

**PROPOSITION 51 LIMITS A TORTFEASOR'S
LIABILITY FOR SUBSEQUENT MEDICAL
MALPRACTICE**

The new case of *Henry v. Superior Court* (2008 DJDAR 2804) holds that Proposition 51 has modified the traditional rule in California that a tortfeasor is fully liable for any subsequent medical malpractice. Now, the original tortfeasor, whether a driver, landowner, etc., can apportion that percentage of plaintiff's general damages (pain and suffering) that is due to the subsequent malpractice of the treating doctor.

The longstanding rule in California has always been that if a negligent act sends someone to the hospital, it is foreseeable that a doctor at the hospital will commit malpractice. Thus, but for the initial negligence, plaintiff would not have been subjected to the subsequent medical malpractice (*Ash v. Mortenson*). The plaintiff thus has a choice as to who to sue for the medical malpractice. It is difficult to sue doctors because juries like doctors. Therefore, plaintiffs have traditionally sued the original tortfeasor for all damages including those arising from the medical malpractice. If the defendant wants to bring in the doctor and try their luck with a jury, they can do that. Such cases are very hard to win, however.

Proposition 51 modified California law by making joint tortfeasors jointly liable only for economic damages. Each tortfeasor "pays their own way" as far as general damages, i.e. pain and suffering. That raises the question as to whether Proposition 51 has modified the old *Ash v. Mortenson* rule, and whether defendants can now point at an "empty chair" to argue that some of plaintiff's pain and suffering is the result of malpractice by a subsequent treating physician who was not sued. The new case of *Henry v. Superior*

Court holds that defendants can indeed do this under Proposition 51.

In *Henry*, plaintiff was a pool cleaner hired to clean the defendant's swimming pool. While leaving the premises, he tripped at twilight over an unmarked concrete step, hurting his shoulder. Once at Kaiser, the doctors allegedly worsened the injury by breaking the shoulder in four places during the course of surgery. Plaintiff opted to sue only the landowner, under the jury instruction that the original tortfeasor was liable for any subsequent medical malpractice. The Court ruled that the defendant could not apportion fault to the doctor.

On appeal, the *Henry* court held that defendants can use Proposition 51 in all cases where the defendant, is being sued not only for his own torts, but also for subsequent acts of medical malpractice. The doctor does not have to be a party to the case in order to apportion general damages to him.

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Ramifications

The decision of whether to bring in the doctor turns on the facts of every case. Juries like doctors. They may be more likely to find some malpractice if the doctor is not actually being sued. On the other hand, plaintiff will ask the jury why the defendants did not bring the doctor in if they really believed that he committed malpractice. Another consideration is the amount of economic damages proportional to the pain and suffering plaintiff might recover. Even under Proposition 51, defendant is still jointly and severally liable for all economic damages. Defendant would have to sue the doctor to apportion those damages. If the main component of the claim is pain and suffering, that might weigh in favor of accepting joint and several liability for the economic damages and leaving the doctor out of the case, so that defendant can argue that much of plaintiff's pain and suffering arises from the malpractice, without actually having to sue the doctor.

- Paul J. Lipman

ENTERTAINMENT NEWS

Kobe Bryant May Head to Court of Law

Kobe Bryant's attorney, Adam Streisand, has fired a cease and desist letter to Dirty World, dba www.thedirty.com ("Dirty"), in an attempt to have it take down a publication wherein Bryant is alleged to have had an affair with a former Laker girl. Dirty has refused. According to Dirty, it has "rock solid" information indicating that Kobe Bryant and the former Laker girl, Vanessa Curry, had an affair.

According to Dirty, it believes the story concerning the affair is true and therefore any reporting on that matter is non-actionable under the First Amendment. Even if the story is not true, Dirty may escape liability because, according to the Supreme Court, "actual malice" is a constitutional requirement in defamation cases related to public figures. Therefore, even if the allegations are subsequently proven to be untrue, a jury would have to find that Dirty acted with malice in publishing the story or otherwise knew the story was false.

Allegations of Discrimination by Beverly Hills Hotel Security

Powerhouse attorney Gloria Allred has been retained by a woman who was allegedly thrown out of a women's restroom at the Beverly Hills Hotel in Beverly Hills, California. On September 23, 2007, Tanya White and a friend were attending a birthday party at the Beverly Hills hotel. According to a letter prepared by attorney Allred, her client was wearing a hat and other "clothing which is similar to the gender uniform of a male." Apparently, after hotel security became aware of the woman's gender, they still demanded she leave the restroom. Allred's June 5, 2008 letter cites "discriminatory policy" and "outrageous conduct" by the hotel. The letter demands an apology and a

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CITY HAS ABSOLUTE IMMUNITY FROM LIABILITY FOR CYCLIST'S INJURIES RESULTING FROM COLLISION WITH FENCE AT EXIT OF TRAIL

In the recent case of *Prokop v. City of Los Angeles*, David Prokop sued the City of Los Angeles seeking damages for injuries he suffered while bicycling along a bikeway, designed by the City, which runs along the south side of the Los Angeles River between Riverside Drive and Los Feliz Boulevard. He alleged that, while bicycling along the path, east of Victory Boulevard in Griffith Park, he attempted to exit the path at its end through an opening provided for bicyclists. While doing so he ignored the message painted on the pavement that stated "WALK BIKE," and collided with a chain link fence, causing a severe laceration to his forehead, loss of consciousness and neck pain. Prokop claimed bicyclists have to curve sharply several times in order to exit the path and avoid the fence, which he asserted is placed too close to the path. Prokop further alleged that his injuries were the result of a dangerous condition created by the City, about which the City knew or should have known, and that City was negligent in failing to protect him against his injuries. The main issue was whether the City was absolutely immune from liability under "Trail Immunity" pursuant to *Government Code* § 831.4.

The California Appellate Court stated that the statutory provisions on governmental immunities and liabilities make it apparent that Section 831.4 gives the City absolute immunity from injuries caused by the condition of any trail described in Section 831.4. Prokop contended that 831.4 did not apply. Instead, he alleged that under *Government Code* section 815.6 the City had a "mandatory duty" to "utilize all minimum safety design criteria and uniform specifications and symbols for signs, markers, and traffic control devices established pursuant to *Section* 890.6 and 890.8." *Streets and Highway Code* § 891. Section 815.6 provides as follows: "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty..." The court rejected that argument.

In reaching its decision, the Court noted that Section 815 clearly states that "The liability of a public entity established by this part (commencing with Section 814) is subject to any immunity of the public entity provided by statute, including this part..." *Gov. Code* § 815(d). Thus, Section 831.4 gives the City absolute immunity from injuries caused by the collision of the bikeway on which Prokop was injured.

The next issue addressed by the Court involved whether the bikeway was a "trail" within the meaning of Section 831.4. Section 831.4, in pertinent part, states:

"A public entity... is not liable for an injury caused by a condition of:

- (a) Any unpaved road which provides access to fishing, hunting, camping, hiking, riding, including animal and all types of vehicular riding, water sports, recreational or scenic areas and which is not a (1) city street or highway or (2) county, state or federal highway or (3) public street or highway ...
- (b) any trail used for the above purposes."

In *Gianuzzi v. State of California*, 1.7 Cal.App.4th 462 (1993), the court examined the legislative history of Section 831.4. The Court concluded that various subsections, including subsection (c), precluded liability for injuries caused by the condition of any paved trail located on an easement of way providing access to unimproved property. Similarly, in *Armenio v. County of San Mateo*, 28 Cal.App. 4th 413 (1994), the plaintiff was injured while riding his bicycle in a scenic park along a surfaced trail, allegedly because of a dangerous condition created by improper patching of the trail. The Court rejected the claim that Section 831.4 immunity applied only to roads or trails providing access to recreational activities, and not to trails on

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which the activity takes place. The court also rejected plaintiff's claim that immunity does not extend to paved trails and instead reasoned that the "plainly stated purpose of immunity for recreational activities on public land is to encourage public entities to open their property for public recreational use..." *Armenio* at 417.

The *Prokop* court concluded that the courts of appeal have been unanimous in holding, since *Armenio* in 1994, that the nature of a trail's surface is irrelevant to the question of immunity. Thus, it was immaterial that *Prokop's* accident occurred outside the confines of the bikeway. This is because a gateway to or from a bike path is patently an integral part of the path itself.

Moreover, the Court expressed that it may be appropriate for the Legislature to reexamine the "trail immunity" statute and its application to Class I bikeways in urban areas. Despite the foregoing, public entities still enjoy absolute immunity from liability for injuries occurring on unpaved roads and trails used for common recreational activities, regardless of the reasonable maintenance or design. The reason for that is because "the actual cost of litigation, or even the specter of it, might well cause cities or counties to reconsider allowing the operation of a bicycle path, which, after all, produces no revenue." *Prokop* at 1341.

Most recently, on August 15, 2007, the California Supreme Court denied *Prokop's* petition for review.

- Steven Ibarra

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change in the policy and practice of the hotel. No lawsuit has been filed to date in connection with this incident.

Wesierski & Zurek specializes in hotel defense cases and also defends charges of discrimination.

- Steven Ibarra

NEW AT WESIERSKI & ZUREK

David M. Ferrante. Mr. Ferrante was born in New Orleans, Louisiana, June 22, 1964; and admitted to the California Bar 1991, U. S. District Court, Central District; Education: Loyola University School of Law (J.D.); Moot Court Board (1989); State Bar of California; Association of Southern California Defense Lawyers; Los Angeles County Bar Association, and ABOTA.

Mr. Ferrante is licensed to practice before all the courts of the state of California as well as the United States District Court, Central District of California.

Matthew Pierce: Matthew Clay Pierce is a 4th generation attorney. Carl Mapes, his great grandfather, was an attorney and Congressman from Michigan in the early 1900s. His grandfather, Robert Littell Pierce, and father, David Littell Pierce, were admitted to the California Bar in 1946 and 1973, respectively. He is honored to follow in their footsteps.

Matthew completed his undergraduate studies at Wesleyan University in Middletown, Connecticut, earning a Bachelor of Arts degree in May of 2003. He graduated from Loyola Law School in 2007 with fellow Wesierski and Zurek Associate Carl Kremer. While at Loyola, Matthew clerked for the Los Angeles District Attorney's Office and was a three-time intramural basketball champion. He was admitted to the California Bar in June of 2008. Matthew is licensed to practice before all the courts of the State of California as well as the United States District Court, Central District of California.

Editor

Paul J. Lipman