CAIIA Status Report

JUNE 2007

When You Need to Know What Really Happened

Submitted by Garrett Engineers, Inc. - Forensic Division

GEI was assigned to inspect and report on a collision between a boat and a Personal Water Craft (PWC) on the Colorado River.

The boat was an eleven-year-old Glastron Sierra, a bow rider or open seating bow. The boat was reportedly traveling at about 20 miles per hour (mph) at the time of the collision, and was towing a skier.

The PWC involved was a four-year-old Sea Doo, GTX. The top speed of this craft is estimated at 50-55 mph. The speed of the Sea Doo at the time of impact was estimated by witnesses as at least 40 mph.

The boat was north bound; the PWC was south bound. The boat was on the right side; the PWC was on "his" left side.

The damage to the PWC was indicative of the PWC trying to "cross the bow" of the boat, i.e., a left to right crossing when viewed from the boat. As such, Inland Navigation Rules, Rule 15 required the boat as the stand-on vessel to maintain course and speed and the PWC as the give-way vessel to maneuver to avoid.

The PWC impacted the boat at about the 11 o'clock position, 12 o'clock being straight ahead.

At impact the PWC was driven under the boat due to the inward velocity rather than pushed out to the side by contact with the steeply angled bow. The PWC also struck the lower unit (out drive) as it was driven under. The skier testified that the PWC and the operator came up from beneath the boat.

A PWC is considered a Class A inboard boat by the U.S. Coast Guard. As such it is expected to follow and obey all applicable boating rules and regulations. Accordingly, both vessels or boats were subject to the general boating laws as well as any specific local laws applying to any particular craft. The Inland Navigation Rules of 1980 apply on the Colorado River. Up river traffic is generally required to be on the right side of the river, down river traffic also on "their" right side, i.e., the other side of the river. The accident happened on the eastern side of

Continued on page 3

PUBLISHED MONTHLY BY
California Association of Independent Insurance Adjusters

An Employer Organization of Independent Insurance Adjusters

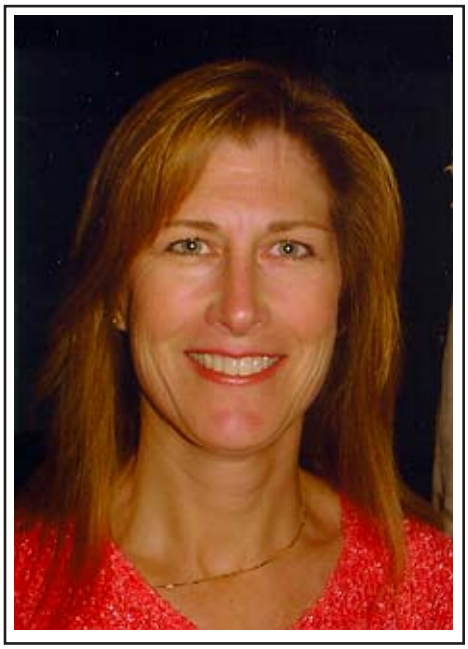
Inside This Issue

***Status Report* Now Available by E-mail**

If you would like to receive the *Status Report* via e-mail please send your e-mail address to *info@caiia.org.*

CAIIA Newsletter
CAIIA Office
P.O. Box 168
Burbank, CA 91503-0168
Web site - http:\\www.caiia.org
Email: info@caiia.org
Tel: (818) 953-9200
(818) 953-9316 FAX

■ PRESIDENT'S MESSAGE



The California Insurance Code provides the commissioner with access to ALL the records of an insurer and the power to examine the affairs of EVERY person engaged in the business of insurance to determine if such person is engaged in unfair or deceptive act. Likewise, the Insurance Commissioner has the authority to impose civil penalties upon any person found in violation of those regulations established to prevent such acts. Are you required to be certified yearly in the FAIR CLAIMS SETTLEMENT PRACTICES REGULATIONS? Did you know the regulations were amended in October 2006? Is your certification current? The CAIIA has finalized the dates and locations for the yearly certification. We are scheduled for June 5 in San Diego, June 6 in Redding and Sacramento, June 12 in Glendale, June 15 in San Ramon and June 29 in Fresno.

In addition, we are pleased to offer recertification for the SEED regulations, which will run concurrently with the FCSPR in 2 locations this year June 6 in Sacramento and June 27 in Newport Beach. The Department of Insurance requires every insurance adjuster who evaluates earthquake claims for or on behalf of an insurer to be certified. The certification is good for 3 years.

Lastly, as an added bonus and for the first time, the CAIIA is also offering the required SIU Training certification at the SEED locations.

It will be your one stop training spot. If you have not already signed up to attend, please do so quickly as seats are limited and filling up quickly. The registration form is enclosed in this Status Report. You can also find in on-line at www.caiia.org.

We look forward to seeing you soon.

SHARON GLENN
President - CAIIA 2006-2007

When You Need to Know What Really Happened

Submitted by Garrett Engineers, Inc. - Forensic Division

Continued from page 1

the river approximately 1/4 of the river's width from the bank.

Arizona Statute, section 5-350, states that it is prima facie evidence of reckless operation of a personal water craft if ... it is operated within a zone of proximity to another watercraft closer than 60 feet ... and …that within a zone of proximity to another watercraft closer than 60 feet, ... it maneuvers quickly, turns sharply or swerves ...

Based on a two vessel closing speed of approximately 60 mph (40 + 20), the closing rate was 88 feet per second. Thus, a football field length of 100 yards is covered in about 3 and 1/2 seconds. Normal perception - reaction time for a known function is taken as approximately 1 and 1/4 to 1 and 1/2 seconds. One may conclude that the accident happened very quickly, with little time for maneuvering once the course was set.

At the last moment, seeing collision is eminent, both vessels are required to maneuver to avoid. The boat driver indicated she did not maneuver and was concerned for the safety of her skier (her ex-husband, but that is a different story). She just had one other PWC in that party cross over and pass her on her right side; and was concerned about her closeness to the shore. If the boat was about 75 feet from the shore, at 20 mph it would have hit the shore in approximately 2 and 1/2 seconds after turning in. Had she turned sharply left, the skier would have had the PWC as an immediate, and most likely, deadly obstacle.

The Fort Mojave Tribal Police accident report indicated that an Indian Ranger verbally warned the PWC on a violation of spraying and operating a watercraft recklessly only 30 minutes before the accident. The report continued by stating that the Ranger was just south of the accident area and saw the PWC attempting to cut in front of a boat ... in an attempt to spray water on the occupants inside the boat.

The final factor in the accident was that the autopsy on the PWC operator reported a BAC exceeding the legal definition of intoxication.

This met the definition of a tragedy in all respects.

Fraud-Fighting Measure Passes Assembly Insurance Committee

AB 1401, Sponsored by the California Dept. of Insurance, Would Help Combat Insurance Fraud

SACRAMENTO - Today Insurance Commissioner Steve Poizner applauded the Assembly Insurance Committee for passing Assembly Bill AB 1401 (Aghazarian, R-25) on a bi-partisan vote (8-0).

A measure that would provide the California Department of Insurance (CDI) with additional investigators to fight insurance fraud, AB 1401 would also require the CDI to post investigative program performance outcomes on its Web site.

"Insurance fraud is not a victimless crime," said Commissioner Poizner. "As consumers, we pay the cost of fraud through higher insurance premiums. As commissioner, I will fight insurance fraud to the fullest extent of the law."

It is estimated that insurance fraud totals $15 billion per year in a $118 billion per year industry. This essentially imposes a "fraud tax" of nearly $500 per year on every man, woman and child in California.

Since 1973 insurers have been required by law to pay an annual fee which helps California combat insurance fraud. AB 1401 would increase this assessment to $5,100 per insurer. This assessment has gone virtually untouched over the past 34 years, with the exception of a $300 increase in 2000. AB 1401 would adjust the assessment for inflation, helping CDI fill approximately 22 vacant positions.

Governmental Liability - Officer Has Qualified Immunity For Injuries Caused By High-Speed Pursuit of Vehicle

Scott v. Harris, (March 31, 2007), United States Supreme Court

California courts, as well as courts of other states have grappled with civil rights claims arising out of high speed pursuits of vehicles by police officers. In this case, the issue was whether a law enforcement official could, consistent with the Fourth Amendment, attempt to stop a fleeing motorist from continuing his flight by ramming the motorist's car from behind.

In March 2001, Plaintiff Victor Harris was clocked traveling 73 mph in a 55 mph zone on a Georgia roadway. When Mr. Harris did not pull over for a traffic stop, a chase ensued. Defendant Timothy Scott, a deputy sheriff, assisted with the pursuit. The chase continued down a two-lane road at speeds exceeding 85 mph. After nearly 10 miles, Scott decided to attempt to terminate the episode by employing a "Precision Intervention Technique" ("PIT") maneuver, which causes the fleeing vehicle to spin to a stop. After having being given permission by radio, Scott attempted the maneuver. In doing so, Scott incorrectly applied his push bumper to the rear of Harris' vehicle, and Harris lost control. Harris' vehicle crashed and he was rendered a quadriplegic.

Harris filed suit against Scott and others under 42 U.S.C. section 1983, alleging a violation of his federal constitutional rights. Specifically, he claimed excessive force resulting in an unreasonable search and seizure under the Fourth Amendment. In response, Scott filed a motion for summary judgment based on an assertion of qualified immunity. The District Court denied the motion. The 11th Circuit Court of Appeals affirmed the District Court's decision. The United States Supreme Court then granted certiorari and reversed.

The Supreme Court, in addressing the issue of whether Scott's actions constituted excessive force, held that in determining the reasonableness of the seizure, courts must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. The Court rejected Harris' argument that it should first analyze whether deadly force should have been used under Tennessee v. Garner, 471 U.S. 1 (1985), holding that the analysis used in the Garner case was simply an application of the Fourth Amendment "reasonableness" tests, and was inapplicable under these facts.

Here, the Court considered the risk of bodily harm that Scott's actions posed to Harris in light of the threat to the public that Scott was trying to eliminate. The Court was influenced by a videotape of the chase, which showed Harris weaving in and out of traffic at a high rate of speed. The Court held that Harris' actions posed a substantial risk of harm to bystanders. In balancing the interests of the parties, the Court also held it was relevant to consider the culpability of the parties. It was Harris who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, "high-speed flight." Taking all of this into consideration, the Court, in an 8-1 decision, had little difficulty in concluding it was reasonable for Scott to take the action he did. The Court, therefore, found that Scott had qualified immunity and the Court of Appeals' decision was reversed.

COMMENT

Without question, this is a significant case for governmental entities and police officers sued in their individual capacity. The Supreme Court held that in considering the reasonableness of an officer's actions, courts should balance the risk of bodily harm to the plaintiff against the risk of harm to the public (by the fleeing vehicle) that the officer is trying to eliminate. The Court further held that a Plaintiff's culpability should be considered as part of the reasonableness analysis.

Continued on page 5

Continued from page 4

Indemnity Contracts – Interpretation – Tender

City of Watsonsville v. Patrick Keith Corrigan, (April 23, 2007), Court of Appeal, Sixth District

The fundamental understanding of parties handling indemnity actions is that a tender is required in order to trigger any duties. This case examines that concept.

In 2003 and 2004, the City of Watsonville was sued by three sets of plaintiffs for damages related to soil instability and landslides on their property. The City cross-complained against Patrick and Jill Corrigan and Michael Tansy, who were partners in developing and marketing the properties. The cross-complaint sought contractual indemnity for the City's defense costs and any judgment. The action brought by the plaintiffs was eventually settled. However, the cross-complaint for indemnification was bifurcated for trial. The City sought to recover the amount of its settlement contribution paid by its insurer and the costs and fees it incurred in defending itself. The trial court denied indemnification based upon the failure to tender the claims to the alleged responsible parties.

On appeal to the Court of Appeal, the judgment was reversed. The court relied upon Civil Code § 2778, which sets forth the guidelines for construction of indemnity contracts. The contract between Patrick Corrigan and the City required Corrigan to hold the City harmless from any claims resulting from the development of the project and to defend the City from any lawsuit based upon those claims. A similar agreement was executed between the City and Michael Tansy.

Civil Code § 2778 paragraph 4, states where there is an indemnity provision the person indemnifying is bound, on request of the person indemnified to defend actions or proceedings brought against the party to be indemnified with respect to matters embraced by the contract. However, it also provides that the person indemnify his right to conduct their own defense if they so choose. The court rejected the position that a duty to pay for defense cost arises only upon tender.

The court distinguished indemnity agreements from insurance contracts which require a tender before a duty to defend arises for the insurance carrier. Contracts for indemnity against claims include costs for defense where they are incurred in good faith and in the exercise of reasonable discretion. The court stated that under subdivision 4 of Section 2778 of the Civil Code notice may be given to the person indemnifying, but it is not compulsory.

The court remanded the matter to the trial court to determine which defense costs were incurred in good faith and in the exercise of reasonable discretion. The matter was therefore reversed and remanded for determination of reasonable monetary fees and costs the City incurred in good faith in its defense in the underlying action.

COMMENT

This case distinguishes indemnification under a contract as opposed to under an insurance policy. The court did not discuss the right of the City to seek reimbursement for the sum paid to settle the case.

Torts - Damages Awardable For Unruh Act Violation Without Showing of Intentional Discrimination

Wilson v. Haria and Gogri Corp., (March 22, 2007), United State District Court, E.D. California

Title III of the Americans With Disabilities Act prohibits discrimination against people with disabilities in places of public accommodation. In 1992, the Unruh Act (California Civil Code section 51 et seq.) was amended to include language that a violation of the ADA also constitutes a violation of the Unruh Act. The Unruh Act provides for a minimum of $4,000 in damages per violation. This case considers the question whether a plaintiff can obtain damages under the Unruh Act for violations of the ADA with-

Continued on page 6

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law, San Francisco, CA

Continued from page 5

out a showing of intentional discrimination.

Plaintiff Ronald Wilson, age 70, suffered from a number of physical difficulties, including symptoms of ALS (a.k.a. Lou Gehrig's disease). When traveling in public, Mr. Wilson required use of a cane or wheelchair. During 2005-2006, Mr. Wilson frequented a Jack-In-The-Box restaurant owned by Defendants Haria and Gogri Corporation. During his many visits, Mr. Wilson alleged that there were several architectural barriers in place that prevented him from enjoying full and equal use of the restaurant. These alleged barriers related to use of the bathroom, parking lot, and seating in the main part of the restaurant. Plaintiff filed suit in U.S. District Court, alleging that Defendant violated Title III of the ADA and the Unruh Act.

While the case was pending, Defendant made certain improvements to the property, but not all alleged problems were corrected. Plaintiff, therefore, filed a motion for summary judgment. In opposing the motion, Defendant argued that Plaintiff was required to establish proof of intent to discriminate to recover damages under the Unruh Act. Defendant relied on a recent California Appellate case, Gunther v. Lin (2006) 144 Cal. App. 4th 223. The Gunther court, interpreting the 1992 legislation that amended the Unruh Act, reached the conclusion that intent was required.

The Wilson court concluded that the Gunther court's reasoning was flawed and that it was not bound to follow it. Looking to the language of the Unruh Act and the Legislative history, the court held that the Legislature intended to include unintentional discrimination within the scope of the Unruh Act. Further, the California Supreme Court has also held that the Unruh Act must be interpreted in the broadest sense possible in order to banish discriminatory practices. The Court, therefore, concluded that a plaintiff may obtain damages without a showing of intent to discriminate. Plaintiff's motion for summary judgment was granted as to the ADA claim and the Unruh Act claim.

COMMENT

This federal court case holds that damages are available for an ADA violation under the Unruh Act, without a showing of intentional discrimination. This decision is contrary to a 2006 California Appellate court decision (Gunther). This decision should be considered when determining whether to remove an ADA/Unruh claim to federal court.

Lipstick in School – Priceless

According to a news report, a certain school in Garden City, MI was recently faced with a unique problem. A number of 12-year-old girls were beginning to use lipstick and would put it on in the washroom.

That was fine, but after they put on their lipstick they would press their lips to the mirror leaving dozens of little lip prints. Every night, the maintenance man would remove them and the next day the girls would put them back.

Finally the principal decided that something had to be done. He called all the girls to the washroom and met them there with the maintenance man. He explained that all these lip prints were causing a major problem for the custodian who had to clean the mirrors every night.

To demonstrate how difficult it had been to clean the mirrors, he asked the maintenance man to show the girls how much effort was required. He took out a long-handled squeegee, dipped it in the toilet, and cleaned the mirror with it.

Since then, there have been no lip prints on the mirror.

THE MORAL OF THIS STORY . . . . . .
There are Teachers, and there are Educators!

CAIIA *Calendar*

CAIIA Annual Convention

October 18, 2007
Disney Grand California Resort
Anaheim, California
Contact Peter Schifrin at 818-909-9090
pschifrin@sgdinc.com

The Broken Mower

When our lawn mower broke and wouldn't run, my wife kept hinting to me that I should get it fixed. But, somehow I always had something else to take care of first, the truck, the car, playing golf – always something more important to me.

Finally she thought of a clever way to make her point. When I arrived home one day, I found her seated in the all grass, busily snipping away with a tiny pair of sewing scissors. I watched silently for a short time and then went into the house. I was gone only a minute, and when I came out again I handed her a toothbrush.

I said, "When you finish cutting the grass, you might as well sweep the driveway."

The doctors say I will walk again, but I will always have a limp.

Moral to this story: Marriage is a relationship in which one person is always right, and the other is the husband.