2010 INSIGHTS:

In the remaining weeks of this year, the Daily Journal will be featuring columns written by select contributors touching upon this year's legal developments, lessons learned and what's to come.

Criminal Cases That Made a Splash in 2010

By Lou Shapiro

As always, it has been an eventful year for the field of criminal law. It seems like a day hasn't gone by in 2010 that a criminal case or issue wasn't highlighted or debated in the news and media. Whether it was Lindsay Lohan fighting for her freedom or the medical marijuana dispensaries challenging a moratorium, criminal law continues to make headlines and peak peoples' curiosity. While there hasn't been a defining case of the year, there have been several small cases that came in big packages.

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BART Officer Convicted of Involuntary Manslaughter: If there was one case this year that highlighted racial tension in America, it was unquestionably the BART case.

It involved a former transit police officer who fatally shot an unarmed African American man, Oscar Grant, at an Oakland train station. The anger of the Oakland residents became so great that it caused the case to be moved to Los Angeles.

The evidence cut both ways. The prosecution argued that Officer Johannes Mehserle's failure to show shock or remorse immediately following the shooting proved he intentionally shot Grant. The defense countered with evidence that Mehserle had poor Taser training, and mistakenly used his gun when he meant to use his Taser.

The jury did not join in the prosecution's theory and convicted Mehserle of involuntary manslaughter (unintentional killing). He was sentenced to two years, which resulted in a time-served sentence.

Quite frankly, nobody won in this case. An innocent man was killed, an officer's reputation was permanently tarnished, and the race card reared its ugly head.

In tribute to Grant, the transit police department, as well as all police departments need to scrutinize their Taser training programs to prevent this situation from reoccurring. A mistake that took a few seconds changed the lives of many eternally.

Irrespective of one's opinion as to the appropriateness of the verdict and/or sentence, the fact that a police officer was prosecuted reinforces the notion that no one is above the law. Everyone, whether in uniform or in plain clothes, will be held accountable for their actions. That is something that people of all races have a lot to be proud of.

Psychiatrist and Boyfriend/Lawyer Convicted in Anna Nicole Smith Case: This case definitely sent a jolt through the medical world. On Oct. 28, Anna Nicole Smith's psychiatrist and her boyfriend/attorney, were convicted of conspiracy to obtain drugs for Smith before her death in 2007. A third defendant, Dr. Sandeep Kapoor, was acquitted.

The theme of the district attorney's case was that doctors need to make sure that they are not overprescribing medicine. The defense countered that all medication prescribed to Smith was lawful because they were for a legitimate medical purpose.

The obvious debate was whether this case would have been pursued had it not involved Smith. In fairness, other doctors have recently been prosecuted for unlawfully prescribing medication. In July, Carlos Estiandan was sentenced to five years in state prison after being convicted of 13 counts of unlawful controlled substance prescription. Michael Jackson's physician, Conrad Murray, is currently fighting involuntary manslaughter charges.

It will be interesting to see how the medical profession as whole responds to the outcome of these cases. The concern is that doctors will be overly conservative in prescribing medication in fear of being prosecuted, thereby causing the patient in sincere pain to suffer.

The big issue then becomes how to ensure that one doctor is aware of what another doctor has already prescribed so as to avoid unknown overlapping and overdosing of medication. One foreseeable solution would be a database accessible only to doctors. They would be required to update the database with their prescriptions, which in turn would inform other doctors of a patient's past and current prescriptions. This might raise medical privacy concerns but at least people will be receiving the medication they justifiably need.

Switzerland Refuses to Return Roman Polanski to California for Sentencing: In 1977, Roman Polanski pled guilty to one count of unlawful sexual intercourse but fled the United States before sentencing. This year, Swiss officials caught up with Polanski but refused to return him to the United States for sentencing because, "U.S. prosecutors failed to present the necessary documents that they had requested."

Besides constituting a slap in the face to the United States, the decision to not return Polanksi might make it more difficult for defendants facing criminal charges to be released on their own recognizance or obtain a lower bail during the pendency of their case. One can't compare the benefit of defending a client who is in custody to a client who is out of custody. Hopefully, the decision by one country not to return a fugitive will not jeopardize everybody else's quest to fight their case on the outside.

City of Bell Council Members and Former City Manager Charged: This pending case needs no introduction.

Regardless of the outcome of this case the facts are the facts, and they are frightening: A city manager was paid $8 million annually and council members were paid $8,000 a month to run a population of 38,000 people (compared to Los Angeles at 4 million people).

In a time where unemployment is at its high, this type of news is the least bit encouraging. Unquestionably, the checks and balances on local governments need to be revamped. In the age of the 4G network and credit card operated parking meters, there is no excuse for unaccountability on such a large level.

In all likelihood, in 2011, federal and state lawmakers will work with the relevant government agencies in devising an effective and transparent auditing system to make sure that public funds and resources are used appropriately and efficiently.

Chelsea's Law: On May 14, in San Diego County, John Gardner was sentenced to three consecutive life sentences without parole for the rape and murders of Chelsea King and Amber DuBois, and the attempted rape of another woman.

California's parole system immediately was put on the defensive since Gardner was on parole during the killings and was living too close to a school, which was in violation of his parole conditions.

One month later, the California Assembly passed Chelsea's Law 65-0! Chelsea's Law includes but is not limited to the following; a life without parole sentencing option for the most dangerous sexual offenders; increased sentences for forcible sex crimes; increased parole terms for those who target children under the age of 14, including lifetime parole; a restriction that sex offenders cannot enter parks; and a requirement that sex offenders' risk assessment scores be made public through the Megan's Law website;

On Sept. 9, 2010, Gov. Arnold Schwarzenegger signed the bill into law.

Of course, the intent of the law is to deter the commission of sexual offenses against children, and it will be interesting to see how those statistics will turn out. Moreover, it remains to be seen how it will be implemented and how parolees will in turn challenge its application. It wouldn't come as a surprise if a case involving this law based on the Eighth Amendment (cruel and unusual punishment) or the First Amendment (Freedom of Association) reaches the U.S. Supreme Court in the near future.

And who could forget... Jet Blue Attendant Uses Emergency Slide: On Oct. 18, JetBlue Airways Corp. flight attendant Steven Slater pled guilty to second degree attempted criminal mischief and a lesser charge of fourth-degree attempted criminal mischief.

He admitted that when he became angry with passengers, he pulled the inflatable emergency chute, took a beer and slid down. This was not before swearing over the plane's intercom at an unruly passenger.

It remains to be seen which beer company will sign him to appear in their respective Superbowl commercial.

Last but not least... Airport Applesauce Scuffle: Ninty-three year-old Nadine Hays was charged with a misdemeanor battery charge for scuffling with a TSA agent at the Bob Hope Airport in Burbank when her applesauce would not be admitted through security.

To no surprise, talk show hosts around the country were having a field day with this case.

The charge was ultimately dismissed before trial, but apparently TSA is still requesting a fine of $2,500 be paid.

TSA has been receiving arguably an undeserved amount of poor media attention this year. This was an isolated incident and TSA agents have a very difficult and demanding job. In a world where it is impossible to provide enough airport security, patience has never been more a virtue for everyone to possess than now. After all, everyone wants the same safe result.

On that note, may we all enjoy a safe and happy holiday season and look forward to an enjoyable and prosperous new year.

The opinions expressed in this article belong solely to the author.

Tax and Medicare: 2010 Developments for Litigators

By David M. Higgins

For your clients and for your practice, several things have happened recently. In addition, Medicare continues to move forward on its expanded reporting requirements.

How to plead injuries for your clients is very important from a tax perspective, especially in cases of emotional distress. Emotional distress damages are generally taxable, unless their origin is a physical injury. If their origin is a physical injury (i.e. *Dillon v. Legg* bystander claims or a survivor's wrongful death claim), then there is no tax on the emotional distress component of the overall damages. So pleadings do not need to be reviewed from a tax perspective in cases having their origin in a physical injury.

In 2010, new Tax Court litigation makes some physical consequences of emotional distress exempt from tax. If emotional distress damages do not have their origin in a physical injury (i.e. employment, harassment and discrimination claims), then emotional distress damages are taxable. Going into 2010, all physical consequences of emotional distress (a heart attack resulting from the emotional distress) were thought to be taxable because those physical consequences had their origin in emotional distress. Now, however, one Tax Court opinion (*Parkinson v. Commissioner*) has distinguished between taxable "symptoms" of emotional distress and nontaxable "signs" of emotional distress. Apparently the "symptom/sign" distinction has a basis in medicine, justifying the different tax treatment. A "symptom" is something only the patient knows and can't be observed by the physician (a stomach ache; a headache, insomnia, etc.) and symptoms of emotional distress are taxable just as emotional distress is. A "sign" of emotional distress, on the other hand, can be observed by the physician (a heart attack, a stroke, an ulcer, etc.). Those are nontaxable, stand-alone physical injuries, although they may have their origin in emotional distress.

Whenever you have something physical involved with the plaintiff, you should plead the physical problems separately as a battery, if applicable, or as a sign of emotional distress. The Internal Revenue Service probably does not like this result and may try to get a different result in later cases. For the time being, however, this is a useful distinction to make, especially as tax rates rise in future years.

Another tax issue for clients that is developing is the rule to distinguish what injuries are physical and what injuries are non-physical. The distinction is important being physical injuries are not taxable and nonphysical injuries are taxable. The tax law does not contain a definition of "physical injury." The Treasury has announced that a physical injury requires "observable bodily harm" such as cuts and bruises. The courts have yet to opine on the correctness of that IRS view, but have said some interesting things in the course of not opining. For example, false imprisonment seems to have significant physical elements to the tort (restraint on movement, elements of kidnapping, etc.). Nevertheless, the 6th U.S. Circuit Court of Appeals this year said false imprisonment is not physical and therefore the damages are taxable. The plaintiff suffered no cuts or bruises while in custody. Presumably, the result would be different if handcuffs had left bruises, other prisoners had touched the plaintiff or guards had roughed up the plaintiff...another reason to be sure your complaints contains a cause of action for every physical aspect of the plaintiff's injuries.

The implementation by Medicare of claims reporting is going slowly. Property/casualty insurers are required to report quarterly when one of their insureds files a claim. To do that, and avoid a $1,000 per day penalty on the insurer, insurance companies ask you for your client's name, address and Social Security Number. If they don't receive it, some make settlement checks payable jointly to your client and Medicare. Until this month, those reports were to begin in the first quarter of 2011. On Nov. 9, the Centers for Medicare & Medicaid Services pushed the date back a full year to the first quarter of 2012.

Note that you always need to develop your own lien information as a case proceeds. Early in the case, you should call 1-800-999-1118 with your client's name, Social Security Number, date of birth and address. In the same telephone call, Medicare will tell you whether your client is receiving Medicare benefits. If so, Medicare will send you a release and associated forms within two weeks. You will return those, wait 65 days and receive from Medicare's Regional Center the amounts Medicare claims as a lien. Review the list to be sure the expenses all arose from your client's injury. The built-in delay of up to 90 days in this lien process means start early. Otherwise, you will find yourself sitting on a settlement check, unable to distribute it, because the lien amount is still unknown.

In addition to developing lien information, Medicare also wants to know what future expenses Medicare might be expected to pay after your client has settled. To protect Medicare's interest in the settlement, your client must take those expenses into account in some way. Some set aside Medicare's estimated future liability for those expenses in a trust to be administered by a third party (a set-aside trust). Others simply segregate the money and keep track of how much is spent on Medicare's expenses from the settlement. The law does not provide any particular method to protect Medicare's interest. If you do not do so, however, Medicare can refuse to pay any future expenses after the settlement. In cases where there are few or no future medical expenses after the settlement, documenting the file with a letter from a physician saying so will be sufficient and permit your client to spend all of the money.

For you, several good things have happened. The treatment of costs in a contingent-fee case got some attention this year. Typically, you can't deduct costs as you incur them. Rather, you have to wait to deduct them until the case settles or ends so that you can know whether you will be reimbursed or not for those costs. The tax theory behind denying you the deduction is that you won't know whether you are simply lending the costs to the client until the case is over. Only then will you know whether you will be reimbursed. To avoid that theory, some charge a gross fee without taking costs into account separately. Of course, the fee charged will exceed the normal 33.33 percent or 40 percent since the fee must pay for costs. At least, however, with that type of contract, you can deduct those costs up front since you will never be specifically reimbursed using a gross fee. The cost, however, of using that form of contract to deduct advanced costs in California is to violate the California ethics rules (Rule 4-210(A)), which prohibits supporting the client's litigation. This developing law is not over either from a tax perspective or an ethics perspective since the IRS intends to announce a national rule shortly and the ethics rules are in the amendment process.

Probably the 2010 development with the biggest tax impact for attorneys is the increase from $250,000 to $500,000 in the limit on the expensing of small business property. That is, for 2010 and 2011, lawyers can expense, rather than depreciate over time, up to $500,000 in capital outlays. 2010 and 2011 are the years to replace old office equipment and systems. To maximize the value of this increase in expensing, you should make the purchases by Dec. 31 of this year so the tax is reduced in this year's return.

Another development that is not yet resolved is whether you will need to file 1099-MISC returns for payments you make to buy goods, such as office supplies, or that you make to corporations, as opposed to individuals. Currently payments for goods and payments to corporations are exempt from information reporting. On Jan. 1, 2012, however, the new reporting requirements will be in place. Congress believes the new requirements will raise $1.7 billion annually in currently-avoided tax. The administrative burden will be enormous under the new rules, with significant penalties for failure to file those returns. Fortunately, however, several members of Congress have introduced bills to repeal the new requirements. Some may even be voted on in the current lame-duck session.

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