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The Law Offices of
Borton Petrini LLP
1600 Truxtun Avenue
Bakersfield, CA 93301
bpcbak@bortonpetrini.com

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INSURANCE CASES
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**EDITOR:
MATTHEW J. TROSTLER
(213) 624-2869**

NEW CASE LAW CLARIFIES LIABILITY FOR SUBSEQUENT NEGLIGENCE OF MEDICAL PROVIDERS

By Matthew J. Trostler, Esq.

In California, a defendant in a personal injury action is legally responsible for plaintiff's harm, and is also responsible for any additional harm resulting from the subsequent acts of others, even if those acts have been negligently performed. In fact, courts have held that medical treatment for resulting injuries caused by the first tort-feasor is a kind of "physical harm" for which the original defendant is liable whether the treatment is itself negligent or not. The important factor in those cases is that the medical treatment is closely and reasonably associated with the immediate consequences of the defendant's original tortious act and forms a normal part of its aftermath. Courts have even gone so far as to hold that subsequent negligent medical treatment is foreseeable as a matter of law. (*Blecker v. Wolhart, 1995.*) The perceived inequity in such a proposition is obvious. A defendant involved in a motor vehicle accident with a plaintiff should be held responsible to the plaintiff for the injuries caused by the accident, and not by a subsequent medical treater who negligently performs treatment, thereby enhancing the injuries. In California, however, a defendant is still jointly and severally responsible for the enhanced injuries.

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Matthew J. Trostler



Matthew J. Trostler is a Partner in the Los Angeles office of Borton Petrini, LLP. He received his undergraduate degree from the University of Southern California earning a major in psychology and a minor in English, with an emphasis in expository writing. He earned his Juris Doctorate from California Western School of Law in 1991 where he was a contributing editor for the law school newspaper.

Matthew's primary area of emphasis at Borton Petrini, LLP is insurance defense. His wide-ranging experience in the field of insurance has provided additional insight to insurance carriers through seminars defining and discussing insurer regulations in California.

Matthew has significant experience in arbitrations, mediations and jury trials. Some of his verdicts have been published statewide and nationally. His aggressive applicational style is tempered by his sense of fairness and compassion.

SUMMARY OF PUBLISHED INSURANCE CASES: JUNE - DECEMBER 2007

By Matthew J. Trostler

Marquez Knolls Property Owners Association v. Executive Risk Indemnity (July 2007): Endorsement in liability insurance policy issued to HOA excluded coverage of claims for wrongful acts based on the design or construction of any structure; however, said exclusion did not preclude coverage of a lawsuit brought by a member against the Association asserting claims of fraud and breach of duty based on the Association's conduct in opining on a dispute that arose between the member and another homeowner after the member constructed a structure blocking the view of the other homeowner.



policy, the uninsured motor vehicle.

California Capital v. Nielsen (July 2007): When owner and operator of an uninsured vehicle have liability insurance coverage for bodily injury damages through a personal liability umbrella vehicle is not an

Cold Creek Compost Inc. v. State Farm (November 2007): Pollution exclusion in insurance policies barr coverage for liability for offensive and injurious odors emanating from a compost facility which had spread over one mile away.

LA Sound USA, Inc. v. St. Paul Fire and Marine (November 2007): St Paul had no duty to defend or indemnify insured in light of insured's material misrepresentations on insurance application.

State of California v. Farmer's Group, Inc. (November 2007): Judgment on the pleadings affirmed for Farmer's Group on the ground that Insurance Code section 1871.7 was not designed to prohibit fraud on the part of insurers, but rather to prohibit submission of fraudulent claims to insurers.



Essex Insurance Co. v. City of Bakersfield (August 2007): Insurer owes City a duty to defend and indemnity following motor vehicle accident and subsequent lawsuit as auto exclusion vague and ambiguous.

Bjork v. State Farm (November 2007): Summary Judgment granted in favor of State Farm affirmed as victim of sexual molestation was a resident of her mother's home at the time she was injured by the alleged molester, therefore the terms of the applicable policy exclude coverage for victim's mother's personal liability (resident relative exclusion).

NEGLIGENCE OF MEDICAL PROVIDERS

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Recent case law, however, more clearly defines several liability involving multiple tort-feasors. The case of *Henry v. Superior Court* (2008) B200690, filed February 25, 2008 (request for de-publication denied May 21, 2008) was a premises liability case. In this case, plaintiff (Reinink) sued the Henrys for bodily injury as a result of a fall on the Henrys' property. Reinink subsequently received medical treatment at Kaiser, who committed malpractice when the surgeon broke plaintiff's shoulder in four places while trying to put it back into place, necessitating further surgeries. Defendants wanted to cut off their liability in light of the physician's malpractice. Plaintiffs objected to expanding the scope of the trial to include Kaiser's alleged negligence in treating plaintiff's original injury. Plaintiffs also cited Jury Instruction No. 3929 which generally provides that a defendant is legally responsible for plaintiff's harm and that a defendant is also responsible for any additional harm resulting from the acts of others, even if those acts were negligently performed. The court agreed with the plaintiffs and defendants filed a writ.

The court of appeal discussed the history of joint and several liability and the current state of the law in regard to allegations of subsequent negligence following an initial tort-feasor's injury. The court rejected plaintiff's contentions and essentially held that the concept is not one of injury, but one of legal causation.

“The concept, at bottom is one of legal causation, that is, are multiple tort-feasors responsible for the plaintiff's injuries, not the precise nature of the resulting damage.

“To the extent damages for Reinink's (plaintiff) injured shoulder can in fact be divided by causation into distinct

component parts B the original injury that resulted from the fall at the Henrys' property and the aggravation of that injury caused by Reinink's negligent treatment by Kaiser physicians B liability for each indivisible component part should be considered separately. The Henrys, if they were negligent, are solely responsible for the initial injury; liability for the indivisible enhanced or aggravated injury, however, is properly apportioned between the Henrys and the Kaiser physicians in accordance with the rules of comparative fault and section 1431.2 (joint and several liability law).”

The court ultimately concluded that Civil Code section 1431.2 permitted the original tort-feasors to limit their liability for non-economic damages to their proportionate share of fault. Plaintiffs in the *Henry* case attempted to limit the application of this doctrine by claiming that the use notes in Jury Instruction 3929 restricted this type of argument to medical malpractice cases. However, the court overruled this argument. The court also ruled that it was “not significant” that the nature of the Henrys' alleged negligence was different from the negligence on the part of the Kaiser Emergency room doctors. The court held that past California cases have made it clear that the comparative fault doctrine is a flexible, common sense concept, under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury in order to arrive at an equitable apportionment for allocation loss, citing the seminal case of *Knight v. Jewett* (1992).

The Henry case can be used to limit a defendant's exposure for an enhanced/aggravated injury as a result of medical negligence following an initial accident. This case carves an exception to Jury Instruction 3929 and allows an initial tort-feasor (i.e., original defendant) to introduce evidence of the subsequent negligence of a physician and have a jury apportion fault between the tort-feasors. ❖

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