Appellate Reports and Cases in Brief

Recent cases of interest to members of the plaintiffs' bar

By Jeffrey Isaac Ehrlich

Howell v. Hamilton Meats & Provisions, Inc.

(2011) __ Cal.4th __ (Cal.Supreme)

Who needs to know about this case: Lawyers trying personal-injury cases involving medical expenses

Why it's important: Long-awaited decision on whether the collateral-source rule applied to differential between a health care provider's "usual" or "billed" charges and the negotiated rate that the provider agrees to accept from a health insurer. Holds that the plaintiff cannot include this rate differential as part of past medical expenses.

Synopsis: Plaintiff Howell was seriously injured in an auto accident caused by a driver for Hamilton Meats. At trial, Hamilton conceded liability and the necessity of medical treatment and contested only the amounts of Howell's economic and non-economic injuries. At trial, plaintiff's witnesses testified that the total amount billed for her medical treatment was $189,000. The jury returned this amount as Howell's past medical expenses. Hamilton made a post-trial motion under *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, to reduce the expenses to the amount actually paid by Howell's insurers. The trial court granted the motion, reducing the medical expenses to $59,000, which reflected the amount written off by the providers.

The Court of Appeal reversed the reduction order, finding that it violated the collateral-source rule. The Supreme Court granted review, and reversed. The Court claimed that it was not limiting the operation of the collateral-source rule, which states, "if an injured party receives some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor." (*Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 6,) "The rule thus dictates that an injured plaintiff may recover from the tortfeasor money an insurer has paid to medical providers on his or her behalf." The Court applied the rule to the amounts that a health insurer actually pays for the plaintiff's medical bills. "Plaintiff thus receives the benefits of the health insurance for which she paid premiums: her medical expenses have been paid per the policy, and those payments are not deducted from her tort recovery."

But the *Howell* court held that a plaintiff may recover as economic damages no more than the reasonable value of the medical services received and is not entitled to recover the reasonable value if his or her actual loss was less. If the plaintiff negotiates a discount and thereby receives services for less than might reasonably be charged, the plaintiff has not suffered a pecuniary loss or other detriment in the greater amount and therefore cannot recover damages for that amount. The same rule applies when a collateral source, such as the plaintiff's health insurer, has obtained a discount for its payments on the plaintiff's behalf. Under Howell's managed-care plan, her liability for the care provided was limited to the amounts negotiated between the plan and its providers – she was never actually liable for the full "billed" amount.

The Court rejected the view that the rule it adopted creates a windfall for the tortfeasor. Because of "the complexities of contemporary pricing and reimbursement patterns for medical providers," it is impossible to generalize that a medical provider's bills generally represent the value of the service provided, and therefore the discounted amount is an artificially-low fraction of that true value. The Court stated, "In effect, there appears to be not one market for medical services but several, with the price of services depending on the category of payer and sometimes on the particular government or business entity paying for the services. Given this state of medical economics, how a market value other than that produced by negotiation between the insurer and the provider could be identified is unclear."

The Court also rejected the argument that the negotiated rate differential was, itself, an insurance benefit, recoverable by the plaintiff. This argument hinges on the contention, which the Court rejected, that the billed amount represents the true market value of the services.

The Court held that evidence of the amounts actually paid by the insurer is generally admissible at trial, but not the fact that it was paid by an insurer. The Court expressed no opinion concerning the relevance or admissibility of the billed amount on other issues, such as noneconomic damages or future medical expenses.

The Court further held that if a jury hears evidence of the amount accepted as full payment by the medical provider, but awards more, the defendant can move for a new trial on the issue of excessive damages. There is no need for a nonstatutory "*Hanif*" motion to reduce the award. The trial court, if it grants the new trial motion, may permit the plaintiff to choose between accepting reduced damages or undertaking a new trial. The decision was 8-1, with all members of the Court in the majority. The dissent was

written by Appellate Justice Joan Dempsey Klein, sitting by designation.

Seabright Insurance Co. v. US Airways, Inc.

(2011) __ Cal.4th __ (Cal. Supreme)

Who needs to know about this case: Lawyers handling claims involving employees of independent contractors, who planned to rely on a violation of Cal/OSHA regulations under a non-delegable duty theory

Why it's important: Greatly limits the non-delegable duty theory with respect to compliance with Cal/OSHA standards. Holds that those who hire an independent contractor implicitly delegate to the contractor the duty to comply with the governing Cal/OSHA regulations. Expands the *Privette* rule to cases where the party who hires the contractor fails to comply with Cal/OSHA requirements, and the injury occurs as a result.

Synopsis: Generally, when employees of independent contractors are injured in the workplace, they cannot sue the party that hired the contractor to do the work. (*Privette v. Superior Court* (1993) 5 Cal.4th 689.)

By hiring an independent contractor, the hirer implicitly delegates to the contractor any tort law duty the hirer owes to the contractor's employees to ensure the safety of the specific workplace that is the subject of the contract. That implicit delegation includes any tort law duty the hirer owes to the contractor's employees to comply with applicable statutory or regulatory safety requirements. While this delegation does not include the tort law duty the hirer owes *to its own employees* to comply with the same safety requirements, under the definition of "employer" that applies to California's workplace safety laws (see Lab.Code, § 6304), the employees of an independent contractor are not considered to be the hirer's own employees.

Here, US Airways uses a conveyor to move luggage at SFO airport. The airport actually owns the conveyor, but US Airways uses it under a permit and is responsible for its maintenance. US Airways hired an independent contractor, Aubry Co., to maintain and repair the conveyor. Aubry's employee, Verdon, was inspecting the conveyor and was injured when his arm was caught in a "pinch point" that should have been guarded under Cal/OSHA regulations. Verdon and Seabright, Aubry's worker's compensation carrier, sued US Airways for negligence and premises liability.

The Court held that by hiring Aubry, US Airways implicitly delegated to Aubry the duties it owed to Aubry's employees to comply with Cal/OSHA safety requirements: "When in this case defendant U.S. Airways hired independent contractor Aubry to maintain and repair the conveyor, U.S. Airways presumptively delegated to Aubry any tort law duty of care the airline had under Cal/OSHA and its regulations to ensure workplace safety for the benefit of Aubry's employees. The delegation – which, as . . . is implied as an incident of an independent contractor's hiring – included a duty to identify the absence of the safety guards required by Cal/OSHA regulations and to take reasonable steps to address that hazard."

The Court explained that it was not suggesting that US Airways could delegate to Aubry its pre-existing duty to care owed to US Airways' own employees. But under the definition of "employer" in the Labor Code section 6304, the employees of an independent contractor like Aubry are not considered to be the hirer's own employees. Accordingly, the plaintiffs cannot recover in tort from US Airways on a theory that Verdon's workplace injury resulted from US Airway's breach of what plaintiffs describe as a non-delegable duty under the Cal/OSHA regulations to provide safety guards on the conveyor.

Short(er) takes

HMO bad-faith; vicarious liability; Health & Safety Code section 1371.25: *Martin v. PacifiCare* (2011) __ Cal.App.4th __ (4th Dist. Div. 3)

Health & Safety Code section 1371.25 provides that a health care service plan and its contracted providers (such as the medical groups who provide care to HMO members) are each liable for their own wrongs, but not liable for the acts or omissions, or the cost of defending others. *Watanabe v. California Physicians' Service* (2008) 169 Cal.App.4th 56 held that this statute eliminated any claim against an HMO based on vicarious liability for the wrongs committed by its contracted providers. The *Martin* court agreed, affirming a nonsuit against Pacificare because it found that plaintiff's claims all arose from the failure of a contracted medical group, Bright, to provide timely, proper utilization review. Because the plaintiffs did not submit an appeal of Bright's decision to PacifiCare, they could not hold PacifiCare liable for Bright's conduct in failing to provide the care that PacifiCare promised in its plan. *Watanabe* refused to consider the legislative history of section 1371.25, which plaintiffs argued supported their position that the statute was not intended to bar vicarious liability. The *Martin* court considered the legislative history, and concluded that it was consistent with the language in the statute.

ERISA; Mental Health Parity Act; Medically Necessary treatment; *Harlick v. Blue Shield of California* (9th Cir. 2011) __ F.3d __.

The California Mental Health Parity Act (Health & Saf. Code, § 1374.72) requires every health care service plan to "*provide coverage for the diagnosis and medically necessary treatment of severe mental illnesses* of a person of any age... under the same terms and conditions applied to other medical conditions as specified in subdivision (c)." [Subdivision (c) refers to lifetime maximum benefits, copayments, and deductibles.] Blue Shield contended that residential care is not a benefit that its policy provides, and is not a mandated benefit under the Parity Act; therefore it was not required to provide it, even if it was medically necessary. The Ninth Circuit rejected this view, holding that the Act

requires health plans to provide "all medically necessary treatment" for the nine enumerated "severe mental illnesses" under the same financial terms as those applied to physical illnesses. The court went on to conclude that the residential treatment for plaintiff's anorexia nervosa was medically necessary, and therefore Blue Shield was required to cover it.

MICRA; constitutional attack on MICRA limits: *Stinnett v. Tam* (2011) __ Cal.App.4th __ (Fifth Dist.)

Holley Stinett sued Tony Tam, M.D., for the wrongful death of her husband Stanley, due to medical negligence. The trial court reduced the jury's $6 million award for non-economic damages to $250,000, as required by MICRA. On appeal, Stinnett contended that the reduction of her noneconomic damages constituted: (1) a violation of her right to equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution and by article I, section 7, subdivision (a) of the California Constitution; and (2) a violation of her right to a jury trial under article I, section 16 of the California Constitution. The court rejected these arguments. The court declined to re-evaluate the constitutionality of MICRA, which has already been determined by the California Supreme Court, based on changed circumstances since the statute was enacted and evaluated.

In dissent, Justice Dawson argued that because the trial court ruled against Stinnett as a matter of law, without allowing her to introduce evidence, she was effectively foreclosed from making her equal-protection challenge to the statute. The dissent would have remanded to the trial court to allow her to introduce the evidence she contended supported her argument.


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