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Evidence Code § 801.1: Leveling the playing field in personal injury cases

California's Evidence Code Section 801.1 requires all medical causation opinions – whether from plaintiffs or defendants – to meet the same “reasonable medical probability” standard, ensuring alternative theories are reliable and admissible.

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Medical experts on both sides in a personal injury case are held to the same standard for admissibility of their medical causation opinions.

However, that was not always the reality.

Traditionally, courts had required plaintiffs' experts to render their medical causation opinions to a “reasonable medical probability,” while allowing defendants' experts to advance alternative medical causation theories without being held to the same standard.

This asymmetry often came into play at the expert discovery stage. A case could appear well-positioned for the plaintiff as it approached expert depositions, only for new alternative medical causation opinions to surface that were not offered to a reasonable medical probability. In a typical scenario, a defendant's orthopedic expert may testify that a plaintiff's acute and severe spinal symptoms *might* stem from a car collision five years ago that caused no property damage and necessitated no medical treatment. And the plaintiff's brain injury? According to the defense's neurologist, the plaintiff's symptoms *could actually* be ascribed to some preexisting cognitive disorder that is not mentioned in her medical history or educational records.

Trial courts would often admit such testimony over plaintiffs' objections, allowing defense experts to offer alternative causation opin-

ions without requiring them to state that, in their expert judgment, the opinion was more likely than not true.

Kline v. Zimmer, Inc. formalized this double standard. In *Kline*, the Court of Appeals held that the requirement of proving causation to a reasonable medical probability in a personal injury action applies “only to the party bearing the burden of proof on the issue which is the subject of the opinion. . .” *Kline v. Zimmer Inc.*, (2022) 79 Cal.App.5th 123, 133.

The holding affirmed that defendants could advance alternative causation theories without satisfying the same probability standard that constrained plaintiffs, increasing the risk that jurors would treat a possibility-based opinion as having the same evidentiary weight as an opinion expressed to a reasonable medical probability.

Enter Evidence Code Section 801.1

In response, the Consumer Attorneys of California (CAOC) success-

fully sponsored California Senate Bill No. 652 (2023-2024 Reg. Sess.), which leveled the playing field.

Effective Jan. 1, 2024, Evidence Code Section 801.1 provides that in a civil case, the party without the burden of proof may only offer an alternative medical causation opinion if the party's expert is able to opine that the proffered alternative cause exists to a reasonable medical probability. *See* Cal. Evid. Cod. § 801.1(a).

The statute ensures that any alternative causation theory presented



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to a jury carries the same evidentiary reliability demanded of plaintiffs, returning expert testimony to its proper role as an aid to the factfinder rather than a vehicle for theories that may not rest on an adequate evidentiary foundation.

Essential practice tips

When a defense expert offers an alternative causation opinion at deposition, ask him or her whether the opinion is being offered to a reasonable degree of medical probability.

That will require the expert either to answer “yes” and stake his or her professional credibility on the opinion, or to concede an unwillingness to embrace the theory as more likely than not. Invoking 801.1 precludes the expert from maintaining their credibility while advancing a thinly-supported theory that may sound plausible enough to a jury. If the expert retreats from the opinion, that alternative causation theory, and – in some circumstances – its evidentiary foundation, should be excluded from trial.

Say, for example, that you represent a client in product liability case who injured his back after falling from a defective ladder. During the case’s pendency, he is involved in an extremely minor car collision that necessitated no medical treatment, but the defense’s expert opines at deposition that your client’s spinal symptoms stem from the car collision and not the ladder incident. But when challenged, the expert concedes that he cannot offer that opinion to a reasonable medical probability.

Because that expert cannot opine that the car collision caused your client’s symptoms to a reasonable medical probability, that opinion and any evidence of the subsequent collision should be excluded from trial. Evidence Code Section 801.1 bars the opinion, rendering any evidence of the subsequent collision irrelevant to the issues in the case and more prejudicial than probative.

When drafting motions in limine pursuant to Evidence Code Section

801.1, ensure that the motion is narrowly tailored to the specific opinions that are ripe for exclusion under 801.1. The broader the motion, the more likely that a judge will deny it or reserve ruling.

Every personal injury lawyer should make use of Evidence Code Section 801.1. If not, defense experts may get away with offering unsupported alternative causation theories that undermine the integrity of the civil process.

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