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CTLA Forum

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From The President's Notebook

By Ernie F. Teitell

HHere are two true stories from the strange world of workers' compensation law. A man who has been working in a body shop for more than thirty years comes to the aid of a co-worker who is holding a rag that appears to be on fire. There is a vapor trial that leads from the flame to a five-gallon pail. He tries to grab the pail to throw it, but it blows up lifting his body into the air. The flames follow the worker and he is burned over 65% of his body. Subsequently, he undergoes about twenty skin grafts and five plastic surgery procedures.

Another worker employed by a construction company is doing a paving job. He is spreading hot asphalt that has been unloaded by a dump truck. As he is standing behind the truck- the tailgate of the truck suddenly opens and he is buried in hot asphalt up to his mid thighs. The temperature of the asphalt is between 300 to 400 degrees. It takes about ten minutes to dig him out. He has severe burns to both legs, requiring multiple surgeries and skin grafting.

Under current workers' compensation provisions, neither of these men is entitled to any compensation for the hor-

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rendous scarring to their legs, arms, chest, back and abdomen (The scarring is so graphic that legislators winced when they saw pictures of it at a recent Judiciary Committee hearing). Current law, after the so called workers' compensation reform of 1993, only applies for compensation for scarring to the face, head or neck. Prior to these "reforms," commissioners had broad discretion to award compensation for scarring on any part of the body that resulted from a work-related injury.

How unfair is it that in the last thirteen years many workers who have suffered horribly painful and debilitating scars have been prevented from being properly compensated for their disfigurements.

Raised Bill 548, which sought to correct this gross inequity by allowing commissioners, in appropriate cases to render awards for scarring on any part of the body, never got out of the Judiciary Committee. We have not given up, though, and are hoping that it can be introduced next legislative session so that such injured workers can get some justice.

Unfortunately, this is just one aspect of Worker's Comp law that is unfair and inequitable. Seniors who are injured on the job and would be entitled to workers comp benefits have those benefits offset by their social security benefits. While this session both houses of the legislature passed SB 25, which repeals this unfair offset of benefits, this bill is currently awaiting the Governor's signature. Other bills which CTLA advanced that are on the Governor's desk include SB 410, which eliminates the need for affidavits or statements from vehicle owners and drivers as to uninsured status in underinsured/uninsured cases where it is impossible or unreasonable to obtain them; SB 550, which extends the time to 120 days; give notice in dram shop actions; and SB 593 which makes clear that the Offer of Judgment statute was not repealed and applies to all cases accruing before Oct 1, 2003.

This year, CTLA has made Workers' Comp reform (as opposed to deform) a huge priority. We have a new Workers' Comp section which has added significant energy to our legislative effort. Anyone who does any Worker's Comp should join this section and participate in its legislative and educational activities. Hopefully, with our legislative advocacy, we will continue in the coming years to change the Worker's Comp system so that it fairly compensates the workers of this state instead of punishing them.

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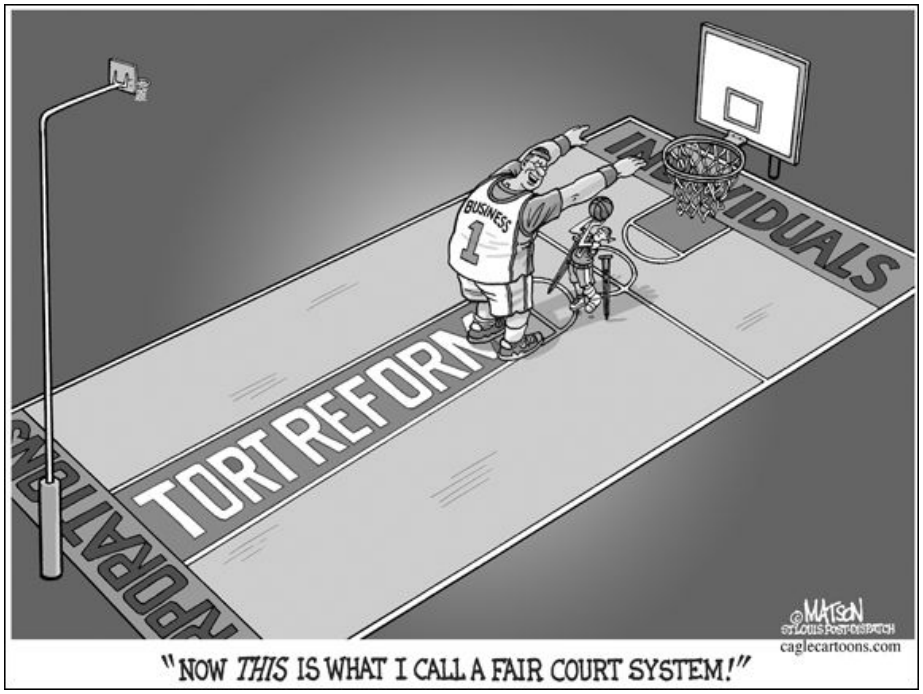
***CTLA was proud and pleased to have Steve F. Meo as one of our ATLA State Delegates until his death in May 2006. We'll miss Steve enormously.**

Opening Statement – The Editor's Page

By David Rosen

Great issue. For starters we have Kathleen Nastri's settlement and verdict summary, which literally sets the standard for settlement negotiations: don't go to a mediation without it. We have summaries from Bob Carter of Worker's Comp cases and from Dale Faulkner of 2005 appellate decisions in tort law. Take fifteen minutes to read them and, if you're like me, you'll get at least one valuable new idea for your cases. Then we have two articles that will make you a better lawyer this afternoon. Paul Slager explains how to use the new Practice Book rule on deposition practice to shut down your disruptive adversary and get a clean deposition. And Bill Clendenen, my personal mediation guru, shares some of his secrets; after reading it, you'll know much more about how to make a mediation effective and, just as important, how to tell early when it won't be — before you've made damaging concessions.

We also inaugurate two new regular features. The first is on trial practice. Each issue we will include at least one excerpt of evidence or argument from an actual trial, picked to help us win cases for the right reason: by showing why we are on the right side. We call this feature Telling It Like It Is. This issue's excerpt is a perfect example: Mike Koskoff explains to a jury during final argument why it really matters that the hospital records are a mess, completely debunking the defendant's excuse that it really doesn't matter, and besides, everybody does it.



"NOW *THIS* IS WHAT I CALL A FAIR COURT SYSTEM!"

Our second new feature is called Getting It Right. Each issue we will include an excerpt from a judicial opinion — usually from a trial court — that deserves wide circulation and recognition. Our first selection involves an issue that is of enormous practical importance and also goes to the heart of the ideal of trial by jury. In Jordan v. Yankeee Gas, Judge B.J. Sheedy, dispels some of the confusion that defendants have eagerly created and exploited around the Daubert-Porter line of cases. Judge Sheedy explains why Daubert-Porter evidentiary hearings and exclusionary rulings should be the exception, not the rule, and why in most cases assessment of expert testimony is quintessentially a jury function.

Finally, with the kind permission of master trial consultant David Ball and the NITA Press, we reprint an excerpt from David's new book, "David Ball on Damages," Second Edition. This excerpt addresses the fundamental issue that those of us who have chosen trial law as our vocation must face — the preservation of the right to jury trial. It explains how we have been our own worst enemies, allowing corporate interests to define who we are and what we do, and, equally important, tells us what we can do about it. Read it; learn it; live it.

And for a quick summary of the problem we face, and that David so masterfully addresses, check out the two pictures on the left, one showing us as we see ourselves — champions of the little guy, playing against the odds in a rigged game — the other showing us as we all too often present ourselves to the world.

CTLA Forum

Verdict and Settlement Report

By Kathleen L. Nastri, Associate Editor

If possible, please submit your verdicts and settlements on a 3.5" floppy disk in Word 97 format, together with a hard copy.

Several readers have mentioned that the verdicts and settlements reported would be more helpful if we included in our report the date on which the case was resolved and the insurance carrier, if any. Therefore, when you send your reports in, please do your best to include this information.

JURY VERDICT

Motor Vehicle Accident;
42-year-old Male;
Verdict of $505,521.70

On November 22, 2005, a jury returned a verdict against the Hartford Insurance Company for $384,438.98, including offer of judgment interest of $121,082.72. The total judgment was $505,521.70. Upon the court's denial of the defendants' motion for remittitur, the case settled for a confidential amount.

The case involved a 42-year-old man who was rear-ended in September of 2000. As a result of the collision, he was diagnosed with a herniated disc in his lower back and three disc herniations in his neck.

On June 29, 2001, he was involved in another motor vehicle collision, which was the subject of the lawsuit. There were no radiographic findings indicating any difference in the plaintiff's condition between the June 29, 2001 collision and the September of 2000 collision. The plaintiff testified, however, that the pain in his neck worsened significantly, and the pain in his lower back (which had resolved from the September of 2000 collision) had returned. The plaintiff further testified that as a result of the June 29, 2001 collision, he was forced to change the course of his employment from a limousine driver to a limousine dispatcher, he could no longer run, and he experienced post-traumatic stress disorder.

The plaintiff filed an offer of judgment for $60,000. The defendants offered $20,000 to settle the case. On the eve of trial, the defendants took their offer off the table.

Submitted by Eric G. Blomberg, Esq. of Berkowitz & Reinken, Stamford.

SETTLEMENT

Motor Vehicle Accident;
Improperly Restrained Child;
Settlement of $900,000

In the case of *Yasef Deitsch, as Guardian and Next Friend of Mendel Deitsch, a Minor v. Mordecai Deitsch,* Superior Court for the Judicial District of New Haven at Meriden (Docket No. CV 05 4001865-S), the parties settled for the amount of $900,000.

On February 14, 2003, the minor plaintiff was a passenger in a motor vehicle being operated by the defendant. The defendant was the minor plaintiff's grandfather. The plaintiff alleged that the defendant was caring for the minor plaintiff in a custodial and/or caretaking capacity at the time of the accident. The defendant allowed the minor plaintiff to sleep in the middle row of seats of the vehicle without utilizing safety restraints. The defendant lost control of the vehicle, causing it to leave the highway and roll over several times, resulting in the minor plaintiff being ejected from the vehicle.

The minor plaintiff was unconscious at the scene, having suffered multiple areas of skull fracture, lacerations and bruises and brain injury. The plaintiff had to be intubated and remained in a coma for an extended period of time.

At the time of the accident, the plaintiff was a student. As a result of the incident and the lengthy inpatient rehabilitation, the plaintiff lost a couple of months from his education. The plaintiff suffered no permanent physical injuries, but was diagnosed as having an "executive processing disorder," secondary to the traumatic brain injury. The minor plaintiff was able to return to school and continue his education without any physical limitations.

The plaintiff alleged two bases for liability. The first claim was that the defendant failed to keep the vehicle under proper control, causing the vehicle to leave the highway and roll over. At the time of the incident, the highway conditions were poor, due to heavy snowfall. The plaintiff anticipated that the defendant would file a special defense of "unavoidable accident", so the plaintiff added a second count in negligent supervision, for allowing the minor plaintiff to travel in the vehicle unrestrained. Although Connecticut prohibits evidence concerning seatbelt usage, there is case law suggesting that a separate and distinct cause of action can exist for negligent supervision when a minor plaintiff is placed in the custodial care of another, and the caretaker fails to use adequate restraints in a motor vehicle. As a result of the alternative theory filed by the minor plaintiff, the defendant chose to settle the case for $900,000, which was placed in a structured settlement for the benefit of the minor plaintiff. The structured settlement payments are guaranteed for thirty years, or the life of the minor plaintiff, whichever is longer, and are expected to pay in excess of $4,000,000 to the minor plaintiff.

Submitted by Kerry M. Wisser, Esq. of Weinstein & Wisser, West Hartford.

SETTLEMENT

Motor Vehicle Collision;
36-Year-Old Female;
Post-Concussive Syndrome;
Neck and Back Injuries;
Settlement of $3 Million

In the case of *Josephine Doe v. The ABC Car Leasing Co.* (the identities of the parties are confidential pursuant to a confidentiality agreement), Superior Court for the Judicial District of Stamford/Norwalk at Stamford, the parties settled for $3,000,000 by mediation before Justice Robert Callahan.

On January 24, 1997, the plaintiff was a 36-year-old resident of Norwalk, who was employed as an analyst for XYZ and Associates in Westport, working on the wireless communication industry projects. At approximately 7:30 p.m., she was operating her 1997 Acura Coupe northbound

on Scribner Avenue in Norwalk, preparing to make a left turn onto the on ramp of I-95 north. She was stopped to make the left turn when she was rear-ended at full speed by a Plymouth van operated by the defendant, Ms. Grass, and owned by the defendant, ABC Car Leasing Co. The force of the impact propelled the plaintiff's vehicle into the opposite lane of travel and past the on ramp.

The crash was witnessed by the operator of an automobile traveling directly behind Ms. Grass. He said that Grass did not brake and he estimated the impact speed at 35 mph. Following the crash, the witness got out of his car to check on the occupants of the two vehicles. When he got to the plaintiff's vehicle, he thought she was dead, as there was no movement whatsoever.

At the scene of the crash, the investigating officer detected alcohol on Grass' breath. She failed the field sobriety test and she was placed under arrest. At police headquarters, Grass underwent a breathalyzer evaluation at 8:38 p.m. (.210), 9:11 p.m. (.181), and 9:46 p.m. (.178).

The plaintiff was admitted to Norwalk Hospital as a trauma patient. Her Glasgow Coma scale was recorded at 14 (15 normal), with reported loss of consciousness and both retrograde and anterograde amnesia. She evidenced other classic symptoms of closed head injury, including perseveration (useless repetition), diminished short term memory, altered state of consciousness and throbbing headaches. Following her discharge from the hospital on January 17, 1997 (three nights), she continued to experience persistent sleepiness, and attention and memory deficits.

The plaintiff was diagnosed with post-concussive syndrome, concussion, seizure activity, cognitive deficits, as well as myofascial pain, which required trigger point injections. She also had pain in her neck, left shoulder girdle, low back and left hip; and experienced transient urinary incontinence. In addition, she has experienced tremendous weight gain and significant depression.

The major component of the plaintiff's injury was her traumatic brain injury, which has been corroborated by two treating neuropsychologists on the basis of neurocognitive testing, a significantly positive SPECT scan (assessing blood perfusion), and PET scan (assessing metabolic activity within the brain). Treating neuropsychologist, Robert Novelly, Ph.D., noted that she has suffered a significant brain trauma affecting her verbal memory, and sustained an impairment of her ability to exercise hierarchical judgment as well as a mild reduction in global IQ.

Following her relocation to Florida in 1999, the plaintiff began treatment with another neuropsychologist, Antoinette Appel, Ph.D., who noted that, although plaintiff's short term memory recovered to within normal limits, her verbal, visual and global memory remained impaired. Her global IQ had dropped approximately 15 points, or two standard deviations in relation to her pre-morbid level of function.

She was also affected by depression related to her adjustment disorder resulting from the subject crash, and experienced facial spasms and recurring headaches from the subject crash.

CT and MRI scans were all interpreted as normal. Abnormal findings were documented on SPECT and PET scans.

The plaintiff made several attempts to return to work, which were unsuccessful. She had been earning approximately $60,000 per year; there was a claim of approximately $1,400,000 in after tax, discounted earnings loss. Past medical expenses were approximately $62,000. There would be future medical expenses depending on the plaintiff's level of function.

Life expectancy was approximately 41 years.

The case was complicated by a prior psychiatric history involving an eight day hospitalization for depression, a prior history of cocaine and marijuana use, and a prior motor vehicle accident with a possible concussion.

Plaintiff's retained experts included Brian Pape, Ph.D. (toxicology), Sam Mehr, M.D. of Omaha NE (nuclear medicine), Gary Crakes, Ph.D. (economist), Monte Buchsbaum, M.D. (PET scans), Michael Foley, M.D. of Tampa, FL (SPECT scans), and Richard Schuster, Ph.D. of New York City (vocational and life care plan).

Submitted by Stewart M. Casper, Esq. of Casper & de Toledo LLC, Stamford.

SETTLEMENT

Delay in Diagnosis of Breast Cancer
40-Year-Old Female
Settlement of $1,500,000.00

In the case of *Jane Doe v. Radiologist ("Dr. Z"), Radiologist ("Dr. H") Surgeon ("Dr. D"), and Gynecologist ("Dr. L"),* filed in the Superior Court for the Judicial District of Stamford, Complex Litigation Docket at Stamford, the parties settled the claim for the sum of $1,500,000.00 at the end of jury selection.

In April of 1998, Jane Doe went to see her gynecologist, Dr. L, for her annual visit. During that visit, she complained of feeling something in her right breast. Dr. L did a physical examination and sent her for a mammogram. Dr. Z, the radiologist, interpreted the mammogram and conducted an ultrasound examination. The plaintiff claimed that Dr. Z misinterpreted the mammogram and ultrasound and should have reported findings suspicious for cancer. In addition, Dr. L should have followed up on the lump that she felt and showed to Dr. L.

A year later in April of 1999, Jane Doe went back to see Dr. L for her annual physical and showed Dr. L a lump on her right breast. Dr. L felt something which he described as a small nodule. He sent her to a surgeon, Dr. D, who performed a physical exam. Dr. D sent Jane Doe for an ultrasound performed by Dr. H.

At the end of February 2000, Jane Doe returned to see Dr. D because she saw dimpling in the area where she had felt the lump. Dr. D sent her for an ultrasound. Following that, a biopsy was done and cancer was diagnosed.

The plaintiff claimed that as a result of the delay in diagnosis, her breast cancer went from an early stage to a more advanced stage, reducing her life expectancy.

The defense claimed that Dr. Z interpreted the images correctly, that there was nothing suspicious on the films and that he made a proper report, and that Jane Doe had a rare form of breast cancer that is difficult to diagnose. The defense also claimed that Dr. L did not feel a lump and did the appropriate thing in sending Jane Doe for radiological tests and that when the tests came back negative, he met the standards of care.

The defense claimed that Dr. D complied with accepted standards of care in performing his exam and sending her for an ultrasound examination. The defense further claimed that Dr. D gave Jane Doe the choice to do a biopsy or return to the office in three months, and that she was to decide which she wanted. The defense

claimed that Jane Doe never responded to tell Dr. D which option she would choose. In addition, the defense claimed that even had the breast cancer been diagnosed two years or a year earlier, it would make no difference in her prognosis. The defense further claimed the plaintiff, at the time of trial, was cancer free and had a good prognosis.

Submitted by Ernest F. Teitell, Esq. and Angelo Ziotas, Esq. of Silver Golub & Teitell LLP, Stamford.

JURY VERDICT

Automobile Accident;
Speeding; Intoxication
35-Year-Old Male Analyst;
Verdict of $51,973

In the case of *Christopher Fraley v. Deborah Warren,* Superior Court for the Judicial District of Hartford (Docket No. CV-03-0821972), a verdict of $51,973 was reached on December 16, 2004, before the Hon. Robert B. Shapiro after the jury deliberated for over six hours. The breakdown consisted of $40,000 in non-economic damages and $11,973 in medicals. With Offer of Judgment interest of $12,473.52 and costs of $9,650.00, the total judgment was $74,096.52. The defendant's attorneys were Andrew H. Sharp, Hartford and Mark Sheehan, Hartford.

Mr. Fraley attempted to make a left turn from a gas station parking lot onto Main Street in Glastonbury. While doing so, he was broadsided by a vehicle driven by the defendant, Deborah Warren. The accident occurred at 3:00 p.m. on September 10, 2001. The defendant had a blood alcohol level of .214 and an independent eyewitness indicated that defendant had sped past the eyewitness just prior to the accident. The plaintiff was unconscious at the scene and claimed a mild closed head injury, as well as back and neck injuries, as a result of the accident.

The plaintiff alleged he was reasonable in his actions and had checked for oncoming traffic before exiting the gas station. He argued that the plaintiff had been drinking alcohol and was speeding (49 mph in a 35 mph zone). The plaintiff, therefore, alleged that the defendant lost the right-of-way.

The defendant contended that the plaintiff failed to yield the right-of-way to oncoming traffic. She also argued that the plaintiff was not injured as a result of this collision.

The plaintiff sustained soft tissue neck and back (lumbar) injuries and a concussion. He lost consciousness at the scene of the accident and had minor disorientation difficulties for several weeks. He was able to return to work with minor concentration problems, but claimed his physical endeavors were limited because his "neck goes out" during workouts. The plaintiff testified that he was in better shape than before the injury, because he worked out more to deal with his injury. He had advanced in martial arts belts since the injury, as a result of the accident, but he was in more pain after he engaged in his martial arts workouts. He sought $11,973 in medicals and $1,100 in lost wages. The plaintiff's income had doubled since the time of the accident as he became a vice president of the investment company where he worked.

The plaintiff's experts were James Harris of Tallahassee, FL (accident reconstruction), James O'Brien, Ph.D. of Farmington, CT (pharmacist/toxicologist), and Dr. Vincent Buonanno of Greenwich, CT (chiropractor).

The insurance carrier was Infinity (total insurance policy ($20,000/$40,000)). The last demand was $50,000 plus costs; the last offer was $10,000.

Submitted by Jason L. McCoy, Esq. of Vernon.

JURY VERDICT

Dog Attack; 57-Year-Old Male;
Back Injuries;
Verdict of $200,000.00

On February 19, 2003, at approximately 1:00 p.m., Robert Hird was walking his dog, a bull-mastiff, on a leash on his street, Darley Drive, in Hamden, Connecticut. At that time, the defendant's son, Kevin D'Andrea, a 12-year-old boy, was playing on the front lawn with his two golden retrievers, one which was 12 years old and the other 18 months old (but weighed approximately 50 lbs.). The dogs were not leashed and the family's yard was not fenced in. The defendant, Diane D'Andrea, lived with her son Kevin D'Andrea and daughter Britiani D'Andrea on the same street as the plaintiff, Mr. Hird.

As Mr. Hird turned the corner on his street, the defendant's dogs, on their lawn approximately 200-250 yards away, spotted Mr. Hird and his dog, and began running toward them. A fight began between the older retriever and Hird's dog. Moments later, the younger retriever jumped into the fight and struck Mr. Hird in the chest, knocking him forcefully to the street pavement, at which time he sustained injuries to his lower back, including a herniated disc at L3-4 and an exacerbation of an asymptomatic pre-existing degenerative condition of his lumbar spine.

The defendant's son, the only other person outside at the time, claimed that the location of the incident was in front of his house, not 200-250 yards away. He admitted that an incident occurred between his older retriever and the plaintiff's dog. He claimed that the younger dog, which allegedly knocked down the plaintiff, not only never left his front lawn, but that the plaintiff never fell down. His position was that the plaintiff made the entire story up.

The plaintiff, a 57-year-old male, had been on disability since 1991, due do a prior Chronic Fatigue Syndrome and depression. The plaintiff did not begin seeking treatment for his symptoms until approximately two and a half months after the incident.

As a result of the injuries, Mr. Hird sought treatment from Dr. Eric Katz, an orthopedic doctor in Bridgeport, and a Pain Management Specialist, Dr. Dwight Lingham, in New Haven.

The plaintiff's total medical expenses related to the claim totaled approximately $28,000. The majority of the bills related to Epidural Injections and Radio Frequency Ablation Procedures (injections).

The demand before trial was $100,000.00; however, on the day of jury selection, the plaintiff requested that counsel withdraw the case if he was able to recoup his costs, which were $2,500.00. Allstate Insurance Company, represented by Attorney Kerry Rousseau of the Law Offices of Kerry Rousseau, refused to reimburse the plaintiff his costs and took a no-pay position.

The case was tried before Judge Jon C. Blue and the jury returned a verdict in favor of the plaintiff in the amount of $200,000.00. Economic and Non-Economic damages were not specified per Judge Blue's verdict form.

The plaintiff also filed an offer of judg-

ment and will get approximately $40,000 in interest, plus approximately $3500 in costs.

Dr. Eric Katz testified for the plaintiff. There were no medical experts that testified for the defendant.

Submitted by Louis M. Rubano, Esq. of Lynch, Traub, Keefe & Errante, P.C., New Haven.

SETTLEMENT

Accident type, age, awardment
Motor Vehicle Collision;
Female Cafeteria Worker

In the case of *Jane Doe and John Doe v. Joe Driver,* Superior Court for the Judicial District of New London at Norwich, the parties settled by mediation in April of 2005, for $1,200,000.

On May 15, 2003, at approximately 1:20 p.m., Jane Doe was driving west on Route 44 in Pomfret, Connecticut. At the same time, the defendant was driving east on Route 44. The defendant crossed the center line and crashed head-on into the plaintiff's vehicle.

The plaintiff suffered severe fractures of her left femur, left rib fractures, a left transverse process fracture at L1, and a right first toe fracture. Plaintiff's orthopedic surgeon stated she has a 20% permanent partial disability of the left leg. The IME doctor, Dr. John Giacchetto stated she has a 40% permanent impairment of function of the left lower extremity. Her total medical/hospital expenses amounted to $135,790.55.

The plaintiff was employed as a cafeteria worker, earning $7.25 per hour at the time of the crash. She worked 30 to 40 hours per week. As a result of her injuries, she has never been able to return to work, and is currently receiving social security benefits.

The plaintiff's vocational rehabilitation expert, Paul Murgo, M.Ed., stated that the plaintiff was unemployable as a result of her injuries, superimposed on her age, education, training and experience. He estimated her lost earning capacity to be between $15,000.00 and $24,000.00 per year.

The plaintiff's economist, Gary Crakes, PhD, calculated the economic loss for lost wages, loss of earning capacity and inability to do household chores at between $431,000.00 and $551,000.00.

The plaintiff, John Doe, had a claim for loss of consortium because he had to care for his injured wife during the first year after the collision, during which time she found it very difficult to walk.

The plaintiff's experts were John Grady-Benson, MD (orthopedic surgeon), Paul Murgo, M.Ed. (vocational rehabilitation), Gary Crakes, PhD (economics), and John Giacchetto, M.D. (IME physician)(orthopedic surgeon).

The case was scheduled for trial, commencing in June of 2005. The defendant's insurance carrier, AIG, requested mediation before Attorney Dale P. Faulkner of New London, Connecticut. The case was mediated in April of 2005. The case settled for $1.2 million.

Submitted by Dennis A. Ferdon, Esq. of Anderson & Ferdon, Norwich.

ARBITRATION AWARD

Slip and Fall;
Death from Pulmonary Embolism;
67-Year-Old Male;
Arbitration Award of $882,000.00

In the case of *Joanne Kipping Edwards, Admx. of the Estate of Victor Kipping, and Sarah Kipping v. John Szafko,* the arbitration award was $882,000.

On December 10, 2001, the plaintiff's decedent, Bishop Victor Kipping, was a tenant, along with his family, in a rented home owned by the defendant, located in Stratford, Connecticut. At approximately 9:00 a.m., Kipping, while exiting his home from the front porch stairs, caught his right heel on the top of a board nailed over the riser. He tripped and fell down or from the front steps. He sustained a medial meniscus tear to his right knee, which required surgery on January 14, 2002.

On February 6, 2002, an MRI revealed a quadriceps tendon rupture of the right knee. On February 16, 2002, Bishop Kipping underwent surgery to repair the tendon rupture. On March 2, 2002, Bishop Kipping was admitted to the hospital suffering from a pulmonary embolism.

Bishop Kipping subsequently died on March 6, 2002, as a result of the pulmonary embolism, which developed as a result of the injury, surgery and subsequent immobilization.

Mrs. Sara Kipping, decedent's wife, claimed loss of consortium. They were married on February 14, 1958 and had lived together continuously since then.

Bishop Victor Kipping received a Doctorate of Divinity degree from the Christ Institute of America, Inc., School of Art, Science and Religion in New York. He became vice president of the Greater Mt. Zion Pentecostal Church of America, Brooklyn, NY. He was also appointed pastor of St. John Pentecostal Church of Greater Mt. Zion Pentecostal Church of America, Inc.

Bishop Victor Kipping served for 33 years as a pastor of Faith Gospel Assembly Church, Inc., Bridgeport, CT, and was the presiding Bishop of Fellowship Churches of Faith Gospel Assembly Church, Inc.

Bishop Kipping was age 67 at the time of his death and had a life expectancy of 19.3 years. His medical bills totaled approximately $32,335.00.

The claim was made against the property owner, John Szafko. The defendant disclosed Robert Labarre, MD, a cardiologist in Fairfield, as an expert to dispute causation regarding the pulmonary embolism. The plaintiff retained James Lettera, MD, a vascular surgeon in Fairfield, to prove the pulmonary embolism did, in fact, result from the knee trauma, subsequent two surgeries and immobilization. The defendant's expert, Dr. Labarre, testified at his deposition that the pulmonary embolism did, in fact, result from the knee trauma and subsequent surgeries and immobilization.

The plaintiff also retained Richard Twomey, a Safety Engineer, from East Lyme, CT, to testify regarding the hazardous and dangerous conditions of the stairs.

The arbitration was held on October 28, 2004 and November 8, 2004. On November 11, 2004, the arbitrator awarded the Estate of Victor Kipping a total of $802,337.09. The sum was reduced by 33 1/3% comparative negligence attributable to Bishop Kipping, so that the net award to the Estate was $534,891.40. The arbitrator also awarded Sarah Kipping $80,000.00 for loss of consortium, which was reduced by 33 1/3% comparative negligence, making the net award $53,333.34. The parties agreed to a $300,000/$50,000 high-low binding arbitration, as the defendant's policy limit was $300,000.00.

Submitted by Mark D. Arons, Esq. of Millman & Arons, Westport.

JURY VERDICT

Trip and Fall Accident;
60-year-old Female; Disputed
Permanent Partial Disability of Left

Arm; Verdict of $110,223.87, Less $42,987.31 for 39% Contributory Negligence, Resulting in Net Award of $67,236.56, Plus Offer of Judgment Interest

In the case of *Irma Schultz v. Stephen Della Bella, d/b/a Lily Lake Inn,* Superior Court for the Judicial District of Waterbury at Waterbury (Docket No. CV 98-0145892-S), a jury returned a verdict in favor of the plaintiff in the amount of $110,223.87, less $42,987.31, for 39% contributory negligence, for a net award of $67,236.56. The defendant's insurance carrier was Sphere Drake Insurance. The defendant's last offer was $20,000 to settle the case. Plaintiff filed an Offer of Judgment for $60,000 within 18 months of the return day and thus was entitled to approximately $24,000 in interest, resulting in a total award of approximately $91,000.

On October 6, 1996, the plaintiff, Irma Schultz, was attending a wedding reception at a banquet facility known as The Lily Lake Inn in Wolcott, CT. After being seated at her table for a short time, the plaintiff decided to go to the bar for a Pepsi. In order to get to the bar, the plaintiff had to walk across the entire reception room. In so doing, the plaintiff could find no direct access or pathways to the bar and was forced to walk between tables. As the plaintiff attempted to walk between various tables, she found it very difficult to do so, because the tables were packed in so tightly together. The plaintiff had to ask several guests to stand up and move their chairs so she could pass by.

Once the plaintiff reached the bar and got her Pepsi, she observed that the only clear pathway back to her seat was across a small stage platform that was also utilized by the wedding disc jockey. Witnesses testified that other people had used the stage platform for the same purpose. As the plaintiff stepped up onto the stage platform, she tripped on an electrical outlet cover on the floor of the stage, fell to the floor and broke her left arm.

The plaintiff contended that, by creating an overcrowded and congested area with limited access an pathways, the defendant forced guests to use the stage area, which contained tripping hazards in the form of electrical outlet covers on the stage floor. The defendant denied liability, claiming that the plaintiff did not trip on the electrical outlet covers and that she was contributorily negligent in causing the accident. Two guests at the wedding testified to the crowded conditions and the difficulty people had in moving about the facility. This testimony supported the plaintiff's claims and also directly contradicted the testimony of the defendant's manager, who was present at the time of the reception.

The plaintiff suffered a minimally displaced fracture at the top of her humerus bone of the left arm. The injury did not require surgery. The plaintiff was, however, required to wear her arm in a sling for three to four months. After her initial emergency room visit, the plaintiff had three follow-up visits with an orthopedic doctor and two physical therapy sessions. She incurred about $2,000 in medical bills. The plaintiff was examined one time by Dr. Robert Nolan in June, 1997. Dr. Nolan found the plaintiff suffered a 30% permanent partial disability of the left arm as a result of the accident. The plaintiff underwent an IME by Dr. Kevin Shea in 1999. Dr. Shea found that the plaintiff suffered only a 7% permanent partial disability of the left arm as a result of the accident. The plaintiff did not call Dr. Nolan to testify and instead relied on his medical report.

After two days of evidence and two hours of deliberation, the jury returned a plaintiff's verdict as noted above.

Submitted by Gregory E. O'Brien, Esq. of Moore, O'Brien, Jacques & Yelenak, Cheshire.

SETTLEMENT

Medical Malpractice; Wrongful Death; 51-Year-Old Male; Settlement of $2.75 Million

In the case of the *Estate of Smith v. Hospital,* the parties arrived at a pretrial settlement of $2,750,000. Smith was not a patient at the defendant hospital. The claim was based on Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, which held that a psychotherapist has a duty to use reasonable care to protect a likely victim from harm by a patient.

Smith was a divorced 51-year-old accountant making a nominal income. He lived in an apartment near a beach. Jones was an ex rock and roll drummer, who was down on his luck and an abuser of drugs and alcohol. He worked as a bus boy/cook at a local bar that was frequented by Smith. Jones had lived with Smith for a time until Smith kicked Jones out of his apartment because of Jones' instability. Smith was also the godfather of Jones' son.

Jones was having serious problems with his girlfriend Sarah (the mother of his son). Because of Jones' abusive behavior, the family court gave Sarah custody and granted Jones weekly supervised visitation. Smith volunteered to supervise Jones' visit with his son. Jones was initially pleased with the idea. However, during the first few visitations, it became clear to Smith that Jones was not fit to even visit his son. Jones had threatened to kidnap his son among other things.

Smith told Jones that he was going to withdraw as the supervisor, that Jones needed help, and that he would have to report to the court that Jones was abusive toward his son. Jones believed that Smith was after Sarah romantically and saw the two as co-conspirators. Jones became increasingly depressed and continued to abuse drugs and alcohol. He felt betrayed by Smith.

One Friday night, Jones got very drunk. He took a knife and slashed his thumbs. A friend came to see Jones at the apartment where he was staying and saw that Jones had cut his thumbs. Mary told Jones that he needed to go to the hospital. Jones agreed that he needed help and allowed Mary to take him to the hospital. Jones had been to the hospital before for a previous suicide attempt.

On the way to the hospital, Jones told his friend that when he got out, he was going to "bash Smith's "*&%^^brains out". Mary brought Jones into the ER of the hospital. The ER physician observed the lacerations on Jones' thumbs, and recorded that, "friend states patient may harm child's godfather." The child's godfather was nowhere identified by name on the chart, nor was there any follow-up to this entry.

The attending psychiatrist was duly notified by the ER physician. The psychiatrist admitted Jones to the hospital at approximately 11:30 p.m. The psychiatrist testified at his deposition that Jones was admitted because of his dangerousness, as well as his extreme intoxication. The psychiatrist did not evaluate Jones in person, but was provided the history over the telephone and spoke to Jones directly. Jones agreed to the admission, although the psychiatrist would have held him even

if he did not agree. Jones' blood alcohol was an astonishing .279.

Jones spent the night in the psych ward where a psych nurse performed an "evaluation" on him. The majority of the four page form evaluation, however, was left blank and the nurse testified that he was unable to elicit any information from Jones due to Jones' intoxication.

The following morning at approximately 8 a.m., Jones was evaluated by another psychiatrist. That doctor did not follow up on the previous night's threat as reported in the record. He did report, however, that Jones was not "suicidal or homicidal". Jones claimed that he had a plane to catch and that he was going to London and needed to leave the hospital. Jones signed himself out "AMA". The doctor testified it was AMA because he wanted Jones to stay in the hospital for a five day detox period.

Jones did have to go to the airport, but it was to take his friend to catch a flight to London. After dropping his friend at the airport, Jones probably purchased some heroin. He returned to his apartment in a state of utter depression. He decided that he was going to commit suicide. He drove to the home of his girlfriend Sarah and she was not there. He parked his car outside of Sarah's home and attached a rubber hose to the exhaust pipe of his car.

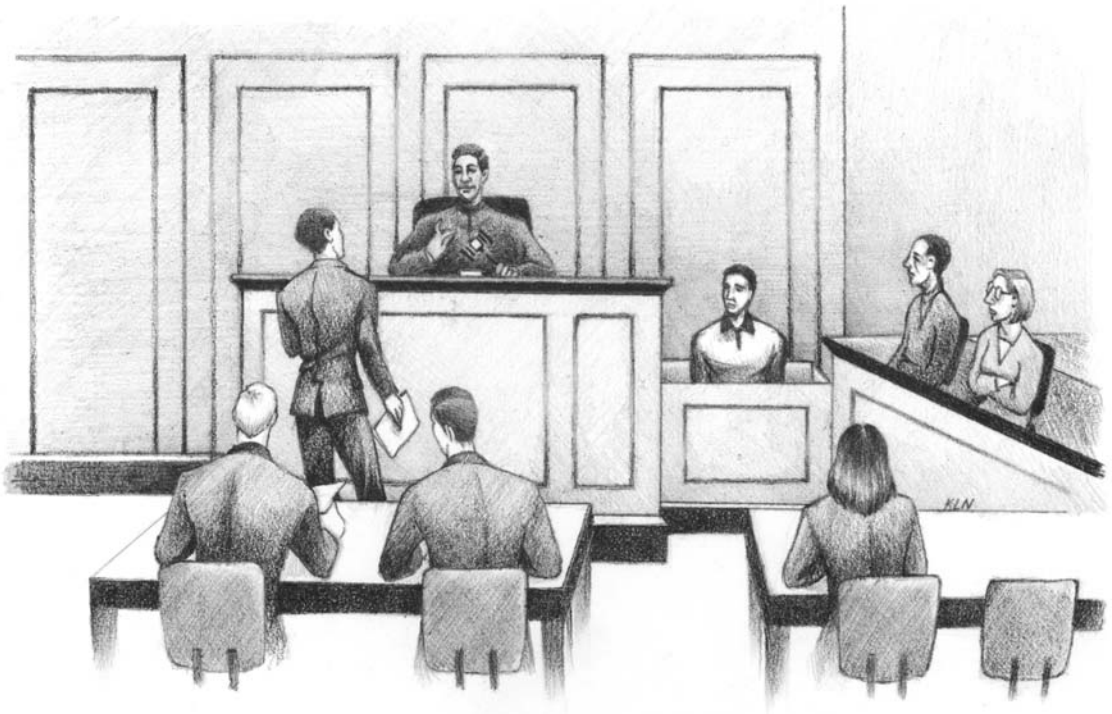
The hose kept slipping off the exhaust pipe and Jones was unable to commit suicide. He then decided that, in order to end his pain, he needed to kill Smith. He drove to Smith's home near the beach. Smith was home and was sleeping. It was 10:30 p.m.

Jones entered Smith's detached garage. He found a hammer in the garage. He used the hammer to break into Smith's home through a window, entering Smith's bedroom. Jones then proceeded to beat Smith about his head with the hammer many, many times.

After he murdered Smith, Jones sat and smoked a cigarette on Smith's bed. He then left the home with Smith's body still lying on the floor of his bedroom. There was blood all over Smith's white walls. Jones proceeded to make another suicide attempt by drinking chloride bleach. This, too, failed. When Smith failed to show up at his Sunday brunch at the bar the next day, his friends became concerned. Jones told some people at the bar that he "thought he might have murdered [Jones] last night." Nobody believed Jones. Smith's body was found later that day.

Smith was survived by his daughter, who lived out of state and who he had not seen for some time, but spoke with about once a week.

Submitted by Joshua D. Koskoff, Esq. and Antonio Ponvert III, Esq. of Koskoff, Koskoff & Bieder, Bridgeport.



Workers' Compensation Review
June 14, 2005, through March 1, 2006

By Robert F. Carter

SUPREME COURT

Accident during travel is compensable, where the travel is integral to the job

Completing the restoration of the law of compensability of travel-related accidents, the Court held that where travel is integral to the claimant's work, the accident en route is a compensable event, an exception to the "going and coming" rule which bars compensability for accidents occurring during a regular commute. Here, a home health care worker was injured on the way to her first patient for one of her employers, when she left the bus and was walking toward the patient's apartment. Labadie v. Norwalk Rehabilitation Services, Inc., 274 Conn. 219 (July 5, 2005). The Court, affirming the fine Appellate Court decision, brought Connecticut back into the mainstream. The CRB had tried to eliminate this well-recognized exception to the going-and-coming rule. Accidents during lawyers' trips to hearings, even the first of the day, are now clearly compensable.

Constables held ineligible for Sec. 7-433c benefits

Constables, though full time paid municipal police officers, are not eligible for heart and hypertension benefits. Their police departments, directed by a resident state trooper, are not "municipal police departments." The Court at great length sifted through the statutes looking for distinctions between resident- state-trooper/constable programs and police departments: the latter have a police chief, instead of the first selectman as chief. Constables can't take oaths. But they, like other uniformed full-time policemen, face criminals with deadly force. Genesky v. Town of East Lyme, 275 Conn. 246 (August 30, 2005). This holding will come as a surprise to those legislators who enacted the heart and hypertension statutes, as well as to the scores of constables who have received these benefits over many years, and to the commissioners who have interpreted the Act for decades to award them. If it looks like a duck and quacks like a duck?

Carrier forgets to pay widow COLAs for 23 years, but claimant can't sue

Where the insurer failed to pay the widow her cost-of-living allowance from 1977 until 2000, the widow has no cause of action against the carrier under CUIPA, CUTPA, or for emotional distress. Almada v. Wausau Business Ins. Co., 274 Conn. 449 (July 12, 2005). The magic of exclusivity, says the Court, citing DeOlivera v. Liberty Mutual Ins. Co., 273 Conn. 487 (2005).

Two-year wrongful death SOL applied to occupational cancers

The statute of limitations for wrongful death actions arising from the death of workers from alleged occupational cancers is two years from the date of death under Sec. 52-555. Hence the Court dismissed actions by the sixty one estates of dead workers alleged to have contracted cancer from workplace exposure to chemicals or radiation at Pratt & Whitney. Greco v. United Technologies Corp., 277 Conn. 337 (Feb. 28, 2006). The Court rejected the claim that the two-year discovery statute of limitations of Sec. 52-577c(b), applicable to actions for personal injuries caused by exposure to a hazardous chemical substance released into the environment, was applicable. The Court also rejected the plaintiffs' argument that a CERCLA provision, 42 U.S.C. Sec. 9658(a)(1), preempted Connecticut law so as to save the cases. The Court thus did not reach the issue of whether exclusivity of remedy barred the actions.

APPELLATE COURT

Lack of final judgment bars appeal: widow's benefits still not paid

The Appellate Court rejected an appeal in a death case as not final, where the dollar amount of widow's benefits had not been calculated. Both sides had wanted a decision on the merits. Hummel v. Marten Transport, Ltd., 90 Conn. App. 9 (July 5, 2005). Sometimes the finality rule is idiotic, where calculation of the damages is simply ministerial. Here, the situation was particularly egregious, since the respondent had refused to pay widow's benefits pending appeal despite a 301(f) order; and the CRB had inexplicably allowed the respondent to get away with not paying based on utterly spurious legal claims: that the COLAs had not been awarded in a specific dollar amount, and that the widow's benefits should be reduced by the amount of her Social Security benefits (even though Sec. 31-307(e) applies only to temporary total disability benefits paid to an employee). The decision below was Hummel v. Marten Transport, Ltd., 4760 CRB-5-03-12 (Nov. 19, 2004).

Injury in employer's basketball game compensable

Where the two owners requested that the employee play a basketball game with them during work hours, one purpose of which was to build company morale and loyalty, and the employee agreed because he was afraid not to play, despite a disinclination to play with a hostile fellow employee, his tendon injury during the game was compensable; the CRB holding to the contrary was reversed. Anderton v. Wasteaway Services, LLC, 91 Conn. App. 345 (Sept. 13, 2005). The Court, emphasizing the benefit to the employer, found that the injury was incidental to the employment and faulted the CRB for substituting its judgment for the trial commissioner. The dissent by Judge Schaller pointed out, as had the CRB, that under Sec. 31-275(1)(B)(i), an injury which results from the voluntary participation in a mostly social or recreational activity is no longer compensable. Both Judge Schaller's and CRB's analyses are off, if you ask me. Judge Schaller is right to point out that Sec. 31-275(1)(B)(i) may have been intended to change the "beneficial-to-the-employer" analysis for such activities. However, he and the CRB would require the employee to show not only that participation was not voluntary, but also that the major purpose of the activity was not social or recreational. This is clearly wrong and not what the statute says: if the participation is not voluntary, the injury is compensable even though the major purpose is social or recreational, and rightly so. If I drag our staff to a morale-building soiree and somebody chokes to death on a fish bone, the injury should be compensable.

The Court also rejected the attempt by the CRB to lay down a rule that, in addition to the claimant's testimony, some "independent corroboration" of the involuntariness of the claimant's participation is needed. I agree with the court. After the injury, viewpoints will change. If, based on the facts, the commission finds that the claimant's belief that he'd better play ball was reasonable under the circumstances (as the commissioner had found here), then such evidence should be sufficient. The claimant's testimony of his

understanding, based on the circumstances, is a proper basis for finding that, in fact, the participation is not voluntary; just as an opposite finding, based on inference drawn from the respondent's testimony would be sufficient. The nuances of the power of owners over employees in particular settings are subtle, and the demeanor of live witnesses gives the trial commissioner the edge in decision-making.

Immediate attention to nail-gun injury is held not to be provision of medical care

Immediately after the claimant was struck in the eye by a projectile from a nail gun, the employer drove him to the doctor and waited for him to be treated. After initial treatment, the claimant continued working, and had no significant treatment until three years later, when the employer paid about $7,000.00 for medical treatment. Despite this treatment, the claimant lost the eye. The CRB held that driving the claimant to the doctor at the time of the injury was not provision of medical care under the Act so as to excuse the failure to file a written notice of claim. Teague v. Repko Roofing, 4920 CRB-7-05-02 (March 1, 2006). This holding is wrong, I believe. The CRB appears to be pushing for a rule that the claimant has to show that the respondent paid the bills for the initial treatment under the Act. But in Kulis v. Moll, 172 Conn. 104 (1976), relied on by the CRB, the respondent employer had no reason to believe the claimant had been injured. The CRB proposes to require some additional affirmative act by the employer beyond taking the claimant to the emergency room, even where, as here, the employer totally acknowledged that the nail-gun injury was work-related, and in fact paid thousands for the treatment.

Temporary partial benefits don't count for calculation of average weekly wage

Despite openly recognizing the inequity of the situation, the CRB nevertheless felt constrained by precedent and the statute to hold that, where a claimant is injured while receiving temporary partial disability benefits and working limited hours because of a prior compensable injury, the average weekly wage for the second injury does not include the wage loss benefits, but only the actual (reduced) wages. Kovalik v. E. Stiewing, Inc., 4905 CRB-7-04-12 (Feb. 28. 2006). Maybe the higher courts can fix this problem by statutory interpretation.

Claimant's failure to undergo examination by insurer's expert bars testimony by claimant's vocational expert

The Appellate Court upheld the commissioner's sauce-for-the-goose decision, that where the claimant refused to submit to a vocational evaluation by the insurer's examiner, the testimony of her own vocational expert was properly excluded. The Court cited the commissioner's broad power to apply the relaxed rules of evidence equitably. The Court also cited the analogous Practice Book sanctions for failure to submit to a physical or mental examination. Bidoae v. Hartford Golf Club, 91 Conn. App. 470 (Sept. 20, 2005).

The Court also held that the respondent was not collaterally estopped by a Social Security decision that the claimant was totally disabled, on the ground that there was no identity of issues because the Social Security standards for total disability are different from the workers' compensation standards. The Court, however, like the CRB, did not point to any real difference in standards for total disability between Social Security and workers' compensation. In fact Social Security has elaborated standards, and Connecticut workers compensation has not, rather operating on a seat-of-the-pants, case-by-case estimation. But the actual standard seems to be the same: is the claimant realistically employable? The Supreme Court in fact has applied collateral estoppel on causation of cancer in a case with concurrent Longshore & Harborworkers jurisdiction, where there was identity of parties: Lafayette v. General Dynamics Corp., 255 Conn. 762 (April 24, 2001), even though the standards for causation were arguably much more different than the standards for total disability between Social Security and workers' compensation. In this case, the ground for lack of collateral estoppel should have been lack of identity of parties, rather than lack of identity of issues. In workers' compensation hearings, Social Security decisions on total disability are usually (and properly) admitted as evidence, but certainly not conclusive evidence, of total disability.

City not liable for intentional tortious acts of employee

The Appellate Court confirmed that a municipality is not liable for the intentional acts of its employee, where the plaintiff was assaulted by a co-worker, applying Sec. 52-577n(a)(2)(A), which provides such immunity. McCoy v. New Haven, 92 Conn. App. 558 (Dec. 13, 2005). The Court, however, did not reach the question of whether the Suarez exception to exclusivity for intentional injuries by the employer has limited pro tanto the immunity provided by the statute. Rather, since the plaintiff alleged that the city condoned assaults, the Court simply held that merely condoning bad behavior doesn't amount to intentional injury by the employer.

PPO administration may not be attacked in formal hearing

The trial commissioner has no jurisdiction to hear complaints that a PPO is being operated without compliance with the statute and regulations, for example (as alleged here) in having no medical director for many years. Rather, a complaint must be filed with the chairman of the commission. Here, however, the chairman of the commission had three times declined the claimant's request to review the administration of the PPO. The trial commissioner, however, could not give the claimant a hearing on his complaints as to the administration of the PPO. The Court, citing only lack of the commissioner's subject matter jurisdiction concerning PPO administration, also declined to review the claimant's claims that he was denied due process of law. Byrd v. Bechtel/Fusco, 90 Conn. App. 641 (August 9, 2005). So what's the remedy: mandamus?

Civil action against employer for emotional distress barred by exclusivity

An action against a self-insured employer for psychological injury caused by the bad faith administration of a workers' compensation claim is barred by the exclusivity of remedy provision of Sec. 31-284(a). Yuille v. Bridgeport Hospital, 89 Conn. App. 705 (June 21, 2005). The court merely cited DeOliveira v. Liberty Mutual Ins. Co., 273 Conn. 487 (May 3, 2005) and noted that inadequacy of remedy doesn't matter because of the "relatively quick and certain compensation." What compensation is the Court talking about? In fact there is no compensation at all for such injuries, including no medical treatment or indemnity benefits under the workers' compensation act. Maybe the Court forgot that.

Existence of chemical sensitivity denied

Where the claimant's claim of compensability was lost on causation, the claimant appealed on the issue of whether the testimony of the respondent's expert,

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denying the very existence of chemical hypersensitivity, should have been barred on the basis that it raised a new defense, and that the claimant was surprised. The appeal was denied on the ground that the disclaimer of liability sufficiently raised the defense. Parisi v. Yale University, 89 Conn. App. 716 (June 21, 2005). It was not clear whether the claimant had tried to keep the record open to present rebuttal evidence. I've done many chemical sensitivity cases over the last 25 or so years, and the people do seem to be genuinely sick and cross-reactive, as well as alarmed and anxious. Because doctors who don't see patients with these poorly understood pathologies are quick to disparage something they don't understand, the cases are sometimes difficult, and some commissioners are not open-minded. It is much easier to prove such weird cases if the chemical exposures are tied more directly to their principal effects on particular organ systems, as for example in occupational asthmas or dermatological, gastrointestinal or nervous system conditions caused by chemical exposures, even though effects on other organ systems may accompany the primary ones. Yet both these primary and secondary effects are all cases of reactions to chemicals.

COMPENSATION REVIEW BOARD

"First manifestation" no longer requires understanding that disease is occupational

In a real stinker, the CRB, refusing to follow eighty years of clear Supreme Court precedent, held that the first manifestation of an occupational disease means the first symptom of the disease, whether or not the claimant knew that the disease was caused by work. The claimant's decedent's multiple myeloma was not medically connected to his work until six years after its first diagnosis. Ricigliano v. Ideal Forging Corporation, No. 4851 CRB-6-04-9 (Sept. 28, 2005). The CRB is already applying its erroneous rule in other cases, stating that in these cases the statute of non-claim begins running "at the time a symptom of the disease is, or should have been, recognized by the claimant, irrespective of whether a causal connection has been drawn between the disease and the claimant's employment." See, Fredette v. Connecticut Air National Guard, 4828 CRB-8-04-7, at 5 (Jan. 13, 2006). The Supreme Court only recently reiterated that the law since at least 1934 has been that "the limitation period for an occupational disease claim does not begin to run until the claimant knew or should have known that the disease is work-related." Discuillo v. Stone and Webster, 242 Conn. 570 (1997), citing Bremner v. Eidlitz & Son, Inc., 118 Conn. 666 (1934). That the current CRB would flout such clear precedent illustrates its perceived mandate. Proving these difficult cases is hard enough already. The Supreme Court has transferred the appeal of this decision to its docket.

Heart disease claim timely, hypertension claim barred

Where the claimant was diagnosed with hypertension in 1976 and with coronary artery disease in 2001, the claim for the latter was timely and for the former was not, based on a hearing request within a year of the diagnosis of the heart disease. Mattson v. City of New London, CRB-2-03-8 (Sept. 28, 2005). I keep saying how wrong the CRB is to use its self-made rule in violation of the Supreme Court holding in Discuillo v. Stone and Webster, 242 Conn. 570 (1997). The Court held in Discuillo that the statute of non-claim for repetitive trauma conditions resembling accidents, such as claims arising from heart conditions, is one year from the last date of exposure. This rule has been repeatedly ignored by the CRB, which has barred heart-impairment claims based on a rule, created from whole cloth, that such claims must be filed within one year from the date of the first appearance of symptoms of the heart condition (sic). See, e.g., Pearce v. New Haven, 4385 CRB-03-01-5 (March 28, 2002), aff'd, 76 Conn. App. 441 (2003); Hunt v. Naugatuck, 4607 CRB-5-02-12 (Feb. 9, 2004); Peck v. Town of Somers, 4640 CRB-1-03-3 (March 5, 2004); Hallock v. Westport, 4829 CRB-4-04-7 (July 22, 2005). These decisions have continued to ignore the Discuillo rule despite the confirmation by the Court in Malchik v. Division of Criminal Justice, 266 Conn. 728 (2003), that the running of the statute in such cases begins on the last date of deleterious exposure. Hopefully, the Court will have an opportunity to review this additional aberrant CRB-made rule concerning the statute of non-claim. Until the Supreme Court corrects the situation, however, readers might be warned to delay trying such cases, unless you want to do the appeal to the Court.

Failure to stop smoking is not refusal of medical care

In Hallock v. Westport, 4829 CRB-4-04-7 (July 22, 2005), cited above, the CRB also held that failure to heed a doctor's advice to stop smoking and to have a cardiac stress test is not a refusal of medical care, so as to provide a basis for denying benefits for later-arising hypertension.

Admiralty jurisdiction preempts state workers' compensation claim

In a scholarly opinion in a murky area, the CRB held that, at least for now, federal admiralty jurisdiction bars concurrent jurisdiction for Connecticut workers' compensation, so the claimant is limited to his federal remedies. DiBlase v. Logistec of CT, Inc., 4896 CRB-4-04-12 (Jan. 19, 2006). Unlike cases arising under the Longshore and Harborworkers' Act, where the injured employee may also pursue concurrent state workers' compensation claims, admiralty jurisdiction remains exclusive, with no concurrent state jurisdiction. Deftly outlining the messy state of the law, the CRB noted that the higher courts will have to straighten out whether the jurisdiction has now become concurrent. While the DiBlase opinion is lucid, the opposite is true in Coppola v. Logistec of CT, Inc., No. 4781 CRB-3-04-2 (June 24, 2005): the CRB upheld the trial commissioner's dismissal for lack of subject matter jurisdiction because the claimant was receiving Longshore benefits. Concurrent jurisdiction between the Connecticut Workers' Compensation Act and the Longshore Act has been accepted and exercised routinely for many years now. See, McGowan v. General Dynamics Corp., 15 Conn. App. 615, 622, aff'd, 210 Conn. 580 (1989). The denial by the CRB was apparently because the accident was over navigable waters, even though the benefits were under the Longshore Act. Even more of a mess is Gerte v. Logistec of CT, Inc., 4820 CRB-3-04-6 (June 24, 2005), where the same respondent unsuccessfully sought to attack the concurrent jurisdiction after a finding and award was entered against it on this issue and was not appealed. Collateral estoppel, said the CRB. The Connecticut Supreme Court will in fact address these issues shortly.

Lunchtime injury for on-duty policeman at home is compensable

The on-duty police officer was at home for an unpaid lunch period and injured his ankle. He was patrolling an eight-town area which included his home, and was carrying his two-way radio, cell phone and gun during his lunch break, as required.

Taking the half-hour lunch break at home in the patrol area was permissible, as long as the police officer carried his live communications equipment. The ankle injury was compensable and under the circumstances the lunch was incidental to the claimant's employment. The CRB found that there was plenty of benefit to the employer during this lunch period, and the claimant was clearly on duty. Martinez v. State of Connecticut, 4836 CRB-1-04-7 (July 22, 2005).

Sarcoidosis of the heart is not heart disease under Sec. 7-433c

In an interesting decision, probably consonant with the legislature's intent, the CRB held that death from "myocardial sarcoidosis" was not death from heart disease within the meaning of Sec. 7-433c, since sarcoidosis is a systemic disease which, once in a while, happens to afflict the heart with growth of the sarcoid tissue. The heart just happens to be the end organ affected, as when cancer originating elsewhere happens to metastasize to the brain. Estate of Brooks v. West Hartford, 4907 CRB-6-05-1 (Jan. 24, 2006).

No motions to preclude in 31-290a cases

Motions to preclude do not lie in retaliation cases under Sec. 31-290a, since these cases are not claims for "compensation" within the meaning of Sec. 31-294c(b) (sic). The CRB also found it had jurisdiction to decide this issue, unlike appeals of 290a cases, since this was an appeal of a "motion." Soto v. Michael Chrysler Plymouth, 4830 CRB-2-04-7 (July 21, 2005).

Heart attack after retirement not compensable under Sec. 7-433c

The claimant suffered a heart attack six months after he retired from being a police officer. The trial commissioner held that the heart attack was not compensable because the claimant retired before it occurred, For good measure, the commissioner also found incredible the uncontradicted report of the claimant's physician, that the claimant's heart attack was caused by the claimant's long-standing coronary artery disease (which, of course, was overwhelmingly probable as a matter of medical science, if the claimant indeed had coronary atherosclerosis, as opposed to clear coronary arteries and vasospasm). Although the CRB did not endorse the proposition that heart attacks must occur during the period of active employment in order to be compensable, it was obliged to defer to the commissioner's discretion to believe what he wants. Scharf v. Town of Seymour, No. 4767 CRB-5-03-12 (July 15, 2005).

Sanctions upheld where carrier reneged on compensability

Wisely emphasizing the trial commissioner's discretion, the CRB upheld the award of sanctions in a case where the carrier had accepted the compensability of the injury and then reneged, apparently contesting liability as well as extent of disability. The IME supported lack of causation of disc herniation and the need for surgery. The trial commissioner, however, apparently felt that it was in poor taste for the carrier to accept the claim initially (back injury from a fall on ice), but then to renege and contest everything. Interestingly, the CRB analogized the situation to offer and acceptance in contract law. Collazo v. Microboard Processing, 4912 CRB-4-05-1 (Jan. 19, 2006).

PTSD following gunshot and hearing loss is compensable

In a good decision, the CRB confirmed compensability on the following facts: a pool hall employee was standing next to the hall's bouncer when a customer shot at the bouncer's head at close range. The employee fell, broke her fingernail, lost her hearing briefly, and had impaired hearing for a while. She was also splattered with blood and had ringing in her ears. This was sufficient physical injury to support the compensability of her stress reaction and later post-traumatic stress disorder arising from the incident, as a "physical-mental" injury under Sec. 31-275(16)(B)(ii). David v. Beloff Billiards Inc., 4843 CRB-4-04-8 (August 15, 2005).

Sec. 284b requires health insurance for survivors

Confirming the settled law, the CRB held that Sec. 31-284b requires continuation of health insurance benefits for surviving spouses and dependents of state and municipal employees who suffer work-related deaths. Robichaud v. State of Connecticut, 4854 CRB-8-04-9 (Sept. 15, 2005). The State had asked the CRB to change the law in view of the subsequently enacted Sec. 1-2z, which tells courts to interpret statutes based on the plain meaning of the text of the statute and its relationship to other statutes. Stare decisis, said the CRB. An identical request by a municipality for the CRB to reverse its prior holdings on this issue was denied in Vincent v. New Haven, 4919 CRB-3-05-1 (Jan. 13, 2006).

Fall from scaffolding not compensable for volunteer firemen

Two volunteer firemen were seriously injured when their scaffolding collapsed, while they were replacing roof shingles on their firehouse. Their injuries were not compensable, where the commissioner found that their activities were voluntary ,rather than ordered by the chief. The department admitted that the firemen were "obligated" to participate in such "work parties" and that their membership in the department could be jeopardized by failure to do so. Further, the fire chief directed the claimants in their work as they performed the shingle replacement. The CRB found, however, that the volunteers were performing duties not "ordered to be performed by a superior or commanding officer in the fire department" as required by C.G.S. Sec. 7-314, and denied compensability. Evanuska and Williams v. Danbury, 4900 CRB-7-04-12 and 4903 CRB-7-04-12 (Dec. 19, 2005). Those of you involved with volunteer fire departments should teach the members that every duty should be ordered by the chief, and that the department bylaws should be amended to reflect that all authorized activities are deemed to be fire duties ordered by the chief. The other lesson is to file a civil action if there may be liability, especially an action against the employer, if there is any doubt of compensability; it often induces the issuance of a voluntary agreement; and, if not, there may be liability insurance.

Motion to reopen saves late appeal

Where the respondent filed a motion to reopen within twenty days of the finding and award, and filed an appeal within twenty days of the denial of the motion to reopen, the appeal was timely, despite the late filing of the original appeal from the finding and award itself. The CRB applied P.B. Sec. 63-1, which creates a new appeal period when a party files a motion that, if it were granted, would render ineffective the decision appealed. Hicking v. State of Conn., 4825 CRB-2-04-6 (July 14, 2005). Right rule, and I think it should generally apply to appeals following denials of motions to correct, but I wouldn't bank on it.

Department of Catch 22

The claimant fell from a ladder and his nail gun shot an anchoring nail deep into his femur. The uninsured employer paid no medical expenses and the Second

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Injury Fund did not assume responsibility for the case until ordered to do so after a formal hearing. The destitute claimant thus had no medical care after the initial emergency treatment. The Fund then argued that the claimant, who remained on crutches for six months, couldn't get temporary total disability benefits because he had no medical documentation to support his claim that he was disabled from working. The CRB ruled otherwise, that based on the initial medical records and the claimant's testimony the commissioner could find a period of total disability. Well, duh. Sousa v. Intercity Development, LLC, 4878 CRB-8-04-10 (Oct. 17, 2005). The Fund almost certainly has authority simply to pay such a claimant's medical expenses and indemnity benefits by agreement, without a finding and award and order, after the 2005 amendments to Sec. 31-255. These amendments allow the Fund to make settlements with employees and still collect such payments from uninsured employers without a finding and award. But this problem of the claimant's poverty resulting in no medical treatment, and hence no medical evidence, also arises all the time where there is insurance, but the case is contested.

SUPERIOR COURT

Motor vehicle exception narrowly construed

A service station employee, fixing an ignition switch, turned the ignition key, caused the car to lurch forward and injured the claimant. Nevertheless, the motor vehicle exception to exclusivity provided by Sec. 31-293a did not apply, as the accident was not "an ordinary motor vehicle accident." Maybe that's the law. Kuhar v. Phillips, 49 Conn. Sup. 351 (Sept. 13, 2005). Semble, Gibbs V. Noland, CV04-0286640 (Meriden Oct. 10, 2005), 11 Conn. Ops. 1374 (Nov. 7, 2005) (plaintiff struck when fellow employee backed out of repair bay in garage). The motor vehicle exception has been construed so narrowly that the rule has become that civil actions against fellow employees for motor vehicle injuries occurring on the employer's premises or at the work site are excluded, all by judicial construction.

Even narrower was the construction of the statute in Sullivan v. Watkins, CV 04 0568292 (New London, Nov. 29, 2005, 40 Conn. L. Rptr. No. 11, 407 (Feb. 6, 2006): operating a truck on a city street, the fellow-employee defendant drove over the plaintiff's foot. Actionable you say? Wrong: the catch was that the plaintiff was picking up trash. The Court said the injury was due to a "special hazard of the workplace," and therefore the action against the fellow employee was barred by exclusivity. Given the spate in recent years of ever-narrower constructions of the motor vehicle exception, about the only situations to which the exception reliably applies are wrecks while travelling on a public highway, where the plaintiff is a passenger. Even there, one can think of some cases the courts might still bounce: what if the policeman is distracted by the police radio while driving? Poked by his weapon? I think the courts have gone too far sometimes, as in this last case.

UIM limits in death claim reduced by workers' compensation benefits paid to decedent's dependent

The UIM coverage for a wrongful death claim in a highway accident was reduced by the amount of workers' compensation benefits paid to the decedent's surviving spouse, who was also administratrix. Hence there was no UIM coverage at all. The policy stated that the coverage was reduced by the amount of workers' compensation benefits paid to or for the insured decedent. The Court cited the policy against double recovery. Deprey v. Continental Casualty, CV 02 0518502 S (New Britain April 22, 2005), 39 Conn. L. Rptr. No. 6, 231 (July 4, 2005). In fact, the estate recovered $20,000.00, period. In a wrongful death action, an estate might recover for net lost earnings, and that recovery might go at least in some part to the surviving spouse, depending on the will. Otherwise it's not a double recovery. If the recovery by the estate is for pain and suffering, there is no double recovery, since those damages are never paid in workers' compensation. The regulation, Sec. 38a-334-6(d), does not address whether this deduction for surviving spouse benefits is permissible; it only says that the UIM limits may be reduced to the extent damages have been "paid or are payable under any workers' compensation law." It doesn't say paid to persons other than the injured person. Perhaps benefits paid "for" the plaintiff means workers' compensation payments for the claimant's medical expenses.

Massachusetts employer cannot obtain reimbursement in Connecticut civil action for workers' compensation benefits paid under Massachusetts law

A Massachusetts employer sought to use Sec. 31-293 to seek reimbursement for workers' compensation benefits paid under Massachusetts law, where the Massachusetts employee was injured in a Connecticut construction accident. Held, dismissed for lack of subject matter jurisdiction. Massachusetts has no similar reimbursement provision. Quality Distribution-Transplastics, LLC, v. Central Construction Industries, LLC, CV 04 5000008 (Putnam March 23, 2005), 39 Conn. L. Rptr. No. 1, 22 (May 30, 2005).

Review of 2005 Supreme and Appellate Court Tort Cases

By Dale P. Faulkner

A. TORT DUTY

Negligent Security: Monk v. Temple George Associates, LLC, 273 Conn. 108 (2005).

FACTS:

(1) The plaintiff paid a fee and parked her car in the defendants' parking lot.

(2) She then attended a near-by nightclub where she was verbally confronted by her husband's ex-girlfriend, D.

(3) When the plaintiff left the nightclub, D followed her, continuing the verbal attack, and when they reached the defendants' parking lot, D physically assaulted the plaintiff.

(4) The plaintiff sued the defendants alleging, in general terms, that the defendants were negligent in that the lot lacked security.

(5) The trial court (Robinson, J.) granted the defendants' motion for summary judgment finding, on the facts, that the defendants did not have a duty to protect the plaintiff from the attack because it was not foreseeable.

(6) The Appellate Court affirmed. 82 Conn. App. 660 (2004). The Supreme Court *reversed.*

ISSUES:

(1) Whether the defendants owed the plaintiff a duty of care.

(2) Whether there was sufficient evidence submitted in opposition to the motion for summary judgment to create a genuine issue of fact regarding causation.

RULES:

(1)Whether a duty to use care is found in the foreseeability that harm may result if it is not exercised. Documentation showed that a serious crime had been committed nearby and that lighting and the presence of an attendant would serve as deterrents to crime. Because the defendants were premises' owners and the plaintiff was an invitee, the duty existed under the totality of the circumstances.

(2) Employing the totality of the circumstances rule to determine foreseeability, and, thus, whether a duty exists, is consistent with public policy.

(3) Even though the attack was intentional, the plaintiff's submissions, including a report of an expert in security, showed that the plaintiff had sufficient proof to establish a question of fact concerning causation.

COMMENT:

This positive decision is driven by the facts.

B. CAUSES OF ACTION

1.

Unreasonable claim handling by Comp. carrier. DeOliveira v. Liberty Mutual Ins. Co., 273 Conn. 487 (2005).

FACTS:

(1) In 1989 the plaintiff sustained a back injury at work.

(2) The defendant, on behalf of the employer, contested the claim for workers' compensation benefits, which included a claim for psychological injuries.

(3) In 1995, after hearings, the commissioner found that the back injury was compensable; that the defendant's denial of the claim was unreasonable; and, because of that conduct, he awarded the plaintiff $4,000 in attorney's fees.

(4) The commissioner, however, denied the claim for psychological injuries, finding that they resulted not from work, but from frustration over the delays in and treatment of his claim.

(5) In 1995, and in 2002, the plaintiff sued the defendant alleging negligence, recklessness, breach of CUTPA, intentional conduct, and bad faith in contesting the claim, delaying payment of the benefits and the attorney's fees.

(6) The two cases came to the Court by petition of the parties for advice.

ISSUE:

Whether Connecticut recognizes a cause of action against an insurer for bad faith processing of a workers' compensation claim.

RULE:

No. The Workers' Compensation Act prohibits damages actions for injuries arising out of and in the course of employment, including injuries arising out of the claims process for which the Act provides remedies for delayed or improperly denied payments. The Act is the exclusive remedy.[1]

COMMENT:

But, the door to claims at law is left ever so slightly ajar. The Court recognizes that an insurer's conduct could be so egregious (the Court's emphasis) that it would fall outside the exclusivity of the Act.

Police officer directing traffic not "occupying" a vehicle. Gomes v. Massachusetts Bay Ins. Co., 87 Conn. App. 416 (2005).

FACTS:

(1) The plaintiff, a volunteer fire policeman, responded to an emergency call in the fire district's vehicle.

(2) While performing his duties directing traffic in the street, he was struck by a car.

(3) The plaintiff received workers' compensation benefits from the fire district and recovered damages from the car driver's insurer.

(4) In this action he sought UIM benefits from the defendant, the automobile liability insurer for the fire district.

(5) The trial court granted the defendant's motion for summary judgment because the exception to the workers' compensation exclusivity was not applicable because the plaintiff was not "occupying" a covered vehicle.

ISSUES:

(1) Is § 38a-336(f), which allows an employee to claim UIM benefits and not be barred by the workers' compensation exclusivity limited to those claimants who are "occupying" the insured vehicle?

(2) Did the trial court properly conclude that the plaintiff was not "occupying" the covered vehicle because he was standing in the street directing traffic?

RULE:

(1) Because the text of §38a-336(f) is plain and unambiguous, the legislature intended to limit the applicability of the exception to employees occupying a covered vehicle.

(2) When compared to the definition of "occupying" as used in another part of the policy, *viz,* "in, upon, getting in, on, out or off," and as defined in other cases, "occupying" does not fit the plaintiff's status under the facts of this case.

COMMENT:

A not unexpected result.

C. CLAIMS AGAINST GOVERNMENT

1.

Private bus company given sovereign immunity. Gordon v. H.N.S. Management Co., 272 Conn. 81 (2004).

FACTS:

(1) The plaintiffs, a bus driver and a passenger, were injured in accidents[2]

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[1] The Court reached the same result, prohibiting a suit predicated on alleged claims handling improprieties, in Almada v. Wausau Business Ins. Co., 274 Conn. 449 (2005).

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involving buses operated by the defendant, a bus management company.

(2) The plaintiffs sought UM and UIM benefits from the defendants.

(3) The defendant asserted by special defense that the claims were barred by sovereign immunity.

(4) The trial court, sua sponte, held a hearing to determine whether sovereign immunity was a valid defense.

(5) At the hearing, evidence showed that the State had hired the defendant to provide bus service; that the State owned all of the defendant's assets including the buses and the defendant's office; that the bus fares were State property; that, in many ways, the State supervised and controlled the defendant; that the State purchased liability insurance for the buses; and that settlements of tort claims against the defendant were paid by the State.

(6) The trial court found that the defendant was not entitled to sovereign immunity.

ISSUE:

Whether the trial court failed to apply the appropriate standard or engage in the required fact-finding in concluding sovereign immunity was not available to the defendant.

RULE:

While there are eight criteria for determining whether a corporation, not bearing the State's name, is an arm of the State and, thus protected by immunity, it is not necessary to satisfy each criterion. Here, the evidence demonstrated: (1) bus service is a governmental function; (2) the defendant was entirely financially dependent on the State; (3) the defendant was controlled by the State; (4) the defendant's budget was monitored by the State; and (5) a judgment against the defendant would, in effect, be a judgment against the State. Sovereign immunity applied.

COMMENT:

The decision is important given the increased frequency of government's delegation of functions to private corporations.

2.

"Reasonably definite" notice of defect is sufficient. **Filippi v. Sullivan, 273 Conn. 1 (2005).**

FACTS:

(1) The plaintiff brought an action against the State under the highway defect statute (§13a-144) alleging negligence in failing to post lane closure signs in a construction zone.

(2) Prior to suit, the plaintiff's compliance with the required statutory notice identified the place of injury on northbound I-95 between exits 72 and 73 at a point approximately 1/4 mile south of exit 73 and about 1/10 mile north of exit 72 in an "area where the subject accident occurred involves a stretch of slopes, grades and curves," and immediately north of a graded blind curve.

(3) The State moved that the action be dismissed because the notice failed to provide the locus with sufficient definiteness and specificity.

(4) At the hearing, the State produced evidence that the two exits are more than 1.6 miles apart and that in the described area there are various terrains including grades, curves, slopes and straight roadway.

(5) The trial court denied the State's motion. The Appellate Court reversed. 78 Conn. App. 796 (2003).

ISSUE:

Was the notice's description of the place of injury defective?

RULE:

(1) The notice requirement was not devised to place difficulties in the path of the injured person. Rather, it is intended to furnish the State with information to enable it to investigate and obtain information to protect against a lawsuit. Unless, then, a notice is patently defective, its adequacy is one for the jury, not the court.

(2) Reasonable definiteness, not precision, is required. Because the State's evidence did not show the existence of more than one graded blind curve between the two exits, the notice was not defective as a matter of law.

COMMENT:

Helpful language for future claimants.

"Identifiable victim" narrowly defined. **Prescott v. Meriden, 273 Conn. 759 (2005).**

FACTS:

(1) The plaintiff, while attending his son's football game, fell on bleachers at the defendant's field, which were covered with mud and rain water.

(2) The defendant's motion for summary judgment was granted by the trial court on the grounds of governmental immunity because the plaintiff was not an identifiable person for purposes of the exception to the rule of sovereign immunity. The Appellate Court affirmed. 80 Conn. App. 697 (2003).

ISSUE:

Whether a parent attending his child's public school sports event comes within the imminent harm exception as a member of an identifiable class of foreseeable victims.

RULE:

(1) The only identifiable class of foreseeable victims, thus far, recognized is that of children attending public school during school hours. Burns v. Board of Education, 228 Conn. 640 (1994).

(2) It is not appropriate to extend the class here because the plaintiff's presence at the game was voluntary; he was not entitled to any special care from the school because of his status as a parent; and the class of foreseeable victims has been characterized as "narrowly defined."

COMMENT:

This class is, indeed, narrowly defined.

4.

Falling rocks and debris on the highway are not a highway defect. **McIntosh v. Sullivan, 274 Conn. 262 (2005).**

FACTS:

(1) The plaintiff brought an action against the State under the highway defect statute (§ 13a-144) after he was injured when his car was struck by rocks and debris which fell from an area adjacent to and above the highway

(2) The State's motion to dismiss on the ground that falling rocks and debris do not constitute a highway defect was denied by the trial court. The Appellate Court affirmed. 77 Conn. App. 926 (2003).

ISSUE:

(1) Whether rocks and debris which fall onto the highway from an area adjacent to and above the highway constitute a highway defect.

(2) Whether the complaint alleged a design defect so as to fall under the statute.

RULE:

(1) A condition does not render the highway defective unless and until it is in the road or so close that it actually obstructs or impedes travel on the road.

2 The two cases involved different accidents but the same issue.

The obligation to keep the highway safe is a reactive obligation, not an anticipatory obligation.

(2) A highway, defective as a result of improper design, is one that is inherently dangerous from the start, not, as was alleged here, defective because of the objects falling from it.

COMMENT:

(1) Dissenting, Justice Katz wrote that the majority's conclusion was based on an unduly narrow construction of the statute.

(2) The majority opinion, written by Justice Palmer, and the dissent provided a detailed, current update on the law spawned by the highway defect statute.

5.

Defect in catch basin off the traveled portion of the road is not a highway defect. **Koslowski v. Commissioner of Transportation, 247 Conn. 497 (2005).**

FACTS:

(1) The plaintiff brought an action against the State under the highway defect statute (§ 13a-144) alleging that he was injured when he stepped on a defective catch basin cover adjacent to a state highway.

(2) He alleged that he was in the course of his employment for a company replacing gas utilities under the road.

(3) The State moved to dismiss, claiming that the plaintiff was not a traveler on the roadway at the time and that, as a consequence, his claim was barred by sovereign immunity and that the catch basin was off the road in an area not meant to be traversed.

(4) The State produced evidence that the catch basin was in a dirt and grass area directly adjacent to the roadway; was guarded by two tall posts at each corner closest to the road; and that a paved curb ran along the road on either side of the posts.

(5) The trial court denied the State's motion.

ISSUE:

Whether the plaintiff's claim falls within the scope of the highway defect statute.

RULE:

The catch basin was located in an area that was not intended for vehicle or pedestrian travel and the alleged defect in the catch basin did not impede travel on the highway.

COMMENT:

No surprises here.

6.

Neighbor injured by falling tree while driving is not an identifiable person for purposes of defeating sovereign immunity. **DeConti v. McGlone, 88 Conn. App. 270 (2005).**

(1) The plaintiff was injured when a rotted tree, located on property owned, controlled, and maintained by the city, fell on her car as she was driving by the property, which was located five houses away from her house.

(2) She sued the superintendent of parks and the parks commission in negligence.

(3) The trial court granted the defendants' motion to strike on the ground that the duty to inspect and care for trees is discretionary and, thus, immunity protects the city's employees and commissioners because the plaintiff did not come within the identifiable person exception.

ISSUE:

Whether there was a sufficient basis to find that the plaintiff was an identifiable person subject to the imminent harm exception to the rule of governmental immunity.

RULE:

The identifiable person exception is narrowly defined. That the plaintiff lived on the street where the trees were located and that she chose to drive home on that street, a voluntary act, was not sufficient to put her within the exception.

COMMENT:

No expansion of the identifiable person exception in sight.

7.

Motor-vehicle exception to sovereign immunity and counter-claim exception to statute of limitations applied. **Mulcahy v. Mossa, 80 Conn. App. 115 (2005).**

FACTS:

(1) The plaintiff, a State trooper, sustained injuries in an automobile accident on January 17, 2000, and sued the defendant alleging that his negligence caused the accident.

(2) The State intervened to be reimbursed for workers' compensation benefits paid to the plaintiff.

(3) On April 1, 2002, the defendant filed a counterclaim against the plaintiff, alleging that the plaintiff negligently caused the accident. At the time, the pleadings in the case were not closed.

(4) The trial court granted the State's motion to dismiss the counterclaim on the grounds of sovereign immunity and that it was barred by the two-year statute of limitations in § 52-584.

ISSUE:

(1) Whether the State was entitled to the defense of sovereign immunity.

(2) Whether the counterclaim was time-barred.

RULE:

(1) The counterclaim against the State fell within the exception to the rule of sovereign immunity provided in § 52-556, which allows claims against the State for injuries caused by a State employee's negligence in the operation of a State-owned motor vehicle. Thus, the claim, even though brought through a counterclaim following the State's intervention, was not barred by immunity.

(2) The counterclaim was not time barred because § 52-584 provides that a counterclaim may be filed at any time before the close of the pleadings, irrespective of whether the statute of limitations governing the underlying claim had run.

COMMENT:

Once the Court fought through the complex pleadings, the decision flowed easily.

D. MEDICAL MALPRACTICE

1.

Neuroradiologist not qualified to testify to orthopedic standard of care. **Friedman v. Meriden Orthopaedic Group, P.C., 272 Conn. 57 (2004).**

FACTS:

(1) The plaintiff sued his orthopedic surgeon in malpractice allegedly committed in the course of back treatment and surgery.

(2) The plaintiff claimed that the defendant failed to diagnosis, from pre-op x-rays, that the plaintiff had a congenital anomaly of the spine.

(3) The plaintiff's expert witness was a board certified neuroradiologist.

(4) The trial court, after taking evidence, precluded the expert's testimony on the applicable standard of care because the plaintiff failed to establish a proper foundation as to whether the expert knew the standard applicable to orthopedic surgeons.

(5) The jury returned a defendant's verdict and the trial court entered judgment. The Appellate Court affirmed.

ISSUE:

Whether the plaintiff's expert's testimony was sufficient to meet the require-

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ment of § 52-184c(d)(2), so that he be knowledgeable and experienced to be able to provide testimony of the professional standard of care applicable to orthopedics.

RULE:

The trial court's ruling was discretionary, and its ruling that the plaintiff failed to establish a sufficient foundation as to whether the expert knew the standard of care for orthopedics, and that he was holding the defendant to that standard, rather than the standard applicable to those in his specialty, was not an abuse of that discretion.

COMMENT:

It is difficult to win a challenge to discretionary rulings.

2.

No expert timely disclosed — defendant's misconduct not sufficiently egregious to make an expert unnecessary. **Boone v. William W. Backus Hospital, 272 Conn. 551 (2005).**

FACTS:

(1) The plaintiff's decedent, age 4, was given medication for an earache in the defendant's emergency room.

(2) Within minutes, the child suffered what appeared to be an allergic reaction.

(3) When the defendant refused to re-admit the child, the child was taken home, where his condition deteriorated.

(4) Upon being returned to the hospital a few hours later, the child died.

(5) The plaintiff's complaint, essentially, alleged that the defendant was negligent in giving the child a drug containing matter to which he was allergic and in refusing to re-admit him despite the signs of an allergic reaction.

(6) The trial court's scheduling order required the plaintiff to disclose an expert by October 26, 2002. When there was no compliance by December 5, 2002, the defendant filed a motion to preclude, which was granted on March 3, 2003.

(7) The trial court granted the defendant's motion for summary judgment, finding that the complaint sounded in medical malpractice and, because there was no expert, no issue of fact existed.

ISSUE:

Whether the complaint alleged medical malpractice and, if it did, whether the defendant's conduct was so egregious that expert testimony was not required.

RULE:

(1) Because the giving of prescription medication is a medical specialty and requires the exercise of medical judgment, the claim that the defendant was negligent and reckless sounds in medical malpractice.

(2) The determination at the emergency room concerning the nature and severity of the reaction and, thus, the decision not to re-admit was a medical judgment the propriety of which requires knowledge not possessed by the typical layperson and in need of expert testimony.

(3) The conduct of the defendant's employees in diagnosing and treating the child did not meet the high threshold of egregiousness so as to fall within the gross negligence exception to the expert witness requirement.

COMMENT:

A tragic end in many ways.

3.

Doctor's prior experience an appropriate subject for informed consent! **Duffy v. Flagg, 88 Conn. App. 484 (2005).**

FACTS:

(1) The defendant, obstetrician, told the plaintiff that her child could be delivered vaginally via the procedure known as vaginal birth after cesarean section (VBAC).

(2) The plaintiff asked the defendant about her personal experience with VBACs and whether she had had any negative outcomes. In response the defendant said that one patient had suffered a uterine rupture.

(3) The defendant did not say that the rupture caused the infant's death and placed the mother at risk.

(4) The plaintiff during an attempted vaginal delivery suffered a rupture and ultimately delivered via cesarean. The infant died after eight days on life support.

(5) The plaintiff's action sounded in lack of informed consent and malpractice in the performance of the VBAC.

(6) The trial court granted the defendant's motion to preclude the plaintiff from introducing any evidence regarding the defendant's prior experience with VBAC deliveries, even though the plaintiff claimed that the evidence was in support of the informed consent claim.

ISSUE:

Whether the trial court abused its discretion in precluding evidence of the defendant's prior experience with one VBAC procedure.

RULE:

When a patient directly asks for information relating to a doctor's prior experience, and when the information is relevant to choices to be made by the patient, the information should be disclosed. Whether the failure to provide such information supports an informed consent claim is a question for the jury not the trial court and should be admitted.

COMMENT:

The decision contains a thorough review of the law of informed consent.

4.

Facts specific to the medical provider an appropriate subject of informed consent (! again) **DeGennaro v. Tandon, 89 Conn. App. 183 (2005).**

FACTS:

(1) The plaintiff's tongue was injured during a dental procedure performed by the defendant, a dentist.

(2) The plaintiff's complaint sounded in medical malpractice and lack of informed consent.

(3) At trial, no expert testimony was offered whether the defendant had deviated from the standard of care.

(4) There was evidence that the defendant was understaffed, was using unfamiliar equipment, and was operating an office that was not ready for business.

(5) The jury returned a general verdict for the plaintiff.

ISSUE:

Whether facts specific to the medical provider can be considered by a jury for a lack of informed consent claim, where the patient did not request information regarding those facts.

RULE:

If the facts and circumstances of a specific case indicate that facts specific to the medical provider would be material to a patient in deciding to embark on a course of therapy, the provider has a duty to disclose that information in order to obtain the patient's informed consent. Such facts, and failure to disclose them, can be considered by a jury on a lack of consent claim.

COMMENT:

This decision is one of first impression.

E. DAMAGES

1.

An injured plaintiff is entitled to at least nominal damages. **Right v. Breen, 88**

Conn. App. 583 (2005).

FACTS:

(1) At trial the defendant admitted that she caused the accident, but denied that she caused the injuries claimed by the plaintiff.

(2) Only a plaintiff's verdict form was submitted to the jury, which awarded the plaintiff no economic or non-economic damages.

(3) The trial court granted the plaintiff's motion for an additur and awarded $1 in nominal damages as well as costs to the plaintiff as the prevailing party.

ISSUE:

Whether a plaintiff must be awarded nominal damages, making the defendant liable for costs, when the defendant's denial of proximate cause and injury is accepted by the jury.

RULE:

"Precedent decrees" that once liability is determined, nominal damages must be awarded.

COMMENT:

A reluctant Appellate Court follows what it sees as the rule in our state.

2.

Jury should have been permitted to award zero non-economic damages. **Smith v. Lefebre, 92 Conn. App. 417 (2005).**

FACTS:

(1) The defendant admitted negligence in causing the accident, but disputed the extent of the plaintiff's injuries.

(2) At trial, the evidence showed that the impact was not substantial; that it was a low speed collision; that she had no cuts or bruises; that the air bags did not deploy; that the plaintiff missed only one and a half days from work; and that she continued weight training after the accident.

(3) At trial, the defendant was able to put into question the plaintiff's credibility.

(4) From her doctors, the plaintiff received a 5% ppd of the back and a 7% ppd of the neck.

(5) The jury awarded $5,500 in economic damages and no non-economic damages.

(6) The trial court ordered a minimal remittitur to conform the verdict to the medical bills and awarded an additur of $7,500 in non-economic damages which the defendant failed to accept.

ISSUE:

Whether the trial court abused its discretion in granting the additur.

RULE:

Because there was conflicting evidence on the extent of the claimed damages, it was the jury's task, not that of the court, to determine the credibility of the witnesses and the weight to be given the evidence.

COMMENT:

The Court's analysis is predicated on the rule of Wichers v. Hatch, 252 Conn. 174 (2000).

But if the verdict for economic damages shows that the jury believed that the plaintiff was injured, non-economic damages are required. **Fileccia v. Nationwide Property & Casualty Ins. Co., 92 Conn. App. 481 (2005).**

FACTS:

(1) The plaintiff sought underinsured motorist benefits for injuries sustained in an accident caused by a tortfeasor with $20,000.00 insurance, which had been paid.

(2) At trial, the plaintiff's evidence consisted of, inter alia, a diagnosis of a herniated disc at L4-5 from his treating orthopedic and physical therapy records showing treatments to reduce pain and muscle spasm.

(3) One CT scan showed a herniation at L4-5. The record was unclear as to what a second CT showed at the L4-5 level.

(4) There was no evidence of a preexisting injury or condition.

(5) The defendant's examining doctor testified that the plaintiff did not have a disc injury and was, in effect, malingering.

(6) Counsel for the defendant, in questioning the doctors, referred to reports of the two CT scans at the L2-3 and L3-4 levels not at the L4-5 level.

(7) The jury awarded $6,148.48 in economic damages, which was the exact amount of bills incurred and proved. The jury awarded no non-economic damages.

(8) The trial court denied the plaintiff's motion for an additur and to set the verdict aside.

ISSUE:

Whether, under the facts, the trial court should have given the additur in view of the jury's precise economic award and the evidence showing objective signs of injury.

RULE:

Because the jury found the exact amount of bills proved to be related to the accident, of necessity, the plaintiff had established that he was hurt. The two aspects of the verdict, therefore, were inconsistent, which likely occurred because the jury was misled by the expert testimony offered by the defendant. The trial court abused its discretion.

COMMENT:

(1) The common denominator of this trio of cases and all that have followed Wichers, supra, is that each case is fact specific.

(2) The results should not be seen as in conflict. The Court broaches this subject in footnote 8.

F. ATTORNEYS

Neither a claim for or the proceeds from a legal malpractice claim can be assigned to an adversary in the same litigation that gave rise to the alleged malpractice. **Gurski v. Rosenblum & Filan, LLC, 276 Conn. 257 (2005).**

FACTS:

(1) The plaintiff, a podiatrist, filed a petition for voluntary bankruptcy under Chapter 11.

(2) Thereafter, the plaintiff was sued in medical malpractice and the defendant was hired to represent him at the request of the plaintiff's insurer.

(3) The plaintiff was later told by the defendant that there was no coverage and that it was filing a motion to withdraw as his counsel.

(4) Before the defendant was allowed to withdraw, a default was entered against the plaintiff because neither he nor the defendant appeared at a court settlement conference.

(5) After a hearing in damages, a judgment was entered against the plaintiff, which judgment was not subject to discharge in bankruptcy.

(6) In a compromise of the judgment outstanding against him, the plaintiff agreed to sue the defendant in legal malpractice and to assign his claim or the proceeds of that suit to the judgment creditor.

(7) After the trial of the legal malpractice case, the jury found that the plaintiff had not breached the standard of care in his treatment of the judgment creditor, but that the defendant had committed legal malpractice.

(8) The trial court denied the defendant's motion for judgment, notwithstanding the verdict finding that pubic policy does not prohibit the assignment of the proceeds of a legal malpractice claim, even though it would prohibit assignment of the action itself.

ISSUE:

Whether a client may assign a legal malpractice claim or the proceeds of such a claim to the client's adversary in the underlying litigation.

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RULE:

Neither a claim for or the proceeds from a legal malpractice claim can be assigned to an adversary in the same litigation that gave rise to the alleged malpractice. This prohibition rests on public policy grounds and avoids opportunities for duplicitous behavior and collusion.

COMMENT:

A case of first impression.

G. RELEASES IN FUTURO

Best for last: release in futuro void as against public policy. **Hanks v. Powder Ridge Restaurant Corp., 276 Conn. 314 (2005).**

FACTS:

(1) The plaintiff was injured while snowtubing at the defendant's facility and sued alleging negligence in its operation.

(2) The trial court rendered summary judgment in favor of the defendant because the plaintiff, at the time of his admission, had signed an agreement that expressly released the defendants from their own negligence.

(3) Other evidence before the trial court included that the defendant charged a fee for admission, that the general pubic was invited to the facility, and that few restrictions were placed on patrons' activities.

ISSUE:

Whether the plaintiff's claim was precluded as a matter of law because he had signed an agreement that expressly and unambiguously released the defendant from liability from its own negligence.

RULE:

Because the agreement adversely affects the pubic interest, it is unenforceable. Among the policy considerations are the expectations that, for a fee, recreational activities will be reasonably safe; that the facility had the knowledge and ability to keep it safe; that broad release agreements remove the incentive to reduce risk; and that the public ultimately would bear the costs of injuries.

COMMENT:

This 4-3 en banc decision is one of first impression and completes the outlawing of adhesion releases in futuro initiated by the Court in Hyson v. White Water Mountain Resorts of Connecticut, Inc., 265 Conn. 636 (2003).

Shutting Down Objectionable Conduct: How to Use Amended Practice Book Section 13-30(b) to Curb Deposition Obstructionists

By Paul A. Slager

We've all been there: an obstructive opposing lawyer makes it impossible to gather meaningful information in a deposition. The obstructions might be inappropriate speaking objections, objections that purport to summarize the witness' earlier testimony, self-serving objections that seek to "clarify" the question you're asking or unfounded instructions not to answer a question. Whatever the form, obstructive deposition tactics like these prevent orderly depositions from taking place. They also share a common trait: each of these tactics violates Connecticut rules of practice.

Of course, the fact that abusive deposition conduct violates the rules doesn't matter unless we: (1) understand how the rules address the issue; and, (2) enforce the rules to stop the conduct. Let's face it, everyone who takes contentious depositions inevitably will face obstructive counsel from time to time, but addressing the problem promises to be time-consuming and frustrating, and almost certainly will delay discovery, right?

Not necessarily. Connecticut practice rules, including an important 2004 Practice Book amendment, give lawyers the tools to stop abusive deposition tactics. Here's a brief primer.

You can't do that!

We all know that Connecticut deposition practice is governed by Practice Book ß 13-30, "Depositions — Deposition Procedure." Section 13-30(b) governs conduct of counsel during depositions. What is less known is that ß 13-30(b) was amended in 2004, to add the following language: "[a]ny objection during a deposition must be stated concisely and in a non-argumentative manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under subsection (c) [which addresses deposition examinations "conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party"]."

The 2004 amendment to ß 13-30(b) is neither novel nor revolutionary. It simply brings the Connecticut rule in line with its federal counterpart, Fed. R. Civ. P. 30(d)(1). Nonetheless, the amended rule arms Connecticut lawyers with the tool they need to keep obstructive counsel in line during depositions. If there was any question about the boundaries of deposition conduct in Connecticut before the amendment (and the fact that there was a distinction between the Connecticut and federal rule before the amendment arguably raised this question), the amendment makes it clear that inappropriate interference by counsel during a deposition need not be tolerated.

Probably because the amended provision is so new, there are no published cases in which Connecticut courts have applied the amended language of the rule. The directive from the Rules Committee, however, is clear from the unequivocal language of the amendment and its similarity to the federal rule. Obstructive deposition tactics involving speaking objections, argument and inappropriate instructions not to answer deposition questions are not permitted in Connecticut practice.

The lay of the land before the 2004 amendments.

Although the practice rules were less specific in defining improper objections before the 2004 amendment, Connecticut courts long have frowned on obstructive conduct by counsel in depositions. Before the 2004 amendments to ß 13-30(b), abusive deposition conduct was usually challenged by lawyers invoking ß 13-30(a), rather than ß 13-30(b). Section 13-30(a) states simply that "[e]xamination and cross-examination of deponents may proceed as permitted at trial." Because interruptions, speaking objections and inappropriate instructions not to answer would never be tolerated in court, the courts reasoned, neither should they be allowed in deposition.

In Hagbourne v. Campbell, 21 Conn. L. Rptr. 121, 1997 WL 781922 (Conn. Super. Dec. 12, 1997)(Vertefeuille, J.), for example, the Court sanctioned defense counsel for repeated interruptions during a deposition taken by plaintiff's

counsel of the defendant. After reciting some glaring examples of defense counsel's speeches and interruptions during the deposition, the Court looked to the language of ß 13-30(a) that "examination and cross-examination of deponent are to be as permitted at trial." This, the Court noted, required counsel "to state the grounds of objection succinctly," rather than through speeches intended to interrupt the deposition. Because defense counsel in Hagbourne had made repeated lengthy speaking objections, and interruptions that were improper, argumentative and time-consuming, the Court ordered defense counsel to pay sanctions in the form of attorneys fees for the estimated time resulting from counsel's interruptions.

The Court reached a similar conclusion in another pre-2005 case, Thomas v. Thomas, 12 Conn. L. Rptr. 604, 1994 WL 597221 (Conn. Super. Oct. 25, 1994)(Bassick, J.) Plaintiff's counsel in Thomas insisted that plaintiff be allowed to consult with her before answering a pending question. The court ordered plaintiff to pay sanctions of court reporter and attorney's fees for taking the continued deposition, explaining that "plaintiff's counsel should not have interrupted the course of the deposition and rather should have advised his client to answer the question posed by defendant's counsel."

Help from the Feds.

Because the amended ß 13-30(b) is nearly identical to Fed. R. Civ. P. 30(d)(1), Connecticut lawyers and judges likely will look to federal cases applying Rule 30(d)(1) for instruction. Not surprisingly, there have been loads of federal court cases in every federal circuit applying Rule 30(d)(1). These cases are remarkably consistent. Federal courts have admonished counsel who are guilty of improper interruptions, speaking objections or instructions not to answer questions for reasons other than protecting a privilege.

The dozens of cases to apply Rule 30(d)(1) include Jones v. J.C. Penney's Dept. Stores, Inc., 228 F.R.D. 190 (W.D.N.Y. 2005), in which the Court ordered sanctions against an attorney who improperly instructed the plaintiff not to answer questions without providing any basis for an objection, and made no colorable claim of privilege. The Jones Court noted that the plaintiff's counsel improperly interrupted by responding to questions before plaintiff could, thus suggesting the answer to plaintiff, in violation of Rule 30(d)(1). The Court found counsel's violations to be wilful, and it pointed to defense counsel's repeated reminders of proper procedure as evidence of wilfulness. Jones highlights a practice pointer: a deposing attorney faced with obstreperous counsel should remind the offending attorney of the requirements of Practice Book ß 13-30(b) on the record to give the attorney the opportunity to correct the conduct, or, if the conduct continues, to have a transcript that clearly demonstrates the wilfulness of the violations.

Similarly, in Morales v. Zondo, 204 F.R.D. 50 (S.D.N.Y. 2001), the court imposed sanctions against defense counsel because his "detailed objections, private consultations with the witness, instructions not to answer, instructions how to answer, colloquies, interruptions, and ad hominem attacks disrupted the examination . . . and protracted the length of the deposition." Id. at 54. In its order awarding sanctions, the court advised that "[i]n all proceedings, including those governed by the Federal Rules of Civil Procedure governing discovery, there is a duty imposed upon counsel to deal fairly and sincerely with the court and opposing counsel so as to conserve the time and expense of all, and so that actions may be litigated in an orderly manner." Id. at 57, quoting Learning International, Inc. v. Competence Assurance Systems Inc., 1990 WL 204163, *3 (S.D.N.Y. 1990).

Finally, in Birdine v. City of Coatesville, 225 F.R.D. 157 (E.D. Pa. 2004), following a deposition, the plaintiff sought an order instructing defense counsel as to proper deposition conduct. The Court advised that the defending attorney's objections should be "succinct and verbally economical, stating the basis of the objection and nothing more." 225 F.R.D. at 158. Specifically, the court advised that it was improper for defense counsel to ask for a clarification of the question before the witness could answer and for defense counsel to object to a question on the ground that it had already been answered and to repeat the answer given previously.

The Court also offered another nugget of practice advice when it advised that a party filing a motion to compel as a result of improper deposition conduct should file it as soon as possible after the deposition. The motion in Birdine was filed about six weeks after the deposition, and the Court stated that had the plaintiff requested more than clarification of proper conduct, the motion would have been denied as untimely because the delay would have adversely impacted the discovery schedule.

How to stop it.

It's easy to recognize when the rules are broken in a deposition, but harder to respond. The Practice Book lends a hand here too. Section 13-30(c) states that "[a]t any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending may order the . . . examination . . . to cease or may limit the scope and manner of the taking of the deposition."

This rule is clear that a party can file a motion for relief. The courts, however, have also made it clear that counsel can also contact the court for immediate help when conduct during a deposition is harassing. In Burgess v. Germain, 2005 WL 2857561 (Conn. Super. Oct. 12, 2005)(Downey, J.), the plaintiff in a motor vehicle case had been in a methadone treatment program. At her deposition, the plaintiff's counsel repeatedly instructed her not to answer questions about the methadone treatment and later objected to the questions on the grounds of relevancy, again instructing her not to answer. The defendant filed a motion to compel and for sanctions. Granting the motion, the court explained that all deposition questions objected to should be answered unless a party first procures a protective order, and that relevancy is not an appropriate objection at a deposition. The Court further emphasized that plaintiff's counsel should have contacted the court for immediate assistance during the deposition pursuant to P.B. 13-30(c), but did not. The Court granted the motion to compel and for sanctions, ordering the plaintiff to pay attorneys' fees and costs incurred in preparing the motion, along with the costs of the reconvened deposition.

Other Connecticut courts have encouraged lawyers to contact the Superior Court for help in the heat of a deposition dispute, whether the dispute centers on improper questions or objections. Some examples of these cases include Kavy v. New Britain Bd. of Education, 2001 WL 688622 (Conn. Super. May 21, 2001)(Shapiro, J.) (noting counsel should have contacted the court immediately pursuant to ß 13-30(c) if she believed a deposition was being conducted in an inappropriate manner and finding counsel's failure to do so, combined with counsel's decision instead to instruct a nonparty witness not to answer questions, was unacceptable); Goenne v. Aetna Life & Casualty, 1994 WL 65219 (February

Shutting Down Objectionable Conduct: How to Use Amended Practice Book Section 13-30(b) to Curb Deposition Obstructionists

(Continued from page 21)

24, 1994)(Corradino, J.) (stating that the proper procedure to address improper, bad faith or oppressive questions during a deposition is "to immediately contact a Superior Court Judge for a ruling").

Not all judges agree as to the efficacy of this procedure. In Rosado v. Bridgeport Roman Catholic Diocesan Corp., 1995 WL 348181, n.19 (Conn. Super. May 31, 1995)(Levin, J.), while noting the requirement that counsel should immediately contact a Superior Court Judge for a ruling if improper, bad faith or oppressive questions are asked during deposition, the Court recognized that "[t]o expect to contact a Superior Court judge on the same day of the deposition, let alone immediately, may be unrealistic. Indeed, in many judicial districts, the procedure virtually is unheard of. To compound the problem, in a case such as this it may be necessary to contact the judge who has familiarity with the case."

The Rosado court highlights a real, practical concern: it may not be easy to find a Superior Court Judge available to take the call when you most need to silence abusive opposing counsel. Nonetheless, these cases suggest that attempting to contact a judge is a good starting point. And, if you are successful finding a judge to address the issue, you'll save the time of having to prepare a written motion later.

If you can't find a judge to rule on the issue immediately, you'll need to file a motion. While this recourse is time-consuming, its value may extend well beyond the case in question: silencing obstructive counsel once might deter her from improper deposition interference not just now, but in the future.

Why to stop it.

Enforcing ß 13-30(b) serves two important functions: it helps you by giving you fair access to discovery in your case and it elevates the level of Connecticut practice. By its very nature, Connecticut's discovery system only works when lawyers, for both plaintiffs and defendants, follow the rules. When discovery rules are ignored or circumvented, the system breaks down. Although most Connecticut lawyers do their best to be strong advocates while practicing within the rules; a small minority of attorneys regularly defy these rules because they consider it to be in their clients' or their own interests. Those who fall in this category usually are repeat offenders who have been permitted by opposing counsel to get away with improper deposition conduct over and over again. This lowers our standard of practice.

The best way to stop improper deposition conduct is for lawyers who are victimized by the interference to challenge the obstructive conduct. If ß13-30(b) offenders face, and lose, a few motions, it may become more difficult for them to explain away their behavior to judges, their clients and their firm colleagues. Equally important, a sanctions order may cause the next lawyer — and the one after that — to think twice before engaging in similar conduct.

Special thanks to Amanda Whitman for her research help.

Reflections on Mediation — Unstacking the Deck[1]

By William H. Clendenen, Jr.

Trial lawyers are increasingly being pressured to mediate their cases and forego the pursuit of fair and just compensation for their injured clients at trial. Insurance companies, large corporations, the court bureaucracy and its functionaries, defense lawyers and the emerging mediation lobby have effectively created a climate in which half a loaf or less is perceived as successful representation. Trial lawyers need to be vigilant to protect Connecticut injured victims from a process which is, increasingly, ineffective.

Mediation can be an effective tool when employed properly in the right case, but all too often, mediators are unable (or unwilling) to leave their preconceptions and egos at the mediation room door. Experienced trial lawyers are rightly skeptical of a mediator who, after less than a few hours and without the benefit of the evidence under the white-hot light of trial, purports to understand the case better than the trial lawyer and to have the ability to judge what the case is worth. Unless the parties otherwise agree, the mediator should never put a number on a case. The only party to benefit from a number is the defendant, not the victim.

To host successful mediations, mediators need to have the rare qualities of selflessness, insight, intuition, intelligence and modesty. The task is to hear the parties' positions, identify the areas of agreement and locate the pathways to resolution.

The hardest and most important step in the mediation process is locating the right mediator for the problem at hand. It is critical to negotiate long and hard to get the right mediator. Most mediations fail because the parties selected the wrong mediator.

In selecting the right mediator, you need to understand the nature of your issues (i.e., coverage, liability, fair value, etc.) and the personality and skills of your opponent. You then should locate a mediator who will naturally focus on your issues and be able to respond to and handle your opponent. I usually vet the mediator candidates with other trial lawyers before agreeing to anyone.

After many years of mediation, with the help of mentors and friends, I have developed a simple process to help insure a successful mediation. There are six steps in the process: 1) Introduce, 2) "Prick," 3) Qualify, 4) Show Off, 5) Close, and 6) Revisit. A trial lawyer must use all six steps to succeed. The steps must be used in order. Going out of order may still result in a settlement but will more often than not leave significant money on the table.

Introduce: The task here is for all of the players at the session to be exposed to you and your client. Let the other side know what you want them to know about you. You want to insure that this first impression of you is what you want it to be. This is the time to extend yourself to them and gain their trust and respect.

In this process you are also probing the other side for information and ideas to be used as the mediation progresses. You need to identify interests, traits, hobbies, etc. to further assist the

[1] Many thanks are due to the late Robert C. Zampano, United States District Court Judge, the Honorable Angelo Santaniello, retired Justice, Connecticut Supreme Court, my friends Robert Thomas and Richard Demato, businessmen and my partner Kevin Shea. The comments and opinions herein are entirely mine.

mediator in finding the path to the resolution you seek. Remember, you want this to be a "feel good" experience.

"Prick:" Once you have provided your opponents with the desired impression of your client (and you), the next task is to obtain a clear understanding of your opponents' time constraint or sense of urgency. You may have already secured some understanding of their time needs during the process of setting up the mediation and establishing the ground rules. The ultimate goal at this stage is to have the opposition understand that mediation day is "Blue Light Special" day — the day the best value is available. You need to make credible a reality that after mediation day you will have neither time to discuss, nor interest in settlement, as you do not want to be distracted from the upcoming trial.[2]

Qualify: The second most frequent cause of a failed mediation is the absence of people capable — empowered and authorized — to make the deal you want them to make. If you need seven figures to settle your case, you need to ensure that the opposition is ready, willing and able to do business at seven figures. Only when you have a qualified person should you move on to the demonstration.

If your opposition is, in this example, in the six-figure range, you have two obvious choices: first, you can try to qualify him or her; or second, you can seek to inject another qualified person to the opposition. (N.B. No qualified person can ever be present on the telephone.) Injecting another person is hard, but sometimes you can qualify an opponent who originally appears unqualifed. One way of qualifying the opposition is to explain clearly and humbly that you understand that s/he does not yet know what you know about the case, and that this understandable absence of knowledge may be the cause of any difference between the respective perspectives on the case. You also need to explain carefully that you know that you need to demonstrate to him/her the merits and value of the case. In fairness to your client, you then need to elicit from the opposition the commitment that once you have successfully made that demonstration, that s/he is then capable (empowered and authorized) to settle at your number.

Unless I am convinced that the opposition is qualified to make a fair, just and reasonable settlement, I abort the mediation. The interpersonal exchange and dynamics are critical here. Being unqualified, your opposition cannot actually settle the case for fair value on mediation day. Compounding this problem is the dynamic of the unqualified person pleading your case to the home office-qualified person above him/her and not doing it as well as you would. An ineffective presentation likely will result in a lost deal or a forced settlement for less than you would have obtained if you had made the case directly to the qualified person.

Show Off: Frequently, the opposition comes to the mediation to watch you put on the essentials of your case. Many of you will proceed with the demonstration even in the absence of a qualified person. If you choose to do so (which is a bad idea), please remember that in the absence of a qualified person you can never close the settlement.

When you have a qualified listener, it is "show time." Pull out all the stops — show the day in the life video, excerpts from the video deposition of your life care planner, etc. On mediation day, the value of the case depends almost exclusively on your show and tell. Your tone should be conciliatory. The opposition is not the enemy; they are your partners in redressing the terrible tragedy suffered by your client and his family. If you show off correctly, the opposition will feel guilty by association with their position. You need to be careful to hold your advocacy in check so as to avoid allowing the opposition to steel themselves from their emotions.

Close: With the qualified person, you are able to progress rapidly in the negotiation using commonly agreed-to units of measure. Everyone has their own take (numbers) and breakpoints to use. For example, if I want to get to $9,000,000, the first critical breakpoint is $5,000,000; then $7,500,000. Once you have reached $7,500,000, you can get to the $9,000,000. For a six-figure case, the same break points apply, with one zero less. Have faith.

If at this stage you learn that your qualified person is suddenly unqualified, abort. It is far better to reschedule another session when a properly qualified person can come then to queer an agreement by dealing with an unqualified person who must then make your argument ineptly to the missing qualified person.

Revisit: Life is short. There is no need to make enemies, particularly when we see many of the same people time and again. Remember that the qualified adjuster gives lots of money to well-prepared lawyers. It is a good idea to play golf or tennis with him/her or have lunch and a drink. You also want to leave mediation day with everyone (your client, the defendant, the mediator, the adjustor) wanting you to be their lawyer and believing that if they were to call you would remember them with enthusiasm.

Fini: Mediation is an art and not a science. Mediation should efficiently resolve difficult problems with limited information. Most professional mediators and lawyers make more of the mediation process than it deserves. The best mediators, in my experience, are the businessmen who on a daily basis buy and sell for a living. And always remember that as trial lawyers we have the ultimate dispute resolution mechanism at our fingertips: "Call your first witness."

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2 Remember that you as a busy trial lawyer always have an upcoming trial.

Getting It Right — The *CTLA Forum* Notable Judicial Opinion

This issue inaugurates a regular Forum feature on notable judicial opinions. Each issue, we will print an opinion that we believe exemplifies insight, clear thinking, good judgment, or eloquence. Our aim is educate our members as well as other lawyers and judges and to recognize judges, particularly trial judges, who have done outstanding work. We encourage our members and readers to send us suggestions. And we do not limit the opinions we select to injury or death cases: we are on the lookout for other civil, or criminal, cases as well.

Appropriately for our first opinion, we have selected a case that clarifies an area in which courts around the country have regularly become dazed and confused: the admission of expert testimony under Daubert v. Merrill-Dow Pharmaceuticals and State v. Porter. In Jordan v. Yankee Gas, Judge B.J. Sheedy addresses a claim that the testimony of State Police fire marshals concerning the cause and origin of a fire should be excluded because the investigators allegedly did not follow the "scientific method" prescribed by the leading text on fire investigations. Denying the motion to preclude without requiring a hearing, Judge Sheedy carefully places the Daubert-Porter analysis in its proper place as a limited tool for assessing the relevancy of novel expert claims. In doing so, she identifies the central role of Hayes v. Decker, the Connecticut Supreme Court opinion that underscored the limits of Porter's scope. (It is particularly appropriate for us to begin with an opinion that relies on Hayes because the Supreme Court's opinion in that case closely followed the analysis proposed by the CTLA in its amicus brief.) The opinion is clear, sensible, and based on a thorough review of the facts as well as the law — just what we are looking for in our notable opinions.

Jordan v. Yankee Gas Servs. Co., 2006 Conn. Super. LEXIS 150, 14-25 (Conn. Super. Ct. 2006)

(J.D. Waterbury, Complex Litigation Docket, No. X01CV940185567S) (Sheedy, J.) This is a product liability case arising out of the death of a mother and two small children in a house fire. The plaintiff alleged that the fire was caused when a gas water heater ignited gasoline that had accidentally spilled on the floor nearby. The water heater was alleged to be defective primarily because it was not elevated on an 18-inch stand that, the plaintiff claimed, would have prevented the water heater's open flame from igniting the heavier-than-air gasoline fumes. The opinion addresses multiple issues; we have included only the portion addressing the motion to preclude the testimony of state fire marshals concerning the cause and origin of the fire.

Memorandum of Decision on Defendant's Motion In Limine to Preclude Testimony of McGurk and Butterworth

The plaintiff has disclosed James Butterworth and Kevin McGurk as expert witnesses regarding the origin and cause of the subject fire and Yankee Gas claims the testimony of each is "no more than speculation and conjecture." Brief, at 2. Yankee Gas argues the testimony: a) failed to follow the scientific method or any other valid or reliable methodology and b) reached conclusions not analytically related to any facts or empirical data. Its fundamental argument is that they failed to follow the now accepted reliable and valid methodology of fire origin and cause investigation as published in the National Fire Protection Association Guide, Section 921 (NFPA 921), 2004 Edition. Id., at 4. Both witnesses were, at the time of the fire, fire investigators with the Connecticut State Fire Marshal's office. McGurk was the lead investigator though Butterworth was his supervisor. Both concluded the fire was accidental in nature and occurred as a result of George Jordan, Sr. spilling a container of mixed gas and oil onto the floor of the dwelling's basement, his subsequent attempt to soak it up with cloths, the spreading of the liquid toward the gas piloted hot water heater in the northeast corner of the basement, and the igniting of the vapors. Butterworth and McGurk, both of whom had received fire investigation training and had conducted fire investigations prior to this fire, concede they relied — at least in part — on Jordan's description of events, which description they ultimately adopted. Relevant is that Jordan gave a number of statements, one written and the others oral. With the exception of one (1) oral statement he gave (weeks after the fire) to Kastens, his landlord, Jordan's statements are "generally" consistent in that, in each, he concedes the storage of gasoline in an obviously cluttered basement containing, inter alia, the subject water heater, two (2) kerosene heaters stored under the bench where he worked, and an oil fueled furnace. They are consistent (with one exception) in that Jordan concedes he knocked over (or spilled) a container housing the gas/oil mixture causing the spill onto the floor and that he attempted to wipe the mixture from the floor with rags. They are generally consistent in that they recite that the mixture fell toward the water heater and burst into flame. See e.g., Exhibit Z, Jordan's signed statement of 8/12/91 (the date of the fire) given to the Derby Police Department.[1] The Kastens statement looms large in that, when deposed, Kastens asserted Jordan told him the fire occurred when he (Jordan) wired a kerosene heater to the ceiling and lit it so that he (Jordan) could use the heat it generated to dry out the kitchen floor in his apartment above and that the heater then fell to the floor and started the fire. Exhibit M, pp. 83-85. Neither McGurk nor Butterworth could have been aware of the Kastens statement at the time of their investigation—nor do their depositions (taken in late 2003 and 2004) suggest they were made aware of the same—if at all — until shortly before their depositions.

Yankee Gas urges the court to preclude the investigators' testimony in the exercise of her "gatekeeping" function under State v. Porter, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). This court does not believe a Porter (or Daubert) analysis is here required because the evidence sought to be excluded is not the type of scientific evidence with the potential to mislead jurors that Porter was intended to address.

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1 Yankee Gas refers to these five (5) statements — as recited on p. 9 of its brief in support of its motion to preclude — as consisting of "different stories" — apparently because not exact recitations (at least as reported by various fire and/or police personnel). That is to overstate the case given that the facts relevant to an origin and cause determination do not vary.

This state's Supreme Court squarely addressed the matter in Hayes v. Decker, 263 Conn. 677, 822 A.2d 228 (2003). There, the expert doctor testified that, though the discontinuation of the plaintiff's blood pressure medication did not cause his heart attack, it did cause his blood pressure to rise and resulted in more tissue damage than would otherwise have occurred had the medication not been stopped. 263 Conn., at 677. Relevant is that the doctor testified he knew of no research or completed study documenting a link between the discontinuance of blood pressure medication and an increase in the severity of the subsequent heart attack. Id., at 680-81. Nor could he point to any scientific articles, studies, or treatises concluding that specific increases in blood pressure resulted in specific amounts of heart muscle damage. Id. at 681. The trial court, on the basis of the Porter standard and the absence of any corroborative scientific study, ruled that testimony inadmissible and denied a subsequent motion to set aside the verdict for the defendant. The plaintiff appealed, claiming mis-application of the Porter standard; the Appellate Court reversed the trial court and remanded and our Supreme Court affirmed.

Hayes concluded:

Expert testimony should be admitted when: (1) the expert has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues. Id., at 683 (Citation omitted.).

The Court went on to state there is a further hurdle to admissibility "when that testimony is based on innovative scientific techniques" (Id., at 683-84) since, in those situations, the scientific evidence that forms the basis for the expert's opinion must undergo a validity assessment to ensure reliability. Id., at 684, citing to Porter, 241 Conn., at 68-69.[2] There is no claim by Yankee Gas the methodology employed by Butterworth and McGurk was "innovative" so as to require a Daubert analysis; under the mantle of Daubert, the defendant instead presumes its applicability and then proceeds to argue that, because the methodology suggested by NFPA 921, was not employed (or was not employed in the manner and order there urged), the testimony of Butterworth and McGurk ought be precluded. That is to ignore the lesson of Hayes. Once qualified as experts, their testimony will "assist the jury in understanding the evidence or in determining a fact in issue." Id. at 686, citing to Conn. Code Evid. ß 7-2. Both McGurk and Butterworth had special training in the conduct of origin and cause determinations prior to the subject investigation. Butterworth attended a two-day fire investigation seminar sponsored by the Connecticut chapter of the International Association of Fire Investigators in Hartford in 1990, and origin and cause determinations were there addressed. He attended an 80-hour program as part of this state's certification requirements in the spring of 1991.[3] Conducted by the Office of the State Fire Marshal, it focused on "origin and cause, interpreting burn patterns, examination and elimination of ignition sources, causes, motives, interviewing." Exhibit E, p. 43. In June of 1991, he attended a two-week program at the National Fire Academy in Emmitsburg, Maryland; the same subjects were there covered. McGurk attended both the Connecticut fire marshal certification program in 1988 and the National Fire Academy in Emmitsburg, Md. (in 1989). Having trained and worked in the state fire marshal's office and having attended programs and seminars on such matters relevant here as origin and cause, burn patterns and their interpretation, examination and elimination of ignition sources, both bring a knowledge of fire investigation techniques beyond the ken of a lay person and, having conducted an examination of the fire scene on 8/13/91, they are qualified to render their opinions to the jury re the origin and cause of this fire. Specifically, they are entitled to tell their jury of their awareness of the statement of the only eyewitness (Jordan — who re-enacted his movements immediately prior and subsequent to the moment of ignition), their observation and interpretation of burn patterns in that area of the basement where Jordan was, their conducting of a "spill test" which they believed confirmed that the spill traveled from the workbench to the water heater, and their investigation to exclude other competent sources of ignition. That Yankee Gas believes their investigation was not thorough and that they did not do all that could or should have been done is a matter of cross-examination. Under the relevant case law and ß 7-2 of the Conn. Code Evid., their opinions are admissible. It matters not at all that Yankee Gas — or even this court — may find more reliable other expert testimony. "Under Porter, a trial court does not have the discretion to exclude expert opinion because it believes there are better grounds for an alternative conclusion." 263 Conn., at 686 (Citation omitted.).

Whether Porter, (or Daubert) applies to the grounds underlying these investigators' origin and cause conclusion is dependent upon whether those grounds "are the type of evidence contemplated by Porter." Id. "Not all premises are subject to the Porter validity assessment . . . Some scientific principles may have become so well established that an explicit Daubert analysis is not necessary for admission of evidence thereunder . . ." Id., at 687. The contribution of such procedures as the interviewing of witnesses, examination of the scene following fire suppression efforts, observation of debris, the location of objects within the fire environment, the examination of debris, the consideration of other competent ignition sources, the study and location of burn patterns, and the spill flow test are established fire investigation techniques. The validity assessment "has either been ignored or rejected in cases in which the method used by the expert was a matter of physical comparison rather than scientific test or experiment . . ." Id., at 688. "The jury is in a position to weigh the probative value of the testimony without abandoning common sense and sacrificing independent judgment to the expert's assertions based on his special skill or knowledge . . . Furthermore, where understanding of the method is accessible to the jury, and not dependent on familiarity with highly technical or obscure scientific theories'[3] the expert's qualifications and the logical bases of his opinions and conclusions can be effectively challenged by cross-examination and rebuttal evidence." Id. (Emphasis added.). This is entirely consistent with Federal Rule of Evidence 702.[4]

Because the experts do not expect to testify concerning innovative scientific techniques, their testimony is admissible without undergoing a Porter analysis or being subjected to a Porter hearing. Additionally, here as in other motions to

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[2] Porter followed the U.S. Supreme Court's decision in Daubert in that regard.

[3] He did not complete the requirements and thus was not certified in October of 2004 when he was deposed.

Getting It Right — The *CTLA Forum* Notable Judicial Opinion

(Continued from page 25)

preclude here adjudicated, the defendant attaches too great an emphasis on NFPA 921. While the NFPA 921 sets out a method of fire origin and cause investigation endorsed not only by Butterworth and McGurk but by professional organizations as valid, reliable, and authoritative and while it is a comprehensive guide, its contribution to fire science ought not be over-stated. It may now be the preferred fire investigative method, but it was never intended to invalidate or supplant all other valid scientific methods. To suggest — as Yankee Gas does — that all origin and cause experts must follow the five (5) steps (described in Chapter 4) comprising the basic methodology of a fire investigation[5] in a ritualistic lock-step approach ignores not only other authoritative sources (i.e., Kirk's Fire Investigation, the Fire Investigation Handbook, the Fire Protection Handbook, etc.) but also ignores the testimony of both investigators that they employed the same methodology but did not then identify it as "the scientific method." See Butterworth depo, Exhibit E, at 251 and McGurk depo, Exhibit P, p. 448. It is a jury question whether their investigation was based on valid and reliable methods of origin and cause fire investigation. All that counsel for Yankee Gas was able to elicit as steps not then taken and which the investigators would undertake today if conducting a similar investigation go to weight and not admissibility.

The motion to preclude Butterworth's and McGurk's origin and cause opinions is denied.

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[4] Rule 702 provides that "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise."

[5] Those steps are 1) data collection; 2) data analysis (inductive reasoning); 3) development of hypothesis; 4) testing of hypothesis (deductive reasoning); and 5) avoidance of a presumption of cause.

TELLING IT LIKE IT IS

The *CTLA Forum* Notable Final Argument

The CTLA believes in the jury system. We think that Lord Devlin's dictum applies to civil as well as criminal cases:

Each jury is a little parliament…No tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.

Final argument is our last, best chance to tell the jury why we believe in our case – and why they should. Beginning with this issue, we will publish excerpts of final arguments that we think speak to issues that go beyond the specifics of the case in which they were given. Our aim is to arm our members with useful tools for their collection and to help us make connections between the particular case that we are working on and the public interest that each of our cases should in some way advance.

Our main sourcebook is the CTLA's own "Collection of Final Arguments," edited by Kathleen Nastri and Joe Mirrione (available from the CTLA – order your copy now, while supplies last). Our first selection is from Mike Koskoff's summation Jacobs v. Yale, a medical malpractice case arising out of what the trial judge, Judge Jon Blue, rightly called "truly horrific" injuries, including brain damage and blindness, suffered during surgery. The excerpt we have chosen addresses a recurrent issue – missing or allegedly inaccurate medical records – that malpractice defendants regularly try to minimize and explain away. As Mike vividly shows, medical records are not a dry or peripheral subject: they are an integral part of a system designed to protect patients.

Final Argument, Jacobs v. Yale University, March 2, 1999 –
Mr. Koskoff:

We have learned in the trial that hospital rules and regulations were flouted, violated and ignored, violated and ignored with seemingly no contrition. "Oh, yes, that's one of my bad traits, I don't get my records in on time, just one of my bad traits, very annoying, many of us at Yale do that, despite the clear words in the regulations that say when records have to be in." And, you know, I made a lot of to-do about the records. And I don't know if I really made it clear why that is but, you know, when a person undergoes surgery, and they're put out and they're unconscious, they are engaging in the greatest act of faith that one human being can give to another. They are placing their lives and their well-being in the hands of total strangers, total strangers. And they're unconscious, and they don't know what's going on. And they don't have any witnesses with them. The only thing they have to protect them is the record.

The only thing they have is the record. And that's what the first witness in our case, the medical records person, told us. She said that the medical records served several important functions in a hospital. The first is to communicate between health care providers, so that one health care provider, one doctor or nurse or someone, knows what's going on and knows what another one is doing. A second function, they said, is to serve as a basis for review, and to review the care that's given to the people in the hospital. A basis for reviewing the care. When we bring out the record and say, Does this record justify the result? Was there a torn aorta? Was there a transected aorta? How are we going to ever bring them to this courtroom, how are we ever going to prove anything, if the record doesn't mean anything, if people come in later on and say, oh, well, as I remember, it was really different, as I remember; Yes, I said it was a small intimal tear, but now as I — as I'm thinking about it, I didn't really mean intimal tear, what I really meant was transected aorta. You know, Roger Maris hit sixty-one home runs in 1961. It's in the record book. It's a record. If Roger Maris came in here and said, as I remember it now, it was sixty-two, what kind of nonsense is this? To allow them to take the record, which is there for the protection on Billy Jacobs, and to be able to torture it and contort it so the words don't mean anything anymore. I mean the records person from Yale said that the reason we have the record, one of the reasons is, to protect the rights of people like us, who need records to document what happened. To protect their legal rights.

When the integrity of the record is violated, when the record isn't made up until seven months later, how can you have faith? How can you trust what they tell you has happened? How can you trust it? We're engaged here in an act of trust, and how can people be accountable for their acts if they're not going to do the things they're required to do under the rules of their hospital, under their own rules and regulations. How can they be permitted to get away with that? If you allow them to do it, if you allow them to make up records thirteen years later, and to change the words, then doctors are free to do and say anything they want, and they're allowed to bury their mistakes, which is what they tried to do in this case — bury it.

You and Tort "Reform"

From "David Ball on Damages" Second Edition, By David Ball, Ph. D., NITA Press 2005

"I was 100% convinced that the doctor did what they said to that poor lady. She deserved what her lawyer was asking for. But I decided no. We can't let lawyers damage the medical profession any more. Sometimes we have to sacrifice the individual to the big picture."

—Juror comment, December 2004

11.1

Stepping out of the Stereotype

You need to take control of the way jurors think about you. Not you as part of a group, but you as an individual attorney.

I hate to say "Do what I say or die," but if you and your colleagues do not quickly start doing the kinds of things this chapter is about — without waiting for your organizations to do it for you — your profession will die, and with it a lot more. As of this writing your profession is in intensive care. Unfortunately no one is providing the care. You have to do it yourself.

The trial lawyer organizations have been using every resource, ounce of energy, and heroic effort to battle tort "reform" in the legislatures. (The civil defense bar has been oddly silent, given that their futures are just as much on the line.) But little has been done to effectively join the battle on the public-opinion level. In addition, the forces behind tort "reform" have had almost unlimited resources and have not allowed themselves to be disadvantaged by truth. So in spite of the trial lawyer's organizations having fought hard in the legislatures, tort "reform"— now ominously relabeled "legal reform"— is winning huge victories that were undreamt of when the movement started 25 years ago.

But the legislative arena is not the only killing ground. So is the courtroom. As much as a third of the jury pool is now poisoned. Of the 60 people in your next jury pool, JuryWatch's research shows that in most cases, 15 to 20 will likely "know" you are dishonest; predatory; pathologically greedy; responsible for driving doctors, businesses, and jobs out of the state; damaging to American businesses by placing them at a disadvantage with foreign competitors no one sues; responsible for the lack of flu shots in the winter of 2004/2005; and akin to a kind of domestic internal terrorist. This is the stereotype that applies to you.

And most of the population believes you and your client are likely to lie in order to win. (Many jurors also think the defense lies. But jurors forgive some lying by an accused. And even if they do not, you are the one with the burden. If jurors think you are lying, you lose even if your opponent is Pinocchio.)

So what can you do? No matter what your involvement with your trial lawyer association's legislative efforts, in order to serve your clients you face an additional requirement. You must let the public see that you are different from the indelible stereotype that many now have of your profession. This task starts long before the first day of trial.

This is not a call for you to fight against the larger forces of tort "reform," or to alter the public's stereotypical image of trial lawyers. It is, rather, a call for you to show that such a stereotype does not apply to you.

You can't do this simply by seeming credible. Even if you are one of the fortunate few who have the personal attribute of conveying absolute credibility from the moment jurors see you (think Gerry Spence), many jurors no longer believe in "credibility."

Did you find Attorney Smith credible?

Very. *But lawyers are taught to seem credible.* They go to seminars to learn how. Credibility is their job and anyone can learn it. That's why I didn't believe him.

And this:

Why did you believe the plaintiff's experts and not the defense's?

They both sounded okay so we were ignoring both sides. None of us had the experience to know which ones were right. But then one of us said that plaintiff lawyers pay legislators to vote for pain and suffering money, so obviously they also pay experts to say what they want.

I wish I were making this up.

You are the butt of Jay Leno jokes that get meaner and meaner every year. You are the focus of talk show vitriol, political attacks, and even pastoral warnings, not-for-profit status be damned. With good reason you are probably at least a little self-conscious when you introduce yourself to a layperson as a trial lawyer.

So you can't overcome it all just by seeming credible in trial.

Not all of this comes from tort "reformers." Some is from plaintiff's attorneys whose advertising would turn their own mother against them, and probably has. And mother is right. One lawyer in a large city — who I'm sure had a mother at one time or another — ran an ad campaign that aroused so much suspicion that entire rooms full of people groaned and laughed when they heard his name. And they assumed that every *attorney working on that kind of case had to be just as disgusting* — as well as attorneys working on other kinds of cases.

When Vioxx advertising started, most of the barrage of advertisements did not bother to mention that Merck might have done something wrong. In the haste to sign up as many clients as their "McLitigator" offices could handle, they left out the only thing that could have justified to the public that anyone would sue: that Merck might have done something wrong. The resulting public impression was that despite Merck being a decent company that voluntarily ran its own testing and yanked Vioxx as soon as its testing discovered a problem, nonetheless the usual trial lawyer vultures lined up to get rich off of this unpreventable misfortune.

In later interviews and newspaper advertising, Merck's president reinforced that public perception so blunderingly created by the McLitigators.

Apparently not yet satisfied with the damage they had done to the profession, some of these Vioxx lawyers next held a well-publicized organizational meeting in a large city. Guess which one.

Las Vegas.

Not even the Mafia does that anymore! They are sensitive to public opinion. But this group of trial lawyers either did not care about the public or never gave the public opinion thought. They just wanted to sign up clients.

In Colorado after a seminar, a lawyer approached and told me his name. It had a distressingly familiar ring. We all hear it all the time on TV ads, and it leaves a lousy taste in the mouth of every juror. "Are you him?" I asked, ready to say something as insulting as I could possibly think of. "No," he said. "I'm not 'him.' "

"Damn," I said to myself, because I had just thought of something really colorful and vile to call him.

"But I have the same name," the poor guy said. "Jurors think I'm him."

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You and Tort "Reform"

(Continued from page 28)

I asked, "Do they throw their chairs at you?" But then I told him how to handle the problem.

So let us not merely blame the forces of tort "reform." Many plaintiff's attorneys are digging graves for the rest of you. These characters don't care what they are doing to the jury pool. They probably have no intention of ever getting in front of a jury. They want a bunch of cases they can settle fast. They are every bit as harmful as tort "reformers" make them out to be.

Many of the Vioxx attorneys are decent folks who will serve their clients well. But they have all been tarred with the same brush by the bad ones. So has every other plaintiff's lawyer—because the bad ads and the bad acts are the ones that jurors see and remember.

So due to tort-"reform" efforts along with the creepiness of some of the McLitigators, jurors believe that you are a major crisis: You are, for example, driving physicians out of whatever state you live in. The fact that physicians are not leaving does not keep people from believing they are. "Heck, three of 'em passed me on the freeway; they couldn't get out fast enough."

Result? You, dear reader, are seen as the crisis. That is what many jurors think about you as you walk into court. And you can't fix it for yourself just by what you do in trial. You have to start earlier.

You may be the most decent human being on the planet, the most caring, the most honest — but you are stereotyped. Stereotyping is called "attributional bias," the mechanism of, for example, racism. You can't shake it off any more than a Black man could at the hands of a racist. It does not go away, not over the course of a trial and probably not over the course of a lifetime.

You cannot run from the stereotype. Some trial lawyers' organizations have desperately tried to run by changing their names from "trial lawyers" to "consumer attorneys." Of course the public takes this as an admission that something really is wrong with trial lawyers.

You cannot hide from the stereotype. Nor can you change it.

The only solution is to transcend it.

For many years, the National Jury Project's Susan Macpherson has worked closely with such social ills. She explains that you can rarely convince anyone that their stereotypical "understanding" of you or anyone else is wrong. It is too deeply ingrained. But, she teaches, there is something you can do about it — and this is what you must start doing long before you ever get to trial: You have to do things (not simply say things) that show you are an exception to the stereotype. You can't suddenly make jurors believe they are wrong about the stereotype they have come to believe after years of powerful conditioning. That will take years, if it can be done at all. But you have cases next week and next month and next year, and cannot wait.

So how do you show (not just say) that you are an exception to the bad stereotype? How do you get the message to the jury pool? Hopefully you are convinced that you must start doing this right away. Some of us who see trials and talk to jurors day in and day out know that either you start doing something about it now, or start looking for another line of work while you can still afford the bus fare to job interviews.

In addition to showing the prospective jury pool that you are an exception to the stereotype (in ways such as those described below), you also have to start showing them what the crises really are. For example, between 400 and 600 people die every day in American hospitals from medical negligence. Of course that's a crisis, but so far hardly anyone knows about it.

Are product safety standards a crisis? Look at the statistics, and of course they are.

How about physicians who lie under oath to prevent recovery for a malpractice victim? Part of the crisis?

Accident reconstructionists who barely know physics but earn hundreds of dollars an hour to help insurance companies get out of paying? Part of a crisis?

Undrinkable ground water in the entire eastern end of a state, is that a crisis?

A civil justice system so poisoned that soon it will be useless to victims of the real crisis. Is that a crisis?

The public does not know about these crises or any of the others. And the credibility of trial lawyers has been so damaged that even if we spread the news, few would believe us.

But if the public knew, imagine how much easier your next med mal case would be.

So you have two tasks in this age of tort "reform's" dominance.

1. Show that you are an exception to the stereotype, and
2. Educate your *future* jurors about the real crises that can affect their decision making. In other words, start providing some antidotes to the poison.

Do not wait for the trial lawyer organizations to do this for you. Help them do it as much as you can, but you are your own grass roots. You need to get busy on your own.

Get busy doing what? Thank you for asking.

Exception to stereotype. West Virginia lawyer Jim Lees — one of the great trial advocacy teachers — said years ago that if lawyers want to change their image, they have to start doing things that help people besides themselves. This is not accomplished when you say that you are here to protect the public, because the public — already suspicious of you — knows you make your living by the things you do to "protect," and they believe that's your only motive.

Nor is it accomplished when you say you are there to protect the little people. Most of the American public that has allowed itself to be poisoned could not care less about the little people.

But what if you listen to Jim Lees and start doing things that *help people in ways that do not profit you?* And find ways to let your community know about them.

In airports, you may have seen a large poster ad that says, "Eat Healthy Food." It has a picture of a good, healthy dinner. On the bottom is says, "American College of Cardiology." It does not say, *"Heart attack? Come to us! You don't pay if we don't cure you!* 800-5555555." It is not a self-serving advertisement. It is a public service — exactly what you need to be.

What's the lawyer's equivalent of that ad? "Wear Your Seatbelt!" for example. With nothing but the name of your firm at the bottom.

What is the principle underlying such an ad that you can use in many effective ways? It takes the knowledge you have from your work as a lawyer—that people get hurt more seriously when they do not wear their seatbelts — and puts it to use to keep people from getting hurt.

I'm all for lawyer advertising — if it's the right kind. Texas political and trial consultant Richard Jenson advises that ads that carry a public service message are just as effective as the junk ads that help ruin the profession's reputation.

American trial lawyers as a group know more than anyone else in the world about the ways people get hurt. You have access to that information. Instead of just using it to sue people, use it to keep people from being hurt in the first place. You know

lots of stuff the public does not, so why not tell them?

Teach consumers how to buy safe products, how to keep themselves safe in hospitals, how to tell when a motel or a car or a work site is safe. Don't wait for people to be hurt. Prevent them from being hurt. If doing that becomes part of your personal, individual reputation, when someone does get hurt then you will be the attorney they seek instead of those who run the sleazy ads.

Do this on your own. Don't wait for trial lawyer organizations to do it; there's no time. Start offering yourself for talks to community groups in which you explain how to help keep people safe. Develop a Web site that does the public some good, rather than one that touts your abilities and degrees and big verdicts. A good Web site should include:

Annotated links to various help groups that provide guidance and support for injured people.

Annotated lists of resources such as books that injured people have found helpful and inspiring. The great running back from the Pittsburgh Steeler's golden years, Rocky Bleier, was badly injured in Vietnam. He went back home to Wisconsin and worked endlessly in his old high school gym until he slowly, painfully, got back to being able to play again. His story — in the book Running Back — has inspired injured readers all over the country to wage the battles they have to wage to contend with their own injuries. Read the book, write a descriptive paragraph about it for your Web site, and tell people who visit your Web site how to get a copy of it. Find another dozen books like it.

Guidance — beyond just "get a lawyer"— for people who have been injured. What kind of doctors should they see? What kind of records should they keep? What kind of support groups and other resources are available?

Guidance for families on how to keep themselves safe in various situations. Show how to avoid the dangers involved in something— such as the measures to take when in the hospital, or the local roads that are most dangerous for younger kids on bikes.

A list of your favorite charities — and call it that: "Favorite Charities and Service Organizations." List each one, explain why you chose it, and describe how people can help. Part of this section should also explain why and how to be careful choosing charities and helping organizations to support.

Your Web site should carry the feel of an organization dedicated to helping people. And this is honest for you to do, because that is the impulse that led you to do plaintiff's work instead of any of the myriad of other fields of law, almost all easier and more lucrative. So go back and remember who you really are, and let that shape your Web site and the rest of what you do. Make sure your site shows that you are the kind of human being that does not match the stereotype of plaintiff's attorneys. Your Web site should show that you are there to help people — and not just those who might become your clients.

(No matter what's on your Web site, in jury selection ask if anyone has been to it. Make sure no one has been offended by anything in it.)

There are many other ways to set yourself outside the stereotype. Some of these ways also happen to be excellent and inexpensive methods of drawing in new clients.

Radio, TV. With a few other attorneys in or out of your firm, invest the time and a little money in running a local weekly public service call-in radio or TV show. Provide advice (short of "legal advice") about things people want to know about: the neighbor's tree hanging over my roof, things new immigrants should be concerned with, legal steps newlyweds or new parents or new divorcees should be concerned with, etc. And discuss trials of local and national interest. Audiences love this stuff and will listen regularly. You will never run out of material.

Towards the end of every show, tell a story-of-the-week: something that illustrates the value of what your profession — not just plaintiff's lawyers — does. A "Paul Harvey" kind of human interest story, or a quick tale of a trial and how it came out — and why.

Then run a one-minute weekly feature of something of service some local attorney has done recently: taken the reigns of a local charity, helped incorporate — pro bono — a new non-profit social service agency, taken on a cause — also pro bono — for legal services, coached a little league team, etc. This will accomplish two things: It will help show people that lawyers are decent contributors to their community, and it will encourage lawyers in the community to be just that.

Finish each show with a fact-of-the-week — a believe-it-or-not, and provide the source of the fact. The number of negligence deaths per day in American hospitals. Statistics showing that verdicts are going generally down, not up. The increase in the number of doctors in your state over the past year. The number of dangerous defects in a particular manufacturer's car over the past three years. How long a pharmaceutical company knew its medicine was causing harm. Facts that show the dishonesty on which tort "reform" is based. Don't argue. Just give facts.

You can accomplish this without all that much work. Rotate the show among three or four other attorneys. Step in for each other when someone has a last-minute conflict. (Trial consultants in your area may also be interested in helping.) The more you do the show, the sooner and the more your name and voice will start being recognizable. Since the show is a public service and not an infomercial to get clients, you will be seen as a person who is there to help, not to exploit. It takes only one or two jurors to bring this to the jury.

And of course in voir dire you will ask, "Who here has heard my radio [or TV] show on Monday afternoons, or listened to any of the reruns on my Web site?" Some might have. You need to know what they think.

You can do the same thing with a weekly newspaper column. Advice, answering queries, commenting on and helping people understand what's going on in trials of local and national interest, stories and facts of the week — the media can be used to help you get the story out about who you are and where the crises really are.

You will enjoy doing this. A little local celebrity is always fun, it brings in business, and will demonstrate that you are not part of the bad stereotype that stigmatizes your profession. And on behalf of your profession, you'll have more effect on the grass roots than any amount of paid advertising could ever have.

Public Service. There are many other things to do that will separate you from the stereotype. Adopt a highway — preferably the one outside my house. Actually, the ideal highway to adopt would be the main road to and from the courthouse. But any will do. And don't hire anyone to do the work; get you and your overweight partner out there once a month to do it yourself. Good public relations, good public service, good exercise. And it's free.

Volunteer to speak anyplace that will have you. Schools. Service clubs. Professional clubs. Talk to your local chamber of commerce; tell business owners how to make sure people don't get hurt in their stores and workplaces. Tell drivers

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the horror stories that happen when a driver does not have enough underinsured motorist coverage. Again, the topic is not how to avoid lawsuits but how to protect people.

Teach people how to protect themselves and their children from the kinds of harm that lawyers know so much about. In these talks (as well as in the radio/TV/newspaper projects), start by educating about the nature and extent of the dangers you are going to talk about (600 hospital deaths per day, etc.), or cite a recent serious case about those dangers. Then teach folks how to protect themselves from them.

When speaking to groups, allow time for their questions and comments. That's the best way for them to end up liking and trusting you. And you will learn a lot when you listen to them talk. Just like a good jury voir dire.

Don't sell your services; don't even talk about them. This is your chance to give something back in a useful way. And when your listeners need a lawyer or want to recommend a lawyer to someone, you'll be the one likely to get the nod. You don't need to ask them for it.

The ABA has a public dialogue series that provides topics for speaking and discussion with groups. Some state trial lawyer's associations also have useful materials.

Be creative in thinking up other ways to turn yourself into a public service. Print up tokens and arrange with a local taxi company to accept them, knowing you will pay the fare associated with them. Give a few dozen to local bars for their bartenders to give to people who have had too much to drink. Help keep those drivers off the road. You might even save a life or two.

These kinds of activities educate jurors about who you really are. Some educate jurors about the real crises in lieu of the fake crises people have been misled into thinking you are part of. Rural or city, small town or huge metropolis, you can start to set yourself apart from the stereotype.

Don C. Keenan's Atlanta law firm has had enormous impact for good on his city's children and the homeless. Keenan could close his firm tomorrow and still would have changed the lives of countless children forever. But his law firm will not close tomorrow, and because of all the public good it has done, people know about the firm. Partly for that reason, it is among the first that many people think of when they need an attorney.

So go do some good.

Caveat. As you start to set yourself apart from the stereotype, be careful not to do anything to reinforce the validity of the bad stereotype. Do not, for example, say or imply that you are an exception to the rule. Never say in trial that "this is not one of those frivolous or illegitimate cases like the McDonald's case." The public and the jurors will see through that, and your reinforcement of the stereotype will hurt you as much as everyone else. Don't build yourself up by ripping others down. It is wrong to do, and it does not work.

11.2

Being Yourself

This part is hard. It involves looking at yourself and doing something about what you see.

You are an integral part of how jurors regard your damages case.

The first rule is to be yourself. If jurors think you are putting up any kind of false front — even if it is only a seemingly harmless formality — it hurts. And it thrusts you right back into the stereotype.

Drop the formalism and "importance" of playing "lawyer-man" or "lawyer-woman" in trial. Formalism is the enemy of damages. So is an air of importance, because it makes jurors believe that you consider yourself more important than they are.

Any mask you adopt for trial — such as someone else's style or a demeanor that conveys formality or importance — is pretense, and jurors spot it as such. A mask conceals the real you and keeps jurors distanced from you. That makes it easier for jurors to disappoint you at verdict time.

There are a number of excellent trial advocates I got to know first by watching them in court. Only later did I get to see them in other settings: home, weekends, dinner, and so forth. Each of these attorneys acts the same way outside court as in. They have no special courtroom persona.

This is true of almost every great trial attorney.

You may think formality or an air of importance is "just who you are." And yes, if you have been doing it long enough, it probably is who you are — in court. But you are many different things, depending on where you are and what you are doing. You can choose any one of them to be bring to trial.

So don't make the bad choice of "who you are." Don't choose the wrong "you." Bring a normal human being to court: the self you are when being comfortable and informal with friends who are your equals.

When the "you" you bring to court is the formalizing character disguising his real self behind a mask of "lawyering," you seem like an inept kid trying to play grown-up. You may make yourself feel important or in control, but jurors wonder why you are strutting like a constipated chicken and talking like a bad actor. I know this does not apply to you, of course, but think about how many of your colleagues it does apply to, and don't let it creep up on you.

The fact that some mask or trait has become habitual does not make it less fake or less distancing. You have good and true "selves" to use in court. Get rid of ways of speaking and acting that show formality, arrogance, self-importance, "business-ish" attitudes, a display of always-in-control competence (which jurors find arrogant or fake), and anything else that makes you different in trial from the way you are among equal friends in pleasant, informal, real-life situations. This is essential to separating yourself from the negative stereotype.

And while you're at it, get rid of your uniforms. Blue suits and black suits are uniforms. Why dress in a way that nails you firmly to the stereotype?

11.3

Greed

Even the best case can be undermined if jurors think you have the wrong motives.

Jurors decide whether to trust you largely by what they come to believe your motives are. If the way you present, dress, and decorate yourself reflects the stereotype of the greedy plaintiff's attorney, your ability to persuade — especially about damages — will suffer.

When you reinforce the stereotype of being motivated by greed, many jurors will not trust your damages evidence and arguments.

Look long and hard to see yourself as jurors might see you. It is difficult, but possible, to spot and get rid of anything that fits the greed stereotype. This is not a deep psychological evaluation and overhaul. It just means leaving your Lexus home and driving to court in the Buick. And no Rolex, no Mont Blanc pen, no gold cuff links, no baby lamb briefcase. Send all that junk to me for safekeeping. No costly haircut. *Especially* no toupee

(but don't send it to me). If you can't be honest enough to admit to losing your hair, jurors may conclude that you cannot be honest about anything as important as adding to your wealth. Besides, the only one who thinks your toupee is not obvious is you.

Your jewelry and clothing should reflect a successful career but not a greedy lifestyle.

Some jurors may admire your suit that costs a month of their income. Others will resent you for it and conclude that anyone who dresses that way is motivated only by money.

Once you confirm the greed stereotype, nothing you do or say in trial will make it go away.

Do not go too far. Wear good-quality clothing and drive a decent car. Jurors expect a decent lawyer to make a decent living. If you seem not to, they will think you are incompetent.

Exceptions. In some social or cultural communities, a show of wealth, usually but not always by a member of that same community, implies credibility and respectability, not greed. And in any setting, attorneys with special kinds of personalities can get away with dressing extravagantly. That is why you may know of some successful attorneys who deck themselves uniquely or expensively. But these are exceptions. In most of America, and with the vast majority of attorneys, showy wealth (by local standards) affirms the greedy lawyer stereotype.

Small communities. If you live in a smaller community where your personal reputation is likely to precede you to court, be careful what that reputation might be. For example, if you are trying cases in a community where most people know your house, do not live in a castle. Do not own highly visible assets (such as a string of rental apartments or a shopping center) that mark you as uncommonly wealthy. You can be as rich as you want, but why remind potential jurors on a daily basis? Your community reputation will affect how jurors hear your cases — and when it comes to damages, any greed-quotient that people attach to you will be a detracting factor.

Whatever a community knows about you can affect your trials. So drive politely and safely, never give anyone a one-fingered wave, treat shopkeepers and service people fairly and nicely, and be active in charitable and community affairs in ways that do not overtly help your business. Be seen at family events with your kids. If people believe you are caring and fair in real life, they will continue to believe it when they are on your juries.

You should even mow your own lawn and wash your own car. These humanizing activities enhance your reputation as a decent, honest, everyday kind of person. I know, you didn't go to law school to have to spend the rest of your life mowing your lawn, but times were different back then. And you need the exercise.

11.4

Advertising

If you advertise, be sure your ads project an image of caring. Take pains that they do not hint at greed.

Every good marketer pre-tests ads in focus groups. You would be foolish not to do the same — partly to see if the ad will attract cases, and partly to see if it will cause problems for you with future jurors.

Pre-test your prospective ads locally. An ad that is effective and tasteful in one locale can be ineffective and offensive in another.

Few jurors object to lawyer advertising. But when jurors think that ads are in bad taste or smell of greed or slime, they factor that into their decision making—sometimes so heavily that they will not trust you enough to let you win the case.

Well-created ads in good taste that reflect caring instead of greed can attract just as many cases as junk ads, and help with how jurors perceive you. And the best ads carry a message to help others, not you. "Wear your seatbelt." "Slow down in school zones."

In other words, evaluate your ads through the eyes of your future jurors.

11.5

Ethics of Advertising

Most firms that advertise are excellent. But the McLitigator firms accept many more cases (or cases that are more complex) than they can handle. Many prospective clients, knowing nothing about how to find a good attorney, select from firms that advertise. The more there are good firms that advertise, the less likely it is that a client will fall into a McLitigator's clutches.

That is why it is a public disservice for good firms not to advertise. Well-done, tasteful advertising by more firms will go a long way toward providing better legal services for the public.

11.6

The Positive Stance: Caring

Jurors give money because they care. They care more if you care.

The way to seem as if you care is really to care. Faking that you care is dangerous, because fakery is visible no matter how skilled an actor you are. Fake caring reinforces the plaintiff's attorney stereotype of greed. And fake caring is slime.

To make your care real, spend time with your client. In a wrongful death case, spend time with the client's family. Do not meet in your office; go to the home. Take part in the family's activities. Be there. Share in their lives beyond the time necessary to conduct business.

Raleigh attorney Donald H. Beskind tells about a successful plaintiff's attorney who brings his clients to spend a day at his home with his own family, then spends a day at the client's home. Not only does the attorney learn a lot, but the intimate at-home time creates compassion in the attorney, and connections between attorney and client. The compassion and the connections are obvious to jurors in trial.

Think about similarities between the plight of your client and the misfortunes you have been through yourself. Your own misfortunes can help you identify with your client. That identification will be apparent in court.

Look deep into the face of your client, or into the photograph of her face if she is dead. Look long and hard enough to contemplate who she is, what she feels, how she is like you, how she is like the people you love. Corny as it sounds, feel her pain and her loss. Get angry at the wrongdoing that hurt her. And decide in the center of your being that it is your personal mission to help her or her survivors as best as she or they can be helped.

Make that the foundation of everything you do in trial. It will give jurors a true picture of yourself that you want them to see. It will blow the greed stereotype out of the courthouse and replace it with caring. It will impel you to do your best work.

In a wrongful death case, go to the cemetery and contemplate who is lying under that stone. Go with the children or the widow. Ask them to tell you about the person lying there. On another day, go alone and talk to the deceased. Ask the deceased what he would like to tell the jury if he could. (Believe it or not, you will get answers!) Ask the deceased how he would like the case to come out. If you have never done anything like this, prepare yourself for a powerful experience.

It will help you get to the level of worrying not about your income or your ego but about your client — so that in trial the jurors will see that you have the right motivations. Those motivations will shine through.

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