

## June/July 2004 Products Liability Column

### Take Time to Reflect on the Importance of What You Do

by James R. Lance, Column Editor

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Those of you who read the **Trial Bar News** on a regular basis certainly are aware that I have the luxury of working with many talented associates who often write the articles for this column. I don't tell them often enough that I truly appreciate their efforts, but I do. I decided to give our overworked associates a month off and write the article for this month's column because several recent cases have highlighted for me the importance of what we do on a daily basis as plaintiffs' attorneys. Although the work at the legislative level by people like David Casey, Jr., and our tireless leader, Chris Hulburt, are absolutely essential, I am writing this article to remind each of you how important the work you do everyday is to our civil justice system and those that need your help. This is true for all cases, and even more so when faced with a case affected by tort reform legislation.

The tort reform legislation I most often encounter is MICRA. I have many conservative (and some ultra-conservative) friends, but I have not encountered one person who seriously argued that MICRA is fair and just when I have explained the consequences in specific cases and/or the consequences to them should a terrible tragedy befall their family because of medical negligence. Yet, Californians have lived with MICRA since 1975, with no increase in the \$250,000 cap on non-economic damages, and the Bush Administration has sought to extend similar legislation to all 50 states.

Although my personal experiences are certainly not unique, I recently represented two families in which the impact of MICRA made the cases much more difficult. These cases have had a tremendous impact on me both professionally and personally. Both were hard fought, intellectually stimulating, handled by professional attorneys on the defense side and involved clients who were trusting, intelligent and of the highest integrity. Due to space limitations, I discuss only one of the cases here.

As a parent, this case is one that shook me to the core. On a Friday evening in May, 2001, a father was rollerblading with two of his sons on a sidewalk near their home in Temecula. They stopped at a crosswalk and waited for the "walk" sign to indicate it was safe to cross. As they were proceeding in the crosswalk, a large Chevy van veered around several cars, ran the red light, and headed straight for them. The older boy was struck on one of his rollerblades and spun

to the ground, but was not seriously injured. The father fell backward and was narrowly missed. However, the van hit the youngest boy, 7-year old Dylan, squarely at approximately 50 miles per hour. The little boy was carried down the road and eventually tumbled out from under the rear of the van. One witness tearfully recounted that Dylan rolled out from under the van "like a little rag doll" -- all before his father's eyes. A cell phone was used to call the little boy's mother and older brother, who rushed to the scene before the paramedics arrived. The four family members all watched Dylan die before their eyes.

As I listened to the story in the initial interview, I was frustrated by the fact that I probably could not help the family from a legal standpoint because it appeared there was very little insurance available and the driver was judgment proof. In fact, prior to our involvement, the insurance company for the driver had represented to the family that the policy limit was \$50,000 and attempted to secure a release of "any and all claims related to the accident" for that amount. Ultimately, we were able to establish that there was \$100,000 in coverage but unfortunately the driver was in fact judgment proof.

However, I was puzzled as to why the driver would be so reckless as to steer around several cars stopped at a red light and enter an intersection at such a high speed. We learned that the driver was an elderly man from New York with diabetes and many other health problems. He was in insulin shock at the time of the accident and had been weaving all over the road for several miles before the intersection. Further investigation revealed that the driver was on a medication for high blood pressure which could block the symptoms of hypoglycemia (*i.e.*, low blood sugar) and the onset of insulin shock so the driver would not have felt the typical "warning" symptoms.

The driver's medical records revealed that this "beta blocker" had been quadrupled shortly before the accident by the VA Hospital in Syracuse, New York and that the VA had documented that the driver was asymptomatic during hypoglycemic episodes **after** the medication was quadrupled but not before. We filed a Complaint in the Central District of California under the Federal Tort Claims Act against the United States alleging medical malpractice in failing to warn the driver regarding the hazards of driving while on this medication.

The Assistant U.S. Attorney assigned to the case took a very aggressive approach. She first filed a motion to transfer the case to New York, which we were able to defeat. She then filed a motion for summary judgment based on the position that New York law applied and non-economic damages are not available in a wrongful death case in New York. Incredible as it may seem, the Government was correct on its reading of New York law, but we were able to convince the District Court that California law applied under the circumstances. At that point the government agreed to go to mediation, but took the position that MICRA limited the potential recovery to \$250,000.

The preparation of the mediation brief and preparing for the mediation were extremely emotional for everyone involved. The emotional turmoil and pain openly expressed by Dylan's mother was almost too much to take at times. Many times I went straight home and hugged my kids longer than they believed was necessary, as I could tell by the puzzled looks on their faces.

Unlike the mother, the father was uncomfortably quiet during the entire case. He discussed the legal issues at hand, but nothing else. The efforts of several of our staff members were required to prepare the mediation brief and video, and all ultimately ended up in tears during the process. It was a team effort in the truest sense and everyone was determined to help the family in any way they could.

At mediation, we were able to convince the mediator chosen by the government, a retired U.S. Magistrate, that at least three separate claims with separate caps had been asserted, such that a total of \$750,000 in non-economic damages was available under MICRA. We asserted a wrongful death claim, a bystander claim on behalf of the father, a bystander claim on behalf of the brother and a loss of consortium claim on behalf of the mother due to the loss of her relationship with her husband because of what he witnessed at the scene. The caps apply per plaintiff, which is why the total cap was arguably \$750,000. We also argued that, even though California law applied, MICRA did not apply because the purposes of MICRA were not served by applying it to a malpractice claim against a New York physician.

In light of the risk, we were able to convince the government to pay our clients \$874,000. With total settlement of \$974,000, the family was able to use the settlement proceeds to purchase a new home in an area where they were not required to drive through the accident scene on a daily basis. In addition, they were able to set up college funds for Dylan's two brothers. Perhaps even more important, there was some closure to a very sad chapter in their lives.

The case settled in late 2003 and it was great way to end the year. However, the case carried over into 2004. When I returned to work this January, there was a box from the family on my chair which contained ten signed baseballs by current members of the St. Louis Cardinals. I am from St. Louis and have always been a Cardinal fan. It was a perfect gift. However, the note inside was even more important. In addition to thanking us for our efforts on the case, the note said, "Thank you for your friendship." For me, that note really puts in perspective the importance of what we do as plaintiffs' attorneys and why it is so crucial that **we fight to keep open the opportunity to empower individuals through the legal system.**

Despite moments of doubt while we were pursuing the claim, our team was able to change the lives of four very special people through hard work, creativity and taking a significant degree of economic risk. I had thoughts of throwing in the towel during our analysis as to whether we should take the case. The driver was judgment proof, MICRA was looming large on the medical malpractice case, and New York law would result in a zero if it applied. Still, the fact remained that these people desperately needed help, and that ultimately outweighed the economic concerns – the same decision many of you make on a regular basis.

I realize that most of you have similar stories. In fact, that is the point of this article – to recognize all of you for your efforts on behalf of unfortunate clients that truly need your help. I can only hope this article will cause you to reflect briefly on the importance of your role in our civil justice system, and also to realize that your work in pushing hard within the constraints of the current system is just as important as the fight at the legislative level. **What you are doing on a daily basis is extremely important. Thank you!**