



Burchell v. Faculty Physicians & Surgeons of Loma Linda University (Cal. App. 4th Dist.)

Topics Covered: Abusive Litigation Towards Physicians, Professional Liability, Tort Reform

Issue

The issue in this case is whether California's cap on non-economic damages (Cal. Civil Code §3333.2), a part of MICRA (Medical Injury Compensation Reform Act), applies to a physician who was found liable for medical battery.

AMA Interest

The AMA supports caps on non-economic damages in medical malpractice lawsuits. Also, the AMA opposes abusive lawsuits against physicians.

Case Summary

Keith Burchell appeared to have a small lump (a one-centimeter palpable mass) on his scrotum. Dr. Gary Barker, a urologist, undertook a removal of the mass, which he was to submit for biopsy testing. Dr. Barker informed Burchell of the proposed procedure, which was to consist of a small incision in the scrotum, excision of the mass, and closure of the incision. Burchell signed two surgical consent forms, both of which described the intended procedure as "local excision of a surgical mass." One of the consent forms authorized Burchell's ex-wife, Elizabeth Burchell, to make medical decisions on Keith Burchell's behalf, should he be unable to do so.

During the surgery, Dr. Barker discovered that the mass was much larger than anticipated and had invaded Burchell's penis. While Burchell was anesthetized, Dr. Barker determined that it was medically appropriate to remove the entire mass. He was unaware of the designation of Elizabeth Burchell to make medical decisions for Keith Burchell, and so Dr. Barker did not obtain additional consent – from Elizabeth Burchell, from Keith Burchell, or from anyone else – before extending the surgery to remove the mass from Burchell's penis as well as his scrotum.

The extended procedure required the removal of a significant portion of Burchell's penis, leaving him with no feeling in his penis and causing blow flow disruption. In the years following the initial procedure, Burchell underwent multiple follow-up surgeries to correct cosmetic and functional deformities.

Burchell sued Dr. Barker for medical negligence and for medical battery. At trial, plaintiff's expert witness, a urologist, testified that he had never before seen this type of mass (a cystic lymphangioma) in the scrotum or penis. He agreed with Dr. Barker's initial recommendation to remove the mass from the scrotum, but he further testified that removing it from the penis without obtaining additional consent violated the standard of care. Dr. Barker's expert witness, a urologist who also had never encountered a cystic lymphangioma in this part of the body,

testified that Dr. Barker's decision to remove the mass met the standard of care even though Dr. Barker could not tell during the surgery whether the tumor was malignant.

The jury found that while Dr. Barker had received consent from Burchell to perform the initial biopsy, Dr. Barker's decision to expand the scope of the procedure to remove the mass in its entirety constituted a substantially different medical procedure. Because Burchell had not consented to the more extensive surgery and it was not justified by the exigencies of the situation, Dr. Barker had committed a medical battery. The jury found Dr. Barker liable for \$22,346.11 in economic damages and \$9.25 million in past and future non-economic damages.

Following the verdict, Dr. Barker moved to reduce the damages under §3333.2. This statute caps noneconomic damages at \$250,000 "[i]n any action against a health care provider based on professional negligence." Burchell opposed the motion because a battery is an intentional tort and was not, therefore, professional negligence. The trial court agreed with Burchell and entered judgment on the full amount of the verdict, including the \$9.25 million in non-economic damages.

Dr. Barker has appealed to the California Court of Appeal. One of the issues on appeal is whether Dr. Barker's conduct should be classified as professional negligence, which would fall within the damage cap of §3333.2, or whether, because his conduct constituted a medical battery – which includes an element of intentionality – it should be outside the §3333.2 protection.

Litigation Center Involvement

The Litigation Center and the California Medical Association filed an *amicus* brief to support Dr. Baker.

California Court of Appeal brief