CAIIA Status Report

April 2013

Personal Injury Claim; Does MICRA Apply?

Credit to Low, Ball and Lynch, San Francisco, CA

Plaintiff Catherine Flores ("Flores") was a patient at Presbyterian Intercommunity Hospital. On March 5, 2009, she suffered injuries when a hospital bed rail collapsed, causing her to fall to the floor. Almost two years later, on March 2, 2011, Flores filed suit against the hospital for personal injury based on negligence and premises liability.

The hospital demurred to Flores' complaint on the basis that it sounded in "professional negligence" and was barred by the one-year statute of limitations set forth in the Medical Injury Compensation Reform Act of 1975 (MICRA), codified at Code of Civil Procedure § 340.5 ("Section 340.5"). The hospital argued that the negligence described by Flores was an "integral part of the professional services rendered."

Flores opposed the demurrer, arguing that her claims arose out of the hospital's ordinary negligence such that the two-year statute of limitations for personal injury (Code Civ. Proc. § 335.1) applied, making her action timely. She argued that the hospital's failure to properly latch the side rails was an act of ordinary negligence occurring ***after*** *all* professional services were rendered.

The trial court sustained the hospital's demurrer and denied Flores' request to amend the complaint, finding that Flores' action sounded in "professional negligence" and was time barred under Section 340.5. Flores appealed.

The Court of Appeal reversed, holding that Flores' action was governed by the two-year personal injury statute of limitations, rather than the one-year medical malpractice statute of limitations. The legislative intent of MICRA was to limit damages for lawsuits against a health care provider based on "professional negligence claims" which are defined as "a negligent act or omission to act by a health care provider in the rendering of professional services..." The Court of Appeal stated that the central issue in determining which statute of limitations applies to Flores' complaint depends on the characterization of the alleged negligence as ordinary negligence or professional negligence. The Court of Appeal then discussed California case law pre-dating MICRA. In *Gin Non Louie v. Chinese Hospital Assn*. (1967) 249 Cal.App.2d 774, plaintiff Gin broke his hip after falling out of his hospital bed. The reviewing court held that the hospital had committed professional negligence by failing to notify Gin's physician of plaintiff's deteriorating condition and failing to provide supervision. In *Gopaul v. Herrick Memorial Hosp*. (1974) 38 Cal.App.3d 1002, a patient with pneumonia who was left unsupervised and unstrapped, fell off a hospital gurney. The reviewing court affirmed non-suit in favor of the hospital after determining that professional malpractice had not been committed because the assessment of whether there was a need to strap plaintiff to the gurney did not require professional skill, prudence and diligence.

The Court of Appeal also reviewed post-MICRA case law. In *Murillo v. Good Samaritan Hospital* (1979) 99 Cal.App. 3d 50, plaintiff was admitted for treatment of shingles and then fell out of bed at night because the rails were not raised. The *Murillo* court determined that these facts established professional negligence. The *Murillo* court disagreed with *Gopaul*, stating that the test for professional negligence was not whether the situation calls for high/low skill, but whether the negligent act occurred in the rendering of services for which the health care provider is licensed. In *Bellamy v. Appellate Department* (1996) 50 Cal.App.4th 797, the reviewing court deemed the hospital to be professionally negligent when plaintiff fell after being left unattended on an x-ray table.

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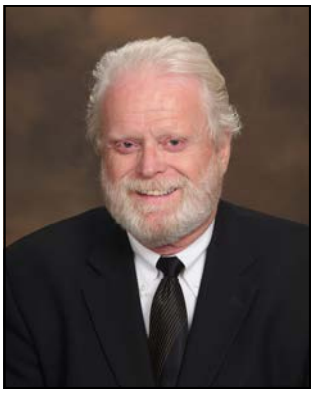
California Association of Independent Insurance Adjusters, Inc.

President's Message



W.L. (BILL) McKenzie
CAIIA President

As anyone who receives and reads the California Association of Independent Adjusters Status Report knows, education is paramount to our members. Over the past many years, our organization has hosted and promoted educational events. I just attended the 25th Annual Combined Claims Conference in Long Beach, CA and the CAIIA has participated for all 25 years. We have been fortunate in having members present topics at this event and received the proper recognition for all of the efforts made to keep education as a part of our professionalism.

It is mandated by the Department of Insurance that we must attend and maintain educational courses, which amounts to a total of 24 hours over a 2 year period, with 3 hours of Ethics. For our members that attended the 25th Annual Combined Claims Conference, there were a multitude of courses which provided all independent adjusters with the necessary educational requirement as mandated by the Department of Insurance. There were classes on Trip & Fall, Working Together with Restoration Contractors, Arson Classes, Workmen's Compensation Classes, AOE-COE Investigation & Surveillance Management, Ethics for the Insurance Professional, Conducting a Prompt & Reasonable Investigation for Coverage, Negligence & Damages, Good Faith Claims Handling, and Medical Cost Containment. All of these were well worth the time spent by our members in continuing their education. I firmly believe that most, if not all, of our members would have attended these classes regardless of the mandatory requirement.

Continuing in this genre, I must remind all of the members that we will be having our Spring Meeting in South Lake Tahoe at the Inn By the Lake on the 26th of April 2013. For those who wish to arrive early, there will be dinner on Thursday, the 25th of April. Mr. Waters, our Education Committee Chairman, has lined up Attorney Steve Huchting to also make a presentation on Claims Handling & Fire Investigation. Mr. Waters had worked hard in securing Mr. Huchting, who is a sought-after speaker and the Of Counsel to the Association, to present what will be a very thorough and enjoyable presentation on Ethics.

Additionally Mr. Waters is working with other members of the Association in finalizing the Certification Programs for the California Fair Claims Settlement Practices Regulations, SIU Regulations and the SEED Seminars. As of now there will be two SEED Seminars, one in Northern California and one in Southern California; and three FSPR/SIU only courses, one in Central California and three in Southern California. Look for the registration, hopefully in next month's Status Report.

Did you know there was an organization that celebrated January 28, 2013 to February 1, 2013 as Claims Professional Appreciation Week? That organization published a newsletter on the internet indicating that even though there is no Hallmark card to honor the occasion, and even if he was the only one who celebrated it, he planned to set aside that week for the remainder of his career to pay homage to the fine men and women who toil in the Claims Departments of America each and every day of the year.

We all know the various hats that adjusters wear during the adjuster's professional career. Those hats can vary dramatically and can include banker, lawyer, pastor, counselor, appraiser, researcher, investigator, mediator, philosopher, educator, communications expert, interpreter, etc. Over the course of several days talking with adjusters and fellow members of the CAIIA at the CCC, we all have a habit of telling "war stories". It is amazing to me that some of the adjusters who have been in the business for 30, 40, 50 years or so are still actively pursuing their career with enthusiasm, and most of all, still appear to enjoy the tasks that we are faced with on a day to day basis. We all know adjusters who have left the business because they were unable to physically and mentally deal with some of the tragedy which we face during the adjustment process. As a property adjuster, it is relatively easy for me to explain to an insured that it is only property and that no one was injured or died as the result of water loss or a fire. Sometimes that works and other times it doesn't, but as a (continued on page 3)

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young adjuster I found it difficult to deal with situations involving the death of an insured or a claimant, and even more so with the death of a child. We accept those responsibilities not only because it's our job or our career, but because I believe over the course of the years we have trained and educated ourselves to assist someone who has a tragedy and we can empathize with those individuals. That I think is one of the great skills we develop over time with our experiences in the adjusting field.

One final story about myself as a young adjuster, while I was at Travelers they hired a college graduate, a couple years younger than me, who had a GPA that was 0.05, greater than mine and quite honestly I believe that is what they used as their criteria. He lasted less than a year because he could not even attempt to develop empathy with the policyholders or the claimants. He remarked on more than once occasion that he just loved denying claims, especially to old ladies. I think, in a relatively short period of time, he realized that the adjusting field was not his true calling. To quote Melony Alias, Director of Claims for Burns & Wilcox, "Independent adjusters jobs are diverse. No two days are alike; no two claims the same. Challenges are many, but the rewards are great."

We experience the diversity of our jobs on a daily basis, we learn from the claims we handle daily, we face the challenges of those claims on a daily basis and yet we continue to do our job, some for 30, 40 or 50 years.

W.L. (Bill) McKenzie, RPA

W.L. (BILL) McKenzie, RPA

President – CAIIA 2012-13

Notes and News from Members

FORMER MEMBER DIANA BROGOITTI DIES

With sad news, we have lost yet another colleague and friend of the insurance industry, Diana Brogoitti. Operating her own business, Brogoitti Claims Service, and supporting women in the Insurance Industry through the NAIW-IAIP, for over 25 years.

Please keep Diana and her family in your thoughts and prayers.

Diana Brogoitti
DIANA CLARE HANSEN BROGOITTI Passed away at her San Francisco residence on February 19, 2013 at the age of 68 years. Loving mother of Joanna Brogoitti (Michael) Whitaker of Fort Knox, Kentucky. Cherished grandmother of Cody, Krista and Brandon Whitaker. Dear sister of George (Ying Pan) Hansen of Hercules, CA; Judith Hansen Roberts of Tigard, OR; Charles Hansen, Jr. of Ripon, CA; and Norman (Charmaine) Hansen of Zephyr Cove, NV.

A native and lifetime resident of San Francisco and a Kentucky Colonel. Graduated from Lowell High School in 1962. Diana reigned as SF Ice Queen in 1962 and was a touring member of the Ice Capades. She was a member of NAIW-IAIP, CA Academy of Sciences, Dahlia Society, Daughters of Norway, numerous book clubs and a SF 49er fan. She owned and operated Brogoitti Claim Services for over 25 years and was an avid supporter of cultural, civic, and philanthropic charities.

Published in San Francisco Chronicle on February 21, 2013

It was sad to learn of Hugh's passing. He was a truly nice person.

Larry Hunt, CAIIA Past President

Hello all,
First I must say Kudos to Bill McKenzie for a heartfelt, personalized, and well written President's message in this current CAIIA Newsletter. Great job Bill!
I also wanted to comment on the passing of High Connely, who was a member of AAI. Nice gentleman as I recall...
Ralph Reese copied here, I suspect Ralph would recall Hugh better than most as I believe it was sometime in the 1990's that he retired from Sunrise adjusting...

Best regards,
Eric Sieber

(continued from page 1)

After reviewing these cases, the Court of Appeal concluded that Flores pled facts amounting to ordinary negligence, bringing her action within the two-year statute of limitations set forth in Section 335.1. The Court of Appeal distinguished previous cases involving falls from hospital beds and gurneys where injury to a patient resulted from the failure to properly secure or supervise the patient. Here, Flores was injured when the bed rail collapsed due to equipment failure – as opposed to the hospital's failure to supervise or secure her. There was no negligent act by the hospital that occurred in the rendering of professional services. The court rejected *Murillo's* dictum that a negligently maintained, unsafe condition of a hospital's premises resulting in a patient's personal injury is professional negligence. Accordingly, Flores' action was governed by the two-year statute of limitations for ordinary negligence as set forth in Section 335.1.

COMMENT

The critical inquiry in determining whether professional negligence exists, thus triggering the one-year statute of limitations under MICRA, is whether the alleged negligence occurred in the rendering of professional services. A court will look to the facts of the complaint in order to determine whether the MICRA one-year statute of limitations for professional negligence claims applies.

Changes to Fair Claims Regs

Changes to Fair Claims Settlement Practices Regulations Effective March 31, 2013

The California Department of Insurance has quietly made changes to the Standards Applicable to Automobile Insurance (2695.8).

We have posted links to a full copy of the revised Regulations and of the redlined section that was changed on the CAIIA website.

The relevant changes and/or additions are as follows:

- Estimates prepared by or on behalf of an insurer being utilized to settle a partial loss have additional requirements. Estimates are required to allow for repairs to be made "in accordance with accepted trade standards for good and workmanlike automotive repairs by an auto body repair shop".

- When there is a dispute with respect to the estimate amount and the insurer chooses to adjust the estimate provided by the claimant's repair shop, the "adjusted estimate shall identify the specific adjustment made to each item and the cost associated with each adjustment made to the claimant's shop estimate."

- If the insurer chooses to use non-original equipment manufacturer replacement cash parts, "The insurer must disclose in writing in any estimate prepared by or for the insurer, the fact that it warrants that such parts are at least equal to the original equipment manufacturer parts in terms of kind, quality, safety, fit and performance."

- If an insurer specifies the use of a non-original replacement part, and learns that the part is not equal in quality to the original manufacturer part, it is to immediately cease use of the part and notify the distributor within 30 days.

- If an insurer specifies use of a non-original replacement part that is not of equal quality, the insurer shall pay for the costs of returning the part and replacing the part with a proper quality non-original replacement part or an original equipment manufacturer part.

Peter Schifrin, SGD, Inc, Northridge, CA

CAIIA Past President

Links: http://complianceware.insurance.cch.com/getregprvcite.plx?legalcitingid=24337&revisionmarkspage=CA_Regulation_2695_8_013013.htm

http://www.insurance.ca.gov/0100-consumers/fair-claims.cfm#date

Insurance Covering Vicarious Liability Deemed Secondary to Other Insurance

Credit to Haight, Brown & Bonesteel, Los Angeles, CA

In *GuideOne Mutual Insurance Company v. Utica National Insurance Company* (No. D059833, filed 2/28/13), a California Court of Appeal rejected a prorata allocation of liability to an employer's insurer based on vicarious liability for an employee. Because the employer's policy only covered vicarious liability, the insurer was deemed to be excess to other insurance, which had to be exhausted before coverage would apply.

GuideOne insured Crosswinds Community Church (Crosswinds) under primary commercial general liability and umbrella policies, each having limits of $1 million. An endorsement covered hired and non-owned autos, and made both Crosswinds and its employees insureds.

Utica insured Crosswinds' parent, Christian Evangelical Assemblies (CEA), under primary commercial auto and umbrella policies, with limits of $1 million and $5 million, respectively. The policies had non-owned auto coverage that covered CEA for employees' use of their own autos, but not the employees themselves.

West, a pastor trained and ordained by CEA, and working for its church, Crosswinds, collided with a motorcycle while performing his duties. There was no dispute that he was an employee of both Crosswinds and CEA. West's auto was covered by his own insurance from State Farm, with limits of $100,000.

The motorcyclist settled the case for $4.5 million, consisting of State Farm's $100,000 limit; the $2 million limits of both GuideOne policies; and $2.4 million from the Utica primary and umbrella policies. The insurers reserved their rights and GuideOne sued Utica for contribution, demanding a reallocation based on the respective policy limits.

The trial court agreed, finding first that State Farm was the sole primary insurer under *Insurance Code* section 11580.9(d), which makes the policy that describes or rates the accident vehicle primary to all other insurance.

The trial court then ruled that the other insurers were equals as primary and excess/umbrella insurers with respect to the $4.4 million balance of the settlement. Because both had prorata other insurance clauses, the court reallocated the $4.4 million based on the policy limits. First, the court found that both $1 million primaries were obligated to exhaust the full policy limits. As to the remaining $2.4 million, the court prorated based on policy limits and given Utica's higher limits, the court found that GuideOne's umbrella was only obligated for $400,000, rather than the full $1 million limit it had contributed to the settlement. As a result, the trial court ordered Utica to reimburse GuideOne $600,000.

The appeals court reversed. While agreeing that *Insurance Code* 11580.9(d) made State Farm the primary insurer, the court held that merely because the statute makes all other insurance "excess," does not necessarily place all other insurers on equal footing. And because GuideOne covered the employee directly, while Utica was limited to covering the employer for vicarious liability because of the employee, the court held that GuideOne was primary and Utica's coverage was secondary.

The GuideOne court cited *United States Fire Ins. Co v. National Union Fire Ins. Co.* (1980) 107 Cal.App.3d 456, where the court held that an employer's coverage was secondary to that of a negligent pilot causing an accident, based on the fundamental principle that an employer may recoup his losses in an action against a negligent employee because, as between the employer and the employee, the obligation of the employee is primary and that of the employer secondary. The *GuideOne* court said this is also consistent with the general rule of indemnity that as between a primary tortfeasor and one who is only vicariously liable, the vicariously liable party has the right to pursue indemnity against the primary tortfeasor and/or any insurance policy that covers the primary tortfeasor. Thus, all of the GuideOne insurance was primary, and had to be exhausted before any Utica insurance applied.

While dealing specifically with priority of auto insurance, the *GuideOne* decision is not limited to auto insurance, and may have broad application in its declaration that vicarious liability effectively makes insurance excess by operation of law. The court stated that both GuideOne policies were primary to both Utica policies, based upon principles of vicarious liability and not more general rules governing primary and excess policies.

Do April showers really bring May flowers?

CHP has no duty to Come to Aid Absent a "Special Relationship"
Credit to Low, Ball & Lynch, San Francisco, CA

In general, absent a "special relationship", a person who has not created a peril has no duty to come to the aid of another. This general rule applies equally to individuals as it does public entities, such as the California Highway Patrol ("CHP"). This case considered the applicability of this general rule where it was claimed that the CHP was negligent in the manner in which its operators responded to a 911 call.

The present case arose out of a collision of a Greyhound Lines, Inc. ("Greyhound") bus with an already overturned sports utility vehicle ("SUV") that was blocking one or more lanes of highway 99 near Fresno, California. In the early morning, the SUV struck the center divider, leaving the vehicle on its side and blocking lanes of traffic. A truck driver reported this accident to a CHP 911 operator, who then inputted some of the information provided but failed to include that the disabled SUV was blocking traffic lanes. Minutes later, the Greyhound bus collided with the SUV. The collision between the bus and the SUV resulted in the deaths of three bus passengers and three occupants of the SUV.

As a result of this collision, Greyhound was sued for damages based on its negligence. Greyhound, in turn, cross-complained against various cross-defendants, including the CHP. Greyhound alleged that the CHP was negligent because the CHP 911 operator, who was informed of the already overturned SUV, negligently failed to enter the code for lane blockage. Greyhound further asserted that this omission was the proximate cause of the bus collision because it resulted in an unreasonable delay in the CHP's response to the emergency. The CHP demurred and the trial court sustained its demurrer without leave to amend. Greyhound appealed the trial court's decision, arguing that the CHP owed a duty of care to the bus passengers based on the 911 operator's assurances to the 911 callers that the CHP was on its way.

The Court of Appeal rejected Greyhound's argument, noting first that the general rule regarding the duty, or lack thereof, to come to the aid of another applies to law enforcement officials including the CHP. The Court, stating that the general rule should be construed narrowly rather than broadly, found that Greyhound's argument was an unwarranted expansion of the rule. No "special relationship" exists merely because the CHP was called. Rather, such a special relationship would only arise if the CHP "made misrepresentations that induced a citizen's detrimental reliance, placed a citizen in harm's way, or lulled a citizen into a false sense of security and then withdrew essential safety precautions."

According to the Court, assuming any "nonfeasance" occurred by the operators by not noting the lane closing, this failure to input the lane blockage code left the bus passengers in exactly the same position they were already in. The CHP did not induce the bus passengers to rely on the CHP to their detriment, place the bus passengers in peril, or increase their risk of harm. As such, there was no special relationship, and thus, the CHP owed no duty.

Additionally, the Court found Greyhound's claim that 911 callers would have stopped and provided aid to the disabled SUV had the CHP 911 operators not provided assurances that CHP was on its way to be "replete with speculation and conjecture." The Court also noted that the 911 calls reporting the initial accident and the second accident with the bus were about three minutes apart. The Court noted that to accept Greyhound's speculative argument would make the CHP "virtually an insurer of safety on the highway, instead of an enforcer of the vehicle code."

The judgment was affirmed.

COMMENT

The *Greyhound* decision affirms the general rule that absent a "special relationship," there is no duty to come to an aid of another. The rule applies to law enforcement officials such as the CHP. Furthermore, in order to establish a "special relationship," which would give rise to a duty of care, there must be actual induced detrimental reliance or an actual increase in the risk of harm, not merely a speculative situation.

CAIIA Spring Conference

April 25 & 26, 2013

Inn By The Lake

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Info@InnByTheLake.com

CAIIA REGISTRATION FORM

Your Name _____ Spouse/Guest _____

Company _____

Address _____

Phone _____ Fax _____

E-Mail _____

EVENT	COST	#TICKETS	TOTAL PRICE
MEMBER CONVENTION Package (*) (Includes Reception, Continental Breakfast, CE Class/ Lunch/ Meeting)	$ 150.00	#_____	$_____
Non-Member Convention Package (Includes Reception, Continental Breakfast, CE Class/ Lunch)	$ 175.00	#_____	$_____
Spouse/Guest fee			
Name_____	$ 100.00	#_____	$_____
3 Hour CE Class (Includes Continental Breakfast, Presentation, Lunch)	$ 100.00	#_____	$_____
		Grand Total payable	$_____

SCHEDULED EVENTS

Please specify which events you and/or your spouse/guest will attend by placing a check mark in the box next to the event.
Complete a separate form for each registrant and additional guest.

Please make your checks payable to CAIIA or pay by credit card.
Mail Registration Form & payment to:

Walsh Adjusting Company
6151 Fairmount Ave #215
San Diego, CA 92120-3439

		You	Spouse/Guest
4/25 –	6:30 P.M. Reception & Dinner	[ ]	[ ]
4/26 -	7:00 A.M. Registration/ Breakfast	[ ]	
4/26 –	8:00 A.M. Seminar	[ ]	
4/26 –	12:00 P.M. Lunch	[ ]	
4/26 –	1:30 P.M. Business Meeting (*)	[ ]	[ ]
4/26 -	Spouse Event		

	AMEX VISA M/C Circle one	3 Digit Security # (CV)	
Cardholder:		Signature:	
Card No:		Expiration Date:	
Card Address: (City/State/Zip)			

(*) Members only.

On the Lighter Side...

Defects

Engineers' Most Interesting Findings
Conversion Factors for your Digestion:

1. Ratio of an igloo's circumference to its diameter = Eskimo Pi
2. 2000 pounds of Chinese Soup = Won ton
3. 1 millionth of a mouthwash = 1 microscope
4. Time between slipping on a peel and smacking the pavement = 1 bananosecond
5. Weight an evangelist carries with God = 1 billigram
6. Time it takes to sail 220 yards at 1 nautical mile per hour = Knotfurlong
7. 365.25 days of drinking low calorie beer = 1 Lite year
8. 16.5 feet in the Twilight Zone = 1 Rod Serling
9. Half a large intestine = 1 semicolon
10. 1,000,000 aches = 1 megahurtz
11. Basic unit of laryngitis - 1 hoarsepower
12. Shortest distance between two jokes - a straight line
13. 453.6 graham crackers = 1 pound cake
14. 1 million microphones = 1 megaphone
15. 1 million bicycles = 1 megacycle
16. 365 days = 1 unicycle
17. 2000 mockingbirds = two kilomockingbirds
18. 10 cards = 1 decacard
19. 52 cards = 1 deckacard
20. 1 kilogram of falling figs = 1 Fig Newton
21. 1000 grams of wet socks = 1 literhosen
22. 1 millionth of a fish = 1 microfiche
23. 1 trillion pins = 1 terrapin
24. 10 rations = 1 decaration
25. 100 rations = 1 C-Ration
26. 2 monograms = 1 diagram
27. 8 nickels = 2 paradigms
28. 5 statute miles of intravenous surgical tubing at Yale University Hospital = 1 I.V. League