

No Stone Unturned: Identifying Claims Other Attorneys Miss



A tragic car wreck leaves your client with catastrophic injuries or, even worse, the loss of a loved one. They have a case worth millions of dollars. And the defendant has little or no insurance. Where do they turn? The answer is to look at all other possibilities to determine if there is someone else other than the defendant driver that is responsible for your client's injuries and damages.

1. Make sure you have identified all available insurance.

We have had many cases over the years where the defendant's initial report regarding the coverage available for the accident is mistaken. An attorney needs to make sure that all insurance that may apply to the accident has been identified. Is there an owner of the car that is different than the driver? Was the driver on the job at the time of the accident? Is there an umbrella policy that might apply to the accident? Does your client have additional insurance coverage through a family member? The insurance issues need to be explored thoroughly to make sure that all available insurance is paid. In one case we

handled years ago, the defendant did not tell the truth about additional coverage that applied to the accident through his employer, and after years of litigation the family was able to recover \$2 million in additional insurance (plus a healthy sum against the insurance carrier for the bad faith conduct).

2. Does the family purpose doctrine apply?

Arizona has some of the strongest laws in the country that makes parents responsible for accidents involving their children. In any case involving a younger driver (we have had cases with drivers late into their twenties), you need to make sure that the family purpose doctrine does not apply. We have had instances where many millions of dollars in additional insurance coverage was available by bringing a claim against the driver's parents.

3. Did a bar or restaurant overserve the drunk driver?

In many instances involving a drunk driver, there is a possibility of a claim against the bar or restaurant that overserved the drunk driver. In these cases we can bring a claim against the bar or restaurant. It is important to get involved in these cases as soon as possible, as witnesses, video from the restaurant or bar, and sales receipt evidence needs to be preserved as soon as possible.

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4. Flaws of traffic controls or the design of the road.

There are some instances where the accident was caused in whole or in part by a failure of the city or state to have proper traffic controls or the design of a road. In these instances, we can bring a claim against the city or state for those failures. In one case we handled, the state had failed to install a traffic signal even though the traffic had increased dramatically because of a new Wal-Mart at the intersection. Although the state should have known that a signal was needed, it did not put one in until after the fatal accident. We are currently handling a case against the state for failing to install median barricades on Interstate 10 between Tucson and Phoenix.

5. A defect in the vehicle caused the plaintiff's injuries or damages.

This is probably the most important area of investigation in our practice. Over the years we have handled dozens of cases where it was discovered that the primary cause of the injury or death was a defect in the vehicles involved in the accident.

These cases break down into two categories. In the first instance, the accident itself is caused by some defect in the vehicle. For example, Gallagher & Kennedy has handled dozens of cases where an accident was caused by a tire on a vehicle separating while the clients were driving down the road resulting in a serious accident. Similarly, Gallagher & Kennedy discovered an accident caused by a defect in Ford Escapes that caused the accelerator to stick and uncontrolled acceleration. In that case, Gallagher & Kennedy worked closely with governmental investigators which led to a recall of hundreds of thousands of cars to cure that defect. In every crash, there needs to be an evaluation of whether anything with the vehicle played a role in causing the accident.

The second thing to look at is whether a defect in the vehicle, while not causing the crash, played a role that caused injuries or the death of the occupants. We have been involved in dozens of cases where this has occurred. Examples of this include vehicles that are not designed properly and that roll over in an accident when they should not. In some of these cases the roof has collapsed causing paralysis or death. In other cases we have seen the seat backs fail, allowing the driver or front seat passengers to collide with rear seat passengers or be ejected into the rear of the vehicle. In other instances we have seen cases where the airbag either did not inflate at all or inflated improperly. In other instances the seat belt did not work as it should, in some instances causing injury or death themselves.



Meet One of the Team: Patrick J. McGroder IV

Pat recently joined Gallagher & Kennedy after nearly four years at the Maricopa County Public Defender's Office. He has represented clients in over 300 felony matters in Maricopa County and has received multiple favorable jury trial verdicts. Pat also spent two years at the Maricopa County Attorney's Office while in law school, prosecuting cases for the county. In 2013, while waiting for bar results, Pat worked with the Personal Injury and Wrongful Death team at Gallagher & Kennedy. During his free time, Pat spends time with his daughter and volunteers with the Ronald McDonald House, assists Child Help Charity Aiding Victims of Child Abuse and coaches Brophy College Preparatory Mock Trial.

Case Law Change Makes Compensation More Achievable for Vulnerable Adults

Until recently, an incapacitated plaintiff seeking to bring a claim under the Adult Protective Services Act (APSA) would have to prove not only that his caretaker had negligently caused her harm, but that the harm was related to her underlying incapacity. See *Estate of McGill ex rel. McGill v. Albrecht*, 203 Ariz. 525, 530 ¶ 16 (2002). In practice, courts and parties alike struggled to interpret the McGill test. After all, when an adult is wholly dependent on a caregiver, couldn't any harm the caregiver inflicts arguably be related to the adult's lack of capacity? That is precisely the question the courts grappled with in *Delgado v. Manor Care of Tucson AZ, LLC*, 242 Ariz. 309 (2017).

In *Delgado*, the plaintiff was confined to a wheelchair in the defendant's facility when she contracted a septic infection, which ultimately resulted in her death. *Id.* ¶¶ 1-5. Yet this tragic case almost came to an abrupt end when the defendants argued that the septic infection had nothing to do with the reasons for which the plaintiff had been confined to a wheelchair in the first place. Applying the McGill test to the defendants' motion for summary judgment, the trial court and court of appeals reached opposite conclusions as to whether the sepsis was related to the plaintiff's underlying incapacity, with the court of appeals finding there was at least a question of fact on the subject. *Id.* ¶ 8. The split decision is indicative of just how difficult it could be to apply the test in practice—and the potentially frightening consequences to an otherwise viable ASPA claim.

In June of 2017, Arizona's Supreme Court resolved the ambiguity by abolishing the McGill test altogether. *Id.* ¶¶ 16, 19. Now, to bring a claim under the ASPA, the test is much simpler: a plaintiff must be a vulnerable adult who has suffered an injury from a caregiver's abuse. *Id.* ¶ 19. Not only is this new test more consistent with the language in the ASPA itself, but it makes it much easier for vulnerable adults to obtain compensation when they are mistreated by their providers.

Gallagher & Kennedy has been at the forefront of Elder Abuse litigation. Not only have Pat McGroder and Shannon Clark successfully tried an elder abuse case involving fatal pressure ulcers, but Bob Boatman, Shannon Clark and Lincoln Combs were part of the team that persuaded the Arizona Supreme Court to confirm that APSA applies to hospitals and other caregivers, not just nursing homes. See *In re Est. of Wyatt*, 235 Ariz. 138 (2014). With the clarification of *Delgado*, we look forward to bringing ASPA claims more frequently to help some of our most vulnerable clients obtain fair compensation for the injuries they've suffered.

Industry Update

Two bills seeking to limit the power of injured victims to sue the people that harmed them passed the U.S. House of Representatives earlier this year and are currently pending in the Senate. H.R. 1215, named the "Protecting Access to Care Act of 2017," would severely limit the ability of injured patients and their families to hold health care providers accountable when they are injured by medical malpractice, nursing home neglect, and defective drugs and medical devices. And H.R. 985, the so-called "Fairness in Class Action Litigation Act," would devastate the ability to pursue justice as part of a class or in a mass action, the only way average citizens can do so in many circumstances.

These bills have faced bipartisan opposition because of their potential to harm consumers and American workers. As recently reported in the *National Law Journal*, when the U.S. House voted on H.R. 1215, the bill passed by the slimmest margin ever for this type of "tort reform" proposal. The final vote was 218 to 210 with 19 Republican representatives joining every single Democrat in opposition. This is by far the most Republican opposition votes for a tort reform bill and shows that even Republicans have concerns about the federal government infringing on the people's constitutional right to a jury trial.

The Senate has not yet taken up debate of either of these two bills, but are expected to do so later this year. If you have concerns about Congress acting to take away your right to a jury trial, contact your state Senators' offices to make your voice heard, or reach out to a Gallagher & Kennedy personal injury attorney to ask how you can help in the fight to protect your right to hold persons and entities accountable when their products and negligence cause harm.

G&K Significant Matter Victories

Gallagher & Kennedy's catastrophic injury and wrongful death attorneys handle some of the most complicated and substantial claims in Arizona. Recently resolved cases include:

\$20,000,000+ settlement of automotive product liability claim;

\$7,250,000 for two victims of medical negligence;

\$4,500,000 for orthopedic injury motor vehicle collision case;

\$3,000,000 for medical malpractice claim;

\$2,500,000 for motorcycle accident;

\$1,200,000 for automotive product liability lawsuit;

\$2,000,000 for intentional assault claim;

\$600,000 for negligent supervision claim;

\$450,000 for motor vehicle collision claim;

\$300,000+ for sports injury negligence claim;

To protect the confidentiality of the settlement agreements and privacy of our clients, case details are omitted. Gallagher & Kennedy makes a substantial investment of time, treasure and passion in each of its cases and welcomes the opportunity to associate with firms on significant personal injury, wrongful death and business tort cases.

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