Objecting to Judicial Council Form Interrogatories

By Howard A. Kapp, Esq.

There is an unfortunate assumption among some plaintiff's counsel — and even some respected commentators — that the Judicial Council Form Interrogatories are unobjectionable as to form and that objections are limited to the improper "checking off" of clearly inapplicable questions. (See Weil & Brown, *California Practice Guide/Civil Procedure Before Trial* (1989) § 8:933.) This article demonstrates that that simply is not true; indeed, a number of such interrogatories commonly propounded to plaintiffs are facially objectionable on well-established legal grounds. In fact, such objections are routinely interposed with few defense attempts to challenge these objections by motion. Moreover, virtually all defense counsel accept the objections without protest, even in large and hotly contested cases.

These objections fall neatly into three classifications: right of medical privacy, unnecessary burden, and miscellaneous objections.

RIGHT OF MEDICAL PRIVACY OBJECTIONS

Unquestionably, the most powerful — and legally unassailable — objection is that of medical privacy.[1] Such objections should be interposed to Form Interrogatories 10.2,[2] 11.1[3] and 11.2.[4] To avoid unnecessary nit-picking and to demonstrate plaintiff's good faith, counsel should

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answer these questions as to "tendered" areas subject to these objections.[5] This procedure exactly tracks the response approved in *Britt v. Superior Court* (1978) 20 Cal.3d 844, 852 and fn. 6 [143 Cal.Rptr. 695], the leading case in this area.

These privileges, which are well established,[6] should always be interposed to each of the form interrogatories which attempts to gather medical, treatment, or claims history information which relates to parts of the plaintiff's body "not tendered" *by plaintiff* by filing the action.

The "not tendered by plaintiff" limitation, which directly tracks the language interpreting Article I, Section 1 of the State Constitution is a very powerful limitation. From a practical standpoint, it precludes the defense from creatively defending the action by raising pseudo-scientific defenses based on irrelevant information.[7] It is counsel's job to insure that defense counsel doesn't waste valuable premium dollars fishing for — or through — such material.

By definition, these objections also bar the discovery of even undeniably "relevant" medical information about parts of the body that have not been "tendered" by the plaintiff. Thus, for example, the privilege would bar discovery of systemic medical conditions that might be, within the hyper-liberal standards of discovery, pertinent to the claimed injury. This, of course, is an inherent characteristic of

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[1] As used here, the "right of medical privacy" objections include the right of privacy in Article I, Section 1 of the State Constitution and the various statutory medical treatment privileges. For the purpose of objecting to interrogatories, there is no reason to distinguish between the various privileges; all should always be asserted. One should also interpose objections as to relevancy.

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[2] This question seeks to have the plaintiff "List all physical, mental, and emotional disabilities you had immediately before the INCIDENT." The problem here is that the form interrogatory is not limited to those body parts that plaintiff tendered in the case. Moreover, while the defense might argue that a loss of earnings claim might be affected by other concurrent disabilities, the interrogatory is not limited to overlapping disabilities. Additionally, the fact that either the accident or the unrelated disability might separately have caused the loss of earnings is usually not a proper defense as the defendant still might be liable for the period of accident-related disability under the doctrine of concurrent causation.

[3] This rather tedious interrogatory seeks to have the plaintiff identify other personal injury "claims" within the past 10 years. There is no case law holding that the past filing of another, unrelated claim waives the privacy privileges. (Cf. *Fellow v. Superior Court* (1980) 108 Cal.App.3d 55 [166 Cal.Rptr. 274]; work product.) There simply is no reason to believe that a plaintiff's prior limited waivers compound for the benefit of the present defendant. Since the question is not limited to similar injury claims, as is Form Interrogatory 10.1, it also fails the privacy tests.

[4] This interrogatory seeks information about worker's compensation claims within the past 10 years. It fails for the same reasons as its sister question, No. 11.1.

[5] The following is a suggested form of the objection:

> Objection. To the extent that this interrogatory seeks information concerning "personal injuries" which were unrelated to the cause of the incident or plaintiff's claimed damages, the interrogatory seeks information which is subject to the physician-patient and psychotherapist privileges and the right of privacy. Without waiving said objections, and in the spirit of discovery, plaintiff responds as to unprivileged matter only:

[6] The details of the rights of privacy are beyond the scope of this article. For an authoritative and comprehensive discussion of these privileges, see Weil & Brown, *California Practice Guide/Civil Procedure Before Trial* (1989) ¶ 8:293 - 339.8.

[7] Which trial lawyer hasn't been confronted with the so-called defense to a garden-variety cervical strain case because of the female claimant's irregular menstrual periods?

valid. The contemporary corporate mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will forgo making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse affect upon its public image. In the products liability area, the exclusionary rule of section 1151 does not affect the primary conduct of the mass producer of goods ..." (*Ault v. International Harvester Co., supra*, at pp. 119-120.)

The situation is not changed by the fact that Children's Hospital was the plaintiff's employer, entitled to a lien for previously paid workers' compensation benefits. (Labor Code §§ 3052, 3856, subd. (b).) The employer's negligence, if any, can be reduced by the percentage share of the employer's responsibility for the injuries. (*Rodgers v. Workers' Compensation Appeals Board* (1984) 36 Cal.3d 330, 335-336.)

Children's Hospital dismissed its complaint in intervention one week before trial and therefore it was not a party. The appellate court decided that there would be no reason to limit section 1151 for a non-party. The rationale behind the statute extends equally to the situation which a non-party will be adversely affected by a jury's determination of negligence. The court concluded that where, as here, a jury is asked to determine if a non-party was negligent and there is no strict liability theory asserted against that non-party and, where the jury's determination will have a direct effect on the amount of damages which that entity will be required to pay, section 1151 *precludes* the use at trial of evidence of remedial measures taken by the non-party (Children's Hospital).

The court felt that even if the judge erred in refusing to permit Otis Elevator to introduce evidence of the remedial repairs taken by Children's Hospital, such error would be harmless. This judgment was affirmed and subsequent to that decision an In Banc California Supreme Court upheld the appellate decision.

CONCLUSION

This case is an excellent case for the injured worker and his employer to use to exclude evidence of subsequent remedial repairs by the injured employee's employer. Children's Hospital was found to be only 10% at fault and had the evidence of subsequent repairs come before the jury, the jury may have decided a much greater degree of liability by the employer; then the plaintiff would have been precluded from recovering from Otis Elevator and the case could have remained in the workers' compensation system.

To increase the damages for your injured plaintiff where there is the issue of employer negligence and subsequent repairs, it is crucial to make a motion in limine under Evidence Code section 1151.

At least by excluding evidence of subsequent remedial repairs that the employer has made, the plaintiff's attorney can reduce the percentage of fault that a jury may find attributable to the employer and therefore maximize the recovery for the injured plaintiff. ■