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Medial Malpractice and
The New Jury Instructions
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[PHOTO NOT SHOWN] caption: Bruce G. Fagel, MD, JD, has law offices in Beverly Hills, California.

The new California Judicial Council (CJC) Civil Jury Instructions[1] offer important changes in the field of medical malpractice. These changes can have significant impact not only on jurors at trial, but also on the trial judge whose understanding of the law impacts on pre-trial motions for summary judgment and ultimately on the evaluation of medical malpractice cases by insurance claims analysts and defense counsel.

Before any medical malpractice case can be submitted to the jury, the plaintiff must first prove the elements of their case with evidence on both negligence and causation. These elements are based on the jury instructions which define the applicable law, and this law must be clearly explained to the trial judge, both to defeat any summary judgment or directed verdict motion and to protect any jury verdict against a motion for a new trial. The new CJC instructions on negligence in a medical malpractice case contain several specific and important changes from the BAJI statements of the law. At the same time, the CJC jury instructions on causation are incomplete and they are not a sufficient statement of the law on causation for a medical malpractice case. The causation instructions require further modification when used at trial to prevent any reversal of any judgment on appeal.

The most significant change between the BAJI and the CJC instructions involves the jury instruction that defines the duty of a physician. BAJI instruction 6.00.1 Duty of a Physician and 6.01 Duty of a Specialist define three duties of care:

1) The duty to have that degree of learning and skill ordinarily possessed by reputable physicians/specialists practicing in the same field and in the same or a similar locality and under similar circumstances, 2) The duty to use the care and skill ordinarily used by reputable physicians/specialists practicing in the same field and in the same or a similar locality and under similar circumstances; and 3) The duty to use reasonable diligence and his or her best judgment in the exercise of skill and the application of learning. A failure to perform any one of these duties is negligence.

In contrast, the new CJC instruction 501 "Standard of Care for Health Care Professionals," which provides a standard definition for all physicians, including specialists states that:

> A medical practitioner is negligent if he/she fails to exercise the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful medical practitioners would possess and use in similar circumstances. When you are deciding whether the

[1] The CJC Civil Jury Instructions are available at http://www.courtinfo.ca.gov/reference/documents/civiljuryinst.pdf

defendant was negligent, you must base your decision only on the testimony of the expert witnesses [including the defendant] who have testified in the case.

The second paragraph of this new instruction also includes language regarding expert testimony (and thus replaces BAJI instruction 6.30 "Medical Negligence — Standard of Care Determined by Expert Testimony"). The CJC instruction is not only simpler in language than BAJI, but it also reflects a distinct change of focus away from the thought processes of a doctor or nurse, and instead focuses on the actions (or inaction) of the defendant doctor or nurse; and it compares the defendant's actions to another's (presumably an expert) actions using the test of "reasonably careful" behavior.

The BAJI instruction which required a physician to "use his/her best judgment" in providing care to a patient required a plaintiff to prove what a physician was thinking, not just what the physician did or did not do in relation to the patient's care. As a result, many defendant physicians would explain their actions or inactions in terms of judgment, and all plaintiff's experts would routinely be asked and would readily admit that judgment is an essential part of medical practice. Since anyone's thought process is peculiarly individual, once a plaintiff's expert conceded that judgment was part of medical practice, the defendant physician could more easily control that issue, and both the judge and the jury would listen carefully to the defendant physician's explanation of their actions or inaction, and then try to determine if that explanation appeared to be the defendant's "best judgment." However, without any medical background both the judge and the jury would often defer to the defendant's explanation of their "judgment," which would make plaintiff's burden of proof on this issue much harder.

The new CJC instruction requires the plaintiff to prove that the defendant physician's actions were not "reasonably careful" in relation to other physicians in similar circumstances.

This focus on actions rather than thoughts will provide for a more objective evaluation of a physician's actions, and removes the relevance of a defendant physician's explanation for why they did or did not do something, unless they testify as an expert (which many defense attorneys do not want because it exposes the defendant to a broader cross-examination). Also, since many medical malpractice cases involve a failure to act in a more timely manner or a failure to diagnose or treat, it will be far more difficult for a physician to show that they were being reasonably careful when the claimed negligence involves a failure to do something.

The instruction, CJC 501, which defines the duty for a physician has the same language and duty for a nurse under instruction CJC 504. The BAJI instructions provided a different set of duties for physicians (6.00.1 and 6.01) and nurses (6.25). Under BAJI 6.25 a nurse had no duty to use their best judgment in the care of a patient. However, ever since *Frajo v. Hartland Hospital* (1979) 99 Cal.App.3d 331, a nurse defendant has been able to request BAJI 6.02, which recognized that "a nurse's exercise of independent judgment in selection of treatment for a patient is under certain circumstances permissible." Under CJC 501, it is the actions of a physician or nurse, who must be "reasonably careful," rather than their judgment or reasons for their actions, which form the definition of negligence. As a result, it is likely that defendant physicians and nurses will now testify that they were more than reasonably careful in providing care for their patient, and their thought processes or judgment will be relegated to the background.

The new CJC 505 instruction "Success Not Required" is modeled after BAJI 6.02 "Medical Perfection Not Required." The BAJI instruction focused on efforts that prove unsuccessful or an error in judgment. The CJC instruction also states that "a physician or nurse is not necessarily negligent just because his/her efforts are unsuccessful," but also if he/she

"makes an error that was reasonable under the circumstances." The removal of any reference to judgment makes this instruction less helpful to a defendant who might have a reasonable explanation for their decision-making process (judgment) but must now explain their actions in terms of being reasonably careful, in comparison to other physicians in similar circumstances.

The new CJC 505 instruction "Alternative Methods of Care" is modeled after BAJI 6.03 "Alternative Methods of Diagnosis and Treatment." The BAJI instruction also referenced that "a physician is not negligent if, in exercising his or her own best judgment, he or she selects one of the approved methods, which later turns out to be a wrong selection, or one not favored by certain other practitioners." The CJC instruction provides simpler language that "a physician is not necessarily negligent just because he or she chooses one medically accepted method of treatment or diagnosis and it turns out that another medically accepted method would have been a better choice." There is no longer any reference to the exercise of best judgment, which again shifts the focus of such alternative methods of care to the defendant's actions rather than on the reason for such action.

The new CJC 514 instruction "Duty of a Hospital" is more specific than the BAJI instruction 6.20 "Duty of a Hospital." Under BAJI, a hospital "has a duty to use reasonable care in furnishing a patient the care, attention, and protection reasonably required by the patient's mental and physical condition." The CJC instruction states that "a hospital is negligent if it does not use reasonable care toward its patients. A hospital must provide procedures, policies, facilities, supplies, and qualified personnel reasonably necessary for the treatment of patients." This more specific instruction is a recognition that all hospitals which are accredited by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) are required by JCAHO to have in place written policies and procedures, but the details of what is contained in such written policies and procedures is not further defined by JCAHO. As a result, all hospitals will have written policies and procedures, but there is a wide variation between hospitals with regard to the specific contents of such policies and procedures. However, the failure of a hospital nursing staff to comply with the hospital's written policies and procedures can be used as evidence on the issue of negligence, if an expert testifies that the standard of care would require compliance with such written policies and procedures. In addition, the requirement that a hospital provide reasonable facilities, supplies, and qualified personnel, allows the plaintiff to focus on these specific issues in addition to the actions or inaction of the nurses or other hospital employees. Often, the failure to act by a nurse or nurses may be related to insufficient facilities, supplies, or qualified personnel.

There are no specific causation instructions for medical malpractice cases in the new CJC instructions. This is not totally surprising, since BAJI also has no specific causation instructions for medical malpractice cases. Instead, both BAJI and CJC have two basic causation instructions, which are similar, although there are some significant but helpful differences in the CJC instruction on multiple causes. However, both the basic causation instruction and the instruction on multiple causes require modification for use in a medical malpractice case.

The new CJC instruction 430 "Causation: Substantial Factor" states that "a substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm." This instruction is similar to BAJI 3.76 "Cause — Substantial Factor Test," which states that "the law defines cause in its own particular way. A cause of injury, damage, loss or harm is something that is a substantial factor in bringing about an injury, damage, loss or harm." This BAJI instruction was based on the California Supreme Court ruling in *Mitchell v. Gonzales*

(1991) 54 Cal.3d 104, but in the years since *Mitchell*, there has been no definition of a substantial factor. The new CJC instruction on causation now provides a definition of a substantial factor as something "more than a remote or trivial factor." However, case law in the field of medical malpractice requires that causation must be shown to a "reasonable medical probability." (*Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208; *Espinoza v. Little Company of Mary Hospital* (1995) 31 Cal.App.4th 1304.) Evidence of causation in a medical malpractice case must be based on competent expert testimony. (*Brome v. Pavitt* (1992) 5 Cal.App.4th 1487.) Since all medical malpractice cases require expert medical testimony on standard of care, the same expert will usually testify on causation. Such testimony is sufficient if the expert testifies that it is more likely than not (or to a reasonable degree of medical probability) that the negligence of the defendant was a substantial factor in causing the patient's injury or death.

Therefore, CJC 430 requires a modification which defines a substantial factor as a factor which, more likely than not [or to a reasonable degree of medical probability] was a factor in bringing about the injury or harm. Neither of the two most recent decisions of the California Supreme Court, which deal with the issue of causation, are medical malpractice cases, but both state that "plaintiff need not prove causation with absolute certainty. Rather, the plaintiff need only introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result." (*Viner v. Sweet* (2003) 30 Cal.4th 1232; *Ortega v. Kmart* (2001) 26 Cal.4th 1200.) In most medical malpractice cases, the negligence of the defendant is rarely, if ever, the sole or direct cause of the injury or death. Rather, an injury or death in a medical malpractice case is usually the result of multiple factors, including the patient's condition, and the actions or inactions of other health care providers. Therefore, the statement in CJC 430 that for a substantial factor to be a factor in causing harm, "it does not have to be the only cause of the harm," is an important addition and clarification of the law on causation. This instruction allows the jury to evaluate the effect of the defendant's negligence in combination with other factors, which together, result in the patient's injury or death.

CJC instruction 431 "Causation: Multiple Causes" adds further clarification to the law on causation in medical malpractice cases, and represents a significant improvement over BAJI 3.77 "Concurring Causes." Under BAJI 3.77, the jury would be instructed that there may be more than one cause of an injury and that when there are concurrent causes, "the conduct of each is a cause of the injury regardless of the extent to which each contributes to the injury." However, it stated that "a cause is concurrent if it was operative at the moment of injury and acted with another cause to produce the injury." This portion of the instruction is almost never applicable in a medical malpractice case, since usually the negligence of the defendant will result in an injury or death at a later point in time, and often only in combination with other later factors. This is especially true in cases involving negligent failure to diagnose or treat.

The new CJC instruction 431 states that "a person's negligence may combine with another factor to cause harm. If you find that the defendant's negligence was a substantial factor in causing the plaintiff's harm, then the defendant is responsible for the harm. The defendant cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing plaintiff's harm." There is no requirement that all of the factors or conditions occur at the same time. However, this instruction may need to be modified in a manner similar to CJC 430 to add the requirement that the conduct of the defendant was "more likely than not" a cause of the plaintiff's harm.