PICK THE DECISION I

Patient fell and struck her head. Some ten days later, and still suffering from headaches, defendant Diplomate, a neurologist, conducted a CT scan, but the results were unremarkable. He diagnosed post-concussion headache syndrome.

Some 30 days later, Patient experienced what was much later diagnosed as a cerebral hemorrhage. She called Dr. Diplomate, complaining that her head pain had increased. Dr. Diplomate advised her to rest and see him the next morning, which she did.

Patient continued to see other doctors, not Dr. Diplomate, over the next half year. They collectively ordered a multitude of diagnostic tests ... without successfully diagnosing the underlying problem.

Eventually, one of Patient's treating doctors ordered an angiogram to check for a possible micro-arteriovenous malformation (micro-AVM). The micro-AVM was diagnosed soon after and a craniotomy was performed soon after that ... but too late to avoid permanent damage.

The issue is whether a jury could permissibly find that Dr. Diplomate committed medical malpractice in failing to diagnose the micro-AVM during the period he was treating Patient.

Now, here's the first catch. Everyone including plaintiff's own expert agrees that Dr. Diplomate then had no reason to suspect or test for a micro-AVM. Indeed, Patient's micro-AVM was a rare congenital condition found in one percent of the population, and mostly in male patients, and it was not visible on noninvasive diagnostic testing.

Instead, the plaintiff's expert claims that standard protocols required the defendant to test for *other* possible causes of the symptomatology and that, if performed, those tests could have fortuitously led to the discovery of the micro-AVM that the doctor admittedly had no reason to suspect.

Here's the second catch. Plaintiff's expert claims only that performance of the purportedly indicated tests *could have* led to diagnosis of the micro-AVM, not that it definitely would have done so.

The issue is whether such proof is sufficient to raise a triable issue of fact in opposition to defendant Diplomate's motion for summary judgment.

The correct answer is:

(1) "[F]ailure to conduct testing that would have led to the discovery of an unindicated condition does not constitute malpractice."

(2) That the allegedly indicated protocol "might well have pointed to an AVM" is insufficient as a matter of law to establish proximate causation inasmuch as there was "no guarantee" that such course would have led to detection of the AVM and causation would therefore necessarily rest on "speculation."

(3) Plaintiff's expert's opinions "raise[] triable issues of fact."

PICK THE DECISION II

Defendant Black Bear Motors ("Black Bear") manufactured the subject loader, basically a kind of ride-on forklift that could be "used for multiple light construction functions."

It sold the machine in issue to a distributor, which in turn sold it to Quality Construction Equipment, Inc. ("Quality"). Quality was in the business of leasing construction equipment, including loaders, typically to smaller construction contractors that would lease rather than buy the equipment they needed. Quality leased the loader in issue to decedent's employer.

The loader was sold without any kind of overhead protection for the vehicle's operator. But Black Bear also manufactured a "door kit" that served to "enclose the cab and thus restrict airborne material from entering that area." The door kit was essentially an option for which the purchaser would have to pay extra. Here, however, the purchaser passed on the option, with the consequence that the decedent-operator was killed "when a small tree entered the open operator cab, crushing him."

Plaintiff commenced the subject products liability action against Black Bear, the distributor, and Quality. In essence, plaintiff argues that a loader that lacked any kind of overhead protection was not reasonably safe for its intended use of lifting heavy materials, and also that such was a proximate cause of decedent's fatal accident.

Black Bear responds that there were up to 150 different attachments that could be added to the loader, that it could hardly sell the machine with all 150 attachments (and that no one would then buy it), and that it was up to the purchaser to determine which were needed for his or her intended use of the machine.

Plaintiff answers that such might make sense when the user is also the purchaser and is thereby in the position to intelligently assess what safety devices are reasonably required, but that such rationale makes no sense at all when, as here, the user is not the purchaser and has no opportunity to decide what options are warranted.

The issue arises during the trial itself, where the question arises as to whether the jury should be told,

a) a product is not defective if, "(1) the buyer is thoroughly knowledgeable about the product and its use and is actually aware that the safety feature is available; (2) there exist normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment; and (3) the buyer is in a position, given the range of uses of the product, to balance the benefits and the risks of not having the safety device in the specifically contemplated circumstances of the buyer's use of the product," or, alternatively,

b) a product is judged by its condition as of the time it leaves the manufacturer, and the question is simply whether the loader was reasonably safe at that time — "that is, if the product is so likely to be harmful to (persons, property) that a reasonable person who had actual knowledge of its potential for producing injury would conclude that it should not have been marketed in that condition." [NYPJI 3d 2:120]

The correct answer is:

(1) Principle A, not principle B, should be charged.

(2) Both principles should be charged.

(3) Principle B, not principle A, should be charged.

(4) Get the parties to collectively draft and agree upon the jury charge.