WESIERSKI & ZUREK LLP

Defense Law Update

Quarter 4 2001 | Irvine/Los Angeles, California | Volume 12 No.4

DIAGNOSTIC TESTS AND THE KELLY RULE

Long ago, California courts ruled that evidence based upon a scientific test will not be admitted unless competent authorities generally recognize the reliability and scientific basis of the test. (*People v. Spigno* (1957) 156 Cal.App.2d 279, 290; Witkin, *California Evidence* (4th Ed. 2001) Demonstrative, Experimental, and Scientific Evidence § 41.) "Scientific Tests" encompassed by this rule include tests for intoxication, genetic tests, hypnosis and polygraph tests, among several others. (Witkin, *Supra*, § 41.) As we will see, this rule also applies to diagnostic tests.

This general and long-standing rule was refined by the case of *People v. Kelly* (1976) 17 Cal.3d 24, 31, in which the court established a three-prong test to ascertain the scientific basis and reliability of these scientific tests. The *Kelly* court's *legal* test of *scientific* tests is comprised of the following inquiries:

a. The reliability of the method must be generally accepted by recognized authorities in the scientific field in which the test belongs. This prong of the *Kelly* test is usually established by expert testimony.

b. A witness giving expert testimony must be qualified as an expert on the subject.

c. It must be shown that correct scientific procedures were used in administering the method. (Witkin, *Supra*, § 42.)

The Fourth District Court of Appeal in California recently applied the *Kelly* test to PET scans in the case of *People v. Eugene Protsman* (2001) 88 Cal.App.4th 509. The court held that the results of PET scans is not currently admissible to prove some diagnoses, like head trauma. In the process, the Protsman court highlighted an important corollary of the *Kelly* rule: even generally recognized and reliable scientific tests will not be admissible if the test is not *applied* in a generally recognized and reliable *manner*, i.e., for a recognized use.

Eugene Protsman was on trial for murder. The prosecution asserted that Protsman killed Elisabeth Smith with a hammer while both were smoking marijuana laced with methamphetamine and perhaps injecting heroin as well. Protsman initially denied any knowledge of the murder. He later admitted to being in her home on the day of her murder and finally blurted out "it was the [substances]...we were doing that day," which caused him to kill Smith. Protsman claimed that he did not remember any details of the fatal episode.

Protsman's defense attorneys marshaled a parade of experts to testify that Protsman was mentally impaired. These experts also testified that Protsman's deficiencies in judgment and emotional stability - when coupled with methamphetamine use - could cause blackouts. Protsman's mother testified that Protsman fell out of his bunk bed at the age of eight, sustaining loss of hearing in one ear. Protsman's mother also claimed that his attention span was "real short" after the fall.

The defense also offered the testimony of Dr. Joseph Wu, the Clinical Director at the UCI Brain Imaging Center and a specialist in the field of PET scan imaging. Dr. Wu tried to enter into evidence the results of a PET scan which, according to Dr. Wu, showed that Protsman had suffered a traumatic brain injury.

The prosecution, however, moved to exclude Dr. Wu's testimony and the results of his tests. The prosecution claimed that the use of PET scans to diagnose head trauma was not accepted in the fields of neurology or brain imaging. An expert for the

Continued on page 3

IN THIS ISSUE

AN EMPLOYEE'S USE OF A BUSINESS VEHICLE CANNOT BE RATIFIED BY AN INSURANCE COMPANY AFTER AN ACCIDENT, BECAUSE IT UNJUSTLY DEFEATS THE RIGHTS OF THE INSURANCE COMPANY 2

WESIERSKI & ZUREK LLP - IN TRIAL 2

COURT REFUSES TO IMPOSE BRIGHT LINE TEST FOR APPORTIONING DEFENSE COSTS AMONG INSURERS 3

One Corporate Park Drive, Second Floor, Irvine, CA 92606
Telephone (949) 975-1000 Fax (949) 756-0517

W & Z

777 South Figueroa, Suite 850, Los Angeles, CA 90017
Telephone (213) 627-2300 Fax (213) 629-2725

AN EMPLOYEE'S USE OF A BUSINESS VEHICLE CANNOT BE RATIFIED BY AN INSURED AFTER AN ACCIDENT, BECAUSE IT UNJUSTLY DEFEATS THE RIGHTS OF THE INSURANCE COMPANY

If an employee uses a business vehicle without permission of the insured, can the insured later ratify the employee's acts and impose liability on the insurance company? No, according to the Fifth Appellate District's recent holding in *Allied Mutual Insurance Company v. Rick Webb, et al.* An employee who does not have permission to use a company vehicle at the time of the accident cannot later acquire permission through ratification of the insured. The court reasoned that it would be unfair to allow ratification in this context because this would enable the insured to unilaterally decide, after the accident, whether or not to impose liability on the insurance company.

The facts of the above-mentioned case involved an employee who drove a company car without the explicit permission of his employer. Although he was permitted to drive the company's vehicles for business purposes, the employee's compensation did not include personal use of a company vehicle. When the employee's car broke down on his way home from work one day, the employee returned to work and used keys to the shop to access the area where the company vehicle was stored. Without asking for permission, he drove the company vehicle home that night and then drove it to work the next day.

Upon leaving work that next day, he decided to stop at his sister's house. The accident occurred while driving to his sister's house in the company vehicle. The appellants argued that the business automobile liability insurance policy covered this accident because the company car was used with the insured's permission. The trial court explained that coverage would depend on whether or not the employee had permission to use the car at the time the accident occurred, since the employee was not a named insured on the policy.

After hearing the facts in this case, the trial court ruled that the insured had not given the employee permission to drive the company car at the time the accident occurred. The appellate court affirmed the trial court's decision and held that non-permitted use of a vehicle could not later be ratified by the insured **after the accident**, so as to impose liability on the third party insurer.

WESIERSKI & ZUREK LLP IN TRIAL

Chris Wesierski recently tried a wrongful death case (*Yamamoto v. Carey*) against the President of the Orange County Trial Lawyers. The case involved a 36 year old female travelling down a two lane road. When traffic backed up, she moved to the right and proceeded straight down between the cars and the curb toward the next major intersection. Unbeknownst to her, traffic to her left had stopped to allow a vehicle to turn left in front of lanes one and two.

The defendant never saw the left turning vehicle driven by a 60 year old dental technician, hit him square on the passenger side and pushed him into another car. He was severely injured and after a number of weeks in the hospital he passed away leaving a wife and two children.

The decedent had over $500,000 in medical bills and claimed loss of earnings up to $600,000.

The jury awarded nothing for the wrongful death claim and gave $267,000 gross award, finding the decedent 95% at fault and the defendant 5% at fault - even though plaintiffs argued defendant was "curb sneaking," speeding and inattentive.

The arbitration award was $1,000,000 gross, and the defendant was found 30% at fault. Defendant filed for trial de novo.

Demand during trial was $2,000,000 from the plaintiff attorney. The offer was $250,000 with an indication defendant would pay more or a binding high/low of $500,000 and $100,000 with the low guaranteed.

Plaintiff attorney refused all offers. Defendant's costs are over $30,000. Plaintiffs will now pay all of it minus the net award of $13,350, since defendant offered $100,000 by statutory offer and plaintiffs did not beat the offer.

In their argument to impose liability on the insurance company, the appellants relied upon general agency law. Agency law provides that an agent's unauthorized act may be ratified when the only reasonable interpretation of the principal's conduct is approval or adoption of the agent's acts. Because the employee in this case had not been disciplined or fired by the company, the appellant argued that the company had impliedly ratified the

Continued on page 4

Continued from page 1

prosecution testified that there are only three accepted uses of PET scan imaging: (1) stroke; (2) Alzheimers; and (3) epilepsy. He asserted that "the use of PET scan imaging for diagnosing or evaluating head trauma was investigational only." This expert for the prosecution told the court that he had spoken with five other leaders in the field of PET scan imaging in developing his opinion.

The court stated "in order for Dr. Wu's testimony to be admissible, Protsman had to demonstrate that the *use of PET scan imaging to diagnose a prior traumatic brain injury was generally accepted* in the field of brain imaging and neurology." (*People v. Protsman*, *Supra*, at 516.) (Emphasis added.)

In order to establish this "general acceptance," counsel attempting to offer the results of a certain scientific test must demonstrate "substantial agreement and consensus of a cross-section of the relevant scientific community." (*Id.*, at 516, *citing, People v. Leahy* (1994) 8 Cal.4th 587, 607, 611.) According to the *Protsman* court, this boils down to demonstrating "a *consensus* in the field." The court went on to speak about the fact that neither Dr. Wu nor the pertinent literature "revealed that the *majority* of qualified members in the neurology and brain imaging do not support the use of PET scans to diagnose prior head trauma and consider the technique generally unreliable for this purpose." (*Id.*, at 516.) (Emphasis added.)

Implications

The *Kelly* test does not apply simply to hypnosis and truth serum; nor is it limited to testing the methodologies employed by practitioners at the forefront or the fringes of the medical and scientific communities. *Protsman* proves that *Kelly* may be invoked to exclude new or unproven applications even for widely accepted tests.

This exclusion is achieved by expert testimony regarding the test and its recognized applications. In light of the ruling in *Protsman*, counsel may be able to exclude a proffered test by showing that a *majority* of practitioners in the field do not support the application of the test to the specific circumstances of the case.

- Jeffrey N. Gesell

COURT REFUSES TO IMPOSE BRIGHT LINE TEST FOR APPORTIONING DEFENSE COSTS AMONG INSURERS

In the recent case of *Centennial Insurance Company v.United States Fire Insurance Company* (2001) 88 Cal.App.4th 105, the Appellate Court for the First District of California refused to impose an across the board bright line test for apportioning defense costs among multiple insurers in all cases, preferring a case-by-case analysis. In making its ruling, the court noted that imposing a single rule "would be the very antithesis" of an equitable approach to apportionment.

The case of *Centennial Insurance Company* followed a construction defect case in which a joint venture responsible for developing, constructing and marketing a residential condominium complex was sued. The joint venture was insured by three different insurance companies between the inception of the project and the time a lawsuit was filed. United States Fire Insurance Company provided coverage from January 19, 1982 through July 1, 1982; Centennial Insurance Company provided coverage from February 1, 1985 through February 1, 1988; and Travelers Insurance Group, Inc. provided coverage from February 1, 1988 through February 1, 1989.

The underlying construction defect action was settled for $1,000,000, with Centennial and Travelers paying $875,000 and U.S. Fire paying $125,000. Centennial and Travelers paid $611,000 in attorney's fees and costs, with U.S. Fire reimbursing them for $68,000. Centennial filed suit on behalf of itself and Travelers contending that defense costs should be allocated equally among all three insurers. All parties filed motions for summary judgment, and the trial court entered judgment apportioning costs on the "time of risk" basis. As such, U.S. Travelers was ordered to pay one-ninth of the total defense costs incurred based on the actual time period U.S. Fire's policy covered the joint venture relative to the time period of Centennial's and Travelers' policies.

The Appellate Court affirmed the trial court ruling. In so ruling, the court noted that when choosing the appropriate method of allocating defense costs among multiple liability insurance carriers, a trial court must

Continued on page 4

VISIT OUR WEBSITE:

WWW.WZLLP.COM

Continued from page 3

determine which method of allocation will most equitably distribute the obligation among insurers "pro rata in proportion to their respective coverage of the risk" and "as a matter of distributive justice and equity."

The Appellate Court further noted that a trial court has discretion in selecting a method of allocating costs among insurers with the aim of producing equitable results based on the facts and circumstances of the particular case. In choosing the appropriate allocation method, courts have used various methods, including: (1) apportionment based on relative duration of each primary policy as compared with the overall period of coverage during which the occurrences occurred ("time on risk"); (2) apportionment based on relative policy limits of each primary policy; (3) apportionment based on both relative durations and relative policy limits; (4) apportionment based upon the amount of premiums paid to each carrier; (5) apportionment in equal shares up to the policy limits of the policy with the lowest limits, then among each remaining carrier up to the limits of the carrier with the next lowest limits, and so on; and (6) apportionment in equal shares ("equal allocation").

The Appellate Court noted that in this case if equal allocation was used U.S. Fire would have paid the same in defense costs as Centennial and Travelers even though it only covered the joint venture for 10% of the duration of the combined policies, and collected premiums for that shorter period accordingly. As such, the court stated a bright line rule dividing defense costs equally would give rise to different equitable considerations. To avoid such inequities the Appellate Court held that trial courts must maintain equitable discretion to fashion allocation depending on the facts of a particular case.

- Ronald F. Templer

Continued from page 2

employee's conduct. The appellants felt that this implied ratification retroactively granted the employee permission to drive the company vehicle.

In response, the appellate court explained that this case differed from general agency principles because the agency relationship involved a third party, the automobile insurance company. The court held that because the employee did not have permission to use the car **at the time the accident occurred**, there was no coverage through the company's insurance policy. The court reasoned that if an insured was allowed to ratify unauthorized use of a vehicle after the accident occurred, the rights of the insurance companies would be effectively destroyed. Unlike general agency principles, ratification in this context cannot operate retrospectively because the intervening rights of the insurance company would be ignored and the result would be unfair.

Although the court found it unjust to impose liability on the insured in this situation, insurance companies should be aware that slightly different circumstances could render a different ruling from the court. For instance, courts might find automobile liability coverage if prior conduct of the parties amounts to implied permission to drive the vehicle. However, insurance companies can challenge coverage based on implied permission by proving that the person had exceeded their scope of implied permission (performing personal errands, driving while intoxicated, etc.).

- Sacha Caldemeyer

Editor

Paul J. Lipman