

Appellate Reports

A look at Prop 51, battery versus med mal, the sudden-emergency doctrine in auto accidents, and genuine-dispute doctrine in health insurance

By Jeffrey I. Ehrlich

Short(er) takes

Proposition 51; reduction of intentional tortfeasor's liability based on negligence of other actors: *BB v. County of Los Angeles* (2020) 10 Cal.5th 1 (California Supreme Court)

While attempting to arrest Darren Burley, LA County Sheriffs Department deputies scuffled with him, tazed him, and ultimately pinned him to the ground while they handcuffed his hands behind his back and tied his ankles together. Once he was in this position, they knelt on his back with their knees. Burley's heart stopped beating and he died 10 days later. A jury found that one deputy, David Aviles, committed battery by using unreasonable force against Burley. Although the jury found Aviles only 20 percent responsible for Burley's death, the trial court entered judgment against him for the entire $8 million award of non-economic damages, on the ground that Proposition 51 (Civil Code § 1431.2, subd. (a)) did not apply against an intentional tortfeasor. The Court of Appeal reversed, finding that Proposition 51 applied. The Supreme Court granted review and reinstated the trial court's judgment, holding that "section 1431.2, subdivision (a), does not authorize a reduction in the liability of intentional tortfeasors for non-economic damages based on the extent to which the negligence of other actors — including the plaintiffs, any codefendants, injured parties, and nonparties — contributed to the injuries in question."

In a footnote, the Court also stated, "We express no opinion on whether negligent tortfeasors may, under section 1431.2, subdivision (a), obtain a reduction in their liability for non-economic damages based on the extent to which an intentional tortfeasor contributed to the injured party's injuries. We also express no opinion on whether, for policy reasons, existing common law principles of comparative fault should be changed vis-à-vis intentional tortfeasors."

Battery versus medical malpractice; MICRA; excessive damages; CCP 998 offers: *Burchell v. Faculty Physicians & Surgeons of Loma Linda University School of Medicine* (2020) _ Cal.App.5th _ (Fourth Distr., Div. 2)

Plaintiff Burchell, then 41, underwent what was supposed to be a simple, outpatient procedure to have a small mass removed from his scrotum for testing. His surgeon, Barker, discovered that the mass was more extensive than expected, involving not only the scrotum but also the penis. Barker believed that the mass was malignant. Without consulting either Burchell (who was under anesthesia) or the person he had designated as his medical proxy, Barker removed the mass from both the scrotum and the penis, a different and substantially more invasive procedure than had been contemplated. Barker knew that the surgery would render Burchell impotent. It did, and Burchell also suffered serious side effects, some of which are permanent and irreversible. The mass turned out to be benign.

Burchell sued Barker and his employer for both medical battery and medical negligence. In May 2017, Burchell served Barker and his employer with a section 998 offer for $1.5 million. The defendants did not accept it. The jury found in favor of Burchell on both claims, awarding him $4 million in past non-economic damages and $5.25 million in future non-economic damages. Based on the 998 offer, the court also awarded over $1 million in prejudgment interest.

The appellate court affirmed the damage award but reversed the interest award, finding that the 998 offer was invalid.

On the damages, the court held that (a) Barker's conduct constituted medical battery and was therefore not subject to the MICRA cap on non-economic damages and (b) the $9.2 million award for non-economic damages was not excessive. On the latter issue, the court found that the defendants' attempt to rely on statistics to show that the award was excessive was unpersuasive, and that its contention that there must be some "reasonable relationship" between the economic and non-economic damages "runs contrary to established law."

On the 998 offer, the court held that it was invalid because it was conditioned on both defendants accepting it. "By framing the offer to settle in the conjunctive, Burchell made it effectively impossible for either party to accept the offer, even if so inclined, because the offer required an entity that was not responsible for Barker's actions to accept liability."

Sudden-emergency doctrine; "which" emergency is relevant? *Abdulkadhim v. Wu* (2020) 53 Cal.App.5th 298 (Second Dist., Div. 1.)

At 1:00 a.m. defendant Tommy Wu was driving an SUV between 60 and 70 mph westbound on Interstate 10 near Rosemead. Behind him was decedent Jasim Al-Kuraishi. Wu saw a car stopped in the lane about 20 to 30 car lengths ahead. He changed lanes to the left, entering the HOV lanes and passed the stopped vehicle. When he was 300 to 400 feet past the vehicle, he saw Al-Kuraishi's vehicle crash into the stopped car. The impact caused Al-Kuraishi's car to leave the lane, where it was hit by another car at high speed. After seeing the accident in his rear-view mirror, Wu stopped and called 911. A paramedic pronounced Al-Kuraishi dead at the scene.

Al-Kuraishi's wife, Halah Jawad Abdulkadhim, sued the driver and owner of the stopped vehicle as well as the driver and owner of the vehicle that hit Al-Kuraaishi's car. She later filed a Doe amendment to add Wu as a defendant. Wu moved for summary judgment based on the sudden-emergency doctrine. The trial court granted the motion. Affirmed.

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Under the "sudden emergency" or "imminent peril" doctrine, "a person who, without negligence on his part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to himself or to others, is not expected nor required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments." The trial court relied on this doctrine to find that Wu had a defense that defeated Abdulkadhim's negligence cause of action against him.

On appeal, the parties disagreed on which "emergency" the doctrine should apply to. Wu contended that it was the stopped car in the lane ahead of him. Abdulkadhim countered that the emergency was Al-Kuraishi's inability to see the stopped car until it was too late because of Wu's lane change. The court agreed with Wu. "An emergency or peril under the sudden emergency or imminent peril doctrine is a set of facts presented to the person alleged to have been negligent. It is that actor's behavior that the doctrine excuses. [Citations omitted.] It is irrelevant for purposes of the sudden emergency doctrine whether Wu's lane change created a dangerous situation for Al-Kuraishi or anyone else; the only relevant emergency is the one Wu faced."

Insurance bad faith; genuine-dispute doctrine; Mental Health Parity Act; Independent Medical Review: *Ghazarian v. Magellan Health, Inc.* (2020) 53 Cal.App.5th 171 (Fourth Dist., Div. 3.)

Plaintiff's son, A.G., has autism. He receives applied behavior analysis (ABA) therapy under a health-insurance policy provided by Blue Shield. The policy's mental-health benefits are administered by Magellan. By law, the policy must provide A.G. with all medically necessary ABA therapy. Before he turned seven years old, Blue Shield and Magellan approved him for 157 hours of ABA therapy per month. But shortly after his seventh birthday, they reduced the approved hours to 81 hours per month, claiming that only the reduced amount was medically necessary. At the plaintiffs' request, the Department of Managed Health Care conducted an independent medical review (IMR) of the denial. Two of the three independent physician reviewers disagreed with the denial, while the other agreed. As a result, the Department ordered Blue Shield to reverse the denial and authorize the requested care. Plaintiffs then filed suit against Blue Shield and Magellan for insurance bad faith (breach of the implied covenant of good faith and fair dealing, intentional infliction of emotional distress and unfair business practices). Primarily, plaintiffs allege that the defendants have adopted unfair medical-necessity guidelines that categorically reduce the amount of ABA therapy autistic children receive once they turn seven years old, regardless of medical need. Both defendants moved for summary judgment, which was granted. Reversed on the bad-faith and UCL claims.

The court found that there are factual disputes as to the fairness of defendants' evaluation. In particular, the medical necessity standards defendants used to deny plaintiffs' claim appear to arbitrarily reduce ABA therapy for children once they turn seven. There are questions of fact as to the reasonability of these standards. If defendants used unfair criteria to evaluate plaintiffs' claim, they did not fairly evaluate it and may be liable for bad faith.

The court rejected Blue Shield's attempt to rely on the genuine-dispute doctrine based on the fact that one of the three doctors on the IMR panel agreed with its denial. The court explained, "for the genuine dispute rule to apply, Blue Shield's denial must be founded on a basis that is reasonable under all the circumstances. . . . The undisputed record must show Blue Shield fairly and thoroughly evaluated plaintiffs' claim and its denial was reached reasonably and in good faith. The record does not show this. [T]here are triable issues as to the reasonableness of Blue Shield's medical necessity guidelines. In other words, there are questions of fact as to whether Blue Shield fairly evaluated plaintiffs' claim and reached its denial reasonably and in good faith. Plaintiffs' claim was not fairly evaluated if Blue Shield denied it based on unfair criteria. Although one physician on the IMR panel arrived at the same conclusion as Blue Shield, that physician did not apply or evaluate Blue Shield's medical necessity criteria. As such, this evidence does not show that Blue Shield acted reasonably as a matter of law."



Ehrlich

Jeffrey I. Ehrlich is the principal of the Ehrlich Law Firm, *in Claremont, California. He is a cum laude graduate of the Harvard Law School, a certified appellate specialist by the California Board of Legal Specialization, and a member of the CAALA Board of Governors. He is the editor-in-chief of Advocate magazine and a two-time recipient of the CAALA Appellate Attorney of the Year award.*

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