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MSJ IS NOW APPROPRIATE IN PREMISES SECURITY CASES, EVEN IF NEGLIGENT SECURITY IS CLEAR, IF PLAINTIFF'S EXPERT DECLARATION ON CAUSATION (THAT MORE SECURITY WOULD HAVE HELPED) IS SPECULATIVE

In the recent California Supreme Court case of *Marianne Saelzler v. Advanced Group 400*, a Federal Express delivery employee was attacked inside a crime-plagued apartment complex where, it was admitted, the defendant negligently failed to provide many basic security precautions. In particular there was a broken security gate which had been propped open. On her way into the complex, plaintiff saw two men loitering nearby. After attempting to deliver a package to a tenant, the Fed Ex employee was accosted by these men who beat her and attempted to rape her. Despite admitted negligence, the landowners brought an MSJ on causation, claiming that plaintiff could not prove that any particular act of negligence (broken gate, too few guards, etc.) actually contributed to enabling the crime. Plaintiff supplied an expert declaration indicating that the area was in a high crime area, and that defendants knew of frequent recurring gang and criminal activity on the apartment complex premises, including rapes and gunshots on the premises and numerous police responses to the premises. The expert declaration stated that "This attack . . . an attempted rape, would not have occurred had there been daytime security and a more concerted effort to keep the gates repaired and closed." The basic defense argument was that, while negligent security was admitted, causation was speculative. The trial court agreed, and granted the defendant's summary judgment, holding that the overwhelming negligence of the defendant still did not add up to a showing that the security breaches were a cause of the attack on the plaintiff.

The Court of Appeal reversed the summary judgment, relying on the common sense idea that particularized causation is often impossible to prove in negligent security cases, but that it is a reasonable inference that if security is negligent, better security would lead to less crime. A jury could reasonably infer that a particular crime would likely have been avoided by better security. The ticking bomb in the Court of Appeal's reasoning was a holding that, where enough negligence is proved in a premises security case, the burden shifts to the defendant on causation, to prove that the negligent security did not facilitate the crime, on the grounds of fairness: once negligent security is proved, it is often impossible for the plaintiff to prove that negligent security did in fact help a thug in a particular case to complete his mission. At that point, held the court, it becomes a question of fact for the jury, whether they could reasonably infer that better security would likely have deterred the crime. In other words, per the court, once negligence is shown, if an expert opines that better security would have made a difference, MSJ is not possible and the case goes to the jury.

The California Supreme Court has now reversed the Court of Appeal, and has held that the mere proof of negligence in a premises security case does not shift the burden of proof on causation to the defendant. The defense still wins on MSJ unless there is actual evidence that a particular act of negligence enabled the crime, and an expert declaration without such facts does not defeat the MSJ. It still must be shown, on a case by case basis, that the particular items of negligence (lack of security guards, unlocked security gates, bad lighting, etc.)

Continued on page 2

IN THIS ISSUE

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LEGAL TRIVIA

Legalese features double word phrases like "cease and desist," "bequeath and devise" etc., in large part because when the Normans (short for the "Norsemen" who conquered the area known afterward as Normandy in the 10th century) conquered further European territories in 1066 they fused together the laws of the invading Norse/Frankish Normans with the Anglo-Saxon laws. Lawyers from then on drafted documents which contained identical words from both languages to be on the safe side, and these phrases have become ritual ever since. The invading language - Norman French - had already evolved considerably from its Teutonic roots, so as to be a different language from the existing language of the Angles (as in Angle-land, or "England") and Saxons, who where themselves originally also Scandinavian invaders. Here are some doublets from Norman French and English ("Angle-ish"): devise (F) and bequeath (E); breaking (E) and entering (F); right (E) title (E) and interest (F); new (E) and novel (F). Soon, doubling began to sound "official," and now words are often paired from the same language, such as the following pairs which are from English only: "have and hold," "each and every," "from and after," and "let or hindrance."

Continued from page 1

actually had something to do with the attack. For instance, in an earlier Court of Appeal case, *Leslie G.*, the plaintiff could not prove that an unlocked security gate was actually used by the rapist in getting into the subject garage and MSJ was affirmed; the plaintiffs in *Saelzler* tried to overturn *Leslie G.* unsuccessfully. The California Supreme Court has now indicated that there must be some actual evidence that a particular act of negligence had an actual causal connection to the crime. The burden will not shift to the defendant on causation on MSJ simply because negligence is proven. Moreover, a simple declaration by a security expert opining that negligence was a cause and that more security would have likely prevented the crime is viewed as speculative without actual facts and figures proving this point, and is insufficient, without such facts, to defeat a defense MSJ.

Implications

Motion for summary judgment is now more feasible in a case where negligent security is admitted, but where there is no evidence linking up the security lapses with the way the crime was actually committed. An expert declaration by the plaintiff simply opining that more security would have likely prevented the crime will be viewed as insufficient to create a triable issue of fact unless the declaration really contains something of a factual nature (statistics, perhaps), beyond a mere opinion, to show that more security would in fact have prevented the crime.

- Paul J. Lipman

ADDITIONAL INSURED IS ENTITLED TO A DEFENSE

An insurance carrier's duty to defend is broad and is triggered when there is only a potential for coverage and even though coverage is ultimately found to be non-existent. In the context of a construction defect case, virtually every subcontractor will have been required to secure an additional insured endorsement naming the general contractor as an additional insured under the subcontractor's policy. It is also common for the subcontractor's carrier to place limitations in the policy, disclaiming coverage for the general contractor for liability arising out of work performed by any trade other than the subcontractor who obtained the additional insured endorsement.

In *Presley Homes Inc. v. American States Ins. Co.*, the court held that those coverage limitations do not limit the extent of the duty of defense of the general contractor by the subcontractor's carrier. In *Presley*, a homeowner sued builder Presley for construction defects relating to the framer and concrete subcontractor. Presley tendered defense to the subcontractor's carrier, American States, under an additional insured endorsement. The carrier agreed to share in Presley's defense, but denied having a duty to defend Presley against all of the homeowners' claims. The carrier sought to limit its defense to framing and concrete issues in light of the fact that the additional insured endorsement contained limiting language as to coverage. The case was settled with the homeowners. Presley did not contribute to the settlement, but did incur attorney's fees and costs. After that settlement, Presley sued American States for money damages, declaratory and injunctive relief. The court of appeals held that while the additional insured endorsements may have limited the carrier's indemnity obligation, it had no effect on the duty to defend. A duty to defend applies to an entire action as a matter of public policy, and cannot be limited by the terms of the insuring agreement. Despite the foregoing, the court of appeals looked to the policies and did not find anything in the insuring agreements which limited the duty of defense as was claimed by American States. The court noted the possibility for confusion if carriers were allowed to choose which portions of a claim to defend based upon what was or was not going to be indemnified in a particular action. If a carrier has expended attorney's fees and costs defending non-covered claims, they can seek reimbursement from the carrier who insured the subcontractor whose work engendered the non-covered claim.

- Thomas E. Martin

CURRENT TRENDS IN VEHICLE "BLACK BOX" TECHNOLOGY

Several vehicle and engine manufacturers are placing electronic data recorders (EDR) in their vehicles that potentially record vehicle information both before and after a crash.

Passenger Vehicles

General Motors

In the spring of 2000, General Motors (GM) awarded Vetronix Corporation an exclusive contract to develop a crash data retrieval (CDR) system for GM and the aftermarket that allows the users of the system to download the information stored in the airbag sensing and diagnostic module (SDM). The data can be accessed through the vehicle diagnostic link underneath the dashboard or directly from the airbag module itself. Data stored in the SDM includes pre-crash data (e.g. vehicle speed and brake status), post-crash data (delta V for up to 300 milliseconds) and other data such as whether or not the seat belt switch was activated at the time of impact. Examples of the pre- crash and post-crash data can be seen in Figures 1 and 2 below. The module also discerns between near-deployment events and full airbag deployment events. Near-deployment data is stored when the airbag module "wakes-up" due to some deceleration event which is not sufficient to cause the airbags to deploy. The first generation SDM, which was installed in 1994 through 1998 model year GM vehicles has limited information available for the pre-crash vehicle parameters and does not plot the delta-V for near-deployment events. The SDM that is installed in current models dating back to 1999 vehicles record vehicle pre-crash data and plots the delta-V for near-deployment events in addition to the deployment events.

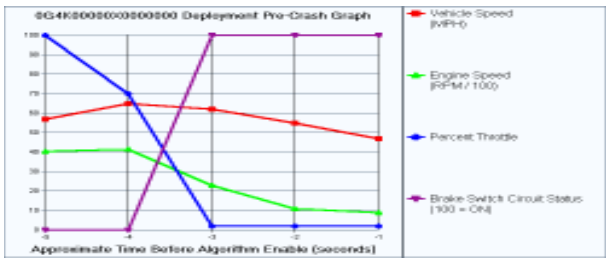

Figure 1: Pre-Crash

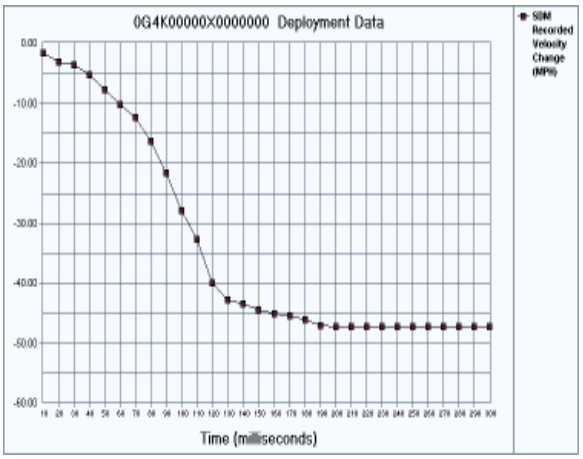

Figure 2: Post-Crash Delta-V Plot

Parameter	1990 DERM	1994 SDM	1999 SDM
State of Warning Indicator when event occurred (ON/OFF)	X	X	X
Length of time the warning lamp was illuminated	X	X	X
Crash-sensing activation times or sensing criteria met	X	X	X
Time from vehicle impact to deployment	X	X	X
Diagnostic Trouble Codes present at the time of the event	X	X	X
Ignition cycle count at event time	X	X	X
Maximum ΔV for near-deployment event		X	X
ΔV vs. time for frontal airbag deployment event		X	X
Time from vehicle impact to time of maximum ΔV		X	X
State of driver's seat belt switch		X	X
Time between near-deploy and deploy event (if within 5 seconds)		X	X
Passenger's airbag enabled or disabled state			X
Engine speed (5 sec before impact)			X
Vehicle speed (5 sec before impact)			X
Brake status (5 sec before impact)			X
Throttle position (5 sec before impact)			X

Figure 3: DERM and SDM information available

A breakdown of the information available for the different model years of SDM's is seen in Figure 3. For a full list of GM vehicles able to be downloaded and CDR capabilities, please visit the CDR section of our web-site at www.accidentresearch.com/CDR.

Ford Motor Company

According to Vetronix, Ford agreed to let them develop software that will interface with the CDR. The software and cables should be available by the end of 2001. The Ford module, called a restraint control module (RCM), will include additional information beyond that of the GM units.

Continued on page 4

Continued from page 3

Heavy Trucks (Tractors, Buses, etc.)

Many trucks manufactured in the mid-to-late 90's and some as far back as the mid 80's are equipped with an electronic control module (ECM) that was originally designed to increase fuel economy in trucking fleets. Many of the ECM's also record a "snapshot" of data from rapid deceleration events. Rapid deceleration events can be as minor as hard braking or the result of a collision. Data including engine speed, vehicle speed, brake position, clutch position, clutch position, throttle position, etc. are stored constantly and captured when a deceleration event occurs. Detroit Diesel and Caterpillar are among the manufacturers that currently equip engines with an ECM.

Detroit Diesel Corporation

The Detroit Diesel Corporation introduced the Detroit Diesel Electronic Control (DDEC) in1985. The first systems did not have the capabilities to record a deceleration event. In 1998, the DDEC IV was introduced into the engine fleet with many advanced capabilities, as seen in Figure 5. The "snapshot" of data from the DDEC IV module normally contains approximately one minute of pre-hard-brake data and 15 seconds post. A sample report of the data is shown in Figure 4. The Detroit Diesel Diagnostic Link allows for the downloading of this information for up to five hard-brake events.

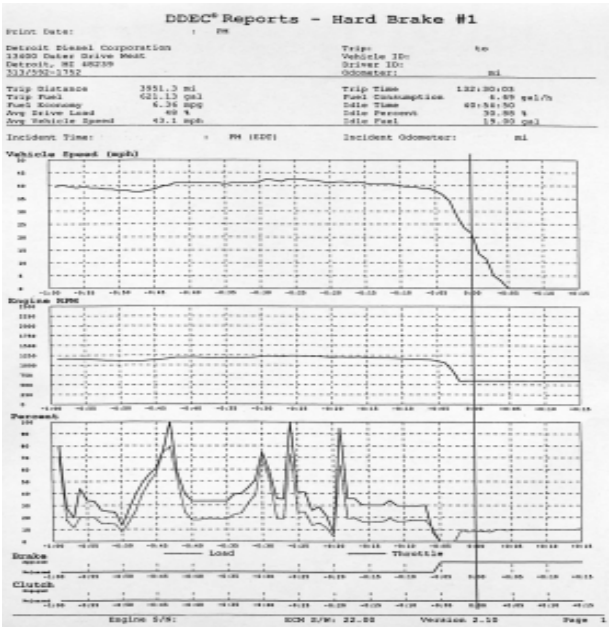

Figure 4: Sample DDEC Report

On-Highway Reports available from DDEC Reports

Available Reports On-Highway	DDEC III Data Pages	DDEC IV R20	DDEC IV R21 or later	DDEC Reports version required
Trip Activity	X	X	X	2.0 or later
Vehicle Speed/RPM	X	X	X	2.0 or later
Overspeed/Over Rev		X	X	2.0 or later
Engine Load/RPM		X	X	2.0 or later
Vehicle Configuration	X	X	X	2.0 or later
Periodic Maintenance	X		X	2.1 or later
Hard Brake Incident			X	2.1 or later
Last Stop			X	2.1 or later
DDEC Diagnostic			X	2.1 or later
Profile	X		X	2.1 or later
Monthly Activity			X	2.1 or later
Daily Engine Usage			X	2.1 or later
Life-to-Date	X		X	2.1 or later

Figure 5: Data available from the DDEC modules

Downloading the Airbag Modules

A training certification course is offered by Vetronix Corporation. Currently, Accident Research and Biomechanics, Inc. has two engineers who have completed this course.

- Thomas F. Fugger, Jr., P.E.

Note: Mr. Fugger is an accident reconstructionist who has kindly authored this at our request. He can be reached at Accident Research and Biomechanics, 27811 Avenue Hopkins, Unit #1, Valencia, CA 91355, (805) 257-8189.

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