CAIIA Status Report

Cinco de Mayo

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May 2017

Vocational Rehab Examination
Credit to Low, Ball, Lynch, San Francisco, CA

Defendants have no rights to compel a vocational rehabilitation examination in California, and will not have a right to do so without legislative intervention.

Mohammed Haniff v. The Superior Court of Santa Clara County

Court of Appeals, Sixth Appellate District (March 18, 2017) 9 Cal.App. 5th 191

When a personal injury plaintiff claims he or she can no longer perform some types of jobs or any employment as a result of his or her injuries, vocational rehabilitation experts are usually retained to provide opinions concerning whether the plaintiff has any work limitations. As a result of this decision, defendants will not be able to compel a plaintiff to receive an examination by a vocational rehabilitation expert retained by the defense.

In this case, Mohammed Haniff ("Haniff") sustained allegedly serious injuries in a motor vehicle accident. Mr. Haniff had not returned to work as a delivery truck driver for almost three years from when the accident occurred to when defendants served a demand that he receive a vocational rehabilitation examination ("VRE"). Mr. Haniff's attorney objected to defendants' demand that plaintiff receive a vocational rehabilitation interview with a vocational rehabilitation counselor selected by defendants' attorney on the grounds that the California Code of Civil Procedure did not authorize a defense VRE. Defendants filed a motion to compel a defense VRE, which was granted by the trial court. Plaintiff's attorney successfully filed a petition for writ of mandate to the Appellate Court, and the Appellate Court issued a peremptory writ of mandate directing the trial court to vacate its order compelling plaintiff to undergo a VRE and to enter a new order denying defendants' motion.

The issue of whether a defendant could demand a VRE of a plaintiff had been addressed in a prior case. In Browne v. Superior Court (1979) 98 Cal.App.3d 610, the defendants argued that a VRE of a plaintiff was authorized under the Code of Civil Procedure section providing for a physical examination of a plaintiff by a physician when the plaintiff's mental or physical condition was at issue. The Browne court concluded that this Code of Civil Procedure section did not authorize an examination by a nonphysician. The defendants in the Haniff case tried to distinguish Browne by arguing that they were not relying upon the Code of Civil Procedure section permitting an independent medical examination of a plaintiff. Instead, defendants argued that it would be unfair for a plaintiff to receive a VRE by his chosen expert while defendants lacked that opportunity and that the trial court had the inherent power to allow defendants' expert to examine the plaintiff. These arguments were rejected by the Appellate Court.

The Appellate Court found that no provision of the Code of Civil Procedure authorized defendants to receive a VRE. C.C.P. § 2019.010 sets forth the six methods of civil discovery, which are (1) oral and written depositions, (2) interrogatories, (3) inspections of documents, things and places, (4) physical and mental examinations, (5) requests for admissions, and (6) simultaneous exchanges of expert trial witness information. C.C.P. § 2019.010 does not provide that a VRE is one of the permitted methods of discovery. The defendants unsuccessfully argued that C.C.P. § 2019.010 should not be interpreted as the exclusive list of methods of civil discovery in California.

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President's Message

The Future

There have been several studies asking people whether they wanted to know the future, what it held for them personally and to a lesser extent society as a whole. As it turns out, most people do not want to know, unless one could confirm they would be rich and/or famous and live a long happy life etcetera. Nobody really wants to know in advance that bad things are going to happen. When people were asked if they want to know the date (and time) of their death, most said, no.

Steve Washington

CAIIA President

And, notwithstanding Palm Readers, fortune-tellers and what tarot cards might suggest…

There are some things the future holds that are inevitable, in other words science and technology are going to make happen, sooner or later. Assuming the planet doesn't shed us humans altogether.

The sun becomes the worlds primary source of energy.

Flying cars. Light weight aerospace engineering coupled with new battery technologies power vehicles on land and in the air.

Kinematical techniques used to understand the Higgs Boson particles generated in the large Hadron Collider advance such that quantum teleportation is more commonplace for matter and humans. (wow, really, like Star Trek)

NASA has set out a plan to eventually have humans living on Mars. Among other things scientists found flowing ice water under the crust. And, one gadget (MOXIE) will be used to make oxygen from carbon dioxide which is in the atmosphere on Mars.

Sports athletes will evolve or devolve depending on how you look at it. The line between artificial and natural body parts blur as science learns to rebuild humans. (Maybe we could have a championship game between natural humans and ones perfected in labs)

Of course, as Peter Drucker stated "The best way to predict the future is to create it".

One last note if I may. There will be lots more new and improved technology to advance us forward (hopefully) decade after decade. The real question we should ask; is the invention or state of the art tech actually making us better off?

Albert Einstein wrote; "It has become appallingly obvious that our technology has exceeded our humanity." And, according to Henry David Thoreau, "Men have become the tools of their tools."

Let's tread lightly my friends. And, I am out.

Steve Washington

CAIIA President 2016-2017

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NEWS FOR OUR MEMBERS

SAVE THE DATE

The CAIIA is proud to be exhibiting at or sponsoring the following upcoming events:

June 7, 2017	CAIIA Seminar for the Evaluation of Earthquake Damages and Fair Claims Settlement Practices Recertification, Brea, CA
June 21, 2017	CAIIA Fair Claims Settlement Practices Recertification, Chatsworth, CA
June 22, 2017	CAIIA Fair Claims Settlement Practices Recertification, Fresno, CA
June 23, 2017	CAIIA Fair Claims Settlement Practices Recertification, San Jose, CA
June 28, 2017	CAIIA Fair Claims Settlement Practices Recertification, La Mesa, CA
September 13-15, 2017	Claims Conference of Northern California, Sacramento, CA
September 28, 2017	CAIIA Annual Meeting, location TBD
October 17, 2017	CPCU Educational Event, Studio City, CA
March 6-7, 2018	Combined Claims Conference, Garden Grove, CA

Expert Failed in Opposition to Summary Judgement

Credit to : Low, Ball & Lynch, San Francisco, CA

Defendant prevails on summary judgment motion by objecting to expert declaration based on assumptions of fact without evidentiary support or on speculation

Sanchez v. Kern Emergency Medical Transportation Corporation

COURT OF APPEAL, FIFTH APPELLATE DISTRICT (February 6, 2017)

An expert opinion filed in opposition to a summary judgment must be based on admissible evidence. In Sanchez v. Kern Emergency Medical Transportation Corporation, Plaintiff sustained an injury to his head while playing in a high school football game. The standby paramedic assessed plaintiff using the Glasgow Coma Scale and gave him the highest possible scores based on his responses. Nevertheless, the paramedic advised plaintiff to go to the hospital and called for a backup transport ambulance. The crew of the transport ambulance applied spinal precautions and transported plaintiff to the hospital 31 miles away. Forty-six minutes elapsed from the time plaintiff was first assessed by the paramedic to the time he arrived at the hospital. Plaintiff received a CT scan upon arrival which revealed a subdural hematoma, drugs were administered to reduce the brain swelling, and plaintiff underwent surgery to relieve a brain hemorrhage. At some point in time, plaintiff suffered a posterior artery stroke.

Plaintiff sued Kern Emergency Medical Transportation Corporation ("Kern"), among others, for his injuries. Plaintiff alleged that Kern was grossly negligent in the care and treatment it rendered to him, failed to properly assess him and failed to recognize he had sustained a traumatic brain injury that required immediate, urgent transport to a trauma center. Plaintiff alleged the delay in transport made his brain injury worse.

Kern moved for summary judgment asserting there was no evidence to support plaintiff's allegations of gross negligence or causation of any damages. Kern supported its motion by submitting evidence that any delay caused by using two ambulances was only 2 ½ minutes which did not harm plaintiff or increase his injuries. Kern also submitted evidence that the delay, even if found to be 30 minutes, could not have caused plaintiff harm because the medical literature indicates there is no evidence such a brief delay in treatment correlates with a worse outcome. Kern submitted declarations from expert witnesses addressing the issues of breach of duty and causation.

When a plaintiff claims negligence in the medical context, the plaintiff must present evidence from an expert that the defendant breached his or her duty to the plaintiff and that the breach caused the injury to the plaintiff. Powell v. Kleinman (2007) 151 Cal.App.4th 112, 123.When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence. Id.

Plaintiff submitted a declaration from neurological surgery expert witness, Dr. Fardad Mobin, in support of his opposition to the motion. Dr. Mobin opined that had plaintiff been transported immediately upon initial contact by the paramedic, there would have been a decrease in brain swelling and pressure because the administration of drugs would have occurred much sooner. Dr. Mobin only referenced the 46 minutes which elapsed between plaintiff's first contact with the paramedics and his arrival at the hospital and failed to set forth any other relevant time periods in his declaration relating to the alleged delay that caused plaintiff's injuries to worsen. Continued on page 4

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The defense raised a number of objections to Dr. Mobin's declaration arguing that the opinions expressed were conclusory, speculative, failed to consider undisputed facts in the record, and failed to address statements made by defense experts that refuted those opinions. The trial court sustained the objections to Dr. Mobin's declaration and granted Kern's motion for summary judgment on the grounds that plaintiff failed to present any admissible evidence contesting Kern's evidence that any delay in transport to the hospital did not make plaintiff's condition worse. Plaintiff appealed.

The Court of Appeal affirmed the trial court's ruling finding that the trial court did not abuse its discretion in sustaining the objections to Dr. Mobin's declaration. The Court found that Dr. Mobin's declaration failed to demonstrate his opinions were based on matters that experts reasonably rely on in forming such opinions and failed to include a reasoned explanation connecting the factual predicates to the ultimate conclusion.

The Court noted that Dr. Mobin referred generally to a delay in transport but failed to define the delay referred to in forming his opinions and failed to address that time was properly spent on assessment by the paramedics and application of spinal precautions. The Court also noted that Dr. Mobin failed to address medical literature presented by defense experts that a moderate delay in treatment could not have affected plaintiff's outcome. The court found that Dr. Mobin had no factual basis for concluding that the delay in transporting plaintiff to the hospital exacerbated his injuries suffered on the football field.

The Court of Appeal found that plaintiff failed to raise a triable issue of material fact on the issue of causation, and the trial court's ruling granting Kern's motion for summary judgment was upheld.

Are we there yet? Paving the Way for Autonomous Vehicle Claims

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

Autonomous or self-driving vehicles (AVs), once confined to the realm of science fiction, are now a reality. Most vehicles on the road today rely on some aspect of autonomous technology. Vehicles of the future will be entirely controlled by a computer—the vehicle will navigate an entire trip with minimal or no input from the human occupant. As autonomous technology proliferates, the number of accidents involving AVs inevitably will increase, as well. Indeed, AV manufacturers reported six accidents involving AVs so far this year and nine accidents in 2015. Claims professionals will be at the forefront of the development and evolution of autonomous technology and AVs. Insurance carriers and claims professionals must be ready to face new challenges in investigating the property damage and bodily injury claims that will inevitably arise from AVs. A cursory review of claims handling issues arising from AVs highlights the complex nature of AV cases that claims professionals will soon face.

CURRENT AV LAW In September 2016, the U.S. Department of Transportation's National Highway Traffic Safety Administration (NHTSA) released its long-awaited policy and guidelines regarding AVs—the Federal Automated Vehicles Policy. It consists of four parts: (1) vehicle performance guidance for automated vehicles; (2) model state policy; (3) NHTSA's current regulatory tools; and (4) modern regulatory tools.

Eight states and Washington, D.C., have enacted laws relating to AVs. Although California was not the first state to act, its legislative framework under California Vehicle Code Section 38750 and its attendant regulations are most often discussed by those interested in AVs. Under California law, an AV is a vehicle equipped with integrated autonomous technology—technology that has the capability to drive a vehicle without the active physical control or monitoring by a human operator. California does not regulate or prohibit the use of AVs on public roadways for nontesting purposes, but the Department of Motor Vehicles has discretion to impose additional requirements for the operation of unmanned AVs on the state's public roadways for nontesting purposes. In order to test AVs on California's roads, a manufacturer must certify that the AV has an easily accessible mechanism to disengage the autonomous technology, and the engagement status must be clearly visible in the vehicle's cabin. The AV also must have a safety alert to notify the operator of a failure and allow the operator to either take control of the vehicle (through various methods) or bring it to a complete stop. Continued on page 5

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Additionally, the AV must meet federal motor vehicle safety standards, and the manufacturer must maintain an instrument of insurance, bond, or self-insurance in the amount of $5 million. The AV must be equipped with a mechanism to capture and store autonomous technology sensor data for at least 30 seconds before a collision. The manufacturer also must provide the purchaser of an AV with a written disclosure that information is collected by the autonomous technology installed in the vehicle.

CLAIMS ISSUES: A CALIFORNIA REVIEW Insurers need to prepare their claims professionals to effectively handle incidents involving AVs by addressing potential issues likely to arise. Fact investigation and determining liability are only two significant obstacles that claims professionals may encounter when dealing with AV claims in the near future. Fact investigations will pose a significant challenge to claims professionals handling AV claims. AVs are equipped with various technologies capable of sensing external conditions to navigate the vehicle. Similar to their nonautonomous counterparts, AVs also are equipped with event data recorders that maintain data obtained from the various sensors on board. Claims professionals will need to gain access to the stored data in order to re-create the events leading up to the collision, particularly when the facts cannot be obtained from the individuals involved. Although Section 38750 requires the manufacturer to disclose the fact that the AV collects certain data, the statute does not specify who owns the collected data, and it does not include provisions as to permitted uses of the data and liability for unauthorized access. AV manufacturers likely will resist the disclosure of such data to third parties (including insurance claims professionals) for a number of reasons, such as a desire to protect the manufacturer's proprietary information regarding its emerging technology or to protect themselves from liability arising from the technology's failure. Thus, manufacturers may impair a claims professional's handling of cases involving AVs.

Until AVs can reliably perform under all driving circumstances, the human AV operator is expected to be ready to disengage the autonomous technology and take control. Liability may turn on whether or not the human operator should have or should not have disengaged the autonomous technology. A disengagement of the autonomous technology can be required under various circumstances. The autonomous technology may fail or may not sense the vehicle's surroundings as expected. While California law requires the AV to notify the operator of a failure, this is not sufficient to prevent a collision. The AV cannot alert the operator of a failure or need to cede control if the AV cannot sense the sub-optimal driving conditions prompting the need for operator intervention. Even assuming the AV performs as intended and notifies the operator of the need to cede control, the operator may be unprepared to take control when needed. Total vehicle automation may cause operators to become distracted or lulled into a state of false security as operators become increasingly reliant on their AVs to perform major vehicle functions. The AV operator also may lack complete understanding of the AV's limited performance capabilities under certain weather conditions, or the operator may simply disengage the autonomous technology unnecessarily because they are nervous or uncertain about the AV's performance through oncoming road conditions. All of these scenarios are possible and could result in a collision. Ascertaining the circumstances leading up to the collision will determine whether liability lies with the operator, the manufacturer, or another party. Again, the data stored by the AV may be crucial in determining what happened prior to the collision and may provide clues as to the performance of the autonomous technology (such as past failures). The data alone will not provide a full picture of liability for the accident. AV claims will involve a reasoned and detailed analysis of the facts, competing interests, and current state of the law as well as an understanding of the limits of autonomous technology itself. Claims professionals should be prepared to understand the complexities of AV claims and the issues that they will bring in the near future.

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Strict Adherence to Government Claims Act is Required

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

J.M., a Minor, etc. v. Huntington Beach Union High School District

Supreme Court of California 2 Cal.5th 648 (March 6, 2017)

Government Code sections 810 et seq. ("The Act") set forth the procedures and requirements for filing a suit against a public entity for a tort claim. The Act requires a plaintiff to present a public entity with a timely written claim for damage before filing a lawsuit. This claim must be filed with the public entity within six months of the accrual of the claim. The Act permits a minor to submit an application for permission to file a late claim, as long as the application is made within one year after the cause of action accrued. If a public entity does not respond to the late claim within forty-five days, the application is denied by operation of law. Then, the plaintiff may seek relief by filing a petition within six months of the denial.

J.M., a minor ("J.M."), alleged he was injured at a school football game. He was subsequently diagnosed with double concussion syndrome on October 31, 2011. His personal injury action accrued on that date. He failed to file a claim within six months as required by the Act. His counsel presented the Huntington Beach Union High School District (the "District") with an application to file a late claim. The application was timely. The District did not take action. Under operation of law, the application was deemed denied on December 8, 2012, forty-five days the District was presented with the application.

More than six months later, J.M. filed a petition with the court seeking relief from the obligation to present a claim before bringing suit. The trial court rejected J.M.'s petition because it was filed untimely, noting that it should have been filed by June 9, 2013, six months after a late claim application is denied. The Court of Appeal affirmed and disagreed with E.M. v. Los Angeles Unified School District (2011) 194 Cal.App.4th 736. The Supreme Court affirmed the Court of Appeal's judgment.

J. M. claimed that there was no need for him to seek relief from the court under section 946.6 because the District was required to grant his application since he is a minor under section 911.6(b)(2). The Court rejected this argument because it was J.M.'s responsibility to seek relief from the court even if the District was required to grant relief.

The Supreme Court held the Appellate Court in E.M., supra, erred because there was no timely notice of the claim, only an application for leave to provide untimely notice, and the plaintiff did not follow the requirements of section 946.6. In E.M., supra, the minor plaintiff applied to present a late claim based on her minor status. The public entity rejected the application and five months later she sued. After another two months, she filed a petition under section 946.6. The trial court denied the petition because more than 6 months had passed after the late claim application was rejected. The Court of Appeal reversed, noting that the claim presentation requirement was satisfied by the plaintiff's attachment of a claim to her late claim application.

The Supreme Court in J.M. required a strict adherence to the Act's procedures and requirements with no additional recourse available to a plaintiff who failed to petition the court within six months of a denial of a late claim application.

The Supreme Court also rejected J.M.'s arguments for equitable relief under the doctrines of estoppel and tolling because plaintiff had not fulfilled those requirements.

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From the DOI

Former Insurance Agents Arrested for $300K Life Insurance Scheme

LOS ANGELES, Calif. - Former insurance agents Ali Kakande, 37, and Sulaiman Lutale, 35, were arrested on multiple felony counts of insurance fraud, identity theft, money laundering, grand theft, and forgery after allegedly falsifying life insurance applications to collect over $300,000 in unearned commissions.

"I have zero tolerance for dishonest agents who rip off insurers or consumers for their own financial gain," said Insurance Commissioner Dave Jones. "The Department of Insurance regulates more than 360,000 licensed agents and brokers who work hard to be professional and honest in their business practices. Agents like these tarnish the reputation of the California insurance industry."

An investigation by the California Department of Insurance and U.S. Immigration and Customs Enforcement's (ICE) Homeland Security Investigations (HSI) alleged that prior to either Kakande or Lutale becoming licensed agents, the duo submitted approximately 70 fraudulent life insurance policy applications to various life insurance carriers under another licensee's agent appointments. For these fraudulent applications Lutale collected over $81,000 in unearned commissions.

In 2012, they both became licensed agents and continued their scheme submitting an additional 89 life insurance policy applications from 2012 to 2014 and collecting more than $138,000 in unearned commissions. After they were no longer able to successfully submit new business under their own licenses,they continued their scheme by using licenses from at least three other licensees to submit over 70 additional fraudulent applications and collect more than $90,000 in unearned commissions.

"Fraud schemes like the one uncovered in this case result in billions of dollars in losses every year in this country and cause incalculable heartache and financial harm to law-abiding consumers," said Joseph Macias, special agent in charge for HSI Los Angeles. "HSI is committed to working with its law enforcement partners to pursue such cases aggressively - ensuringthose who brazenly enrich themselves through fraud and identify theft are held accountable for their crimes."

To obtain personal information for the fraudulent applications, investigators allege Kakande and Lutale recruited applicants by paying them $50 to $200 and promising that they would receive free life insurance policies. Other applicants were victims of identity theft and unaware that life insurance policies had been issued in their names.

Life insurance policy applications were also submitted with Kakande and Lutale as the purported policyholders. The applications submitted to the insurance carriers contained misrepresentations and fabricated information, including false occupations, income, net worth or beneficiary information. Some of the applications also contained forged signatures of the alleged applicants.

The investigation also showed that premium payments were generally not paid by the applicants, but instead paid from accounts owned by Kakande or Lutale, or from accounts opened by other individuals who assisted them in carrying out the advance commission scheme.

Kakande was booked into Orange County Central Jail by CDI Fraud Detectives and bail was set at $470,000. Lutale was booked into Los Angeles County Jail by CDI Fraud Detectives and Homeland Security Agents and bail was set at $370,000. The Los Angeles County District Attorney's Office is prosecuting the case under the California Department of Insurance's Life and Annuity Consumer Protection Program.

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On the Lighter Side...

Wonderful English from Around the World

Cocktail lounge, Norway:
LADIES ARE REQUESTED NOT TO HAVE CHILDREN IN THE BAR

Doctor's office, Rome:
SPECIALIST IN WOMEN AND OTHER DISEASES.

Dry cleaners, Bangkok:
DROP YOUR TROUSERS HERE FOR THE BEST RESULTS.

In a Nairobi restaurant:
CUSTOMERS WHO FIND OUR WAITRESSES RUDE, OUGHT TO SEE THE MANAGER.

On the main road to Mombasa, leaving Nairobi:
TAKE NOTICE: WHEN THIS SIGN IS UNDER WATER, THIS ROAD IS IMPASSABLE.

In a City restaurant:
OPEN SEVEN DAYS A WEEK AND WEEKENDS.

In a Cemetery:
PERSONS ARE PROHIBITED FROM PICKING FLOWERS, FROM ANY BUT THEIR OWN GRAVES.

Tokyo hotel's rules and regulations:
GUESTS ARE REQUESTED NOT TO SMOKE, OR DO OTHER DISGUSTING BEHAVIOURS IN BED.

On the menu of a Swiss Restaurant:
OUR WINES LEAVE YOU NOTHING TO HOPE FOR.

Hotel, Yugoslavia:
THE FLATTENING OF UNDERWEAR WITH PLEASURE, IS THE JOB OF THE CHAMBERMAID.

In the lobby of a Moscow Hotel, across from a Russian Orthodox Monastery:
YOU ARE WELCOME TO VISIT THE CEMETERY, WHERE FAMOUS RUSSIAN AND SOVIET COMPOSERS, ARTISTS AND WRITERS ARE BURIED DAILY, EXCEPT THURSDAY.

Hotel, Zurich:
BECAUSE OF THE IMPROPRIETY OF ENTERTAINING GUESTS OF THE OPPOSITE SEX IN THE BEDROOM, IT IS SUGGESTED THAT THE LOBBY BE USED FOR THIS PURPOSE.

Advertisement for donkey rides, Thailand:
WOULD YOU LIKE TO RIDE ON YOUR OWN ASS?

Airline ticket office, Copenhagen:
WE TAKE YOUR BAGS AND SEND THEM IN ALL DIRECTIONS. (Just Like Qantas!!!)

A Laundry in Rome:
LADIES, LEAVE YOUR CLOTHES HERE AND THEN SPEND THE AFTERNOON HAVING A GOOD TIME.