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NEW YEAR'S UPDATE

In This Issue

OFF TO THE SUPREME COURT ON THE ASSUMPTION OF RISK ISSUE

by Jeffrey M. Lenkov and Steven J. Renick

In July 2005, Dr. Smriti Nalwa took her two children to the California's Great America amusement park in San Jose, California. They decided to ride the Rue Le Dodge bumper car ride. As they stood in line waiting for their turn, Dr. Nalwa watched the ride. She later explained that she knew that, during the ride, she would be bumped by the other cars. She said that getting bumped by other cars was what made the ride fun. There was even a warning at the entrance to the ride explaining that "Rue Le Dodge cars are independently controlled electric vehicles. The action of this ride subjects your car to bumping."

Dr. Nalwa got into one of the bumper cars with her son. Her son drove, bumping into several other cars during the ride. Near the end of the ride, Dr. Nalwa's car was bumped from the front and then from behind. Dr. Nalwa put her left hand out to brace herself and fractured her wrist.

Dr. Nalwa sued the owners of the amusement park, alleging multiple causes of action. Cedar Fair – the defendant by virtue of having purchased the park after this incident had occurred – brought a motion for summary judgment on the ground of primary assumption of the risk. As was pointed out at the very beginning of that motion: "Even a child knows that if you go on a bumper car ride, you will get bumped by other cars. That's the whole point of a bumper car ride. ... Sustaining an injury from being bumped by another car is a risk inherent in going on a bumper car ride." The trial judge agreed and granted the motion for summary judgment.

At this point you are probably asking, why am I reading about something so elementary in this newsletter? After all, we all know that part of the fun of riding a bumper car is the bump. But the answer is that things are not always as obvious as they may first appear.

The doctrine of assumption of risk has a long history, and, as originally conceived, was "defined as the voluntary acceptance of a specific, known and appreciated risk that is or may have been caused or contributed to by the negligence of another." (Knight v. Jewett (1992) 3 Cal.4th 296, 325 (Kennard, J., dissenting). But the adoption of comparative fault in Li v. Yellow Cab Co. (1975) 13 Cal.3d 804 all but eliminated assumption of risk as a viable defense.

That changed in 1992 when the Supreme Court decided the companion cases of Knight v. Jewett supra and Ford v. Gouin (1992) 3 Cal.4th 339. With these two opinions, the Supreme Court reinvigorated the all-but-dead assumption of risk doctrine, dividing it into two components: primary assumption of risk and secondary assumption of risk. Primary assumption of risk involves activities "where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury". (Knight, supra, 3 Cal.4th at 314-315) Primary assumption of risk operates as a complete bar to the plaintiff's recovery.

In contrast, cases involving secondary assumption of risk – "where the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty" (Knight, supra, 3 Cal.4th at 315) – are viewed as comparative fault situations, where the trier of fact must apportion liability between the plaintiff and the defendant.

It was not necessary for the Supreme Court in Knight and Ford to clarify the exact scope of the primary assumption of risk doctrine; specifically, whether it applied to all activities in which people may engage, or only some activities. Unfortunately, this has led to the development of two very distinct lines of appellate cases on that issue. Which brings us back to Dr. Nalwa and the bumper cars.

Following the granting of the defendant's motion for summary judgment, Dr. Nalwa ap-

pealed. In a two-to-one decision, the Court of Appeal for the Sixth Appellate District (located in San Jose) reversed the summary judgment, holding that the primary assumption of risk doctrine was not applicable to amusement park rides. In reaching this conclusion, the two judge majority cited to several cases that have limited the application of the doctrine of primary assumption of the risk to active sports, which the majority described as activities done for "enjoyment or thrill," requiring "physical exertion as well as elements of skill," and involving "a challenge containing a potential risk of injury". (Nalwa v. Cedar Fair, L.P. (2011) 196 Cal.App.4th 566, 593; superseded by grant of review.) Based on this definition, the majority concluded that riding on a bumper car did not constitute an active sport – one where the participant controls their activity – and thus was not an activity subject to the primary assumption of risk doctrine.

Justice Wendy Clark Duffy vigorously dissented from the majority's decision. In her dissent, she relied on another line of cases, which applied the primary assumption of risk doctrine more broadly. Justice Duffy noted that while "[t]here are numerous instances in which the court in Knight uses language that might suggest that the doctrine applies only to sports, ... there are other times the [Knight] court suggests that primary assumption of risk may bar a plaintiff's injuries sustained in sports or other activities". (Nalwa, supra, 196 Cal. App.4th at 593, fn.9 [Duffy, J., dissenting].)

Justice Duffy noted that the doctrine had been applied to activities as diverse as an assault on a nurse's aide by hospital patient with dementia (Herrle v. Estate of Marshall (1996) 45 Cal.App.4th 1761, 1765), an injury suffered when spectators attempted to catch a skateboard deck thrown into a crowd (McGarry v. Sax (2008) 158 Cal.App.4th 983, 1000), and where the plaintiff was "burned when he tripped and fell into the remnants of the Burning Man effigy while participating in the festival's commemorative ritual" (Beninati v. Black Rock City, LLC (2009) 175 Cal.App.4th 650, 658-659). Based on this broader application of the primary assumption of risk doctrine, Justice Duffy concluded that the summary judgment should have been affirmed.

> "The integral conditions of the bumper car activity at issue here are such that they render the possibility of injury obvious. The fundamental nature of Rue Le Dodge is the bumping of cars. Riders are continually jostled about during the ride. The purpose of the amusement park ride is to provide thrills and entertainment to its riders from bumping fellow riders while attempting to avoid being bumped by others. . . . .
> Given that the whole point of the Rue Le Dodge ride is bumping, imposing a duty of care for any injury resulting from a participant being bumped would clearly either require that an essential aspect of the [activity] be abandoned, or else discourage vigorous participation therein. ..." (Nalwa, supra, 196 Cal.App.4th at 596 [Duffy, J., dissenting].)

Cedar Fair represented by Manning & Kass, Ellrod Ramirez, Trester LLP sought review of the Court of Appeal decision, and supporting amicus letters were submitted by some industry leaders. On August 31, 2011, the California Supreme Court granted the defendant's petition for review. Cedar Fair had argued that the Supreme Court should no longer permit two conflicting lines of cases to exist regarding the scope of the primary assumption of the risk doctrine. The Nalwa opinion and its dissent clearly showed how allowing these two competing theories to simultaneously exist enables judges to come to diametrically opposite legal conclusions from the identical set of facts. Cedar Fair explained that:

> "This situation presents tremendous difficulties for persons and companies in California that market – for profit or otherwise – activities that present inherent risks for the participants. If the primary assumption of the risk doctrine applies to their particular activity, their duty to the participants regarding those inherent risks is limited to ensuring that they don't increase those risks beyond the level inherent in the activity. But if the doctrine does not apply, then they may have an obligation to take steps to reduce, and possibly eliminate, that risk."

The two judge majority in Nalwa made it clear that they believed that this latter course is exactly the policy that California should be following.

> "Amusement park owners' liability for injuries on their rides will affect the 'nature' of rides. It will make them safer. ... [G]iven the regulatory requirements to assure safety on amusement park rides, we conclude that any effect on the rides can only be a positive one consistent with public policy." (Nalwa, supra, 196 Cal.App.4th at 579.)

Justice Duffy noted that there was a darker side to expanding liability in the manner advocated by the majority.

> "Imposing liability would have the likely effect of the amusement park either eliminating the ride altogether or altering its character to such a degree – by, for example, significantly decreasing the speed at which the minicars could operate – that the fun of bumping would be eliminated, thereby discouraging patrons from riding. Indeed, who would want to ride a tapper car at an amusement park?" (Nalwa, supra, 196 Cal.App.4th at 597 [Duffy, J., dissenting].

The Supreme Court's decision in Nalwa will have a profound effect on the application of the primary assumption of risk doctrine in California. If the approach taken by the majority in Nalwa is adopted by the Supreme Court, primary assumption of risk will become a very narrow defense, applicable only to cases arising from injuries sustained while the plaintiff is participating in an active sport.

It simply will not be applicable outside of that very limited group of cases. The doctrine will thus be inapplicable in all non-sports cases, even those where a plaintiff is injured by a risk inherent in the activity in which he or she was participating, and even if the risk was obvious and was one that the plaintiff was fully aware of. In particular, it will not apply to injuries that persons riding on bumper cars may suffer when they are bumped by cars being driven by other persons riding bumper cars, even though bumping is the very reason that all of those persons were in the cars in the first place.

On the other hand, if the Supreme Court adopts the approach taken by Justice Duffy, the primary assumption of the risk doctrine will continue to be more broadly applied than solely to active sports. In that case, the Court will have to decide just how broadly to apply the doctrine. It could decide to make the doctrine generally applicable; i.e. if a plaintiff participating in any type or category of activity is injured by a risk inherent in that particular activity, that plaintiff will be barred from bringing suit over that injury. Alternatively, the Supreme Court could decide to limit the types of activities for which the doctrine will be applicable; broader than just active sports, but narrower than all activities which carry inherent risks.

The importance of this case cannot be minimized. Every business and other organization in California that offers any sort of activity to the public will be affected by this decision, because there are risks inherent in many – perhaps most – of those activities. The decision reached by the majority in Nalwa imposed a burden on those businesses and organizations to identify and then minimize, and perhaps eliminate, those risks, or face what amounts to strict liability if a patron is injured through one of those risks. If this becomes the rule in California, every business and organization will have to decide whether they can eliminate all inherent risks from all activities they offer. It could come down to an all-or-nothing proposition for business owners. If they can't, or won't, eliminate these risks, they they will have to decide whether they must stop offering those activities entirely.

The alternative is to recognize that individuals must exercise personal responsibility when engaging in activities of all sorts. It is up to the individual to decide whether he or she wants to participate in a particular activity in the face of risks that are inherent in that activity.

The Supreme Court will make that decision when it decides Nalwa, likely sometime next year. Let's hope that the justices don't take the "bump" out of the bumper cars!

EXPLAINING JOINT AND SEVERAL LIABILITY

By Thomas R. Gill & David R. Reeder

Over the years in representing design professionals, contractors and subcontractors in construction-related cases, a question that keeps coming up is why my poor negligibly, if any, liable client can be held responsible for the majority, if not all, of a plaintiff's special damages.

In short, the answer lies within Proposition 51 and the concept of Joint and Several Liability.

The horrible fate of San Francisco Giants fan, Bryan Stow provides a perfect example of how to explain joint and several liability.

By way of introduction, on March 31 of this year, San Francisco Giants' fan, Bryan Stow, attended a San Francisco Giants versus Los Angeles Dodgers game at Dodger stadium in Los Angeles.

Apparently, Bryan was wearing San Francisco Giants' apparel and during the game, hostility arose and continued to increase throughout the game. For those non-baseball fans reading this, the San Francisco Giants/Los Angeles Dodgers rivalry is intense and can be compared to the New York Yankees/Boston Red Sox rivalry.

Unfortunately, in both situations, violence has been common.

As Bryan and his friends were leaving the stadium, they were attacked in the parking lot, and Bryan was beaten severely, into unconsciousness. Bryan was transported to the hospital where doctors instituted a medically induced coma and Bryan's prognosis has since remained questionable.

Given the severity of Bryan's injuries, it is entirely possible that Bryan will need intensive medical care for the rest of his life, which given his age, could be another 30 years or more. Medical expenses in cases such as this can be in the tens of millions of dollars, if not more. In addition to his medical expenses, Bryan's family is left without the primary bread winner, as Bryan will likely never return to his job as a paramedic. Combined, these are Bryan's "Special Damages" and they could total in the millions.

One alleged attacker has been arrested and currently resides in Los Angeles County Jail. It has been alleged that there were other attackers, but none have been arrested. The suspect in jail denies the attack, has an alibi and a number of witnesses who will confirm his alibi that he was somewhere else at the time of the attack. On top of this, it is understood that the suspect has no significant assets.

While many will argue that Bryan Stow's current condition and his special damages, loss of earnings, medical expenses, future medical expenses, etc., were solely caused by the criminal attacker, there is also an argument that not enough security was present at Dodger Stadium at the time of the attack.

There have been accusations that the Los Angeles Dodgers Club knew or should have known of the increase in violence after

games, especially games involving rivalries such as the one between San Francisco and Los Angeles. There have also been accusations that the Dodgers actually reduced the level of security at Dodger Stadium before the attack on Bryan Stow. Based on these facts, a colorable argument can be made that the Los Angeles Dodgers, its owners, managers, etc. are at least partially responsible for the attack and resulting injuries to Bryan Stow.

Bryan Stow and his family filed suit in May of 2011 in Los Angeles County Superior Court against the Los Angeles Dodgers and others. The Complaint alleges that throughout the game, Dodger fans intimidated and physically threatened Bryan Stow and his companions. The Complaint alleges that the Dodgers and their security staff failed to intervene and protect Bryan Stow. It's a safe assumption that 90% or more of the liability will be allocated to Bryan's attacker. Also, if this case goes to trial, it is entirely likely that Bryan's lawyer will convince a jury of twelve to allocate at least 1% of liability to the Los Angeles Dodgers. The special damages, which will include the multimillions of dollars in medical expenses, future medical expenses, loss of earnings and loss of future earnings will all be part of this verdict.

Under the concept of joint and several liability and pursuant to Proposition 51, should this case go to trial, and should the Los Angeles Dodgers be found as little as 1% (or even less) liability, the Los Angeles Dodgers will be found to be jointly and severally liable for the multi millions of dollars in damages which will undoubtedly be awarded in favor of the Stow family and Bryan, and against his attacker. Stated differently, since the attacker will be unable to pay, the Los Angeles Dodgers will be held responsible to pay 100% of these damages.

Bryan and his family will also undoubtedly also receive a verdict in their favor for millions of dollars in "General Damages" (i.e.: pain and suffering, loss of consortium, etc.), but fortunately for the Dodgers, the Dodgers will not be obligated to pay any more than their allocated share of those damages.

However, this is a lawsuit driven by special damages. This lawsuit could have a catastrophic effect on the future of the Los Angeles Dodgers baseball team and its owners.

As it pertains to the geotechnical field and complex construction defect cases, Bryan's story offers a clear example of the basic principles of Joint and Several Liability and Proposition 51, and may further explain of why you may have been brought into a lawsuit for a project in which you may have had only a nominal role. Nevertheless, should you find yourself in this position, it is important to have a clear and well managed defense strategy, so as to mitigate your potential exposure.

THE CALIFORNIA SUPREME COURT HOLDS THAT INSURED IS NOT LIABLE FOR UNDISCOUNTED MEDICAL BILLS WHICH WERE NEVER PAID

Ruling Based on Fact that Injured Plaintiff Suffered No Economic Loss – Collateral Source Rule "Has No Bearing" on Proper Damage Calculation

by: Scott Wm. Davenport

On August 18, 2011, the California Supreme Court issued a 6-1 opinion which held that an injured party could not recover for undiscounted sums that were never paid on behalf of the injured person "for the simple reason that the injured plaintiff did not suffer any economic loss in that amount." Howell v. Hamilton Meats & Provisions, 52 Cal. 4th 541, 548 (2011).

In so holding, the California Supreme Court concluded that the collateral source rule, which precludes deductions of compensation the plaintiff has received from other independent sources, "has no bearing on amounts that were included in a provider's bill but which the plaintiff never incurred liability because the provider, by prior agreement, accepted a lesser amount as full payment." Ibid.

Potential Impact: While some outstanding issues will need to be addressed in future cases, this decision is generally favorable to defendants and insurers and clarifies what had been a great deal of confusion regarding their potential liability. The decision will result in enormous cost savings as it limits liability to economic damages which were "both incurred and reasonable" (rather than the grossly inflated sums initially charged by medical providers which are later deeply discounted).

The Backstory

As indicated in prior HOT FLASHES and e-mail alerts issued by the firm, recently the continued viability of the decision in Hanif v. Housing Authority of Yolo County, 200 Cal.App.3d 635 (1988) has come into question. In Hanif, the Court of Appeal held that a plaintiff was entitled to recover as special damages for medical care only the amount actually paid on the plaintiff's behalf and not the amount billed. Id. at 643-644.

However, beginning in November of 2009, a number of published opinions were issued which began to chip away at this law, including: Howell v. Hamilton Meats & Provisions, Yanez v. Soma Environmental Engineering, and King v. Wilmett. In each case, the

Court of Appeal declined to follow Hanif indicating that the decision violated the collateral source rule, which precludes deduction of compensation the plaintiff received from independent sources.

The California Supreme Court granted review in Howell and issued grant and holds in the remaining cases. This de-published by operation of law all of the recent Court of Appeal opinions. California Rules of Court, Rule 8.1105, subd. (e)(1).

The Facts of the Case

In Howell, the plaintiff was seriously injured in an automobile accident. At the time of trial, plaintiff presented evidence that the total amount billed for her medical care was nearly $190,000.00. The jury returned a verdict awarding the same amount as damages for plaintiff's past medical expenses.

Following trial, defendant made a post-trial motion to reduce the past medicals by more than $130,000.00, the amount assertedly "written off" by plaintiff's medical providers pursuant to an agreement which the medical providers had with plaintiff's insurer. Plaintiff opposed the motion, arguing that such a reduction would violate the collateral source rule. The trial court granted defendant's motion and reduced plaintiff's judgment by more than $130,000.00.

The California Court of Appeal reversed the reduction order, holding it violated the collateral source rule. Thereafter, the Supreme Court granted review to resolve the issue.

The Supreme Court's Analysis

The Supreme Court began its analysis with the notion that compensatory damages are designed to compensate a person for damages which are actually suffered. Civil Code, § 3281, 3333. Where an person undergoes a treatment and remains liable for it or where another party provides actual compensation for it, the plaintiff would be able to recover those damages. Civil Code, § 3282; Helfend v. So Cal. Rapid Transit, 2 Cal.3d 1, 6 (1970).

Applying these concepts, the Court of Appeal in Hanif authorized the reduction of unpaid Medi-Cal bills which were "written off" to prevent overcompensating the plaintiff for his past medical expenses. Thereafter, in Nishihama v. City and County of San Francisco, 93 Cal.App.4th 298 (2001), the Court of Appeal applied the Hanif rationale to payments made by a private insurer.

These two cases were distinguished in Katiuzhinsky v. Perry, 152 Cal.App.4th 1288 (2007), however, which involved a situation in which a portion of plaintiffs' medical bills were sold at a discount to a medical finance company. Under these facts, the Court of Appeal held that since the plaintiff remained liable to the finance company for the entire amount, no reduction should be applied "as long as the plaintiff legitimately incurs those expenses and remains liable for their payment." Id. at 1291.

None of these cases, however, discussed whether restricting recovery to amounts actually paid by a plaintiff or on his or her behalf contravenes the collateral source rule. In declining to apply this rule to the current situation, the Supreme Court made a number of noteworthy points which will be helpful in future cases:

* In order to be recoverable, damages "must be both incurred and reasonable." Howell, 52 Cal. 4th at 555.
* To the extent there is a difference between Medi-Cal write-offs and private insurer write-downs, "[w]e find the distinction unpersuasive." Id. at 557.
* The Court left open whether a reduction should occur for donated services which were provided without fee for charitable or humanitarian reasons. Id. at 557-559.
* The tortfeasor does not obtain a "windfall" merely because the private insurer has negotiated a favorable rate. Id. at 560-563.
* A negotiated rate differential by a private insurer does not constitute a gratuitous payment to the injured plaintiff nor an arbitrary reduction which would alter this analysis. Id. at 563.
* Since plaintiff never incurred liability for the providers' full bills, plaintiff cannot recover them in damages for economic loss. Id. at 563.
* "We conclude the negotiated rate differential is not a collateral payment or benefit subject to the collateral source rule." Id. at 565.
* "Plaintiff's insurance premiums contractually guaranteed payment of her medical expenses at rates negotiated by the insurer with the providers; they did not guarantee payment of much higher rates the insurer never agreed to pay." Id. at 565.
* To the extent there is "an element of fortuity" to this rule in that a defendant who injures an insured individual would be entitled to reduction where another might not, "fortuity is a fact in life and litigation."

It is common that "identical injuries may have different economic effects on different victims." Id. at 566.

Future Admissibility Issues

Where a medical provider has accepted as full payment the amount paid, evidence of that amount is relevant to prove plaintiff's damages for past medical expenses and is admissible at trial. However, evidence that such payments were made in whole or in part remains generally inadmissible under the evidentiary aspect of the collateral source rule. Id. at 567.

Where a trial jury has heard evidence of the amount accepted as full payment but has awarded a greater sum as damages for past medical expenses, the defendant may move for a new trial on the grounds of excessive damages (Code of Civil Procedure, § 657, subd. 5) and a nonstatutory "Hanif motion" is unnecessary. Id. at 567.

Dissent

Justice Klein, the Presiding Justice of the Second Appellate District, Division Six who was sitting by designation because of the vacancy on the Supreme Court, issued the sole dissenting vote. Justice Klein lamented the real problem in this case arose due to the industry practice of artificially inflating medical charges and then deeply discounting them. Id. at 573.

Justice Klein opined that plaintiff's medical bills should not be capped at the discounted amount her medical providers agreed to accept, but rather she should be able to recover the "reasonable value or market value" of such services as determined by expert testimony at trial. Id. at 568.

Justice Klein further opined that limiting the recovery to the "reasonable value of the treatment" would "eliminate the potential mischief created by the Court of Appeal's opinion, which enables a plaintiff to recover damages for medical expenses based on potentially inflated medical bills...." Id. at 570.

Remaining Issues

Although Howell is generally good for defendants and insurers, there are potential issues in the case which may need to be addressed in future cases (and possibly future legislation). Indeed, there appears to be a great deal of room for medical providers, collection agencies, the plaintiffs' bar and other entities to enter into collusive relationships all designed to circumvent the Howell ruling (such as by drafting agreements by which an injured person remains liable for a loss, at least through the time of trial).

However, for now, the law is much more clear and, generally, more favorable to defendants and insurers.

CALIFORNIA SMALL CLAIMS COURT-LIMITS ARE ON THE RISE

By Lawrence D. Esten

In January 2012, new and higher limits will apply to certain types of Small Claims cases in California. These higher limits may prove to be efficient for insurance companies and businesses, but they might also turn out to be a fertile ground for fraudulent claims.

Small Claims Court was created to provide an accessible forum for resolving minor disputes in an expeditious, inexpensive and fair manner. The intent of the court is to provide a forum in which parties can resolve their disputes without the parties spending money on discovery and hiring attorneys to appear for them in court. While Limited Civil (former Municipal Court) has kept the maximum limit at $25,000, the California Legislature has revisited the jurisdictional maximums for Small Claims Court, with a steady trend toward increasing the maximum thresholds.

Senate Bill 221 was signed by California Governor Jerry Brown this past July, raising the limit on Small Claims cases from the old limit of $7,500 to the new limit of $10,000. There is an important limitation on this change. An exception occurs for a bodily injury claim involving an automobile accident, where the defendant has insurance coverage, which includes a duty to defend. In that matter, the limit will remain at $7,500 for the next three years. Thereafter, a sunset provision applies. In other words, after three years, the new law would also apply to such insured bodily injury lawsuits, unless the legislature acts before January 2015 to extend or delete the sunset provision.

Over the next few years, businesses should see a substantial increase in the number of premises liability personal injury lawsuits filed in Small Claims Court. There is a considerable debate in the community as to whether these increased limits will help businesses by promoting the efficient resolution of claims, or whether the enhanced thresholds will turn out to be a breeding ground for fraudulent claims. Automobile carriers will remain exempt from the increased limits for the next three years. They will undoubtably be watching to see how the new limits impact the type and quality of such lawsuits.

In Small Claims Court, parties may not be represented by attorneys, although attorneys are permitted to assist parties outside of court in preparing the prosecution or defense of a claim. With regard to businesses, they may only appear and participate in Small Claims actions through a regular employee, who is otherwise employed for purposes other than solely representing the company in Small Claims

Court. If the defendant does not like the outcome of a Small Claims trial, the defendant may file an appeal within 30 days. The appeal of a Small Claims decision is actually a whole new trial, but in the new trial, the defendant may have an attorney appear in court on their behalf to present witnesses, evidence, and argument.

While Small Claims Court is quick and efficient, be on the lookout for abuse by plaintiffs seeking to avoid the scrutiny of civil discovery. Many plaintiffs may recognize that if their case were thoroughly challenged in Court, they would likely never recover the amount that they think they can win in a quick trial in front of a Small Claims Judge.

HOT FLASH: THE MEDICARE SECONDARY PAYOR ACT

Article from Centers for Medicare & Medicaid Services

The purpose of this memorandum is to provide information regarding proposed Liability Medicare Set-Aside Arrangement (LMSA) amounts related to liability insurance (including self-insurance) settlements, judgments awards, or other payments ("settlements").

Where the beneficiary's treating physician certifies in writing that treatment for the alleged injury related to the liability insurance (including self-insurance) "settlement" has been completed as to the date of the "settlement", and that future medical items and/or services for that injury will not be required, Medicare considers its interest, with respect to future medicals for that particular "settlement", satisfied. If the beneficiary receives additional "settlement" related to the underlying injury or illness, he/she must obtain a separate physician certification for those additional "settlements."

When the treating physician makes such a certification, there is no need for the beneficiary to submit the certification or a proposed LMSA amount for review. CMS will not provide the settling parties with confirmation that Medicare's interest with respect to future medicals for that "settlement" has been satisfied. Instead, the beneficiary and/or their representative are encouraged to maintain the physician's certification.

The above referenced guidance and procedure is effective upon publication of this memorandum.

IS MEDICAL CAUSATION DETERMINED BY EXPERT WITNESS OR CACI 430 "REASONABLE PERSON" STANDARD?

By Thomas A. Trapani

Lack of causation is one of the pillars of the triad defense that Defendants have to Plaintiffs' tort and breach of contract actions. Thus, Plaintiffs know that in order to be successful, they have the burden of proving that it is more likely true than not true that (1) the Defendant breached a legal or a contractual duty that the Defendant owed to the Plaintiff, (2) the breach of duty caused harm to the Plaintiff and (3) the amount of harm that the Plaintiff suffered. Without meeting the Plaintiff's burden of proof on all three elements, the Plaintiff cannot prevail. So, it is a significant development in the law whenever any portion of this triad defense is altered in any significant way.

Many Defendants contend that the Judicial Council of California Civil Jury Instruction 430 titled: "Causation: Substantial Factor"1 has quietly, but very obtrusively, changed the law of causation in California in a way that is very prejudicial to Defendants. That change will be challenged in the First District Court of Appeal in a case that Thomas A. Trapani of our firm tried to a jury verdict in the San Francisco Superior Court last March. The trial judge ignored Mr. Trapani's objections to the use of CACI 430 as the causation instruction in a significant medical malpractice case. Mr. Trapani contended that the instruction conflicted with long established case law requiring the testimony of expert witnesses in medical causation cases, such as medical malpractice and toxic tort cases. Now, the Court of Appeal will decide whether the San Francisco County Superior Court Judge or Mr. Trapani was correct.

It has long been the law in California that in order to prove medical causation in cases presenting complicated medical causation issues, Plaintiffs must prove through the testimony of competent expert witnesses that the Defendant's breach of duty was a cause of harm to the Plaintiff. See e.g., Bockrath v. Aldrich Chemical Co. (1999) 21 Cal.4th 71, 79, 86 Cal.Rptr.2d 846, 980 P.2d 398). In the Bothrock, supra case, the California Supreme Court noted that in cases "presenting complicated . . . medical causation issues, the standard of proof ordinarily required is 'a reasonable medical probability based upon competent expert testimony that the Defendant's conduct contributed to [the] Plaintiff's injury'."

The requirement that proof of medical causation be established through expert testimony is an explicit recognition that since these cases necessarily involve the use of medical evidence, juries require the expertise of medical experts to prove that there is a causal link between the Defendant's breach and the Plaintiff's harm. Put another way, the causal connection "is sufficiently beyond common experience that the opinion of an expert" is necessary to assist the trier of fact. Evidence Code Section 801(a). This same principle applies to proof of liability in most medical malpractice cases where the testimony of an expert witness concerning the applicable standard of care is mandatory.

Even a cursory comparison between the need for expert testimony for proof of causation in medical causation cases and the "reasonable person" standard that is embodied in CACI 430 shows that the two principles are essentially incompatible. CACI 430 does not mention "reasonable medical probability" or expert testimony. Rather, CACI 430 appeals to the jury's common sense perception of what a "reasonable person would consider" about the facts presented.

While the CACI 430 standard makes sense in the ordinary personal injury lawsuit in which the factual recitations show plainly the connection between cause and effect, this standard was rejected long ago in the medical causation context. See Bockrath, supra, 21 Cal 4th at 78. Yet, trial court judges are reticent to use anything other than CACI instructions for common legal principles, such as causation. So they point to the fact that since the Judicial Commission drafted a special Rutherford-type instruction for asbestos cancer cases, but no special instructions for other medical causation cases, the Judicial Commission must have felt that CACI 430 was sufficient. We will now explain to the First District Court of Appeal why the trial judges are incorrect in their unbridled deference to the use of CACI 430 in this context.

To highlight the need for appellate resolution, Mr. Trapani faced the issue again in another San Francisco medical malpractice trial in May of 2011. This time, he convinced the trial judge that expert testimony was necessary to prove causation. However, rather than replacing the CACI 430 instruction with an instruction that more closely paralleled California case law on the issue, the trial judge simply gave the jury both instructions together. As a result, the jury was told that while expert testimony was required to establish causation, a "substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm."

So this time, the jury had to elect between two competing instructions to determine which one they wanted to follow. They were left to decide whether causation was established solely through the testimony of the expert witnesses who testified for the Plaintiff and the Defendant or whether causation was decided by what a "reasonable person" might think was a cause. It is anyone's guess which instruction they chose to follow in returning a verdict of only $2,283.90 after an eight day trial. Since the judgment was thereafter paid in full, the appellate issue that was created by the conflicting instructions in that case will not be resolved.

Since the issue has yet to be briefed in the appellate court, it will still be a long time before trial judges will receive any guidance on this important issue from the Court of Appeal. However, in the meantime, trial counsel will be able to argue that since the issue is already pending before a Court of Appeal, the trial judges should use caution before blanketly using CACI 430 in all cases and contexts.

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Happy Holidays!!

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