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A plaintiff's own pre-treatment negligence cannot support a finding of comparative fault

A MED-MAL DEFENDANT SHOULD NOT BE PERMITTED TO USE THE PLAINTIFF'S OWN PRE-TREATMENT NEGLIGENCE TO SUPPORT A FINDING OF COMPARATIVE FAULT

Obviously, people go to hospitals when they are sick or injured. And they become sick or injured well….. sometimes due to their own idiocy. We have taken cases where prior to the negligent treatment at the hospital, our client crashed her car into a tree while driving drunk. Or shot himself in the leg. Or allowed a massive tumor to grow unchecked for years, finally leading to a hospitalization.

Likewise, such pre-treatment issues are prevalent in medical malpractice cases even outside of the hospital setting. Defense lawyers are trained to use pre-treatment lifestyle choices against a plaintiff. For example, in a case surrounding the diagnosed lung cancer, defense lawyers will try to blame the plaintiff for her smoking history. Or in a case of failing to timely treat a diabetic ulcer, leading to amputation, defense lawyers will blame the patient's lifestyle choices for leading to the diabetes.

One of the most important cases to impact medical malpractice action in the past decade is actually not a medical malpractice case at all. Nonetheless, *Harb v. City of Bakersfield* (2015) 233 Cal.App.4th 606, successfully handled on appeal by Advocate's own editor-in-chief Jeffrey Ehrlich, is invaluable in medical malpractice cases where there are issues of a plaintiff's own pre-treatment negligence. In short, *Harb* holds that a decedent's pre-treatment conduct cannot constitute comparative negligence, as a medical provider "takes a patient as they find the patient."

In such cases, it is critical that the plaintiff's attorney file motions in limine and trial briefs to prevent defense lawyers from using CACI 405 or 407 and to otherwise argue that the patient was negligent or responsible for her own harm.

Pre-treatment conduct by a patient cannot constitute comparative negligence pursuant to *Harb v. City of Bakersfield*

In *Harb*, the plaintiff suffered a massive stroke and drove his car onto a sidewalk. (*Harb v. City of Bakersfield* (2015) 233 Cal.App.4th 606, 609.) The police officer who arrived on the scene did not call an ambulance immediately because she thought he was intoxicated due to his slurred speech, disorientation, and vomiting and handcuffed the plaintiff instead, and kept him sitting on the curb for 30 minutes. The delay in receiving treatment caused massive brain damage, rendering the plaintiff unable to care for himself.

At trial, the jury was instructed on comparative negligence due to the plaintiff's negligent failure to manage his own high blood pressure before the accident. (*Id.* at p. 610.) Specifically, the defense argued that the plaintiff's blood pressure was high and repeatedly argued that plaintiff negligently failed to take medication to control his high blood pressure. The defense contended that the plaintiff's uncontrolled high blood pressure resulted in the stroke. After a defense verdict for the city based on the actions of the police officer, the plaintiff appealed.

The Court of Appeal held that the trial court committed reversible error. It conducted a careful review of secondary authority, cases from other jurisdictions, and California's own adoption of the basic principles of tort law that "a tortfeasor takes the plaintiff as he finds him." (*Id.* at p. 633.) In doing so, *Harb* recognized, "[t]he courts generally agree that a patient's conduct *prior* to seeking medical attention should not be considered in assessing damages." (*Id.* at p. 626.)

Harb also noted that secondary authorities supported that the comparative fault instruction cannot be given based on a plaintiff's own negligence prior to treatment. *Harb*, following a California Medical Malpractice guide, recognized that "*the only legitimate application of the doctrine of contributory fault is when it takes place concurrently with or after the delivery of the practitioner's care and treatment.*" (*Ibid.* [emphasis added and quoting McDonald, 1 Cal. Medical Malpractice: Law & Practice (2014) § 10:13.])

Indeed, even CACI No. 405, the instruction on comparative fault, cites to *Harb* in the "Sources and Authority" section to state:

> *Pretreatment negligence by the patient does not warrant a jury instruction on contributory or comparative negligence.* This view is supported by comment m to section 7 of the Restatement Third of Torts: Apportionment of Liability, which states: "[I]n a case involving negligent rendition of a service, including medical services, *a factfinder does not consider any plaintiff's conduct that created the condition the service was employed to remedy.*"

(Emphasis added; see also Haning et al., Cal. Prac. Guide Pers. Inj. Ch. 3-D [The Rutter Guide] at ¶ 3:1006 ["Plaintiff's negligence is taken into account in assessing comparative fault only where it is contemporaneous with or subsequent to the injury caused by defendant . . . [P]laintiff's preexisting condition does not eliminate or reduce defendant's liability … even where the condition results from plaintiff's own negligence or lack of due care."].)

Harb held that the trial court's error in allowing the defense to argue comparative fault of the plaintiff was not harmless error. (*Id.*, 233 Cal.App.4th at p.

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633.) The Court of Appeal explained that "allowing the issue of Harb's comparative negligence in failing to take his blood pressure medication may have affected the findings that the defendants were not at fault by improperly focusing the jury's attention on the patient's conduct." (*Ibid.*)

Harb relied on many out-of-state cases involving medical malpractice in finding that a plaintiff cannot be held comparatively at fault for pre-treatment negligence

Really showing how important *Harb's* holding is to medical malpractice cases, *Harb* itself extensively and thoroughly went through many out-of-state medical malpractice cases that related to the issue of pre-treatment actions by a plaintiff. In doing so, *Harb* relied on a handful of authorities involving medical malpractice cases to conclude that a plaintiff cannot be held liable for pre-treatment negligence.

Just to hammer the point home, we will inform the court of each and every one of these out-of-state holdings and emphasize that not a single court nationwide has ever held that a patient could be found comparatively at fault for her own pretreatment negligence.

***Son v. Ashland Community Healthcare Services* (Oregon med-mal case)**

Notably, both *Harb* and *Frausto* (discussed below) relied heavily on *Son v. Ashland Community Healthcare Services* (2010) 239 Or.App. 495, 244 P.3d 835. *Son* involved an Oregon case wherein the mother of a 16–year–old girl filed a wrongful death action against two physicians who treated her daughter for a drug overdose. The physicians asserted various affirmative defenses, including that the daughter was at fault for (1) consuming a variety of substances that led to her hospitalization and (2) not providing accurate information to defendants about what substances she consumed, the quantity taken and the time she consumed each. The trial court struck the defense of the daughter's comparative fault for taking the pills and allowed the defense about inaccurate information to go to the jury. The jury determined each doctor was 30 percent at fault, the daughter was 25 percent at fault, and her father was 15 percent at fault.

After the trial court entered judgment, each side appealed. The mother claimed the jury should not have been allowed to consider the comparative fault of the daughter and her father. The doctors claimed the trial court improperly struck their defense that the daughter was comparatively at fault for consuming the substances that led to her medical condition and ultimately her death.

As to the question of whether the daughter's consumption of substances could be considered by the jury in its allocation of fault, the court concluded that the consumption of drugs was not the type of conduct that could support a comparative-fault defense. (*Id.* at p. 842.) The court explained its conclusion by stating, "*the focus in a medical malpractice case is on the injury caused by the negligent treatment, not the original injury that created the need for treatment*." (*Id.* at p. 843 [emphasis added].) The court stated its "conclusion is in line with the majority of other jurisdictions that have dealt with this issue." (*Ibid.*) Under the majority rule, contributory or comparative negligence is not available as a defense when the patient's conduct provides the occasion for medical attention. (*Id.* at pp. 843-844.) Thus, the court distinguished between a patient's pretreatment conduct and conduct that occurs concurrently with the provision of medical services. (*Id*. at p. 844.) Applying this distinction, the court concluded the trial court correctly struck the comparative negligence defense related to the daughter's consumption of the substances that led to her hospitalization.

***Mercer v. Vanderbilt University, Inc.* (Tennessee med-mal case)**

Further, *Harb* relied on the Supreme Court of Tennessee case *Mercer v. Vanderbilt University, Inc.* (Tenn. 2004) 134 S.W.3d 121, 126. In *Mercer,* a drunk driver got into an accident and was taken to the hospital with multiple facial fractures and a concussion. Over the next several days, the driver suffered from severe agitation and the hospital administered unusually large doses of opioids and benzodiazepines to calm him. The hospital then negligently administered a paralytic drug in order to perform a CT scan. The patient was also not properly hooked up to a monitor that would provide an alarm if he went into respiratory distress. The driver ended up going into cardiopulmonary arrest and sustained "severe and permanent brain damage."

At trial, the trial court allowed the defense to argue comparative fault as a result of the driver driving while under the influence. The jury attributed 30% of the fault to the driver and 70% to the hospital. The Tennessee Court of Appeals reversed the trial court as to the comparative fault issue. The Tennessee Supreme Court affirmed, finding that the driver's "negligence merely provided the occasion for the medical care, attention, and treatment that gave rise to this medical malpractice action." (*Id.* at p. 130.) As such, the Court held that "the principles of comparative fault do not apply so as to allow fault to be assessed to [the driver.]" (*Ibid.*) Importantly, the Court specifically rejected the argument that the injuries have to be the same or indivisible in order to avoid a comparative-negligence instruction. (*Ibid.* ["[T]his indivisible/separate injury distinction defies meaningful application."].) As such, "it would be unfair to allow a defendant doctor to complain about the patient's negligence because this negligence caused the very condition the doctor undertook to treat." (*Ibid.* [citing the Restatement (Third) of Torts: Apportionment of Liablity § 7].)

***Rowe v. Sisters of Pallottine Missionary Society* (West Virginia med-mal case)**

Similarly, the *Harb* court approvingly quoted and relied upon the West Virginia case of *Rowe v. Sisters of Pallottine Missionary Society* (2001) 211 W.Va. 16,

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22. *Rowe* also involved a medical malpractice case where a motorcycle driver participated in a motocross event and injured his left leg. After going to the hospital, an emergency-room physician negligently discharged the plaintiff and failed to recognize that the plaintiff had a dislocated knee and a lacerated popliteal artery. The delay in diagnosis required extensive surgery and after a 35-day hospital stay, the plaintiff had significant impairment to the use of his leg.

The West Virginia Supreme Court affirmed the trial court's order that the jury was not to be instructed on principles of comparative negligence in relation to the plaintiff's crash. The Court "stated the reason for this rule was simple and obvious – patients who may have negligently injured themselves are entitled to subsequent nonnegligent medical care and to an undiminished recovery if reasonable medical treatment is not afforded." (*Harb*, *supra*, 233 Cal.App.4th at p. 629 [explaining the holding of *Rowe*].)

Spence v. Aspen Skiing Co. **(Colorado med-mal case)**

Harb also relied on *Spence v. Aspen Skiing Co.* (D. Colo. 1993) 820 F.Supp. 542. In *Spence*, a skier became dizzy and light-headed. (*Ibid.*) An EMT provided an IV solution due to the dizziness. The skier began to experience redness, swelling, and other symptoms in the arm, which eventually led to permanent loss of use in the arm. The EMT argued that the skier failed to properly treat her hyperglycemia, which led to the dizziness and light-headedness. The jury found the skier 95% at fault for her own injuries. The court granted a new trial, holding that "[i]t would be inconsistent with the reasonable and normal expectations of both parties for the court to excuse or reduce the provider's liability simply because it was the patient's own fault that she required care in the first place." (*Id.* at p. 544.) As such, the district court entered a judgment in favor of the plaintiff for the full amount of the damages. (*Ibid.*)

Harding v. Deiss **(Montana med-mal case)**

Next, *Harb* cited a Montana Supreme Court medical malpractice case, *Harding v. Deiss* (2000) 300 Mont. 312, 317, 3 P.3d 1286. In *Harding*, a mother sued two physicians who treated her daughter before she died. Her daughter had gone horseback riding even though she was allergic to horses and had severe asthma. After she collapsed, she was taken to the hospital, where she was allegedly negligently treated by the two emergency room physicians. The trial court instructed the jury on contributory negligence of the decedent and allowed the physicians' attorneys to argue to the jury that the decedent's conduct before she was taken to the emergency room caused her death.

The Montana Supreme Court reversed, finding that the arguments of comparative fault warranted a mistrial. (*Id.* at p. 1289.) The Montana Court explained: "comparative negligence as a defense does not apply where a patient's pre-treatment behavior merely furnishes the need for care or treatment which later becomes the subject of a malpractice claim." (*Harding*, 300 Mont. 312 at p. 318.)

Matthews v. Williford **and** ***Whitehead v. Linkous*** **(Florida med-mal cases)**

Harb then relied on a Florida Appellate wrongful death case premised on medical malpractice, *Matthews v. Williford* (Fla.Dist.Ct.App. 1975) 318 So.2d 480, 481. In that case, the patient had suffered a heart attack ten years prior and did not follow his healthcare provider's advice not to smoke or become overweight. (*Ibid.*) He suffered another heart attack but was not placed in a coronary care unit. (*Ibid.*) He passed away the next day due to the provider's failure to place him in the unit. (*Ibid.*)

The Second District Court of Appeal of Florida found that the trial court did not err in refusing to allow the defense to argue comparative fault of the decedent who refused to follow his doctor's advice not to smoke. The Court explained that a plaintiff's pre-treatment conduct "simply is not available as a defense to malpractice which causes *a distinct subsequent* injury – here, the ultimate injury, wrongful death." (*Harb*, *supra*, 233 Cal.App.4th at p. 631 [quoting *Matthews*, *supra*, 318 So. 2d at p. 483].)

Harb also cited to *Whitehead v. Linkous* (Fla.Dist.Ct.App. 1981) 404 So.2d 377, 380), where the patient attempted suicide by drinking large amounts of beer and taking Valium and Darvocet. The Florida court found that the trial court erred in giving a comparative-negligence instruction, holding "any conduct on [the patient's] part before he entered the hospital which contributed to his cardiac and pulmonary arrest and subsequent death was not a proximate, legal cause of the damages sought in this case. Accordingly, we find that the trial court erred in submitting the instruction on comparative negligence to the jury over the prior and timely objection of counsel."

Fritts v. McKinne **(Oklahoma med-mal case)**

Harb also addressed *Fritts v. McKinne* (Okla.Civ.App. 1996) 934 P.2d 371. In *Fritts*, a driver was seriously injured in a one-vehicle accident when he drove intoxicated and hit a tree. At the hospital, an otolaryngologist failed to properly perform a tracheostomy that was needed for an oral surgeon to fix facial fractures. The patient ended up bleeding to death.

Over the plaintiff's objection, the trial court allowed evidence of the decedent's consumption of alcohol. (*Id.* at p. 373.) The Court of Civil Appeals of Oklahoma, Division 2, reversed and ordered a new trial. (*Id.* at p. 374.) As explained by the Court: "Under the guise of a claim of contributory negligence, a physician simply may not avoid liability for negligent treatment by asserting that the patient's injuries were originally caused by the patient's own negligence." (*Ibid.*)

Martin v. Reed **(Georgia med-mal case)**

Harb next cited *Martin v. Reed* (Ga.Ct.App. 1991) 200 Ga.App. 775. In *Martin*, a driver was injured in a car accident and claimed that doctors failed

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to properly diagnose him after he went to the hospital. As a result, the patient became paralyzed.

The trial court refused to provide the following special instruction offered by the plaintiff: "You are not to consider the cause of [the plaintiff's] automobile wreck when deciding whether [the defendant is] liable in this case. You should not consider the cause of the wreck because there is no legal connection between [the plaintiff's] actions while driving on the highway and [the defendant's] later actions at the hospital."

The Court of Appeals of Georgia held that the refusal to give this instruction was reversible error and ordered a new trial. (*Id.* at p. 776.) The Court explained: "Those patients who may have negligently injured themselves are nevertheless entitled to subsequent non-negligent medical treatment and to an undiminished recovery if such subsequent non-negligent treatment is not afforded. Since the refused request to charge states a correct and applicable principle of law, it was error for the trial court to have failed to give it." (*Ibid.*)

Frausto v. Department of CHP reinforced that pre-treatment negligence could not support a comparative fault defense against the plaintiff

Frausto v. Department of California Highway Patrol (2020) 53 Cal.App.5th 973, 999 followed *Harb* and found that pre-treatment negligence could not support a comparative fault defense against the plaintiff.

In *Frausto*, a driver was pulled over by the CHP. During the pull-over, patrol officers had observed Cornejo swallow something, which he claimed was gum, during the traffic stop. The CHP manual required officers to seek medical examination for a prisoner in need or requesting medical attention, yet the officers took Cornejo to jail instead of a hospital, despite indications he might have ingested drugs. The driver ended up dying of a methamphetamine overdose.

Following a jury verdict in favor of the driver's parents in the wrongful-death action, the CHP appealed. At trial, the trial court partially granted the plaintiffs' motion in limine to exclude evidence and argument on comparative fault of the decedent. The trial court granted the motion as to the ingestion of the drugs, but denied as to the decedent's post-ingestion statements and conducts with the officers.

The Court of Appeal affirmed, finding that the trial court properly denied the motion. (*Id.,* at p. 1000.) Relying on *Harb*, the Court of Appeal noted that contributory negligence by a patient can only be applied to "a patient's conduct that is concurrent or contemporaneous with the physician's negligence." (*Ibid.*)

Frausto explained that a tortfeasor takes the patient as she finds him. In that case, the decedent's "negligence in swallowing the drug was not relevant to the officers' response; his postingestion negligence was relevant." (*Ibid.*) Accordingly, "[t]he trial court properly excluded evidence of the former and permitted the jury to consider evidence of the latter." (*Ibid.*)

How to use *Harb* in your medical malpractice case

First, it is unlikely that you will want the actual pre-treatment conduct at issue excluded entirely at trial. For example, in a failure-to-diagnose lung-cancer case where the patient is a smoker, you will want (in fact need) to have the patient's smoking history in evidence to help establish that the provider should have been more aware of the need to screen for the cancer. The patient's medical history (including ailments caused by their own negligence) is often critical to prove liability against the provider.

At our firm, we first will file a motion in limine to preclude the defendants' counsel and experts from arguing that the patient was comparatively at fault prior to the treatment. Of course, while the defense can certainly bring up the patient's pre-treatment condition, we seek to limit the defense lawyer from trying to blame or attribute fault to the patient.

Second, we file a trial brief to exclude the use of CACI 405 ("Comparative Fault of Plaintiff") or CACI 407 ("Comparative Fault of Decedent") and to not allow the plaintiff/decedent to be identified on the verdict form in relation to comparative fault.

Third, we ask the judge to provide a special instruction to the jury along these lines: "You are not to consider whether the plaintiff/decedent acted negligently in relation to his pre-treatment conduct in deciding whether or not Defendants are liable in this case."

Lastly, we will hammer this point home during jury selection. It is critical to do so not only to pre-condition, but to identify bad jurors for your case. We explain that under the law, the provider "takes the patient as they find them" and that the jury cannot hold the patient's lifestyle choices against them.

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