

AHP LOSES KEY CALIFORNIA MOTION IN LIMINE

By Fabrice N. Vincent

Plaintiffs pursuing lawsuits for diet drug induced heart valve injury and/or primary pulmonary hypertension ("PPH") won a significant victory in California recently, when the California Coordination Court, the Honorable Daniel S. Pratt presiding, denied American Home Products Corporation's ("AHP's") motion to exclude evidence of inadequate PPH warnings in a heart valve lawsuit. *Haroutonian and Haroutounian v. Wyeth Ayerst et. al.*, JCCP 4032 (Los Angeles County Court, Southeast District (Norwalk) DD000147, 2/8/2000).

Judge Pratt denied AHP's motion in limine on the grounds that plaintiff Haroutonian is entitled to establish causation with respect to her entire "decision making process," highlighting the importance to plaintiffs of seeking the introduction of all potential evidence which would have affected a plaintiff's decision-making process, including, for example, introduction of PPH warning inadequacy issues in a heart valve injury case and vice versa.

Indeed, evidence of AHP's failure to warn of heart valve injuries is compelling and PPH plaintiffs will likely seek to present such evidence, alongside PPH warning defect evidence, even where the plaintiff has no valve problem since, as held by Judge Pratt, such evidence is potentially probative and admissible even where the plaintiff does not have the condition which the company failed to warn of:

In the failure-to-warn context, California authority holds causation is measured not with respect to the injury suffered, but with respect to plaintiff's decision making process. [citing *Carlin*] ... Defendant's attempt to limit the holding in *Warren v. Schechter*, *supra*, to cases where plaintiff actually contracts the disease defendant failed to warn about is not persuasive. ... PPH evidence is thus relevant [in a heart valve case] both to AHP's duty to warn and to causation.

Haroutonian, Order Denying AHP Motion *In Limine*, p. 2.

The entirety of the Judge's ruling is as follows:

Failure-to-warn sounds both in negligence and strict liability. *See Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1112. "Negligence law in a failure-to-warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons which fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about." *Id.* at 1, 12, quoting Anderson, *supra*. "The rules of strict liability require a plaintiff to prove only that the

defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution." *Ibid.*, quoting *Anderson v. Owens-Corning Fiberglass Corp.* (1993) 63 Cal.3d 987, 1002-1003.

The issues are, did AHP's duty extend to warning about PPH when plaintiff does not suffer from PPH and did AHP's failure to so warn cause plaintiff's VHD?

Causation

Under both a strict liability and negligence theory, plaintiff must prove defendant's breach of duty caused her damages. *Carlin, supra*, at p. 1110; *Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 614. "As a practical matter," the elements of duty and causation "are interrelated, as the question whether an act or omission will be considered a breach of duty or a proximate cause of injury necessarily depends upon the scope of the duty imposed." *Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, 1211, internal quote and citations omitted.

"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 or harm."

BAJI, 8th ed. (1994) § 3.76, emphasis added.

AHP contends evidence which relates exclusively to PPH (PPH evidence) is irrelevant to causation because any warning about PPH could not have proximately caused plaintiff's injury. In other words, evidence of a lack of warning of the risk of disease X is irrelevant to a plaintiff's claims if she suffers only from disease Y. In support of this position in its first motion in limine, AHP cited a number of foreign cases. This position does not comport with California law.

In the failure-to-warn context, California authority holds causation is measured not with respect to the injury suffered, but with respect to plaintiff's decision making process. *E.g., Carlin, supra*, at p. 1113 ["When, in a particular case, the risk qualitatively (*e.g.*, of death or major disability) as well as quantitatively, on balance with the end sought to be achieved, is such as to call for a true choice judgment, medical or personal, the warning must be given. . . ."]; *Cobbs v. Grant* (1972) 8 Cal.3d 229, 245 ["There must be a causal relationship between the physician's failure to inform and the injury to the plaintiff. Such causal connection arises only if it is established that had revelation been made consent to treatment would not have been given."]; *Warren v. Schechter*, (1997) 57 Cal.App.4th 1189, 1203 [defendant liable for all damages resulting where inadequate advisement did not provide plaintiff with sufficient information to intelligently decide whether to undergo the procedure].

Defendant's attempt to limit the holding in *Warren v. Schechter, supra*, to cases where plaintiff actually contracts the disease defendant failed to warn about is not persuasive. True,

Warren suffered from the particular disease she was not warned about. However, the court defined "proximate cause" not by matching the disclosed risks to the injury, but by examining whether plaintiff, if given adequate disclosure, "would not have consented to [the] operation." *Id.*, at p. 1203, original emphasis.

PPH evidence is thus relevant both to AHP's duty to warn and to causation.

The Evidence

PH evidence is relevant because, allegedly, PH can be associated with VHD. Plaintiffs claim AHP knew about cases of PH, which knowledge put it on notice that Pondimin/Redux might cause VHD. Therefore, evidence relating to what AHP knew about PH is directly relevant to the adequacy of AHP's warnings. PPH evidence is relevant to plaintiff's claim that had she had this warning, she would not have been injured.

However, even if it were not relevant, the court is not satisfied defendant accurately distinguishes between PPH evidence and PH evidence. In written briefs and oral argument, AHP uses the term "PPH evidence" to refer to evidence that actually relates to PH, not PPH. The instant motion illustrates the problem. Though the caption refers to PH evidence, the points and authorities deals almost exclusively with PPH evidence. However, it appears the evidence which AHP terms "PPH evidence" actually relates to both PH and PPH. (Though it listed in support of it's motion in limine No. 1 a number of examples of purportedly PPH evidence, AHP did not demonstrate why this evidence relates to PPH and not to PH.)

An example of evidence which is unambiguously PPH evidence would be a question put to plaintiff: "If you had been warned about the risks of PPH, would you have taken the drug?" (A patient's testimony as to whether she would have undertaken treatment had she known of a particular risk is relevant, though not dispositive. *Cobbs v. Grant, supra*, at p. 245.) Other than this, the court is aware of few, if any, other clear examples of purely PPH evidence. AHP has not demonstrated exactly what specific evidence it seeks to exclude as exclusively PPH evidence. Therefore, even if the court did not find PPH evidence to be relevant, it would be unable to grant this motion.

AHP argues plaintiff made judicial admissions regarding the adequacy of warnings given. Even if the motion for summary judgment brought by plaintiff's physician dealt with AHP's duty to warn, which it didn't, plaintiff's non-opposition was not an admission of anything. *Haroutonian*, Order Denying AHP Motion *In Limine*, pp. 1-3.

Judge Pratt's opinion is likely to be persuasive authority which diet drug plaintiffs in other states can use to seek to persuade their courts to admit all warning evidence. Defendants', on the other hand, are likely to counter any reliance upon Judge Pratt's ruling by distinguishing their state's warning liability standards from the "entire decision making process," recognized in California.