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Quick Links:

Volume 5, Issue 3

About Us

Services

Newsletter archives

Contact Us

Courts Get Tougher on Billed Amounts as Medical Damages

Three years ago, the California Supreme Court issued one of its most significant personal injury decisions in some time. In *Howell v. Hamilton Meats & Provisions, Inc.*, it ruled that an injured plaintiff whose medical expenses are covered by insurance may not collect more in damages than his health insurer actually paid his doctors and hospitals. The much larger amounts the doctors and hospitals billed are not relevant to calculate the "reasonable value" of their services, the court held.

In some decisions since, the state Courts of Appeal have been reinforcing and broadening the holding, including applying its reasoning to calculating future expenses and to cases involving Medicare rather than private insurance.

One particularly interesting decision in the area, *Dodd v. Cruz*, held that a plaintiff can't hide the discounted amount actually accepted by the medical provider by bringing in a third party "factor" to buy the patient's promise of future payment. This newsletter described that ruling in a recent issue. But the Supreme Court depublished that decision in June, meaning it may no longer be cited in other cases.

Nonetheless, the trend of *Howell* expansion continued in two new decisions this summer. The first case applied the Supreme Court's reasoning well outside the injury litigation area to a dispute between an insurer and a hospital over reimbursement rates. The second extended the *Howell* limitation on damages to a case in which the plaintiffs' providers were anticipating payment from their liens against the plaintiffs' potential damages rather than from insurance coverage.

Howell and related decisions all point out that hospitals typically contract with health insurers to accept payment rates far below what the hospitals bill. But the first of the new decisions involves a situation in which there was no contract.

The children's hospital in Madera billed Blue Cross $10.8 million for treating a certain class of patients over a 10-month period, but the insurer only paid it $4.4 million. A jury awarded the hospital the difference. *Children's Hospital Central California v. Blue Cross*

Under state regulations, when a hospital-insurer contract has expired, the insurer must pay the "reasonable and customary value" of the hospital's services. The hospital argued, and the trial judge agreed, that its "charge master" schedule of standard charges was the only evidence needed to show what was reasonable. However, evidence also showed that fewer than 5 percent of payers overall actually paid the charge master rate.

On appeal, the appellate court held the trial judge should have allowed Blue Cross to discover and tell the jury how much those others had paid. "[E]vidence regarding the range of fees that Hospital accepts … is relevant to the reasonable value of those services," it held. But contrary to *Howell* and other decisions, the court here held that the "full range" of fees is relevant, including the full billed amounts.

Another way to analyze reasonable value would be under "quantum meruit principles," the court concluded. With that approach, "rates are relevant if they reflect a willing buyer and a willing seller negotiating at arm's length."

Although the decision could be argued to apply only to disputes under these hospital-insurer regulations, it alternatively could be cited to support calculating the reasonable value of medical services from the whole range of accepted payments.

The second recent case arose from a three-vehicle rear-ender accident in heavy traffic. The couple in the middle vehicle, a big-rig tractor, suffered back injuries. Both had surgery about 2½ years after the accident, and neither has worked since. *Ochoa v. Dorado*

A jury awarded them nearly $2.8 million, which included a little more than $800,000 for past medical expenses based solely on their chiropractors' and doctors' bills.

Both sides appealed, but the Court of Appeal sent the case back to fix several procedural problems, including the fact that no formal judgment had been entered. Even so, the appellate panel offered guidance on a couple of important issues, including calculating the value of medical services.

The court noted that *Howell* held that "an injured plaintiff whose medical expenses are paid by private insurance can recover damages for past medical expenses in an amount no greater than the amount that the plaintiff's medical providers, pursuant to prior agreement, accepted as full payment for the services."

In this case, however, the providers' bills remained unpaid, apparently because the doctors and chiropractors had accepted liens from their patients. For the same reason, there was there no prior agreement to pay a set amount.

But those differences made no difference to the Court of Appeal.

"[T]he full amount billed, but unpaid, for past medical services is not relevant to the reasonable value of the services provided," it held. The reasoning in *Howell* and other cases "compel the conclusion that the same rule applies equally in circumstances where there was no such prior agreement."

Finally, the court ruled that the plaintiffs' treating physician could offer his opinion about the reasonable value of his services, even though he had not been designated as an expert.

Court Says Stores Have No Duty to Keep Defibrilators at Hand

Public health experts estimate that as many as 50,000 lives might be saved every year if those heart-shocking devices called automatic external defibrillators, or AEDs, were widely available. Proponents of AEDs believe all public buildings, including stores, restaurants and government facilities, should have them.

But while that might be a good idea, according to the California Supreme Court, not even very large retail outlets have a legal duty to keep AEDs on hand and staff trained to use them. A store "owes no common law duty to its customers to acquire and make available an AED," the court held. *Verdugo v. Target Corp.*

The case began with the death from cardiac arrest of a woman shopping at a Target in Pico Rivera. It had taken paramedics several minutes to get to the store and several more to make their way through to the woman.

Her mother and brother sued Target, contending that because so many people shop at Target, a heart attack was reasonably foreseeable. They said an automatic defibrillator "was an essential element of the life-saving first aid" the story was obligated to provide.

A federal trial judge rejected their contention, but when the family appealed, the 9th U.S. Circuit Court of Appeals asked the state Supreme Court for its view of California law on the subject.

Although California has a few statutes dealing with AEDs, the courts said the question in this case was whether a business is required by its common law duty of reasonable care to have the devices available for customers needing first aid. Stores do have a "special relationship" with their customers that imposes a duty "to provide at least some assistance" to a customer suffering a heart attack.

To determine whether that assistance includes having AEDs on hand, the Supreme Court analogized the lawsuit to a premises liability action by a crime victim against the owner of the property where the crime took place. Plaintiffs in both situations contend the owner should have done more to prevent the tragedy.

Generally, the crime-victim cases turn on balancing how likely the crime was against how difficult or costly it would be to make the crime less likely. Courts won't require a property owner to take extra steps, such as hire security guards or install more lighting, if it would be burdensome to do — unless the crime was highly foreseeable because similar crimes had been committed nearby in the past.

Using that analysis, the Supreme Court held that "as in the criminal assault cases, when the precautionary medical safety measures that a plaintiff contends a business should have provided are costly or burdensome rather than minimal, the common law does not impose a duty on a business to provide such safety measures in the absence of a showing of a heightened or high degree of foreseeability of the medical risk in question."

And while AEDs aren't terribly expensive — Target sells some models online for $1,200 — meeting the regulations about training and maintenance "clearly implicates more than a minor or minimal burden," the court said. On the question of foreseeability, the court said there is nothing about shopping at Target that makes cardiac arrest more likely there than anywhere else.

In a concurring opinion, one Supreme Court justices said her colleagues' analysis reached too far. While she agreed that Target wasn't liable to the late shopper's family, she said the analogy to crime victim litigation could be read too broadly. The majority opinion "may leave the unfortunate impression that the rule for prevention of assaults applies to all claims of negligent omission to act within a special relationship." The question properly should be about the duty to install AEDs, "not whether businesses in general have a duty to take precautionary safety measures in general."

A Wrong-Way Ruling Over Trucker's Questionable Parking

A fairly ordinary accident between a big rig and a car led to a puzzling ruling by a trial court judge, which in turn led to a highly unusual reversal by an appellate panel. The moral of the matter may unfortunately be that judges shouldn't explain their rulings if they don't have to.

The story began when a trucker heading north on Pacific Coast Highway toward Santa Barbara needed a rest. Seeing only no-parking signs on his side of the road, he cut across the highway to a designated parking area on the other side and took a nap. Although adjacent to the southbound side of the road, he parked facing north toward oncoming traffic.

When he woke up at about dusk, he drove up to the edge of the highway, looked carefully and made a left turn across the southbound lane toward the north. Just as he was finishing the turn, a southbound car crashed into his trailer at the back.

The 18-year-old driver and his passenger sued. A jury ruled for the defense, finding that the trucker was negligent but that his negligence was not a substantial cause of the accident. The judge refused to grant a new trial, and both sides appealed. *David v. Hernandez*

The plaintiffs argued the jury's negligence finding was inconsistent with the defense verdict. But the Court of Appeal panel ruled that wasn't necessarily so. As one of several examples, the jury might have decided the trucker was negligent because his right turn signal was broken but that it didn't matter because he was turning left.

The plaintiffs also argued that the trucker was negligent per se — and therefore a cause of the accident — because he had parked facing oncoming traffic in violation of a Vehicle Code section. The Court of Appeal countered that the jury could have concluded he was not in violation of the statute because he was not parked alongside the road but was in a parking area some distance away.

The problem in the case cropped up when the plaintiffs' moved for a new trial. In orally denying the motion, the trial court judge said that the trucker was in violation of the statute by parking where he did, which later led to the tail end of his truck being on the wrong side of the road. But the judge next concluded that the other driver caused the accident by being inattentive.

Though apparently not asked to do so by the parties, the appellate court held the trial judge could not rule simultaneously that the trucker was negligent per se and yet not at fault. "Contrary to the court's ruling, its findings legally compelled it to conclude that [the trucker's] negligent conduct was a substantial factor in causing the collision."

The defense urged the appellate court simply to ignore the contradiction on the ground that trial judges aren't required to state reasons when denying a motion for a new trial, only when granting one. The panel responded that "a reviewing court must not turn a blind eye to reasons or findings stated on the record."

Although appellate courts rarely reverse judges' new-trial decisions, the panel ruled that this decision was based on a legal error and therefore was an abuse of discretion. It sent the case back for a new trial.

Exception to Social Host Immunity Came Too Late for Teen

For 35 years, California has had one of the broader social-host immunity laws in the country. People serving too much alcohol to a someone in a social situation cannot be sued over what happens to the friend or what the friend later does.

The state Legislature poked a hole in that immunity in 2010 after a teenage girl died from alcohol poisoning after a sleepover at a friend's home. Since the law was amended, adults who give alcohol to a minor in their home can be sued for injuries the minor suffers or causes.

But the change to the host immunity statute was no help to the parents of Shelby Allen, whose death at 17 sparked the new law. In a recent decision, the state Court of Appeal in Sacramento held the old immunity law prevented Steve and Debbie Allen from suing the parents of their daughter's friend, and it rejected all their attempts to assert alternative causes of action. *Allen v. Liberman*

During her stay at friend Kayli Liberman's home, Shelby Allen drank 15 shots of vodka in about an hour. When she vomited and then passed out, Kayli propped her up in the bathroom, took her cell phone and closed the door. Kayli's father didn't check on Shelby in the morning for fear of disturbing a girl in the bathroom.

When she finally was found later that morning, it was too late. Her blood alcohol was 0.339.

The Allens sued the Libermans, including Kayli, arguing the social host immunity statute didn't apply. Civil Code Section 1714(c) declares that "no social host who furnishes alcoholic beverages to any person

may be held legally accountable for damages suffered by that person … resulting from the consumption of those beverages."

They argued that the Libermans didn't "furnish" the vodka to their daughter but only failed to prevent her from finding and drinking it. The appellate court called that argument absurd.

"It would not make sense to interpret the statute in a manner that gives a person immunity for directly handing a drink to a minor, but affords no similar protection to a person who fails to lock up the liquor cabinet to prevent the minor from helping herself to alcohol."

They next argued that the Libermans owed Shelby "an independent duty of care as adults supervising a minor in their home."

The court countered that while they had a "special relationship" with her as a minor invited into their home, that relationship was not enough to overcome the host immunity statute.

Finally, they contended that Kayli had a duty not to make Shelby's situation worse — which is what she had done by not seeking help and by closing her in the bathroom without her phone. But "Kayli was a minor herself," and no law or precedent imposes "a special relationship on a minor who invites another minor to stay the night," the court said.

Ultimately, Shelby's own drinking was the proximate cause of her death, the court held.

In a footnote, the court quotes a bit of the 2010 legislative history of the bill that narrowed the immunity law. "Shelby's parents … were shocked to discover, as many other parents have, that unlike most other states, California's current law continues to grant all social hosts complete and unqualified immunity from all legal responsibility, even in cases involving the deaths of minors."

The amendment adopted that year declared that when an adult "knowingly furnishes alcoholic beverages at his or her residence" to someone under 21 then "the furnishing of the alcoholic beverage may be found to be the proximate cause of resulting injuries or death."

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