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Legal Viewpoint

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Volume 1, Issue 5

Chief Justice-to-Be Joins Chorus on Medical Expenses Gap

For the third time in less than a year, a California appellate court has ruled that an injured plaintiff in a tort lawsuit can collect far more in damages for medical expenses than his doctors and hospitals actually accepted from the plaintiff's health insurers.

Though dissenters in all three decisions complain that the holdings give windfalls to the plaintiffs, the appellate majorities say rather that their rulings prevent windfalls to defendants.

The California Supreme Court has already agreed to review the first two decisions, and it will almost certainly accept the new case from August.

What makes that latest decision special, however, is that the majority opinion was written by the Third District Court of Appeal justice who will be leading the Supreme Court when it likely decides the issue next year: Tani Cantil-Sakauye, who is slated to become California's chief justice in January.

That issue is easy to state but not so easy to decide: When calculating tort damages, which side gets the benefit of the "negotiated rate differential" between the amount medical providers bill and the lower amount they accept as full payment from health insurance companies under their contracts with those insurers.

In the August case, *King v. Willmett*, the plaintiff (interestingly, a defense attorney for Farmers Insurance) suffered neck and back problems after being rear-ended while driving home one evening. He sued, and a jury awarded him close to $315,000.

That amount included about $170,000 for medical expenses, equaling the total of the bills from his doctors and hospitals. The trial court judge cut those medical damages by 55 percent to just over $76,000, which is how much the doctors and hospitals accepted as full payment from the plaintiff's health insurance company.

On appeal, Justice Cantil-Sakauye analyzed the issue under the "collateral-source rule," which generally declares that the damages a defendant pays should not be reduced just because a plaintiff also receives payment from an additional source, such as insurance. Even though under the rule, a plaintiff may get a double recovery, Cantil-Sakauye noted, someone who obtains health insurance "should receive the benefit of his thrift."

Applying the collateral source rule in this situation represents a policy choice by the Supreme Court "to permit the victim to retain a benefit where necessary, rather than to confer a benefit on the tortfeasor," the justice commented.

Two state statutes change the result somewhat in medical malpractice cases and in cases against a government defendant. But the Legislature has otherwise left the collateral-source rule alone, Cantil-Sakauye noted. "The existence and nature of these exceptions … strongly suggest that normally … the trial court should not reduce a jury's award of damages to reflect collateral source payments," she wrote.

The defense has already appealed this decision to the California Supreme Court, where it will probably will be held until the court decides the first case, *Howell v. Hamilton Meats and Provisions, Inc.* which was described in the Rodolff Law Firm newsletter in January. The second case, *Yanez v. SOMA Environmental Engineering Inc.*, described in the Rodolff Law Firm newsletter in July, already is on hold at the high court.

Victim Can't Win Damages for Crime Across the Street

Courts in California have been working for years to spell out just how responsible a property or business owner is for a crime committed against a customer or guest. Generally speaking, the rule is that the owner is liable to the crime victim only if the crime was "foreseeable," for instance if the same sort of crime had occurred at the location several times previously.

But what happens when a crime, even a very foreseeable one, starts on the owner's property and finishes a couple of blocks away? In that case, a court declared recently, the owner is not liable to the crime victim.

Under California law, "if a proprietor is to be held liable in tort for the criminal activity of third parties, that criminal activity must have occurred on the proprietor's property," a federal appellate court declared in *Toomer v. United States*.

In this case, the landowner was the United States itself, specifically the U.S. Navy. The government operates a nightclub called Club Metro on the 32nd Street Naval Base in San Diego, where the off-duty sailors and Marines often get rowdy. In fact, "fights Club Metro are common," according to the appellate opinion, and the club has metal detectors and roving security guards.

On the night of Nov. 18, 2003, several fights broke out between two groups of service members. After the last, one group headed to the Del Taco restaurant across the street from the base.

One member of the other group, Myron Thomas, went home, grabbed his roommate's AK-47 and returned to spray bullets at the Marines at the restaurant. One of them, Roderick Little, was killed.

In their suit against the Navy, Little's family contended that the military should have done more to prevent the bloodshed. In particular, they argued that guards manning a base gate should have acted when they heard Thomas threaten that he was "going to do a 187" as he drove out. The guards knew that "187" is the California Penal Code section on murder.

But the trial court rejected the lawsuit, and the appellate court agreed. Although the United States did owe some duty to Little to protect him while he was in Club Metro, "those obligations ended when Little drove off the Naval Base," the court held. "The United States did not have a duty to protect Little while he was at the Del Taco restaurant. Where there is no duty, there can be no negligence."

Even if the Navy's duty might have stretched outside the base gates in some cases, the court added, it had no duty in this case because the killer's drive-by shooting was not foreseeable criminal activity. While the guards did hear someone threaten a "187," they didn't know who made the threat or who it was directed against.

And they certainly could not have known that Thomas would "pick up a gun, return more than half an hour later to the Del Taco restaurant several blocks away from the exit at which they were stationed, and shoot Little in cold blood."