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Inside this issue:

Broadening the
Definition of Com-
mon
Carriers - Roller
Coasters 1

When is the Billing
from a Healthcare
Provider Paid in
Full? 1

Expert's Corner:
Evaluating Low
Speed Impact Inju-
ries 2

Recent Trial Update 5

Upcoming Events 6

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Broadening the Definition of Common Carriers - Roller Coasters

Operators of entertainment vehicles carry the same heightened duty as traditional duty as a "common carrier" for their riders.

By Aron Digumarthi
Associate Attorney/Staff
Writer

In transportation cases, commercial 'carriers of persons for reward' are assigned the highest level of duty to protect their riders. This duty is to protect passengers with the "utmost care and diligence." However, this rule was recently challenged for the operators of entertainment rides that don't actually transport passengers to remote destinations: roller coasters.

In 2002 a rider on Disneyland's Indiana Jones ride was injured and suffered brain injuries claimed to be the result of shaking and stresses incurred in the ride. The rider eventually died and his estate brought suit against the Walt Disney Company. The California Supreme Court examined the question if California Code of Civil Procedure § 2100, which establishes common carrier liability, applied to the operators of amusement rides at theme parks. The core issue was if an amusement park ride was considered a "common carrier" under the Code. While the lower court ruled that such a ride did not

constitute a common carrier under C.C.P. § 2100, the California Supreme Court overruled this decision and held that Walt Disney was a common carrier in operating amusement park rides.

In typical transportation cases the transporter is obligated to transport passengers "with reasonable skill, and with the utmost prudence and caution" *Stokes v. Saltonstall* (1839) 38 U.S. (13 Pet.) 181. Until the ruling in *Gomez*, this heightened standard was only applied to traditional carriers such as buses, taxis, airplanes, etc.. The recent decision in *City of St. Helena v. Public Utilities Commission* (2004) 119 Cal. App. 4th 793 had suggested that vehicles used for entertainment over travel, such as a wine train, were not common carriers under the Code. The court in *Gomez* expressly

overruled this narrow interpretation under *City of St. Helena* and stated that the operators of a roller coaster could be deemed "a carrier of persons for reward under sections 2100 and 2101."

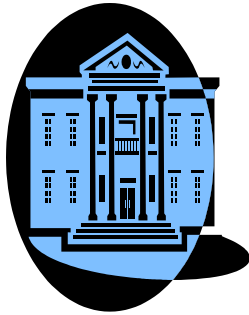
Also significant is that the Court expressly equated amusement rides with other quasi-transportation operators, such as operators of ski lifts, elevators, sightseeing rides, etc.. The significance of the ruling in *Gomez* is that the Court continues to broaden the scope of what commercial operations may be deemed a "common carrier" and subject to the highest levels of duty and potential liability to its customers.

When is the Billing from a Healthcare Provider Paid in Full?

Under *Parnell v. Adventist Health System/West*, (2005) 35 Cal.4th 595 a health care provider cannot assert a lien (absent contractual provisions) for the difference between a bill and the amount agreed upon for full payment for treatment.

By Lenore Defiesta
Associate Attorney/Staff Writer

A plaintiff in a personal injury action is typically entitled to recover the reasonable value of medical services rendered to the plaintiff, including the amount paid by a collateral source, such as an insurer. Medical expenses represent actual pecuniary loss caused by the defendant's wrong. Thus, when the evidence shows a sum certain to have been paid or incurred for past medical care and services, whether by the plaintiff, or by an



When is the Billing from a Healthcare Provider Paid in Full?

Continued from page 2

independent source, that sum certain is the most the plaintiff may recover for that care despite the fact that it may have been less than the prevailing market rate. *Id.* at 641.

The principle case governing what may be recovered for medical expenses is *Nishihama v. City and County of San Francisco*, (2001) 93 Cal.App.4th 298 where on appeal the jury was found to have improperly awarded plaintiff certain medical costs she did not incur. Plaintiff pedestrian filed suit after stepping from a bus platform into a

pothole in a crosswalk maintained by the City of San Francisco. At trial she was awarded \$99,064.00. On appeal, the judgment was modified after it was determined that medical provider California Pacific Medical Center (CPMC) rendered medical services in the amount of \$17,168.00 but accepted \$3,600.00 as payment in full from Blue Cross (Plaintiff's employer sponsored health plan).

A medical provider's rights are derivative of and not independent from the rights of the injured person. If a medical

provider has already accepted payment for medical services rendered to plaintiff, this is the extent to which the plaintiff can be compensated for those services. The burden on satisfying a medical lien is on the defendant tortfeasor, and not the injured party. The California Hospital Lien Act, Civil Code Sections 3045.1-3045.6, permits a medical provider to seek recourse against the third party tortfeasor in the case of failure to pay the proper amount at the time of judgment, but there is no authority permitting the provider to seek recourse from the injured person. See *Reimbursement*, page 3

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**Medical
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Expert's Corner: Evaluating Low Speed Impact Injuries

Cholakian & Associates hosts or facilitates numerous conferences and lectures on pertinent subjects impacting a wide array of litigation areas. We recently hosted a lecture by Dr. Kay Stewart, an expert in motor vehicle-related injuries, to provide guidance in evaluating low impact injuries and how to assess common medical characterizations of injury grades contained in medical records.

Common Injury Evaluation Errors

Dr. Kay emphasized that auto body damage does not always equate to the level of bodily injury. Modern vehicles often have bumpers which resist visible damage but which can translate substantial thrust force to the passengers. Additionally, due to bumper construction, the physical evidence of the forces involved in the impact may be within the bumper, mounts or pistons.

Pistons in particular can assist an expert in determining the level of force involved in an auto accident, and can be more useful that a visual examination of the exterior of the bumper itself.

The importance of this is to recognize that basing a defense to an injury claim on a lack of exterior damage alone is risky and can potentially be rebutted by an expert examining evidence of force not readily visible on the exterior of the vehicle. In evaluating a claim of injury based on a slow speed impact, it may well prove fruitful to have an expert examine the vehicle to ascertain the forces involved in the impact.

Dr. Kay also notes that in performing an evaluation after a slow speed impact it can be misleading to evaluate the physical conditions of other vehicle passengers. Many factors can result in wide variation

of injuries for a vehicle's occupants including the height of the subject, head rest adjustments, the size of the neck of the person claiming injury and head position can all play a role in resulting injury.

Medical Grading

Often medical records from chiropractors contain "grades" for the claimed injuries. Grading usually is 1 ("mild"), 2 ("moderate") or 3 ("severe"). Dr. Kay notes that a chiropractor should only work with patients graded at level 1. Grade 1 injuries sometimes do not have apparent pain for days after the accident, are sufficiently mild that the patient can still use and move the injured portions of their body, and there is minimal swelling and/or bruising. If a chiropractor is treating a patient with more substantial symptoms graded at

See *Impact Injuries*, page 4

Reimbursement

This holding was recently tested in *Parnell v. Adventist Health System/West*, (April 2005) 35 Cal.4th 595. In *Parnell*, defendant hospital sought review of an appellate judgment which reversed a judgment for the plaintiff-patient for unfair business practices and other claims.

The patient was injured in an automobile accident and treated at San Joaquin Community Hospital, owned by defendant Adventist Health System/West. The patient had health insurance which contracted with Community Care Network (CCN) to provide discounts on medical care to its beneficiaries. The hospital eventually submitted a claim for payment to CCN, which in turn paid a discounted amount on the hospital billing, consistent with the provider agreement. This payment was considered full payment of the outstanding bills.

The patient later sued the driver of the vehicle involved in the accident. Consequently, the hospital filed a notice of lien the patient's action to recover the difference between the actual cost of the medical services it rendered and the negotiated amount that the hospital received from CCN under the provider agreement.

The trial court ruled that under the Hospital Lien Act (Ca. Civil § 3045.1) a hospital may claim a lien against any judgment or settlement recovered by that patient for reasonable and necessary charges. The trial also found that this ability to recover was not constrained by the Hospital's negotiated discount with a health insurance carrier.

The trial court's ruling was reversed by the appellate court which held that "a hospital that has received full payment for services under the terms of its contract with the medical insurance provider is not entitled to file a lien to recover the difference between that payment and the hospital's 'usual and customary' charges for similar services."

In *Parnell*, the California Supreme court granted review to determine whether a lien asserted under the Hospital Lien Act (HLA) requires the existence of an underlying debt owed by the patient to the hospital. The Court found that in order for the hospital to assert a lien, an underlying debt is required. The HLA does not give the hospital an independent cause of action against the third party tortfeasor, but provides for a lien on any damages recovered by the patient for injuries caused by the tortfeasor. *Parnell* 35 Cal.4th at 603; CC 3045.1.

It is the debt owed by the patient to the hospital which is the foundation for the hospital's lien right. *Grauberger v. St. Francis Hosp.* (N.D. Cal. 2001) 149 F.Supp.2d 1195, 1191. As set forth in *Nishihama v. CCSF* (2001) 93 Cal.App.4th 298, 308, "the amount that a hospital is entitled to receive as payment necessarily turns on any agreement it has with the injured person or the injured person's insurer."

In *Parnell*, the hospital received full payment for services rendered to plaintiff-patient as provided for in the hospital's contractual agreement with CNN. Therefore *Parnell's* debt to the hospital was extinguished and the hospital could

not assert a lien pursuant to the Hospital Lien Act against *Parnell's* recovery in the third party case. Neither Insurance Code § 10133.2 or Health and Safety Code § 1373.18 precludes hospitals from contractually preserving their right to recover "reasonable and necessary charges" pursuant to an HLA lien under CC 3045.1; both statutes limit co payment amounts recoverable by a health care provider pursuant to contract

Under *Parnell*, the determination of whether a health care provider may assert a lien in a third party actions following receipt of payment is dependent upon whether the provider preserved its rights to do so in its contractual agreement with the insurer entity. Where such a contract right has been negotiated, there is arguably no extinction of the debt owed by the plaintiff-patient to the health care provider, and the patient's third party action remains the vehicle by which a provider can seek further reimbursement for reasonable and necessary charges.

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Impact Injuries

Continued from pg. 2

2 or higher, than the degree of injury may well exceed the services typically provided by chiropractors, indicating that such treatment may not be appropriate.

Generally, sprains or strains are considered grade 1. Grade 2 injuries have immediate pain, swelling and/or bruising. A person with a grade 2 injury will typically be aware of the need for immediate medical treatment and would be similarly obvious to observers at the scene. Finally, grade 3 injuries usually require ambulatory removal from the scene, involve severe pain, hemorrhage and loss of joint use and mobility.

Additionally, the terms "mild", "moderate" and "severe" specifically correlate with grades 1-3 respectively. If a medical treater describes an injury as "moderate" or "severe", the treater should be challenged to support the basis for this assessment and to determine if they are using the terms indiscriminately.

Recovery for Grade 1 Injuries and Pre-Injury Status

Dr. Kay states that it is well established that uncomplicated strains usually resolve within 12 weeks. When a strain is treated properly, the average

time frame for recovery is 42 days. (source: Mercy Guidelines). Perhaps more significantly, persons with grade 1 injuries are expected to be able to return to their regular routine, including work and daily activity, without restrictions.

A common misconception in evaluating a low speed injury can occur when assessing if a party has returned to his/her "pre-injury state." The determination of if a subject has returned to a pre-injury state is made with an analysis of their pre-accident condition. A common evaluative error is to assess if the subject is pain or symptom-free. In actuality, many persons are not pain or symptom free before the accident. Therefore, an analysis of if a person has returned to their pre-injury condition requires a careful assessment of

their pre-injury condition. This error in analysis is often conducted by treaters, who's treatment goals may be oriented around getting the patient to a pain-free state as opposed to bringing the patient back to their pre-accident status.

In Summary

Applying sound techniques in assessing the scope of injury after a low speed impact, and recognizing the grading methodology and treatment goals are essential elements in evaluating low impact injuries. For more information contact Dr. Kay Stewart at www.drkaydc.com.



Injury Grades and Typical Symptoms

Grade 1:

- Minimal swelling and/or bruising
- Usually no apparent need for treatment
- Pain/soreness may take 1-14 days to appear
- Recovery: typically up to 12 weeks with an average of 42 days

Grade 2:

- Immediate moderate pain, limited range of motion
- Perceived need for immediate care
- Recovery: Can be months with some instability or residual arthritic condition

Grade 3:

- Immediate, severe pain and mobility impairment
- Requires medical intervention
- Recovery: Up to years or never. Requires intensive therapy and may result in persistent instability or arthritis.

Recent Trial Update

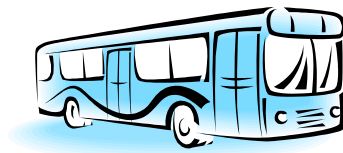
In the recent case of *Coleman v. Slovenec, City of San Francisco*, Kevin Cholakian presented the defense of defendant Frank Slovenec in a claim of injuries resulting from a San Francisco MUNI bus accident.

On December 16, 2002, our client, Defendant Frank Slovenec was involved in a motor vehicle accident with a San Francisco MUNI Bus (owned and operated by defendant City and County of San Francisco) while the bus was attempting to make a wide right turn at slow speed. Plaintiff sued both MUNI and Mr. Slovenec. MUNI disputed liability and claimed Mr. Slovenec was at fault.

At the time of the collision, Plaintiff, Michael Coleman, was allegedly standing near the rear exit, holding onto a pole. He claimed to have been suddenly jerked forward and to the left while holding onto the pole resulting in claimed nerve damage injuries to his hand.

The case focused on expert testimony and witness credibility. Mr. Cholakian's cross examination of plaintiff's medical expert illuminated the questionable results of plaintiff's strength tests.

In the end, the San Francisco jury, consisting of citizens used to hearing about dangerous MUNI buses, returned a defense verdict and a finding of no liability on behalf of Mr. Slovenec to both plaintiff's and MUNI's claims.



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(NASP)

Trucking Industry Defense
Association (TIDA)



Cholakian & Associates is listed in Best's Insurance Directory, is AV rated by Martindale-Hubbell, and is retained defense counsel to a dozen major insurance companies doing business in California. This practice includes, though it is not limited to, the representation of carriers regarding commercial and personal lines claims as well as the defense of insureds involved in serious personal injury catastrophic trucking accident litigation, complex commercial litigation, product liability/fire subrogation matters and coverage litigation. This includes defense of matters involving allegations of construction defects, mold related claims, inter and intrastate trucking, commercial landlord/tenant, environmental liability, professional liability, including insurance agents, labor and employment law, officer's and director's liability, and uninsured/underinsured motorist matters. The attorneys in this practice group have significant litigation experience, with emphasis on high exposure cases.

UPCOMING EVENTS *

"Getting Your Evidence and Expert Testimony Admitted into Court in California"

Panelist: Kevin K. Cholakian

September 22, 2005
Pan Pacific San Francisco Hotel
500 Post Street - Union Square
San Francisco, CA 94102

"Black Box Recorders: Big Brother is Watching Over You - Use It or Lose It"

Panelist: Kevin K. Cholakian

NASP National Conference in Austin, Texas
November 15, 2005

For more information about these events, please contact Maureen Liu at (415) 467-8200 ext. 200

Kevin K. Cholakian attended North Carolina School of the Arts in Winston-Salem, North Carolina his senior year of high school 1971-72 on a full scholarship. Mr. Cholakian then attended San Francisco Conservatory of Music on a Ford Foundation Scholarship from 1972-1974. He graduated magna cum laude with a B.A. in Philosophy from California State University, Fresno, in 1977. From 1976 to 1978, he served as Chief Administrative Assistant to California State Senator Rose Ann Vuich (first woman elected to the California State Senate). He received his law degree from the University of California, Hastings College of the Law in 1981. At Hastings, he was Executive Editor of the Hastings Communications and Entertainment Law Journal. Mr. Cholakian began his legal career as an employment and product liability defense lawyer, practicing with the litigation sections of Littler, Mendelson, Fastiff & Tichy (1981-1983) and McCutchen, Doyle, Brown & Enersen in San Francisco (1983-1987), and managed the defense practice at AV rated 30 attorney civil defense firm Kinder, Wuertel & Cholakian (1988 through 1999). He has continued to specialize in high exposure personal injury defense, bad faith, product liability/fire subrogation matters, construction defect, coverage and employment/housing discrimination matters. Mr. Cholakian regularly defends cases that have exposures in excess of \$1,000,000.00. Mr. Cholakian also specializes in the defense of commercial housing/environmental, landlord-tenant and ADA cases. He successfully defended Clint Eastwood and the Mission Ranch in a high profile ADA case. He has tried and defended more than 20 cases with verdict exposure greater than \$100,000.

Mr. Cholakian is a member of the following organizations: Defense Research Institute (DRI), the International Association of Defense Counsel, the Northern California Association of Defense Counsel, the American Bar Association, the San Mateo Bar Association, Bar Association of San Francisco, the San Francisco Trial Lawyers Association, the California Trial Lawyers Association, National Association of Subrogation Professionals (San Francisco Chapter President) (NASP), and Trucking Industry Defense Association (TIDA). Mr. Cholakian is the current President of the San Francisco Defense Seminar Association, a 40 year old organization comprised of defense litigators. Mr. Cholakian sits on the Executive Committee of the Board of Governors of the City Club of San Francisco.