 45 percent likely, jury could still consider possibility of that surgery “with all its resultant cost, pain and distress”); *accord Henderson v. Hercules, Inc.*, 57 Or App 791, 796–97, 646 P2d 658 (1982) (possibility of surgery was “less than 50 percent”). Thus, the showing required for a jury to consider possible future complications in awarding noneconomic damages is less than the reasonable-probability showing required for the admissibility of specific future medical expenses in awarding economic damages. See generally C. S. Wheatley, Jr., Annotation, *Future Pain and Suffering as Element of Damages for Physical Injury*, 81 ALR 423 (1932) (supplemented periodically).

§ 7.2-4 Costs of Medical Monitoring

When there is no present physical injury, a plaintiff in Oregon cannot recover economic damages for the costs of future medical monitoring to detect a disease or condition that may manifest in the future. *See Lowe v. Philip Morris USA, Inc.*, 344 Or 403, 414–15, 183 P3d 181 (2008) (rejecting recovery for cost of medical monitoring when plaintiff alleged mere risk of future injury without existence of present physical injury); *cf. Paul v. Providence Health Sys.-Oregon*, 351 Or 587, 594–97, 273 P3d 106 (2012) (holding that credit monitoring costs were not compensable damages for future harm in patients’ negligence action against healthcare provider arising from theft of sensitive information, because no present economic injury to plaintiffs).

Other jurisdictions, however, have allowed plaintiffs to recover medical-monitoring expenses under certain circumstances. *See, e.g., Sadler v. PacifiCare of Nev.*, 130 Nev Adv Op 98, 340 P3d 1264, 1270 (2014), *reh’g den* (2015) (“a plaintiff may state a cause of action for negligence with medical monitoring as the remedy without asserting that he or she has suffered a present physical injury”); *Meyer ex rel. Coplin v. Fluor Corp.*, 220 SW3d 712, 717–18 (Mo 2007) (allowing recovery of medical monitoring costs upon a showing of increased risk of disease and necessity of monitoring to reasonable degree of medical certainty for the purpose of diagnosis); *Burns v. Jaquays Min. Corp.*, 156 Ariz 375, 752
P2d 28, 33 (Ct App 1987) (same). Many of the reported medical-monitoring cases involved exposure to harmful substances such as asbestos, pesticides, or radioactive materials. See generally Allan L. Schwartz, Annotation, Recovery of Damages for Expenses of Medical Monitoring to Detect or Prevent Future Disease or Condition, 17 ALR5th 327 (1994) (supplemented periodically).

Most courts addressing recovery of costs for medical monitoring require the plaintiff to prove the following:

- Significant exposure to a proven hazardous substance through defendant’s negligence;
- As a proximate result of the exposure, a significantly increased risk of contracting a serious latent disease;
- The increased risk makes periodic diagnostic medical examinations reasonably necessary; and
- Monitoring and testing procedures exist that make early detection and treatment of the disease possible and beneficial.


An issue that arises for a plaintiff who establishes a claim for future medical monitoring is whether the plaintiff is entitled to receive a lump-sum payment from the defendant or whether a court-supervised fund should be utilized. Courts appear to prefer the latter, at least in part to ensure that the defendant pays no more than the cost of future medical monitoring actually provided to the plaintiff. See, e.g., Hansen, 858 P2d at 982; Burns, 752 P2d at 34; Ayers, 525 A2d at 313–15.
Notably, in Metro-N. Commuter R.R. Co. v. Buckley, 521 US 424, 117 S Ct 2113, 138 L Ed 2d 560 (1997), the United States Supreme Court refused to recognize a cause of action under the Federal Employers Liability Act (FELA) for future medical-monitoring costs because the plaintiff had no present physical injury and sought a lump-sum recovery. Metro-N. Commuter R.R. Co., 521 US at 438–44. Still, the Court left open the possibility that medical-monitoring costs might be recoverable under FELA if the plaintiff has a present physical injury or, if not, seeks payment of future medical-monitoring costs into a court-administered fund. Metro-N. Commuter R.R. Co., 521 US at 438–44.

§ 7.2-5 Reduction of Future Expenses to Present Value

Courts reduce any award of economic damages based on future medical expenses to present value. See, e.g., Denton v. EBI Companies, 67 Or App 339, 343, 679 P2d 301 (1984). The same probably holds true for a lump-sum award of medical-monitoring costs. See § 7.2-4. The logic underlying the present-value rule is that the plaintiff receives an amount of money that, if reasonably invested now, will provide adequate funds to compensate for the future losses. Denton, 67 Or App at 343–44. The plaintiff must prove both the gross amount of future loss and the formula to use for reducing that amount to its present value, with the risk of underestimating the present value falling on the plaintiff. Denton, 67 Or App at 344; see also Sunset Presbyterian Church v. Andersen Const. Co., 268 Or App 309, 322–23, 341 P3d 192 (2014), rev den, 357 Or 551 (2015) (plaintiff has “burden of proving its damages on any particular theory”).

Both the plaintiff and the defendant can use experts, usually economists, to explain present value and state an opinion about the amount needed now to provide for reasonable medical care in the future. But expert testimony is not required, because “assumptions and predictions about inflation, wage levels and interest rates needed to calculate present value . . . may be made by [the] factfinder without expert assistance.” Brokenshire v. Rivas & Rivas, Ltd., 142 Or App 555, 564, 922 P2d 696 (1996), rev dismissed, 327 Or 119 (1998) (citing Wilson v. B.F. Goodrich, 292 Or 626, 631, 642 P2d 644 (1982)); see also Parries v. Labato, 40 Or App 851, 863, 597 P2d 356, rev den, 287 Or 507 (1979) (“the trier of fact is not required to accept any particular expert’s contentions as to the various
assumptions of interest rates and rates of inflation”). Instead, final calculation of present value is for the trier of fact.

NOTE: Expert testimony is also not required to establish the present value of future losses in state court cases when damages are determined under federal law. See Miller v. Pac. Trawlers, Inc., 204 Or App 585, 597–601, 131 P3d 821 (2006) (applying federal law and following Fifth, Sixth, Seventh, and Eighth Circuits—the “clear weight of authority”—in holding expert testimony not required to determine present value of future losses).

§ 7.3 PLEADING, DISCOVERY, AND PROOF

§ 7.3-1 Pleading Generally

Pursuant to ORCP 18 B, a plaintiff who seeks the recovery of money or damages must state “the amount thereof” in his or her pleading. Therefore, a plaintiff who seeks to recover economic damages in the form of medical expenses must plead the amount sought with at least some degree of specificity.

This rule exists even when a plaintiff’s medical treatment is not complete by the time a lawsuit is filed. In such cases, the plaintiff is advised to specify an amount of medical expenses in his or her original complaint (perhaps the amounts then known) and thereafter move to amend once his or her full expenses are known or ascertainable. McKenzie v. Pac. Health & Life Ins. Co., 118 Or App 377, 382, 847 P2d 879 (1993), rev dismissed as improvidently granted, 318 Or 476 (1994). Failure to plead medical expenses with specificity may result in their exclusion from evidence and preclude their recovery. State Farm Fire & Cas. Co. v. Am. Family Mut. Ins. Co., 242 Or App 60, 65, 253 P3d 65 (2011).

When pleading the amount of medical expenses, the plaintiff should be aware that ORCP 67 C states that a judgment cannot “exceed[] the amount prayed for in the pleadings” absent special considerations. See Portland Gen. Elec. Co. v. Ebasco Servs., Inc., 353 Or 849, 858, 306 P3d 628 (2013) (discussing interplay between ORCP 18 B and ORCP 67 C).

NOTE: Although ORCP 18 B requires a plaintiff to plead economic damages (including medical expenses) with specificity in
the complaint, there is no requirement to plead a specific amount of noneconomic damages in the complaint. *State Farm Fire & Cas. Co.*, 242 Or App at 65 (“General damages . . . are not required to be pleaded with specificity because the opposing party is on notice as a matter of law that general damages arise from the nature of the injury alleged.”); *McKenzie*, 118 Or App at 382 (“We agree with plaintiff that he was not required to specify the amount of his noneconomic damages.”).

§ 7.3-2 Requirement of Noneconomic Damages

Although a detailed discussion of noneconomic damages is beyond the scope of this chapter (see chapter 4), a brief discussion of the rules regarding whether a plaintiff may be entitled to recover medical expenses absent a recovery of noneconomic damages is warranted.

The long-standing rule in Oregon was that an award of economic damages must be accompanied by an award of noneconomic damages; generally speaking, a jury cannot award the former without also awarding the latter. *Williams v. Funk*, 230 Or App 142, 146, 213 P3d 1275, *rev den*, 347 Or 365 (2009); *Mays v. Vejo*, 224 Or App 426, 429, 198 P3d 943 (2008), *rev den*, 346 Or 213 (2009).

However, the Oregon Supreme Court in *Wheeler v. Huston*, 288 Or 467, 605 P2d 1339 (1980), announced a major exception to this rule. Under *Wheeler*, a court may award special (economic) damages without awarding general (noneconomic) damages in the following circumstances:

1. If there is a question whether any general damages were sustained, the jury may conclude that the plaintiff suffered no general damages but did reasonably incur wage loss and/or medical expense. Such verdicts are valid and include cases in which (a) the plaintiff’s evidence of injury is subjective, (b) there is evidence that the plaintiff’s injuries for which general damages are claimed were not caused by the accident, and (c) the objective evidence of a substantial injury sustained by plaintiff is controverted by other competent evidence, or could be disbelieved by the trier of fact.

2. Even in the case where the jury must award some general damages, if there is a substantial dispute as to the amount of special damages to which the plaintiff is entitled, an unsegregated verdict in the
exact amount of the claimed specials will be upheld. Such an award may reflect a decision by the jury not to award the total amount of the claimed special damages but rather to award part of the claimed specials and some general damages. The mere identity between the award and the specials claimed would not exclude a conclusion that the verdict included an award for general damages.

Wheeler, 288 Or at 479 (footnote omitted).

After Wheeler, the law in Oregon appears to now be that a plaintiff who has suffered “substantial” injuries is necessarily entitled to recover noneconomic damages, while a plaintiff who suffered only “minor” or “insubstantial” injuries is not. Consider, for example, the following motor vehicle accident cases in which the Wheeler rule applied:

- In Williams, the jury awarded the plaintiff $4,443.94 in economic damages and $0 in noneconomic damages. Williams, 230 Or App at 144. The verdict was upheld on appeal, because the evidence permitted the jury to find that the plaintiff had suffered only minor, insubstantial injuries. Thus, an award of noneconomic damages was not required. Williams, 230 Or App at 149.

- In Fatehi v. Johnson, 207 Or App 719, 143 P3d 561, rev den, 342 Or 116 (2006), the jury awarded the plaintiff $10,000 in economic damages and $0 in noneconomic damages. Fatehi, 207 Or App at 721. Before trial, the defendant admitted that the plaintiff incurred “some minor physical injury” in the accident. Fatehi, 207 Or App at 723. But the defendant’s admission was held insufficient to entitle the plaintiff to non-economic damages. Fatehi, 207 Or App at 728. The plaintiff must suffer a “substantial, as opposed to minor, injury before he is necessarily entitled to recover.” Fatehi, 207 Or App at 728.

- In Hovey v. Davis, 120 Or App 425, 852 P2d 929, rev den, 318 Or 26 (1993), the jury returned a verdict of $2,817 in economic damages and $0 in noneconomic damages. The verdict was rejected, and the jury later returned with an award of $8,800 in noneconomic damages. The evidence at trial was
that the plaintiff had been treated for four months, leading the
court to remark: “An injury that requires treatment for four
months is a substantial injury. . . . [T]he jury was required to
award noneconomic damages.” *Hovey*, 120 Or App at 429–
30.

- In *Mays*, the jury was instructed—using UCJI 70.04—that it
must award “some” noneconomic damages if it found that the
plaintiff suffered economic damages. (The defendant did not
object to the jury being given UCJI 70.04 even though the
evidence suggested the plaintiff’s injury was insubstantial).
The jury awarded the plaintiff $3,103.30 in economic
damages but only $1 in noneconomic damages. The plaintiff
objected to the verdict on grounds that nominal damages were
insufficient as a matter of law. The trial court disagreed,
holding that $1 constituted “some” damages and accepted the
verdict. On appeal, however, the Oregon Court of Appeals
held that an award of nominal damages for pain and suffering
amounted to a finding “that plaintiff should not be compen-
sated for her noneconomic damages” and remanded the case
for a new trial. *Mays*, 224 Or App at 432. Thus, in cases in
which the plaintiff is entitled to noneconomic damages, the
jury cannot award nominal damages for pain and suffering;
the award must be something greater.

If the plaintiff believes that noneconomic damages must be awarded
as a matter of law, he or she must bring the issue to the trial court’s
attention *before* the case is submitted to the jury, either by asking for a
special instruction (such as UCJI 70.04) or moving for a directed verdict
or she will be deemed to have waived any objection if the jury later returns
a verdict awarding economic damages without a corresponding award of

**NOTE:** In *Mays* and *Williams*, the plaintiffs each moved for a
special jury instruction on the entitlement to noneconomic damages
(granted in *Mays*; denied in *Williams*). The plaintiff in *Fatehi,*
however, moved for a directed verdict on the issue of entitlement to noneconomic damages (denied).

Conversely, if the defendant believes the plaintiff is not entitled to an award of noneconomic damages (because one of the exceptions listed in Wheeler exists), he or she must oppose the plaintiff’s request for a special instruction (such as UCJI 70.04) or motion for a directed verdict on the issue of noneconomic damages. Failure to object means the defendant has waived the right to raise the issue on appeal. Mays, 224 Or App at 430.

**PRACTICE TIP:** At trial, when the evidence of injury is hotly disputed, or the evidence would support only a minor or insubstantial injury, the defendant should consider opposing any motion by the plaintiff for a special instruction or directed verdict on the issue of entitlement to noneconomic damages. If denied, the jury would be allowed to award noneconomic damages, but not required to.


### § 7.3-3 Discovery

Requests for admissions can be used to establish medical expenses. The plaintiff can serve on any other party copies of medical bills and ask for an admission by the latter of the genuineness, reasonableness, and necessity of those expenses. *See* ORCP 45. A written stipulation that the expenses were reasonable and actually incurred can also be used to substantially reduce problems of proof at trial.

### § 7.3-4 Proof of Damages

As set forth in § 7.2-2, a plaintiff must establish that the medical expenses being claimed as economic damages were for services or supplies that were actually provided, reasonable in amount, and necessary for the treatment of the injury sustained.
The long-standing rule in Oregon is that medical bills are not admissible for the purpose of proving the amount of medical expenses a plaintiff is entitled to recover. *Valdin v. Holteen*, 199 Or 134, 147, 260 P2d 504 (1953) (holding that medical bills do not constitute best evidence, nor do they come within “shop book” rule); see also L.C. Di Stasi, Jr., Annotation, *Necessity and Sufficiency, in Personal Injury or Death Action, of Evidence as to Reasonableness of Amount Charged or Paid for Accrued Medical, Nursing, or Hospital Expenses*, 12 ALR3d 1347, § 3[a] (1967) (supplemented periodically) (collecting Oregon cases for the proposition that “evidence of the amount paid for accrued medical, hospital, or nursing expenses is not in itself evidence of the reasonableness of such expenses”).

Since medical records and bills cannot be relied on, other evidence is required to prove reasonableness and necessity of the amounts charged. Options include the following:

*First*, the plaintiff’s testimony itself may be used to show (1) the cause, nature, and extent of the accident and injury; (2) the cost and details of the medical care received; and (3) the payment of bills, as evidence that the expenses were for services or supplies actually incurred. However, the plaintiff’s testimony by itself does not establish the reasonableness and necessity of the expenses; other evidence of the reasonableness of the charges is thus required. *See Valdin*, 199 Or at 147–48; *see also Mathews v. City of La Grande*, 136 Or 426, 430, 299 P 999 (1931).

*Second*, the plaintiff may rely on the testimony of a doctor to establish the reasonableness and necessity of treatment. This evidence is usually presented through questions put to the treating physician as part of the physician’s entire testimony about the case. This testimony, along with plaintiff’s testimony, can provide an adequate basis for an award of damages for medical expenses. *See Valdin*, 199 Or at 147–49.

*Third*, the plaintiff may also rely on the testimony of individuals to relate their observations about the nature of the plaintiff’s injuries and the type of treatment given. *See generally OEC 701; State v. Lerch*, 296 Or 377, 383–84, 677 P2d 678 (1984) (general discussion on admissibility of laypersons’ opinions).
NOTE: As an exception to the rule stated above, medical records and bills are admissible in arbitration hearings held pursuant to ORS 36.400 to 36.425, Oregon’s mandatory, nonbinding arbitration program. See UTCR 13.190(2)(a)–(b).

NOTE: Another exception is found in the Personal Injury Protection (PIP) statutes. If an insurer does not timely dispute medical bills submitted by a provider (i.e., within 60 days), the expenses become presumptively reasonable and necessary. ORS 742.524(1)(a). In that situation, evidence that the plaintiff actually incurred the expenses (which may come from the bills themselves) would be sufficient for a prima facie demonstration of their reasonableness and necessity.

PRACTICE TIP: Defense counsel should argue that damages for services that were received more for personal convenience or gratification (e.g., private room, phone, television, or gourmet food) rather than for treatment are not necessary and, therefore, are not recoverable.

As a practical matter, proof of the various items of economic damages may be dispensed with through stipulation. When there is no evidence to the contrary, defense counsel will frequently stipulate that the sums were reasonable and actually incurred. However, as set forth below, the question of whether the treatment was necessarily incurred usually remains an issue.

Evidence of a preexisting medical condition and course of treatment may be used to show that plaintiff’s claimed medical expenses were not necessitated by the defendant’s conduct. Herrell v. Johnson, 136 Or App 68, 73–74, 899 P2d 759 (1995). In Herrell, the Oregon Court of Appeals affirmed a defense verdict in a case in which the defendant introduced evidence of treatment for a preexisting injury. The court held that sufficient evidence existed to allow the jury to find that the medical expenses claimed by the plaintiff resulted from the preexisting condition.

Evidence of a subsequent injury also may be used to show that the plaintiff’s claimed medical expenses may not have resulted from the subject accident. Fugate v. Safeway Stores, Inc., 135 Or App 168, 174–75, 897 P2d 328 (1995) (evidence of subsequent domestic abuse suffered by
plaintiff was improperly excluded because it was relevant to show that chiropractic treatment may have been necessitated by something other than defendant’s conduct).

**Practice Note:** Medical bills can be used to refresh the recollection of a witness and may be admissible under the recorded-recollection exception to the hearsay rule if the proper foundation is established. See OEC 612; OEC 803(4); Kenneth S. Broun et al., *McCormick on Evidence* ch 28 (7th ed 2013) (supplemented periodically). If the actual medical bills are admitted, the plaintiff’s counsel should delete any references to first-party coverage, such as private insurance or workers’ compensation coverage. Defense counsel should be careful to exclude any references to the referral of delinquent accounts to collection agencies.

**§ 7.3-5 Personal Injury Protection Benefits**

In cases involving automobile accidents, personal injury protection (PIP) benefits should be pleaded and proved, even if the plaintiff’s insurer has received reimbursement from the liability insurer under ORS 742.534. *Koberstein v. Sierra Glass Co.*, 65 Or App 409, 413, 671 P2d 1190 (1983), *modified on recons*, 66 Or App 883, 675 P2d 1126, *rev den*, 297 Or 83 (1984). After trial—and pursuant to ORS 31.555—“the amount of the insured’s judgment can be reduced by the lesser of (1) the amount of the PIP payments, reduced by the percentage of the insured’s negligence found at trial, or (2) the amount of the reimbursement payment.” *Koberstein*, 65 Or App at 414; *see also Schmitz v. Sanseri*, 243 Or App 409, 414–18, 260 P3d 509, *rev den*, 350 Or 716 (2011).

If a plaintiff does not plead economic damages, so that no overlap exists between the damages awarded and the PIP compensation, no reduction of the amount awarded should occur. *Schmitz*, 243 Or App at 418 (acknowledging plaintiff is free to include or exclude PIP benefits from its economic-damages claim); *Brus v. Goodell*, 119 Or App 74, 78, 849 P2d 552 (1993).

**Note:** In *Schmitz*, the Oregon Court of Appeals was faced with a situation in which the plaintiff elected to include all medical bills in her complaint (i.e., all bills paid by her PIP insurer plus all
outstanding bills). On the eve of trial, the plaintiff moved to amend her economic-damages claim to only the outstanding bills not paid by her PIP insurer (about $7,000). At the same time, the plaintiff wanted to introduce evidence of her total medical expenses (about $32,000). To explain the gap to the jury, the plaintiff offered to admit a chart entitled “Medical Bills (Not Paid by Plaintiff’s Insurer).” Schmitz, 243 Or App at 417. On these facts, the Oregon Court of Appeals affirmed the trial court’s decision to deny the plaintiff’s motion to amend and disallow her proposed exhibit. The plaintiff’s evidence would have injected issues of insurance into the trial in violation of ORS 31.580(2) and also would have risked confusing the jury. Schmitz, 243 Or App at 418. In this instance, the proper way to try the case was to present all medical expenses to the jury and have it decide what bills were reasonable and necessary. If the jury’s verdict included amounts paid by the plaintiff’s PIP insurer, the resulting judgment could include an offset for that amount.

Finally, a trial court may not refuse to reduce a judgment by the amount of PIP benefits received based on speculation about the jury’s basis for its award. Mitchell v. Harris, 123 Or App 424, 431, 859 P2d 1196 (1993). In Mitchell, the plaintiff opposed reducing his award by the amount of PIP benefits received, because, in his view, the jury already deducted that amount. The plaintiff claimed the jury heard evidence of PIP benefits, and that he had asked the jury to take that amount into account when reaching its verdict. Mitchell, 123 Or App at 430. The Oregon Court of Appeals disagreed. Even if the jury heard evidence of PIP benefits, its verdict form did not clearly reflect that it had taken those amounts into account. Thus, “[a]ny conclusions about how the jury actually calculated plaintiff’s damages would be based on mere speculation.” Mitchell, 123 Or App at 431. For that reason, the trial court could not refuse to deduct the amount of the plaintiff’s PIP benefits from his award.

**Practice Tip:** Plaintiffs’ attorneys should include a special offset in the final judgment for the total amount of PIP reimbursement. If economic damages are not awarded, there should be no reimbursement or offset.
For a more detailed discussion of PIP-related issues, see 1 Torts § 18.6 (OSB Legal Pubs 2012) and 1 Insurance §§ 19.48–19.89 (Oregon CLE 1996 & Supp 2003).

§ 7.4 PERSONS WHO MAY RECOVER

§ 7.4-1 The Injured Person

Plaintiffs are entitled to recover damages for reasonable medical expenses incurred for treatment, regardless of whether they have actually paid for or become obligated to pay these expenses. White v. Jubitz Corp., 347 Or 212, 234, 219 P3d 566 (2009); Restatement (Second) of Torts § 924 comment f (1979) (supplemented periodically).

Practice Tip: In settling a case in which a plaintiff has incurred but not yet paid medical expenses, defense counsel should take precautions in negotiating the settlement and drafting the settlement documents to ensure that medical liens will be paid by the plaintiff out of the settlement amount, and that the plaintiff will indemnify and hold harmless the defendant against any later claims asserted by the medical providers.

§ 7.4-2 Spouse of the Injured Person

At common law, a married woman did not have the right to sue for medical expenses she incurred as a result of someone else’s wrongful act; rather, that right belonged to her husband alone since he was under a duty to furnish support to the wife. See generally A.M. Vann, Annotation, Medical Expenses Due to Injury to Wife as Recoverable by Her or by Husband, 21 ALR3d 1113 (1969) (supplemented periodically).

This is not the law in Oregon. An injured spouse has the right to sue in his or her own name. See, e.g., ORS 108.010. Further, unless one’s spouse has been appointed by the court in some fiduciary capacity (guardian, conservator, personal representative, etc.), one’s spouse cannot maintain an action to recover medical expenses incurred by the other spouse.

Note: As an exception to the rule above, a spouse can recover medical expenses incurred by the other spouse (due to a third party’s wrongful act) if the former spouse has become directly liable for
those expenses by operation of law. For example, in *Hansen v. Hayes*, 175 Or 358, 376–77, 154 P2d 202 (1944), the Oregon Supreme Court held that a surviving wife could sue in negligence to recover the medical expenses her deceased husband incurred because—by operation of the family-expense statute (now ORS 108.040)—the wife had become liable for those expenses herself.

Finally, a spouse can maintain a claim for loss of consortium against the tortfeasor, which is a separate but related claim to the injured spouse’s claim for medical expenses. For more information about claims for loss of consortium, see § 10.2-1 to § 10.2-4.

**§ 7.4-3 Parents of the Injured Person**


However, ORCP 27 A allows a child to bring an action in its own name through a guardian *ad litem*. When this happens, the child’s parents may elect to file a consent along with the guardian *ad litem’s* complaint to include in that action “the damages as . . . will reasonably and fairly compensate for the doctor, hospital and medical expenses caused by the injury.” ORS 31.700(1). If the court allows the filing, the parents may not thereafter maintain a separate action to recover those same medical expenses. ORS 31.700(2). Conversely, if the parents elect not to file a consent, the guardian *ad litem* cannot recover those medical expenses in the action brought on the child’s behalf. *Barrington ex rel. Barrington v. Sandberg*, 164 Or App 292, 298–99, 991 P2d 1071 (1999). In other words, absent express consent, the right to recover for the child’s medical expenses remains with the parents. This rule exists to prevent an accidental double recovery, such as when a child and the child’s parents each sue and recover for the same medical expenses. *Barrington*, 164 Or App at 299.

**NOTE:** Under ORS 12.160, the statute of limitations for a minor’s personal-injury claim is tolled for up to five years. The same result is unlikely for the parents’ claim to recover the child’s medical expenses. Instead, the parents’ claim likely remains governed by the two-year limitation set forth in ORS 12.110(1).
For more information about issues raised by guardians *ad litem*, see *Guardians, Conservatorships, and Transfers to Minors* § 3.14 (OSB Legal Pubs 2009).