

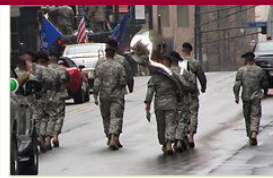


lying carmakers
social media
va crisis
informed consent
motorist insurance

09.14

at issue: Your Health
and Safety

thinking
Connecting our Community with Current Issues



The Truth About Carmakers: They Don't Know How to Tell It.

— Dev Sethi

Since January, GM recalled 29 million vehicles – six times as many as it has sold this year. Its ignition switch problems spiraled into a crisis involving Congressional hearings, firings, and the revelation that dozens died as a result of this hidden defect. Police reports suggest at least 74 people died in GM cars with the same ignition switch problem as the recalled vehicles.

GM engineers first encountered problems with the switches in 2001, a year before they went into production. The faulty GM ignition switches can cause engines to shut off while driving, leading to a sudden loss of power steering and power brakes, and the failure of air bags to deploy in a crash. The driver loses all control. At that time, fixing the ignition switch, at a cost of \$10/car, did not represent “an acceptable business case.”

Gene Erickson died in 2004, when the Saturn Ion he was riding in suddenly swerved into a tree. GM alleged the driver was “intoxicated on illegal narcotics.” She plead guilty to involuntary manslaughter because trace amounts of Xanax were found in blood test. She recently learned the collision was not her fault. Her ignition switch turned the car off.

Federal regulators long ago asked GM for its analysis of Mr. Erickson's death, and many others. In each case the company repeatedly found ways not to answer simple and direct questions. Sometimes it said it had not assessed the cause. Other times it hid behind attorney/client privilege, and in an astounding bit of hubris, it often wrote back, “G.M. opts not to respond.”

Investigations now reveal G.M. absolutely knew about the sudden power loss problems, but it simply played games with NHTSA, the agency tasked with overseeing automotive safety. NHTSA's acting director, David Friedman, commented, “G.M.'s decision-making, structure, process and corporate culture stood in the way of safety.”

Do not think G.M. is alone in this approach. Toyota, whose sudden acceleration problems were widely covered a few years back, recently agreed to a landmark \$1.2 Billion fine in exchange for a likely dismissal of criminal charges. In ratifying the agreement, the Federal Judge overseeing the case had harsh words for Toyota:

In Court Statement

...The statements of fact to which Toyota has agreed...really present a reprehensible picture of corporate misconduct. This, unfortunately, is a case that demonstrates that corporate fraud can kill...I sincerely hope that this is not the end but, rather, a beginning to seek to hold those individuals who are responsible for making these decisions accountable...

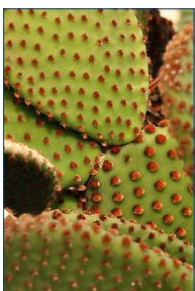
In these instances, as with the Ford Pinto, the Ford Explorer/Firestone tire, and the Goodyear Load Range E tire recalls, it was individuals and their lawyers working through the products liability system that uncovered massive safety problems. Engineers working with victims discovered the scope of danger and rang the alarm. Government agencies are over stretched, and they have cozy relationships with manufacturers. Regulators, and even the markets, will never be able to motivate product makers to develop and sell safe products as efficiently as the legal system will. The courtroom is the only place where everyone – from richest to smallest – is held accountable.



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The explosion of Social Media

— Matt Schmidt



The explosion of social media and sites like Facebook, Twitter, YouTube and Instagram have made sharing just about anything with anyone as easy as a click of the button.

If you don't know what you are doing, however, it has also made it much easier for strangers to have complete access to a plethora of information you would rather keep private. Some things are better kept off the internet.

Take these two stories. This summer a young woman was arrested when she took a "selfie" (taking a picture of yourself) wearing clothes she had just stolen. The store she had stolen from sent out a press release with a picture of the missing clothes. It took no time for Facebookers to find her self-incriminating picture on her profile and turn her in. In another case, police were able to catch a burglar because the man had decided to check his Facebook account on a computer in the house he was stealing from, forgot to log out and left the computer there.

This is not to suggest our readers would commit these kinds of crimes or that they would publicly announce such delinquencies on the internet, but these kinds of stories illustrate how embarrassing things can very quickly become when people share things on social media that should obviously be kept far from anything remotely near a computer.

It can also be dangerous. It is not uncommon, for example, for families to publicly announce to the world they are going on three week vacation and return to a completely ransacked home.

In the legal arena, sharing too much can be damaging to your case as well. There have been instances where defense lawyers found photos of a plaintiff skiing in the Alps in a case where the plaintiff was making a claim for a severe back injury, or instances where plaintiff lawyers

found the defendant admitting to a friend on her profile page she was wasted the night she caused a car collision and seriously injured another person. Whether a person's profile is private or not, courts have wavered back and forth on the issue of whether to allow an opposing party's attorney access to private information on a person's social media account. More and more, courts are leaning toward allowing such access, reasoning the information must not be that private if the person is ok with sharing it with even a few other people, even if only friends.

**Think extremely
carefully about the potential
consequences before clicking
the "post" button.**

The bottom line: Think extremely carefully about the potential consequences before clicking the "post" button, regardless of whether your profile is as private as the Pentagon or as public as a San Francisco parade. You should obviously go through your settings with a fine-tooth comb to ensure they meet your privacy needs, but don't let having a private profile provide you with the false sense of security that you are now at full liberty to post anything you would like—anything you post on the internet could eventually become public, humiliating and damaging to your reputation. Before I ever post anything on the internet, I often ask myself: "What would Grandma say?"



Playing Multiple Sports Increases Athletic Performance and Reduces Injury

— Jim Campbell



I love to coach youth sports. It is a great way for me to get closer to my three boys, and I get a huge kick out of helping boys and girls learn life's lessons the dirt and sweat of team sports. Over the last 12 years, I coached everything from t-ball where I had to teach little guys how to run to first base to uber competitive basketball with daily practices and a complex motion offense.

While I am not the only one, I too have seen the effects of sports specialization. Growing up, we played everything. If a ball could be thrown, bounced, hit, or kicked, we did it. Seasons were short, and the next sport was just around the corner.

Now, however, kids are increasingly focusing all their time on one sport. Be it soccer, lacrosse, baseball, basketball or football, kids are playing these sports full time. I am not just talking about high school, but I am seeing this specialization start as early as 7 years old.

Parents are directing their kids in hopes they will be good enough to play high school sports, and even possibly reach the brass ring of a college scholarship. They fear that if they do not get their kid focused on a single sport, Jonny or Isabella will fall behind and not succeed in high school. Even more sinister, I see some parents who driven for their child to be the sports star they never were.

First, the good news is playing multiple sports actually improves athletic performance. Research shows that kids who delay sports specialization are more coordinated and physically fit. A 2012 Belgian study demonstrated boys playing multiple sports developed greater athletic coordination and were more physically fit than those that specialized. This allowed them to outperform peers who specialized in one sport at an early age. It cannot be a big surprise playing multiple sports improves overall athletic ability.

On the other side, early sports specialization contributes to increased injuries. When a child plays multiple sports, their muscles get different types of repetitions and stresses. The short season allows time for healing. But, when a player does only one sport nearly year around, they repeat the same types of motions over and over. For example, playing club baseball three to four times a week for months on end contributes to early elbow tendon injuries. As a result, more and more kids requiring Tommy John Surgery. In extreme circumstances, they become physically unable to play in high school. Similarly, playing basketball year around results in increased foot, ankle, and knee injuries. Many players develop significant permanent injuries to their feet and ankles by the time they are out of high school, which causes lifelong pain.



It's a hard choice. We all want the best for our children. All I can say is I face this issue with my youngest son. As the youngest of three boys, he is the most athletic and mature for his age. (It probably comes from running from his brothers.) He also is developing into a heck of a pitcher. I could put him in club baseball, and he probably would continue to blossom. But, after thinking about this a little more and learning about the increased injuries that are occurring because of early specialization, we are going to keep him throwing, kicking, and bouncing as many different balls as possible.

“But I Signed an Informed Consent?”

A Complication is Malpractice When It is Not Reasonably Treated.

— Jim Campbell

The reality is that sick people obtain medical care. Even with the best of care, a patient can get much worse following a surgery, procedure, or taking a drug. This is often not medical malpractice. Doctors often call these bad outcomes “a known complication.”

In an effort to make sure patients know they may have a bad outcome from their procedure/ medicine/ implant, and to cover their behind in the event something goes wrong, doctors require their patients sign documents acknowledging they have been informed of the risks. This is called an “informed consent” document.

One common example is a bowel perforation during a colonoscopy. If a patient has a weak area of their intestine, this weak area may expectantly perforate (split open) under the pressure of the inflation gas or instrumentation. Often this perforation is immediately recognized, and the patient undergoes emergency surgery to repair the bowel. The patient may require significant time to recover and have permanent consequences from the perforation. While this is incredibly unfortunate, this is generally not malpractice.

It is malpractice, however, to not to recognize and immediately treat the common signs of a complication. In the colonoscopy example, following a colonoscopy, if the patient has excessive pain or a very tight stomach, then the treating doctor must suspect a bowel perforation and order appropriate testing. While the complication of a bowel perforation is not malpractice, it is malpractice to fail to act on the face of that complication.

Importantly, even though a person signs an informed consent document before undergoing a procedure or surgery, no patient gives his or her doctor permission to commit malpractice by failing to reasonably treat a known complication. In every instance this comes up in a medical malpractice case, the defendant doctor acknowledges, as they must, they have a duty to reasonably treat and correct known complications.

The bottom line is that nothing in medicine is certain, and every procedure carries risk. Even though a patient signed an informed consent document, the doctor and nurses still have an obligation to aggressively treat the complication of that procedure to minimize the harm to the patient.

Other examples the failure to recognize and treat a known complication are:

- A woman suffers an injury to a ureter (the tubes that delivers urine from her kidneys) or bowel during a gynecological or abdominal surgery. This initial injury is often not malpractice, but it can be malpractice to recognize quickly the growing infection because urine or feces are spilling into the patient’s abdomen.
- A woman has an unusual amount of bleeding after a heart or other surgery. Again, this is often unavoidable and is not malpractice. What is malpractice, however, is the failure to closely monitor the patient’s signs and symptoms to determine whether they are bleeding internally. If this is not caught early enough, the patient can bleed to death right in front of her caregivers.
- When a man takes a blood thinner because he may have a heart condition or to prevent a stroke, excessive bleeding is a known risk of this medication. But, it is malpractice for a doctor to not recognize the symptoms of excessive blood thinners in the system and act quickly to correct the imbalance. If the imbalance is not quickly corrected, the patient can suffer a devastating stroke and death.
- A man undergoes an orthopedic surgery, i.e. repair cartilage in the knee, and develops a post-operative infection. Developing the infection is not malpractice, but it is malpractice to not aggressively treat the developing infection. The failure to properly treat an infection like this can lead to more extensive surgery, disability, and even amputation.
- A woman suffers a stroke during a surgery to clean out her carotid arteries. Again, this is a known and recognized risk of this type of procedure. After this occurs, however, the surgeon must take steps to minimize the extent of the injury to the patient. If the surgeon fails to address the sign of a stroke in his patient after this kind of a surgery and the stroke progresses, that is malpractice.



Each one of these examples was a real case. They all have a common theme: the original bad outcome was a “known complication” and not malpractice, but the doctor ignored or failed to act on the complication. Often, this occurs because surgeons like to focus on surgery and not recovery. As a result, the patient suffered a very significant injury that was largely avoidable.



THE VA SCANDAL & POTENTIAL REFORMS

— Dev Sethi

Health care through the Veterans Administration system remains difficult to coordinate and mired in bureaucratic dysfunction, but agreements recently announced – and heading for Congressional approval – promise some relief for the men and women who have served in our armed forces.

On May 28, the VA Office of Inspector General published a harsh report that listed about 1,400 veterans who were awaiting primary-care appointments and who were logged on the hospital's official electronic wait list. It also identified another 1,700 veterans who were expecting appointments but were not on the official lists. They were lost in the system, at extreme risk of being totally forgotten in the VA's convoluted scheduling process. Secretary of Veteran's Affairs, Eric Shinseki, himself a decorated General, resigned in the wake of the scandal. Close to home, the Phoenix VA was at the center of the problems.

In late June, acting Director Sloan Gibson, delivered a report that found the Phoenix VA suffered from a "corrosive culture," low morale, poor management and widespread distrust between employees and management – all of which drove systemic delays in delivering health care to the nation's veterans. The report detailed a history of retaliation against employees who raised valid concerns and a lack of accountability from top to bottom in the hospital.

The VA scandal centers on failures in caring for tens of thousands of veterans. Investigator findings include widespread manipulation of appointment records and delays and medical and mental health treatment for tens of thousands, some of whom waited months or never received needed treatment. The Justice Department is now looking into the appropriateness of criminal charges.

The problems our veterans have endured getting medical care have moved beyond dry reports and have become a national concern. The frustrations were highlighted last month when the story of some Lowe's store employees who helped a Vietnam era combat veteran repair his broken wheelchair made the news. The veteran had been waiting months to see someone at the VA for help.

In July, the House and Senate Veteran's Affairs Committees issued a joint agreement on a plan to fix the veterans' health program scandalized by long patient wait times and falsified records covering up delays. The bill is expected to authorize billions in emergency spending to lease 27 new clinics, hire more doctors and nurses and make it easier for veterans who can't get prompt appointments with VA doctors to get outside care.



Congress adjourns for the campaign season in late September. Elected officials have stated that getting this deal done is a top priority. Let's hope they come though on this important issue. The ongoing failures of the VA system are a national embarrassment.

BEWARE:

Everyone in the Family may NOT be Covered for Underinsured Motorist Insurance Based on New Arizona Case

— Ted Schmidt



Everyone in the Family may NOT be covered for Underinsured Motorist insurance based on new Arizona Law

In Arizona, every auto insurance company must offer you uninsured and underinsured motorist coverage with the same limits as your liability coverage. Liability insurance covers you in case someone else claims you were at fault in an auto collision. Uninsured motorist covers you if your injury was the fault of another driver who has no insurance. Underinsured covers you if the other driver at fault has insurance but just not enough to cover the extent of your injury.

Traditionally, it has been understood that if the head of the household buys auto insurance, the uninsured and underinsured coverage offered by that policy will protect everyone living in the household. This, however, may no longer be the case.

In *Beaver v. American Family Mutual Insurance Company*, 234 Ariz. 584, 324 P.3d 870 (App. May 20, 2014) the head of the household bought insurance from American Family Insurance and chose underinsured motorist coverage. Subsequently his daughter, living in the household, had an accident on her motorcycle which was the fault of an underinsured motorist. While the daughter had separate insurance on the motorcycle, she did not choose to also buy underinsured coverage.

While the American Family policy defined insured to include the head of the household and relatives living in the household, it expressly excluded any others living in the household who "owns a motor vehicle." Since the daughter owned the motorcycle her claim was denied.

The Arizona Court of Appeals upheld the denial stating that Arizona's Underinsured Motorist Act only requires the coverage be offered to the "insured" and does not define who an insured is. Therefore the insurance company is free to define "insured" as it sees fit.

Lesson learned? Not all auto insurance companies exclude members of the household from coverage if they own their own vehicle. So first, look at your policy and see how it defines insured. If it excludes family members who own a vehicle, either change coverages to a company that is not so restrictive or be sure all family members who own their own car have not only purchased liability insurance but have chosen to add uninsured and underinsured coverage. These coverages are relatively inexpensive and a must have; after all this is the coverage that protects you and your loved ones when injured.

"Review your Motorcycle Insurance Policy and Verify that all Family members are included within your Family plan. Otherwise find a plan that will ensure your families safety."



Jim Campbell was named to the Executive Counsel of the Trial Section of the Arizona Bar.

As a member of the Executive Counsel, Jim assists in coordinating the trial sections activities, including CLE and the trial college. He also has been active in teaching Continuing Legal Education Courses. In April, Jim taught a course to the Pima County Young Lawyers Association on how to

handle a supervising attorney's potentially unethical directives.

This was an informal and interactive review of the applicable ethical rules and practical considerations on how to address these prickly situations. In May, Jim was one of 3 presenters in an Arizona State Bar CLE to help plaintiff and defense of practitioners navigate the minefield created by multiple plaintiffs personal injury suits. The seminar was webcast live throughout the state. Jim also participated in organizing this year's successful Arizona Bar Convention held at La Paloma Resort. On a personal note, Jim looks forward to coaching youth basketball in the upcoming fall YMCA season.



Ted Schmidt, Dev Sethi and Burt Kinerk

have all just been named to the 2015 class of "Best Lawyers in America." Dev has been included in this prestigious list since 2009, Ted since 2003 and Burt since 1995. "Best Lawyers is based on an exhaustive and rigorous peer-review survey comprising more than 5.5 million confidential evaluations by top attorneys" in the U.S.

Ted Schmidt

Ted was recently elected President of the Pima County Junior Soccer League and Vice President to the Arizona Youth Soccer Association.

His principal initiative in these new positions will be to establish a new program entitled "Respect the Game." This program is designed to curb parent, fan, coach and player abuse of referees in the Arizona youth soccer programs and to improve the quality of officiating while recruiting new referees. It is Ted's hope that if this program is successful it can be expanded into all youth sports in Arizona and across the nation.



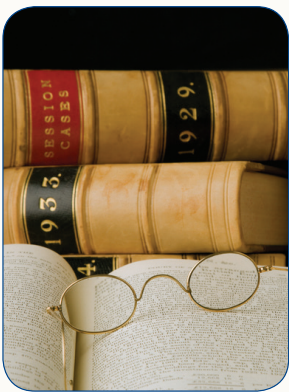
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Are you interested in our thinking? If you would like to be added or removed from our mailing list for the KSS newsletter, please contact Irma Almazan 520.545.1674 or ialmazan@kss-law.com.

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