

#52.40

8/5/69

Memorandum 69-101

Subject: Study 52.40 - Sovereign Immunity (Collateral Source Rule)

The attached legal newspaper report of the Court of Appeal opinion in Helfend v. Southern California Rapid Transit District indicates the difficulties that exist in the existing law relating to the collateral source rule as applied to actions against public entities and public employees. If you have had any concern that a study of this area of the law was unneeded, the attached report should convince you that this study is essential and should be given priority. Our research consultant is at work on preparing the background research study.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

When Collateral Source Rule Can't Be Invoked Against Public Entity

The collateral source rule may not be invoked against a public entity if the result would be punitive damages against the entity.

To do so would impose an unjust burden upon the innocent taxpayer without directly penalizing the wrongdoer.

Those principles were emphasized by Division Four, Second Court of Appeal, Friday in *HELFEND vs. SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT*.

It was not contended that the evidence does not support the verdict and judgment, either as to liability or as to amount of damages, against the district, where a man sued for injuries allegedly caused by a district bus.

Since the district was entitled to — and denied — the right to mitigate the award against it by showing how much of the medical expense had been paid by the plaintiff's insurers, the justices reversed the judgment.

But the court's ruling does not inure to the benefit of the bus driver. No public policy nor statutory provision denies recovery of punitive damages against a public employe, said the justices.

Subject to the trial judge's discretion, under the Garfield rule, a defendant may show existence of two or more policies of medical insurance as bearing on a plaintiff's credibility, said the court.

At a new trial, if the trial court permits, both defendants may offer evidence of multiple insurance as bearing on credibility. But only the district may offer evidence of insurance in mitigation of damages.

The justices discussed a solution to a possible procedural problem that could stem from that holding upon a retrial. The entire appellate opinion follows:

Filed July 25, 1969

In the Court of Appeal of the State of California, Second Appellate District, Division Four.

Civil No. 33,116

JULIUS J. HELFEND, Plaintiff and Respondent, vs. **SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT**, et al., Defendants and Appellants.

Appeal from a judgment of the Superior Court, Los Angeles County. Otto J. Emme, Judge. Reversed.

Judgment in favor of plaintiff in action for personal injuries, reversed.

Victor Rosenblatt for Defendants and Appellants.

Calden, Bloomgarden & Kal-

man, and Newton Kalman, for Plaintiff and Respondent.

Plaintiff was injured by being struck by defendant Transit District's bus. He sued and, after a trial by jury, recovered a judgment in the amount of \$16,400. Defendants have appealed.

It is not here contended that the evidence does not support the verdict and judgment, either as to liability or as to the amount of damages. Nor, except as indicated below, is it claimed that the trial court committed error. The appeal is pressed solely on two points:

(1) That defendants were entitled to show, in mitigation of damages, that plaintiff had been reimbursed for at least part of his medical expenses by his medical insurance carriers; and

(2) That defendants were entitled to show, as bearing both on plaintiff's credibility in general and on the necessity for

part of the medical treatment, that he carried two or more policies of insurance, under which he might have made a profit by extending his treatment beyond actual need.

The trial court rejected defendants' attempt to interrogate plaintiff as to the nature and extent of his medical insurance; that ruling is, as we have said, the only error assigned here.¹

I

The long settled and general rule in tort cases is that a de-

fendant cannot secure a reduction of the judgment against him by reason of the receipt by plaintiff of compensation received from an independent source, such as insurance. This rule, commonly called the "Collateral Source Rule," is not questioned here.² However, defendant district contends that that rule is not applicable where the

defendant is a governmental agency.³ It bases that contention on the holding of the Supreme Court in *City of Salinas v. Souza & McCue Construction Co., Inc.* (1967) 66 Cal. 2d 217. We conclude that the point is validly taken by the defendant district but that it is not valid as against the individual employee defendant.

In *Souza* a contractor sued a city for damages, allegedly caused by the city's fraudulent concealment of sub-soil conditions. The city contended that the contractor had been reimbursed, in part, for that damage by a settlement with one of its suppliers. The trial court refused to allow any showing on that issue. The Supreme Court reversed.

It was argued at length to the trial court, and it is argued here, that *Souza* case stands only for the nonapplicability of the collateral source rule to actions for breach of contract. A reading of the opinion does not sustain that contention. After making a general discussion of the collateral source rule, the court said (at pp. 227-228):

"In the instant case the gist of the city's conduct sounds in deceit, resulting in a fraudulent breach, and might, for some purposes, have been treated as an action for relief grounded on fraud. [Citation.] It is not necessary, however, that we reach the issue of whether the fraudulent breach of a contract in some settings would justify the application of the collateral source rule [citation], as we are compelled to conclude that the rule is not applicable against a public entity for the reasons which next follow. . . .

"It is manifest that a public entity normally does not act or make its functional decisions through the whole body of those who may be deemed to compose it. Rather it necessarily acts in the performance of its various functions through public officials and representatives who have no greater proprietary interest in the entity than does any citizen or taxpayer. Should the conduct of such official or representative cause damage to those with whom they are dealing the general rule has been that the public entity would incur no liability, under the doctrine of governmental immunity. Although many statutory and other inroads on this doctrine

have been made (see *Muskopf v. Corning Hospital Dist.* (1961) 55 Cal. 2d 211, 216-218 [11 Cal. Rptr. 89, 359 P. 2d 457]), the levying of punitive damages against a public entity has not been authorized. To do so would impose an unjust burden upon the innocent taxpayer without directly penalizing the wrongdoer. The punitive purpose would thus be frustrated. We have seen that the collateral source rule is punitive in nature (*United Protective Workers v. Ford Motor Co., supra*, 223 F. 2d 49, 54; 2 Harper & James, *Law of Torts*, § 25.22, p. 1345; Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 Cal. L. Rev. 1478, 1482-1484), and the theory of its application in the instant case would be that because the city's actions were willfully fraudulent, a desirable punitive and preventative effect may be obtained by making the wrongdoer pay damages for an injury which may have been already compensated in whole or part. As we cannot impose on the city any measure of direct damages which are punitive in nature, it necessarily follows that we are foreclosed from doing it by an indirect and collateral route."

In the face of that language, we have no choice but to agree with the district and hold that it was entitled to mitigate the award against it by showing how much of the medical expense had been paid by the plaintiff's insurers.

But the holding, and the reasoning, of *Souza* do not inure to the benefit of the individual driver-employee. There is no public policy, nor statutory provision,⁴ denying recovery of punitive damages against a public employee. In fact, the statute expressly recognizes that there may be such a case. In the section (Gov. Code, § 825) that covers the right of an employee to be held harmless by his employer for judgments recovered against him while acting in the course and scope of his public employment, the Legislature has provided:

"Nothing in this section authorizes a public entity to pay such part of a claim or judgment as is for punitive or exemplary damages."

Since the district avoids the collateral source rule only because the Supreme Court regards that rule as being in the nature of "punitive damages," and since

that rationale cannot apply to an individual, it follows that the defendant driver was not entitled to any reduction of the verdict against him.

II

In *Garfield v. Russell, supra*, (1967) 251 Cal. App. 2d 275, 278-279, Division Five of this district ruled that a defendant might show the existence of two or more policies of medical insurance as bearing on a plaintiff's credibility.⁵ The ruling was based on the court's belief that such evidence was "relevant" and, therefore admissible under section 351 of the Evidence Code, but subject to the discretionary power of the trial court, under section 352 of the Evidence Code, to exclude it if that court concludes that its probative value is outweighed by "substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Plaintiff argues that the theory of *Garfield* was not presented to the trial court by an adequate offer of proof and, thus, is not available here. It is true that the bulk of the 14 pages of the Reporter's Transcript in which the admissibility of the evidence was discussed was devoted to a consideration of the collateral source rule and the meaning of *Souza*. However, *Garfield* was cited to the court and the use of the evidence as bearing on motive was referred to, and counsel for defendants stated, without contradiction, that plaintiff had at least two policies of medical insurance. We think the point was sufficiently raised below to allow defendants to urge it here.

III

As we have pointed out, while both defendants may, on a new trial, if the trial court permits, offer evidence of multiple insurance as bearing on credibility, the district (but only the district) may offer evidence of insurance in mitigation of damages. This could well pose a procedural problem. In *Souza*, the trial was to the court sitting without a jury, so that problems of confusion or prejudice presumably would not arise. But, as *Garfield* points out, those problems are inherent in a jury trial. If defendants can show insurance of such a nature as to entitle them to invoke the *Garfield* rule, and if the trial court does not exclude that evidence under section 352 of the Evidence

Code, both effects may properly go to the jury. However, if defendants cannot bring themselves within Garfield, or if the trial court decides to invoke section 352, then we think that evidence of insurance (which, under those circumstances would operate merely to reduce the judgment against the district) should be received outside the presence of the jury, whose verdict could then be reduced by the court in entering judgment in the same manner as is used in dealing with the lien of a compensation carrier.

The judgment is reversed.
KINGSLEY, J.

We concur:
JEFFERSON, Acting P. J.
DUNN, J.

1 The defendants were the district and its employed bus driver. The judgment was entered against them jointly and they have joined in the appeal. The contentions made in their brief are made on behalf of both defendants. As we point out, the contention relative to the "Collateral Source Rule" is available only to the district.

2 As Mr. Justice Knuts said in *Garfield v. Russell* (1967) 251 Cal. App. 2d 272, 276: "The rule on that point was too clear to make it worth anybody's time to argue to the contrary."

3 The status of defendant district as a "public entity" within the scope of *Souza* is not here questioned.

4 A footnote to the portion of the *Souza* opinion which we have quoted above, reads as follows:

"A statutory expression of the then existing public policy is found in § 818, Gov. Code, effective shortly after the judgment herein. As a part of legislation extending the liability of public entities for the tortious conduct of public employees (Stats. 1963, ch. 1681), section 818 provides as follows: 'Notwithstanding any other provision of law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant.' (See also Gov. Code, § 825.) Section 818 is explained by the California Law Revision Commission on the ground that such damages are imposed to punish a defendant for oppression, fraud or malice. They are inappropriate where a public entity is involved, since they would fall upon the innocent taxpayers.' (4 Cal. Law Revision Com. Rep. (1963) Recommendation Relating to Sovereign Immunity, p. 817.)"

5 "Evidence that a plaintiff is being wholly or partially compensated for her medical expenses—or perhaps even making money every time she sees her doctor—may obviously be relevant on her motives in seeking medical help and her credibility as a witness, even if only remotely. (Evid. Code, § 780, subd. (f).) Pursuant to section 351 of the Evidence Code 'Except as otherwise provided by statute, all relevant evidence is admissible.' We know of no statute, either in or out of the Code which holds that the type of evidence with which we are concerned is inadmissible; section 352, however, gives the trial court a broad discretion to exclude otherwise admissible evidence if its probative value is outweighed by substantial danger of unfair prejudice, of confusing the issues, or of misleading the jury."