thor, Assemblymember Blanca Pacheco, D-Downey, told the Assembly Public Safety Committee.

Pacheco referenced a widely cited 2020 National Judicial College survey that "revealed a majority of the judges feared for their safety and desired enhanced protection." She also noted research from the U.S. Marshals Service, which issued a new warning last week about growing threats against the federal judges it protects. According to figures published by the service, the number of threats against the judiciary have [illegible] California Judges Association lobbyist Cliff Costa told the committee. "You heard the numbers that Assemblywoman Pacheco has mentioned. Let me say that that is more than five times the amount of threats that occurred just a decade ago. Just recently Supreme Court Chief Justice John Roberts remarked and noted the dramatic increase of threats against the judiciary."

But George Parampathu, legislative attorney for

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announced the additi
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Montoya ruling shifts the burden on causation in medical malpractice and beyond

By Benjamin T. Ikuta and Michael J. Jeandron

On Friday, March 21, 2025, the Second District Court of Appeal, division 3, published *Montoya v. Superior Court of Orange County* (Cal. Ct. App., Feb. 28, 2025, No. G064459) 2025 WL 654642. It is an important opinion on burden shifting when it comes to causation. In short, when a defendant's negligent omission makes it uncertain as to specificity or the extent of a plaintiff's injury, the burden shifts to the defense to prove causation.

While *Montoya* is a medical malpractice case, it is an important opinion that will impact any civil case where an omission results in an inability to assess the level of harm. It is the first opinion to assess burden-shifting in causation in decades and criticizes much of the language of *Thomas v. Lusk* (1994) 27 Cal.App.4th 1709, including portions of *Thomas* that categorized the burden-shifting on causation as a "narrow exception."

In *Montoya*, after a patient's heart surgery, the patient had symptoms suggestive of a stroke. The defendant cardiothoracic surgeon did not call a code stroke or order a CT Scan. Over 10 hours later, the patient finally had a CT scan. By that time, the stroke had advanced too far and it was too late to do a thrombectomy. Due to the delay, the patient suffered catastrophic injury with an inability to communicate or move one side of her body.

Plaintiff's stroke neurology expert opined that had the CT scan been done earlier, it would have led to a "better outcome." But since the CT was never done, "[t]o what extent she would have been better is unknowable."

The trial court denied the plaintiff's request for a special instruction on causation, seeking to shift the burden to the defense to prove that the physician's negligence *did not* cause the patient's harm. In doing so, the trial court commented that "there aren't many . . . burden-shifting cases." Ultimately, the trial court agreed with Defendant that such an instruction was improper as it would require every medical malpractice case involving an omission to use a burden-shifting instruction.

The Court of Appeal reversed by way of a petition for writ of mandate, finding that the trial court erred in refusing a special instruction. The court first relied on the California Supreme Court's decision in *Haft v. Lone Palm Hotel* (1970) 3 Cal.3d 756. *Haft* involved a wrongful death action where a woman's husband and son died in an unwitnessed drowning at a hotel pool. The hotel failed to provide a lifeguard and was unquestionably negligent. At trial, the jury found in favor of the hotel on causation. The California Supreme Court reversed, holding that "when the defendant's negligence makes it impossible, as a practical matter, for plaintiff to prove 'proximate causation' conclusively, it is more appropriate to hold the defendant liable than to deny an innocent plaintiff recovery, unless the defendant can prove that his negligence was *not* a cause of the injury."

However, following *Haft*, there was a relative dearth of case law despite the importance of the burden-shifting issue. Two cases with very similar fact patterns in the 1990s came to opposite results and analysis of *Haft*. First came *Thomas*

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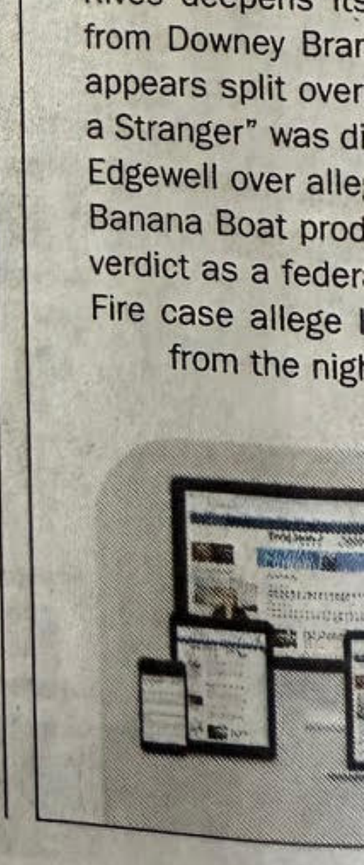

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But *Kelo* did warn against the use of the Fifth Amendment's "public use" language as a pretext. The question is what that meant. Several attempts have been made to get the Supreme Court to address that issue. So far, to no avail. *SCLS Realty* provides the courts with a new angle. In that case, the property owners planned to convert their 31-acre parcel of vacant land into homes for low- and moderate-income families. The property is zoned for medium-to high-density residential development. The Town's Comprehensive Community Plan agreed, noting the need for more such housing.

The property owners had a plan to develop a 216-unit residential project designed for less affluent residents of the Town – on property properly planned and zoned for such use. More than that, the need was apparent. Only 8% of the housing in the Town is affordable for the average resident.

That's when it all hit the fan. It turned out that the mayor was not a fan of this proposal and wrote a letter to the planning board expressing his strong opposition, listing the usual issues that opponents of such projects raise: traffic, drainage, influx of students into the local schools, and general "chaos." He promised to use "all the power of government" to stop the project. The only thing that would dissuade him was if the property owners abandoned their affordable housing project and replaced it with a neighborhood of traditional single-family homes designed for a more affluent clientele.

Led by its mayor, and apparently recognizing that state and local land use laws permitted (even encouraged) the planned project, the Town announced that it would invoke the power of eminent domain to condemn the land for a new municipal complex for a new police station, fire station, and city hall.

Here is where the subject matter of today's column comes in. The property owners claim that the eminent domain action is a sham and the proposed municipal facilities a mere pretext to stop the provision of modest housing. Why? The Town had no plans for this new government center. Nor was there any evidence that it had ever studied or considered such a project or had budgeted any money to pay for the property acquisition or facility construction. Neither the police chief nor the fire chief had expressed a need for new facilities. No engineer had studied the site for the Town to determine whether it was appropriate for the suggested project.

When any government agency is considering employing the power of eminent domain, many things precede the actual exercise of that power. Remember, as one court expressed it, "The power of eminent domain, to that of conscription of man power for war, is the most awesome grant of power under the law of the land." *Winger v. Aires*, 89 A.2d 521, 522 (Pa. 1952). Thus, public works projects involving the use of eminent domain to compel the sale of property to the government are preceded by public studies and hearings ("transparency," in the argot of today). None of that happened.

Instead, in the course of intemperate opposition to a low-income housing development, the mayor unleashed a rant about doing anything necessary to stop the project, including condemning the property. No hearings. No studies. No public input. Merely governmental ukase. And they did it in secret. Somehow, the Town – without notice to the property owners – "took" the title to the property and transferred it to itself. Then it told the owners that if they did not vacate the property they the way the eminent domain process works anywhere in this country.

The immediate result was suit by the property owners claiming that the new government center was merely a pretext to allow the Town to throw a monkey wrench into the progress of this development. The next thing that happened was that a local judge issued a temporary restraining order compelling the Town to return title to the property owners and stop threatening them, pending a full hearing at a later date.

My best estimate is that pretext is going to be the first big inroad into the *Kelo* holding. And this case seems to have excellent facts to tee up the issue. The Supreme Court warned that its *Kelo* holding should not be used as a pretext to push the limits of the "public use" restriction on eminent domain. Whether this is the case to do that or whether something ahead of it in the first is something we will have to wait to see.

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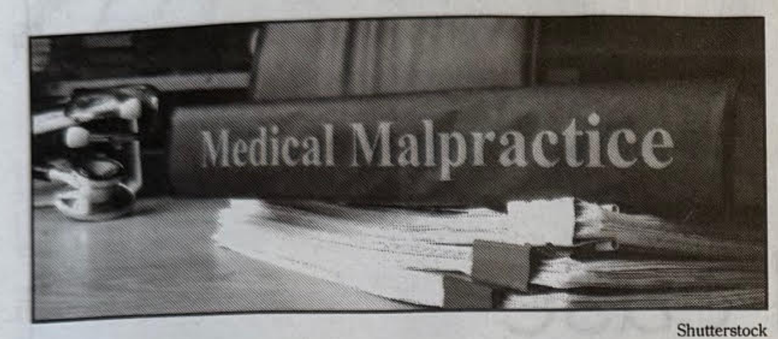
Montoya ruling shifts the burden on causation in medical malpractice and beyond



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v. Lusk (1994) 27 Cal.App.4th 1709. *Thomas* involved a legal malpractice case where the underlying case involved a case against a product manufacturer after an employee was injured due to an allegedly malfunctioning hammer. The non-party employer initially retained the hammer but, at some point, it became lost. The employee's former attorney failed to request the hammer on a timely basis when it could still be located.

In a confusing opinion, the First District Court of Appeal found that the trial court erred in providing a *Haft* instruction. While the Court of Appeal admitted that proving causation was made more difficult by the loss of the hammer, the primary basis for the reversal appears to be that both the employee and the nonparty employer had access to the hammer before it was lost. In doing so, the *Thomas* court stated: "The essential principle underlying this narrow exception to the usual allocation of proof is that the burden of proving an element of a case is more appropriately borne by the party with greater access to information."

The second case was *Galanek v. Wismar* (1999) 68 Cal.App.4th 1417. *Galanek* was also a legal malpractice case where, in the underlying case, the plaintiff was allegedly harmed by a seatbelt defect. Her first attorney failed to inspect the vehicle before it was sold to a third party despite being provided notice. The Fourth District, Division 1, reversed the trial court's granting of a nonsuit on causation. As *Galanek* held, a defendant "cannot be insulated from personal liability by the very act of professional negligence that subjects him to liability." However, *Galanek* did not directly address or criticize the contrary language and holding in *Thomas*, despite containing a relatively similar fact pattern.

The *Montoya* opinion cleans up this muddy area of law and criticizes the errant and incorrect analysis in *Thomas*. The Court explained: "We question some of the rationale in *Thomas*. In particular, we disagree that the 'essential principle' in *Haft* was allocating the burden to the party with the best access to the evidence. In *Haft*, there was no evidence."

Instead, "when critical evidence of causation does not exist, *and the defendant breached a duty to create or preserve that evidence*, defendant should bear the burden of rebutting a presumption of causation. The defendant should suffer the consequences of his own breach, not benefit from it."

Both at the trial court level and the Court of Appeal, the defense repeatedly argued that the opinion would have to be given in every medical malpractice case should the burden-shifting instruction be given. However, *Montoya* explains that the floodgates would not open in every medical malpractice case involving a negligent omission. The opinion outlines the criteria that a plaintiff in a medical malpractice case must show before the instruction is given. First, the plaintiff must show that the defendant was negligent in the omission. Second, the plaintiff must show a prima facie case of causation in that there is reason to believe that the omission caused some level of harm. And third, the plaintiff must show that had the omission not occurred, evidence *would* have existed to show the extent of the plaintiff's harm.

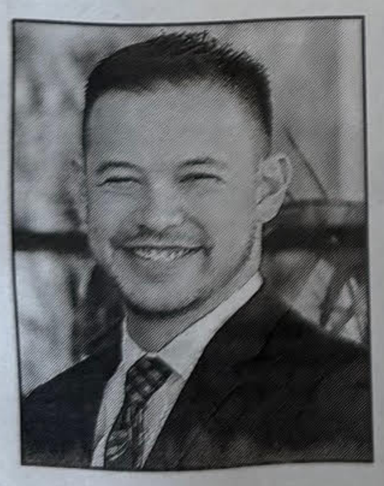
As to the second element on the prima facie case of causation, *Montoya* explained that: "[t]he requirement to make a prima facie case of causation, though it must be tempered by the fact that the defendant's breach caused an absence of evidence, will prevent parties from taking mere 'shots in the dark.' There must be *some plausible* reason to believe that the defendant›s negligence caused plaintiff›s harm."

The opinion then states: "The third requirement, that the missing evidence be critical to proving causation, further serves to limit the cases to which burden shifting applies. In many instances, for example, the failure to perform a particular diagnostic test will not critically impair a plaintiff's ability to prove causation because causation can be determined by other evidence."

The Court of Appeal also provided a hypothetical where if the negligent omission was the failure to perform a thrombectomy rather than ordering a CT scan, such an instruction would not be appropriate.

Thus, burden-shifting will not apply in every case involving a negligent omission. A plaintiff must still show a connection between the negligent omission and the harm. However, where the negligent omission makes it impossible to prove damages *with specificity* due to missing evidence, the defendant will now bear the burden on causation. This opinion not only provides much-needed clarity as to these burden-shifting issues, it will have a far-reaching impact on civil cases involving missing causation evidence.

Benjamin T. Ikuta *is an attorney at Ikuta Hemesath LLP, where he concentrates his practice entirely on medical malpractice on the plaintiff side.* **Michael J. Jeandron** *is a partner and personal injury trial attorney at Roberts | Jeandron Law. Both attorneys successfully sought publication on behalf of CAOC of Montoya v. Superior Court.*



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