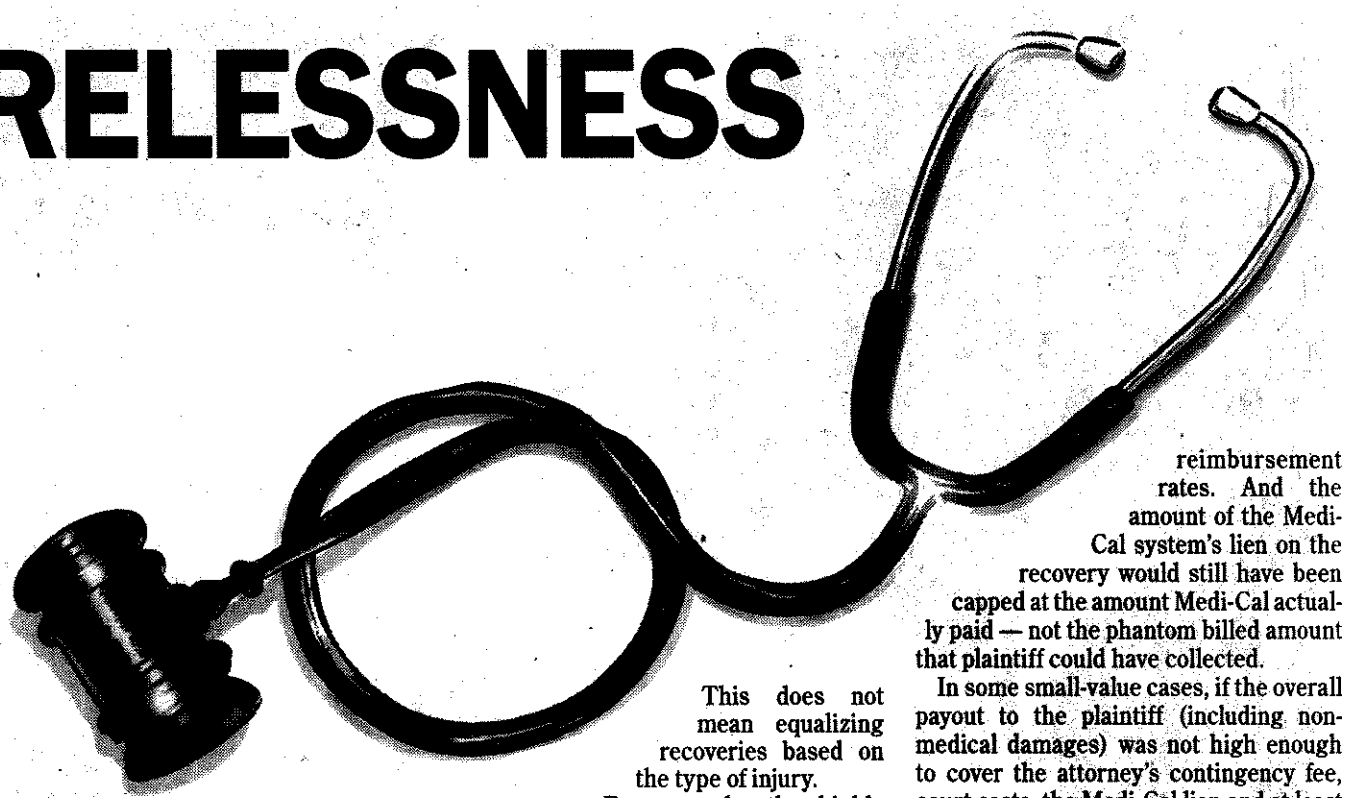
INTENSIVE CARELESSNESS



By David B. Newdorf

Plaintiffs' lawyers squared off with business and insurance interests recently in Sacramento over Senate Bill 93, one of a flurry of end-of-session measures sent to the governor. Proponents of the bill said it would have rescued the Medi-Cal system. The California Chamber of Commerce called it a "job killer" that would drive up business, home and auto insurance rates.

Business won this round when the governor vetoed the bill. This won't be the last of it. Legislators passed similar measures twice before, and the law would have meant big bucks for plaintiffs' attorneys. They'll be back.

What is at issue here? A tort reform organization opposed to S.B. 93 asserted: "It would allow lawyers to overstate the medical costs in a personal injury lawsuit, resulting in inflated settlements and judgments and bigger fees for the lawyers who take a third or more of the money for themselves."

A lawmaker in favor of the measure countered that insurance companies are "responsible for paying for the defendant's wrongdoing, and the amount that they are being required to pay is less than what the cost of the medical treatment is. The taxpayer and the public health system is paying for that."

The clear message is that if plaintiffs' lawyers have their way, accident victims insured by Medi-Cal (and their lawyers) will recover higher settlements and judgments. But the rhetoric of both sides fails to explain why the resulting medical damage awards would be fair — or too high, depending on one's point of view. The lesson here, if anyone needs reminding, is that truth and understanding fall by the wayside when complex legal issues butt up against entrenched economic interests.

This issue is too complex for opposing sound bites. A quick primer on tort law is helpful to follow the dialogue. In the interest of full disclosure, I'm not neutral in this debate. This issue has been percolating through the courts for years, and I've opposed the basic tenet embodied in S.B. 93 in the state Court of Appeal and the California Supreme Court. In the judicial branch, the defense view has prevailed, and now the plaintiffs' bar has moved the debate to the political arena.

Medi-Cal reimbursement rates are lower than most private insurance. Hospitals don't like this, and neither do plaintiffs' lawyers.

Back to Tort Law 101. California law has long permitted injured persons to recover "reasonable and necessary" medical costs, in addition to pain and suffering and, if applicable, lost wages and property damage.

In the past, "reasonable and necessary" medical costs generally meant the amount billed by the provider. However, with the advent of managed care, insurers (including Medi-Cal) have negotiated substantial discounts from billing rates. Hospitals and doctors write off the balance, and neither the patient nor the insurer is liable for anything more than the negotiated rate. The injured person is entitled to recover the medical costs actually paid or incurred, even if this expense was covered by insurance. Then the insurance company (or Medi-Cal) usually has the right to recover out of the plaintiff's proceeds all or part of the amount paid out by the insurer for care.

Under these basic rules, tort law has sought to restore the accident victim as nearly as possible to his or her former position or to give the plaintiff the monetary equivalent.

Medi-Cal reimbursement rates are lower than most private insurance. Hospitals don't like this, and neither do plaintiffs' lawyers. In the leading court case on this issue, a hospital "billed" a Medi-Cal patient $27,000, but Medi-Cal paid only $16,494 to the hospital. The court held that since neither Medi-Cal nor the patient was liable for the higher billed amount, the plaintiff could only recover the amount actually paid. *Hanif v. Housing Authority* 200 Cal. App. 3d 635 (1988). In many cases, the disparity between hospital bills and Medi-Cal payments is even greater.

The *Hanif* analysis is based on bedrock principles of tort damages. As the court explained: "A plaintiff in a tort action is not, in being awarded damages, to be placed in a better position than he would have been had the wrong not been done." Since *Hanif*, California courts have been reasonably consistent in limiting tort medical damages to the insurance rates actually paid, even if less than billing rates.

Plaintiffs' lawyers have railed against the vagaries of this rule because similar injuries command widely different tort payouts depending on the type of medical insurance. But the purpose of the tort system is to compensate as nearly as possible for the individual damages sustained. This does not mean equalizing recoveries based on the type of injury.

For example, the highly compensated banker recovers more for lost wages than a house painter, although each missed the same days of work. If a bus destroys a brand new car, the consumer could recover the retail price. But if the bus plowed into a car lot, the dealer could recover only the lower wholesale price. As these examples show, tort awards vary — by design — because they are tailored to the individual harm caused.

Enter S.B. 93. It would have turned the traditional tort rule on its head. In assessing the amount of the plaintiff's "reasonable and necessary" medical expenses, juries would not have been told, and judges could not have considered, the amount actually paid by Medi-Cal. But plaintiffs could admit into evidence the amount of the hospital bill before any payments or write-downs. This so-called bill — which no one is expected to pay in full — is far higher than the prevailing market cost of care because all public and private insurance plans have negotiated discounts.

Oddly, since proponents of S.B. 93 ballyhooed the bill as helping to pay for medical care for accident victims, the measure did not allot any of the higher medical damages to the hospitals or doctors who may be squeezed by low Medi-Cal reimbursement rates. And the amount of the Medi-Cal system's lien on the recovery would still have been capped at the amount Medi-Cal actually paid — not the phantom billed amount that plaintiff could have collected.

In some small-value cases, if the overall payout to the plaintiff (including non-medical damages) was not high enough to cover the attorney's contingency fee, court costs, the Medi-Cal lien and at least an amount equal to the lien left over for the plaintiff, S.B. 93 would have given a modest boost to Medi-Cal's recovery. But the windfall to plaintiffs and their lawyers would have dwarfed this occasional benefit to Medi-Cal.

Another anomalous result of S.B. 93 is that it would have turned Medi-Cal patients from the least desirable personal injury clients to the most sought after. In all cases involving private medical insurance, the traditional rule limiting medical damages would still apply.

This measure, like the ones before it and those certain to come next session, would enrich plaintiffs' lawyers without giving one penny more to the hospitals and doctors that actually treat California's poor. It is bad public policy and these efforts deserve defeat.

David B. Newdorf is a deputy city attorney and trial lawyer for the city and county of San Francisco. He represented San Francisco in *Nishihama v. City and County of San Francisco* and the League of California Cities as an amicus in *Parnell v. Adventist Health System/West*, both of which affirmed a cap on permitted medical damages.