WASHINGTON INSURANCE LAW LETTER™

A SURVEY OF CURRENT INSURANCE LAW AND TORT LAW DECISIONS

EDITED BY WILLIAM R. HICKMAN

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INDEX

PAGE

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ALLOCATION OF FAULT MEETS SOVEREIGN IMMUNITY

FACTS:

Ken was operating a crane in the parking lot of an Indian casino on the reservation. The Tribe wanted several large containers moved from one side of the parking lot to the other. In addition to hiring Ken's employer, the Tribe also hired the employer of two truck drivers. What the Tribe did not hire was a rigger to connect and disconnect the crane cables and the containers before and after each move.

Two employees of the Tribe took over the job of riggers.

The first six containers were loaded and unloaded without any problem. Then Ken loaded the seventh container onto Joe's truck. Joe began to drive away before anyone disconnected the cables of the crane. The truck pulled on the crane cables and lifted the crane off its rear. Ken decided this was a good time to leave the cab of the crane. Joe stopped his truck before the crane tipped over. Ken injured his leg in jumping from the cab of the crane.

Ken sued Joe and his employer. Joe took the position that he was not negligent, that Ken was negligent in jumping, and that fault should be allocated to the Tribe because their employees were in charge of the whole operation.

The trial court ruled on summary judgment that fault could not be allocated to the Tribe, and that Ken was free of negligence. After a jury trial and a jury verdict for Ken, Joe appealed. The Court of Appeals reversed for a new trial, saying that the Tribe's sovereign immunity does not bar allocation of fault to the Tribe.

HOLDINGS:

(1) The Tribe enjoys sovereign immunity. The State lacks jurisdiction over the Tribe to enforce a common law duty of care. Under this doctrine, the State lacks the jurisdiction to enforce a standard of care on the Tribe for conditions at the worksite outside the casino on the day of the accident.

(2) Under Washington tort law, fault will be attributed to every entity that caused a plaintiff's injury, including entities that are immune to a suit from a plaintiff. RCW 4.22.070(1). The statute evidences an intent by the legislature that entities such as the defendants pay only their own proportionate share of damages. The statute also clarifies that a plaintiff should not recover for fault attributable to immune parties.

(3) The Tribe's sovereign immunity does not bar the allocation of fault to it in a negligence action against Joe.

(4) The Tribe is a juridical being clearly capable of fault. Sovereign immunity protects the Tribe from being subject to suit or incurring liability, but it does not render the Tribe incapable of fault.

(5) Employers generally are not liable for injuries incurred by independent contractors because employers cannot control the manner in which independent contractors work.

(6) An employer can be held liable for injuries incurred by an independent contractor if the employer retained control over the manner in which the independent contractor worked.

(7) The proper inquiry for the retained control test is whether the employer retains the right to direct the manner in which the work is performed, not simply whether the employer actually exercises control.

(8) When the evidence is seen in the light most favorable to Joe, it raises a genuine issue of material fact regarding retained control by the Tribe.

COMMENT:

There are at best a handful of cases around the country which deal with the interface of tort law and the sovereign immunity of the Indian tribes. This is the first one in Washington. There will be more. Lots more. It is no accident that every tort/Indian case arises out of an Indian casino.

FURTHER COMMENT:

I am pleased to note that Pam Okano and I represented Joe in this appeal.

Humes v. Fritz Companies, Inc., 2005 WL 196443 (Wn. App. 2005).

THREE FOR TRIAL

FACTS:

Shanna was riding with her fiancé when they were rear-ended by Dan. Shanna had insurance with MET which included UIM. That policy provided that, if Shanna sued an underinsured driver, MET had the right to defend on the issues of liability and damages.
Shanna sued Dan, and later added MET as a defendant. Prior to trial, she tried to prevent MET from actively participating.

The jury returned a verdict for Shanna, but she did not like it, and when the judge would not give her a new trial, she appealed, arguing that "right to defend" does not include the right to participate.

The Court of Appeals affirmed, pointing out that the policy gave MET the right to participate in the trial, and it was not bad faith for MET to participate.

HOLDINGS:

(1) An insurance contract must be construed as a whole and interpreted as it would be understood by an average insurance purchaser. Undefined terms are given their ordinary meaning. One reliable way to determine this meaning is to consult a standard English dictionary.

(2) The term "right to defend" is clear and unambiguous. Giving the term its ordinary meaning, the "right to defend" encompasses the right to participate at trial. Interpreting the word "defend" to mean that MET cannot participate would lead to a strained or forced construction and would create an absurd result.

(3) There is a strong public policy in favor of joining the UIM insurer and the tortfeasor in a single action.

(4) A UIM insurer is bound by a judgment or arbitration award against an underinsured tortfeasor if the UIM carrier had notice and a reasonable opportunity to intervene in the action.

(5) An insurer has a duty of good faith to its policy holders. To prevail on a bad faith claim, a policyholder must establish that the insurer's breach of the insurance contract was unreasonable, frivolous, or unfounded.

(6) Because the relationship between a UIM insurer and its insured is adversarial, *Tank's* "enhanced obligation rule" does not apply; however, a duty of good faith and fair dealing remains and the insured has a "'reasonable expectation' that he will be dealt with fairly and in good faith by his insurer."

(7) Shanna's arguments are based on her assumption that the "enhanced duty" applies here. It doesn't.

(8) The Washington Supreme Court has concluded that the benefits of joining the UIM insurer and tortfeasor in a single action outweigh any conflict between an insurer and insured.

COMMENT:

A gem of an opinion. Somehow we missed this when it came out last year. While the situation presented is unique, the forthright analysis can be applied in many insurance situations.

Petersen-Gonzales v. Garcia, 120 Wn. App. 624, 86 P.3d 210, *rev. denied,* 152 Wn.2d 1027, 101 P.3d 421 (2004).

THE RULE OF COMPLETION AND ACCEPTANCE

FACTS:

In the early 1970s, Horsley assembled and installed a conveyer system in Reddy's plant. This was done pursuant to the manufacturer's specifications. Eighteen years later, Reddy sold the plant to McCain. After that, McCain renovated the production line by having PCE do electrical work. After that, Horsley reconfigured some of the equipment, including the conveyor.

In August 1996, Heidi, a McCain employee, was working around the equipment. She tried to pull some tape off an overhead conveyor belt. The belt pulled her arm into roller guides and she was injured. The conveyor did not have either a safety guard or a shut-off switch.

Heidi sued PCE for negligence and sued Horsley for negligence and strict product liability. Both moved for dismissal, arguing that their work had been completed and accepted by the owner, and that they were therefore insulated from liability as a matter of law. The judge agreed and dismissed. Heidi appealed and Division III reversed as to common law negligence.

HOLDINGS:

(1) Washington subscribes to the completion and acceptance rule. Once a contractor's work has been completed and accepted by the owner, the contractor is not liable to third persons for damages or injuries subsequently suffer by reason of the condition of the work, even though he was negligent in carrying out the contract.

(2) The work done by these contractors was done in accordance with the owner's plans and specifications and was accepted by the owner.

(3) There are two recognized exceptions to the completion and acceptance rule: contractors remain liable for injuries to third parties if their work results in an inherently or imminently dangerous condition.

(4) A thing is inherently dangerous if the nature and quality of it is reasonably certain "to place life and limb in peril." Whether the result of the work is imminently or inherently dangerous is then a question of fact generally calling for expert testimony.

(5) A conveyor is not inherently dangerous when a stop/reverse switch is provided at the pinch point. But that switch is missing here.

(6) Division One concluded that only explosives or the like are inherently dangerous for the

purposes of this exception. Division Two disagreed with this conclusion and held that dangerousness is a question of fact. We agree with Division Two.

(7) The contractors owed Heidi a common law duty of reasonable care.

(8) The legislature preempted common-law product liability with the Washington Product Liability Act. The Act imposes strict liability on any manufacturer of a defective product for resulting injuries.

(9) A "product" is an object "produced for introduction into trade or commerce." Construction services are not products for purposes of the Product Liability Act.

COMMENT:

Classic example of the exception swallowing the rule hook, line, and sinker. In case the court went too fast, here is how it plays out:

(1) The contractor is not liable for personal injuries caused by his work after acceptance.

(2) Except when the result of the work is inherently dangerous.

(3) Work is inherently dangerous when it results in personal injuries.

(4) Therefore, the contractor is always liable for personal injuries caused by the work.

I ponder late into the night debating with myself as to the proper noun or adjective to apply. Can it be that elusive sophistry:

Sophistry: n: a deliberately invalid argument displaying ingenuity in reasoning in the hope of deceiving someone.

No, that is not quite right. Perhaps, oh, yes, cast your mind back some 40 years. (Those of you less than 40 are excused from this exercise.) There we have Joseph Heller setting out a military rule, the circular logic of which most notably prevents anyone from avoiding combat missions.

* One may only be excused from flying missions on the grounds of insanity;

* One must request to be excused;

* One who requests to be excused is presumably in fear for his life. This is

proof of his sanity. If he is sane, he cannot be excused. He is therefore obliged to continue flying missions;

* One who is truly insane would not make the request. He would continue flying missions, even though as an insane person he could be excused from them by asking. But if he asked to be excused, this would show he was not insane.

Yossarian was moved very deeply by the absolute simplicity of the clause of Catch 22 and let out a respectful whistle.

"That's some catch, that Catch 22," he observed.

"It's the best there is," Doc Daneeka replied.

Joseph Heller, Catch 22 (1961).

Garza v. McCain Foods, Inc., ___ Wn. App. ___, 103 P.3d 848 (2004).

SHERRY H. ROGERS

PRACTICE

Ms. Rogers' practice focuses on representation of health care providers and medical institutions in medical and dental malpractice matters. She also has experience in medical product liability cases.

Ms. Rogers also concentrates her practice in the area of medical staff relations representing hospitals, physicians, and nurses in medical disciplinary and credentialing matters. She has handled a variety of claims and risk management issues on behalf of hospitals, physician groups, clinics, and insurers including Providence Hospital Medical Center, University of Washington Medical Center, Multicare, Washington Casualty Company, Hudson, AIG and TIG.

Ms. Rogers is a certified Emergency Nurse and Critical Care Practitioner, and has more than 11 years of nursing experience.

EDUCATION

Seattle University School of Law , J.D., 1986
Rockford College, B.A., 1983
University of Denver, Critical Care Nurse Practitioner, M.S.N., 1977
Atlantic Union College, B.S.N., 1970

BACKGROUND

Ms. Rogers is admitted in the State of Washington and the United States District Court, Western District of Washington.

Ms. Rogers is a member of the following professional organizations:

The Washington State Bar Association
The American Bar Association
Washington Defense Trial Lawyers
DRI
Washington Women Lawyers

THE FIFTH OF BRIAN

FACTS:

Jason was stabbed to death. That much is certain. And it is critical to keep that in mind, for not much else is certain.

The police focused on Brian. He was arrested and charged. But a probable cause hearing produced no probable cause, and the grand jury did not indict.

Jason's parents sued Brian, alleging negligent and/or intentional stabbing. Brian was insured under a homeowner's policy issued by MetLife. After accepting the defense of Brian under a reservation of rights, MetLife started a coverage action. However, as to any questions or allegations that touched on the events of Jason's death, Brian took the Fifth.

Both sides moved for summary judgment. The trial court ruled that Brian had failed to cooperate, and that MetLife had been prejudiced thereby. The Court of Appeals agreed.

HOLDINGS:

(1) Providing MetLife with information about how the incident occurred was at the very heart of the duty to cooperate.

(2) Brian manifestly and persistently failed to provide that information when asked to do so in a number of different ways and at several different times. His assertion of rights under the Fifth Amendment afforded him no sanctuary from his obligation to cooperate, for "it is not by the Commonwealth or by [MetLife] that [Brian] 'is compelled to . . . furnish evidence against himself,' but by his own contractual undertaking."

(3) The better rule is that the duty to cooperate does include the obligation to provide accurate information bearing on coverage. "While the insured has no obligation to assist the insurer in any effort to defeat recovery of a proper claim, the cooperation clause does obligate the insured to disclose all of the facts within his knowledge and otherwise to aid the insurer in its determination of coverage under the policy. . . ."

(4) Although a showing of prejudice is not, and should not be, easily made, we conclude that prejudice was shown here.

(5) Reduced to essentials, then, Brian's refusal to disclose what happened on the night of Jason's death necessarily kept from MetLife information that Brian alone was in a position to provide and that was essential to sound coverage and defense decisions. That is the quintessence of prejudice.

COMMENT:

An extremely clear, concise, and well-researched opinion. The court went the extra mile to demonstrate why a claim of Fifth Amendment protection is simply irrelevant in a coverage dispute.

MetLife Auto. & Home Ins. v. Cunningham, 59 Mass. App. Ct. 583, 797 N.E.2d 18, *rev. denied,* 440 Mass. 1110, 801 N.E.2d 803 (2003).

A FEW TOO MANY BEERS

FACTS:

Bob dropped into the 1896 Tavern for a few beers. He had a few. When he left, his blood alcohol was 0.31. He drove across the center line, hit another car, and got dead.

His widow sued the tavern over the loss of Bob, alleging that his death was caused by overserving Bob. The tavern moved for dismissal, citing Washington common law that tavern owners who overserve alcohol owe no duty to adult patrons who suffer harm as a result of intoxication.

The trial court dismissed the widow's lawsuit. The Court of Appeals affirmed the dismissal, saying that as a matter of law, the widow had no wrongful death claim against the tavern.

HOLDINGS:

(1) A negligence action and a wrongful death action based on negligence require the widow to establish the existence of a duty, breach, resulting injury, and proximate cause between the breach and the injury. The threshold determination is whether a duty of care is owed by the defendant to the plaintiff. Whether there is a duty owed by the Tavern to the surviving spouse and minor child of an intoxicated patron is a question of law.

(2) There is no common law action for wrongful death. Wrongful death actions are strictly statutory.

(3) If the Tavern did not owe a duty to Bob, his death is not wrongful.

(4) A commercial vendor owes no duty of care to patrons who suffer injuries as a result of their intoxication.

(5) Because the Tavern did not owe a duty to Bob, his statutory beneficiaries cannot pursue a statutory wrongful death claim.

(6) Adults are expected to temper their alcohol consumption or simply refrain from driving when intoxicated. Unlike an innocent bystander hit by a drunk driver or a youth whose sense of immortality leads to reckless abandon, the responsibility for self-inflicted injuries lies with the intoxicated adult.

COMMENT:

A clear and concise application of the analysis and discussion set out in *Estate of Kelly v. Falin,* 127 Wn.2d 31, 896 P.2d 1245 (1995).

Jiggens v. Batten, 2005 WL 94355 (Wn. App. 2005).

MICHAEL S. ROGERS

PRACTICE

Mr. Rogers has a general litigation and appellate practice emphasizing insurance coverage and extracontratual litigation matters.

Insurance Coverage Litigation

Mr. Rogers represents insurance companies in coverage litigation, including commercial general liability, automobile and first-party property coverage areas. Mr. Rogers also defends "bad faith" claims brought by policyholders relating to claims handling and defense obligations.

Insurance Defense Litigation

Mr. Rogers defends suits involving damage to real property and significant personal injury claims.

EDUCATION

University of Washington School of Law, J.D., 1986
University of Washington, B.S. (Physics), 1983

BACKGROUND

Mr. Rogers was born in Seattle, Washington. He is admitted to practice in the State of Washington, the United States District Court, Eastern and Western Districts of Washington, and the United States Court of Appeals for the Ninth Circuit.

REPRESENTATIVE APPELLATE CASES

Philippides v. Bernard, 2004, Supreme Court of Washington, 151 Wn.2d 376 (amici)

Daley v. Allstate, 1998, Supreme Court of Washington, 135 Wn.2d 777

Findlay v. United Pacific, 1996, Supreme Court of Washington, 129 Wn.2d 368 (amici)

State Farm v. Bongen, 1996, Supreme Court of Alaska, 925 P.2d 1042 (amici)

Hall v State Farm, 2001, Court of Appeals of Washington, 109 Wn. App. 614

Eide v. State Farm, 1995, Court of Appeals of Washington, 79 Wn. App. 346

Burmeister v. State Farm, 1998, Court of Appeals of Washington, 92 Wn. App. 359

Washington Ins. Guaranty Assoc. v. Smith, 1994, Court of Appeals of Washington, 77 Wn. App. 250

Dutton v. Wash. Physicians Health Program, 1997, Court of Appeals of Washington, 87 Wn. App. 614

Pain Diagnostics & Rehabilitation Assoc., v. Brockman, 1999, Court of Appeals of Washington, 97 Wn. App. 691

AFFILIATIONS

Mr. Rogers is a member of the following professional organizations:

The Washington State Bar Association
Washington Defense Trial Lawyers (Amicus Committee)
Northwest Insurance Coverage Association

DOING THE RIGHT THING

FACTS:

Holly and AID entered into a contract whereby Holly was to harvest timber on AID's land. After two years, AID became dissatisfied with Holly's performance, kicked it off the land and sued it.

Holly had a CGL policy with Westport and tendered the defense to it. The tender was denied, with the company pointing out that it could find no allegation of "occurrence," "bodily injury" or "property damage." And it appeared there were allegations of intentional acts.

A couple of years later, Holly tendered again, saying that things had changed. The insurer rejected the tender saying it did not see anything new.

Holly sued Westport. A couple months later, Westport said that in light of the newly alleged timber trespass and property damage claims, it would defend under a reservation of rights.

Holly and Westport both moved for summary judgment. The trial court ruled that Westport had breached its duty to defend and acted in bad faith as a matter of law. The Court of Appeals reversed, saying that the claims in the complaint were unambiguously not covered, that there was no duty to defend and no bad faith.

HOLDINGS:

(1) An insurer's duty to defend arises when an action is first brought; and it is based on the *potential* for liability. An insurer has a duty to defend when a complaint against the insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage.

(2) If the complaint is ambiguous, insurers should construe it liberally, in favor of the insured. If the alleged claims are clearly outside the policy's coverage, then the insurer has no duty to defend.

(3) Two exceptions to the general rule of reading only the complaint favor the insured. **First**, if coverage is not clear from the face of the complaint but may nonetheless exist, the insurer must investigate the claim and give the insured the benefit of the doubt in determining whether the insurer has a duty to defend. **Second**, the insurer may consider facts outside the complaint if (a) the allegations are in conflict with facts known to or readily ascertainable by the insurer or (b) the allegations of the complaint are ambiguous or inadequate.

(4) Westport's insurance policy specifically excluded from coverage contractual liability and

expected or intended injuries. AID's complaint alleged no covered "occurrence" (accident) or "property damage" as defined under the policy.

(5) Because AID's claims were clearly outside the policy coverage, Westport had no duty to investigate or to look outside the complaint for additional information.

COMMENT:

In addition to the points noted above, the court went out of its way to set out four specific acts by Westport which demonstrated its good faith.

Finally, in footnote 8, the court had this to say about a reservation of rights:

> Where an insurer is uncertain about whether it has a duty to defend in a particular case, it may defend under a reservation of rights. A reservation of rights is a means by which the insurer conditionally defends its insured, subject to potential reimbursement by the insured upon later discovery that there was no duty to defend. An insurer's defense of its insured under a reservation of rights avoids breaching its duty to defend while seeking to avoid waiver and estoppel allegations.

All in all, a coverage opinion which should be read closely by coverage counsel, and by company personnel charged with making coverage decisions.

Holly Mountain Resources, Ltd. v. Westport Ins., ___ Wn. App. ___, 104 P.3d 725 (2005).

PARENTAL IMMUNITY STILL HERE

FACTS:

Nine-year-old Mike was riding in the front seat of his family's minivan. His mother was driving. The van collided with Kevin's car. Mike was injured when the passenger-side airbag deployed.

Mike sued his parents and Kevin. He claimed his mother was negligent when she placed him in the front seat of the van with the air bag. The parents moved for dismissal which the trial court granted. Mike appealed. The Court of Appeals affirmed the dismissal saying that the parental immunity doctrine barred Mike's claim.

HOLDINGS:

(1) Parents are immune from lawsuits by their children when the complained-of actions are in discharge of parental duties.

(2) The duty to discipline the child carries with it the right to chastise and prescribe a course of conduct designed for the child's development and welfare. This in turn demands that the parents be given a wide sphere of discretion.

(3) In order that these parental duties may be adequately performed, it is necessary that the parents not be subject to the risk of suit at the hands of their children. Public policy demands that parents be given immunity from such suits while in the discharge of parental duties.

(4) An exception exists when parents are not acting in their parental capacity.

(5) Another exception arises when the parent's negligent driving causes the accident.

(6) An exception also exists if the parents temporarily abdicate their parental responsibilities.

(7) Here, mother was driving the family car for the purpose of engaging in family activities. She was in the discharge of her parental duties and the immunity doctrine applies.

COMMENT:

Although not published, the case stands as a clear reminder that outside the sphere of negligent automobile driving, the doctrine of parental immunity still has some viability.

Warring v. Hake, 2005 WL 152429 (Wn. App. 2005).

THE MARINA RESCINDED

Milo purchased a marina for $400,000. Soon thereafter, the insurer declined to renew. Milo had his broker contact several companies including IMU which was acting as an agent for OB. The broker filled out the application and sent it in. IMU/OB issued the policy without going out to look at the marina.

A couple years later, the marina was vandalized. The IMU/OB adjuster reported that the property had been built in the 1800's and was "dilapidated." From that, IMU/OB concluded that Milo had

misrepresented the condition of the property, and told Milo they were rescinding the policy. Shortly thereafter, the marina was further damaged by a windstorm.

OB filed suit against Milo, seeking a declaration that the policy was void at its inception. Milo sued his broker, saying that if there were any misrepresentations he made them. Milo also claimed that the policy was valid and covered the losses.

The case was tried to a federal judge who, after hearing OB's case, ruled that OB had no right to rescind, and that OB owed Milo $400,000 plus attorney fees.

HOLDINGS:

(1) An insurer seeking to rescind an insurance policy must show that the insured made material representations with an intent to deceive the insurer.

(2) The insurer has the burden of proving each element by clear, cogent, and convincing evidence.

(3) The standard of proof requires that the "trier of fact be convinced that the fact in issue is 'highly probable.'"

(4) Even if the statements were false, OB failed to show that it would have done anything differently concerning the policy.

COMMENT:

This case serves to highlight the fact that in Washington, rescission of an insurance policy is difficult to obtain. In addition to the court's normal reluctance, there are several statutes which come into play: RCW 48.18.080(1) (limitation on use of application as evidence); RCW 48.18.090(1) (requirement of intent to deceive); RCW 48.18.320 (limitation on retroactive annulment).

An excellent review is found in *Cutter & Buck v. Genesis Ins. Co.,* 306 F. Supp. 2d 988 (W. D. Wa. 2004).

One Beacon America Ins. Co. v. Milosavljevic (W.D. Wa. Jan. 11, 2005; #C03-3317L).

MARY R. DEYOUNG

PRACTICE

Ms. DeYoung is a shareholder in the Reed McClure law firm. Her practice emphasizes insurance and environmental law and litigation.

Insurance Law

Ms. DeYoung assists clients with issues of insurance coverage and extracontractual exposure. Approximately half her practice in this area involves coverage and claim handling consultation and advice. The other half involves litigation including declaratory actions, bad faith lawsuits and appellate litigation. Ms. DeYoung's work has extended to a variety of matters arising under both personal and commercial policies. She has helped clients with claim exposures involving environmental liabilities, construction defects, property losses, employment relationships, business torts, business interruption losses, professional liability, and directors and officers liability, among others.

Environmental Law

Ms. DeYoung has counseled public and private clients and represented them in litigation with respect to their obligations under local, state and federal environmental laws. She has handled matters involving toxic tort liabilities, allocation of cleanup liability between responsible parties, responsibility for operation or removal of underground storage tanks, rights and obligations assumed in transactions involving contaminated properties, and liability for soil, air and water emissions.

EDUCATION

University of Michigan, J.D., *cum laude*, 1986
University of Michigan, A.B., *with distinction*, 1980
Kalamazoo College, 1975-1977

BACKGROUND

Ms. DeYoung was born in Cobleskill, New York. She has been admitted to practice in the State of Washington, the United States District Court for the Western and Eastern Districts of Washington, and the Ninth Circuit Court of Appeals.

Ms. DeYoung is a member of the following professional organizations:

The Washington State Bar Association
The American Bar Association
(Member, Tort and Insurance Practice Section)
Northwest Environmental Claims Association (Co-Chair, 1992)
Northwest Insurance Coverage Association
(Co-Chair, 2002-2005)

SELECTED PRESENTATIONS AND PUBLICATIONS

"Junk Fax: Is it Invasion of Privacy?", presentation for PLUS's Communications Liability Seminar, April 2003.

"Staying out of trouble, or How to avoid bad faith," presentation for the Spokane Adjusters Association 2002 fall insurance seminar, October 2002.

"Weyerhaeuser II—ramifications for insurers in Washington," presentation for the WDTL Insurance Law Seminar, October 2001.

"Selected coverage issues arising from construction defect claims in Washington state," presentation for CPCU Society seminar, March 2001.

W. R. Hickman and M. R. DeYoung, "Allocation of Environmental Cleanup Liability Between Successive Insurers," 17 N. Ky. L. Rev. 291 (1990).

"Allocation of Insurance Coverage for Environmental Damage Claims," Gonzaga L. Rev. Vol. 28, 381 (1992/93).

NO INTENTIONAL COLLAPSE

FACTS:

Gilbert was repairing a scoreboard at a grade school when the lifting device he was using collapsed and injured him. Prior to the accident, he had talked with the school's risk manager who said that the device was dangerous.

In Washington, employers are generally immune from civil suits by their employees for on-the-job injuries. The immunity does not extend to intentional and deliberate acts that result in injury.

Gilbert sued the school district for intentional injury. The trial court dismissed the claim. The Court of Appeals affirmed, saying that what the school did was not the same as an assault and that Gilbert's injury was the result of an accident.

HOLDINGS:

(1) The legislature abolished civil causes of action against employers for personal injuries obtained on the job by the Industrial Insurance Act. The act provides a narrow exception for injuries caused by the "deliberate intention" of an employer.

(2) Before *Birklid*, the "deliberate intention" necessary to satisfy the exception to employer immunity generally required physical assault. *Birklid* expanded this exception.

(3) The court held that "the phrase 'deliberate intention' means the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge."

(4) A "deliberate intention" cannot be shown by the employer's gross negligence or carelessness. It cannot be shown by the employer's failure to follow safety procedures or laws governing safety. Even knowledge to a substantial certainty that an act will produce an injury is not sufficient.

COMMENT:

The citation to *Birklid* is *Birklid v. Boeing Co.,* 127 Wn.2d 853, 904 P.2d 278 (1995). When it came out, we did fear that it represented the camel's nose under the tent. However, as this opinion and *Schuchman v. Hoehn,* 119 Wn. App. 61, 79 P.3d 6 (2003), indicate, the courts are keeping the bar as high as the legislature intended.

Valencia v. Reardan-Edwall Sch. Dist., ___ Wn. App. ___, 104 P.3d 734 (2005).

BAD BAD TIMING

FACTS:

Melanie was a foster child who lived with the Taylors. She moved in when she was 16 and continued through her 18th birthday. Just before she turned 18, she bought a car. The foster mother listed herself as the owner and added the car to the family's auto policy. She did not add Melanie's name. The policy provided coverage for family members including a ward or foster child.

On August 1, Melanie turned 18. On August 4, the car was added to the policy. On August 8, Melanie got her driver's license. On August 9, Melanie sustained severe injuries while riding as a passenger in a friend's car. None of the drivers had insurance.

Melanie sought UIM coverage under her foster family's policy. The company rejected the claim, pointing out that when she turned 18 she was no longer a foster child.

The trial court and the Court of Appeals agreed that once Melanie turned 18, the policy no longer covered her.

HOLDINGS:

(1) We give a policy a fair, reasonable, and sensible construction taking into account the understanding of an average person purchasing the policy. We do not accord weight to one party's unexpressed intent as relevant to the parties' mutual intent. When clear and unambiguous, we enforce the policy language as written.

(2) A term is ambiguous if it is fairly susceptible to two different but reasonable interpretations by an average insurance purchaser. We construe ambiguous insurance contract language in favor of the insured.

(3) Generally, we give undefined terms their plain, ordinary, and popular meaning as would be understood by the average insurance purchaser. We may consult the dictionary to determine meaning.

(4) When Melanie turned 18, she no longer fit the definition of "ward."

(5) A reasonable meaning for a "foster child" means a child under the age of 18. The term is not susceptible to multiple meanings.

(6) Melanie did not qualify for uninsured motorist coverage under the Taylors' insurance policy.

COMMENTS:

Holy cow! Rocky Mountain Fire & Casualty. We have not seen that name for years. Back in the 60's and 70's, it seemed that half our coverage law was made by those folks.

In addition to its plain reading of the policy and its legal pronouncements, the court also pointed out that there was no public policy which would invalidate the clause excluding non-family members as insureds.

Wheeler v. Rocky Mountain Fire & Cas. Co., ___ Wn. App. ___, 103 P.3d 240 (2004).

CARJACKED AT THE AIRPORT

FACTS:

Nathalie was sitting in her car at the airport's pick-up drive. Her car was carjacked with her in it. She was injured. The perp was fleeing airport police who had caught him breaking into a car in the airport garage.

Nathalie sued the airport, alleging failure to provide adequate police and security at the airport. The trial court dismissed her claim and the Court of Appeals affirmed because the carjacking was not foreseeable.

HOLDINGS:

(1) A cause of action for negligence requires the plaintiff to establish (1) the existence of a duty to the plaintiff, (2) breach of that duty, (3) resulting injury, and (4) proximate cause between the breach and the injury. The threshold determination of whether the defendant owes a duty to the plaintiff is a question of law.

(2) If a criminal occurrence is so highly extraordinary or improbable as to be wholly beyond the range of expectability, a court may find it unforeseeable as a matter of law.

(3) The general rule in Washington is that a person owes no duty to prevent criminal harm to third persons. But, a business owes a duty to its invitees to protect them from imminent criminal harm and reasonably foreseeable criminal conduct by third persons.

(4) A business invitee is owed a duty of reasonable care for reasonably foreseeable criminal conduct by third persons. No duty arises unless the harm to the invitee is foreseeable.

(5) The carjacking of Nathalie's car was so highly improbable as to be beyond the range of expectability. We find that the carjacking of Nathalie's car was unforeseeable as a matter of law.

COMMENT:

It is hard to get a Washington court to rule on foreseeability as a matter of law. However, this opinion demonstrates that a clear line can be drawn.

Fuentes v. Port of Seattle, 119 Wn. App. 864, 82 P.3d 1175 (2003), *rev. denied,* 152 Wn.2d 1008, 99 P.3d 895 (2004).

QUICKLY, QUICKLY, QUICKLY

Last issue (Fall 2004), we mentioned what appeared to be a very significant insurance law opinion: *Alaska National v. Bryan*. It was significant in large part because it negated a host of specious legal arguments frequently made by policyholders' counsel. The only shortcoming in the opinion was that it was not published. That situation was corrected on December 21, 2004, when Division One ordered the opinion published.

In case you have misplaced your last issue, here are some of the significant rulings:

(1) Filing a declaratory judgment action is not bad faith.

(2) An insurance company has no duty to defend its insured in a coverage declaratory judgment action.

(3) *Olympic Steamship* attorney fees are payable only after a court has ruled that there is coverage.

(4) Bad faith estoppel may arise only when the insurer in fact controls the reserved defense.

(5) A clear and cogent discussion of reservations of rights letters.

Alaska Nat'l Ins. Co. v. Bryan, ___ Wn. App. ___, 104 P.3d 1 (2004).

A recent case out of Nevada reiterates the general rule that when concerned with CGL coverage, the tangible, physical injury must occur during the policy period for coverage to be triggered. Here, a 362-foot sign was constructed and erected in December 1993. On April 29, 1994, the contractor's CGL policy expired. The sign collapsed on July 18, 1994. The court said that it viewed improper welding as intangible, economic injury and not the type of physical, tangible injury that a reasonable person would contemplate as covered.

United National Ins. Co. v. Frontier Ins. Co., 99 P.3d 1153 (Nevada 2004).

Last issue, we were particularly critical of a Court of Appeals opinion which turned a blind eye to a jury verdict which allocated three times as much fault to the school as to the mother, when it was the mother who did not put her kindergartner in the car, did not buckle him in, and did not shut the door. We received a note from one of the attorneys in the case expressing the view that the opinion had failed to point out that the pickup/drop-off/drive-through area at the school was chaotic, had been chaotic for years, and the school knew that and did not correct the problem. That may justify some allocation of fault to the school, but in my view, the one who has the most to lose also has the most responsibility.

Romero v. West Valley Sch. Dist., ___ Wn. App. ___, 98 P.3d 96 (2004).

A recent opinion out of the Tenth Circuit brought to our attention that some individuals, in some jurisdictions, are libel-proof as a matter of law. The case involved the eloquently misnamed Mr. Lamb who has been in the state prison for the last 30 years serving three life sentences for kidnapping and murder. He took exception to what a newspaper reporter wrote about him when he came up for a parole hearing. Parole was denied and Mr. Lamb sued for libel. The district court dismissed and the Court of Appeals affirmed, saying that when a person engages in conspicuously anti-social behavior which is widely reported, his reputation diminishes proportionately. Depending on the specific conduct, there comes a time when the person's reputation is so low that it cannot get any lower. In that situation, the person is deemed libel-proof as a matter of law and is not permitted to burden the defendant with a trial.

Lamb v. Rizzo, 391 F.3d 1133 (10th Cir. 2004).

A late January 2005 opinion from the Washington Supreme Court points up a couple of litigation problem areas. The case involved a barn which caught fire and burned down. The owner sued for the negligent destruction of the barn. The first question is rather fundamental: what is the measure of damages for the negligent destruction of a barn. Since folks have been burning down barns for ages, one would think that the formula for the measure of damages would be well established. One would think so. One would be wrong.

The Supreme Court split 5-4 with the majority saying that there is one measure of damage if the building is destroyed, but a different measure of damage if the building is merely damaged. The dissent called the majority analysis a "logic-defying leap" and that nowhere in Washington case law is there any basis for such a distinction.

And to compound the confusion, and to reduce predictability even more, the justice who wrote the majority opinion has retired, and has been replaced by a new Johnson. What is the trial court supposed to do the next time a negligent destruction of property case comes up?

And there is more. A second issue in the case was whether the defendant's responses to requests for admission were so bad as to be subject to sanctions. The trial court said they were. The Court of Appeals agreed. The Supreme Court reversed 5-4. The majority this time was the four dissenters plus the old Johnson. The new majority said the requests for admission were improper because they were requests to admit legal conclusions. The dissent said the requests were proper because they were not requests to admit legal conclusions.

The Supreme Court is just that, SUPREME. With that lofty title goes a commensurate amount of responsibility. Include therein is the obligation to issue opinions which provide guidance. In particular, we want opinions which provide guidance to trial judges and trial counsel. The question of measure of damages for barn destruction arises occasionally. But whether a request for admission is or is not a request to admit a legal conclusion is a question which arises in all tort cases, and most civil cases. Is it too much to expect that someone will compromise their personal view in deference to the majority so that the court will at least appear to speak with one voice?

Thompson v. King Feed & Nutrition Svc. Inc., 2005 WL 107185 (Wash. 2005).

Remember, selected back issues of the Law Letter are available on our web site at www.rmlaw.com/newsltr.htm ... and Pam Okano's Coverage Column is available at www.wdtl.org/ (see Coverage Uncovered).

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