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QUARTERLY REPORT TO CLIENTS AND ATTORNEYS - VOL. 95, NO. 2

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NOTE: The accounts of recent trials, verdicts and settlements contained in this newsletter are intended to illustrate the experience of the firm in a variety of litigation areas. Each case is unique, and the results in one case do not necessarily indicate the quality or value of any other case.

SDSBS

The Deberry's Legal Odyssey Concludes With A $7.75 Million Settlement

Chris Searcy, David DeBerry and Greg Barnhart

Tom and Gwenda DeBerry of Vero Beach have fought two battles for over a decade, raising a severely brain damaged child and pursuing a medical malpractice case against the doctors who negligently treated their newborn son, David. The DeBerry's legal battle ended in May when they accepted a $7.75 million settlement from Doctors' Clinic of Vero Beach and obstetrician Robert Klomp.

Chris Searcy and Greg Barnhart pursued the medical malpractice case on behalf of the DeBerrys. The suit accused the doctors of causing David's mental retardation by failing to treat him properly within the first 12 hours after his birth at Indian River Memorial Hospital in 1981. Born five weeks premature, David developed a systemic infection shortly after birth. Proper medical treatment for the infection and respiratory problems would have prevented David's oxygen deprivation and severe brain damage. David, now 14, requires 24-hour supervision and extensive therapy. His daily living skills are assessed at an 18 month to 2 year-old level.

The DeBerry's legal odyssey has spanned twelve years, including five trials, (three mistrials), and six appeals. The litigation has been handled by ten judges through the

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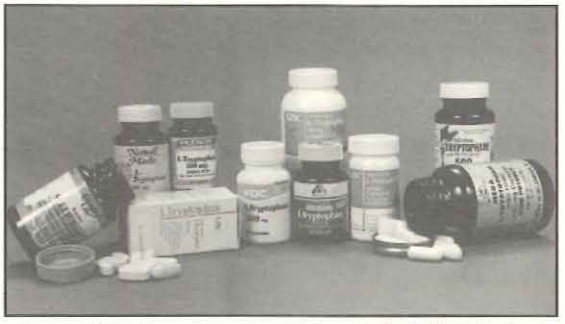
Contaminated Health Food Poisoned Consumers

Contaminated L-tryptophan, a nutritional supplement sold by grocery stores, health food stores, drug stores and many other retail establishments, sickened over 1,500 Americans and killed 27 in the United States. This outbreak of an autoimmune blood disorder was linked to tainted batches of the health food produced by a major Japanese petro-chemical manufacturer called Showa Denko. As a result, the Food and Drug Administration has ordered all L-tryptophan products off the market as of the end of 1989.



Some of the brand names that contain L-Tryptophan.

L-tryptophan, an amino acid, occurs naturally in foods such as milk and white turkey meat. Manufactured L-tryptophan was sold through retail outlets as a non-prescription remedy for conditions including insomnia, pain relief, obesity, and premenstrual syndrome. As an essential amino acid, normally

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Decisions...Decisions...Decisions..

REPORTED "DECISIONS" OMITTING CLIENTS' AND/OR DEFENDANTS' NAMES ARE AS A RESULT OF REQUESTS FOR ANONYMITY.

JANE ROE vs. ABC AMBULANCE, XYZ HOSPITAL, ET AL

Jane Roe was a college professor, the holder of two Masters degrees and an exceptionally bright woman in her early 40's. She spoke two foreign languages fluently and was only a few credits away from obtaining her Ph.D. One evening, she began to feel faint and called a neighbor for help. Her neighbor arrived and promptly called 911, fearful that Roe was having a heart attack. ABC Ambulance arrived to render aid. The paramedic employees of ABC completed a preliminary assessment, established IV lines and attached an EKG monitor. Shortly thereafter, Roe stopped talking and went into cardiac arrest.

ABC employees intubated Roe and transport was begun to XYZ Hospital. XYZ Hospital was unprepared for her arrival. Roe was unloaded by the paramedics from ABC Ambulance. She presented with a distended abdomen and was cyanotic, indicating clearly that a proper airway had not been established. Although the emergency room doctor noticed these conditions and realized that Roe was oxygen starved, a proper airway was not established until approximately 12 minutes after her arrival.

Miraculously, she survived. However, she is now permanently brain damaged, losing forever a promising career in the academic field. She will be forced to reside in a supervised living care facility for the remainder of her life. Her devastating injury was a direct result of failure on the part of the paramedics to establish and maintain a properly opened airway and a failure on the part of the hospital's emergency room doctor and the hospital's E/R personnel to recognize and act immediately to correct this life-threatening condition.

T. Michael Kennedy and Chris Searcy negotiated a $3,625,000 settlement against all defendants. ■

BENJAMIN PERRY vs. PENINGTON WIMBUSH, M.D.

Benjamin Perry, 74, had a total hip replacement necessitated by degenerative arthritis. The surgery was a success but Mr. Perry had some lingering minor pain. His surgeon attributed the pain to benign bone growth around the prosthesis. Mr. Perry was referred to a radiation oncologist, Penington Wimbush, MD, for a series of low dose radiation treatments to discourage the bone growth.

The treatment regimen called for ten doses of 200 rads each to be administered over an extended period of time for a total of 2000 rads. Dr. Wimbush testified that in his long career he had never administered more than 700 rads at a single time. Nevertheless, he ordered a one-time dose of 2000 rads to be given to Ben Perry's hip and thigh area. At the time of the treatment, Mr. Perry felt a mild burning sensation that continued for months.

The radiated tissue deteriorated despite intensive treatment and therapy. The massive dose of radiation burned the muscles and skin around Mr. Perry's hip area, causing severe nerve damage and leaving his leg virtually paralyzed. A very active man before his visit to Dr. Wimbush, Mr. Perry can now barely walk.

Taking advantage of the Florida Malpractice Statutes capping damages, Dr. Wimbush admitted liability limiting Mr. Perry's pain and suffering damages to $250,000. Despite this, William Norton was able to achieve a settlement of $750,000. ■

JANE DOE vs. DR X

Jane Doe, 31, gave birth to a baby girl with a swollen skull (hydrocephalus) and a hole in her lower back (meningomyelocele) . The baby had minimal brain tissue and was paralyzed from the waist down. Her parents requested that the hospital withhold life-sustaining measures, but HRS officials threatened to take the case to court if the baby was not fed. The baby was transferred to Hospice where she suffered from seizures, vomiting and infection. She died nearly three months later.

Mrs. Doe sued her obstetrician, Dr. X, for failing to properly notify her of the potentially worrisome results of a prenatal screening for alpha-fetoprotein. The screening showed an increased risk for birth defects. She did not learn about these results until she returned for a regular check up a month later.

Continued from previous page

She was not referred for appropriate follow-up tests in time. The ultrasound that was ultimately performed showed severe abnormalities in the fetus. By that time, Doe was more than 24 weeks pregnant. It was too late to have an abortion in Florida. Mrs. Doe was sent to an abortion mill in Georgia, but could not go through with the procedure since the pregnancy was now over 26 weeks.

Dr. X claimed that Doe was reluctant to have the prenatal screening and never wanted to end the pregnancy. He did, however, acknowledge his failure to record what he told his patient. Just before trial was scheduled to begin, John Shipley negotiated a $350,000 settlement. ■

PLAINTIFF vs. DEFENDANT and ALLSTATE INSURANCE COMPANY

John Plaintiff, 56, was rear-ended by a vehicle driven by George Defendant. Since Mr. Defendant was uninsured, the Plaintiff turned to his uninsured motorist policy for reimbursement. A liability issue existed since the Plaintiff was attempting to restart his stalled vehicle when the impact occurred. The Plaintiff had been disabled since 1979 for a work-related neck/back injury. He had previously undergone two back surgeries. This accident caused an aggravation of those neck and back complaints. He underwent a third lumbar spine surgery for removal of hardware which had previously been implanted. Allstate argued that the removal of the hardware was a natural progression of the prior injury, whereas the Plaintiff asserted that the surgery would not have been necessary but for the aggravation caused by the accident. The Plaintiff also claimed the accident caused a herniated cervical disc. Allstate's expert disputed the significance of that diagnostic finding. James Nance negotiated a $100,000 settlement for the Plaintiff. ■

ESTATE OF JOHN DOE vs. CLINIC X AND DRS. A, B AND C

John Doe, 49, went to Clinic X complaining of chest pain. He was seen by Dr. A, who suspected his problems were cardiac in nature and performed an EKG. The EKG computer results suggested that, indeed, he suffered from an evolving cardiac problem. Dr. A ignored the analysis and sent him home after ordering some blood work. The blood work was returned the next day, and clearly showed that cardiac enzymes were elevated, indicating an evolving heart problem. These results were read by Dr. B, misdiagnosed, and Mr. Doe was not informed of the problem.

Approximately two weeks later, Mr. Doe returned to the same clinic to be seen by Dr. A and now complaining of numbness in the jaw, a classic symptom of cardiac problems. Again, Dr. A misdiagnosed him and sent him home.

Approximately three months later, Mr. Doe again visited the clinic complaining of chest tightness. He was seen by Dr. C. who read the chest X-ray he ordered as normal. The next day when the chest X-ray was read by a radiologist, the radiologist found that the X-ray showed an enlarged heart, another classic symptom of cardiac problems. Mr. Doe was never informed by Dr. C that the radiologist had found that he had an enlarged heart. He was told that he had flu-like symptoms and sent home.

As a result of the misdiagnosis of Drs. A, B and C and the clinic personnel, Mr. Doe never knew that he had an evolving heart problem and sought no further medical attention. Seven months later he suffered an irregular heartbeat and a subsequent heart attack and died.

Mr. Doe is survived by his wife and two children. During an early mediation, Bill Norton negotiated a $1.7 million settlement for the surviving wife and children. ■

TREZISE vs. TRENT and USAA

Carolyn Trezise, a 65 year old widowed real estate agent, was involved in an intersection automobile accident in West Palm Beach. A van running a red light collided with her automobile resulting in substantial damage to both vehicles. Despite the fact that she was secured in her three-point restraint, her knees went into the dashboard causing severe swelling and bruising. She also had severe bruising on her shoulder and across her chest and abdomen from the three-point restraint. She suffered a bruised heart with no permanent damage other than a change in her EKG. Arthroscopic surgery was required on one of her knees. Nine months after the crash she discovered a lump in her breast. A biopsy revealed the lump to be necrotic fat tissue from the trauma in the automobile accident. Three months later, another lump appeared in the same breast, with the same result. She underwent two surgeries on her breast. Greg Barnhart settled her case for $110,000. ■

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The Meeting Corner:

David K. Kelley

David K. Kelley, Jr., a partner at Searcy Denney Scarola Barnhart & Shipley, P.A., has been with the firm for fifteen years. He joined the firm after having gained substantial experience as an Assistant U.S. Attorney for the Southern District of Florida, handling white collar crime and tax evasion prosecutions. He also served as a Federal Public Defender for the Southern District of Florida, defending racketeering and major federal criminal cases.

A native Floridian, Mr. Kelley graduated with honors from Florida State University in 1972. He graduated cum laude from Ohio State University College of Law in 1975, specializing in tax matters.

Since joining the firm, Mr. Kelley has practiced exclusively in civil and criminal trial matters. He devotes a large portion of his practice to professional malpractice and product liability cases. Over his career, he has received numerous multi-million dollar awards.

Mr. Kelley is actively involved in both professional and civic activities. He has recently concluded a two-year chairmanship of the Florida Bar Ethics Committee for Palm Beach County which regulates conduct and investigates attorneys for ethical and professional misconduct. Mr. Kelley is also a member of the Committee for the Needs of Children.■

James E. Cook

Jim Cook is a Paralegal/ Investigator at Searcy Denney Scarola Barnhart & Shipley, P.A. Brought up in Fort Pierce, he graduated from Indian River Community College.

Mr. Cook began his claims career with the Hartford Insurance Group in West Palm Beach in 1967. He joined Allstate Insurance Company in 1969 working with the West Palm Beach and Fort Lauderdale claim offices. He was involved in all aspects of supervision and management.

Since joining the law firm in 1989, Mr. Cook has worked primarily with David K. Kelley, Jr. in management of personal injury, medical malpractice and products liability cases. His duties include investigation, case resolution and trial preparation.

He is very active as a band parent for the John I. Leonard High School marching band primarily dealing with fund raising and community support. He is also in his fifth year as an all night volunteer with John I. Leonard's Project Graduation.■

Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties.

- -John Milton, 1644

RE-VISITING A PAST SIGNIFICANT CASE:

Record-Breaking Verdict Leads To Safer Highways

One family's tragedy has resulted in enhanced safety for all Floridians. State highways have been made safer in response to a $9,250,000 verdict against the Florida Department of Transportation in the case of a 3-year old girl killed in a bizarre accident.

In January 1986, Brenda Smith of Fort Pierce, was driving on Interstate 95 in Palm Beach Gardens with her daughter, Leslie. A 117 square foot, 250 pound road sign, negligently designed, constructed and maintained dismounted from its support structure and crashed through the car's windshield. The sign sliced Leslie's head in half, killing her before her mother's eyes.

Chris Searcy and Lance Block of Searcy Denney Scarola Barnhart & Shipley, P.A. sued Florida's Department of Transportation on behalf of Leslie's parents, Brenda and Steve Smith, claiming state highway officials could have prevented the accident by properly attaching the sign. The sign structure did not meet the Department of Transportation (DOT) guidelines. It was constructed based on "guesswork," had never been inspected, had fallen on at least one previous occasion and was refastened with improper brackets. The state refused to admit liability and made no efforts to prevent similarly attached signs from endangering motorists on Florida's highways.

The Smiths pursued their claim in large measure to ensure that no similar tragedy would ever befall anyone else. Leslie's death had not been a sufficient impetus to spur the DOT into taking measures to prevent future accidents.

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Revisiting A Past Case - Verdict Leads To Safer Highways...

Continued from previous page.

In February 1990, after four years of delay, costly litigation and not even an expression of sympathy from the DOT, a Florida jury rendered a verdict of $9,250,000. The verdict is believed to be the largest in American history for the wrongful death of a child. The jury ruled that the state's Transportation Department was negligent because it installed the sign with faulty clamps and without testing the sign's ability to withstand wind and road vibrations.

After the verdict, Brenda Smith said, "For the first time since Leslie's death, they have accepted responsibility for what happened. I just hope and pray that DOT does something about their signs state-wide." The publicity generated by the record-breaking verdict led to the realization of Brenda Smith's hopes and prayers.

Within months after the verdict, the DOT changed the way it installs similar signs and ordered tests and random inspections of clamps on highway signs throughout the state. The department inspected existing signs mounted by use of the questionable clamps, replaced or repaired all damaged, cracked and structurally defective brackets and instituted a plan to phase out all use of the extruded aluminum bracket. A uniform mandatory program was established to inspect all single and multi-post ground signs on the State Highway System. That procedure prescribed inspection practices as well as reporting and documentation of all sign inspections.

Everyone traveling Florida's highways today owes a debt of gratitude to Brenda and Steve Smith for pursuing their courageous struggle. Their efforts have helped to eliminate one of the many dangers on our highways.■

Legal Odyssey Concludes With $7.75 Million Settlement...

Continued From Page One

years. The case was tried in Indian River County three times between 1985 and 1988, each time ending in a mistrial.

In 1985, the DeBerrys accepted a $1.5 million settlement from Indian River Memorial Hospital. These funds were used to redesign the DeBerry home to make it wheelchair accessible and user friendly for David so he could continue to live at home. However, these funds could only begin to adequately take care of David's extensive needs...the fight had to continue.

Before the fourth trial in 1990, the case was moved to Martin County because of pretrial publicity. Later that year, the DeBerrys entered into a $500,000 conditional settlement with Dr. Daniel Thornton, David's pediatrician.

In a 1990 Martin County trial, a jury awarded the DeBerrys $12.5 million from Klomp and Doctors' Clinic, a Martin County record verdict at the time. The 4th District Court of Appeal overturned that verdict in 1993, ruling that jurors had improperly been given information on a doctor's prior settlement. A new trial was ordered.

Before the fifth trial began, the DeBerrys rejected settlement offers of $2 million, $3.5 million and $5 million. The fifth trial ended in May after 6 weeks of testimony when the $7.75 million settlement was reached. Defense attorneys had threatened to appeal the case if the jury awarded a large amount to the DeBerrys. The St. Lucie County jurors polled after the announcement of the settlement stated they would have awarded the DeBerrys more than the settlement amount.

The settlement means a secure future for David. The money goes to a guardianship, administered by a judge, for David's benefit. If invested wisely, the money will be sufficient to care for David at home for the rest of his life.

Searcy Denney Scarola Barnhart & Shipley, P.A. made a commitment to the DeBerrys to proceed with this case against all obstacles. That commitment was sustained through twelve years of litigation. Hundreds of thousands of dollars in costs and thousands upon thousands of hours were expended on trial preparation as well as on the numerous trials and appeals. The DeBerrys made a commitment to fight for justice for their son regardless of the time and the toll it has taken on them personally. After reaching the settlement, Gwenda DeBerry said, "When Tom and I felt like quitting, all we had to do was look at our little boy. He's not a quitter. He's a fighter. He has more courage, strength, character and determination than anyone I know."■

Contingent Fees: Keys To The Courthouse

Contingent fee practice has been an essential ingredient in our justice system for more than 100 years. It permits every American, regardless of wealth or social standing, the opportunity to pursue a valid claim against even the most powerful corporation or individual. In large measure, it has made our justice system the envy of the world. It breathes life into the democratic ideals that no one is above the law and everyone must be accountable for his or her behavior.

The contingent fee is perhaps the one device in law that gives injured people, no matter what their financial means, an even break in the courtroom against giant corporations and insurance companies. Were it not for the contingent fee, people of the middle class or of low economic means would not be able to have their day in court, a constitutional right which corporations and insurance companies fight hard to eliminate.

The contingent fee puts the middle class on equal footing with the wealthy. Eliminating the contingent fee would price the middle class out of the market for justice and would especially disadvantage women and the elderly. Without the contingent fee system, none but the wealthy and powerful would be able to bear the costs associated with pursuing a claim and receiving just compensation. Often only those whose negligent conduct causes injury would be able to afford quality legal representation.

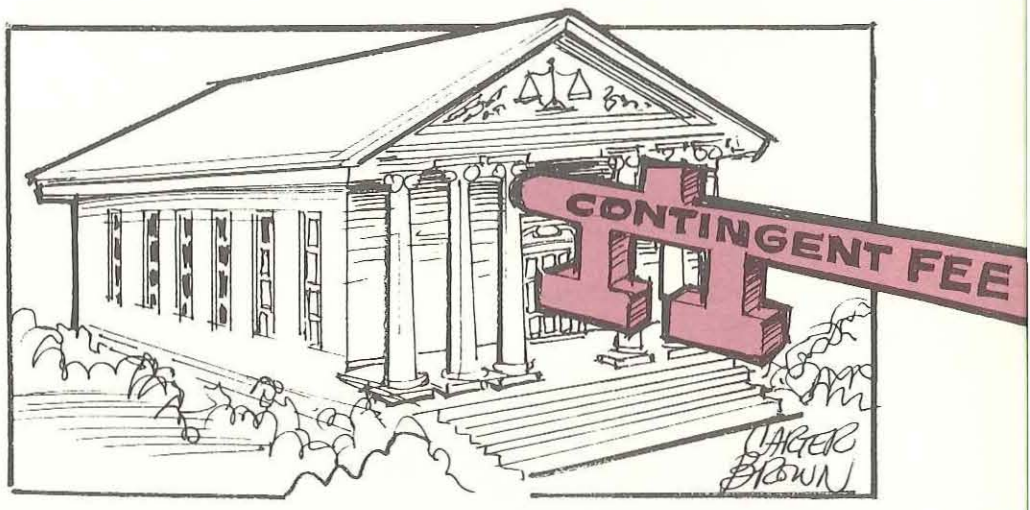
The contingent fee is one of the distinct differences between the United States and countries elsewhere in the world. It is a hallmark of our democratic system. The contingent fee is the "key to the courthouse" for millions of victims of wrongful and careless conduct or defective products.

The contingent fee is the most common form of payment arrangement for plaintiffs seeking representation in personal injury litigation. Instead of billing the plaintiff on an hourly basis, the attorney is entitled to a percentage of the settlement or trial award, usually in the amount of one-third. If the plaintiff does not receive any compensation for damages, the attorney receives nothing.

Over the years, the contingent fee has been attacked by insurance companies, corporate America and special interests such as the American Medical Association (AMA). The contingent fee is a prime target of groups seeking to limit the rights of injured victims. There is no more effective way to undermine our jury system. Eliminating the contingent fee would effectively keep the average citizen from the courthouse.

Those who object most strenuously to contingent fee practice, and now call for regulation or limits, seldom have had occasion to represent the injured who need such a fee agreement. Instead, the contingent fee critics typically are the defendants called on by injured consumers to account for negligence or recklessness.

The attacks on the contingent fee system come from the tortfeasors who have to compensate their victims, not from victims who have to pay their lawyers. The tortfeasors never seek limits on their own ability to pay lawyers or access a defense. They seek only to limit victims. Their mission is to make the already uneven playing field even more uneven.



Businesses and individuals who want to avoid accountability for their negligent and reckless acts are pushing for special protections in the state legislatures and Congress. Whether the wrongdoer seeks to limit liability or to interfere with fee agreements, its goal remains the same: to deny access to justice to the tens of thousands of Americans who are injured each year due to another's wrongful acts.

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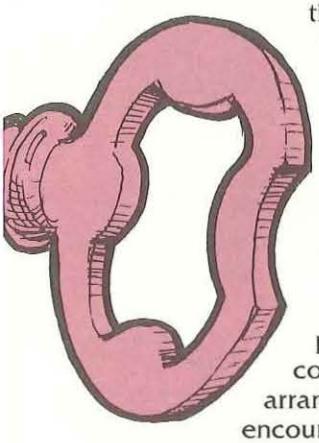
Contingent Fees...*continued.*

(Adapted from an Association of Trial Lawyers of America Publication)

Critics of the contingent fee contend that it encourages attorneys to take on nonmeritorious cases. Simple common sense refutes that claim. Economic disincentive alone precludes attorneys from taking a case where the plaintiff is not entitled to be compensated for injuries. When a plaintiff is not compensated, the attorney is not compensated. The fact that the fee depends on winning provides an incentive to screen out cases with little legal merit. That incentive is lacking with an hourly fee.

A number of studies have also refuted the claim that contingent fees promote frivolous lawsuits. For example, a U.S. Department of Health, Education and Welfare Commission on Medical Malpractice concluded that the contingent fee does not open the courthouse doors to undeserving plaintiffs: "The contingent fee arrangement does not encourage lawyers to accept nonmeritorious cases with a low probability of winning just because the possible recovery is large." While the AMA has been a proponent of limiting the contingent fee, its own Special Task Force on Professional Liability and Insurance concluded: "Regulating (contingent fees) may not reduce the number or severity of suits."



Proponents of tort reform incorrectly argue that the contingent fee increases litigation. In fact, there is no litigation explosion generally. The litigation that accounts for caseload increases when increases have occurred is not litigation brought by plaintiffs using contingent fees.

Personal injury lawsuits do not "clog" the courts. The real increase in litigation has been from businesses suing businesses, not consumers seeking compensation through personal injury litigation. Not only do businesses suing businesses comprise the majority of cases filed in court, but this category also experiences the greatest increase in the number of suits filed year after year.

According to statistics, there certainly is not an explosion of personal injury cases in state courts. The National Center for State Courts reported that in 1992 only 9 percent of the new cases filed in state courts were tort cases of any kind.

If contingent fees were eliminated, the fees charged to plaintiffs would not necessarily be lowered under an hourly agreement. Empirical evidence confirms that, averaging over cases won and lost, the effective hourly earnings of attorneys paid a contingent fee are similar to the hourly earnings of defense attorneys paid by the hour. In addition, a contingent fee provides an inducement for an attorney to be efficient and expeditious. There is a powerful incentive to perform well whereas an hourly fee arrangement can encourage delay, inefficiency and unnecessary action.

The contingent fee helps protect the integrity of the civil justice system. It enables injured victims with strong cases but little economic resources to proceed against far more powerful defendants. As "keys to the courthouse," the contingent fee system provides access to justice for all Americans.■

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.

- -George Sutherland, American Jurist, 1932

Taking... Time to Care

Searcy Denney Scarola Barnhart & Shipley, P.A. works with a large number of community groups. One that we are especially proud to be associated with is the Guardian Ad Litem Program.

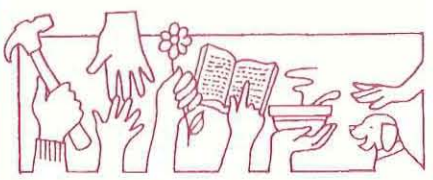
The State of Florida Guardian Ad Litem Program recruits citizens who are interested in working as advocates for children caught in the maze of Florida's social service and court systems. Teachers, retirees, housewives, business men and women, lawyers, blue collar workers and others volunteer their time and efforts to help children in need.

Guardian Ad Litem Programs have been organized in each of Florida's twenty judicial circuits. Every circuit program has a director who overseas the volunteer activities. Each program has at least one attorney to provide legal advice. Several hundred Florida attorneys volunteer countless hours of free legal assistance to this program.

Thousands of Florida's confused and distraught children who have suffered painful and frightening experiences have been guided along a path to a safer and healthier future by their Guardians Ad Litem and Pro Bono attorneys.

There are never enough volunteers to make certain that every child is represented. Additional Guardians Ad Litem and Pro Bono attorneys are needed as more and more children enter the system.

Won't you consider becoming one of them? **For statewide information, call 904-922-5094. To volunteer in Palm Beach County, please call Lois Messer at 407-355-2773.** ■



JCAHO Releases Performance Reports For Accredited Facilities

CONSUMERS SHOULD BE INTERESTED BUT SKEPTICAL

(Excerpts reprinted from Public Citizen's Health Research Group Health Letter)

Joint Commission on Accreditation of Healthcare Organizations (JCAHO) released performance reports on hospitals and other health facilities that participate in its voluntary accreditation program. The reports include ratings (between 0 and 100; 100 being a perfect score) showing the facility's overall compliance with JCAHO's accreditation standards. Also included are separate scores in 28 performance areas related to patient care, medical staff, physical environment and safety, leadership and management, and specific services like emergency care, laboratories, and radiation oncology.

Since JCAHO surveys individual facilities only once every three years, it will be the end of 1996 before reports are available for all 11,000 member organizations, which include hospitals, home care agencies, mental health centers, nursing homes, and ambulatory care clinics.

A Step Toward Public Accountability

Given JCAHO's record of secrecy about survey results, the new performance reports represent a step toward greater public accountability. But, JCAHO points out--and we strongly agree--that this information alone is not sufficient and offers no guarantees about the quality of any provider's care. At best, the reports are a starting point for seeking further information about a facility's services.

Consumers Should Greet JCAHO's Reports with Healthy Skepticism

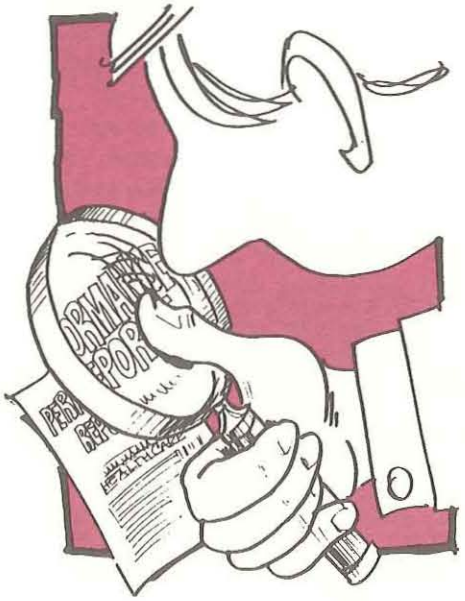
While the new disclosure policy does add to a very limited pool of publicly available data, it should be seen for what it largely is: a public relations ploy. In fact, access to and usefulness of the information are seriously compromised by the following anti-consumer policies:

- The performance reports cost $30 a piece.
- Facilities will be told the identity of each person who requests their performance reports.

Information on Facility Ratings is Only as Good as the Ratings Themselves

A private organization primarily funded and controlled by the industry it monitors, JCAHO is subject to a fundamental conflict of interest not shared by public oversight agencies. As a matter of fact, JCAHO very rarely denies or seriously restricts accreditation of any member facility, including some later found to have serious deficiencies. This tendency is revealed in the new performance reports, which show that 94 percent of all hospitals received overall scores between 80 and 100, and none were rated below 70.

Ratings for the 28 performance areas are more useful than the overall scores, showing greater variation between facilities. However, even here some scores seem inflated compared to what is known from previous years.For example, according to JCAHO's statistical summary of hospital surveys between 1987 and 1989:



- 50 percent of all hospitals failed to adequately review whether appropriate surgery was provided or performed safely and effectively.
- 43 percent of all hospitals failed to adequately evaluate the usage of drugs.

In contrast, the new performance reports for hospitals show that 94 percent received scores between 80 and 100 for "operative procedures," and 92 percent received scores between 80 and 100 for "medication use." Even accounting for changes in standards since 1989, such large discrepancies raise legitimate questions as to the meaning of what is being reported to the public today.

Public Disclosure by JCAHO is Purely Discretionary

While JCAHO may be moving toward greater openness, the fact remains that its disclosure of information to the public occurs purely at its whim. As a private entity, JCAHO is not bound by--and still does not observe--the standards of accountability required of public agencies. The problem is that JCAHO plays a quasi-regulatory role, since the federal government and most states automatically accept JCAHO accredited hospitals as eligible for Medicare and Medicaid eligibility and state licensure. Yet, if JCAHO's new disclosure policy fails to meet the public's needs, the public will have no remedy.

To order reports, call JCAHO's Customer Service Department at (708) 916-5800.

L-Tryptophan...
Continued from Page One

supplied by protein in the diet, L-tryptophan was not considered a drug. It had great appeal for health-conscious consumers who wished to avoid taking drugs for their ailments and was marketed as a miracle health food.

Millions of people had taken L-tryptophan with positive results, but by the mid to late eighties, adverse symptoms began to appear. At the time of the contamination, worldwide sales were estimated to exceed $100 million, with one-third of the market in the United States.

The debilitating illness, caused by contaminated L-tryptophan, had a wide range of ailments including many that are catastrophic. Patients reported extreme fatigue, great pain in muscles and joints, high fever, shortness of breath, hair loss, severe skin lesions and paralysis. Many suffered symptoms so severe that they were hospitalized or could not work.

Doctors discovered unusual concentrations of white blood cells in the patients' muscle tissue. Over 1,500 patients who consumed L-tryptophan were diagnosed as having this potentially fatal autoimmune disorder Eosinophilia-Myalgia Syndrome (EMS). EMS causes respiratory and cardiac failure, muscle atrophy, neurological damage and skin that turns so leathery that blood vessels no longer are capable of carrying blood.

No cure has been found for EMS. The treatment consists mainly of the steroid prednisone which reduces swelling and some of the pain. The condition of a number of the victims is deteriorating and 27 of them have died.

Doctors and researchers initially traced the problem of contaminated L-tryptophan to that produced by Showa Denko K.K., Japan's third-largest petrochemical manufacturer. The company had created a process of genetic engineering which

manufactured the L-tryptophan at an accelerated rate. The substance was no longer derived naturally from organic products, but instead synthesized through biochemical reactions.

In addition, Federal health investigators isolated a chemical compound which they believed tainted batches of the dietary supplement either through the genetic process by which it was manufactured or through poor filtration. Changes in the manufacturing process included changing the filtration process to give the product a whiter, cleaner appearance. Either the genetic engineered bacteria or the lack of filtration resulted in the contamination.

In the 1980's Showa Denko set out upon an aggressive plan to corner the world market of L-tryptophan. By 1989, Showa Denko held 60% of the worldwide market of this nutritional supplement. In 1989, Showa Denko reported sales of all its products at $3.5 billion and profits of $223 million.

Searcy Denney Scarola Barnhart & Shipley formed its own litigation group, headed by partner, David Kelley, specifically to handle L-tryptophan cases. David Kelley represented 26 of the more seriously injured victims of this crippling disorder. Cases were filed in Federal and State Courts. He handled cases as far away as California and Tennessee as well as various jurisdictions throughout the State of Florida. Palm Beach Medical Consultants, Inc. was retained to provide information about EMS.

Showa Denko's defense tactics used early on in the litigation included a motion to dismiss the cases on grounds that the United States court system had no jurisdiction over a Japanese company not doing business in America. They argued since they were in Japan they were immune from prosecution in the United States. Our courts found otherwise and denied their motion to dismiss. The company also tried to claim a statistical relationship between the amount of product sold and the number of those people stricken with the disease. Their argument was that hundreds of thousands consumed the product while only a few thousand contracted EMS. That argument was also unsuccessful in the courts.

After litigation extending over a period of five years, nearly all of the firm's cases have been successfully concluded. The actual amounts of the settlements are confidential.■

SEARCY DENNEY SCAROLA BARNHART & SHIPLEY PA
Attorneys at Law
OF COUNSEL
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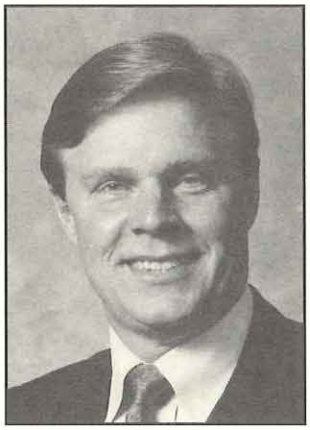
Announcing...

The Jewish Family & Children's Service of Palm Beach County, Inc. honored **Searcy Denney Scarola Barnhart & Shipley, P.A.** as its 1995 "Advocate of the Year." The award was presented by Dale A. Konigburg, president of JF&CS, to **Chris Searcy** who accepted the award on behalf of the law firm. ■

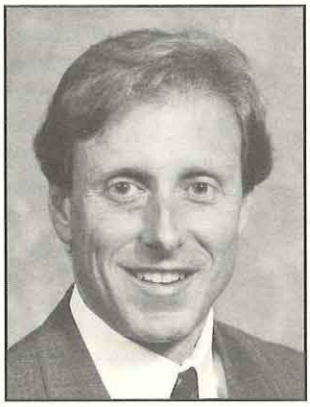
Presenting Award: Honorable Harry Lee Anstead, Justice of Supreme Court, Florida. Co-Receivers of Award: Joel Seldman and Jack Scarola.

Jack Scarola was selected by the Legal Aid Society of Palm Beach County, Inc. to be the recipient of the 1994 Pro Bono Community Law Award. The award was presented at an annual event which was co-hosted by the Legal Aid Society PBC and the Palm Beach County Bar Association. ■

Chris Searcy, president and partner of **Searcy Denney Scarola Barnhart & Shipley, P.A.,** has been selected to receive the1995 Stetson Lawyers Association Meritorious Service Award. The award is presented for outstanding service and dedication to the legal profession and to the Stetson College of Law. ■



Greg Barnhart spoke at the Academy of Florida Trial Lawyers Spring Advanced Trial Skills Seminar in May. His topic: "Arguing Non-Economic Damages (The Art of Persuasion in Explaining Pain)". ■



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Is Law Reform Good For Consumers?

(Excerpts reprinted from Consumer Reports, *May, 1995)*

As part of the Contract With America, Republican lawmakers have advanced a series of bills that would cap punitive damages, discourage "frivolous" lawsuits, and protect drug companies from suits involving approved drugs. At first glance these seem like laudable goals. But, the issue is more complicated.

Congress is considering several legislative proposals to change the American civil justice system. In the area of product liability, many of the proposed changes under consideration would tip the scales of justice against consumers. Here are some of those proposals:

Punitive damage caps. A key provision of a tort-reform bill that passed the House of Representatives in March would cap punitive damages at $250,000, or three times the amount awarded the plaintiff for economic injury, whichever is greater. (Economic injury includes lost wages and medical expenses.)

For all the fuss, such awards are very rare. Nationwide, punitive damages were awarded in product-liability cases only 355 times during the 25-year period from 1965 to 1990--or an average of 14 a year. That's even though consumer products, not including automobiles, are responsible for an estimated 29,000 deaths and 30 million injuries each year. Nor are product-liability cases "clogging the courts," as some allege. Tort filings represent only 9 percent of the courts' civil cases, and only 4 percent of that number are product-liability cases.

Punitive damages are intended to punish egregious corporate wrongdoing and to deter further consumer injuries. Indeed, there is evidence that punitive damages do make products safer: In nearly 80 percent of product-liability cases that resulted in punitive damages, the manufacturers subsequently took safety measures to prevent additional lawsuits.

The cap on punitive damages would, in effect, allow manufacturers simply to budget for future fines as a cost of doing business, significantly reducing the law's previous incentives for them to make products safer.

Pain-and-suffering caps. A related provision in the bill that passed the House would cap pain-and-suffering awards in lawsuits involving doctors, hospitals, medical devices, and drugs at $250,000 --an amount that would vastly undercompensate consumers injured by medical negligence or unreasonably dangerous drugs.

"Loser pays" provisions. In the name of discouraging frivolous lawsuits, Republican lawmakers initially proposed a "loser pays" system that would have required the losing party to pay the winner's legal fees. That provision was later modified to what could be called an "even if you win, you lose" provision. The modified version that passed the House of Representatives stipulates, for example, that if an injured consumer chooses to go to trial rather than accept a settlement offer, he or she could be forced to pay the defendant's attorney fees and costs if the jury ultimately awards a sum less than the settlement offer.

Obviously, many injured consumers would not be willing to accept the financial risk of going to trial under such a rule. Only the very poor, who would have nothing to lose, and the very rich, who could afford to lose, would be likely to press their cases. The huge majority of Americans would, in effect, be gambling their life savings if they chose to pursue a case after being offered a low-ball settlement.

The FDA defense. Under proposed legislation, manufacturers of defective or unreasonably dangerous drugs and medical devices would be shielded from punitive damages if their products had been approved by the U.S. Food and Drug Administration. Though the FDA has been vigilant in protecting the American consumer's interests in recent years, the data it reviews before a drug or device is marketed doesn't always show every problem. Some approved drugs and devices ultimately have proved dangerous, such as the Dalkon Shield intrauterine device and Versed, a sedative.

The irony, of course, is that the very political forces that want drug and medical-device makers off the hook once their products receive FDA approval have also been seeking to make it more difficult for the agency to police the marketplace. The likely result if this legislation becomes law would be a double blow for American consumers: weaker oversight by the FDA and little legal recourse if a drug or medical device harms them.

Though the tort-reform debate appears to be about frivolous lawsuits, what it's really about is corporate responsibility. In the end, the most important question will be who--if anyone-- can be held accountable when American consumers are killed, injured, or defrauded through no fault of their own. ■

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