

Concussion Testing  
Prevent Medical Mistakes  
Police Violate Citizen Rights  
Drug Manufacturers Beware  
Serials Lessons

03.15

**at issue: Your Kids'  
Safety**



**thinking**  
Connecting our Community  
with Current Issues



## Protecting our Kids from Risks in the 21<sup>st</sup> Century

— Ted Schmidt

Both as a lawyer and working with youth in our state soccer program I see far too often how easily kids and young adults can unwittingly be victimized by those older and wiser. In today's world, the avenues of vulnerability are many and more complex than ever. Education can go a long ways towards prevention. When all else fails, kids and their parents often have legal recourse sometimes criminal and even more often civil.

### THE RISKS ARE MANY, BUT THE THREE MOST PREVALENT ARE:

1. Alcohol and drug related injuries and death
2. Sexual assault
3. Hazing

### HERE ARE SOME HELPFUL RULES FOR YOU AND YOUR KIDS TO FOLLOW TO AVOID THE RISKS.

1. Never go to parties of any type alone; always go with a group of trusted friends.
2. Never drink anything handed to you that you didn't either pour yourself or watch poured. Never drink the "jungle juice" or mixed punch at parties.
3. Never leave what you are drinking unattended.
4. Keep an eye on each other in your trusted friend group. If a friend appears intoxicated, uneasy, and/or backed in a corner, rescue them and take them home before something happens you regret.
5. Never, ever should any child or young adult be alone with an adult coach, teacher, church or scout leader or anyone else not a parent. A child should never be alone, one on one in person, on the phone, texting or otherwise with these individuals. This is how sexual predators strike.

So what if the unthinkable happens and you or a loved one are injured in a car crash, assaulted, raped, humiliated or hurt during initiation demands? What if a loved one is killed as a result?

There is often at least one, if not two avenues to pursue. Criminal charges may be brought which could result in jail or prison time for the perpetrator, payment of fines, and restitution.

Almost invariably the harm caused was at least in part due to the carelessness of someone supervising the person providing the alcohol or drugs, the car to drive or the actual perpetrator of the harm. If someone is negligent in serving alcohol to a minor or in supervising employees and volunteers who take advantage of kids they can be held responsible to pay the victims money damages for the injury, emotional distress, pain and humiliation. The key in these cases is determining if there is insurance to cover the improper conduct.

Often when the person primarily responsible for the harm has no insurance or inadequate coverage it is important to fully investigate the matter to determine the insurance coverage for all those with some level of responsibility for the harm. These cases may involve negligent training, failure to have and enforce proper rules, negligent supervision of employees, failure to do background checks and even failure to educate parents and kids in their care regarding how to avoid the risks.





# BASELINE CONCUSSION TESTING A MUST FOR ALL YOUTH ATHLETES

— Ted Schmidt

No one is surprised that tackle football players experience concussion injuries. More recently, however, we have learned that virtually all athletic endeavors, and particularly the more popular sports like soccer, basketball, baseball, softball and lacrosse, each present some level of risk for concussion injuries.

We now know that the brain can be contused and damaged not only from a single significant blow, but by repeated, softer impacts, such as heading a soccer ball. We know that even players with helmets take blows the helmet cannot totally absorb and that players injure their head falling to the ground, striking goal posts, and other players' heads with and without helmets in their respective sports.

We have also learned that any time a youth athlete strikes their head and experiences any symptoms of injury (head pain, headache, dizziness, blackout, vision blurred, or cognitive deficits), they must be taken out of competition and practice immediately and should not be allowed to return until after they have been cleared by a doctor.

How can the doctor have some level of certainty that a child has recovered from a concussion, or whether or not they even sustained one in the first place? Often, nothing shows up on x-ray, sonogram, CAT scan or even MRI, yet there is an injury. Certainly a physical exam which includes a careful history, ear and eye responses as well as reflex and cognitive tests is primary. But there is now a new and inexpensive tool being recommended for all kids who play sports. A tool that many believe vastly improves our ability to determine the existence, severity, and duration of a concussion.

This tool, developed by a neurologist and neuropsychologist, is called Baseline Concussion Testing. Arizona high schools now administer this test to their athletes free of charge. However, it would be far more beneficial if our kids took this test at age 10. Those administering sports programs are beginning to recognize this and are offering the testing for younger ages. Tucson Soccer Academy and GotSoccer, for example, offer the testing for less than \$10.

The test only takes 30-45 minutes to complete and can be done online. It involves computerized assessments that measure Reaction Time, Memory Capacity, Speed of Mental Processing, and Executive Functioning of the brain. They also record baseline concussion symptoms and provide extensive information about the athlete's history with concussions. Ideally a child would repeat the test annually for comparison and most definitely repeat it if it is suspected they suffered a concussion.

The potential long-term effects of concussion injuries not properly recognized and treated can be tragic. Knowing that our kids may face life-long learning disabilities, chronic headaches and psychological problems should lead us all to be vigilant. Vigilant in assuring our kids receive Baseline Concussion Testing at an early age, vigilant in assuring they are immediately pulled from play when an injury is suspected, and vigilant in assuring they are properly examined and screened by a medical doctor and do not return to play unless and until it is with the doctor's blessing.



Find out more about Baseline Concussion Testing at:  
[www.tucsonsocceracademy.com](http://www.tucsonsocceracademy.com)  
[www.gotsoccer.com](http://www.gotsoccer.com)



## Take Charge of Your Medical Care to Prevent Dangerous Medical Mistakes — Jim Campbell

Modern medicine has been broken down into the never ending referral to specialists and the ordering of tests. As a result, the care of the patient becomes secondary to the referral and the next big test.

For example, Jane Patient visits her doctor and tells her, “my leg hurts, and I am having problems breathing.” (It used to be Jane’s doctor was simply “her doctor.” Now, we know them as PCP’s or primary care doctors.) Jane’s PCP does a brief exam, and she discovers the patient’s heart is also beating irregularly. So, the PCP orders Jane to see a cardiologist. Jane sees the cardiologist, and of course, focuses on her heart and orders heart tests. All the while, a deadly blood clot is continuing to travel from her leg into her lungs. Because the PCP washed her hands of her patient, and because the cardiologist does not focus on the lungs, nobody investigates whether she is suffering from a blood clot. Sadly, Jane passes away the next day from the blood clot clogging her lungs.

In another real world example, John Biker visits his primary care doctor complaining of pain in his groin. His doctor sends him to an urologist for further evaluation. The urologist orders a CT scan. John does not hear anything from anyone, and he assumes all is well. Several months later, the pain returns but much worse. Again, John goes to the urologist. This time, the urologist looks in his chart and finds the CT scan results were sent to him, which show John has testicular cancer, and it likely has spread because nobody reviewed the CT scan report.

Why are these, and many other similar health system failures happening? Refusal by doctors to treat the whole patient and communication failures.

First, doctors are quick to say, “well this is not a heart (lung, GI, liver . . .) problem, so I am done here.” The patient is shuttled on to the next doctor who will hopefully address their medical problem before it is too late. This is especially true in the hospital setting.

Next, information is only helpful if it is communicated. All the wonders of modern medical testing don’t do a bit of good unless the results of the test land in the right hands and are actually appreciated. Otherwise, it’s simply a positive test result sitting in the bowels of some computer database or the bottom of some doctor’s inbox. All this is made worse by the chaotic switch to electronic medical records as mandated by Medicare.

Unfortunately, with more specialists ordering different testing from outside providers, communication breaks down all too frequently. The patient is not told critical information about their health, and they are injured as a result.

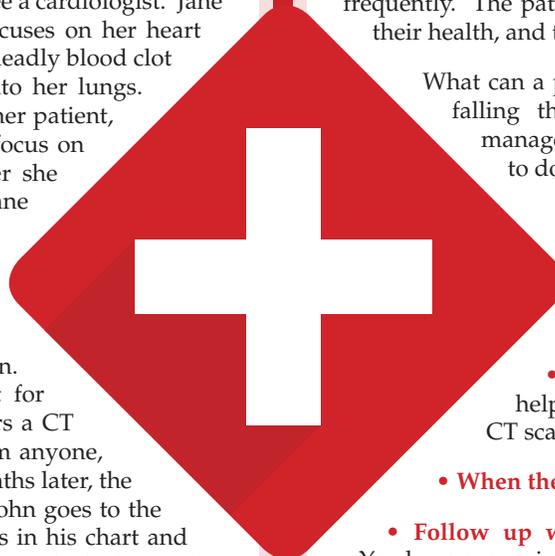
What can a patient do? To prevent your health from falling through the cracks, patients must take management over their own care. Here is how to do this:

- **Keep a health journal.** In the journal, write down the following:
  - **Your problems:** describe when and what hurts, swells, or skips a beat.
  - **The tests** the doctor is going to run to help diagnose your problem, i.e. angiogram, CT scan, X-Ray, colonoscopy, blood work.
- **When the tests results will be done.**

- **Follow up with your doctor for your test results.**

You have every right to see the results of any test run on you. You need to get these results and read them. Even though you probably won’t know what it means, you can then call your doctor and ask him what the report means. This will force your doctor to look at your results, and hopefully act on it if follow up is needed.

- **What’s Next:** What is the treatment for my condition? If your problem is not solved, ask what is next, and repeat the above until you get the answers you deserve.





# WHEN THE POLICE VIOLATE CITIZEN RIGHTS!

— Matthew Schmidt

Recently, law enforcement agencies and individual police officers across the country have been the focus of substantial public scrutiny. Claims of excessive use of force, discrimination and abuse often ending in death to a private citizen appear to be on the rise. In Missouri, an 18-year-old black man was fatally shot by a police officer under very controversial circumstances. In New York, another police officer was caught on tape placing a black man in a choke hold that ultimately killed him, after the man was arrested for selling cigarettes on the street. In Cleveland, Ohio, police officers shot a 12-year-old boy, mistaking a toy gun for a real one.

This has been a concern locally as well. In Tucson, a police officer in riot gear was caught on video violently slamming an unarmed and harmless young woman over a metal frame. In another incident, two Tucson Police Department officers shot and killed a 28-year-old man inside an apartment in the middle of the night in response to a report that an evicted tenant was still staying in the apartment.

Whether you side with the police or the victims' families everyone seems to agree that if police officers use more force than the law allows or overreact to a situation resulting in serious injury or death to an innocent victim, the police ought to be held accountable.

This said, in the majority of these cases, no criminal charges are brought against the police officers, nor are they disciplined by their department. One common misconception amongst many people is that without a criminal charge or discipline by the department, these officers and their departments cannot be held accountable.

Au contraire! Section 1983 (42 U.S.C. § 1983: "Civil Action for Deprivation of Rights") is a federal law that allows citizens to bring civil lawsuits against officers and departments for breaking federal law and violating the constitutional rights of citizens. This not only allows private lawsuits for use of excessive force, but for any harm caused by any constitutional violation, including violations concerning the First and Fourteenth Amendments, the Due Process and Equal Protection Clauses, cruel and unusual punishment and discrimination, to name a few. It also provides a claim for prisoners who have been harmed by their guards or teachers in the prison who are not provided guard protection. Often this federal law is the only remedy for citizens who have been injured by a government agent or entity's wrongdoing.

Section 1983 can provide the disincentive needed to change an officer's conduct or a department's policies for the better. Civil damages can include the value of the lost relationship between the deceased or injured person and a family member, pain and suffering, emotional distress, medical expenses, attorneys' fees, and if the officer's conduct was really bad, punitive damages. Because the government is vicariously liable for the conduct of its employees, it is the government that is responsible for paying the damages. Section 1983 assures those harmed are fairly compensated and the government is held accountable.



# DRUG MANUFACTURERS BEWARE: BETTER TELL CONSUMERS WHAT YOU TELL DOCTORS

— Ted Schmidt



In 1984 and 1987 the Arizona legislature abolished the very core of strict products liability law in Arizona. The Uniform Contribution Among Joint Tortfeasors' Act and Products Liability legislation eliminated the ability of an injured consumer to recover damages against any "link in the chain of distribution" of the product.

The whole idea behind strict products liability when it was adopted in Arizona and across the country was that the industry as a whole ought to bear the burden of compensation to those harmed by defective and unreasonably dangerous products. Thus, an injured consumer could sue the designer, manufacturer, distributor and/or retailer of the product and recover damages for all their injuries from any one of the links. With so many foreign made products being sold in this country, it made sense that an injured consumer could sue Home Depot for a defective lawnmower and would not be required to sue the Chinese manufacturer and wrestle with jurisdictional and venue issues in order to be compensated.

This is no longer true. The Arizona statutes require that no party be responsible to pay anything more than its particular percentage of fault in creating the defect. If you can't prove Home Depot designed or was at least aware of the defect when it sold the product you can't recover against it.

Now a new twist: based upon the same rationale the Arizona Court of Appeals in *Watts v. Medicis Pharmaceutical Corp.*, 705 Ariz. Adv. Rep. 19 (App. Div. I, January 29, 2015) (J. Gemmill) has rejected the continued vitality of the "learned intermediary" doctrine.

Since 1978, the law in Arizona has been that if a product warning is given to a learned intermediary (e.g., from the drug manufacturer to the doctor prescribing the medication) the responsibility for delivering that warning to the ultimate consumer falls on the learned intermediary. For example, the patient that is injured due to side effects from a drug may not sue the manufacturer of the drug for failure to warn if a proper warning was given the doctor prescribing the drug.



*"In today's world, where drugs are regularly advertised in the media, consumers are more likely to rely upon direct representations by the manufacturer . . . and consequently be misled by what is represented or omitted in the advertisements"*

The Arizona Court of Appeals in *Watts* made note of the fact that in today's world, where drugs are regularly advertised in the media, consumers are more likely to rely upon direct representations by the manufacturer, have more input with their doctors as to which drugs will be prescribed and consequently be misled by what is represented or omitted in advertisements. More importantly, now that a manufacturer can only be held responsible for its percentage of fault, there is no good reason to give the manufacturer a complete pass just because it communicated something to the doctor that should have been communicated directly to the consumer.



# SERIAL'S LESSONS

— Dev Sethi

Serial has become the most popular podcast ever. The installment series explores the story of the 1999 murder of Hae Min Lee, an 18-year old high school senior and the trial of her former boyfriend, Adnan Sayed, who is serving a life sentence. In the end we are left with many questions and only a little certainty. Here are some lessons learned.

## TELL YOUR CLIENT'S STORY.

The prosecution defined Adnan as a deceitful character. But what the prosecutor framed as duplicitous behavior was, when you hear the entire picture told, the average behavior of a first generation immigrant child. His trial lawyer, Christina Gutierrez, missed an opportunity to educate the jury on the cultural overlay of Adnan's life. His lawyer allowed an unflattering narrative to be imposed onto Adnan without affirmatively telling his story.

## MEMORY IS A FUNNY THING.

Very early in the story, our guide Sarah Koenig, comes to a pretty important conclusion. People forget things; memory is unreliable. Take this test -- pick a random day two weeks back. Retrace your steps...precisely. How confident are you? Or this -- pick an important day in your life...wedding, graduation, death of someone dear, a day of note. How certain are you about exactly (exactly) what happened and when. We would be wise to keep this in mind and to educate the jury on this reality.

## SIMPLICITY IS KEY.

It's less important to show off all your knowledge than to directly, clearly, and concisely share what is important. Gutierrez' treatment of the cell phone towers is an example. They probably mean something...and it is probably helpful to the defense. But by the time she is done presenting the evidence, the importance is lost and buried. Be clear with what is important and why it matters.

## SHOW, DON'T TELL.

Another brilliant stroke in Serial is the show, don't tell approach. Facts are revealed in an organized structure that leads to a satisfying, "Ah ha!" moment just before Ms. Koenig wraps it up for us -- in the rare instances that she can. No one likes to be told what to do or think. Try cases the same way. Allow jurors to discover the answers -- that you want them to -- on their own by presenting the facts. Don't force a conclusion on them.

## BE ON YOUR BEST BEHAVIOR.

By Serial's account Adnan's first trial was going very well for the defense until a mistrial derailed it. The judge declared a mistrial after Ms. Gutierrez got into an argument with the judge, which was overheard by the jurors. In the heat of battle, it is important to remain mindful of your behavior. It's not an overstatement -- had Christina Gutierrez not lost her temper in court, Adnan's life could have been completely different.

## KEEP YOUR EYE ON THE BURDEN OF PROOF.

The importance of reasonable doubt, and the relevant jury instructions, got short shrift from the defense. Jurors come to the courthouse uncertain of their job and unclear of their duties. An effective trial advocate must take time to make clear both what the jury has sworn to do (the law) and what they want it to do (the result), and they must make it clear that the two are one and the same.

As a post script, in February 2015, the Maryland Court of Appeals granted Adnan leave to file a renewed appeal. Regardless of the outcome, the University of Virginia College of Law Innocence Project is filing a request to have DNA and other physical evidence examined, some for the first time.

For entertainment's sake alone, the podcast is worthwhile, but if you keep your ears open it will teach practical and valuable lessons. That much I know. What I still don't know is whether there was a pay phone at the Best Buy.

## Happenings

Once again, we are proud to announce that Kinerk Schmidt & Sethi has been named a **Tier I** law firm by U.S. News and Best Lawyers. Along with that honor, Burt Kinerk, Ted Schmidt, and Dev Sethi have all been named to the 2015 Best Lawyers list in the areas of personal injury representation, products liability and medical malpractice.



### Jim Campbell

**Jim** was recently honored as being one of "Arizona's Finest Lawyers." Arizona's Finest Lawyers recognizes lawyers demonstrating long-term excellence in their field. Jim was selected for his representation of his clients injured by medical malpractice. Jim's Arizona's Finest Lawyers profile can be found on its website.

### Matt Schmidt

**Matt** was recognized by the *Arizona Daily Star*, in partnership with the Tucson Hispanic Chamber of Commerce as a rising leader as part of its 40 Under 40 panel of honorees. Matt's success on behalf of his clients, along with his work as a writer and educator, and his community service, especially with Big Brothers/Big Sisters and Old Pueblo Rugby Football Club, were highlighted at the awards ceremony. Congrats, Matt!



### Dev Sethi

**Dev Sethi** has been appointed to the Arizona Supreme Court's Task Force on the Rules of Civil Procedure. The Task Force is currently reviewing the Arizona Rules of Civil Procedure to restyle, simplify, and clarify the rules. It is also working to bring them in step with the federal rules or identify specific intent for differences. The Task Force will work through 2015 and deliver a Rules Petition to the Arizona Supreme Court in January 2016. Between now and then Dev will be reaching out to get practitioners' input. If you would like to be involved and be heard, get in touch with him at [dsethi@kss-law.com](mailto:dsethi@kss-law.com).



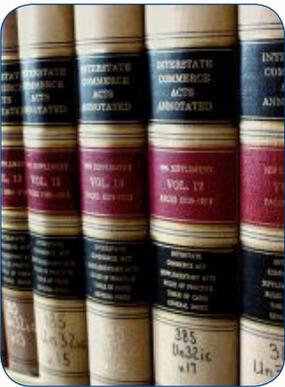
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**We are dedicated** to providing the strongest representation for our clients in a wide range of cases involving serious injury or death. We are grateful for the opportunity to work with referring lawyers from Arizona and around the country. We appreciate the trust those lawyers have in allowing us to assist their clients. We welcome the chance to talk. If you have a case to discuss or simply want to know more about us, please give us a call.

Are you interested in our thinking? If you would like to be added or removed from our mailing list for the KSS newsletter, please contact Irma Almazan 520.545.1666 or [ialmazan@kss-law.com](mailto:ialmazan@kss-law.com).

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