1 of 41 DOCUMENTS

Bacardi 151 Rum: An Inherently Dangerous Product?

2010 Emerging Issues 5357

James C. Moore on Bacardi 151 Rum: An Inherently Dangerous Product?

By James C. Moore

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SUMMARY: In Sclafani, the Court addressed two fundamental questions: (i) is Bacardi 151 Rum defectively designed because it is highly flammable? and (ii) is the removal of the safety device from the bottle an unforeseeable, post-manufacturer modification absolving Bacardi of liability? Senior trial lawyer James C. Moore examines the Court's decision and reviews the current state of New York law governing strict liability and negligence in products case.

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ARTICLE: Recently, in *Sclafani v. Brother Jimmy's BBQ, Inc., et al.*, a New York Supreme Court addressed the question of whether a manufacturer of an admittedly dangerous product, which was equipped with a device intended to prevent misuse and injury, could nevertheless be held accountable for the consequences of its misuse. n1 In *Sclafani*, the Court denied, because of the existence of questions of fact, the application of the Bacardi defendants (the product manufacturers) to dismiss the claims of plaintiff that defendants' product, Bacardi 151 Rum, was unreasonably dangerous because of a defective design. n2 The Court further allowed plaintiff's claim for punitive damages to stand. n3

Given the early stage of the proceedings and the substance of the plaintiff's opposing papers, the Court's decision was hardly surprising. Nevertheless, the decision includes a comprehensive review of the current New York law governing strict liability and negligence claims against product manufacturers and is therefore worthy of review.

Background

The *Sclafani* case arose when the plaintiff was injured during a pyrotechnic display being performed by the bartender at Brother Jimmy's BBQ. n4 The bartender is said to have poured Bacardi 151 Rum onto the bar, lit it on fire, and then poured additional 151 Rum into the flame. n5 As a result, the flame traveled up the bottle, which then acted as a flamethrower and injured the plaintiff. n6

In addition to suing the bar and the bartender, the plaintiff sued Bacardi, alleging both strict liability and negligence. n7 In her complaint, Ms. Sclafani stated that Bacardi was strictly liable to her for two reasons: First, the 151 Rum was defective and not reasonably safe because of its high flammability propensity. n8 Second, the 151 Rum bottle was defectively designed because the flame arrester in the mouth of the bottle, whose purpose is to prevent a flame from traveling back up the bottle, was easily removable. With respect to her negligence claim, the plaintiff

alleged that Bacardi chose to continue to manufacture a highly flammable alcoholic beverage and a bottle with an easily removable flame arrester even though it had actual and constructive knowledge that bartenders routinely removed the 151 Rum's flame arrester and that the 151 Rum was commonly used for pyrotechnic displays. Significantly, the plaintiff did not argue that Bacardi failed to provide an adequate warning. n9

Bacardi's Motion to Dismiss

Before filing an answer and, accordingly, before any discovery had taken place, Bacardi moved pursuant to CPLR § 3211(a)(7) to dismiss the claims against it for failure to state a cause of action. n10 In support of the motion, Bacardi argued that, as a matter of law, flammability of rum cannot be a defect because flammability is an inherent trait of alcohol. n11 Bacardi noted *Forni v. Ferguson,* n12 which had held that "a product's defect is related to its condition, not its intrinsic function." n13 Second, Bacardi argued that, under *Robinson v. Reed-Prentice,* n14 the bartender's removal of the flame arrester constituted a substantial modification of a safety feature, absolving Bacardi of liability. n15 Third, Bacardi stated that as a matter of law it could not be liable because the 151 Rum had not been used for its normal purpose. n16 Fourth, Bacardi argued that any alleged design defect was not a proximate cause of the plaintiff's injuries because the bartender's misuse of the 151 Rum was an intervening and superseding cause. n17 Finally, Bacardi sought a dismissal of the plaintiff's claim for punitive damages, arguing that the plaintiff had failed to allege that Bacardi manufactured a defective product maliciously, with evil intent, or with deliberate disregard for others' interests; rather, she provided only conclusory allegations. n18 Bacardi did not address the plaintiff's negligence claim. n19

In response, the plaintiff contended that the quality which renders 151 Rum defective-its flammability-is not related to the 151 Rum's intrinsic function-to cause consumers to become intoxicated. n20 The plaintiff also argued that the flame arrester's removal did not absolve Bacardi of liability because it was easily removable n21 and, thus, fell within the post-*Robinson* caveat created by *Lopez v. Precision Papers, Inc.* n22 Third, with respect to Bacardi's "normal use" argument, the plaintiff argued that pyrotechnic uses of the 151 Rum were reasonably foreseeable, imposing on Bacardi a duty to avoid an unreasonable risk of harm arising from both the intended and the reasonably foreseeable unintended uses of the product. n23 Alternatively, contended the plaintiff, pyrotechnic use of the 151 Rum is so common that it should be considered a normal use. n24 Fourth, the plaintiff argued that it was for the jury to decide whether the bartender's removal of the flame arrester and ignition of the 151 Rum were reasonably foreseeable results of the design defect, which would allow the chain of proximate cause to remain unbroken. n25 Finally, the plaintiff argued that her allegations were sufficient for her claim of punitive damages to survive a motion to dismiss. She contended she had properly alleged that Bacardi had consciously disregarded others' safety by manufacturing the 151 Rum despite actually and constructively knowing the hazard posed by the rum. n26

The Court's Decision

In reaching its decision, the Court had to address two fundamental questions. First, was Bacardi's product, the 151 Rum, defectively designed because it was highly flammable? Second, was the removal of the safety device from the bottle an unforeseeable, post-manufacturer modification, thereby absolving Bacardi of liability for the rum's misuse?

The High Flammability of 151 Rum as a Design Defect

The Court rejected Bacardi's argument that, as a matter of law, the high flammability of the 151 Rum was not a design defect. The Court began by noting the Court of Appeals recent decision in *Adams v. Genie Industries, Inc.,* n27 which in turn refers to *Voss v. Black & Decker* n28 to address the proper test for a design defect claim. Restating well-established New York law, *Adams* observed that, to state a cause of action for strict liability for design defect, a plaintiff must allege that the manufacturer marketed a product not reasonably safe and that the design defect was a substantial factor in causing the plaintiff's injuries. n29

The Court of Appeals had attempted, in *Voss*, to articulate a uniform standard for proving a design defect. n30 Previous cases had used a variety of standards, such as "not reasonably safe," "unreasonably dangerous," n31 and

"reasonably safe." In *Voss*, the Court of Appeals settled on the "not reasonably safe" standard. n32

According to *Voss*, a product is not reasonably safe when a reasonable person would conclude that the risk of harm from the design defect outweighs the utility of the defectively designed product. n33 Seven factors n34 were to be considered when conducting this balancing test: 1) the utility of the product to the public and to the individual user; 2) the likelihood that it will cause injury; 3) the availability of a safer design; 4) the potential for designing and manufacturing a safer yet functional and reasonably priced product; 5) whether the plaintiff could have avoided injury by careful use of the product; 6) "the degree of awareness of the product which reasonably can be attributed to the plaintiff"; and 7) the manufacturer's ability to spread the cost of designing a safer alternative.

Parallels between strict liability and negligent design claims

Citing *Voss*, the Court in *Sclafani* stated that the issue before it was whether the 151 Rum, at the time it was manufactured, was "'in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use [or reasonably foreseeable use]' . . . or in this case, unreasonably flammable and explosive" (alteration in original). n35 The language quoted by the Court was written in *Voss*. n36 Three years before *Voss*, the Court of Appeals used the "unreasonably dangerous" standard in *Robinson v. Prentice-Reed*, in which it held:

a defectively designed product is one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its *intended use*; that is one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce. n37 (emphasis added)

The Court of Appeals has not explicitly stated that the "unreasonably dangerous" standard applies to both intended and unintended uses. n38 Although the Court of Appeals has stated, in *Micallef v. Miehle*, that a manufacturer has the duty to create a design that avoids an unreasonable risk of harm from both intended and reasonably foreseeable unintended use, it has done so in the context of a negligence claim. n39 Even the *Robinson* decision was careful to articulate this duty only when analyzing the victim's negligence claim, not his strict liability claim. n40

Yet, the Court of Appeals has also noted that "the strict liability concept of defective design [is] functionally synonymous with the earlier negligence concept of unreasonable designing" n41 and that the *Voss* standard applies to both strict liability and negligent design claims. n42 Furthermore, in *Lopez v. Precision Papers*, the Court of Appeals referred to *Micallef* when upholding the Second Department's denial of summary judgment to the manufacturer on both strict liability and negligence claims because of triable issues of fact as to whether a forklift was "not reasonably safe . . . for the uses intended or reasonably anticipated by the manufacturer." n43

This blend of strict liability and negligence in New York's framework of design-related claims allowed the Court in *Sclafani* to reject Bacardi's claim that, as a matter of law, Bacardi was not liable because the pyrotechnic display was not a normal use. n44 The Court concluded that the plaintiff had sufficiently alleged that the unintended use-the pyrotechnic display-was reasonably foreseeable. n45 Furthermore, the Court concluded that the bartender's disregard of several warnings on the 151 Rum bottle n46 did not absolve Bacardi of liability from a design defect claim because the plaintiff had sufficiently alleged that Bacardi knew or should have known that it was routine for bartenders to remove the flame arrester and to use the 151 Rum for pyrotechnic displays despite the warnings not to do either. n47

The intrinsic function of 151 Rum

Forni v. Ferguson had held that a design defect relates to a product's condition, not its intrinsic function. n48 Bacardi relied on *Forni* to argue that the 151 Rum's flammability was an inherent characteristic present in all alcohol, and thus, as a matter of law, the rum's flammability could not be considered a defect. n49 The Court in *Sclafani* rejected this argument, stating that the issue was not whether all alcohol is flammable but, rather, whether the 151 Rum's condition-its flammability-would not be reasonably contemplated by the ultimate consumer and whether the condition was unreasonably dangerous for its intended or reasonably foreseeable unintended use. n50

The Court's decision indicates that it did not consider the flammability of the 151 Rum to be related to the intrinsic function of the rum. n51 Relying on *DeRosa v. Remington Arms*, n52 the Court acknowledged that some products are inherently dangerous because their function requires it. In *DeRosa*, the Eastern District of New York granted judgment notwithstanding the verdict to a gun manufacturer on a design defect claim in which the alleged defect was the low pull force required for the trigger. The District Court judge stated that the "very purpose [of the product] is to . . . kill and to wound." n53 The Court in *Sclafani*, however, distinguished *DeRosa*, stating that the 151 Rum's function is not to burn or maim.

Instead, the Court focused on *Adamo v. Brown & Williamson Tobacco*, n54 another case exemplifying the parallels between strict liability design defect claims and negligent design claims. In *Adamo*, the plaintiff brought a negligent design claim against two cigarette companies for failing to design "light" cigarettes, which have lower tar and nicotine levels, rather than "regular" cigarettes. n55 The Court of Appeals stated that even though the plaintiff brought a negligence claim, she still had to prove that the "regular" cigarettes were "not reasonably safe" because it was feasible to design a safer cigarette that remained functional. n56 The plaintiff failed to do so because she failed to show that the consumers would find the safer alternative acceptable. n57 The function of cigarettes, according to the Court of Appeals, is not simply to smoke them but, rather, to provide pleasure from smoking them. n58 "Light" cigarettes, however, would not bring the same level of pleasure to a smoker and, thus, would not be functional. n59

The Court also discussed *Felix v. Azko Nobel Coatings*, in which the victim commenced a design defect claim based on the high flammability of a quick-drying lacquer sealer. n60 The Second Department granted summary judgment for the design defect claim because the proposed safer alternative, a water-based lacquer sealer, would not achieve the same function as the quick-drying lacquer sealer-namely, the finish and the time it takes to dry. n61

Of course, on a motion to dismiss, the Court in *Sclafani* had to view the allegations in the plaintiff's favor. Accordingly, whether a lower-proof rum with low flammability would be acceptable to consumers "is an issue for summary judgment after discovery or the trial." n62 Going forward, however, whether a safer alternative to 151 Rum remains functional will depend on how the function is articulated. If the function of the 151 Rum is something more than to make consumers intoxicated-for example, to provide pleasure to its consumers by providing a higher alcohol content or make them intoxicated more quickly-then the safer alternative does not remain functional, which would militate against a finding of a defective design due to high flammability.

The Flame Arrester as a Design Defect

The Court in *Sclafani* also rejected Bacardi's argument that, under *Robinson v. Reed-Prentice*, Bacardi could not be held liable, as a matter of law, for a defective design of the 151 Rum bottle's safety feature, the flame arrester, because of the bartender's substantial modification to the flame arrester. n63 In *Robinson*, the Court of Appeals reversed a jury verdict and dismissed the complaints against a manufacturer of plastic molding machines equipped with a safety gate. n64 The victim was injured when his hand went through a 6 inch by 14-inch hole in the gate that the employer had cut to process more plastic beads without stopping and opening the gate. n65 Although the manufacturer knew that the employer might cut the hole, the Court of Appeals refused to impose liability on the manufacturer because the hole was a substantial modification that "destroyed the practical utility" of the safety gate. n66

The Court in *Sclafani*, however, reasoned that *Robinson* did not apply in this case because the removal of the flame arrester fell within the post-*Robinson* caveat created by *Lopez v. Precision Papers*. n67 In *Lopez*, the Court of Appeals noted that *Robinson's* refusal to impose liability even when the substantial modification was reasonably foreseeable applied only if the change in the product's condition was material. n68 The victim in *Lopez* was injured while operating a forklift without the "easily removable" overhead guard devices. n69 The Court of Appeals held that, because the guard devices were removable and the forklift's design permitted its use without the guard devices, triable issues of fact existed as to whether the forklift was not reasonably safe for its intended use or its reasonably foreseeable unintended use. n70

The Court in *Sclafani* noted several other cases that adhered to the *Lopez* caveat. In *Fernandez v. Mark Andy, Inc.*, the Second Department denied a manufacturer's summary judgment motion in which the victim was injured by a label press with "easily removable" safety guards and for which the label press's design permitted its use without the safety guards. n71 In *Eiss v. Sears, Roebuck & Co.*, the Fourth Department denied a manufacturer's summary judgment motion when the victim was injured by a planer with an "easily removable" cutter guard and for which the planer's design permitted its use without the cutter guard. n72 In *Smith v. Day*, the Third Department denied a forklift manufacturer's summary judgment motion when the victim was injured while operating a forklift with an "easily removable" platform and whose design permitted its use with a different platform that was improperly attached. n73 In *Tuesca v. Rando Machine Corp.*, the First Department denied a feed machine manufacturer's summary judgment motion in a case that involved a victim who was injured - while cleaning the machine - when someone accidentally turned it on. The machine's design permitted its use without a removable plexi-glass safety guard, and the manufacturer's recommended method of cleaning the machine included the safety guard's removal. n74

Based on these cases, the Court in *Sclafani* concluded that it could not be said as a matter of law that removal of the flame arrester constituted a material change of the 151 Rum bottle. n75 The plaintiff alleged that the flame arrester was easily removable n76 and that the bottle was designed to permit its use without the flame arrester. n77 Finally, the plaintiff's affidavits indicated that Bacardi knew or should have known that bartenders routinely remove a 151 Rum bottle's flame arrester. n78 The Court did not, however, conduct an analysis of whether the removal of the flame arrester destroyed its practical utility as a safety feature. n79

Conclusion

It is important to remember that the *Sclafani* case is at a very early stage. On a motion to dismiss, the Court, viewing the allegations in the plaintiff's favor, only had to consider whether the plaintiff had sufficiently stated a cause of action. Thus, it is not surprising that Bacardi's motion to dismiss for failure to state a cause of action was denied.

Nonetheless, the case brings into focus some significant legal concepts in the area of product liability. First, even inherently dangerous products can lead to manufacturer liability if a dangerous but inherent trait of the product is not related to the product's intrinsic function. It remains to be seen whether the 151-proof rum's high flammability will be considered an inherent characteristic of the product related to its function.

Second, even if inherently dangerous products, such as cigarettes or high-proof alcohol, suffer from defects unrelated to the products' intrinsic function, the products' manufacturers will not be liable if consumers will not accept a safer alternative-that is, if the safer alternative cannot achieve the defective product's functions.

Third, a manufacturer's product misuse defense is limited by the fact that New York's product liability framework blends strict liability and negligence concepts. Thus, when a victim or a third party engages in an unintended use of the product, the manufacturer may be liable if the unintended use is reasonably foreseeable. Even if the user ignores the manufacturer's warnings and misuses the product, the manufacturer may nonetheless be liable if the user's actions were reasonably foreseeable.

An appeal from the Court's decision is pending.

Return to Text

n1 *Sclafani v. Brother Jimmy's BBQ, Inc., et al., 2010 N.Y. Misc. LEXIS 2394* (Sup. Ct. New York Co. May 18, 2010).

n2 *Id.* at *11, 20.

n3 *Id.* at *29.

n4 *Id.* at *2.

n5 Plaintiff's Memorandum of Law at 15.

n6 *Id.*

n7 Complaint at 8-11.

n8 *Id.* at 9.

n9 *Sclafani, 2010 N.Y. Misc. LEXIS 2394*, at *7 n1.

n10 *Id.* at *1.

n11 Defendant's Memorandum of Law at 5-6.

n12 *232 A.D.2d 176* (1st Dep't 1996).

n13 *Id.*

n14 *49 N.Y.2d 471 (1980).*

n15 Defendant's Memorandum at 6-10.

n16 *Id.* at 10-11.

n17 *Id.* at 19-21.

n18 *Id.* at 23.

n19 *See* Defendant's Memorandum at 3-4 ("Though Plaintiff claims that Bacardi is liable under a theory of strict liability for alleged defects in the Bacardi 151 rum product . . . these claims fail as a matter of law."), and at 23 ("Plaintiff's complaint sets forth a garden variety product liability claim against Bacardi."); *see also* Defendant's Memorandum at 4 n1 ("While the Bacardi defendants have unilaterally denominated the Complaint as sounding in only strict liability . . . ").

n20 Plaintiff's Memorandum at 27-32.

n21 *Id.* at 34-39.

n22 *67 N.Y.2d 871 (1986).*

n23 Plaintiff's Memorandum at 41-44.

n24 *Id.* at 42.

n25 *Id.* at 44-50.

n26 *Id.* at 51-57.

n27 *2010 N.Y. LEXIS 976* (May 11, 2010).

n28 *59 N.Y.2d 102 (1983).*

n29 *2010 N.Y. LEXIS 976,* at *6-7 (citing *Voss, 59 N.Y.2d at 107).*

n30 *Voss, 59 N.Y.2d at 108.*

n31 *Robinson v. Reed-Prentice, 49 N.Y.2d 471, 479 (1980).*

n32 *Voss, 59 N.Y.2d at 108.*

n33 *Voss, 59 N.Y.2d at 108.*

n34 *Id. at 109.*

n35 *Sclafani, 2010 N.Y. Misc. LEXIS 2394,* at *11 (citing *Voss, 59 N.Y.2d at 107).*

n36 *Voss, 59 N.Y.2d at 107.*

n37 *Robinson v. Reed-Prentice, 49 N.Y.2d 471, 479 (1980).*

n38 *See, e.g., id.*; *Voss, 59 N.Y.2d at 107-110.* In fact, *Voss* indicated that it was moving away from the "unreasonably dangerous" standard and towards the "not reasonably safe" standard. *Id. at 108.*

n39 *39 N.Y.2d 376, 382, 385-386 (1976); see also DeRosa v. Remington Arms, 509 F. Supp. 762, 766 (E.D.N.Y. 1981).*

n40 *Robinson, 49 N.Y.2d at 480* (prefacing the duty by stating, "Nor does the record disclose any basis for a finding of negligence.").

n41 *Denny v. Ford Motor Co., 87 N.Y.2d 248, 258 (1995).*

n42 *Adams v. Genie Indus., Inc., 2010 N.Y. LEXIS 979,* at *8.

n43 *67 N.Y.2d 871, 873 (1986).*

n44 *Sclafani, 2010 N.Y. Misc. LEXIS 2394,* at *20-21.

n45 *Id.*

n46 Some of the warnings included "Do not pour directly from bottle near the flame or intense heat," "Do not remove or puncture the flame arrester in top of the bottle," and "Removing the flame arrester may cause the content of the bottle to become ignited and intense flaming will occur." *Id.* at 9-10 n2.

n47 *See id.* at 21-27.

n48 *232 A.D.2d 176, 176* (1st Dep't 1996); *see also Robinson, 49 N.Y.2d at 479* ("[The unreasonable risk of harm] rule, however, is tempered by the realization that some products . . . must by their very nature be dangerous in order to be functional.").

n49 Defendant's Memorandum at 5-6.

n50 *Sclafani, 2010 N.Y. Misc. LEXIS 2394,* at *11.

n51 *Id.*

n52 *509 F. Supp. 762 (E.D.N.Y. 1981).*

n53 *Id. at 767.*

n54 *11 N.Y.3d 545 (2008).*

n55 *Id. at 549.*

n56 *Id. at 550.*

n57 *Id.*

n58 *Id.*

n59 *Id.*

n60 *262 A.D.2d 447, 448, 449* (2d Dep't 1999).

n61 *Id. at 448-449.*

n62 *Sclafani, 2010 N.Y. Misc. LEXIS 2394,* at *15.

n63 *Id.*

n64 *Robinson, 49 N.Y.2d 471, 476 (1980).*

n65 *Id. at 477.*

n66 *Id. at 477-478.*

n67 *Sclafani, 2010 N.Y. Misc. LEXIS 2394,* at *17-18.

n68 *Lopez v. Precision Papers, 67 N.Y.2d 871, 873 (1986).*

n69 *Lopez v. Precision Papers, 107 A.D.2d 667, 667-668* (2d Dep't 1985).

n70 *Lopez, 67 N.Y.2d at 873.*

n71 *7 A.D.3d 484, 485* (2d Dep't 2004).

n72 *275 A.D.2d 919, 920* (4th Dep't 2000).

n73 *242 A.D.2d 394, 396* (3d Dep't 1997).

n74 *226 A.D.2d 157, 158* (1st Dep't 1996).

n75 *Sclafani, 2010 N.Y. Misc. LEXIS 2394,* at *20.

n76 *Id.*

n77 *See id.*

n78 *Id.*

n79 *See Robinson, 49 N.Y.2d at 481.*

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Eades on Martin v. Ohio County Hosp., 295 S.W.3d 104 (Ky. 2009)

2010 Emerging Issues 5051

Eades on Martin v. Ohio County Hosp., 295 S.W.3d 104 (2009): Kentucky Supreme Court Charts New Course in Valuing Loss of Consortium Damages and Proving EMTALA Claims

By Ronald Eades

June 8, 2010

SUMMARY: In *Martin v. Ohio County Hospital Corp., 295 S.W.3d 104 (Ky. 2009),* the Kentucky Supreme Court overruled prior decisions on loss of consortium damages in wrongful death claims. Second, the Court declared the elements necessary for an action under the Emergency Medical Treatment and Active Labor Act (EMTALA). This commentary is written by Ronald W. Eades, Professor of Law Emeritus, Louis D. Brandeis School of Law at the University of Louisville.

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ARTICLE: The opinion in *Martin v. Ohio County Hospital Corp., 295 S.W.3d 104 (Ky. 2009),* covers two important issues. First, it overrules prior decisions and allows loss of consortium claims to include damages for a period after the injured spouse has died. Second, it explains the necessary elements for an action under the Emergency Medical Treatment and Active Labor Act (EMTALA) *42 U.S.C. § 1395dd.*

A. Extending the measuring period for damages for a loss of consortium claim

At common law, loss of consortium claims were limited. If a husband had been injured, the wife could recover for loss of love, services, and conjugal relationships during the period of his injury. The wife could only recover for such losses during that period that the husband was injured. If the husband died, that would terminate the time period for measuring the loss. It was assumed that the death would end any spousal relationship and, therefore, no further damages could be recovered. *Martin v. Ohio County Hospital Corp., 295 S.W.3d 104, 107 (Ky. 2009).*

In 1970, the Kentucky General Assembly passed legislation that extended the right of recovery for loss of consortium to the husband when the wife was injured. K.R.S. § 411.145. The nature of the recovery remained the same. The loss of consortium damages were to recover for loss of love, affection, services and conjugal relationships. The measuring period for such recovery was during such time as the spouse was injured. Decisions rendered after passage of that statute held that the death of the injured spouse, however, ended the measuring period. Those decisions were reached even though there is no language in the statute that would require such a conclusion.

In this case, the Court completely reviewed and analyzed the law of loss of consortium. It noted that, in 1997, it

had extended an action for loss of family relationships when a child lost a parent. It was important that the measuring period for recovery of loss of parental relationships was not terminated at death of the parent. *Giuliani v. Guiler, 951 S.W.2d 318 (Ky. 1997).*

The Court further reviewed the law of loss of consortium in other states. It found that 26 states have statutes which permit recovery of loss of consortium damages. All of those states allow the measuring period for that loss to extend past the death of the spouse. Furthermore, 15 states recognize loss of consortium damages by common law decision and only 7 terminate the measuring period for the damages at the death of the injured party. *Martin v. Ohio County Hospital Corp., 295 S.W.3d 104, 111 (Ky. 2009).*

After that review, the Court concluded that the measuring period for loss of consortium damages does not end at the time of death of the injured spouse. To the extent that *Clark v. Hauck Manufacturing Co., 910 S.W.2d 247 (Ky. 1995)* and *Brooks v. Burkeen, 549 S.W.2d 91 (Ky. 1977)* held to the contrary, they were overruled.

B. Claims under the Emergency Medical Treatment and Active Labor Act (EMTALA) *42 U.S.C. § 1395dd.*

The plaintiff filed the claim in this case for damages under several theories. Included within those theories were claims in simple negligence and a violation of the Emergency Medical Treatment and Active Labor Act (EMTALA) *42 U.S.C. § 1395dd.* The claim under simple negligence did provide a basis for the action and allowed the case to go for the jury. The Court held, however, that the defendant should have received a directed verdict for the claim under EMTALA.

EMTALA is frequently referred to as an "anti-dumping" statute. There was a concern that a patient might come to an emergency room and be refused treatment due to an inability to pay. The legislation requires that, where a hospital provides an emergency room, that hospital must screen and stabilize a patient before that patient may be transferred to a different facility.

The statute creates a strict liability form of claim. The hospital must provide screening to determine the nature of the medical emergency and then provide treatment for stabilization before transfer. Failure to follow those steps leads to civil liability and fines. *Martin v. Ohio County Hospital Corp., 295 S.W.3d 104, 113 (Ky. 2009).*

In an effort to assist attorneys in future cases, the Court provided two suggested jury instructions for use in cases where violation of the statute is alleged. The first form is to be used where the nature of the medical emergency has not been determined and the duty to screen is at issue. The second form is to be used where the nature of the medical emergency is known and the duty to stabilize the condition is at issue. *Martin v. Ohio County Hospital Corp., 295 S.W.3d 104, 114 (Ky. 2009).* Both of those suggested instructions will require close scrutiny by attorneys practicing in an area that may involve violations of EMTALA.

In this case, there were no facts showing a violation of EMTALA. The hospital did screen and determine the nature of the medical emergency. In addition, the hospital did try to treat the emergency. The difficulty with this case, was that the treatment was alleged to be negligent. The defendant, therefore, was entitled to a directed verdict on the issue of violation of EMTALA. The defendant, however, could remain liable for simple negligence in medical malpractice. *Martin v. Ohio County Hospital Corp., 295 S.W.3d 104, 115 (Ky. 2009).*

CONCLUSION:

A. Future issue for courts concerning loss of consortium

The portion of the Court's decision that allows the measuring period for loss of consortium damages to extend beyond the time of death of the injured spouse leaves some questions for proof of facts problems. In allowing those damages to extend beyond the death of the injured spouse, the Court gave little guidance as to how far into the future the period should extend. In addition, there was no guidance provided on what factors the opposing parties could and

should raise.

It would seem that the maximum period of time that the plaintiff could allege loss of consortium damages would be the normal life expectancy of the plaintiff or of the injured spouse whichever would have been reached first. That would have been what the plaintiff could claim was the "normally expected" time of the joint married life. At least one case has indicated that is the appropriate time period for measuring the loss in *California. McCarthy v AstenJohnson, Inc., 2009 U.S. Dist. LEXIS 16863 (C.D. Calif. 2009).* In addition, Kentucky recognizes that for workers' compensation death benefits, the benefits are payable throughout the period of "widowhood or widowerhood." K.R.S. § 342.750(1)(a). Of course, workers' compensation benefits may be reopened after adjudication and the Kentucky statute provides a lump sum payment worth 2 years of benefits if the widow or widower remarries. K.R.S. § 342.750(1)(c). That period of time, however, seems too long. In the modern world, it is possible for people to remarry after the death of a spouse. The loss of consortium damages should not extend past the time of possible remarriage. In addition, the divorce rate is extremely high in the United States. It is possible that the plaintiff's marriage to the now deceased spouse would not have extended very far beyond the time of injury. Other than examples such as the Kentucky workers' compensation provisions for remarriage, there appears to be very little law on this topic in the United States. Even the Kentucky Workers' Compensation provision does not provide for the possibility that the spouses would have divorced.

In short, the courts will need to review cases and provide guidance on the types of proof that will be acceptable in future loss of consortium cases. The specific items that will need to be addressed include: 1) Is there an arbitrary time period to measure the loss? 2) How should the possibility of remarriage enter into the formula? 3) How should the possibility that the spouses may have divorced had one not died enter into the formula? There will, of course, be other proof of facts issues that will arise as more of these cases attempt to apply this new rule.

B. Strategic Point-Plaintiff-Loss of consortium claim

The Court has overruled prior decisions and opened up the loss of consortium claim to an extended time period for measuring the loss. Where prior cases would have ended that measuring period at the time of death, that limitation is now gone. The plaintiff will need to consider carefully future loss of consortium claims where the injured spouse has died.

The plaintiff's lawyer will need to give new thoughts to this issue in preparation, filing, and presentation of the action. The preparation and presentation of the witnesses on this issue of damage will need to be prepared in light of the extended measuring period.

The plaintiff will want to first determine a reasonable time period. One such time period may well be the normal life expectancy of the surviving spouse or of the deceased spouse whichever time would have been reached the soonest. That would, of course, have been the maximum "normally expected" time the parties would have been married. That plaintiff/spouse may want to claim that he or she will not remarry and seek recovery for that full time period.

The difficult issues that will then have to be faced will concern the nature of the marital relationship that existed between the spouses. The plaintiff's lawyer will want to determine whether there is sufficient evidence to prove a reasonable likelihood of a continued marriage had the death of one spouse not ended that marriage. In addition to proof of love and affection, the plaintiff's lawyer will need to look for evidence of long term stability and expectations of continued marriage stability.

C. Strategic Point-Defendant-Loss of consortium claim

Defense attorneys will find that the extended measuring period for loss of consortium presents something of a dilemma. The plaintiff may well be trying to prove that the marriage between the spouses would have continued, with a sustained level of love and affection, throughout the normal life expectancy of both spouses. It is clear that statistical evidence of the marriage relationship in the United States would suggest that not all marriages are for life. Many marriages end in divorce. In addition, many people remarry after divorce or death of a spouse. The defendants may want

to consider statistical evidence that continued, lifelong marriage is unlikely. Information concerning the statistics and rates of divorce are readily available on the internet. The U.S. Government office of the Center for Disease Control compiles much of this information and it may be found at http://www.cdc.gov/nchs/fastats/divorce.htm. Actual introduction of such evidence, however, may be problematic. For example, under Fed. R. Evid. 703, experts may offer opinions based upon facts, "if of a type reasonably relied upon by experts in the particular field." Fed. R. Evid. 703, see especially the Advisory Committee Notes. This would allow the introduction of such opinions but only if an expert on marriage and divorce rates could be found. In addition, few if any, cases can be found which have discussed the introduction of such evidence. In addition, remarriage is highly likely. The problem, of course, with such evidence is the impact it might have on the jury. While the jury is observing the grieving spouse, it might do more harm then good to tell that jury that the marriage would have probably ended in divorce and that the surviving spouse will remarry anyway. The defendants will have to consider the type of evidence that is to be presented. Although there may be an urge by the defendants to use such an approach, admissibility may be difficult and the impact on the jury may be counter productive.

D. Strategic Point-Both Parties-Jury instructions on claims under EMTALA

The Kentucky Supreme Court carefully analyzed the elements of a claim for violation of EMTALA. In the course of the analysis, the Court carefully set out two possible jury instructions. One such instruction is to be used where the basis of the claim is that the hospital failed to determine the nature of the medical emergency. The other instruction is to be used where the basis of the claim is that the nature of the medical emergency was known and the hospital had a duty to stabilize. *Martin v. Ohio County Hospital Corp., 295 S.W.3d 104, 114 (Ky. 2009).* Both parties to the litigation will have to review those suggested instructions. It will be necessary to revise those instructions so that they are appropriate for the facts of any particular case.

RELATED LINKS:

- 1-6 Jury Instructions on Damages in Tort Actions § 6.24

- 1-9 Jury Instructions on Medical Issues § 9-13

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Latin & Timken on Trupia v. Lake George and Assumption of Risk in N.Y.

2010 Emerging Issues 5024

Latin & Timken on Trupia v. Lake George Cent. School Dist., 2010 N.Y. LEXIS 344 (Apr. 6, 2010) and Assumption of Risk in N.Y.

By Hon Richard Latin and Nelson Timken

June 7, 2010

SUMMARY: Civil Court Judge Richard G. Latin and Associate Court Attorney Nelson Timken discuss the state of assumption of risk doctrine in New York after the decision of the Court of Appeals in *Trupia v. Lake George Cent. School Dist., 2010 N.Y. LEXIS 344* (Apr. 6, 2010). Latin and Timken first review pre-Trupia rulings by the high court, then discuss splits between the appellate departments, and finally break down the Trupia decision.

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ARTICLE: Introduction

The common-law doctrine of assumption of risk, which was an affirmative defense in a negligence action similar in effect to contributory negligence, has been expressly abolished in most comparative fault jurisdictions or merged into the doctrine of comparative fault. However, in New York, even following the passage of N.Y. C.P.L.R. § 1411 in 1975, the doctrine of assumption of risk has somehow survived and remained viable, principally in actions involving athletic activities and sporting or recreational pursuits.

In light of the holding of the New York Court of Appeals in *Trupia v. Lake George Cent. School Dist., 2010 N.Y. LEXIS 344, 2010 NY Slip Op 2833* (Apr. 6, 2010), practitioners should be aware that few if any non-sporting, non-recreational activities may qualify for the defense of assumption of risk.

The doctrine of assumption of risk is a precept often applied to sporting activities in order to nullify any liability on the part of the sponsoring entity on the grounds that the participant voluntarily engaged in a qualifying activity and knew and assumed the risks inherent in the particular activity, thereby vitiating the defendant's duty of care in connection that activity. The policy underlying the doctrine of primary assumption of risk is to encourage free and unbridled participation in athletic activities. Without the doctrine, the fear is that athletes may be reluctant to play aggressively for fear of being sued by an opposing player.

Prior High-Court Rulings on Assumption of Risk

The doctrine of assumption of the risk was resurrected by New York's Court of Appeals in several cases decided

after N.Y. C.P.L.R. § 1411, the comparative negligence statute, was enacted.

Maddox v. New York, 66 N.Y.2d 270, 487 N.E.2d 553, 496 N.Y.S.2d 726 (1985) involved a professional baseball player who fell on a wet and muddy field during a professional baseball game and was injured. He brought an action against the city, baseball club, umpires, stadium owner, builder, and maintenance company. The court held that as a professional baseball player, the plaintiff was aware of and assumed the risks of continuing to play on a field that was wet and muddy, whether or not he had foreseen the exact manner in which his injury occurred.

In *Turcotte v. Fell, 68 N.Y.2d 432,502 N.E.2d 964, 510 N.Y.S.2d 49 (1986),* a jockey whose horse clipped the heels of another horse during the eighth race at Belmont Park was denied recovery for his injuries. He was deemed to have accepted the risk of injuries that were known, apparent, or reasonably foreseeable consequences of his participation in the race, thereby relieving the defendants of any legal duty toward him. According to the Court of Appeals, primary assumption of risk is applicable to sporting events, in which the risks are freely and voluntarily assumed, to the extent that each party is free to participate in the event or not. In such cases, the defendant's duty is one of reasonable care to make the conditions as safe as they appear to be. A plaintiff is deemed to consent to those risks that are fully comprehended or obvious, thereby discharging a defendant of its duty of care. The Court of Appeals reasoned that assumption of the risk, while not an absolute defense, survived the enactment of the comparative fault statute because it is a measure of the defendant's duty of care, based upon the plaintiff's actual consent which is implied from the act of electing to participate in the activity.

The plaintiff in *Benitez v. New York City Bd. of Educ., 73 N.Y.2d 650, 541 N.E.2d 29, 543 N.Y.S.2d 29 (1989)* was a 19[#8209]year[#8209]old senior star athlete at George Washington High School when he suffered a broken neck resulting in paralysis during a varsity football game. The Court of Appeals held that the plaintiff, by participating in the football game, accepted the dangers inherent in the sport, just as a fencer accepts the risk of a foil thrust by his opponent, or a baseball spectator the risk of being struck by a batted ball. It rejected any duty on the part of the defendant Board of Education to supervise the plaintiff, a 19[#8209]year[#8209]old senior star football player and college scholarship prospect.

In *Morgan v. State, 90 N.Y.2d 471, 685 N.E.2d 202, 662 N.Y.S.2d 421 (1997),* a consolidated appeal of four separate cases brought against owners or operators of athletic facilities, the Court of Appeals drew an important distinction between inherent risks of activities that are assumed by injured participants as part of the activity, and those for which a distinctive, separate duty continues to be operative, which is not assumed by the participant. Thus, a claimant injured while driving a bobsled in a national championship race, a claimant injured while performing a tumbling technique over an obstacle at a karate school, and a claimant injured while performing a kick maneuver at a martial art training school were held to have assumed the risks inherent in those activities, and their cases were dismissed. However, a 60-year-old plaintiff who was injured when he snagged his foot in the hem of a torn net dividing indoor tennis courts, despite his prior knowledge that the net was ripped, was held not to have assumed the risk of the torn net. The Court of Appeals reasoned that a torn net, whose purpose is to prevent interference from bouncing balls or others players on adjacent courts, was not automatically a part of or sufficiently interwoven into the assumed inherent risk of the sport of tennis. Rather, it was more akin to an allegedly negligent condition arising during the ordinary course of any property's maintenance that implicates comparative negligence principles.

Finally, *Sykes v. County of Erie, 94 N.Y.2d 912,728 N.E.2d 973,707 N.Y.S.2d 374 (2000)* involved a plaintiff who was injured when he stepped into a recessed drain near the free-throw line while playing basketball on an outdoor court owned by the defendant. Because there was no evidence that the drain was defective or improperly maintained, the Court of Appeals held that the plaintiff assumed the risks inherent in playing basketball upon an irregular outdoor surface, particularly as the condition of the basketball court was open and obvious. A recent, similar holding occurred in *Trevett v. City of Little Falls, 6 N.Y.3d 884, 849 N.E.2d 961, 816 N.Y.S.2d 738 (2006),* in which plaintiff was injured while attempting a layup when he collided in midair with a pole supporting a basketball backboard and rim. In dismissing the case, the Court of Appeals held that the proximity of the pole to the court was open and obvious, and thus the risk of collision with the pole was inherent in playing on that court.

Conflicts in the Appellate Courts

Building upon these foundations, appellate courts in the First and Third Departments have liberally invoked these precepts in traditional sporting activities, holding that where activities were recreational in nature, a defendant's duty to the injured party was nullified by that party's voluntary participation in and knowledge of (and thereby assumption of) the risks inherent in the particular activity. Practitioners must be cautioned that appellate courts in the Second and Fourth Departments have expanded the doctrine to include situations in which the activities are neither athletic nor recreational.

A number of appellate cases have extended the Court of Appeals holding in *Sykes* in athletic contexts to include the condition of the playing surface or playing area, holding that, if the participant is injured as a result of a defect in, or feature of the field, court, track, or course upon which the sport is being played, the doctrine of assumption of risk bars liability against the owner as long as the risk presented by the condition is inherent in the sport. For example, the doctrine was invoked in cases involving the following conditions:

- *hole in outdoor basketball court [Mendoza v. Village of Greenport, 52 A.D.3d 788* (2d Dep't 2008)]
- *hole in a surface of basketball court [Casey v. Garden City Park-New Hyde Park School Dist., 40 A.D.3d 901, 837 N.Y.S.2d 186* (2d Dep't 2007)]
- *an uneven, "very wavy" basketball court surface [Lincoln v. Canastota Cent. School Dist., 53 A.D.3d 851, 861 N.Y.S.2d 488* (3d Dep't 2008)]
- *crack in a sidewalk pavement [Yisrael v. City of New York, 38 A.D.3d 647, 832 N.Y.S.2d 598* (2d Dep't 2007)]
- *crack in a tennis court surface [Sammut v. City of New York, 37 A.D.3d 811, 830 N.Y.S.2d 779* (2d Dep't 2007)]
- *open and obvious wall behind out-of-bounds line in basketball court [Wilkes v. YMCA of Greater N.Y., 68 A.D.3d 542, 889 N.Y.S.2d 458* (1st Dep't 2009)]
- *raised manhole cover on soccer field [Manoly v. City of New York, 29 A.D.3d 649, 816 N.Y.S.2d 499* (2d Dep't 2006)]
- *cement strip running alongside a sideline of football field [Brown v. City of New York, 69 A.D.3d 893, 895 N.Y.S.2d 442* (2d Dep't 2010)]

However, the *Sykes* doctrine has *not* been applied to foreclose liability against cities and municipalities for the maintenance of paved public roadways, paved pathways in parks, and sidewalks because courts have been unwilling to hold, as a matter of law, that merely by choosing to operate a bicycle on a paved public roadway, or by engaging in some other form of leisure activity or exercise such as walking, jogging, or roller skating on a paved public roadway, a plaintiff consents to the negligent maintenance of such roadways by a municipality or a contractor. For example, in both *Vestal v. County of Suffolk, 7 A.D.3d 613, 776 N.Y.S.2d 491* (2d Dep't 2004) and *Cotty v. Town of Southampton, 64 A.D.3d 251, 880 N.Y.S.2d 656* (2d Dep't 2009), the Court held that riding a bicycle on a paved public roadway normally does not constitute a sporting activity for purposes of applying the primary assumption of risk doctrine, as opposed to mountain biking and other forms of off[#8209]road bicycle riding in which the irregular surface of an unimproved dirt[#8209]bike path is the attraction for dirt[#8209]bike riders. In these cases, the courts' concern is that expanding the doctrine of primary assumption of risk in situations involving paved thoroughfares could have the arbitrary effect of eliminating all duties owed to participants in such leisure or exercise activities, not only by the defendants responsible for road maintenance, but by operators of motor vehicles and other potential tortfeasors. *See also Moore v. City of New York, 29 A.D.3d 751, 816 N.Y.S.2d 131* (2d Dep't 2006) (plaintiff did not assume risk that his bicycle tire would fall through a gap between roadway and sewer grating); *Phillips v. County of Nassau, 50 A.D.3d 755, 856 N.Y.S.2d 172* (2d Dep't 2008) (bicyclist did not assume risk that his tire would hit a raised concrete mound on a county road); *James v. Newport Gardens, Inc., 70 A.D.3d 1002, 896 N.Y.S.2d 116* (2d Dep't 2010) (a ten-year-old plaintiff did not assume risk of crack in a sidewalk on a public street).

In *Farnham v. Meder, 45 A.D.3d 1315, 845 N.Y.S.2d 619* (4th Dep't 2007), the court considered the assumption of risk doctrine in a non-sporting, non-recreational context. In *Farnham*, the plaintiff was chasing the defendant's bull from

his property, when the defendant's bull turned and knocked him to the ground, injuring him. The Fourth Department, acknowledging that it had extended the doctrine of assumption of risk to activities other than sporting, recreational, and entertainment activities, nonetheless concluded that the risk of injury in *Farnham* was not fully comprehended or perfectly obvious because the plaintiff had chased the bull from his property on other occasions and at no time had the bull ever acted in an aggressive manner toward the plaintiff, thereby affording the plaintiff no awareness that it would do so on this particular occasion. However, the practitioner must be cautioned that, in a recreational context, even the risk that a horse would bite a plaintiff in the shoulder while being prepared for the activity of horseback riding was held to have been a known danger, inherent in the activity, and assumed by the plaintiff, an experienced recreational horseback rider. *Tilson v. Russo, 30 A.D.3d 856, 818 N.Y.S.2d 311* (3d Dep't 2006). Thus, the defendant in *Tilson*, who neither concealed nor enhanced the danger, was held to owe no further duty of care to the plaintiff. *See also Dalton v. Adirondack Saddle Tours, Inc., 40 A.D.3d 1169, 836 N.Y.S.2d 303* (3d Dep't 2007) (risk that horse might suddenly break into a run is inherent in the activity of horseback riding).

Cases That Are Incorrectly Decided under the Reasoning in Trupia

In *Davis v. Kellenberg Mem'l High Sch., 284 A.D.2d 293, 725 N.Y.S.2d 588* (2d Dep't 2001), the plaintiff, a student at the defendant's school, was injured when he and some other students stood on top of a concrete bench, and began rocking it to amuse themselves, while waiting for his mother after school. He attempted to dismount the bench as it was rocking, and it toppled over, catching his foot and landing on top of it. The Second Department held that the injured plaintiff assumed the risk of injury inherent in his horseplay.

Lamandia-Cochi v. Tulloch, 305 A.D.2d 1062, 759 N.Y.S.2d 411 (4th Dep't 2003) involved an infant plaintiff who fell while attempting to slide down a wooden handrail adjacent to porch steps of the defendant's residence. The court held that in attempting to slide down the handrail, the child was aware of and voluntarily assumed the risks inherent in the activity, including that the handrail might bend or shift beneath him.

Sy v. Kopet, 18 A.D.3d 463, 795 N.Y.S.2d 75 (2d Dep't 2005) involved a plaintiff whose door had been padlocked by the landlord because he was late with his rent. Plaintiff attempted to gain re-entry to his room in the defendant's boarding house by entering a second-floor window. Dismissing his injury lawsuit, the court held that the plaintiff had assumed the risk of injury by attempting to enter his room through the second story window by climbing window-guard rails and a gutter on the house. Likewise, in *Belloro v. Chicoma, 8 A.D.3d 598, 599, 779 N.Y.S.2d 231* (2d Dep't 2004) the plaintiff assumed risk of injury in attempting to enter his room through second story window by climbing a ladder that was placed on top of another ladder. Similarly, in *Shaw v. Lieb, 40 A.D.3d 740, 836 N.Y.S.2d 213* (2d Dep't 2007), the plaintiff was held to have assumed the risk of injury when he chose to ride on a vehicle while standing on its rear bumper.

The Third Department Decision in *Trupia*

The case which is the focus of this commentary was first addressed on appeal by the Third Department in *Trupia v. Lake George Cent. School Dist., 62 A.D.3d 67, 875 N.Y.S.2d 298* (3d Dep't 2009). Anthony Trupia, not yet twelve years old, was injured while participating in a summer school program. During a break between classes he attempted to slide down the banister of a stairway, and fell to the bottom of the stairwell, sustaining serious injuries. The defendants moved to amend their answer to interpose the defense of assumption of risk. The lower court permitted the amendment and the plaintiff appealed. Acknowledging that the Second and Fourth Departments had expanded the application of the doctrine beyond sporting and recreational activities, the Third Department, without any discussion of the plaintiff's theory of negligent supervision whatsoever, held that it would decline to apply the doctrine in this case because to do so would be to sanction reversion to the former doctrine of contributory negligence, wherein any recovery is barred. Thus, the Third Department in *Trupia* rejected the applicability of the doctrine, reversing the lower court, and denying the defendants' motion to amend its answer.

The Court of Appeals Holding in *Trupia*

The Court of Appeals entertained the appeal presumably in order to provide guidance and direction in light of differing opinions among the appellate divisions. Upon review by the Court of Appeals, Chief Judge Lippman, writing for the court, noted initially that the plaintiff's complaint sought recovery principally upon a theory of negligent supervision. That single statement set the tone for the balance of the decision in which the Court of Appeals affirmed the Third Department's decision, but on entirely distinct legal grounds. Judge Lippman noted the inconsistencies between the First and Third Departments, which generally invoked the doctrine of assumption of risk only in athletic and recreational activities, and the Second and Fourth Departments, which adopted a more expansive application of the doctrine. Tracing the history of the precept of assumption of the risk, and its survival as a bar to recovery in light of the passage of N.Y. C.P.L.R. § 1411, the comparative fault statute, the Court of Appeals concluded that the doctrine logically could not coexist in the wake of comparative causation. In reality, it is a rebirth of the supplanted contributory negligence theory justified by the societal value in facilitating aggressive and vigorous participation in athletic activities.

Practitioners should note the Court of Appeal's statement that it had not applied the doctrine of assumption of risk outside of the context of athletic activities, and its pronouncement that the doctrine's application should be closely circumscribed in order not to seriously undermine and displace the principles of comparative causation. Query whether this statement, which could have sweeping consequences, is *dicta*, or whether the Court actually intended to strictly limit the doctrine of assumption of risk to activities that can be deemed to be of social value, such as athletic activities, and other similarly beneficial pursuits.

In addition, Judge Lippman noted that application of the doctrine of assumption of the risk in a context where there is a concurrent obligation of an educational institution to supervise children would have unfortunate consequences. The reasoning behind such a rule is that a child, lacking the mature judgment to foresee consequences of his or her actions cannot validly be deemed to have voluntarily consented to the risk of those consequences. Even if the child can validly be charged with some culpable conduct or complicity in connection with the activity, the concept of comparative fault would more logically synthesize a just result than the invocation of the assumption of risk doctrine. While children can, in an appropriate case, be held to have assumed the risk of injury in activities such as athletics, in which they voluntarily engage, both in and out of school, where adults are concerned, the use of the doctrine should be reserved for pursuits that are both unusually risky and beneficial that the defendant has in some non-culpable way enabled.

In *Trupia*, Judge Lippman takes the opportunity to explain the application of assumption of risk since the enactment of N.Y. C.P.L.R. § 1411, which abolished contributory negligence and assumption of risk as absolute defenses in personal injury cases. The court acknowledges and explains that the doctrine has survived as a bar to recovery based upon theory that by freely assuming a known risk, a plaintiff negates any duty on the part of the defendant to protect the plaintiff from the known risk. Judge Lippman reminds us that the Court of Appeals has not applied the doctrine of assumption of risk outside the limited context of athletic and recreational activities. Yet he acknowledges that the Second and Fourth Departments have expanded and permitted a broader use of the doctrine. He uses the *Trupia* case as a vehicle to explain how assumption of risk should be applied.

The courts all acknowledge that the application of assumption of risk must be limited if comparative fault is to remain the law of the land. Allowing its broad application weakens the comparative law rules and permits the culpable conduct of the defendant to be eliminated from the equation of complete fault. In *Trupia*, Judge Lippman explains (as he did before, in his majority decision in *Roberts v. Boys and Girls Republic, 51 A.D.3d 246, 850 N.Y.S.2d 38 (1st Dept. 2008))* that sports activities have great societal benefits and must be permitted to encourage vigorous competition in sports and recreation.

In *Roberts*, the court espouses what it calls primary assumption of risk for sports. *Trupia* does not mention primary assumption of risk but does again explain that sports and recreation are special and provide benefits to society. The benefits require the courts, on policy grounds, to shield defendants from liability based on foreseeable injuries. If the risks of the activity are fully comprehended or perfectly obvious, the plaintiff has consented to them and the defendant owes no further duty. Furthermore, athletes and sports enthusiasts need to be encouraged to give their best performance

without having to be worried about being sued by someone they may injure during an event.

In *Trupia*, Judge Smith writes the concurring opinion joined by Judges Read and Pigott, who take a different direction to reach the result. Judge Smith views the case simply. No child can consent to negligent supervision, therefore, assumption of risk does not apply in this case. In fact, the concurring opinion says that the majority acknowledges this principle and therefore the remainder of the majority decision is merely dicta. The concurring opinion is very clear on what the assumption of risk is not; however, the opinion declines to define what assumption of risk is. Judge Smith notes that the assumption of risk doctrine in tort law is hard to understand. Presumably, Judge Smith's difficulty originates from the fact that the legislature has abolished the doctrine of assumption of risk as an absolute bar. Judge Smith goes on to criticize the majority for making sweeping pronouncements in a case that did not need them, especially since the majority does not answer the questions that they have raised.

The concurring Judges want to know exactly what athletic or recreational activities are and why participants in these activities (which are encouraged by society) are penalized by the application of assumption of risk, while participants in horseplay (which is not valued by society) receive a benefit that allows participants to sue. To answer this question, read the *Trupia* decision alongside *Roberts v. Boys & Girls Republic, Inc., 51 A.D.3d 246, 850 N.Y.S.2d 38* (1st Dep't 2008), which is not cited in either the majority or dissenting *Trupia* decision. Judge Lippman, who wrote for the majority in *Trupia*, has at least once before addressed the doctrine of assumption of risk. When he wrote for the majority as an appellate division justice in *Roberts*, he also referred to the benefits that sports and recreational activity has for society. Judge Lippman wrote in *Roberts* that one assumes commonly appreciated risks that are inherent in and arise out of the nature of the activity and flow from such participation.

The plaintiff in *Robert*s, who was watching her son practice at a baseball field, was struck by a bat being swung in a warm-up area adjacent to the bleachers by an "on-deck" batter when she traversed the area. The majority and dissenting opinions in *Roberts* differed in their interpretation of the operative facts of the case, particularly in the logistics and demarcation or lack of marking of the *de facto* warmup area. The majority held that the danger associated with people swinging bats on the sideline while warming up for the game is inherent in the game of baseball, and one which the plaintiff assumed. Furthermore, the location of the injury and the plaintiff's right to be at that location did not negate the plaintiff's assumption of the risks inherent with the activity. The majority also rejected the dissent's suggestion that the improvised on-deck area posed a unique or enhanced risk because it was immediately adjacent to the field, open and obvious to any spectator or bystander. The dissent in *Roberts* believed that the fact that the location of the on-deck circle was in an unofficially designated area meant the risk was not to be perceived. This argument misses the point. The holding in *Roberts* is essentially that people at baseball games assume the risk of being hit by a bat if they get to close. The proximity to the field is unimportant. Presumably, if you got hit by a home run ball in the parking lot at the game, that is a risk you would have assumed as well. Justice Lippman explained that the primary assumption of risk doctrine is based upon the policy that sports have many societal benefits and must be permitted to exist despite the risks inherent in the activity. Therefore, a certain level of risk that may not provide optimal safety to the participants must be tolerated.

In addition to all the other benefits of sports and recreation, each sport has its own rules and its own inherent risks. This other benefit is discussed in *Roberts* and implied in *Trupia*. Judge Lippman wrote in *Roberts* that one assumes commonly appreciated risks that are inherent in and arise out of the nature of the activity and flow from such participation.

Whether a baseball game is played in New York, California, or Japan, the risks for the players or the fans are well known. Spectators at a game know that they can be hit by a ball or broken bat. Football players know the risks of being hit by other athletes and fans know someone could make a diving catch and fall on top of them if they are too close to the field. At the Indy 500, spectators as well as racers know that cars can hit the wall and burst into flames. Those risks are known, easily perceived and not of the type that a defendant would be responsible for guarding against. Obviously one would not assume the risk of a piece of concrete falling from the stadium's structure or other risks not associated with the game.

The running of the bulls is a perfect example of how and why the principle should be viewed and applied. The running of the bulls is an event that involves running in front of six bulls that have been let loose on a course of a sectioned[#8209]off subset of a town's streets. The purpose of this event is to transport the bulls from the off[#8209]site corrals to the bullring. People jump among them to show off their bravado. Surely, the sponsors of this event do not owe a duty to the people who jump in with the bulls to prevent them from being gored or trampled.

As for applying a special rule to horseplay, the question is really whether a person assumes all the risk for every stupid thing they do. Surely the Legislature and the courts did not intend that people should assume all the risk for every stupid thing they do that leads to an injury. It is not that the person engaged in the horseplay or the ill-advised activity is getting a benefit; it is that the risk is not generally known or easily perceived. That being the case, the defendant should not be released from culpable conduct, and the general principles of comparative fault should be applied as per N.Y. C.P.L.R. § 1411.

The Court of Appeals has spoken, albeit in *dicta*, and assumption of risk should only be applied when participants, competitors and spectators are injured as result of a risk that is generally associated with that activity.

Conclusion

In the aftermath of *Trupia*, the lines of demarcation in the tumultuous coexistence between the comparative fault statute and the doctrine of assumption of risk have become better defined. The lesson here for the practitioner is that comparative law principles will be applied in most cases.

Certainly, a literal reading of the *Trupia* decision's more sweeping semantics would compel the conclusion that the Court of Appeals intends to use the doctrine when activities that it considers athletic and recreational and that possess social value need protection, even though they involve significantly heightened risks. The continuing discussion and application of the assumption of risk doctrine create confusion for the bench and bar. The courts should consider abolishing the doctrine of assumption of risk. The legislature buried it and it should not have been resurrected. The legal arguments for exempting it from comparative negligence are artificial and not compelling. The doctrine of assumption of risk should be replaced with "the no duty rule," specifying that in sports and recreational activities there simply is no duty owed for perceived and ordinary risks. Accordingly, recovery is precluded in those cases.

RELATED LINKS: Cross-References:

- Warren's Negligence in the New York Courts Chs. 80, 101, 145 (sports participants; spectators; recreational facilities);
- New York Practice Guide: Negligence 27.01[8][e] (ballfields);
- Premises Liability: Law and Practice Ch. 5 (recreational premises liability);
- 1-3 LexisNexis AnswerGuide New York Negligence 3.07 Analyzing Duty Owed to Participants in Sporting Activities);
- 1-5 LexisNexis AnswerGuide New York Negligence 5.24 (Considering Culpable Conduct, Comparative Fault, and Assumption of Risk);
- 1-3 LexisNexis AnswerGuide New York Negligence 3.15 (Checklist for Anticipating Applicable Defenses in Premises Liability Cases);
- 1-3 LexisNexis AnswerGuide New York Negligence 3.17 (Raising Defense of Plaintiff's Fault);
- 1-2 LexisNexis AnswerGuide New York Negligence 2.05 (Checklist for Evaluating Motor Vehicle cases)

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4 of 41 DOCUMENTS

Castaneda v. U.S.: Ninth Circuit Errs in Suit Against Public Health Personnel

2010 Emerging Issues 4989

Castaneda v. United States: Ninth Circuit Errs in Permitting Suit Against Public Health Service Personnel for Failing to Provide Medical Treatment

By Hon. Robert C. Longstreth

April 27, 2010

SUMMARY: Like great and hard cases, horrific cases can also make bad law. Understandably affected by shocking allegations of neglect, the trial and appellate courts in Castaneda v. U.S. each rejected dozens of contrary holdings and wrongly concluded that § 233 of the Public Health Service Act does not preclude an action against Public Health Service officers for failing to treat a detainee's medical condition. This failure led to the plaintiff's death.

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ARTICLE: Like "great" and "hard" cases, n1 horrific cases can also make bad law. Understandably affected by shocking allegations of neglect, the trial and appellate courts in *Castaneda v. United States* n2 each rejected dozens of contrary holdings and wrongly concluded that Section 233 of the Public Health Service Act n3 does not preclude an action against Public Health Service officers for failing to treat a detainee's medical condition. This failure ultimately led to the plaintiff's death.

The facts in *Castaneda* are indeed shocking. Following conviction, plaintiff Francisco Castaneda was held in a California prison from December 2005 to March 2006, and then in a United States Immigration and Customs Enforcement (ICE) correctional facility from late March 2006 until early February 2007. n4 He began complaining of a lesion on his penis while in state custody, but a referral and a biopsy were never carried out as recommended. After he was transferred to federal custody, he complained that the lesion was growing in size, exuding discharge and becoming painful. He was examined by Public Health Service (PHS) personnel - who provide health care to undocumented migrants in ICE custody through an interagency agreement between the Department of Homeland Security, which includes both ICE and the Division of Immigration Health Services (DIHS), and the Department of Health and Human Services, which operates the PHS.

PHS personnel, like the medical personnel in the California correctional institution, recommended referral to a urologist and a biopsy. The outside urologist to whom Mr. Castaneda was referred by PHS recommended a biopsy and treatment of the lesion, but DIHS officials declined to approve the biopsy, considering it an elective outpatient procedure. After two other outside urologists diagnosed the condition as genital warts and one recommended circumcision, which would have provided the material for a biopsy, DIHS again denied the recommended treatment as elective in nature. Although Mr. Castaneda's symptoms worsened, his medical summary listed no "current medical problems" when he was transferred to an ICE facility in Los Angeles County several months later. Mr. Castaneda

obtained legal representation in Los Angeles, and his lawyers sent letters to ICE urging treatment. He was seen by two additional urologists, and although the recommended biopsy was finally approved, he was released from federal custody before the date scheduled for the procedure.

A biopsy was performed a week after Mr. Castaneda was released, and he was diagnosed with penile cancer. His penis was promptly amputated, but the cancer had metastasized to his lymph nodes, and he died a year later.

Three months before his death, Mr. Castaneda filed suit against the United States under the Federal Tort Claims Act (FTCA), n5 and against five individual federal medical employees for constitutional violations under *Bivens*. n6 The five individual PHS defendants moved to dismiss, contending that, under section 233 of the Public Health Service Act, n7 an FTCA action against the United States is the plaintiff's exclusive remedy for claims arising from malpractice by PHS medical personnel. These defendants pointed out that section 233 precludes all other remedies, including *Bivens* actions for constitutional violations. As acknowledged by the district court, defendants' position had been adopted by the Second and Third Circuits, as well as at by least twenty district courts. n8 Although not referenced by the district court, defendants' position had also been adopted by the Fifth and Sixth Circuits, as well as by the Ninth Circuit in a case decided shortly before the Federal Rules of Appellate Procedure were amended to permit citation to unpublished cases. n9

Despite this overwhelming precedent, the district court in *Castaneda* rejected these holdings, finding that plaintiff could maintain a *Bivens* action notwithstanding the express language of section 233. Surprisingly, the Ninth Circuit affirmed on interlocutory appeal. n10

In rejecting the uniform line of authority holding that section 233 bars *Bivens* actions, as well as other causes of action against PHS medical personnel, the *Castaneda* courts erred. Section 233 provides that:

The remedy against the United States provided by sections 1346(b) and 2672 of title 28, or by alternative benefits provided by the United States where the availability of such benefits precludes a remedy under section 1346(b) of title 28, for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim. n11

The statutory language could not be more clear. In any case that suit is based on "the performance of medical, surgical, dental, or related functions" by PHS personnel, the FTCA remedy is "exclusive of any other civil action or proceeding by reason of the same subject-matter" against that employee. In *Castaneda* there was no dispute that the PHS personnel were acting within the scope of their employment n12 and were being sued for the performance of medical functions. There was also no dispute that a *Bivens* claim is a "civil action or proceeding." Nor was there a dispute that the *Bivens* claims arose out of the same subject matter as the alleged malpractice for which the FTCA provided a remedy. n13 Accordingly, the plain language of Section 233(a) bars the *Bivens* claims asserted in *Castaneda* against the individual medical personnel.

Congress did not make an exception for claims alleging constitutional violations from the preclusive language of section 233; to the contrary, Congress expressly stated that the provision bars *any* civil action or proceeding against PHS personnel that arises from the provision of medical services. Indeed, in addressing the interplay between the FTCA and *Bivens* claims in *Carlson v. Green*, n14 the Supreme Court specifically identified Section 233 as an instance in which Congress adopted the "practice of explicitly stating when it means to make FTCA an exclusive remedy."

The district court in *Castaneda* relied primarily on the 1988 amendments to the Federal Tort Claims Act, officially titled the Federal Employees Liability Reform and Tort Compensation Act and commonly known as the Westfall Act, which expanded the scope of the exclusive remedies previously provided by the FTCA to include all torts committed by

federal employees. n15 *28 U.S.C.S. § 2679*(a) as amended by the Westfall Act carves out actions alleging federal constitutional and statutory violations from the provision making the FTCA the exclusive remedy for wrongful conduct by government officials resulting in personal injury or property damage. The district court concluded that, since Section 233(a) is subject to the provisions of the chapter that contains *28 U.S.C.S. § 2679*(a), the exception for allegations of constitutional violations is incorporated into Section 233(a), as well as *28 U.S.C.S. § 2679*(a). n16

There are several difficulties with the district court's argument. The very legislative history quoted by the court states that the Westfall Act "would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their constitutional rights." n17 Accordingly, reading the Westfall Act, which expanded the immunity of federal employees from suit for common law torts, as overriding existing immunities from suit for constitutional violations does not accord with Congressional intent. Put differently, if the Westfall Act does "not affect" *Bivens* liability either way, the premise of the district court's argument fails. Moreover, if Congress had intended in 1988 to modify pre-existing immunity provisions to allow assertion of constitutional and statutory violations, it would have been an easy matter to expressly modify those provisions. This is particularly true since, as the district court recognized, Congress was clearly aware of them, n18 and since, as noted above, Section 233 and the other previous immunity provisions had been expressly referenced by the Supreme Court as examples of where Congress had explicitly stated that it meant to make the FTCA an exclusive remedy. n19

The district court's Westfall Act argument is also premised on a misreading of dicta in *United States v. Smith*, n20 the Supreme Court's first examination of the Act. The district court believed that *Smith* "acknowledged the FTCA's express preservation of employee liability for *Bivens* claims in the context of *10 U.S.C. § 1089*," which is almost identically worded to Section 233(a). n21 Following passage of the Westfall Act, however, the government in *Smith* disclaimed its previous reliance on *28 U.S.C.S. § 1089*, and proceeded solely under *28 U.S.C.S. § 2679*. n22 Thus, *Smith* did not address *10 U.S.C.S. § 1089* at all, let alone conclude that exception for allegations of constitutional violations by federal employees included in *28 U.S.C.S. § 2679* was incorporated by implication into *10 U.S.C.S. § 1089* as well.

Perhaps understanding the flaws in the district court's analysis, the Ninth Circuit did "not reach the issues of statutory construction which [sic] underlie the district court's opinion." n23 The Ninth Circuit's analysis is no more persuasive, however. As a preliminary matter, the Ninth Circuit declared that for *Bivens* liability to be preempted:

Congress must provide an alternative remedy that is "explicitly declared to be a *substitute* for" *Bivens* (rather than a complement to it) *and* Congress must view that remedy as 'equally effective.' *446 U.S. at 18-19*. Both these elements must be present for a court to find the *Bivens* remedy expressly displaced. n24

The Supreme Court has repeatedly made it clear, however, that courts should not imply a *Bivens* remedy merely because existing remedies are inadequate. For example, in *Bush v. Lucas*, n25 the court declined to create a *Bivens* remedy for violations of First Amendment rights, stating that the question "cannot be answered simply by noting that existing remedies do not provide complete relief for the plaintiff." When Congress has expressly declared a remedy to be a substitute for *Bivens* relief, courts must give effect to that determination, rather than rejecting it on the grounds that the alternative remedy is not viewed as equally effective. n26 This is particularly true when the alternative remedy, as in *Castaneda*, generally provides full compensation from a deep-pocket defendant for all economic losses. n27

The Ninth Circuit then found that Congress did not explicitly make the FTCA a substitute for *Bivens* liability in actions involving the PHS, since Section 233(a) "does not mention the Constitution or recovery thereunder" and could not have addressed *Bivens* causes of action that did not exist in 1970 when Section 233(a) was enacted. n28 Congress, however, used the broadest possible language in defining the scope of Section 233(a), stating that the provision bars "any" alternative remedy against PHS personnel. It is unreasonable to require Congress to implement its intent to bar all alternative remedies, including those not even judicially recognized, by specifically enumerating each such remedy. Courts, including the Ninth Circuit, that have addressed whether such all-encompassing language precludes causes of action created in the future have generally reached the straightforward conclusion that it does. n29 Indeed, appellate

courts, again including the Ninth Circuit, have consistently construed the provision that an FTCA judgment bars "any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim," n30 to bar *Bivens* actions, even though this provision was enacted well before *Bivens* was decided and makes no specific reference to constitutional claims. n31

The Ninth Circuit also relied on the legislative history of Section 233(a) to conclude that Congress intended to immunize PHS personnel only from "malpractice" suits, which the court defined as encompassing only negligence or incompetence, not intentional conduct. n32 The word "malpractice" appears nowhere in the statute. Instead, the statute is triggered by personal injury claims "arising from the performance of medical, surgical, dental, or related functions," and once triggered bars all claims "by reason of the same subject matter against the [PHS] officer or employee." n33 The preclusive effect is therefore defined by the subject matter of the claim, not by the legal theory asserted. This is borne out by the legislative history relied on by the Ninth Circuit, which cited Representative Staggers statement that "in the event there is a suit against a PHS doctor alleging malpractice, the Attorney General of the United States would defend them *in whatever suit may arise*." n34 The contemporary understanding, as expressed in the plain language of the statute, is that a suit containing both malpractice allegations and allegations of constitutional violations arising from the same facts, as *Castaneda* clearly does, may not be asserted against PHS physicians personally. The Ninth Circuit's acknowledgement that "the acts giving rise to a constitutional action might also give rise to one for malpractice" n35 - that is, that they do arise "by reason of the same subject matter" - is fatal to its holding.

The court also relied on the text and legislative history of the Westfall Act, passed 18 years later. n36 In so doing, the Ninth Circuit disregarded its previous recognition that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." n37 Moreover, the Westfall Act demonstrates that, when Congress wants to carve out statutory and constitutional violations from an exclusive-remedy bar, it knows how to do so in clear and unambiguous terms. When it fails to do so, and expressly states instead that all claims arising from a particular factual situation are barred, an exception for constitutional claims should not be implied. The logical implication of both the Ninth Circuit and the district court's reasoning is that malpractice claims against PHS doctors based on federal statutes, including those passed before Section 233 was enacted, may be freely brought. It is hard to square this result with the text or purpose of Section 233.

The Ninth Circuit also erroneously concluded that accepting the PHS defendants' argument would grant them an immunity from constitutional claims not afforded to VA doctors, since, in the court's view, *38 U.S.C.S. § 7316* protects VA doctors only from actions alleging the common law torts of malpractice and negligence, not those alleging constitutional torts. n38 But *38 U.S.C.S. § 7316*, like Section 233, immunizes VA doctors from all civil actions arising from the same subject matter as a malpractice claim. In both cases, constitutional claims arising from the factual circumstances that could also support a malpractice claim are barred. Instead of harmonizing the various exclusive remedy statutes, the Ninth Circuit's construction of "malpractice" as necessarily encompassing only the failure to use due care, n39 creates a conflict with those statutes triggered by a "negligent *or wrongful* act or omission." n40

The Supreme Court granted a writ of certiorari in *Castaneda*, and oral argument was heard on March 2, 2010. Based on the oral argument, it appears likely that the Supreme Court's analysis will be similar to that set forth in this commentary, and that the Ninth Circuit's decision will be reversed.

Return to Text

n1 *See Northern Securities Co. v. United States, 197 U.S. 193, 400, 48 L. Ed. 679, 726, 24 S. Ct 436, 468* (Holmes J. dissenting).

n2 *Castaneda v. United States, 546 F.3d 682 (9th Cir. 2008), aff'g, 538 F.Supp.2d 1279 (C.D. Cal. 2008).*

n3 *42 U.S.C.S. § 233*(a).

n4 The factual allegations of the complaint and amended complaint are summarized at *Castaneda v. United States, 538 F. Supp. 2d 1279, 1281-1285 (C.D. Cal. 2008),* and *Castaneda v. United States, 546 F.3d 682, 684-687 (9th Cir. 2008).*

n5 *28 U.S.C.S. §§ 1346*(b), 2671-2680.

n6 *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971),* discussed in 2 L. Jayson & R. Longstreth, *Handling Federal Tort Claims,* § 13.06[1][b].

n7 *42 U.S.C.S. § 233*(a), discussed in 1 L. Jayson & R. Longstreth, *Handling Federal Tort Claims,* § 6.01[4].

n8 *Castaneda v. United States, 538 F. Supp. 2d 1279, 1291 (C.D. Cal. 2008), citing Anderson v. Bureau of Prisons, 176 Fed. Appx. 242, 243, 2006 U.S. App. Lexis 9034 (3d Cir. 2006), cert. denied, 547 U.S. 1212, 105 L. Ed. 2d 927, 126 S. Ct. 2902 (2006); Cuoco v. Moritsugu, 222 F.3d 99, 107 (2d Cir. 2000); Pimentel v. Deboo, 411 F. Supp. 2d 118, 126-127 (D. Conn. 2006); Brown v. McElroy, 160 F. Supp. 2d 699, 703 (S.D.N.Y. 2001); Lyons v. United States, 2008 U.S. Dist. LEXIS 2260* (Jan. 11, 2008); *Lee v. Guavara, 2007 U.S. Dist. LEXIS 71206* (D.S.C. Sept. 24, 2007); *Fourstar v. Vidrine, 2007 U.S. Dist. LEXIS 70701* (S.D. Ind. Sept. 21, 2007); *Hodge v. United States, 2007 U.S. Dist. LEXIS 64644* (M.D. Pa. Aug. 31, 2007); *Coley v. Sulayman, 2007 U.S. Dist. LEXIS 57639* (D.N.J. Aug. 7, 2007); *Wallace v. Dawson, 2007 U.S. Dist. LEXIS 6279* (N.D.N.Y. Jan. 29, 2007); *Barbaro v. United States ex rel. Fed. Bureau of Prisons FCI Otisville, 2006 U.S. Dist. LEXIS 79338* (S.D.N.Y. Oct. 30, 2006); *Williams v. Stepp, 2006 U.S. Dist. LEXIS 73239* (S.D. Ill. Sept. 21, 2006); *Cuco v. Fed. Medical Center-Lexington, 2006 U.S. Dist. LEXIS 49711* (E.D. Ky. June 9, 2006); *Arrington v. Inch, 2006 U.S. Dist. LEXIS 20193* (M.D. Pa. March 30, 2006); *Foreman v. Fed. Corr. Inst., 2006 U.S. Dist. LEXIS 96187* (S.D. W. Va. March 29, 2006); *Whooten v. Bussanich, 2005 U.S. Dist. LEXIS 37995* (M.D. Pa. Sept. 2, 2005); *Freeman v. Inch, 2005 U.S. Dist. LEXIS 41912* (M.D. Pa. May 16, 2005); *Dawson v. Williams, 2005 U.S. Dist. LEXIS 3059* (S.D.N.Y. Feb. 28, 2005); *Lovell v. Cayuga Corr. Facility, 2004 U.S. Dist. LEXIS 20584* (W.D.N.Y. Sept. 29, 2004); *Valdivia v. Hannefed, 2004 U.S. Dist. LEXIS 16355* (W.D.N.Y. Aug. 10, 2004); Cook v. Blair (E.D.N.C. March 21, 2003).

n9 *Miles v. Daniels, 231 Fed. Appx. 591, 591, 2007 U.S. App. LEXIS 10759 (9th Cir. 2007); Montoya-Ortiz v. Brown, 154 Fed. Appx. 437, 439, 2005 U.S. App. LEXIS 25198 (5th Cir. 2005); Beverly v. Gluch, 902 F.2d 1568,* slip op. at 3-4 (6th Cir. 1990) (unpublished).

See also Navarette v. Vanyer, 110 F. Supp. 2d 605, 606 (N.D. Ohio 2000); Lewis v. Sauvey, 708 F. Supp. 2d 167, 169 (E.D. Mich. 1989).

n10 *Castaneda v. United States, 546 F.3d 682 (9th Cir. 2008), aff'g, 538 F. Supp. 2d 1279, 1286-1297 (C.D. Cal. 2008).*

n11 *42 U.S.C.S. § 233*(a).

n12 *Castaneda v. United States, 546 F.3d 682, 689 (9th Cir. 2008).*

n13 *Castaneda v. United States, 546 F.3d 682, 694 (9th Cir. 2008)*("the acts giving rise to a constitutional action might also give rise to one for malpractice").

n14 *Carlson v. Green, 446 U.S. 14, 20, 64 L. Ed. 2d 15, 25, 100 S. Ct. 1468 (1980).*

n15 *28 U.S.C.S. § 2679*(a), as amended by Pub. L. 100-694, *102 Stat. 4563 (1988).* The Westfall Act is discussed at length in 1 L. Jayson & R. Longstreth, *Handling Federal Tort Claims*, § 6.01[3].

n16 *Castaneda v. United States, 538 F. Supp. 2d 1279, 1287-1292 (C.D. Cal. 2008).*

n17 *See* H.R. Rep. 100-700 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5945, 5950, *quoted in Castaneda v. United States, 538 F. Supp. 2d 1279, 1292 (C.D. Cal. 2008).*

n18 *Castaneda v. United States, 538 F. Supp. 2d 1279, 1295 (C.D. Cal. 2008).*

n19 *Carlson v. Green, 446 U.S. 14, 20, 64 L. Ed. 2d 15, 24-25, 100 S. Ct. 1468, 1472 (1980).*

n20 *United States v. Smith, 499 U.S. 160, 166-167, 113 L. Ed. 2d 134, 111 S. Ct. 1180 (1991),* discussed in 1 L. Jayson & R. Longstreth, *Handling Federal Tort Claims*, § 3.51.

n21 *Castaneda v. United States, 538 F. Supp. 2d 1279, 1290 (C.D. Cal. 2008).*

n22 *See* 1 L. Jayson & R. Longstreth, *Handling Federal Tort Claims*, § 3.51.

n23 *Castaneda v. United States, 546 F.3d 682, 702 n. 26 (9th Cir. 2008).*

n24 *Castaneda v. United States, 546 F.3d 682, 689 (9th Cir. 2008), quoting Carlson v. Green, 446 U.S. 14, 18-19, 64 L.Ed.2d 15, 23, 100 S. Ct. 1468, 1471 (1980)*(emphasis in original).

n25 *Bush v. Lucas, 422 U.S. 367, 388, 76 L. Ed. 2d 648, 665, 103 S. Ct. 2404, 2417 (1983).*

See also Schweiker v. Chilicky, 487 U.S. 412, 425, 101 L. Ed. 2d 370, 382, 108 S. Ct. 2460, 2468 (1988) (*Bivens* remedy not implied even though "creation of a *Bivens* remedy would obviously offer the prospect of relief for injuries that must now go unredressed").

The Ninth Circuit recognized in *Castaneda* that the remedial schemes in *Bush* and *Schweiker* were "undercompensatory." *Castaneda v. United States, 546 F.3d 682, 691 (9th Cir. 2008).*

n26 *Carlson v. Green, 446 U.S. 14, 20, 64 L. Ed. 2d 15, 24-25, 100 S. Ct. 1468, 1472 (1980).*

n27 *Cf. Castaneda v. United States, 546 F.3d 682, 688-691 (9th Cir. 2008),* arguing that FTCA suits, unlike *Bivens* actions, do not allow recovery of punitive damages, require trial to the court rather than a jury, do not provide the deterrent effect of suit against an individual, and are substantively governed by varying state laws

that may limit recovery for non-economic losses, require certificates of merit before suit is filed, or abrogate the collateral source doctrine.

n28 *Castaneda v. United States, 546 F.3d 682, 692 (9th Cir. 2008).*

n29 *See, e.g., John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401, 406-407 (9th Cir. 1992)* (general release intended to encompass all liabilities applies to liability created by later-enacted statute); *Mardan Corp. v. C.G.C. Music, 804 F.2d. 1454, 1461-1462 (9th Cir. 1986)* (same).

n30 *28 U.S.C.S. § 2676.*

n31 *See, e.g., Pesnell v. Arsenault, 543 F.2d 1038, 1042, 1046 (9th Cir. 2008); Gasho v. United States, 39 F.3d 1420, 1436-1438 (9th Cir. 1994); Harris v. United States, 422 F.3d 322, 334-337 (6th Cir. 2005)* (collecting cases).

n32 *Castaneda v. United States, 546 F.3d 682, 692-693 (9th Cir. 2008).*

n33 *42 U.S.C.S. § 233*(a).

n34 *Castaneda v. United States, 546 F.3d 682, 693 (9th Cir. 2008), quoting* 91 Cong. Rec. H42,543 (1970).

n35 *Castaneda v. United States, 546 F.3d 682, 694 (9th Cir. 2008).*

n36 *Castaneda v. United States, 546 F.3d 682, 695-696 (9th Cir. 2008), quoting* H. Rep. No. 100-700, at 4-6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5948-5949 Cong. Rec. H42,543 (1970) and *Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcomm. On Administrative Law and Government Relations of the H. Comm. on the Judiciary*, 100th Cong. 58, 76, 78-79 (1988).

n37 *Royal Foods Co. v. RJR Holdings, Inc., 252 F.3d 1102, 1108 (9th Cir. 2001), quoting United States v. Price, 361 U.S. 304, 313, 4 L. Ed. 2d 334, 340, 80 S. Ct. 326, 332 (1960). See also Massachusetts v. EPA, 549 U.S. 497, 167 L. Ed. 2d 248, 275 n.27, 127 S. Ct. 1438, 1460 n.27 (2007); Jones v. United States, 526 U.S. 227, 238, 143 L. Ed. 2d 311, 323, 119 S. Ct. 1215, 1221-1222 (1999).*

n38 *Castaneda v. United States, 546 F.3d 682, 698-699 (9th Cir. 2008).* The Ninth Circuit's statement that *38 U.S.C.S. § 7316* was not added until 1991 is misleading; the 1991 statute merely reenacted and renumbered a previous provision, *38 U.S.C.S. § 4116*, enacted in 1965.

n39 *Castaneda v. United States, 546 F.3d 682, 693-694 & n.12 (9th Cir. 2008).*

n40 *10 U.S.C.S. § 1089*(a)(emphasis added); *42 U.S.C.S. § 2458a* (emphasis added).

RELATED LINKS: For further information, see
- 2-13 Jayson & Longstreth, Handling Federal Tort Claims § 13.06[1][b];
- 1-6 Jayson & Longstreth, Handling Federal Tort Claims § 6.01[4];
- 1-3 Jayson & Longstreth, Handling Federal Tort Claims § 3.51

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SUPREME COURT "SHARPENS" TEETH OF OHIO'S DOG-BITE LAWS

2010 Emerging Issues 4983

SUPREME COURT "SHARPENS" TEETH OF OHIO'S DOG-BITE LAWS

By Vaseem S. Hadi

April 22, 2010

SUMMARY: Dog-bite owners will need shorter leashes thanks to a recent decision by the Ohio Supreme Court. In Beckett v. Warren, the Court clarified that victims of dog attacks may assert general negligence claims, in addition to seeking relief under Ohio's dog-bite statute. This ruling opens the door to recovery of non-economic and punitive damages if the dog's vicious propensities were known, and no reasonable precautions were taken to protect others.

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ARTICLE: INTRODUCTION

Dog-bite owners, harborers, and keepers will need shorter leashes thanks to a recent decision by the Ohio Supreme Court clarifying that victims of dog attacks may assert general negligence claims, in addition to seeking relief under Ohio's dog-bite statute. R.C. 955.28. The Court's decision opens the door for plaintiffs to request punitive damages when the defendant knows of the dog's vicious propensities, but fails to take reasonable precautions to protect others.

In the case of *Beckett v. Warren*, the plaintiff sought damages on behalf of her minor child, who suffered scalp and head injuries after being mauled by a dog. The victim was a visitor in the defendants' home. In her complaint, the plaintiff asserted two common law negligence claims and a claim for violation of the dog-bite statute. R.C. 955.28. The trial court, however, required the plaintiff to choose either the statute or a common law remedy. The plaintiff chose relief under the statute, which resulted in a favorable jury verdict, but only for $5,000 as reimbursement for the costs of plaintiff's medical treatment. Strict liability claims under the dog-bite statute are limited to recovery of compensatory damages. The plaintiff requested a new trial based on inadequate damages.

On appeal, the Ninth District Court of Appeals in *Beckett, 2008 Ohio 4689 (9th App. Dist. 2008)*, reversed the trial court and held that dog-bite victims could pursue recovery under both the statute and common law negligence claims simultaneously. Although the case was remanded to the trial court for further proceedings, the Ninth District also certified a conflict with a prior Sixth District decision, which resulted in Supreme Court review. *See Beckett v. Warren, 121 Ohio St. 3d 1424, 903 N.E.2d 324 (2009).*

On January 6, 2010, in a 5-2 decision authored by Justice Stratton, the High Court in *Beckett* concluded: "There are two bases for recovery in Ohio for injuries sustained as a result of a dog bite: common law and statutory ... In a common law action for bodily injuries caused by a dog, a plaintiff must show that (1) the defendant owned or harbored the dog;

(2) the dog was vicious; (3) the defendant knew of the dog's viciousness; and (4) the dog was kept in a negligent manner after the keeper knew of its viciousness ..." *Beckett v. Warren, 124 Ohio St. 3d 256, 257-258 (2010).*

Beckett radically altered the mechanics of dog-bite litigation because it deemed the dog's propensity and history of viciousness, as well as the defendant's negligence in how the dog was maintained, as relevant issues. These issues did not matter under the dog-bite statute, which imposed strict liability on an owner, keeper, or harborer of a dog for "any injury, death, or loss to person or property that is caused by the dog" unless the injured person was trespassing or committing a criminal offense other than a minor misdemeanor on the property. The test for strict liability under the dog-bite statute differs significantly from a general negligence claim under the common law. For strict liability under the statute, the plaintiff must prove: (1) ownership, keepership, or harborship of the dog; (2) whether the dog's actions were the proximate cause of the injury; and (3) the monetary amount of damages.

Perhaps more significantly, the Supreme Court in *Beckett* recognized that punitive and non-economic damages are now recoverable in dog-bite cases under the general negligence claim. *Beckett* even suggested punitive damages might be appropriate under the facts of the present case.

As such, practitioners should be prepared to alter their approach in all phases of prosecuting or defending dog-bite injury cases.

PRE-SUIT INVESTIGATION AND EVIDENCE PRESERVATION

Practitioners should begin preserving evidence as soon as possible after a dog-bite incident occurs. This includes taking photographs and obtaining witness' written and/or recorded statements for insurance purposes. Recently, the Ohio Rules of Civil Procedure were amended to require preservation of any potentially relevant electronic evidence once litigation is anticipated. As the dog bite or attack itself may be enough for a court to conclude litigation is probable, it is best to start preserving evidence immediately.

Although a dog-bite case may not be expected to yield much electronic evidence, e-mails, text messages, and other electronic forms of communication are becoming more commonplace in discovery requests. Most cell phones contain camera and video components that the parties or other witnesses may have captured. Social networking websites such as Facebook and MySpace may contain photographs and written messages regarding the incident, the plaintiff's treatment, and other relevant matters as well.

Practitioners representing the plaintiff should issue letters to all potential defendants informing them of the claim, requesting that they place their carriers on notice, and recommending that they begin preserving evidence now. Videos of the dog may be useful regarding the issue of viciousness. As most dogs are killed after a vicious attack on a person, these videos may be the best and only way to demonstrate the dog's temperament and demeanor prior to the biting incident. Such videos may also assist the defendant in establishing that he was unaware of the dog's vicious tendencies and that the plaintiff's injury resulted from an isolated incident.

PLEADINGS AND THIRD-PARTY PRACTICE

It is unclear under a general theory of negligence in a dog-bite case whether a "keeper" can be found liable at common law. Unlike the dog-bite statute, which imposes liability on owners, harborers, and keepers, the first element of the common-law negligence claim makes reference only to "owners" and "harborers." In the past, an "owner" was defined as the person to whom the dog belongs. A "keeper" is anyone having physical control over or care of the dog. A "harborer" is a person with possession and control over the premises where the dog is living and who acquiesces to the dog being present. *See Webb v. Prout, 2006 Ohio 4792 (5th App. Dist. 2006); Flint v. Holbrook, 80 Ohio App.3d 21, 608 N.E.2d 809 (2nd App. Dist. 1992).* These definitions are not expected to change.

To avoid any procedural problems, practitioners should generally allege all elements of each claim in the complaint and assert that the defendants were owners, harborers, and keepers of the dog on all claims. Otherwise, it is

possible that a general negligence claim will be subject to dismissal if the defendant is identified only as a "keeper" within that claim. If a local ordinance regulating dog ownership has been violated in the course of the attack, a negligence *per se* claim also may be appropriate.

Additionally, the complaint should allege that the dog had vicious propensities that defendant(s) knew about at all relevant times and that, upon information and belief, the defendants were aware of prior incidents in which the dog caused bodily injury and property damage to others. Such allegations will not only allow the complaint to survive a Rule 12 motion to dismiss, but will generously expand the scope of discovery in accordance with *Beckett.* Such allegations will also support a claim for punitive damages, which should be requested in the complaint's prayer for relief.

The complaint should identify anyone who may constitute an owner, keeper, or harborer of the dog. This should include landlords, lessors, and anyone named as the legal owner or title holder of the property according to the Recorder's office. One court reasoned that landlords or property owners can be viewed as harborers of their tenants' dogs if they permit the animals to be brought onto the property's common areas. *See Flint v. Holbrook, 80 Ohio App.3d 21, 608 N.E.2d 809 (2nd App. Dist. 1992).*

Practitioners should also identify "John Doe" defendants as unknown persons who may be identified during discovery and who may be potentially liable for the plaintiff's injuries. If all potentially liable people are not included, the named defendants can assert cross-claims or third-party claims against such persons to share liability. When the plaintiff is a tenant of a defendant-harborer, plaintiff might assert a breach of contract claim if the incident resulted from a violation of written pet policies or restrictions.

Now that general negligence and strict liability claims can be pursued simultaneously, defendants will need to raise all of the standard affirmative defenses typically raised in any negligence claim, *i.e.,* comparative negligence of the plaintiff, intervening and superseding causes, failure to join parties under Civil Rules 19 and 19.1, assumption of the risk, open and obvious danger, plaintiff's damages were caused by the conduct of third parties over whom the defendants lack control, etc.

The Ohio statute of limitations on a general negligence claim is two years. R.C. 2305.10.

DISCOVERY, TRIALS, AND SETTLEMENT NEGOTIATIONS

As discussed earlier, *Beckett* made a dog's propensity for viciousness and history of violence, as well as the defendants' knowledge of these facts, relevant in a general negligence claim. In turn, these matters are now legitimate areas for written discovery and deposition questioning, and they may yield critical information that supports a punitive damages claim.

Written Discovery

Practitioners should now address these areas in initial requests for interrogatories, admissions, and production of documents. Such discovery requests should seek all incidents of injury or property damage by the dog at any time, documents and photographs of each incident, and the identities of any witnesses. As each prior incident may have resulted in an insurance claim being filed, it is also appropriate to request insurance information and to request that the defendant sign a release of all insurance records. Medical records of the dog's prior victims could prove helpful as well. Redacted copies of medical records might be attained to avoid privilege objections.

If the dog previously harmed someone in an earlier biting incident, and this was reported to the authorities, it is likely that the dog will immediately be destroyed after the new biting incident. In the absence of the dog itself, a search of the dog's records might lead to useful information about the dog, or even about the defendants if they have a history of owning, raising, or breeding violent dogs. Discovery into the dog's breed and history could also be fruitful as Ohio courts have upheld the constitutionality of ordinances that regulate and restrict ownership of dogs considered more

harmful than others, such as pit bulls. If such a violation occurred, practitioners should inquire whether any of the defendants received a citation. Such evidence could result in summary judgment being granted in the plaintiff's favor on the issue of liability.

Veterinary records of the dog should likewise be obtained as they may shed light on these issues, as well as the defendant's awareness of the dog's history and propensities. The dog's veterinarian and staff members could be important witnesses regarding the defendants' knowledge or lack thereof regarding the dog's propensity for viciousness.

Depositions

As noted above, the *Beckett* decision by the Ohio Supreme Court resulted in additional issues and defenses being relevant in dog-bite cases. Thus, practitioners must tailor the depositions of their opponents accordingly. The dog-bite statute, R.C. 955.28, allows the defendant to assert defenses on the grounds that the victim/plaintiff was trespassing or committing an offense on the property other than a minor misdemeanor. When taking the plaintiff's deposition, counsel for the defendant should ask such questions and should confront the plaintiff with any pertinent court records.

The plaintiff also should be questioned about his relationship with the dog and its owner, keeper, or harborer at the time of the incident. Some courts have precluded recovery under the statute when the victim lived with the defendant or otherwise shared possession and control of the premises. On the general negligence claim, plaintiff should be asked questions regarding defenses of comparative negligence, assumption of the risk and open and obvious danger. If the plaintiff taunted or teased the dog, or was aware of the dog's vicious propensities but failed to take reasonable steps to protect himself, these defenses may apply. Also, any written or verbal warnings or signs that the plaintiff ignored could be important. Records and testimony from the veterinarian's office, as well as videos of the dog, could be used to force the dog's owner to make admissions.

On damages, the plaintiff's medical and income history are still relevant. Questions about pain and suffering, loss of consortium, other potential stressors that contributed to emotional distress, and mental health treatment are fair game in assessing non-economic damages.

Defendants should also be questioned about their role during their incident, as well as their relationship with the dog, the plaintiff, and other defendants. The dog's violent and vicious history and the defendant's knowledge of this before the incident must be thoroughly explored. Even if the defendant claims to be unaware that the dog would hurt the plaintiff, the dog's history, breed, and potential harm to other animals or property may support an argument that defendant should have known the dog's propensities. If the defendant received past reports or complaints about the dog, this could shed light on the defendant's awareness.

Finally, non-party witnesses will be important on all of these issues in light of the ruling in *Beckett.* For example, the defendant's veterinarian may know about the dog's viciousness or lack thereof, and may recall discussions with the defendant about the dog's health and personality traits. In turn, the defendant may rely on the veterinarian's expertise and advice that the dog was harmless to show he was unaware of anything that could lead to an attack.

The plaintiff's spouse may assert a loss of consortium claim that will place any marital troubles generally into issue. Relatives, family members, and co-workers may have valuable information about the circumstances of the incident, plaintiff's medical treatment and recovery, effect on plaintiff's job, and other relevant matters.

Assessing Damages

Recently upheld tort reform legislation will apply to general negligence dog-bite cases. Compensatory damages for medical expenses and lost wages are not affected. However, non-economic damages for pain and suffering and emotional distress are capped unless the incident resulted in a catastrophic injury or death. A wrongful death claim is exempted from the tort reform caps completely.

As *Beckett* suggested, punitive damages can be obtained on a general negligence dog-bite claim. Thus, practitioners representing a defendant should consider filing a motion to bifurcate and stay the punitive damages claim pending resolution of the liability phase of trial. Punitive damages are capped at twice the amount of compensatory damages.

Jury Instructions

Beckett discussed how jury instructions should be crafted in such a way as to delineate between the strict liability statutory claim and the general negligence claim. Again, if the jury concludes that the defendant was unaware of the dog's viciousness, there would be no liability on the common law negligence claim. This could serve to greatly reduce recoverable damages by eliminating non-economic and punitive damages from consideration altogether. Similarly, the jury interrogatories should be crafted in such a way that a mistake can be corrected later and that a potential appeal can be preserved.

Now that defenses such as assumption of the risk, open and obvious danger, and comparative negligence are viable defenses to the general negligence claim, jury instructions and interrogatories should include them as well. The open and obvious doctrine and assumption of the risk defenses serve as complete bars to recovery on the negligence claim, although they will not negate liability on the strict liability statutory claim.

Settlement Valuation

Finally, *Beckett's* holding will require parties, judges, juries, and mediators to alter their evaluation of dog-bite cases. In the past, recoverable damages from a strict liability claim were limited to medical expenses subject to liens, and lost wages subject to taxes, which served to keep the value of a dog-bite case down. Now that non-economic damages, and possibly punitive damages, are recoverable, dog-bite cases should be evaluated more akin to other types of general negligence claims. The defendants' actual or potential knowledge of the dog's history and propensity for violent attacks will become greater factors in claim evaluation.

RELATED LINKS: For further information, see
- 1-3 Anderson's Ohio Personal Injury Litigation Manual § 3.07

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6 of 41 DOCUMENTS

Specific Causation Standards After Norfolk Southern Railway Company v. Sorrell

2009 Emerging Issues 4727

Specific Causation Standards After Norfolk Southern Railway Company v. Sorrell

By Sara Youngdahl

December 15, 2009

SUMMARY: In Norfolk Southern Railway Company v. Sorrell, the United States Supreme Court ruled that in FELA negligence cases, courts could no longer apply a different causation standard to defendant employers. If the scope of the Sorrell decision seems straightforward, for having announced a simple rule requiring uniform causation standards for both parties in FELA cases, the application of this rule is anything but uncomplicated.

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ARTICLE: In *Norfolk Southern Railway Company v. Sorrell*, n1 the United States Supreme Court ruled that in FELA negligence cases, courts could no longer apply a different causation standard to defendant employers from the standard applied to plaintiff employees, because doing so improperly departs from common law principles. n2 The Court explained that FELA departs from common law principles only when Congress expressly rejected a common law principle in the statute. n3 And, because FELA did not expressly reject the common law principle of applying uniform causation standards to both defendants and plaintiffs, the Court concluded that FELA requires the application of the same standard to both parties. n4

If the scope of the *Sorrell* decision seems straightforward, for having announced a simple rule requiring uniform causation standards for both parties in FELA cases, the application of this rule is anything but uncomplicated, especially for FELA litigators, because the Justices writing the majority opinion refused to address the specific causation standard that courts should apply in FELA negligence cases. n5 The majority only hinted that "there are a variety of ways to instruct a jury to apply the same causation standard to railroad negligence and employee contributory negligence." n6

Before *Sorrell*, in *Rogers v. Missouri Pacific Railroad Company*, the Supreme Court held that the specific causation standard to apply in FELA negligence cases was "whether the proofs justify with reason the conclusion that the employer negligence played any part, *even the slightest*, in producing the injury or death for which damages are sought," n7 which many courts, including the U.S. Supreme Court, has interpreted as having created a relaxed standard of causation in FELA negligence cases. n8 Complicating matters more is the split of authority among the federal courts of appeals as to whether this reduced standard applies both to the negligence prongs of causation *and* fault (which encompasses both duty of care and breach), or *only* to the causation prong. n9

Unlike the majority opinion in *Sorrell*, however, two separate concurrences of Justices in that case did address the specific causation standard to apply in FELA cases. Justice Souter argued that "*Rogers* did not address, much less alter,

existing law governing the degree of causation necessary for redressing negligence as the cause of negligently inflicted harm; the case merely instructed courts how to proceed when there are multiple cognizable causes of an injury." n10 Indeed, Justice Souter invited the Missouri Supreme Court on remand of the *Sorrell* case to "take on that issue" and "necessarily deal with *Rogers*, which . . . is no authority for anything less than proximate causation in an action under FELA." n11 Justice Ginsburg countered that the "[majority] opinion leaves in place precedent solidly establishing that the causation standard in FELA actions is more 'relaxed' than in tort litigation generally." n12 Unfortunately, the *Sorrell* decision accomplished very little to put any of this chaos into order.

In the midst of this chaos, FELA litigators should remain aware of the standard applied in their jurisdictions, as well as understand whether that standard applies only to the causation prong of negligence or also to the fault prong. Moreover, in the absence of any official word from the United States Supreme Court in its *Sorrell* opinion about the applicable causation standard in FELA cases, n13 FELA lawyers should remain alert for those jurisdictions choosing to adopt Justice Souter's interpretation of *Rogers*, which would abolish a reduced causation standard in FELA cases altogether in favor of the more rigorous proximate cause standard.

Return to Text

n1 *549 U.S. 158 (2007).*

n2 *Sorrell, 549 U.S. 158, 168.*

n3 *Sorrell, 549 U.S. 158, 168.*

n4 *Sorrell, 549 U.S. 158, 168.*

n5 *Sorrell, 549 U.S. 158, 164-65* (rejecting the Petitioner Railroad's request to enlarge the question presented to include the additional argument that proximate cause should be the standard applied in FELA cases across the board, despite the Court's grant of certiorari only to decide whether different standards for railroad and employee negligence were permissible under FELA).

n6 *Sorrell, 549 U.S. 158, 172.*

n7 *352 U.S. 500, 508, 77 S. Ct. 443 (1957)* (emphasis added); *see also Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 543 (1994).*

n8 *Sorrell, 549 U.S. 158, 177-80* (Ginsburg, J., concurring); *see also CONRAIL v. Gottshall, 512 U.S. 532, 543 (1994)* (acknowledging that "a relaxed standard of causation applies under FELA"); s*ee, e.g., Johnson v. Cenac Towing, 544 F.3d 296, 302 (5th Cir. 2008)* (the "Supreme Court has used the term 'slightest' to describe the reduced standard of causation); *Coffey v. NE Ill. Reg'l Commuter R.R., 479 F.3d 472, 476 (7th Cir. 2007)* (suggesting that *Sorrell* stands for the proposition that the common law standard of causation in FELA cases is a relaxed standard); *Napier v. F/V DEESIE, Inc., 454 F.3d 61, 67 (1st Cir. 2006)* (the burden to prove causation under the Jones Act [and FELA] is "featherweight"); *Richards v. Consol. Rail Corp., 330 F.3d 428, 433-34 (6th Cir. 2003)* (*Rogers* requires a plaintiff alleging a FELA violation to offer "more than a scintilla of evidence in order to create a jury question on the issue of employer liability, but not much more"); *Williams v. Long Island R.R. Co., 196 F.3d 402, 406 (2d Cir. 1999)* (the *Rogers* decision created a relaxed standard for negligence as well as causation); *Hernandez v. Trawler Miss Vertie Mae, Inc., 187 F.3d 432, 436 (4th Cir. 1999)* ("the Supreme Court has relaxed the standard of causation by imposing employer liability whenever 'employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought'"); *Summers v. Mo. Pac. RR., 132 F.3d 599, 607 (10th Cir. 1993)* (the Supreme Court "definitively abandoned" proximate causation as the test in FELA cases); *Oglesby v. S. Pac. Transp., 6 F.3d 603, 607 (9th Cir. 1993)* ("the Supreme Court indicated that the standard of causation required under the FELA differs from common-law proximate cause," and "the test . . . is simply whether . . . employer negligence played any part, even the slightest, in producing the injury or death from which damages are sought"); *Hines v. Consol. Rail Corp., 926 F.2d 262, 267 (3d Cir. 1991)* (FELA has a more lenient standard for determining negligence and causation); *Little v. Nat'l R.R. Passenger Corp., 1988 U.S. App. LEXIS 18803,* *2 (D.C. Cir. 1988) ("the standard of negligence in a FELA case is exceptionally broad; a plaintiff need only show that 'employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought'"); *Fletcher v. Union Pac. R.R. Co., 621 F.2d 902, 909 (8th Cir. 1980)* ("the test of causation under the FELA is whether the railroad's negligence played any part, however small, in the injury which is the subject of the suit"); *Fare v. S. Ry. Co., 438 F2d 933, 934 (11th Cir. 1971)* ("the plaintiff's burden of proof in an FELA case is 'much less than the burden required to sustain recovery in ordinary negligence actions'").

n9 *See Montgomery v. CSX Transp., Inc., 656 S.E.2d 20, 26-7 (S.C. 2008)* (noting that the Second Circuit Court of Appeals applies a reduced standard of causation to both the causation and fault prongs of negligence, while the Fourth and Fifth Circuit Courts of Appeals apply a reduced standard only to the causation prong).

n10 *Sorrell, 549 U.S. 158, 173* (Souter, J., concurring).

n11 *Sorrell, 549 U.S. 158, 176-77* (Souter, J., concurring).

n12 *Sorrell, 549 U.S. 158, 178* (Ginsburg, J., concurring).

n13 *Sorrell, 549 U.S. 158, 164* (explaining that the Court is "typically reluctant to permit parties to smuggle additional questions into a case . . . after the grant of certiorari").

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Railroad Requests for Post-Trial Setoffs and the Collateral Source Doctrine

2009 Emerging Issues 4728

Railroad Requests for Post-Trial Setoffs and the Collateral Source Doctrine

By Sara Youngdahl

December 15, 2009

SUMMARY: Defendant railroads are now employing a strategy designed to reduce verdict amounts in FELA cases by moving courts for post-trial setoffs, which ask courts to reduce the amount of damages to account for payments made to a plaintiff employee's Railroad Retirement benefits. This Emerging Issues Analysis will discuss railroad requests for post-trial setoffs and the Collateral Source Doctrine.

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ARTICLE: Defendant railroads are now employing a strategy designed to reduce verdict amounts in FELA cases by moving courts for post-trial setoffs, which ask courts to reduce the amount of damages to account for payments made to a plaintiff employee's Railroad Retirement benefits. n1 Railroads argue that they are paying injured plaintiffs twice for lost wages: once through FELA verdicts, and again by having contributed to the plaintiff's Tier II Railroad Retirement Account fund, which pays the plaintiff's disability annuity. n2

Congress enacted the current version of the Railroad Retirement Act in 1974, altering the prior Act enacted in 1937, and the Act establishes two tiers of benefits: Tier I benefits that are roughly equivalent to Social Security benefits, while Tier II "provides retirement benefits over and above social security benefits and operates similarly to other industrial pension systems." n3 Railroad employees who are injured and unable to perform their duties may receive either an occupational disability annuity or a total disability annuity. n4 Payments under the Railroad Retirement Act are not based upon an injury due to the negligence of the railroad employer; rather to qualify for an occupational disability under the Railroad Retirement Act, the employee must have performed 240 months of railroad service and be permanently disabled from his normal railroad job, or be at least 60 years old with 120 months of service with the same level disability. n5 A total disability is granted if the employee has at least 120 months of service and is disabled from all occupations, n6 while the amount of the annuity depends upon the length of the employee's railroad employment. n7 Annuity payments by the Railroad Retirement Board are not subject to assignment, tax, legal process, or anticipation. n8

For decades, courts have held that benefits received from the Railroad Retirement Board are from a collateral source and are not subject to setoff. n9 The case most on point is *Eichel v. New York Central Railroad Company*, n10 but the United States Supreme Court decided it before the Railroad Retirement Board split the Railroad Retirement Act benefits into two tiers. n11 Defendant railroads are now attempting to persuade courts to ignore years of precedent to reach the opposite conclusion, that Tier II benefits are distinct, not a collateral source, and are subject to setoff. n12 The

railroads, however, have not fared well in persuading courts that their position is correct; indeed, as the courts explained in *Wilkins v. CSX Transportation, Inc*., n13 and *CSX Transportation, Inc. v. Gardner*, n14 the two most recent cases deciding this issue, the *Eichel* reasoning still governs this matter, even though it was decided before the current version of the Act became law.

The collateral source rule provides that a tortfeasor may not mitigate damages by setting off payments made to the plaintiff by an independent source, but the rule also operates to prevent a tortfeasor from paying twice for the same injury. n15 Importantly, the fact that a tortfeasor funded the source of the plaintiff's payments does not preclude application of the collateral source rule; rather the collateral source rule may apply if the tortfeasor made the payment because it was obligated to do so. n16

Courts look at the purpose and nature of the fund and of the payments, and not merely at their source when determining whether a payment is from a collateral source. n17 The question, then, that courts must answer when railroads move for setoffs is whether disability annuities paid to a plaintiff under the Act are not a collateral source, because the benefits are attributable to the railroad's payments into the fund during the plaintiff's employment. n18 More specifically, the question comes down to "whether the form of the Tier II benefits under the revised Act are so significantly changed that the *Eichel* reasoning no longer applies." n19

In *Eichel*, the United States Supreme Court explained that "[t]he Railroad Retirement Act is substantially a Social Security Act for employees of common carriers," and "[t]he benefits received under such a system of social legislation are not directly attributable to the contributions of the employer, so they cannot be considered in mitigation of the damages caused by the employer." n20 But when the Court decided *Eichel*, the Railroad Retirement Act was funded equally by taxes between employers and employees, and any shortfall in the fund was supplemented by additional taxes against the employers. n21

Today, the Act is funded in part by taxes paid by the employer and employee, so that the Tier I taxes equal Social Security tax rates and the Tier II rate varies, but is higher for the employer than the employee. n22 Benefits are available to employees regardless of the source of the injury that caused the disability under Tier II of the current Act, as it also was under the 1936 act. n23 Under both versions of the Act, benefits are based on any disability despite the cause, and on the years of service the employee has accrued in the system. n24

Under the current Act, funding of Tier II benefits has changed so that the employer is responsible for a greater percentage of the cost, a fact on which the railroads rely heavily when making their argument. n25 But the purpose and availability of Tier II benefits has not changed in any significant way, n26 and both the *Wilkins* and *Gardner* courts rejected outright the railroad's argument that its higher percentage of contributions into the fund entitled it to setoffs. n27 In fact, the railroad was unable to cite a single case indicating that *Eichel* should not control the *Gardner* court's analysis. n28

This is, indeed, not the last time a railroad will attempt to seek setoffs. Plaintiffs should be prepared to rebut a railroad's argument that it is entitled to setoffs because: (1) it contributed a higher percentage of money into the plaintiff's retirement fund, and (2) that the cases following *Eichel* are either incorrect or inapplicable, since *Eichel* was decided before the changes made to the Railroad Retirement Act.

In short, plaintiffs must be prepared to call the railroad's argument what it really is: a red herring designed to steer a court away from the proper analysis. Plaintiffs must remind courts that it is the purpose and nature of the fund, not merely the source of the fund, that counts most when courts determine whether Tier II benefits constitute a collateral source.

Return to Text

n1 *See, e.g., Wilkins v. CSX Transp., Inc., 669 S.E.2d 784, 785-86 (N.C. Ct. App. 2008); CSX Transp., Inc. v. Gardner, 874 N.E.2d 357, 361 (Ind. Ct. App. 2007).*

n2 *See, e.g., Gardner, 874 N.E.2d 357, 361.*

n3 *Wilkins, 669 S.E.2d 784, 787* (quoting *Gardner, 874 N.E.2d 357, 362).*

n4 *45 U.S.C § 231a*(a)(1)(iv),(v).

n5 *Wilkins, 669 S.E.2d 784, 787.*

n6 *45 U.S.C § 231a*(a)(1).

n7 *Wilkins, 669 S.E.2d 784, 787* (quoting *Gardner, 874 N.E.2d 357, 362).*

n8 *45 U.S.C § 231m*(a).

n9 *Wilkins, 669 S.E.2d 784, 787.*

n10 *375 U.S. 253 (1963).*

n11 W*ilkins, 669 S.E.2d 784, 787.*

n12 *Wilkins, 669 S.E.2d 784, 787.*

n13 *669 S.E.2d 784.*

n14 *874 N.E.2d 357.*

n15 *Gardner, 874 N.E.2d 357, 365; see also Mead v. Nat'l R.R. Passenger Corp., 676 F. Supp. 92, 93-94 (D.Md. 1987); Flowers v. Komatsu Mining Sys., Inc., 165 F.3d 554, 558 (7th Cir. 1999).*

n16 *Gardner, 874 N.E.2d 357, 365; see also Falconer v. Penn Mar., Inc., 397 F.Supp.2d 144, 147 (D.Me. 2005).*

n17 *Gardner, 874 N.E.2d 357, 365; see also Russo v. Matson Nav. Co., 486 F.2d 1018, 1020 (9th Cir. 1973)* (per curiam)

n18 *Gardner, 874 N.E.2d 357, 365.*

n19 *Wilkins, 669 S.E.2d 784, 787.*

n20 *Eichel, 375 U.S. 253, 254.*

n21 *Wilkins, 669 S.E.2d 784, 787-88.*

n22 *Wilkins, 669 S.E.2d 784, 787-88.*

n23 *Wilkins, 669 S.E.2d 784, 788.*

n24 *Wilkins, 669 S.E.2d 784, 788.*

n25 *See Wilkins, 669 S.E.2d 784, 788.*

n26 *Gardner, 874 N.E.2d 357, 365; see also Wilkins, 669 S.E.2d 784, 368* (court balances five factors when deciding whether a payment is a collateral source: "(1) whether the employee makes any contribution to funding of the disability payment; (2) whether the benefit plan arises as the result of a collective bargaining agreement; (3) whether the plan and payments thereunder cover both work-related and nonwork-related injuries; (4) whether payments from the plan are contingent upon length of service of the employee; and (5) whether the plan contains any specific language contemplating a set-off of benefits received under the plan against a judgment received in a tort action"; the only factor weighing in favor of the railroad's argument is the source of the payments, which is not determinative, because the nature of the benefits is most important).

n27 The United States District Court for the District of Kansas, the Missouri Supreme Court, and the Illinois Court of Appeals have rejected this same argument by railroads. *See Starling v. Union Pac. R.R. Co., 203 F.R.D. 468, 483 (D. Kan. 2001)* (although railroad introduced evidence indicating that it had funded approximately 75% of the RRA disability benefits, court was "wholly unpersuaded" that *Eichel* was not binding); *Giddens v. Kansas City S. Ry. Co., 29 S.W.3d 813, 824 (Mo. 2000)* (per curiam), *cert. denied, 532 U.S. 990 (2001)* (holding that *Eichel* forecloses the railroad's argument that the collateral source doctrine should not apply because the railroad funds the annuities disbursed by the Board); *Laird v. Ill. Cent. Gulf R.R. Co., 566 N.E.2d 944, 955 (Ill. Ct. App. 1991)* (noting that although the railroad introduced evidence that it contributed the majority of the funds supporting the plaintiff's disability payments, "defendant has not brought to our attention any FELA cases which distinguish the holding of the Supreme Court in *Eichel*").

n28 *See Gardner, 874 N.E.2d 357, 364.*

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Aviation Accident Litigation

2009 Emerging Issues 4729

Aviation Accident Litigation

By Timothy M. Ravich

December 15, 2009

SUMMARY: Few if any subjects illustrate the term "mass torts" like aviation accident litigation.Commercial airline disasters of every kind invariably pose significant and complex administrative and substantive concerns for all that are involved. This article introduces the salient substantive, procedural, and ethical themes in aviation accident litigation as a leading example of mass tort litigation.

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ARTICLE: Few if any subjects illustrate the term "mass torts" like aviation accident litigation. Consider, on March 27, 1977, almost 600 people died when two Boeing 747 jumbo-jets collided on a runway in Tenerife in the Canary Islands. It was the worst aviation disaster at the time. More recently, the terrorism of September 11, 2001 generated convoluted litigation aimed at multiple parties, including airlines, airports, security companies, and government authorities.

While these tragedies represent extreme examples, commercial airline disasters of every kind invariably pose significant and complex administrative and substantive concerns for courts, including the parties, lawyers, witnesses, experts, insurers, airplane and component manufacturers, and others involved in lawsuits arising from aviation disasters. This article introduces the salient substantive, procedural, and ethical themes in aviation accident litigation as a leading example of mass tort litigation.

Establishing Order from Chaos

The complexity of major aviation accident litigation cannot be overstated. A single airliner disaster involves potentially hundreds of individuals. Each person on a jetliner (and perhaps on the ground) represents a potential plaintiff and each potential defendant represents a potential cross-claimant against other defendants. (Interestingly, courts are reluctant to certify class actions in mass aviation disaster lawsuits. *See, e.g., McDonnell Douglas Corp. v. U.S. Dist. Ct., 523 F.2d 1083 (9th Cir. 1975); Marchesi v. Eastern Airlines, Inc., 68 F.R.D. 500 (E.D.N.Y. 1975); Causey v. Pan Am. World Airways, Inc., 66 F.R.D. 392 (E.D. Va. 1975); Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76 (E.D. Pa. 1970).)*

As a threshold matter, while an aviation accident may occur in one place, a lawsuit arising from that accident may involve the laws of many other jurisdictions. The law of the place of the disaster, the law of the place of manufacture of the airplane, the residency of the survivors of an aviation accident, and the location of the act or omission allegedly giving rise to the accident being litigated all may have occurred in different places. Consequently, aviation practitioners

frequently confront the challenge of determining which law to apply from among different jurisdictions. Choice-of-law may be the most important preliminary issue in an aviation wrongful death case and, indeed some practitioners regard resolution of choice-of-law issues in aviation cases as the difference between multimillion-dollar recovery and no recovery.

Meanwhile, aviation accident litigation frequently involves the federal government, which plays a significant and wide-spanning role in promoting and ensuring safety in commercial airline operations, through the Federal Aviation Administration, National Transportation Safety Board, and National Aeronautics and Space Administration. Almost all air traffic controllers are federal employees, for example. While the federal government and its political subdivisions generally are insulated from lawsuits under the doctrine of sovereign immunity, the

United States government is legally accountable in certain circumstances under the Federal Tort Claims Act where private persons would be liable. *See 28 U.S.C. § 1346*(b).

Additionally, the international character of commercial airline travel poses special jurisdictional issues for aviation practitioners. In the litigation that followed the Tenerife tragedy mentioned at the outset above, Dutch plaintiffs sued U.S.-based Pan American Airways and two of its New York-based crew members in American courts. Because all of the evidence was located in the Netherlands and Dutch civil law applied, the case filed in the United States was dismissed on grounds of *forum non conveniens*. *See Bouvy-Loggers v. Pan American World Airways, Inc.*, 15 Civ. 17,153 (S.D.N.Y. 1978). Still, United States courts remain attractive forums for non-U.S. plaintiffs to try aviation cases for accidents occurring outside the United States.

Finally, where fatal accidents occur over international spaces and litigation ensues, aviation counsel for the survivors likely will confront special jurisdictional, procedural, and substantive issues, including application of the Death on High Seas Act ("DOHSA"). Tellingly, the remedies under DOHSA, which is a federal statute that creates a private cause of action to recover for wrongful death, neglect, or default occurring on the high seas are available only "in admiralty." *See, e.g., In re Air Crash Off Long Island, New York, on July 17, 1996, 209 F.2d 200 (2d Cir. 2000).)*

The multiplicity of parties and rights in aviation accident litigation-including application of admiralty jurisdiction, the doctrine of *forum non conveniens*, choice of law, treaties and statutes such as the Montreal Convention, the Death on the High Seas Act, and the Federal Tort Claims Act-underscores the need for competent aviation counsel in mass tort aviation disaster litigation. A specific example of the complexity of aviation litigation is the accident of a Continental Airlines DC-9 that crashed as it attempted a takeoff in a snowstorm at Denver's Stapleton Airport in the late 1980s. Twenty-eight people perished and 54 people were injured. An exemplar trial was filed in Idaho. The court applied Texas law to punitive damages claims. Colorado law applied to the negligence and prejudgment interest issues. The law of the state in which other plaintiffs filed their suits applied to consolidated plaintiffs' compensatory damages claims. *See In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo., 720 F. Supp. 1505 (D. Colo. 1989).*

In light of the richness of procedural and substantive law issues arising in aviation disaster cases, some commentators believe that the present system of mass tort litigation results in unnecessarily high costs and requires expanded federal jurisdiction over aviation disaster cases and the establishment of new substantive federal tort law for such cases-in much the same way that the maritime industry is governed by the legal framework established by admiralty courts. *See* Joseph D. Tydings, *Air Crash Litigation: A Judicial Problem and a Congressional Solution, 18 AM. U. L. REV. 299, 304 (1969). See also Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972).*

Economic Considerations

The economic impact of aviation accident litigation is multivariable and dynamic, too. Some commentators have noted that, "there is virtually always someone who is liable for an aviation accident . . . Typically, the defendants either agree among themselves about how to divide expenditures for compensation and litigation, or they agree to let the outcome of one trial decide the division of liability." JAMES S. KAKALIK ET AL., COSTS AND COMPENSATION

PAID IN AVIATION ACCIDENT LITIGATION 88 (1988). Moreover, where Plaintiffs may receive 50 percent of funds expended in mass tort litigation generally, they may attain a more significant 71 percent in aviation torts. *Compare id*. at 93-94 *with* JAMES S. KAKALIK ET AL., COSTS OF ASBESTOS LITIGATION 39-40 (1983) (finding that plaintiffs received 37 percent of funds expended in early stages of asbestos litigation). *See also* R. Daniel Truitt, *Hints of Uneven Playing Field in Aviation Torts: Is There Proof?, 61 J. AIR L. & COM. 577 (1996).*

Aviation accident litigation appears to be more lucrative than other mass tort litigation, generally. "[S]ettlement amounts are growing . . . [t]he average award in [a] 1987 Northwest Airlines crash in Detroit [was] projected to be $1 million, a far cry from the $362,943 found in a 1988 RAND Corp. study . . ." *See* Andrew Blum, *The Aviation Bar Splits Over Turf*, NAT'L L.J., Mar. 20, 1989. In tort cases that proceeded to trial in federal district court in 1996-97, of 41 cases described as "personal injury-airplane," the median award was $937,000, far higher than the median for "product liability" cases, and of the 16 plaintiff verdicts in "airplane" cases, 43.8 percent were $1 million or more. *See* BULLETIN, FEDERAL TORT TRIALS AND VERDICTS, 1996[shy]97, BUREAU OF JUSTICE STATISTICS, Feb. 1999, at 5.

Professional Responsibility in Aviation Accident Litigation

As a concluding note, lawyer professionalism in the arena of aviation disaster litigation frequently is wanting. Truly, a small number of lawyers in the nation specialize in aviation accident cases. However, solicitation by unqualified lawyers has become commonplace, particularly in the Internet age where a search of "aviation lawyer" may generate a list of lawyers who, other than listing "aviation" as a practice area, have had scant experience, if any, in the arena of aviation accident litigation. *See generally* Wendell K. Smith, *The General Aviation Case, 12 UTAH B.J. 17 (Feb. 1999). See also Matter of Anis, 599 A.2d 1265* (N.J.), *cert. denied, 504 U.S. 956 (1992);* Charles Maher, *Crashes & Disasters*, 5 CALIF. LAW. 39, 41 (1985). Indeed,

[m]any of the claims handled by plaintiff aviation litigation specialists are referred to them by other attorneys. Frequently the referring attorney is the family lawyer or a friend of the decedent or the decedent's relatives or has some preexisting business or professional or personal relationship with them . . . .

Sometimes the referring attorney has no preexisting relationship with the decedent or the claimants, but through advertising, publicity, or some other means has obtained several cases and wishes to refer them to an aviation specialist or involve such a specialist at some point. In this

instance, the referring attorney usually insists on a portion of the total fee and may negotiate with one or more specialists to obtain the most profitable arrangement. Aviation specialists reported demands by such attorneys for as much as one-half the total fee.

KAKALIK ET AL., AVIATION ACCIDENT LITIGATION, at 46.

In light of the obvious ethical issues that arise in the aftermath of an aviation accident, Congress enacted the Aviation Disaster Family Assistance Act of 1996 ("ADFAA"), prohibiting lawyers from soliciting clients during the first 30 days following an aviation accident. In 2000, Congress expanded the ADFAA's "black out" period to 45 days. *See 49 U.S.C. § 1136*(g)(2). *See generally* Lester Brickman, *The Market for Contingent-Fee Financed Tort Litigation: Is It Price Competitive?, 25 CARDOZO L. REV. 65, 107-08 (2003).*

Conclusion

In the final analysis, aviation accident litigation specifically has great pedagogical value in presenting the subject of mass tort litigation generally. The multiplicity of actors and issues that are involved in the wake an air disaster touch upon an expansive number of substantive and procedural matters. That said, the legal issues that make aviation accident litigation interesting should not overshadow the real psychological, emotional, and life costs that are paid by the victims and survivors of aviation tragedies. In this respect, the terrible consequences of aviation accidents, like other mass torts,

are best avoided by ethical business leadership, quality-focused product research and development, regular training and compliance programs, and effective and appropriate government oversight in the first place-not necessarily courts of law.

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FELA Claim Preclusion.

2009 Emerging Issues 4631

Sara Youngdahl on the Preclusion of FELA Claims by the Federal Railroad Safety Act.

By Sara Youngdahl

November 23, 2009

SUMMARY: Until the U. S. Supreme Court decides whether the Federal Railroad Safety Act precludes FELA claims based on excessive train speeds and inadequate warning devices, plaintiffs and defendants should be prepared to argue about whether the FRSA regulations at issue cover the same subject matter as that on which the plaintiff's FELA claim is based, and whether distinctions exist between the regulation's purpose and the nature of the FELA claim.

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ARTICLE: Congress passed the Federal Railroad Safety Act (FRSA) in 1970 to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." n1 The FRSA's preemption clause, meant to promote the uniformity of railroad safety throughout all 50 states, provides:

"Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters) ... prescribes a regulation or issues an order covering the subject matter of the state requirement." n2

When the FRSA's preemption clause supersedes another federal statute, such as FELA, concerning conduct that the FRSA has expressly and specifically deemed to be acceptable, then the event that occurs is issue preclusion, not preemption. n3 The origins of the FRSA's preclusion of FELA claims first began, however, as an issue of the FRSA's preemption of state law tort claims, which some courts have now expanded to include certain FELA claims. Importantly, the FRSA puts at risk of preclusion only two FELA claims, (1) excessive train speeds and (2)inadequate warning devices, both of which the FRSA now preempts at the state law level. While the United States Supreme Court has not taken up this issue, however, a few federal circuit courts of appeals have, and at some point, the Supreme Court will have to decide the issue.

FRSA preemption began with two United States Supreme Court cases, *CSX Transportation v. Easterwood* n4 and *Norfolk Southern Railway v. Shanklin.* n5 In both cases, the plaintiffs sued the railroad claiming violations of state law negligence, in *Easterwood* for having operated its train at an excessive speed and for having failed to maintain adequate warning signals at a crossing, and in *Shanklin* for having failed to maintain adequate warning devices at a crossing. n6 And in both cases, the railroad successfully persuaded the Court that once the railroad had complied with the standards set forth in the FRSA, then the injured motorist lost his or her right to bring a state law negligence claim. n7

Importantly, both rulings rested on the fact that the injuries occurred at crossings that either were created entirely with federal funds or received improvements bought with federal funds, thus displacing state decision-making authority concerning the safety standards in question with the FRSA's regulations covering the same subject matter. n8 In other words, "what States [and plaintiffs bringing state law tort claims] cannot do-once they have installed federally funded devices at a particular crossing-is hold the railroad responsible for the adequacy of those devices." n9 The *Easterwood* Court also explained that in order for a federal law to preempt a state law "covering the same subject matter," the federal law must "substantially subsume" the subject matter of the state law. n10

Soon after the Supreme Court decided *Shanklin*, the U.S. Seventh Circuit Court of Appeals took up the issue of the FRSA's preclusion of FELA claims in *Waymire v. Norfolk & Western Railway*. n11 In *Waymire*, the Seventh Circuit laid the groundwork for the preclusion of FELA claims based on excessive train speeds and inadequate warning devices, relying entirely on the Supreme Court's preemption analysis in the *Easterwood* and *Shanklin* cases. n12 The *Waymire* court explained that in order to serve the FRSA's goal of uniformity, the plaintiff's FELA claims had to be precluded, because the crossing in issue was federally-funded, operated, and installed in accordance with FRSA regulations. n13

Not long after the Seventh Circuit decided *Waymire*, the Fifth Circuit handed down its opinion in *Lane v. R.A. Sims Jr. Inc*., n14 which addressed a plaintiff's state law negligence claim based on excessive speed. The plaintiff argued that the FRSA simply established minimum safety requirements, the observance of which only provided evidence of the railroad's due care, but could not preclude a finding of negligence if a reasonable railroad would have taken additional precautions. n15 The Fifth Circuit relied on the Seventh Circuit's reasoning in *Waymire*, explaining that the railroads in both the *Waymire* and *Easterwood* cases had been operating their trains at below the FRSA-approved speed limits, and "[i]t would . . . seem absurd to reach a contrary conclusion ... when the Supreme Court has already found that the conduct is not culpable negligence." n16 The court also supported its decision by reiterating the FRSA's goal of national uniformity, which FELA claims would undermine if not precluded by law. The court explained the issue this way:

"Such uniformity can be achieved only if the regulations covering train speed are applied similarly to a FELA plaintiff's negligence claim and a non-railroad-employee plaintiff's state law negligence claim. Otherwise, a railroad employee could assert a FELA excessive-speed claim, but a non-employee motorist involved in the same collision would be precluded from doing so. Dissimilar treatment of the claims would have the untenable result of making the railroad safety regulations established under the FRSA virtually meaningless: "The railroad could at onetime be in compliance with federal railroad safety standards with respect to certain classes of plaintiffs yet be found negligent under the FELA with respect to other classes of plaintiffs for the very same conduct.'" n17

Only one court, in *Earwood v. Norfolk Southern Railway*, n18 has concluded that FELA claims based on excessive train speed and inadequate warning devices are not precluded by the FRSA. In *Earwood*, the U.S. District Court for the Northern District of Georgia examined the parameters of the FRSA in conjunction with a plaintiff's FELA claims of unsafe working conditions by redefining the preclusion issue as a question of "whether the Secretary's regulations issued pursuant to a federal statute [the FRSA] abrogate the federal common law surrounding FELA." n19

The court explained that "whether a previously available federal common law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law," and this question requires an examination of the problems the law was intended to address. n20 The court observed that the speed regulations promulgated pursuant to the FRSA were not directed at the issue of employee safety, although they had the natural consequence of improving employee safety. As such, the FRSA's speed regulations did not displace the plaintiff's claims under FELA, which remains a tort remedy statute. n21 Indeed, the court explained that the speed regulations themselves purport only to establish "minimum safety requirements," n22 while FELA holds railroad employers to "more than a mere minimal standard." n23 The court added that "the fact that the Defendant was within the speed limit does not necessarily preclude a finding that the Defendant was negligent with regard to the heightened duty under the FELA" n24 because

there is "no indication that the federal common law of FELA jettisoned the traditional tort rule that statutory compliance, while evidence of due care, is not dispositive." n25

Until the United States Supreme Court decides whether the FRSA precludes certain FELA claims, lower courts will continue to offer their opinions on the matter. In the meantime, plaintiffs fighting FRSA preclusion of FELA claims should persuade courts to engage in a fact-specific analysis, as the *Earwood* court did, asking whether the FRSA regulations cover the same subject matter upon which the plaintiff's FELA claim is based, and when able, draw distinctions between the purpose of the regulation and the nature of the FELA claim.

Return to Text

n1 *49 U.S.C. 20101* (2005).

n2 *49 U.S.C. 20106* (2005).

n3 *CSX Transp., Inc. v. Miller, 159 Md. App. 123, 162 (Md. Ct. Spec. App. 2004).*

n4 *507 U.S. 658 (1993).*

n5 *529 U.S. 344 (2000).*

n6 *Easterwood, 507 U.S. 658, 661; Shanklin, 529 U.S. 344, 350.*

n7 *Easterwood, 507 U.S. 658, 670; Shanklin, 529 U.S. 344, 354.*

n8 *Easterwood, 507 U.S. 658, 671-72; Shanklin, 529 U.S. 344, 355-56.*

n9 *Shanklin, 529 U.S. 344, 358.*

n10 *Easterwood, 507 U.S. 658, 664.*

n11 *218 F.3d 773 (7th Cir. 2000).*

n12 *Waymire, 218 F.3d 773, 776-77.*

n13 *Waymire, 218 F.3d 773, 776-77.*

n14 *241 F.3d 439 (5th Cir.2001).*

n15 *Lane, 241 F.3d 439, 442.*

n16 *Lane, 241 F.3d 439, 443* (quoting *Waymire, 218 F.3d 773, 776).*

n17 *Lane, 241 F.3d 439, 443-44* (quoting *Waymire v. Norfolk & W. Ry. Co.*, 65F. Supp. 2d 951, 955 (S.D. Ind. 1999), *aff'd, 218 F.3d 773 (7th Cir.2000)).*

n18 *845 F. Supp. 880 (N.D. Ga. 1993); see also Grimes v. Norfolk, 116 F. Supp. 2d 995 (N.D. Ind. 2000)* (rejecting the railroad's argument that its compliance with the FRSA regulations precluded the plaintiff's FELA claims arising out of injuries sustained from falling into a hole while inspecting trains, because the FRSA regulations were directed at creating safe roadbeds for trains, not safe walkways for employees who inspect trains); *Miller v. CSX Transp., 858 A.2d 1025 (Md. Ct. Spec. App. 2004)* (plaintiff's FELA claim for knee injuries caused by cumulative trauma occurring during the course and scope of employment was not precluded by the FRSA because the FRSA regulations relied on by the railroad are unrelated to the railroad yard conditions that injured the plaintiff).

n19 *Earwood, 845 F. Supp. 880, 889-90.*

n20 *Earwood, 845 F. Supp. 880, 890* (quoting *Milwaukee v. Illinois, 451 U.S. 304, 315 n.8 (1981)).*

n21 *Earwood, 845 F. Supp. 880, 891.*

n22 49 C.F.R. § 213.1.

n23 *Earwood, 845 F. Supp. 880, 891.*

n24 *Earwood, 845 F. Supp. 880, 889.*

n25 *Earwood, 845 F. Supp. 880, 891.*

RELATED LINKS: See Sara Youngdahl's Emerging Issues Analysis discussing the preclusion of FELA claims by the Federal Railroad Safety Act at
- 529 U.S. 344

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10 of 41 DOCUMENTS

Longstreth on John R. Sand & Gravel Co. v. U.S.

2009 Emerging Issues 4504

Longstreth on John R. Sand & Gravel Co. v. U.S.: The Supreme Court Clarifies Whether Statutory Limitations Periods for Filing Suit Against the Government are Jurisdictional and When They may be Equitably Tolled

By Hon. Robert C. Longstreth

October 23, 2009

SUMMARY: For decades, courts have held that a plaintiff's compliance with a statutory limitations period is a jurisdictional prerequisite to filing suit against the government. However, in John R. Sand & Gravel, the Supreme Court clarified that equitable tolling is permissible in the appropriate circumstances. Federal tort claims expert, Hon. Robert C. Longstreth traces the history of this issue and analyzes the Court's opinion in John R. Sand & Gravel.

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ARTICLE: It has been accepted for decades that, when a statute waives the federal government's sovereign immunity from suit, a plaintiff's compliance with the statutory limitations on when such an action can be brought is a jurisdictional prerequisite to suit, rather than an affirmative defense to be asserted by the government. n1 The rationale for this view was expressed many years ago by the Supreme Court in *The Harrisburg*, in which the court construed the federal admiralty statutes and concluded that:

> The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all.. . It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right. n2

Over 100 years after deciding *The Harrisburg*, the Supreme Court held in *Irwin v. Veterans Administration* that the 30-day period for filing a discrimination complaint against the federal government under Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e-16*(c), could, under appropriate circumstances, be equitably tolled. n3 The Court found that the 30-day statutory period for filing suit "is a condition to the waiver of sovereign immunity and thus must be strictly construed," but also concluded "that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver," and that "[s]uch a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation." n4

The *Irwin* decision was interpreted by many federal appellate courts as signaling a sea change in analyzing the

statutory limitations periods governing waivers of sovereign immunity. The Eighth Circuit concluded almost immediately, in *Schmidt v. United States*, that *Irwin* necessarily implies "that strict compliance with the statute of limitations is not a jurisdictional prerequisite to suing the government." n5 The court then concluded that "[b]ecause the [Federal Tort Claims Act]'s statute of limitations is not jurisdictional, failure to comply with it is merely an affirmative defense which the government has the burden of establishing." n6 Many other courts followed suit. n7

However, the *Schmidt* court, and those following it, erred in concluding that *Irwin* dictates that statutes of limitations governing claims against the government are not jurisdictional. *Irwin* never says this, instead affirming that these time requirements are conditions to the waiver of sovereign immunity, and affirming the lower courts' dismissal of the action for lack of subject matter jurisdiction. In waiving sovereign immunity and in fixing a statute of limitations for the claims at issue as a condition of the waiver, Congress may or may not conclude that plaintiffs can rely on equitable tolling to demonstrate that they have complied with this condition of the waiver. The fact that various methods of demonstrating compliance with a statutory time period are permissible does not mean that compliance itself is not a jurisdictional requirement. *Irwin* is ultimately grounded on an "assessment of legislative intent" as to whether equitable tolling may be considered in determining compliance with the jurisdictional prerequisite that suit be timely filed. n8 It is not grounded on a distinction between "jurisdictional" and "non-jurisdictional" conditions of immunity waivers.

Schmidt and the cases following it are now best viewed as aberrations. The Eighth Circuit itself has now repudiated *Schmidt*, recognizing that "there is no inconsistency between viewing compliance with the statute of limitations as a jurisdictional prerequisite and applying the rule of equitable tolling," and that "considerations of equitable tolling simply make up part of the court's determination whether an action falls within the scope of the waiver of sovereign immunity granted by Congress, and thus within the jurisdiction of the federal courts." n9 Some courts, however, continue to adopt *Schmidt*'s position that statutes of limitations for claims against the government cannot be jurisdictional if they allow for equitable tolling. n10

Any remaining doubts on this question were put to rest by the Supreme Court's decision in *John R. Sand & Gravel Co. v. United States*. n11 In this case, the Supreme Court held that *28 U.S.C.S. § 2501*, which governs the timeliness of suits filed in the Court of Federal Claims, is not subject to waiver or equitable tolling. The Court distinguished between statutes of limitations primarily intended to protect a defendant's case-specific interest in timeliness, which are typically subject to tolling, and those addressing broader goals, such as facilitating administration of claims, promoting judicial efficiency, or limiting the scope of a governmental waiver of sovereign immunity, which are generally not subject to waiver or equitable considerations. n12 The Court stated that it had "often read" these latter statutes as precluding equitable extensions of statutory limitations periods, and had referred to such time limits as "jurisdictional" as a "convenient shorthand." n13

The Court in *John R. Sand* did not imbue the term "jurisdictional" with a talismanic power that in itself controlled the tolling issue; instead, as in *Irwin*, the Court focused its inquiry on Congressional intent, stating that whether the *Irwin* presumption regarding equitable tolling applies turns on the "judicial assumption about the comparative weight Congress would likely have attached to competing legitimate interests." n14 These interests -- the importance of treating the government like other litigants, on the one hand, and the special governmental interest in protecting public funds, on the other -- have little to do with traditional jurisdictional analyses, and the Court stressed that *Irwin* neither created a critical anomaly with earlier precedent, nor overruled longstanding interpretive rules.

As the dissenting opinions in the case point out, *John R. Sand* resurrects the holding in *Soriano v. United States*, n15 a decision that the dissent in *Irwin* quite plausibly believed the majority in *Irwin* had overruled. The reach of *Irwin* had been narrowed even before the decision in *John R. Sand*, and courts should be wary in relying primarily on *Irwin* to conclude that a particular limitations period applicable to a suit against the United States may be equitably tolled.

By the same token, however, *John R. Sand* should not be read as foreclosing the application of equitable tolling merely because the limitations period at issue is a jurisdictional condition to the waiver of sovereign immunity. As discussed above, *Irwin*, properly read, allows equitable tolling of such jurisdictional limitations periods. It is as much an

error to conclude, as the Ninth Circuit did in *Marley v. United States*, n16 that jurisdictional limitations periods may not be equitably tolled for that reason alone as it is to conclude that a limitations period subject to equitable tolling cannot be jurisdictional. Instead, as both *Irwin* and *John R. Sand* dictate, the proper focus should be on Congressional intent.

In evaluating Congressional intent on the applicability of equitable tolling, the courts have looked at a variety of factors. These include:

- whether the legislative history demonstrates that Congress expressly considered and rejected allowing the limitations period at issue to be equitably tolled; n17
- whether Congress has allowed equitable tolling in similar statutes, but not in the statute at issue; n18
- whether Congress has allowed methods other than equitable tolling for ameliorating the otherwise harsh application of a limitations period; n19
- whether allowing equitable tolling would hinder the administration of claims against the government; n20
- whether the comprehensiveness and specificity of the statutory scheme at issue indicates that tolling provisions not expressly set forth should not be implied. n21
- whether the statute of limitations at issue has long been interpreted in a manner that precludes application of the equitable tolling doctrine. n22

The *John R. Sand* decision underscores the principle that, in construing a statute of limitations that operates as a condition of the waiver of sovereign immunity, courts "should not take it upon [them]selves to extend the waiver beyond that which Congress intended. Neither, however, should [they] assume the authority to narrow the waiver that Congress intended." n23 The decision also underscores the importance of attention to compliance with statutory time requirements in actions against the United States.

Return to Text

n1 *See* 3 L. Jayson & R. Longstreth, *Handling Federal Tort Claims*, § 14.01[2], discussing the matter generally and collecting cases primarily addressing the limitations period of the Federal Tort Claims Act, *28 U.S.C.S. § 2401*(b).

n2 *The Harrisburg, 119 U.S. 199, 214, 30 L. Ed. 2d 358, 362, 7 S. Ct. 140, 147 (1886).*

n3 *Irwin v. Veterans Administration, 498 U.S. 89, 112 L. Ed. 2d 435, 111 S. Ct. 453 (1990).*

n4 *Irwin v. Veterans Administration, 498 U.S. 89, 112 L.Ed.2d 435, 111 S Ct. 453 (1990).*

n5 *Schmidt v. United States, 933 F.2d 639, 640 (8th Cir. 1990).*

n6 *Schmidt v. United States, 933 F.2d 639, 640 (8th Cir. 1990).*

n7 *See, e.g., Hughes v. United States, 263 F.3d 272, 278 (3d Cir. 2001); Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir. 1996), rev'd on other grounds, 542 U.S. 692, 159 L. Ed. 2d 718, 124 S. Ct. 2739 (2004); Capital Tracing, Inc. v. United States, 63 F.3d 859, 861 n.3 (9th Cir. 1995); Glarner v. United States Dep't of Veterans Administration, 30 F.3d 697 (6th Cir. 1994).*

n8 *See* R. Parker & U. Colella, *Revisiting Equitable Tolling and the Federal Tort Claims Act: The Impact of Brockamp and Beggerly, 29 Seton Hall L. Rev. 885, 898 (1999), citing* 3 L. Jayson & R. Longstreth, *Handling Federal Tort Claims,* § 14.01[2]. *See also* 3 L. Jayson & R. Longstreth, *Handling Federal Tort Claims,* §§ 14.01[2] and 14.05[1], at 14-12 to 14-13 and 14-84 to 14-89 & n.13.

n9 *T.L. v. United States, 443 F.3d 956, 961 (8th Cir. 2006).* The First Circuit has reached the same conclusion. *See, e.g., Estate of Barrett ex rel. Barrett v. United States, 462 F.3d 28, 38 (1st Cir. 2006). Schmidt* was also expressly rejected on this point in *Willis v. United States, 879 F. Supp. 889, 891 (C.D. Ill. 1994), aff'd without published op., 65 F.3d 171 (7th Cir. 1995)* and *City of Moses Lake v. United States, 451 F. Supp. 2d 1233, 1240 (E.D. Wash. 2005), later opinion, 430 F. Supp. 2d 1164, 1178-1183 (E.D. Wash. 2006).* The Fourth and Federal Circuits have also recognized that statutory time periods may be subject to equitable tolling even though compliance with them is jurisdictional. *See Kokotis v. United States Postal Service, 223 F.3d 275, 278, 280-281 (4th Cir. 2000); Bailey v. West, 160 F.3d 1360, 1366 (Fed. Cir. 1998).* A district court in the Sixth Circuit has reached the same conclusion. *Schappacher v. United States, 475 F. Supp. 2d 749, 753, 755-756 (S.D. Ohio 2007).*

n10 *Smith v. United States, 518 F. Supp. 2d 139, 148-149 & n.7 (D.D.C. 2007).* In extensive dicta, the court found that the Federal Tort Claims Act's statute of limitations is not jurisdictional. The court found the contrary position to be "well-taken," but considered itself bound by the D.C. Circuit's decision in *Norman v. United States, 467 F.3d 773, 776 (D.C. Cir. 2006),* to conclude that the limitations period is not jurisdictional.

See also Tanter v. Department of the Interior, 432 F. Supp. 2d 58, 63 (D.D.C. 2006). The court found that the government has the burden of proving that a plaintiff has not exhausted administrative remedies.

In *Rouse v. U.S. Dep't of State, 548 F.3d 871 (9th Cir. 2008),* the Ninth Circuit, in extensive dicta, distinguished between statutory time bars that operate as a statute of limitations, which may be equitably tolled, and those that operate as jurisdictional provisions, which may not. The court found that equitable tolling may be applied when the cause of action asserted against the government is sufficiently similar to actions against private parties to warrant application of a presumption in favor of such tolling, and there is no indication that Congress did not want equitable tolling to apply. *Id. at 876-878.* These tests, however, while useful in determining Congressional intent as to how statutory time periods can be complied with, make no sense as a method of separating "jurisdictional" from "non-jurisdictional" conditions of immunity waivers. The Ninth Circuit's analysis underscores the fruitlessness of using "jurisdictional" labels in this context.

As discussed below, in *Marley v. United States, 548 F.3d 1286,* (9th Cir. 2008), the Ninth Circuit also distinguished "jurisdictional" limitations periods, which cannot be equitably tolled, from limitations periods that operate only as procedural bars, which can be tolled.

n11 *John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 169 L. Ed. 2d 591, 128 S. Ct. 750 (2008).*

n12 *John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 134, 169 L. Ed. 2d 591, 595, 128 S. Ct. 750, 753 (2008).*

n13 *John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 134-135. 169 L. Ed. 2d 591, 595-596, 128 S. Ct. 750, 753-754 (2008).*

n14 *John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 135, 169 L. Ed. 2d 591, 599, 128 S. Ct. 750, 756 (2008)*

n15 *Soriano v. United States, 352 U.S. 270, 1 L. Ed. 2d 306, 77 S. Ct. 269 (1957).*

n16 *Marley v. United States, 548 F.3d 1286 (9th Cir. 2008).*

n17 *See, e.g., Wukawitz v. United States, 170 F. Supp. 2d 1165, 1169 (D. Utah 2001), citing* U. Collela & A. Bain, *Revisiting Equitable Tolling and the Federal Tort Claims Act: Putting the Legislative History in Proper Perspective, 31 Seton Hall L. Rev. 174, 217 (2000).* The court noted that Congress did not include an equitable tolling exception in the limitations period of the Federal Tort Claims Act, *28 U.S.C.S. § 2401*(b), despite the presence of such provisions in earlier versions of the legislation, and did not add such a provision when the limitations period was amended in 1949, 1966, and 1988. This legislative history was also relied on in *Marley v. United States, 548 F.3d 1286 (9th Cir. 2008).*

n18 *See, e.g., Marley v. United States, 548 F.3d 1286 (9th Cir. 2008)*(Congress provided in *28 U.S.C.S. § 2401*(a) that the statutory time period is tolled by legal disability, but did not include such a provision in *28 U.S.C.S. § 2401*(b), indicating that no exceptions to the time period set forth in *28 U.S.C.S. § 2401*(b) should be permitted.

n19 *See, e.g., United States v. Beggerly, 524 U.S. 38, 48-49, 141 L. Ed. 2d 32, 41, 118 S. Ct. 1862, 1868 (1998).* Since Congress provided in the Quiet Title Act, *28 U.S.C.S. § 2409a*(g), that the statutory period for filing suit does not begin to run until the plaintiff knew or should have known of the claim of the United States, "extension of the statutory period by additional equitable tolling would be unwarranted."

n20 *See, e.g., United States v. Brockamp, 519 U.S. 347, 352-353, 136 L. Ed. 2d 818, 823-824, 117 S. Ct. 849, 852 (1997).* The requirement in *26 U.S.C.S. § 6511*(a) that claims for tax refunds be filed within three years of filing the return or two years of paying the tax at issue, whichever is later, is not subject to equitable tolling. The court noted that, given the 200 million tax returns received and 90 million tax refunds issued each year, allowing equitable tolling "could create serious administrative problems by forcing the IRS to respond to, and perhaps litigate, large numbers of late claims" and that "[t]he nature and potential magnitude of the administrative problem suggests that Congress decided to pay the price of occasional unfairness in individual cases (penalizing a taxpayer whose claim is unavoidably delayed) in order to maintain a more workable tax enforcement system."

n21 *See, e.g., United States v. Brockamp, 519 U.S. 347, 352, 136 L. Ed. 2d 818, 823, 117 S. Ct. 849, 852 (1997).* Looking at the statutory language governing claims for tax refunds, including when they must be filed, the Court found that its "detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicate to us that Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote."

n22 *See, e.g., John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 136-137, 169 L. Ed. 2d 591, 598-599, 128 S. Ct. 750, 756-757 (2008), citing Kendall v. United States, 107 U.S. 123, 27 L. Ed. 437, 2 S. Ct. 277 (1883); Finn v. United States, 123 U.S. 227, 31 L. Ed. 128, 8 S. Ct. 82 (1887); United States v. New York, 160 U.S. 598, 40 L. Ed. 551, 16 S. Ct. 402 (1896); De Arnaud v. United States, 151 U.S. 483, 38 L. Ed. 244, 14 S. Ct. 374 (1894); United States v. Greathouse, 166 U.S. 601, 41 L. Ed. 1130, 17 S. Ct. 701 (1897);* and *Soriano v. United States, 352 U.S. 270, 1 L. Ed. 2d 306, 77 S. Ct. 269 (1957).*

n23 *Smith v. United States, 507 U.S. 197, 203, 122 L. Ed. 2d 548, 555, 113 S. Ct. 1178, 1183 (1993), quoting United States v. Kubrick, 444 U.S. 111, 117-118, 62 L. Ed. 2d 259, 267, 100 S Ct. 352, 357 (1979).*

RELATED LINKS: See generally the discussion in
- 1 L. Jayson & R. Longstreth, Handling Federal Tort Claims, §§ 3.03-3.06, at 3-10 to 3-20.2

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Longstreth on Ali v. Federal Bureau of Prisons

2009 Emerging Issues 4486

Longstreth on Ali v. Federal Bureau of Prisons -- Supreme Court Expands Scope of FTCA's Detention Exclusion

By Hon. Robert C. Longstreth

October 15, 2009

SUMMARY: In Ali v. Federal Bureau of Prisons, the Supreme Court expanded the scope of the detention exclusion under the Federal Tort Claims Act. The Hon. Robert C. Longstreth analyzes the Court's majority and dissenting opinions and discusses the implications of this ruling on future detention of property cases under the FTCA. Judge Longstreth also addresses the possibility of utilizing non-tort remedies against the U.S. in similar detention cases.

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ARTICLE: The detention exclusion of the Federal Tort Claims Act ("FTCA") precludes tort actions against the government for "any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer." n1 The Supreme Court has adopted an expansive interpretation of this exclusion in *Ali v. Federal Bureau of Prisons*. n2 The Court held in *Ali* that the exclusion applies to detentions by all law enforcement officers, not just those enforcing customs or excise laws.

Plaintiff Abdus-Shahid M.S. Ali, a federal prisoner, was transferred from the United States Penitentiary Atlanta (USP Atlanta) to the United States Penitentiary Big Sandy (USP Big Sandy). As required, he left personal property with the Receiving and Discharge Unit at USP Atlanta before the transfer. n3 When he received his property at USP Big Sandy about two weeks later, he noticed that some of his property was missing, and that it had never been inventoried at USP Atlanta. He filed an administrative claim with the Bureau of Prisons, which found that plaintiff had not informed the prison staff of any missing items, that he had certified that the inventory forms were accurate by signing them, and that he had failed to provide any evidence that any of the allegedly missing items were in his possession before the transfer. Accordingly, the claim was denied for lack of proof that Ali suffered any loss as a result of governmental negligence. n4

Plaintiff filed suit *pro se* under the Federal Tort Claims Act, the Religious Freedom Restoration Act (RFRA), *42 U.S.C.S. §§ 2000bb et seq.*, and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUA), *42 U.S.C.S. §§ 2000cc et seq.*, and also brought a constitutional tort claim against federal officials under *Bivens*. n5 The District Court dismissed Ali's FTCA claim with prejudice, holding that the Bureau of Prison employees had detained his property within the meaning of the FTCA's detention exclusion, and citing *Kosak v. United States* n6 for the proposition that the exclusion includes a claim for the negligent handling or storage of detained property. n7 As to the remaining claims, the District Court found that plaintiff had not exhausted his administrative remedies under the Prison

Litigation Reform Act, and dismissed these claims without prejudice.

The Eleventh Circuit affirmed dismissal of the FTCA claim in a non-precedential, per curiam opinion. n8 The Eleventh Circuit, like the District Court, noted that the Supreme Court "has interpreted § 2680(c) broadly to cover not only damages arising from the detention of goods or merchandise, but also situations in which damages result from their negligent storage or handling." n9 And relying on its decision in *Schlaebitz v. United States Dep't of Justice*, n10 the Eleventh Circuit found that the officers who handled Ali's property fell within the definition of "any other law enforcement officer" in § 2680(c). n11 The Eleventh Circuit vacated and remanded the dismissal of the remaining claims, however, finding a factual issue as to whether Ali was misled by prison officials into thinking that his administrative claim would exhaust his remedies as to both his FTCA claim and his non-FTCA claims. n12

The Supreme Court granted certiorari to resolve a 6-5 split in the Circuit Courts of Appeals as to whether § 2680(c) encompasses all law enforcement officers -- as the Fifth, Eighth, Ninth, Tenth, Eleventh, and Federal Circuits had held -- or only those performing customs or excise functions -- as the Second, Fourth, Sixth, Seventh, and D.C. Circuits had held. n13

Affirming the Eleventh Circuit in a 5-4 decision, the Supreme Court found that Congress had used "expansive language" in § 2680(c), and that the phrase "any other law enforcement officer" is "most naturally read to mean law enforcement officers of whatever kind." n14 Finding that "Congress could not have chosen a more all-encompassing phrase than 'any other law enforcement officer,'" to express its intent, the court concluded that "Congress intended to preserve immunity for claims arising from the detention of property, and there is no indication that Congress intended immunity for those claims to turn on the type of law being enforced." n15 The Court found further support for its position in the Civil Asset Forfeiture Reform Act of 2000 n16 -- which amended § 2680(c) to restore the waiver of sovereign immunity for certain seizures of property made under "any provision of Federal law providing for the forfeiture of property" -- concluding that in restoring the waiver for officers enforcing any civil forfeiture law reflected Congress's view that all such officers had previously been covered by § 2680. n17

The Court distinguished its prior decision in *Dolan v. United States Postal Service*, n18 which held that the term "negligent transmission of letters or postal matter" in the postal matter exclusion of *28 U.S.C.S. § 2680*(b) is limited by the words immediately preceding it to "failings in the postal obligation to deliver mail in a timely manner to the right address." n19 By contrast, the Court stated, the relevant phrase in § 2680(c) "is disjunctive, with one specific and one general category," rather than consisting of "a list of specific items separated by commas and followed by a general or collective term." n20 In addition, the Court concluded that "it is not apparent what common attribute connects the specific items in § 2680(c)," and that adopting a limiting construction would require a determination of the relevant limiting characteristic of "officer of custom or excise." n21

The Court concluded by rejecting Ali's attempt "to create ambiguity where the statute's text and structure suggest none," finding that "[n]othing in the statutory context requires a narrowing construction," and noting that Congress had provided an administrative remedy applicable to Ali's claim under *31 U.S.C.S. § 3723*. n22

The Court's decision sparked two dissents. The first, authored by Justice Kennedy and joined by all four dissenting justices, argued that the phrase "any other law enforcement officer" should be limited by the preceding phrases "officer of customs or excise" and "assessment or collection of any tax or customs duty." n23 Justice Kennedy noted that references to "detentions" in the United States Code generally occur in the customs or excise context, and argued that the term "detention" will be a difficult concept to apply case-by-case if the exclusion is not limited to this context. n24 He then argued that the detention exclusion would have an inordinately broad applicability if not limited to customs and excise matters, an argument that appears to conflict with his previous argument that detentions largely arise only in customs and excise matters. n25 Further, the logic of Justice Kennedy's argument would suggest that the exclusion for the claims arising from the assessment and collection of taxes should be limited to those involving customs and excise taxes, but no one argues for this result. Justice Kennedy also referred to two brief excerpts of legislative history, one from 1931 and one from 1946, and argued that the majority's reliance on the 2000 amendments to § 2680(c) was

suspect. n26

Justice Breyer's dissent, joined by Justice Stevens, also relied on the legislative history and the large number of law enforcement officers that are immunized if the exclusion is not limited to customs and excise matters. n27 Justice Breyer also attempted to address why Congress would chose to immunize only those detentions involving customs and excise laws, and not detentions under other laws, stating that when the FTCA was enacted, other statutes provided for recovery for plaintiffs harmed by federal officers enforcing customs and tax laws, but did not provide a general remedy for federal officers enforcing other laws. n28

None of the opinions in the *Ali* case dwells on whether the FTCA should be given a strict or liberal construction. Justice Kennedy's dissent reiterated the caution in the *Kosak* case that "unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute." n29 In distinguishing prior precedent, the majority opinion noted that "the 'clear statement rule' applicable to waivers of sovereign immunity" was not a relevant circumstance. n30 Accordingly, the opinions are consistent with the view that notions of strict or liberal construction are not controlling and that the courts' primary task should be to determine Congressional intent.

As Justice Kennedy's dissent highlights, the Supreme Court did not address in *Ali* which governmental actions constitute "detentions." This issue will likely receive increased attention as counsel attempt to avoid the expanded reach of the detention exclusion. While the term "detention" implies a deliberate decision by the government to withhold property, arguments that a claim really involves negligent loss or destruction of property, rather than a deliberate decision to deprive the plaintiff of the property, are unlikely to be successful given the holding in *Kosak*. It appears that the exclusion will be triggered whenever there is an element of compulsion in the initial relinquishment of property to the government.

Counsel may also address the *Ali* holding by exploring non-tort remedies against the United States. The Supreme Court's decision in *Hatzlachh Supply Co. v. United States,* n31 indicates that contractual remedies under the Tucker Act are independent of the tort remedies available under the FTCA. n32 The same is true of contractual claims asserted against entities such as the United States Postal Service under applicable "sue and be sued" clauses. n33 Accordingly, if an implied-in-fact contract to protect a plaintiff's property has been formed between the plaintiff and the government, recovery may be permitted despite the detention exclusion.

Return to Text

n1 *28 U.S.C.S. § 2680*(c).

n2 *552 U.S. 214, 169 L. Ed. 2d 680, 128 S. Ct. 831 (2008).*

n3 See *Ali v. United States, Federal Bureau of Prisons, 2006 U.S. Dist. LEXIS 96352,* *3 (N.D. Ga. 2006), stating that "prisoners must take their personal belongings to the prison's Receiving and Discharge Unit" for inventorying and packaging before transfer.

n4 *Ali v. United States, Federal Bureau of Prisons, 2006 U.S. Dist. LEXIS 96352,* *7-8 (N.D. Ga. 2006).

n5 *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971),* discussed in 2 L. Jayson & R. Longstreth, *Handling Federal Tort Claims,* § 13.06[1][b].

n6 *Kosak v. United States, 465 U.S. 848, 79 L. Ed. 2d 860, 104 S. Ct. 1519 (1984),* discussed in 1 L. Jayson & R. Longstreth, *Handling Federal Tort Claims,* § 3.42.

n7 *Ali v. United States, Federal Bureau of Prisons, 2006 U.S. Dist. LEXIS 96352,* *12-13 (N.D. Ga. 2006).

n8 *Ali v. Federal Bureau of Prisons, 204 Fed. Appx. 778 (11th Cir. 2006).* The Eleventh Circuit's decision was issued shortly before January 1, 2007, and therefore is not subject to Federal Rule of Appellate Procedure 32.1.

n9 *Ali v. Federal Bureau of Prisons, 204 Fed. Appx. 778, 779 (11th Cir. 2006),* citing *Kosak v. United States, 465 U.S. 848, 854-859, 79 L. Ed. 2d 860, 104 S. Ct. 1519 (1984).*

n10 *Schlaebitz v. United States Dep't of Justice, 924 F.2d 193 (11th Cir. 1991).*

n11 *Ali v. Federal Bureau of Prisons, 204 Fed. Appx. 778, 779 (11th Cir. 2006).*

n12 *Ali v. Federal Bureau of Prisons, 204 Fed. Appx. 778, 780-781 (11th Cir. 2006).*

n13 *Ali v. Federal Bureau of Prisons, 552 U.S. 214, 169 L. Ed. 2d 680, 685-686 & n.1, 128 S. Ct. 831, 834-835 & n.1 (2008).* The Court noted that plaintiff failed to challenge the lower courts' conclusions that his property had been detained.

n14 *Ali v. Federal Bureau of Prisons, 552 U.S. 214, 169 L. Ed. 2d 680, 687, 128 S. Ct. 831, 836 (2008).*

n15 *Ali v. Federal Bureau of Prisons, 552 U.S. 214, 169 L. Ed. 2d 680, 687-688, 128 S. Ct. 831, 836-837 (2008).*

n16 Pub. L. No. 106-185, § 3(a), *114 Stat. 211 (2000).*

n17 *Ali v. Federal Bureau of Prisons, 552 U.S. 214, 169 L. Ed. 2d 680, 688-689, 128 S. Ct. 831, 837-838 (2008).*

n18 *Dolan v. United States Postal Service, 546 U.S. 481, 163 L. Ed. 2d 1079, 126 S. Ct. 1252 (2006),* discussed in 1 L. Jayson & R. Longstreth, *Handling Federal Tort Claims,* § 3.62.

n19 *Ali v. Federal Bureau of Prisons, 552 U.S. 214, 169 L. Ed. 2d 680, 690, 128 S. Ct. 831, 838-839,* quoting *Dolan v. United States Postal Service, 546 U.S. 481, 486-489, 163 L. Ed. 2d 1079, 126 S. Ct. 1252 (2006).*

n20 *Ali v. Federal Bureau of Prisons, 552 U.S. 214, 169 L. Ed. 2d 680, 690, 128 S. Ct. 831, 839 (2008).*

n21 *Ali v. Federal Bureau of Prisons, 552 U.S. 214, 169 L. Ed. 2d 680, 690, 128 S. Ct. 831, 839 (2008).* The Court had previously noted that "[a]cting in a customs or excise capacity" is not a self-defining concept" and that difficulties would attend any attempt to define the scope of a limited construction of the detention exclusion.

n22 *Ali v. Federal Bureau of Prisons, 552 U.S. 214, 169 L. Ed. 2d 680, 692 & n.7, 128 S. Ct. 831, 840-841 & n.7 (2008).* A discussion of *31 U.S.C.S. § 3723* is set forth in 3 L. Jayson & R. Longstreth, *Handling Federal Tort Claims,* Appendix 44, and discussed in 1 L. Jayson & R. Longstreth, *Handling Federal Tort Claims,* § 1.21.

n23 *Ali v. Federal Bureau of Prisons, 552 U.S. 214, 169 L. Ed. 2d 680, 694, 128 S. Ct. 831, 843 (2008)*

(Kennedy J., dissenting).

n24 *Ali v. Federal Bureau of Prisons, 552 U.S. 214, 169 L. Ed. 2d 680, 697, 128 S. Ct. 831, 845-846 (2008)*(Kennedy J., dissenting).

n25 *Ali v. Federal Bureau of Prisons, 552 U.S. 214, 169 L. Ed. 2d 680, 697, 701, 128 S. Ct. 831, 845-846, 849 (2008)* (Kennedy J., dissenting).

n26 *Ali v. Federal Bureau of Prisons, 552 U.S. 214, 169 L. Ed. 2d 680, 698-701, 128 S. Ct. 831, 846-848 (2008)*(Kennedy J., dissenting).

n27 *Ali v. Federal Bureau of Prisons, 552 U.S. 214, 169 L. Ed. 2d 680, 703-704, 128 S. Ct. 831, 851-852 (2008)*(Breyer J., dissenting).

n28 *Ali v. Federal Bureau of Prisons, 552 U.S. 214, 169 L. Ed. 2d 680, 703, 128 S. Ct. 831, 851 (2008)*(Breyer J., dissenting), citing *Bazuaye v. United States, 83 F.3d 482, 485-486 (D.C. Cir. 1996).*

n29 *Ali v. Federal Bureau of Prisons, 552 U.S. 214, 169 L. Ed. 2d 680, 693, 128 S. Ct. 831, 851 (2008)*(Kennedy J., dissenting), citing *Kosak v. United States, 465 U.S. 848, 853 n.9, 79 L. Ed. 2d 860, 104 S. Ct. 1519 (1984).* This language and other decisions to the same effect are discussed in 1 L. Jayson & R. Longstreth, *Handling Federal Tort Claims,* § 3.03.

n30 *Ali v. Federal Bureau of Prisons, 552 U.S. 214, 169 L. Ed. 2d 680, 687 n.4, 128 S. Ct. 831, 836 n.4 (2008).*

n31 *Hatzlachh Supply Co. v. United States, 444 U.S. 460, 62 L. Ed. 2d 614, 100 S. Ct. 647 (1980),* discussed in 2 L. Jayson & R. Longstreth, *Handling Federal Tort Claims,* § 9.03[3][a].

n32 This issue is discussed generally, and numerous cases are collected, in 2 L. Jayson & R. Longstreth, *Handling Federal Tort Claims*, § 9.03[3][a].

n33 *See, e.g., MB Financial Group, Inc. v. United States Postal Service, 545 F.3d 814 (9th Cir. 2008)*(Tallman, J. dissenting), recognizing that plaintiff may recover under a state law breach of contract theory even if a negligence claim is barred under the postal matter exclusion in § 2680(b).

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The Hon. Robert C. Longstreth is a judge on the Superior Court of California, County of San Diego. Prior to joining the bench, Judge Longstreth practiced with DLA Piper US LLP in San Diego, California, where he concentrated his work in environmental law and insurance law. Prior to joining DLA Piper, Judge Longstreth served as Trial Attorney for the Department of Justice, Torts Branch. He is a co-author of the leading treatise on the Federal Tort Claims Act, Jayson & Longstreth, Handling Federal Tort Claims (LexisNexis Matthew Bender). He received his undergraduate degree from Haverford College and his law degree from Yale.

Nissenberg on Spoliation of Discoverable Evidence in Truck-Accident Cases

2009 Emerging Issues 4434

Nissenberg on Spoliation of Discoverable Evidence in Truck-Accident Cases

By David N. Nissenberg

October 8, 2009

SUMMARY: Truck-accident expert David Nissenberg discusses the preservation of evidence in truck-accident cases. The destruction, concealment, or suppression of evidence is referred to as spoliation of evidence, and the ramifications and potential penalties for such conduct can be severe. Nissenberg also takes a look at the type of evidence available at the outset of any truck-accident case and advises how counsel should go about preserving key evidence.

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ARTICLE: There is no uniform response among the various jurisdictions to a party's destruction, concealment, or suppression of evidence needed by another party to prove its case. Generically referred to as "spoliation of evidence," most courts generally recognize a "duty to preserve evidence if a reasonable person in the party's position should have foreseen that the evidence would be material to a potential lawsuit." *See, e.g., Jones v. Macias, 374 Ill. App. 3d 918, 817 N.E.2d 98, 105 (2007).* However, the courts differ on the remedies available to the aggrieved party. These may include:

(a) A cause of action for negligent spoliation. *Jones v. Macias, 374 Ill. App. 3d 918, 817 N.E.2d 98, 105 (2007);*

(b) A rule of evidence that gives rise to an adverse inference. *De Graffenreid v. R. L. Hannah Trucking, 80 S.W.3d 866 (Mo. App. 2002);*

(c) The raising of a rebuttable presumption that the evidence would have been unfavorable to the cause of the spoliator. *Anderson v. Litzenberg, 115 Md. App. 549, 694 A.2d 150 (1997); Texas v Elec. Co-Op v. Dillard, 171 S.W.3d 201* (Tex. App. -- Tyler 2005), which may be rebutted by showing that the evidence in question was not destroyed with fraudulent intent or purpose, *Ordonez v. M. W. McCurdy & Co., Inc., 984 S.W.2d 264 (Tex. App. 1998),* and cases cited therein;

(d) Or the imposition of sanctions. *Huber v. Henly, 669 F. Supp. 1474 (S.D. Ind. 1987); Bachmeier v. Wallwork Truck Ctrs., 544 N.W.2d 122 (N.D. 1996).*

The type of evidence needed to prove the essential elements of a truck-accident case based on principles of negligence or products liability includes numerous items that by law, agreement, or business practice may be destroyed or become unavailable before trial unless the party desirous of using the evidence has made a sufficient demand on the other side for their retention.

DOCUMENTS THAT MUST BE RETAINED BY LAW

Set forth below are some of the more important documents likely to have an impact in trucking litigation, as well as the time-retention requirements contained in the Federal Motor Carrier Safety Regulations:

1. Drivers' logs: Truck drivers engaged in transporting goods in interstate commerce are limited in the hours they are allowed to drive pursuant to hours of service regulations. 49 C.F.R. Part 395. A record of a driver's on duty and off duty activities are required to be maintained in a driver's log. 49 C.F.R. § 395.8. Under these regulations, the driver is required to keep a copy of the logs in his possession for the previous seven consecutive days. 49 C.F.R. §395.8 (k) (2). Thereafter, the logs must be turned over to the motor carrier at its principal place of business. The motor carrier is then required to maintain the logs and all supporting documents for each driver it employs for a period of six months from the date of receipt. 49 C.F.R. §395.8 (k) (1).

2. Supporting documents: Supporting documents that are covered by the same regulation are documents maintained in the ordinary course of business and used by the motor carrier to verify information on the logs. These include accident and incident reports, bills of lading, border crossing reports, way bills, cash advance receipts, credit and debit card receipts and statements, customs declarations, delivery receipts, dispatch and assignment records, driver reports, expense vouchers, freight bills, fuel billing statements, fuel receipts, gate receipts, data provided by global positioning and cellular systems, inspection reports, invoices, interchange reports, international registration program receipts, international fuel tax agreement receipts, lessor settlement sheets, lodging receipts, bumper receipts, on-board computer reports, over/short and damage reports, overweight/oversize reports and citations, ports of entry receipts, telephone billing statements, toll receipts, traffic citations, transponder receipts, trip permits, trip reports, and weight/scale tickets.

The foregoing is not an exhaustive list. Listed below are other documents maintained by the motor carrier that can be used to verify information on the driver's logs. These are considered to be supporting documents. *See* DOT Interpretations of Part 395, Federal Register, Vol. 62, No. 65, page 16370, et seq.

3. Annual Inspection Reports: Each commercial motor vehicle must undergo an annual inspection. The inspection report must be retained by the motor carrier or other entity responsible for the inspection for a period of 14 months from the date of the inspection report. 49 C.F.R. §396.21.

4. Repair Records: Repair, maintenance and inspection records indicating their date and nature must be retained while the vehicle is either housed or maintained for a period of one year or for six months after the motor vehicle leaves the motor carrier's control. 49 C.F.R. §396.3 (c).

5. The Driver Qualification File: This must be maintained by each motor carrier for each driver it employs and for three years thereafter. 49 C.F.R. §391.51.

Documents retained by agreement

1. Records of Fuel Purchased, Received and Used in the Conduct of a Motor Carrier's Business: The International Fuel Tax Agreement (IFTA) is an agreement between all 48 contiguous states and 10 Canadian provinces to simplify the reporting of motor fuel use taxes. One tax return is filed where a qualified motor vehicle (GVW exceeding 26,000 pounds, three or more axles or a combination vehicle meeting the requirements) is licensed and based for vehicle registration purposes for fuel consumed in all member jurisdictions. IFTA licenses must be obtained from the base jurisdiction by any person who operates a qualified commercial motor vehicle in two or more of the member jurisdictions, including lessors, lessees, and motor carriers. Since the distribution of the fuel taxes paid by each licensee is dependent on the number of miles traveled in each jurisdiction, it is incumbent on each licensee to maintain records of fuel purchases showing for each vehicle where and when the purchase was made. The IFTA requires each licensee to keep mileage records, fuel receipts, and invoices for four years for each qualified motor vehicle in its fleet.

When driver logs have been destroyed or are otherwise unavailable, or when there is an issue as to the extent of activity by the particular commercial motor vehicle in a state, the records required to be maintained by the IFTA can be an invaluable source of information. Each licensee, as a condition of obtaining the license, has consented to the retention agreement. As a practical matter, it is the motor carrier's accountant who often maintains these records.

Evidence disposed of as a business practice

New technology in the operation of heavy commercial motor vehicles often produces data about the vehicle's performance that may be kept by third parties and then disposed of. A prime example is the information accumulated by the tractor's Qualcomm system. This is a satellite tracking system that enables the motor carrier to know the location of its vehicles at any precise moment. The data collected -- including location, speed, time, duration of stops, brake application, and vehicle performance -- is usually stored by Qualcomm for fourteen days before being discarded.

Sometimes the evidence that a party wants retained by another party is the truck or tractor-trailer itself, which may have been severely damaged in the accident. Often, as a customary business practice, an insurance carrier will sell the vehicle for salvage value or junk it.

Taking steps to preserve the evidence

Plaintiff's Attorney

Immediately after being hired by the plaintiff, it is recommended practice for the plaintiff's attorney in a truck-accident case to send a certified letter to the motor carrier and the motor carrier's insurer setting forth in specificity the documents or other evidence that the plaintiff seeks to have retained, along with a statement that the documents are considered evidence in a case that the plaintiff intends to bring against the motor carrier. The letter should include an admonition that the destruction of any documents or other evidence identified in the plaintiff's letter will be considered spoliation and will result in the plaintiff seeking sanctions or other remedies against the guilty party. Also, a demand for retention of a wrecked vehicle should always be accompanied by an offer to pay for the reasonable costs of storage through trial since it is unlikely a court will fault an insurance carrier for trying to rid itself of a wrecked vehicle rather than paying for its storage when there is no further use for it. Alternatively, the plaintiff should consider purchasing the wreck and storing it himself.

Defense Counsel

Defense counsel has other issues to deal with. First, defense counsel should advise the client not to throw away or dispose of any documents that the law requires the client to maintain. Such disposal occurred in the oft-cited case of *J.B. Hunt Transp. Inc. v. Bentley, 207 Ga. App. 250, 427 S.E.2d 499 (1992).* The defendant trucking company in that case destroyed the driver's logbook in the normal course of business, as well as the pre-trip and post-trip vehicle inspection reports. The defendant did this knowing that the driver had been involved in a major injury accident and that the driver was alleged to be a "tired trucker" who was driving erratically prior to the accident. Moreover, it was established that the truck had been taken off the road the day before because of operational defects. In upholding a punitive damage award, the court found that the destruction of the logs raised a presumption that the logbooks showed that the driver had been compelled by his employer to drive without sufficient rest. Likewise, the court concluded that the destruction of the inspection reports, in light of the evidence of operational defects the day before the accident, raised a presumption that the rig was not in a safe condition to be on the highway.

Another issue that defense counsel must consider involves the duty to preserve evidence when a reasonable person in the party's position should foresee that the evidence will be material to a potential lawsuit. Aside from the type of evidence mentioned in this article, there may exist, depending on the circumstances of the accident and the commercial motor vehicle involved, other data and records that could hold the key to fault and liability. If the tractor-trailer, for instance, was equipped with a collision warning system that recorded the activity of the rig and that of other vehicles in its path in a black box, a decision has to be made whether to retain that evidence. Similarly, if the vehicle's engine was

equipped with an electronic control module (ECM) that recorded data on the vehicle's performance, including the speed at the time of collision, such information is evidence that in all likelihood will be in the hands of the defense right after the accident. What to do with this information if it is adverse? Does the defense have a duty to preserve it when there has been no demand to do so, usually because at that juncture the plaintiff is without counsel?

It is these questions that undoubtedly will be wrestled with and answered by a court in the near future.

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ABOUT THE AUTHOR(S):

David N. Nissenberg is a member of the California and Florida bars and is currently a practicing attorney in San Diego, California. He lectures frequently throughout the United States on the topic of truck-accident litigation and is the author of the widely-used book, *The Law of Commercial Trucking: Damages to Persons and Property* (LexisNexis Matthew Bender, 2009). Mr. Nissenberg is a graduate of Brown University and the University of Miami School of Law. He may be contacted at dnnesq@yahoo.com. He may also be contacted through the Truck Litigation Resource Center, L.L.C. at www.truckaccidentexperts.com.

13 of 41 DOCUMENTS

Alford on Jarrett v. Jones

2009 Emerging Issues 4039

Margie Searcy Alford on Jarrett v. Jones, 258 S.W.3d 442 (Mo. 2009)

By Margie Alford

January 27, 2009

SUMMARY: The Missouri Supreme Court held that a direct victim of an accident may recover emotional distress damages for observing the injury or death of a third party due to the accident. Personal injury litigator and author Margie Searcy Alford reviews and comments on the courts decision.

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ARTICLE: Overview

While driving a car with bad tires, Defendant Jones was speeding on a rainy day. His wife and two daughters were riding with him. Their car skidded across a median and crashed into a truck driven by Plaintiff Jarrett.

Defendant Jones was knocked unconscious and his two-year-old daughter Makayla was killed. A bystander ran up to Jarrett and asked how he was. Jarrett said he was "all right." Jarrett then ran to the other vehicle where he observed Jones' dead two-year-old daughter.

Jarrett was upset by the sight of the deceased girl and developed posttraumatic stress disorder. Even though the wreck was not his fault, he felt guilt for having been in a crash that killed a child. He missed a lot of time from work and had to go through extensive counseling.

Jarrett sued Jones for being negligent in causing the wreck that caused Jarrett so much emotional distress, made him incur medical bills for the emotional distress, and caused him to lose income as a result of not being able to drive his truck for a long time. Plaintiff Jones filed a motion for summary judgment that the trial court granted.

The motion for summary judgment argued that Jarrett was not in any reasonable fear of harm to himself at the time he viewed Makayla's body-that any reasonable fear he felt would have ended when the wreck ended. The trial court held that when Jarrett said he was "all right" he was no longer in the "zone of danger." The reasonable fear was a requirement under prior Missouri law. See *Asaro v. Cardinal Glennon Memorial Hospital, 799 S. W. 2d. 595 (Mo. Banc 1990).* Jarrett appealed and the case was heard by the Supreme Court of Missouri, which reversed and remanded the case.

The Court held that since Jarrett had been a direct victim of the wreck and not just a bystander that two additional requirements other than the usual criteria in a negligence case, had to be met in order for him to prevail. These criteria are "(1) the defendant should have realized that his conduct involved an unreasonable risk of causing the distress and (2) the emotional distress or mental injury must be medically diagnosable and must be of sufficient severity so as to be medically significant." *Bass, 646 S.W. 2d at 772-73.* Jarrett had filed affidavits in his response to the motion to offer proof of these two requirements.

Analysis

The Jarretts on appeal argued three main issues: (1) that different law should apply to an actual victim of a wreck in contrast to a bystander; (2) that Jarrett had been in danger at the time he observed the child's body; and (3) that Jarrett's emotional distress was caused not only from seeing the dead child but also from fear for his safety.

Many courts around the country have for a long time recognized the right of a person physically injured by another's negligence or wantonness to collect for emotional distress caused by the physical injuries. Less frequently litigated questions have been whether a person who was in a wreck that was caused by someone else's negligence or wantonness, may recover for emotional distress caused by observing injuries to another person or by seeing a dead body (what the requirements would be for such a recovery).

For some time Missouri courts have held that victims who are physically injured by another's negligence or wantonness may recover for emotional distress that was caused at the time of impact. See *Trigg v. The St. Louis, Kansas City & Northern Railway Co., 74 Mo 147 (1881); Pretsky v. Southwestern Bell Telephone Company, 396 S.W. 2d 566 (Mo. 1965).*

In 1990, in the case of *Asaro v. Cardinal Glennon Memorial Hospital, 799 S. W. 2d. 595 (Mo. Banc 1990),* a new cause of action was created in Missouri for a bystander to an incident in which he or she suffered emotional distress as a result of seeing the disturbing event. Asaro held that in order to recover, the bystander had to be in a "zone of danger" where he could have been harmed himself or had a reasonable fear of being harmed himself.

In Jarrett v. Jones, the defendant argued that the wreck was already over and that at the time Jarrett viewed the body of the dead child, he was not in any danger and could not have a reasonable fear that he was in danger. The Court held that actual victims to a wreck could recover for emotional distress from viewing a dead child after the crash if the two previously stated additional requirements were met. These requirements were taken from *Bass v. Nooney Co., 646 S. W. 2d. 765 (Mo. Banc 1983).*

The court viewed the facts in the light most favorable to the non-moving party and upon seeing the affidavits submitted by Jarrett to substantiate that he met the two additional requirements, reversed and remanded the case to the trial court. The Supreme Court viewed the wreck and the viewing of the body of the dead girl as all part of one incident and did not feel that Jarrett had become merely a bystander during the time he got out of his truck and went to the Jones' car.

Justice Stephen N. Limbaugh, Jr. dissented primarily because he thought that Jarrett was no longer in a zone of danger in which he could be injured or had a reasonable fear of being injured at the time he viewed the body. He felt that a plaintiff should be in a "zone of danger" in order to recover.

Conclusion

The Missouri Supreme court created a new cause of action for emotional distress suffered by a party who was in a wreck or other incident and who witnessed a distressful sight even though the plaintiff was not in danger or reasonable fear of danger for himself at the time he witnessed the distressful sight.

Practice Tips

1. If counsel is faced with a situation that has not been compensable in the past but seems as if it should be, best practice dictates that a practitioner should think about what would remedy the situation. Sometimes courts will recognize new causes of action for injuries or losses.

2. Search law in other states to see how their courts have expanded their causes of action or remedied situations for which there has not previously been a cause of action in your state.

3. Since the vast majority of cases are settled, the fear alone that counsel may prevail in creating a new cause of action may make some defendants more likely to settle. Counsel should not be afraid of espousing new damages or causes of action if they seem as if they are right and just. At the same time, they should keep on arguing the old tried and true allegations if plaintiff(s) might prevail on them.

4. Practitioners should remember that sometimes courts not only create new causes of action, but sometimes will say that they have been misinterpreting the law. For example, the Alabama Supreme Court in *Griffin v. Unocal Corp., 2008 Ala. LEXIS 19* (Ala. Jan 25, 2008), held that for roughly twenty-six years it had been interpreting the law incorrectly and thus reinterpreted when the statute of limitations should begin to run in toxic tort cases.

RELATED LINKS: See the Jarrett v. Jones decision at
- 258 S.W.3d 442 (Mo. 2009)

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ABOUT THE AUTHOR(S):

Margie Searcy Alford is the principal author and editor-in-chief of the five-volume set A Guide to Toxic Torts (LexisNexis), a contributing author to the four volume set Drug Product Liability (LexisNexis), a contributing author to the two volume set Alabama Civil Practice Forms (LexisNexis), and a contributor to many other publications and commentaries.

She served two years as National Chairperson of the American Association for Justice Section on Toxic, Environmental, and Pharmaceutical Tort Law and two years as National Chairperson of the Women Trial Lawyer's Caucus of the American Association for Justice. Also, she was National Chair of the Dioxin Litigation Group for three years.

Margie Searcy Alford practices in the area of serious personal injury with a special focus on toxic torts. Attorney Alford has handled toxic tort cases in sixteen states.

She graduated from The University of Alabama School of Law in 1974. She is a Fellow with the National College of Advocacy and a Trial Warrior for Justice.

Attorney Alford was chosen the most outstanding young career women in Alabama by the Alabama Federation of Business and Professional Women and is in more than a hundred Who's Who type publications. She has served on many boards, committees, and commissions.

Gersten on L.A. Fitness Int'l, LLC v. Mayer, 980 So. 2d 550 (Fla. 4th DCA 2008)

2009 Emerging Issues 3438

Judge David M. Gersten on L.A. Fitness Int'l, LLC v. Mayer, 980 So. 2d 550 (Fla. 4th DCA 2008), and Health Club's Duty to Aid Business Patrons

By Judge David Gersten

January 1, 2009

SUMMARY: *Judge David M. Gersten on L.A. Fitness Intl, LLC v. Mayer, 980 So. 2d 550 (Fla. 4th DCA 2008),* and a health clubs duty to aid business patrons. In L.A. Fitness, the Fourth District Court of Appeal held that a health club owed its patrons a duty of reasonable care in rendering aid, but did not have a legal duty to administer cardiopulmonary resuscitation (CPR) or have an automatic external defibrillator (AED) on the premises.

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ARTICLE: Background

Alessio Tringali ("the patron") died from cardiac arrest while exercising at an L.A. Fitness facility. The patron's estate filed a wrongful death action alleging that L.A. Fitness was negligent in failing to perform CPR within the first three minutes of cardiac arrest.

The trial involved several key witnesses. An L.A. Fitness sales representative, who was certified in cardiopulmonary resuscitation ("CPR"), came to the patron's aid. The sales representative, however, did not perform CPR on the patron because he feared the patron may have sustained a concussion or a neck injury. The sales representative called for emergency medical assistance, and an ambulance arrived within five minutes.

The Emergency Medical Technician testified that when he got to the fitness facility, the patron was not breathing and did not have a pulse. Expert testimony at trial revealed that the patron had a 75 percent or greater chance of survival had he received CPR within three minutes of cardiac arrest. The jury found in favor of the estate and awarded damages. L.A. Fitness appealed.

Appellate Level

On appeal, L.A. Fitness argued the duty owed to a business invitee during a medical emergency is limited to a duty of reasonable care. L.A. Fitness asserted that it satisfied this duty by timely calling emergency services.

The estate contended that the duty owed to a business patron should extend to providing medical care, including administering CPR and having professionals on duty who are qualified to perform CPR. The estate also contended that

L.A. Fitness breached its duty to aid by not having an automatic external defibrillator ("AED") on the premises.

The Fourth District recognized that a relationship exists between a health club and its patrons. That relationship imposes a duty on the health club to aid the patron in a medical emergency when the health club knows or should have known of the injury. Although the court determined that the scope of that duty is limited to providing first aid until the injured can receive professional care, "first aid" does not encompass skilled treatment, such as administering CPR.

The Fourth District found that providing CPR, which requires training, is more than mere first aid. Thus, there was no duty to provide treatment requiring special training or to have qualified staff members provide aid. Further, even if the health club employed personnel certified in CPR, the health club has the discretion in deciding when to administer CPR.

The Fourth District also recognized that Florida law requires that an action undertaken for the benefit of another, even gratuitously, be performed with reasonable care. Therefore, if the health club performs CPR, then the law imposes a duty of reasonable care in providing it. Additionally, assessing the patron's condition does not amount to a voluntary assumption of a duty to provide CPR.

Concomitantly, the Fourth District addressed the facilities' failure to provide an AED. The Court discussed the Cardiac Arrest Survival Act, Fla. Stat. § 768.1325 (2007), and determined that the Act does not require that an AED be placed in any building. In addition, the act does not require employing persons with AED training, even if the building owners or possessors elect to place an AED on the premises. Therefore, the court held that a health club (or other business entity) does not owe its patrons a duty to have an AED on the premises.

Practitioner Pointers

Although courts have receded from the view that there is "no duty to aid," many courts narrowly construe any exception to this doctrine. It is good practice to limit claims to a business entity's failure to provide reasonable aid in an emergency situation.

However, where an employee of a business entity undertakes to administer medical aid, there is a reasonable duty of care. In the event the employee starts administering medical treatment that requires training, the employee and the business entity assume the duty to perform the treatment with due care. Fla. Stat. § 768.13(2)(a) (2008).

Therefore, a practitioner may allege negligent undertaking where an employee assumes the duty to aid by starting to provide medical treatment. However, the practitioner should be careful in distinguishing acts that constitute assumption of a duty to provide medical care from acts that are mere assessment of the patron's condition.

Conclusion

Even though a health club, as a business entity, owes its patrons a duty of reasonable care to provide aid in the event of a medical emergency, that duty is no greater or lesser than that owed by any other business entity. The duty arises when the club knows or should have known that a patron needs medical assistance. At this point, an employee may render basic first aid, taking reasonable steps to turn the patron over to qualified medical assistance providers. Ultimately, the duty to aid is discharged when the patron is being cared for by medical professionals. However, the scope of that duty does not extend to providing any aid that requires special training, such as CPR or use of an AED, even if the health club employs personnel competent to provide such aid.

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ABOUT THE AUTHOR(S):

Judge David M. Gersten is currently a judge on the Third District Court of Appeal where he was appointed in 1989. Prior to his appointment, he was in private practice from 1975 until 1980. He was elected to the Dade County Court in 1980 and elected to the Eleventh Judicial Circuit in 1982. In 1995, he was appointed as Associate Dean, Appellate Division, at the Florida College of Advanced Judicial Studies, and became a member of the Florida Court Education Council in 1996. He is the author for the *Florida Civil Practice Guide*, a multi volume set published by LexisNexis/Matthew Bender, and he is a judicial consultant for *LexisNexis Practice Guide: Florida Pretrial Civil Procedure*.

Information referenced herein is provided for educational purposes only. For legal advice applicable to the facts of your particular situation, you should obtain the services of a qualified attorney licensed to practice law in your state.

Smith on Defending Implied Equitable Indemnity Claims in Kentucky

2008 Emerging Issues 2974

Smith on Defending Implied Equitable Indemnity Claims in Kentucky

By Sky W. Smith

October 2, 2008

SUMMARY: Kentucky is no stranger to indemnity claims,but how does a Kentucky court reconcile the conflict between the state apportionment statute and the common-law principle of implied equitable indemnity? Equally important, how can one defend against such a claim if the apportionment statute does not protect you? Attorney Sky Smith examines this issue and the "case within a case" strategy for defending against implied indemnity claims in Kentucky.

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ARTICLE: Kentucky is no stranger to indemnity claims, but how would (or should) a Kentucky court reconcile the apparent conflict between the state apportionment statute and the common-law principle of implied equitable indemnity. More specifically, how should the court treat a claim for implied indemnity -- that is based on settlements -- in a case where the judge would otherwise give apportionment instructions? Equally important, how should one defend against such a claim?

Although the answers can be gleaned by a review of Kentucky court rulings, the answers are somewhat unsatisfying and logically contradictory. In this respect, the law in Kentucky presents a classic case of judges refusing to let go of common-law principles that have been pre-empted by legislative enactments.

Implied Indemnity Claims

Under Kentucky law, common law indemnity remains available to one exposed to liability because of the wrongful acts of another with whom which he is not *in pari delicto*. To state a cause of action for indemnity in Kentucky, a party must be able to prove the following elements:

1) he is subject to liability, but 2) he is exposed to such liability as a result of the actions of another person and that 3) the other person should as a matter of public policy in law or equity be required to make good the party's loss. n1

Successful implied indemnity actions fall into two categories: (1) Where the party claiming indemnity has not been guilty of any fault, except technically, or constructively, as where an innocent master was held to respond for the tort of his servant acting within the scope of his employment; or (2) where both parties have been at fault, but not in the same

fault, towards the party injured, and the fault of the party from whom indemnity is claimed was the primary and efficient cause of the injury (passive negligence v. active negligence distinction). n2

Apportionment Provided by KRS 411.182

KRS Section 411.182 provides that courts are required to instruct the jury to apportion liability "to the parties of the case, including plaintiffs, defendants, and third-party defendants, and to parties who have settled or otherwise bought their peace by an agreement described in subsection 4 [of the statute]." *Barnes v. Owens-Corning Fiberglas Corp., 201 F.3d 815, 823 (6th Circuit 2000).*

The *Barnes* court continued: "a non-party tortfeasor who settled his claims with a plaintiff, or was dismissed, is to be treated as a party for apportionment purposes, although apportionment would not impose any liability on non-parties." *Id.* at 423, *citing Floyd v. Carlisle Construction Company, 758 S.W.2d 430 (KY 1988).* "If there is an active assertion of a claim against joint tortfeasors, and the evidence is sufficient to submit the issue of liability to each, an apportionment instruction is required whether or not each of the tortfeasors is a party-defendant at the time of trial." *Barnes, 201 F.3d at 823, citing Floyd*. Finally, a tortfeasor "who is not actually a defendant is construed to be one for purposes of apportionment if he has settled the claim against him or if he was named as a defendant in the plaintiff's complaint even though the complaint was subsequently dismissed." *Id.*

Technically, a defendant seeking an apportionment instruction must file a third-party action against the party who he believes is responsible for all or part of the plaintiff's damages. In short, the statute "applies to persons named as parties, regardless of how named and those persons who bought their peace from the litigation by way of releases or agreements." *Barnes, supra, at 824; see also* KRS § 411.182. Apportionment "encompasses named parties, including third-party defendants and parties dismissed for whatever reason, and settling parties or settling non-parties."

Discrepancies

The enactment of KRS 411.182 would logically make implied indemnity claims obsolete under Kentucky law..right? Wrong. Interestingly enough, the dissent in the Kentucky Supreme Court case of *Degener v. Hall Contracting Corporation* n3 makes this very case:

In this century, Kentucky tort law requires tortious parties to pay for their share of the plaintiff's damages, and only their share of the plaintiff's damages. Equitable implied indemnity is very much an anachronism, and KRS 411.182 properly rendered it extinct.

Yet despite a very lengthy, and well reasoned dissent, the majority in Degener took (in this author's view) the altogether nonsensical approach that the common law right of indemnity exists distinct and apart from any rights of apportionment under KRS 411.182 (apportionment statute). Therefore, a party who is apportioned fault, may nevertheless maintain an implied indemnity action against other apportioned parties if he can prove that his negligence was passive and the others' negligence was active and primary. n4

Question: If you are defending one of these allegedly "active" and "primary" indemnitors against an implied indemnity claim based on settlements paid to non-parties, how can you defend your client if the apportionment statute does not protect you?

"Case within a Case"

Answer: You force the party asserting the implied indemnity claim to prove the factual basis of the settlements it paid. In effect, you force the party seeking indemnity to prove the position of the settling parties, which it had previously been arguing vociferously against. As odd as it sounds, this approach is supported by Kentucky common

law.

Implied indemnity cases hold that, before one who settles a claim may recover from an indemnitor, he must first establish he (the indemnitee) was "legally liable" for the claim and "could have been compelled" to pay the claim before he is permitted any recovery. n5 In *Ashland*, the court denied an indemnitee recovery because he settled with a party against whom it would have had a legal defense. The fact that the indemnitee could have used its legal defense to deny the claim made its payment to the settling party "voluntary" and, therefore, not a "compelled" payment.

But what happens if an indemnitor's defenses are based not on legal defenses, but on fact-based defenses that the indemnitee did not assert against the non-settling parties? Can the indemnittee now force the indemnitor to prove the fact-based nature of the defenses? Determining the answer to this question requires a review of several key cases.

In *Long v. Illinois Central Gulf* n6 the court held:

The law of Kentucky is that a defendant who has settled a claim against him may recover on a claim for indemnity against a joint tortfeasor only after the defendant has shown that he was actually liable on the plaintiff's claim, ***including showing that there were no defenses, or impediments*** to the plaintiff's recovery on the claim settled. Therefore, to adequately make out a claim for indemnity on a settled claim under Kentucky law, the indemnitee must allege that the indemnitee was subject to *actual* legal liability. (Emphasis added)

The *Long* court did not distinguish between legal defenses and fact-based defenses to the underlying claim. However, the inclusion of the term "impediments" could be read broadly to include fact-based impediments as opposed to "legal defenses". In *Kentucky School Board of Trust v. Mann* n7, the Court of Appeals came close to answering the question directly.

In *Mann*, the Court of Appeals confirmed the *Long* and *Ashland* decisions, but added more clarity to the "actual liability" issue. In *Mann* the District Court denied an indemnity action from one insurance company to another because the indemnitee failed to prove at trial the actual legal liability of the indemnitor. Although the facts of the case presented at that trial were not a part of the record, it is apparent from the appellate decision that the indemnitor's defense to the action was fact-based.

Indeed, the brief in support of Horace Mann's motion for summary judgment argued, under the heading "Facts Here Do Not Give Rise to Liability," that the facts did not "justify the admission of negligence ... upon which a conclusion of reasonable liability can be established." Thus, although the brief in the district court also references the need for a fact finder to determine whether KSBIT's settlement with the Ropers was reasonable, we read the district court's March 1996 order reserving the reasonableness issue for trial as fairly indicating to KSBIT that the issue whether the admissible evidence in the Roper case could set forth sufficient facts to prove actual legal liability would be litigated as well.

The *Mann* Court continued:

It is clear..that Kentucky law requires that ***evidence of negligence and causation*** be presented by KSBIT in asserting the rights of the School Board against State Farm at the non-jury trial. (emphasis added).

Obviously, if a party seeking indemnity is required to prove negligence and causation, the party's defenses will be fact based. It should be noted that, although both litigants in the *Mann* case were insurance companies, this was not an "insurance law case". n8 The two litigants were disputing which of them had primary coverage and had no insurance contracts with each other. Thus, the case was decided solely under the common law.

Forcing an indemnittee to prove the case of the parties with whom it has already settled is a burden few indemnitees would want to take on.

Imagine representing an owner of a large construction project against claims by the building contractors who all blame each other and the owner for the problems on the project. Then imagine the dispute raging for several years as the owner defends, denying liability all the while and then settling with some of the parties before trial. The settlement agreements acknowledge claims but deny that the settlement is an admission of liability. Then imagine, as the owner, stepping into the settling contractors' shoes and attempting to assert those settlements as "damages" at trial against the non-settling parties in an implied indemnity setting. The other parties defend themselves by forcing you to make the settling contractors' case by using those contractors' witnesses, documentation, etc. The settling contractors (who are necessary witnesses) are in no mood to assist you in making your case and make (at best) reluctant witnesses and (at worst) work to undermine your case.

It should be clear that this sequence of events would spell chaos for an owner trying to make that case for indemnity. How much simpler would it be to just follow the apportionment statute and let implied indemnity actions die on the vine?

Reasonableness defenses

As noted in the *Mann* case cited above, there were two issues that the Court of Appeals recognized as issues to be resolved through the litigation process. One, was the issue of proving negligence and causation as to the claimant contractors. The second was the issue of the reasonableness of the settlement itself.

Conceptually then, the defense is two-pronged into a liability, and a quantum phase. Assuming the indemnitee wants to take on the burden of proving the settling parties' claims against another party, it must also then prove that the settlement it paid was reasonable, based on the facts as developed in the case. Therefore, if the potential indemnitor defends itself by forcing the indemnitee to prosecute the claim to its fullest, and it succeeds in showing that from a factual standpoint the settlements were not reasonable, it would therefore be entitled to reduction in the amount to be indemnified.

Conclusion

The continued existence of implied indemnity actions in Kentucky does not make logical sense considering the existence of an apportionment statute, yet it persists even so. In the context of defending implied indemnity actions based on settlements, the best bet is to force the one asserting the claim to prove its case.

Return to Text

n1 *Kentucky School Boards Ins. Trust v. Mann, 188 F.3d 507 (6th Cir. 1999).*

n2 *Degener v. Hall Contracting Corporation, 27 S.W.3d 775 (KY 2000).*

n3 *27 SW.3d 775 (KY 2000).*

n4 *Id.*

n5 *Ashland Oil v. General Telephone Company, 462 S.W.2d 190 (C.A. KY 1970).*

n6 *660 F. Supp 469 (W.D. KY 1986).*

n7 *188 F.3d 507 (6th Cir. 1999).*

n8 Insurance cases often have contractual language dealing with settlements. As a general rule, the insurance contract prevents an insured from challenging "good faith settlements."

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16 of 41 DOCUMENTS

Arthur Best on Colbert v. Moomba Sports, Inc.

2008 Emerging Issues 2817

Arthur Best on Colbert v. Moomba Sports, Inc., 176 P.3d 497 (Wash. 2008)

By Arthur Best

September 5, 2008

SUMMARY: Restricting bystander recovery for negligent infliction of emotional distress: the Washington Supreme Court distinguishes a parent's observation of rescue attempts from a parent's observation of the aftermath of an injury.

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ARTICLE: Overview. The plaintiff in Wash. 2008), received a phone call at about 3:00 one morning and was told that his daughter had disappeared from the back of a boat on a lake and that a search was taking place for her. He went quickly to the lake, about five minutes from his home, and observed a search for his daughter. About three hours later, searchers found the body of his daughter, and the plaintiff saw it pulled over the side of a boat by its arm. He sued the boat manufacturer and several others on a variety of theories, including a claim that the manufacturer should have warned about the risk of carbon monoxide exposure to individuals who used the boat's swim platform while its engine was running. He sought damages for negligent infliction of emotional distress. The trial court granted summary judgment and the Court of Appeals affirmed. The Supreme Court affirmed the summary judgment. The Supreme Court concluded that the observation the plaintiff had made of the harm to his daughter did not involve seeing the accident or seeing horrendous attendant circumstances, and that therefore the bystander cause of action was properly rejected.

Basic Doctrine and Significant Washington Precedents. Recovery for negligent infliction of emotional distress (NIED) is permitted universally for victims who suffer some physical impact from the defendant's tortious conduct, and is permitted in almost every state for victims who do not suffer physical impact from that conduct but who were in a zone of danger in which such physical impact could have occurred. In addition to those potential plaintiffs, many states authorize "bystander" recovery for NIED if a plaintiff outside the zone of danger observes serious harm to a close relative.

For an overview of this topic, see 13-55A Personal Injury -- Actions, Defenses, Damages § 55A.09 Bystander Recovery for Negligent Infliction of Emotional Distress.

1-5 Damages in Tort Actions, Part II Specific Losses, Chapter 5, Negligent Infliction of Emotional Distress surveys recent developments in a number of states with regard to this cause of action.

The development of this tort in Washington followed a typical pattern, with the bystander recovery first being

permitted because of the unusually high foreseeability of emotional distress when a person sees a close relative suffer serious harm. Because foreseeability can be highly subject to individual interpretation and thus is usually a question for the jury, doctrinal limitations were added to limit the number of potential plaintiffs who might state a cause of action under the newly-recognized tort.

Hunsley v. Giard, 553 P.2d 1096 (Wash. 1976). This was Washington's first decision recognizing the NIED tort. The defendant had negligently driven a car into the plaintiff's house. There was no physical impact to the plaintiff and the accident occurred outside her presence, but she experienced heart trouble after the accident that was later diagnosed as having resulted from severe mental stress. The court abandoned the previous requirement that the plaintiff must be in the zone of danger to have a cause of action. Instead, it evaluated the plaintiff's claim under the general tort principles of duty, breach, proximate cause, and damage or injury. The court determined that if the specific harm that the plaintiff alleged was foreseeable to the defendant, then the defendant had a duty to avoid it and he could be liable for failing to adhere to his duty of care.

Cunningham v. Lockard, 736 P.2d 305 (Wash. App. 1987). In this case, the state's intermediate appellate court imposed significant limitations on NIED recovery that the state's high court had not articulated in *Hunsley*. The minor plaintiffs' mother was struck by the defendant's car, but they did not see the accident nor did they come on the scene of the accident shortly after its occurrence. Under *Hunsley's* general application of foreseeability, a cause of action for infliction of emotional distress might have been stated. The Court of Appeals reasoned that this approach would allow for too many emotional distress recoveries and might not be adequately predictable. For these policy reasons it held that the class of plaintiffs who can bring a claim of negligent infliction of emotional distress should include only 1) those who are actually placed in peril by the defendant's negligent conduct and 2) family members present at the time who fear for the one imperiled.

Wash. 1990). In this case, the Supreme Court endorsed the idea that NIED bystander recovery should be limited in a way additional to general foreseeability concepts. The plaintiffs were family members of a state trooper killed by a truck. They saw film relating to the fatal accident on television and sought recovery for distress they suffered. The Supreme Court adopted the position of the *Cunningham* court that NIED recovery should be limited. It held that the plaintiffs had no claim for negligent infliction of emotional distress, but that a claim would be recognized if plaintiffs arrived shortly after an accident where a family member was injured. The Court stated that a defendant's duty to avoid infliction of emotional distress "does not extend to those plaintiffs who have a claim for mental distress caused by the negligent bodily injury of a family member, unless they are physically present at the scene of the accident or arrive shortly thereafter. Mental distress where the plaintiffs are not present at the scene of the accident and/or arrive shortly thereafter is unforeseeable as a matter of law." *Gain, 787 P.2d 553, 557 (Wash. 1990).*

Hegel v. McMahon, 960 P.2d 424 (Wash. 1998). This decision developed the meaning of "shortly thereafter," the phrased used as dictum in *Gain*. It decided two consolidated cases. In one, an accident victim was lying in a ditch severely injured and bleeding when his relatives discovered him as they drove along the same road shortly after the accident. In the other case, the victim was killed when his motorcycle collided with a school bus. His father happened on the scene before emergency crews arrived, and saw his son still conscious but with his leg cut off and other severe injury. The Court stated:

Prior to *Gain,* negligent infliction of emotional distress claims were limited only by general tort principles...*Gain* narrowed the cause of action by requiring a plaintiff to be present at the accident scene in order to recover. *Gain* did not further restrict liability by mandating that the plaintiff be present *at the time* of the accident, nor did it foreclose a cause of action for a plaintiff who arrives on the scene after the accident has occurred and witnesses the victim's suffering.

Hegel, 960 P.2d 424, 428 (1998). The Court reasoned that a bright line rule limiting recovery to those who witness the actual occurrence of the injury would be simple to apply but would not be based on a meaningful distinction among potential plaintiffs, since the tort is intended to be available to those who "witness the aftermath of an accident in all its alarming detail." The Court stated that "[a]n appropriate rule should not be based on temporal limitations, but should

differentiate between the trauma suffered by a family member who views an accident or its aftermath, and the grief suffered by anyone upon discovering that a relative has been severely injured." *Hegel, 960 P.2d 424, 429 (1998).* The Court concluded that a cause of action for negligent infliction of emotional distress is recognized "where a plaintiff witnesses the victim's injuries at the scene of an accident shortly after it occurs and before there is a material change in the attendant circumstances." *Hegel, 960 P.2d 424, 429 (1998).*

Distinguishing Observation of Rescue from Observation of Injury. In the current case, the Washington Supreme Court held that -- as a matter of law -- what the plaintiff experienced was not comparable to witnessing a loved one's accidental death or serious injury. It seems that the main basis for this conclusion was that the plaintiff's daughter was underwater by the time the plaintiff was aware of her peril. The Court stated that the plaintiff did not arrive "shortly thereafter" because he "did not observe his daughter at the scene of the accident after its occurrence and before there were material changes in her condition, or the scene, or both." *Colbert, 176 P.3d 497, 504 (Wash. 2008).* As a dissent points out, this logic would preclude recovery by a parent whose view of a grievously injured child was obscured by smoke or flames, even though extreme emotional distress would be highly foreseeable in that circumstance.

A clue to the Court's willingness to apply a somewhat arbitrary distinction (between the parent in the current case and the plaintiffs whose recoveries were authorized in *Hegel*) may be found in one other aspect of the case. The Court limited NIED bystander recovery to plaintiffs whose presence at the scene is unwitting, that is, whose presence is not the result of being notified that their close relative has been injured. The Court linked that new requirement to the idea that severe emotional response is less foreseeable when the plaintiff who views an injured relative has been warned about it in advance than when the plaintiff sees it by surprise.

Litigating in the Context of Retrenchment of NIED Bystander Recovery. Since the *Hegel* case authorized NIED recovery for someone who views the aftermath of an accident, plaintiffs' counsel in future Washington cases will strive to characterize circumstances at the time of a plaintiff's presence as highly similar to the circumstances at the exact time of the immediate victim's injury. Similarly, in other states where judicial sentiment seems to restrict this cause of action, counsel must frame arguments that relate to the underlying basis for establishing the tort in the first place. In other words, where a plaintiff encounters a close relative's plight in any way that is different from actually seeing the occurrence of the injury, counsel must seek to argue that the overall circumstances were qualitatively different from merely learning about the harm in a conversation remote from the scene. Where those differences are present, courts that are attentive to the policy basis for bystander recovery may be persuaded to allow its application.

RELATED LINKS: For an overview of negligent infliction of emotional distress, see
- 13-55A Personal Injury -- Actions, Defenses, Damages § 55A.09;
- 1-5 Damages in Tort Actions, Part II Specific Losses, Chapter 5, Negligent Infliction of Emotional Distress

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17 of 41 DOCUMENTS

Joe McDonnell on Wills v. Foster, 2008 Ill. LEXIS 629

2008 Emerging Issues 2563

Joe McDonnell on Wills v. Foster, 2008 Ill. LEXIS 629, Docket No. 104538, Revisiting the Collateral Source Rule -- Again -- With an Added Twist for Flavor.

By Joseph B. MCDonnell

July 17, 2008

SUMMARY: Can an injured party recover damages for medical bills paid in whole or in part by insurance? What if the services were rendered without any expectation of payment? Doesnt this constitute a windfall for the plaintiff? The answers and how *Wills v. Foster, 2008 Ill. LEXIS 629,* was actually decided is discussed in detail by experienced Illinois litigator Joe McDonnell.

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ARTICLE: In *Wills v. Foster, 2008 Ill. LEXIS 629,* the Illinois Supreme Court, for the second time in three years, was presented with an opportunity to extend or to limit the common-law collateral source rule. As in *Arthur v. Catour, 216 Ill. 2d 72 (2005)* the issue was whether the plaintiff was entitled to sue for the full amount of her medical expenses as billed or whether she was restricted to the amounts actually paid on her behalf by a third party -- in *Arthur*, by private insurance, and in *Wills*, by Medicare and Medicaid.

After extensive discussion of the rule and the policy reasons behind it, the Court concluded that the correct application of the rule entitles the plaintiff to sue for the "reasonable value" of the services rendered, regardless of the amount actually paid; and that such "reasonable value" may be proven even in those cases where no charge for services has been made (overruling *Peterson v. Lou Bachrodt Chevrolet Co., 76 Ill. 2d 353 (1979)).* The case is noteworthy both for its exposition of the collateral source rule and its differing applications by the courts; and for the "twist" which enabled the Court to dispose of the case through a simple evidentiary rule. The two aspects of the opinion will be discussed in that order.

I.

The collateral source rule is supported by substantial case authority in Illinois. The rule is that payments made to or benefits conferred on the injured party from other sources are not to be credited against the tortfeasor's liability, even though they cover all or part of the harm for which the tortfeasor is liable. Put another way, benefits received by the injured party from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable. The rule is based on the proposition that a defendant tortfeasor should not be allowed to lessen his responsibility in tort because of a relationship between the plaintiff and the third party payor (such as a medical

insurer) to which the defendant is not a party.

An inroad into the operation of the rule was made in *Peterson v. Lou Bachrodt Chevrolet Co., 76 Ill. 2d 353 (1979),* in which the Supreme Court held that a minor plaintiff could not recover the reasonable cost of medical care furnished by the Shriners' Hospital because the services were rendered without charge. Since plaintiff incurred no legal liability for the medical care provided, he could not claim the value of such services as damages, because no "damages" had been incurred for which compensation could be recovered. To permit recovery in the absence of evidence that plaintiff had an obligation to pay would result in a windfall for the plaintiff.

The Supreme Court's disposition in *Wills v. Foster* makes it clear that neither billing nor collection is a relevant consideration; indeed, whether the plaintiff "incurred" expenses is at best secondary. Where the injured party has received care and treatment for her injuries, she is entitled as a part of her compensatory damages to the reasonable value of those services. *Peterson,* said the Court, had ignored this approach, as well as pertinent sections of the Restatement (Second) of Torts dealing specifically with collateral source issues. *Wills v. Foster,* slip op., 13-14, 16-17. As to the tortfeasor, it is only fortuitous that plaintiff is protected, in whole or in part, by a third party payor, whether it be Medicare or Medicaid, or, as in *Peterson,* where the services are rendered gratuitously. To the contention that this results in a windfall for the plaintiff, who may recover amounts never actually paid by him, or for which he has incurred no legal obligation, the Court said that a benefit which is directed to the plaintiff because of a relationship with a third party should not be shifted so as to become a windfall for the tortfeasor. *Peterson* was thus expressly overruled. *Wills v. Foster,* slip op., 18.

Tips for Practitioners. The Supreme Court, at the outset of its opinion, recognized that its opinion in *Arthur v. Catour* had left certain questions unanswered. Those questions have now been resolved. With its opinion in *Wills v. Foster,* Illinois joins the majority of states which hold that plaintiffs may recover the "reasonable value" of medical services provided them, and that such amounts are not to be reduced by amounts forgiven or discounted by the insurance provider or, as in Medicaid cases, by the government.

Recovery of the "reasonable value" of medical and hospital bills has been a part of the Illinois Pattern Jury Instructions for years. See *IPJI, 30.06* (jury to consider "the reasonable expense of necessary medical care, treatment and services received"). Where plaintiff has been billed for the services and the bill paid in full, there is a presumption that the charges are reasonable. *Gill v. Foster, 232 Ill.App.3d 768 (4th Dist. 1992).* Where the bill has not been paid, or where a lesser amount has been accepted in full payment by the provider pursuant to an insurance contract or Medicare, the plaintiff may prove that the billed amount is reasonable by calling a witness familiar with the services (the doctor, the hospital administrator, etc.) to so testify. Since *Peterson* is overruled, services rendered gratuitously are recoverable, so long as plaintiff establishes through competent testimony the reasonable value of such services. See *Arthur v. Catour, 216 Ill. 2d at 81-83.*

Defendant may dispute the charges billed, but not by introducing evidence that the original bill was settled for a lesser amount, whether through Medicare, private insurance, Medicaid, or voluntary compromise -- or forgiveness -- by the provider. Defendant may call its own witnesses to dispute either the necessity of the services rendered or the amount billed for those services, or both. The jury then considers all of the evidence, including the bills and the testimony concerning the services, their necessity and the reasonable cost thereof, and determines whether to award all, part or none in damages.

II.

Now for the "twist" -- the Third District Appellate Court had affirmed the trial court's reduction of the medical expenses awarded plaintiff from the billed amount of $80,163.77 to the actual paid amount -- $19,005.50 -- citing *Peterson.* On appeal, the case was briefed and argued solely on the application of the collateral source rule. The record disclosed, however, that plaintiff, after introducing her medical bills into evidence, did not call a witness to testify to the reasonableness of the bills and nor did the defense. Without more, that would mean that plaintiff would not be entitled

to damages for the billed medical services, because (1) the bills had not been paid (at least not in full, and there was no evidence as to what portion had been paid), and (2) the bills alone are not evidence of reasonableness. See *Arthur v. Catour, 216 Ill.2d at 81-83.* However, the bills (or a summary thereof) had been admitted into evidence by stipulation. The Supreme Court held that the stipulation and the defendant's failure to object or to offer any evidence regarding reasonableness relieved the plaintiff of the burden of establishing reasonableness.

Both parties had filed pre-trial motions *in limine*. Plaintiff's motion to prevent the defense from introducing evidence of the reduced Medicare and Medicaid payments was sustained; the defendant's motion to limit plaintiff's medical bills to the paid amounts was denied.

Defendant took the position on appeal that the issue was adequately presented in the pre-trial motions, that the substantive issue was properly preserved, and that the amounts written off were not recoverable as a matter of law. That position was rejected by the Supreme Court, as earlier discussed. The evidentiary hook on which the case hung, therefore, involved the admissibility of the evidence of the medical bills pursuant to the stipulation. The Court held that the stipulation relieved the plaintiff of her burden of establishing that the amounts sued for were reasonable for the services rendered, and enabled the jury to award the full amount, absent any issue as to their reasonableness.

Two things should be kept in mind:

1. A party is bound by the consequences of her stipulation unless such stipulation is unreasonable, the result of fraud, or violative of public policy. *Higginbotham v. American Family Ins. Co., 143 Ill.App.3d 398 (3rd Dist. 1986).* No such circumstances existed here. The jury was therefore entitled to consider the medical bills as presented and without limitation.

2. An order on a motion *in limine* is interlocutory and remains subject to reconsideration by the court throughout the trial. *Romanek-Golub & Co. v. Anvan Hotel Corp., 168 Ill.App.3d 1031 (1st Dist. 1988).* Where the motion is denied, the movant must nevertheless object to the evidence in question when it is offered at trial; failure to do so results in waiver. *Reid v. Sledge, 224 Ill.App.3d 817 (5th Dist. 1992).*

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ABOUT THE AUTHOR(S):

Joseph B. McDonnell is an attorney affiliated with the Swansea, Illinois office of Greensfelder, Hemker & Gale, P.C. He graduated from Saint Louis University School of Law, where he was a member of the law review. He is licensed to practice in Illinois and Missouri and in the United States Seventh Circuit Court of Appeals, as well as in the federal courts for the Southern and Central Districts of Illinois. He served as an Assistant State's Attorney in St. Clair County, Illinois for over eight years and has extensive litigation experience in both civil and criminal cases. He currently serves as an adjunct professor at Southwestern Illinois College, where he teaches law courses to paralegal students. Mr. McDonnell's trial practice has included the defense of legal malpractice suits, product liability actions, industrial accident cases and commercial litigation. He is a member of the Illinois State Bar Association, the American Bar Association, the Metropolitan Bar Association of St. Louis, and past president of the St. Clair County (IL) Bar Association. He is also a member of the Bar Association for the Central and Southern Districts of Illinois, the Seventh Circuit Bar Association and the Appellate Lawyers Association of Illinois. He serves on the board of the Lawyers Trust Fund of Illinois.

Arthur Best on Baldonado v. El Paso Natural Gas Co., 176 P.3d 277 (N. Mex. 2008)

2008 Emerging Issues 2412

Arthur Best on Baldonado v. El Paso Natural Gas Co., 176 P.3d 277 (N. Mex. 2008)

By Arthur Best

June 25, 2008

SUMMARY: Modifying the state's prior firefighter's rule, the New Mexico Supreme Court expanded the circumstances in which a professional rescuer may be entitled to recover damages against a defendant whose conduct caused their injuries. Arthur Best, a Professor of Law at the University of Denver Sturm College of Law, comments on the practical implications of *Baldonado v. El Paso Natural Gas Co., 176 P.3d 277 (N. Mex. 2008).*

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ARTICLE: Overview

Firefighters responding to the scene of a natural gas pipeline explosion suffered emotional distress when they observed the injuries the explosion had caused to many members of an extended family who had been camping at that location. Modifying the state's prior firefighter's rule, the New Mexico Supreme Court expanded the circumstances in which a professional rescuer may be entitled to recover damages against a defendant whose conduct caused their injuries. Among the potential causes of action now available is one for intentional infliction of emotional distress, which can be based on proof of a defendant's reckless conduct as well as intentional conduct.

Summary of the case

In the summer of 2000, a high-pressure natural gas pipeline operated by the defendant ruptured south of Carlsbad, New Mexico. Twelve members of an extended family were camped in the area of the pipeline. The escaping gas created a fireball that engulfed the campsite. All twelve family members, including young children, either were killed during the fire or died later from severe burns. The survivors were conscious but in obvious physical pain and mental anguish.

The plaintiffs in this case were paid and volunteer members of local fire departments who responded to the explosion. They did not suffer any physical injuries from the fire or explosion, but they asserted that they suffered extreme emotional distress from witnessing the victims' severe injuries when they assisted those victims.

The plaintiffs sought damages for negligent and intentional infliction of emotional distress. The trial court dismissed the claims on the basis of the firefighter"s rule. The intermediate appellate court affirmed the trial court with respect to the negligent infliction of emotional distress claim, but reversed with respect to the intentional infliction of

emotional distress claim. The Supreme Court granted certiorari on the question of the intentional infliction of emotional distress claim.

Pertinent Legal Principles

Firefighters' Rule. This doctrine, in force in most states, prohibits firefighters from suing for damages sustained while responding to a fire. The rule ordinarily provides an exception for cases where the owner or occupier of the land fails to warn of a known danger or misrepresents the nature of the hazards being confronted by the firefighter. In New Mexico, the firefighter's rule was adopted in *Moreno v. Marrs, 695 P.2d 1322 (N. Mex. Ct. App. 1984).*

See generally, 35A Am Jur 2d Fires § 51, Injuries Sustained by Firefighters' "fireman's rule" and 62 Am Jur 2d Premises Liability § 425, "Firefighter's Rule"; Assumption of Risk.

Intentional Infliction of Emotional Distress. The tort of intentional infliction of emotional distress was developed by common law courts as a response to dissatisfaction with the result in cases where a defendant's conduct was odious and likely to cause a victim to suffer emotional distress, but where the common law assault cause of action was not available because the defendant did not intend to place the victim in fear of an imminent harmful or offensive touching.

Many courts have adopted the Restatement (Second) of Torts articulation of this cause of action. It treats both intentional and reckless conduct. In § 46, the Restatement sets out a two-pronged approach, providing for both first-party and third-party claims:

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

(a) to a member of such person"s immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.

New Mexico adopted the Restatement provision in *Trujillo v. Northern Rio Arriba Electric Cooperative, Inc., 41 P.3d 333.* (N. Mex. 2002).

The New Mexico Supreme Court's Decision

Firefighter's Rule. The court provided a scholarly and fairly lengthy description of the origins of the firefighter's rule. It noted that jurisdictions have based the rule on analysis of landowners' duties to entrants on land, assumption of risk, or general issues of public policy. It analyzed a recent Utah decision, *Fordham v. Oldroyd, 171 P.3d 411* (Utah, 2007), as exemplifying the public policy rationale. The Utah court held that a person creating a peril owes a professional rescuer *no duty* if the rescuer's injury (1) was derived from the negligence that occasioned the rescuer's response; and (2) was within the scope of risks inherent in the rescuer's professional duties. That result was supported by the rationales that the firefighter's rule encourages the public to summon assistance when they need help and recognizes that firefighters have freely chosen to encounter risks. Also, since taxpayers support rescue professionals, the rule avoids having taxpayers pay twice, one in taxes and a second time in a court judgment, when firefighters' services are needed.

The New Mexico court stated that its version of the firefighter"s rule is related to the rescue doctrine. That doctrine

protected a rescuer from being barred from recovery because of a finding of contributory negligence. A modern understanding of the doctrine would treat it as equivalent to a finding that those who create hazards owe a duty of care to rescuers. That notion, however, leads to a perceived need for the firefighter"s rule. Although there is no general duty to rescue, the rescue doctrine creates a duty of care to rescuers. When a rescuer such as a firefighter already has a duty to rescue, the rationale for imposing a duty changes. The firefighter's rule essentially limits the rescue doctrine. While the rescue doctrine creates an exception to traditional tort no-duty rules, the firefighter"s rule limits that exception.

The New Mexico court criticized the recent Utah formulation because it would allow recovery for injuries arising from negligent actions, so long as those injuries were outside the normal scope of a firefighter's duties. Instead, the New Mexico court established a two-prong test based on culpability. Under its test a person creating a peril owes a professional rescuer *no duty* if the rescuer"s injury (1) was derived from the negligence that occasioned the rescuer's response; *or* (2) was derived from the reckless conduct that occasioned the rescuer's response and was within the scope of risks inherent in the rescuer"s professional duties.

Thus, for harms related to intentional conduct there is no immunity, and for harms related to reckless conduct there is immunity only if the harms are within the inherent scope of professional rescuers' duties. Additionally, negligence different from negligence that creates the need for a rescue, such as maintaining concealed hazards or falsely describing a potential hazard, is outside the coverage of the firefighter's rule.

To apply the second prong of its new test to the current case, the court was required to consider whether the alleged infliction of emotional distress was outside the normal scope of distress inherent to their profession. It stated that ultimately that would be a jury question, but that the complaint's allegations were adequate in that regard. The plaintiffs alleged physical symptoms that have affected their personal lives, including nightmares and flashbacks. Those consequences could be found by a jury to exceed the normal scope of injuries inherent to the profession.

Intentional Infliction of Emotional Distress. Having decided that severe emotional distress, inflicted recklessly, could be actionable even for the benefit of a professional rescuer, the court next was required to consider whether the rescuers in this case had properly stated that cause of action.

Under *Trujillo v. Northern Rio Arriba Electric Cooperative, Inc., 41 P.3d 333.* (N. Mex. 2002), an intentional infliction of emotional distress plaintiff must show that 1) the defendant's conduct was extreme and outrageous, 2) the defendant acted intentionally or recklessly, 3) the plaintiff suffered extreme and severe mental distress, and 4) a causal connection between the defendant"s conduct and the plaintiff"s mental distress.

In characterizing conduct as extreme and outrageous, prior cases have typically involved a preexisting relationship between the plaintiff and the defendant. Examples include *Coates v. Wal-Mart Stores, Inc., 976 P.2d 999 (N. Mex. 1999)* (employer-employee and Workers' Compensation Act) and *Jaynes v. Strong-Thorne Mortuary, Inc., 954 P.2d 45 (N. Mex. 1998)* contract for burial).

While the New Mexico court did not hold that a special relationship is required, it noted a structure of statutes and regulations that "requires more of both parties than the typical relationship of a member of the general public with the local fire department. It requires more than even a business owner or landlord who must abide by a fire code and pass inspections. This regulation requires active cooperation between Defendant and Plaintiffs. In particular, [a regulation] requires Defendant and Plaintiffs to work together to minimize the exact risk that Plaintiffs allege led to their injuries in this case." *Baldonado v. El Paso Natural Gas Co., 176 P.3d at 285 (N. Mex. 2008).*

In the context of this relationship the court noted that it is highly unlikely that calling firefighters in response to an emergency will ever be considered extreme and outrageous conduct. However, other conduct by the defendant could be characterized as extreme and outrageous by a jury. The plaintiffs alleged that the defendant failed to take steps necessary to insure the safety of the pipeline at issue, had been cited for past safety violations, had experienced at least two previous pipeline explosions, and knew that the area around the pipeline involved in this case was used for

camping. Despite this knowledge, and its obligation to coordinate with firefighters, the defendant did not share any of this information with the plaintiffs. The court concluded that allegations that the defendant knew about the specific risks inherent in failing to maintain its pipelines, and that the plaintiffs would be exposed to those risks, could support a finding of such abuse of the relationship between the plaintiffs and the defendants.

In relation to recklessness and causation, the court found that allegations of disregard of prior explosions could support a finding of recklessness, and that the narrative of events starting with the defendants' conduct and the plaintiffs' claimed injuries would satisfy the required causation element.

Comments

Re-examination of the firefighter's rule is widespread. See, Robert H. Heidt, *When Plaintiffs Are Premium Planners for Their Injuries: A Fresh Look at the Fireman"s Rule, 82 Ind. L.J. at 745 (Summer 2007),* for a description of national trends. Some states have essentially abrogated the rule, as in New Jersey where a statute allows rescuers to seek damages on all grounds, including negligence. See N. J. Stat. § 2A:62A-21.

Plaintiffs' attorneys should be aware that courts may be open to further expansions of plaintiffs' rights in these contexts. The debate between the Utah and New Mexico courts, represented in this opinion, shows that at least some courts are willing to expose even actors whose culpability is only negligence to liability towards professional rescuers.

It should be noted that supervisors of firefighters are unlikely to be targets of intentional infliction of emotional claims merely because they send firefighters into dangerous situations. The New Mexico Supreme Court treated an arguably parallel case in the context of workers' compensation. See *Delgado v. Phelps Dodge Chino, Inc. 34 P.3d 1148 (N. Mex. 2001)* (when an employer engages in an intentional act or omission, without just cause or excuse, that is reasonably expected to result in the injury suffered by the worker an employer could be liable for a worker's injury, but firefighters and police fall under the "just cause or excuse" exception).

RELATED LINKS: See generally,
- 38 Am Jur 2d Fright, Shock, and Mental Disturbance § 15

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19 of 41 DOCUMENTS

Tatting on Exculpatory Clauses Under Minnesota Law

2008 Emerging Issues 2347

Tatting on Exculpatory Clauses Under Minnesota Law: Uncertain Shields Against Liability

By Troy F. Tatting

June 4, 2008

SUMMARY: Exculpatory clauses in participant waiver forms are presumptively disfavored by judges and juries. However, when properly drafted, such clauses can minimize or eliminate the claim of an injured participant. Attorney Troy Tatting reviews this significant topic and provides practical tips to plaintiff and defense attorneys facing the prospects of litigating a case in which the enforceability of an exculpatory clause may dictate the outcome.

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ARTICLE: *Exculpatory clauses garner mixed reviews from courts, juries, and consumers but can be useful tools in the armory of companies that provide services involving significant risk. Litigators and transactional attorneys alike will benefit from knowing the strengths and limitations of these devices.*

Companies routinely include exculpatory clauses in contracts with their clients. Exculpatory clauses are especially important to companies that provide services involving a significant risk of physical injury, such as health clubs, ski resorts, skydiving companies, horse stables, and paintball facilities. These clauses purport to relieve a company from liability resulting from a negligent or wrongful act. n1 The idea behind such provisions is that once a patron signs a contract containing an exculpatory clause, the patron's ability to bring a negligence claim will magically disappear.

In practice, however, an exculpatory clause does not necessarily abrogate litigation. Minnesota courts disfavor exculpatory clauses, and juries may loathe them even more. Minnesota case law has not explicitly approved of certain "magic words" that would make an exculpatory clause airtight. n2 Under these circumstances, the course of litigating a matter involving an exculpatory clause may change dramatically depending on a court's interpretation of the clause in a ruling on a motion to dismiss or for summary judgment.

So how should plaintiff, defense, and transactional attorneys best serve their respective clients when confronted with an exculpatory clause?

Exculpatory Basics. Minnesota case law on exculpatory clauses is still developing, but courts have adopted some basic rules. The rules are conflicted, providing hope for both plaintiff and defense attorneys. On one hand, an exculpatory clause is valid as long as (1) it is not ambiguous in scope; and (2) it does not exonerate the benefited party from liability for intentional, willful or wanton acts. n3 On the other hand, exculpatory clauses are disfavored and

strictly construed against the benefited party. n4 They are also void if they violate public policy considerations. n5

Tactics for Plaintiffs. Plaintiffs' attorneys should be wary, but willing, in taking on an exculpatory clause. An exculpatory clause does not necessarily terminate your client's claims. It may intimidate you because it adds increased risk and litigation costs, even if successful. To reduce monetary risk, consider charging a flat fee to contest the validity of the clause and, if successful, a contingent fee thereafter.

Tip the scales in your favor. Remember, defendants and their attorneys see an exculpatory provision as a complete bar to liability and convenient tool to avoid protracted litigation. Your case's value should inflate significantly if you survive a motion to dismiss or summary judgment. That is why it is essential to have a good handle on the facts before you place your case in suit. You need to be able to create a record for negligence, ambiguity, overly broad contractual language, and an offense to public policy.

First, tell the court about the strengths of the underlying case. You represent an injured party, who needs compensation. You have a good argument that the defendant was, at the very least, negligent. The defendant should have cleaned up that wet floor, fixed its treadmill, tightened that saddle, etc. Show the court that your client would win if not for the exculpatory provision.

Then, attack the contract. Focus on any ambiguity, however small or questionable it may be. This is a disfavored contract and it should be avoided for even the smallest of ambiguities.

Look into the exculpatory language itself to see if it is overly broad. Minnesota courts are unclear about whether an attempt to exculpate intentional misconduct results in the voiding of an entire exculpatory clause or the voiding of only the portion of the clause attempting to exculpate intentional misconduct. n6

Nevertheless, the contract may ask for too much, and you may hope to convince the court that your client should be relieved from its oppressive terminology because of it.

Tactics for the Defense. Keep the case about the contract. Plaintiff signed it voluntarily, gave consideration, and could have contracted with other companies if he or she so desired. Focus on the contractual language that unambiguously blankets the factual scenario that brought about plaintiff's alleged injury. If a clause is unambiguous, construction by the court is unnecessary and summary judgment is appropriate. n7 Plaintiff's alleged injury can be said to be contemplated by the express terms of the contract if it states, for example, that the defendant shall not be held liable for the negligence of its employees or injuries resulting from use of its facilities. If the language suggests that the contract might apply to exonerate willful acts, argue that it does not do so in the underlying case.

Remind the court that exculpatory clauses are routinely upheld and why that is so. Although Minnesota courts disfavor exculpatory clauses, historically they have upheld such clauses in the business and commercial context. n8 Where these clauses have been upheld, the cases rely on principles of freedom of contract and provide that parties may protect themselves against liability resulting from their own negligence so long as the agreement does not contravene public policy or public welfare. n9

You may also want to argue that exculpatory clauses allocate risk between contracting parties. Without exculpatory clauses, your client's membership fees will increase, its inspection costs will skyrocket, or its recreational activities will be unaffordable. In other words, your client will suffer hardship that will be passed on to its clients and consumers.

It's not over until it's over. Remind plaintiff's attorney that you will appeal an unfavorable judgment relating to the validity of the exculpatory clause. Even if the court denies your motion to dismiss or for summary judgment, any recovery at trial might still be completely wiped out with a post-trial reversal.

Drafting Exculpatory Clauses. In drafting exculpatory clauses, adopt language from already scrutinized

contracts. While the courts may not have explicitly approved of certain magic words that would make an exculpatory clause fool-proof, they have upheld contracts containing specific exculpatory language. Find a case, such as *Breehner v. Cragun Corp., 636 N.W.2d 821, 825-26 (Minn. App. 2001),* where a clause has been upheld and set forth in the opinion. Adapt it to apply to your clients' businesses and make a generic annotated copy for your records so you can later explain why you selected certain words and phrases.

Advise your clients about the public policy test. The test examines (1) whether, at the time of contracting, there was a disparity of bargaining power between the parties, and (2) if the type of service being offered is a public or essential service. n10 A disparity of bargaining power exists where an adhesion contract is drafted by a business and forced on an unwilling or unknowing public "for services that cannot readily be obtained elsewhere." n11 To establish a disparity in bargaining power, a party must show that there was no opportunity for negotiation *and* that the services could not be obtained elsewhere. n12

If your client is one that provides a public or essential service, such as a common carrier, hospital, public utility or innkeeper, among others, courts will not enforce its exculpatory clause. n13 A public or essential service includes a service generally thought suitable for public regulation. n14 Recreational activities generally do not fall into the categories of public or essential services. n15

Update your work. A good exculpatory clause today may be an overly broad clause tomorrow. Compare new case law with your annotated copy and adjust it accordingly. Each adjustment gives you a great reason to keep in contact your clients.

Conclusion: Be an Expert. A thorough understanding of how exculpatory clauses are enforced, avoided, and drafted should provide you with an excellent opportunity to market to current clients, generate new business, and impress your partners and associates. Your expertise in this area should make you the go-to-attorney when your firm is dealing with exculpatory clauses.

Return to Text

n1 *Black's Law Dictionary* 258 (2d pocket ed. 2001).

n2 *See, e.g., Anderson v. McOskar Enters., Inc., 712 N.W.2d 796, 798-99 (Minn. Ct. App. 2006)* (Court of Appeals upholds an exculpatory clause which provided: "In consideration of being allowed to participate in the activities and programs of [defendant/exercise club] and to use its facilities, equipment and machinery in addition to the payment of any fee or charge, I do hereby waive, release and forever discharge [defendant], and their officers, agents, employees, representatives, executors, and all others ([defendant's] representatives) from any and all responsibilities or liabilities from injuries or damages arriving [sic] out of or connected with my attendance at [defendant's exercise club], my participation in all activities, my use of equipment or machinery, or any act or omission, including negligence by [defendant's] representatives."); *Schipper v. Dahl Trucking, Inc., 2007 Minn. App. Unpub. LEXIS 671 (Minn. Ct. App. 2007)* (Court of Appeals upholds an exculpatory clause which sought to waive "any claim, demand, action, or cause of action" brought by contractor against defendant trucking company that arose "in connection with the performance of contractor or the contract.") (unpublished opinion). *Compare Yang v. Voyagaire Houseboats, Inc., 701 N.W.2d 783, 786-787 (Minn. 2005)* (Supreme Court finds exculpatory clause unenforceable which provided: "In consideration for being permitted the use of ["defendant/houseboat company's] equipment, the Renter, [..], his/her family, relatives, heirs and legal

representatives do hereby waive, discharge and covenant not to sue [defendant], any affiliated companies, or any of its officers or members for any loss or damage, or any claim or damage or any injury to any person or persons or property, or any death of any person or persons whether caused by negligence or defect, while such rental equipment is in my possession and/or under my use as in accordance to the terms stated in this agreement [...] Therefore, Renter shall indemnify and hold harmless Owner from and against all claims, actions, proceedings, damage and liabilities, arising from or connected with Renter"s possession, use and return of the boat, or arising at any time during the term of this rental."

[3] *Yang v. Voyagaire Houseboats, Inc., 701 N.W.2d 783, 789 (Minn. 2005).*

n4 *Schlobohm v. Spa Petite, Inc., 326 N.W.2d 920, 923 (Minn. 1982).*

n5 *Id. See also Zerby v. Warren, 210 N.W.2d 58, 64 (Minn. 1973).*

n6 *Schlobohm, 326 N.W.2d at 923* (providing that an exculpatory clause is unenforceable if it "purports" to release intentional conduct but citing to cases from other jurisdictions suggesting that an overbroad clause including a release of intentional conduct would be narrowed to a negligence release); *Nimis v. St. Paul Turners, 521 N.W.2d 54, 57 (Minn. App. 1994)* (court voided entire clause where it released all claims caused by negligence "or otherwise"); *Ball v. Waldoch Sports, Inc., 2003 Minn. App. LEXIS 1105 (Minn. App. 2003)* (an attempt to release intentional misconduct would result in voiding only that portion of the clause) (unpublished opinion).

n7 *See Schlobohm, 326 N.W.2d at 923.*

n8 *See Solidification, Inc. v. Minter, 305 N.W.2d 871, 873 (Minn. 1981); Great Northern Oil Co. v. St. Paul Fire & Marine Ins. Co., 189 N.W.2d 404, 407 (Minn. 1971).*

n9 *Arrowhead Elec. Co-op. Inc. v. LTV Steel Mining Co., 568 N.W.2d 875, 878 (Minn. App. 1997).*

n10 *Schlobohm, 326 N.W.2d at 923.*

n11 *Id. at 924.*

n12 *Id. at 924-925; see also Malecha v. St. Croix Valley Skydiving Club, Inc., 392 N.W.2d at 730 (Minn. App. 1986)* (fact that party had no opportunity to negotiate terms of exculpatory agreement by itself not enough to show a disparity in bargaining power).

n13 *Schlobohm, 326 N.W.2d at 923.*

n14 *Id. at 925.*

n15 *Id. at 925-926.*

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Nissenberg on Loading Dock Safety: Forklifts and Tractor Trailers

2008 Emerging Issues 2343

Nissenberg on Loading Dock Safety: Legal Issues Involving Forklifts and the Loading and Unloading of Tractor-Trailers

By David N. Nissenberg

June 2, 2008

SUMMARY: Activity at any loading dock can be frenetic, with tractor-trailers and forklifts constantly in motion, re-positioning, moving to and from a dock, and often maneuvering in tight spaces. OSHA reports that approximately 100 workers are killed and 20,000 are injured every year in forklift mishaps. Truck-accident legal expert David Nissenberg takes a look at the multitude of legal issues arising out of these accidents.

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ARTICLE: Workplace accidents involving trucks often occur during the loading or unloading process. The activity at the loading dock area can be frenetic, with tractor-trailers and powered industrial trucks (i.e. forklifts) constantly in motion, re-positioning, moving to and from a dock, and often maneuvering in tight spaces. The risk to safety of the truckers, the forklift operators, and any other persons present on the premises during these operations cannot be overestimated. The U.S. Department of Labor Occupational Safety and Health Administration (OSHA) reports that there are 68,040 forklift accidents each year. *See* OSHA, *First Report of Serious Accidents, 1985 to 1990*. On average, 100 workers are killed and 20,000 injured every year due to forklift mishaps. Forklift safety violations ranked sixth among OSHA's top 10 violations in the year 2005. *See* www.logisticsmgmt.com.

Loading Dock Area. In order to effectively represent a client in accident litigation involving a forklift, the attorney must first understand how and why the accident happened. This will enhance the attorney's analysis of the situation so that the full range of causes of action, defenses, and responsible parties is considered. At the outset, it is important to understand the setting in which these types of accidents occur. One commentator on loading dock safety described the conditions under which forklift activity often is carried out as follows: "For the lift truck operator, ramps and inclines, overhead obstructions, dissimilar surfaces often wet and slippery, poor lighting in trailers, other vehicular traffic, pedestrian traffic, restricted views, sheer drops, trailer creep, congested staging areas, and accumulations of empty containers, pallets, and debris are hazards which can all be present at the same time within a very confined area." Dave Piasecki, *Loading Dock Safety: Education And Equipment Can Increase Safety In Your Loading Dock*, at www.inventoryops.com.

Types of Forklift Accidents. While there are numerous types of forklift-related accidents, some of the most common are as follows:

1. A truck driver may mistakenly drive away from the dock while the forklift is still being operated in the trailer or, worse yet, while the forklift operator is in the process of either entering or departing the trailer. *See, e.g., J.R. Beadel and Company v. De La Garza, 690 S.W. 2d 71 (Tx. App. 1985).*

2. The trailer may gradually separate from the loading dock due to the ongoing impact and momentum of forklifts traveling in and out of them (trailer creep) or when the truck driver leaves the truck in the wrong gear. *See, e.g., Felix v. Stavis, 385 S.W.2d 72 (Ky. App. 1964).*

3. The load on the forklift is so high and wide that the operator can not see in front of him and while maneuvering either strikes an object or a person or drives off the platform. *See, e.g., Morris v. Owens-Illinois, Inc., 582 So. 2d 1349 (La. App. 2nd Cir. 1991).*

4. The weight of the forklift causes the floor of the trailer to collapse. *See, e.g., Major v. Schmidt Trucking Co.*[cedil] *166 N.W.2d 517 (Mich. App. 1968).*

Safety Features at the Loading Dock. Attorneys should be familiar with devices designed for safety that are used during forklift operations to keep the trailers from moving during the loading/unloading process. This occurrence is known as "trailer creep," and there are a number of safety devices designed to combat it.

One such device is the Wheel Chock. This is usually a wedged shaped wooden block that restrains a vehicle's movement when placed in front of the rear wheels of a trailer. An alternative vehicle restraint device is the ICC bar restraint system. This locks onto or engages the rear-impact guard on a trailer to keep it from moving away from the dock.

A device known as "Dock Levelers" can also help avoid injuries resulting from the space that frequently arises between the dock and the trailer bed. Traversing this space is often treacherous because of differences in the trailer width, height, and floor levels. Therefore, the use of a Dock Leveler is essential because it provides a bridge to the trailer, as well as a ramp to facilitate the height from dock to trailer. Physical barriers can also be set up at the open edges of docks and ramps to prevent the forklift and its operator from falling into space.

OSHA Regulations. When an accident occurs that involves the loading or unloading of a truck at a worksite, counsel must immediately determine whether the actions giving rise to the accident were in violation of any OSHA regulations covering loading dock safety and forklift activity. The violation of an OSHA regulation is considered negligence per se. *See, e.g., Koll v. Manatt's Transp. Co., 253 N.W.2d 265 (Iowa 1977).* It is essential for the attorney involved in a forklift accident case to review the numerous OSHA regulations on powered industrial trucks at 29 CFR § 1910.178 to determine whether a violation of one of these regulations took place and whether the violation was causally related to the accident.

In all cases, an attorney's first inquiry should focus on the forklift operator's training. Under 29 CFR § 1910.178(l)(1)(i), the employer has a duty to "ensure that each powered industrial truck operator is competent to operate a powered industrial truck safely." And, pursuant to 29 CFR § 1910.178(l)(1)(ii), the employer must ensure that "each operator has successfully completed the training required by this paragraph" prior to allowing an employee to operate a powered industrial truck. The regulation includes numerous specified truck-related topics that must be included in the course of instruction. *See* 29 CFR § 1910.178(l)(3). Further, there is a requirement for refresher training under certain circumstances: (a) when the operator has received an evaluation revealing that the operator is not operating the truck safely, (b) when the operator has been involved in an accident, (c) when the operator has been observed operating the vehicle unsafely, (d) when the operator is assigned to drive a different truck, and (e) when a condition in the workplace changes in a manner that would affect the safe operation of the truck. 29 CFR § 1910.178 (l)(4)(ii).

If an untrained trucker has been ordered by a shipper to use a forklift to unload his or her truck, this violation will undoubtedly lead to shipper liability in the case of an accident.

29 CFR § 1910.178 also covers safety issues regarding the safe use of a tractor-trailer while loading or unloading is underway. For instance, it is required that: "the brakes of highway trucks shall be set and wheel chocks placed under the rear wheels to prevent the trucks from rolling while they are boarded with powered industrial trucks." 29 CFR § 1910.178(k). *See also* 29 CFR § 1910.178 (m)(7), which states that: "Brakes shall be set and wheel blocks shall be in place to prevent movement of trucks, trailers, or railroad cars while loading or unloading." The regulations further provide that "the flooring of trucks, trailers, and railroad cars shall be checked for breaks and weakness before they are driven onto." 29 CFR § 1910.178(m)(7).

Forklift operations are also covered in the OSHA regulations. Prohibitions include: driving up to anyone standing in front of a fixed object, 29 CFR § 1910.178(m)(1); standing or passing under the elevated portion of the forklift, 29 CFR § 1910.178(m)(2); giving a ride to anyone not authorized to ride on the forklift or failing to provide a safe place for an authorized rider, 29 CFR § 1910.178(m)(3); providing insufficient headroom under overhead installations, lights, pipes, sprinkler system, etc., 29 CFR § 1910.178(m)(8); as well as a host of other regulations. The violation of any one of these prohibitions could form the basis for liability depending on the circumstances of the accident.

Considering the wide variety and frequency of forklift accidents that occur each year, coupled with the extensive regulations under 29 CFR § 1910.178 regarding forklift use and loading dock safety, the creative attorney in such cases has an enormous supply of options and discovery opportunities to formulate strong causes of action or defenses in his or her case.

Forklift Litigation Based on Products Liability Theories. By far, the most prevalent theories advanced in forklift accident cases are those based on products liability principles. In *The Law of Commercial Trucking* (LexisNexis Matthew Bender, 2007), there is an extensive listing of products liability cases involving commercial motor vehicles. This list includes 48 different decisions under the headings of forklift, forklift truck, lift truck, and power lift truck, and sets forth the defects alleged in each case. *See The Law of Commercial Trucking* §§ 13-19, 2007 Supplement.

One of the issues in these products liability cases involves the use of expert testimony. For example, in *Brown v. Raymond Corp., 432 F.3d 640 (6th Cir. 2005),* the plaintiff alleged that a forklift was unreasonably dangerous because of its defective design. Plaintiff's expert, however, was not an expert in forklift design and had not proposed an alternative design. When the plaintiff then called another expert, this time to prove that defendant's warnings regarding the operation of the forklift had been inadequate, the expert again failed to propose alternative warnings. Under principles set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc., 579 U.S. 599, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993),* both experts were precluded from testifying, with the court finding that the experts failure to propose alternative designs or alternative warnings rendered their testimony "unreliable and irrelevant to the trier of fact." *Brown v. Raymond Corp., 432 F.3d at 648.* Consequently, summary judgment for the defendant was upheld.

Another common products liability allegation involves the failure of a forklift to be equipped with a pedestrian warning system that beeps or buzzes when the forklift is operated in reverse. In *Cordani v. Thompson and Johnson Equip. Co., 792 NYS 2d 675 (App. Div. 2005),* the plaintiff was injured when he was struck by a forklift being driven in reverse by a co-worker. In suing the forklift manufacturer and the company that leased the forklift to plaintiff's employer, plaintiff alleged that the failure of the forklift to be equipped with a backup beeper or some other pedestrian warning system rendered the forklift defective. The trial court upheld the plaintiff's allegations in the face of a summary judgment challenge by defendants, but on appeal the court reversed and granted defendants' motions for summary judgment.

Following an established line of New York cases, the *Cordani* court found that the forklift was not rendered defective simply by the lack of a pedestrian warning system. Indeed, the court noted that the forklift met all national and industry standards, that it was safe for its intended use when properly maintained and operated, and that "no law or regulation mandated a backup alarm or other safety device on forklifts." Furthermore, it was undisputed that the plaintiff's employer had the opportunity to select optional pedestrian warning alarms, but knowingly declined to do so. The court concluded, therefore, that it was plaintiff's employer, not the defendants, that was responsible for the lack of a

pedestrian warning system. Given that the employer was in the best position to decide what optional safety features were needed for its specific business operations, the court found no liability on the part of the defendants.

The lack of a seatbelt on a forklift is another potential area for products liability litigation. In *Huss v. Yale Materials Handling Corp., 538 N.W.2d 630 (Wisc. 1995),* a forklift operator was knocked from the seat of his forklift by a falling pallet. When he fell to the ground, the plaintiff struck his back and was rendered a paraplegic. One of the plaintiff's allegations was that the 20-plus year old forklift should have been equipped with a seatbelt. The jury, however, disagreed, finding that the forklift "was not defective and unreasonably dangerous for lack of a seat belt and that [the defendant] was not negligent in the manufacture of the forklift."

During the trial, the court had permitted defense witnesses to testify that the manufacture of the forklift in 1972 without a seatbelt did not render the forklift defective. However, when plaintiff's counsel sought to cross-examine these witnesses to show that they had recommended in the 1980s that all forklifts should be fitted with seatbelts, the trial court excluded this line of questioning on the ground that such testimony was inadmissible under the subsequent remedial measures rule. On appeal, the court reversed and remanded the case for a new trial, holding that the plaintiff's proposed line of cross-examination should not have been excluded.

The appellate court held that "the apparent inconsistency of the two opinions [by defense witnesses] is a legitimate avenue for [plaintiff's] cross-examination. Eliminating inquiry into the apparent inconsistent opinions of these witnesses unduly restricted [plaintiff's] attempts to demonstrate that a forklift manufactured without seat belts in 1972 was unreasonably dangerous."

While seatbelts or operator restraint devices are currently available on many types of forklifts, OSHA requirements under 29 CFR § 1910.178 do not mandate their use. However, the duties of an employer as set forth in the Occupational Safety and Health Act of 1970 *(29 USC § 651,* et seq.), at § 654(a)(1), provide that "(a) each employer -- (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." Arguably, since the failure to provide a seatbelt on a forklift increases the risk of injury to a forklift operator, an employer under the foregoing section may be duty bound to require the use of seatbelts.

Another potential area of litigation involves forklift rollover accidents. If the injured operator was using a forklift that was not equipped with rollover protection, an allegation of defective design can be made in the context of a products liability case against the manufacturer. *See, e.g., Torres v. Caterpillar, Inc., 928 S.W.2d 233* (Tex. App. 1996.) It should be noted that 29 CFR § 1910.178(m)(9) requires an overhead guard to protect the operator of the forklift from falling objects.

Conclusion. Effective and competent representation of a client in a forklift accident case requires not only knowledge of case law, OSHA regulations, and administrative interpretations, but also an understanding of what transpires in a warehouse or on a loading dock, what procedures are safe, and what devices are available to an employer or premises owner in order to ensure that the forklift operator is able to safely carry out his or her job.

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21 of 41 DOCUMENTS

Nissenberg on Legal Consequences of Driving an Overweight Big Rig

2008 Emerging Issues 2345

Nissenberg on Too Much Weight Kills: Legal Consequences of Driving an Overweight Big Rig

By David N. Nissenberg

June 2, 2008

SUMMARY: Excess weight in connection with big rigs can initiate a chain of events leading to catastrophes and is often overlooked as a cause of accidents involving trucks. Truck-accident litigation expert David Nissenberg examines the many legal issues that arise when a big rig exceeds prescribed weight limits, including the damage that overweight rigs can do to bridges and roads and the impact of excess weight on the operation of trucks.

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ARTICLE: Americans are obsessed with weight. Too much weight, we are told, can be unhealthy, even deadly. We are bombarded daily by a multi-billion dollar industry that gives us a multitude of options for losing weight and staying lean. Unfortunately, America's concern over weight does not reach such obsessive levels when the topic turns to big-rig tractor trailors traveling on our roadways.

Last summer's deadly collapse of the I-35W bridge in Minneapolis is a perfect example of how excessive weight on a load-bearing surface can spell disaster. The August 1, 2007 collapse of the I-35W bridge resulted in the deaths of 13 people and injuries to more than 145 others. After months of on-going investigation, the National Transportation Safety Board ("NTSB") issued a March 17, 2008 update of its interim report on the cause of the collapse and noted that questions of load capacity, design issues, and analysis of undersized and corroded gusset plates continue to be at the center of the investigation. Interestingly, the NTSB also reported that, at the time of the collapse, construction workers had placed 99 tons of sand on the roadway directly over the bridge's two weakest points. The stress of this additional weight was reportedly 83% more than the bridge could handle. (*See* Matthew L. Wald, *Mounds of Sand Stressed Minnesota Bridge, Report Says*, N.Y. Times, March 18, 2008.)

Should it be determined that excess weight played a role in the collapse of the Minneapolis bridge, this won't be the first time that excessive weight has had a critical hand in a bridge disaster. However, in most cases, it isn't piles of sand on the bridge that pose the danger. Rather, it is the overweight truck, tractor-trailer, or intermodal chassis container combination that causes the most serious damage to bridges.

Truck-Related Damage to Bridges and Highways. The I-35W bridge collapse serves as a dramatic illustration of how the failure to consider the impact of weight on a load-bearing surface can have disastrous consequences. Excess weight in connection with big rigs can be just as deadly, can initiate a chain of events leading to catastrophes, and is

often overlooked as a cause of accidents involving trucks.

Sometimes, the cause and effect of these accidents is obvious. When a truck driver ignores the posted load limit on a bridge and proceeds with more weight than allowed, liability for any resulting bridge damage will clearly fall at the feet of the driver and employer. *See generally* Summit *Township Road District v. Hayes Freight Lines, Inc., 44 Ill. App. 2d 274, 194 N.E. 2d 682 (1963); Fifield v. State Farm Mut. Auto Ins. Co., 119 Wis. 2d 220, 349 N.W. 2d 684 (1984).* This would, of course, include personal injury damages as well. *See, e.g., Byers v. Standard Concrete Prods. Co., 268 N.C. 518, 151 S.E. 2d 38 (1966); Nesbitt v. Mulligan,* 11 Con. P. 348, *527 A.2d 1195 (1987).*

Overweight trucks can also cause damage to streets and highways that were not constructed to accommodate such heavy use or loads. *See* Town of *Newport v. Brewer, 566 S.W.2d 873 (Tenn. 1978).* But liability only goes so far. In *Thomas v. Ballard, 577 So. 2d 149 (La. App. 1 Cir. 1991),* a driver lost control of his automobile when it struck a pothole and veered into another lane of traffic, striking a vehicle and injuring its occupants. Plaintiff was able to establish that the poor condition of the road was caused by trucks driving on it in excess of a parish weight ordinance. Nevertheless, the court rejected the plaintiff's theory that the companies whose trucks misused the highway should be held at fault, finding "that the risk which caused the accident was [not] within the scope of any duty imposed on [the companies] by the weight ordinance.." (at p. 151).

Excess Weight and Its Impact on a Truck's Operation. Damages to bridges or highways caused by excessively heavy big rigs represent only one type of problem -- that involving the effect that weight has on the surface over which the truck is traveling. More common, however, and therefore more dangerous, is the impact the excess weight has on the operation of the truck itself and the truck's ability to maintain enough stability to keep its load from shifting or its trailer or chassis container combination from rolling over.

Eighteen wheelers traveling on our interstate highways, in the absence of special overweight permits or exceptions, can legally weigh no more than 80,000 pounds. *See 23 U.S.C.S. § 127*(a). When the big rig is overloaded or overweight, truck-related accidents are more likely to happen because:

1. Increased weight means the truck cannot stop as quickly.

2. Greater weight puts more stress on brakes, increasing the likelihood of failure. *See, e.g., Shaffer v. ACME Limestone Co., 206 W. Va 333, 524 S.E. 2d 688 (1999)* (stone quarry that routinely overloaded trucks held liable for damages caused when one of the trucks experienced brake failure, went through a stop sign, and struck a car killing its driver; plaintiff proved that the constant overloading resulted in the breakdown of the truck's brakes).

3. Greater weight stresses tires, which are rated for specific weights, increasing the likelihood of tire blowout accidents. If a blown tire is not replaced, the remaining tires must support the weight of the load, increasing pressure on them, and making the rig that much more dangerous.

4. Overloaded trucks can get out of control going downhill.

5. Overloaded trucks slow suddenly on hills causing danger to following vehicles at blind corners.

6. Overloaded trucks have a high center of gravity, making them more likely to tip during wind gusts, when steering, when making abrupt moves in traffic, and when banking on curves either in the roadway or on ramps entering or exiting an interstate.

7. Overloaded trucks have a more rearward center of gravity, taking weight off steering wheels, leading to poor steering.

See The Dangers of Overloaded Trucks: What Can Be Done? What Is Being Done? 24-7 PressRelease.com, February 14, 2008, at http://www.24-7pressrelease.com/press-release/the-dangers-of-overloaded-trucks-what-can-be-done-what-is-being-done-41007.php.

As a matter of good practice, an attorney handling an accident case involving an overweight issue that bears on causation should always seek to ascertain the nature of the cargo being transported, how it was distributed in the trailer or container, and whether there was compliance with the very specific rules on protection against shifting or falling cargo as set forth in the Federal Motor Carrier Safety Regulations. *See* 49 C.F.R. § 393.100 et seq.

Enforcement of Weight Laws. Federal and state authorities customarily weigh trucks at weigh stations on our interstate highways. Some states utilize portable truck scales and make unannounced spot checks on roads away from the interstate system, where concrete and asphalt trucks, cement mixers, and dump trucks are more prevalent. When found to be overweight, many states allow the drivers of their rigs, under varying circumstances, to shift, rearrange, remove, redistribute, or unload cargo in order to comply with the state's axle weight limits in order to avoid penalties for an overweight violation.

In California, if a truck driver has a reasonable assumption that the load he has been assigned to drive is overweight, and if the business has an axle weight scale at the loading facility, then the truck driver has a right to demand that the load be weighed before the vehicle leaves the loading facility. At a port facility, the requirement only applies if the scale is located in outbound lanes. *See* Cal. Vehicle Code § 35558.

Recording Truck Weight. Oftentimes in logging or mining operations, suppliers of wood, logs, minerals, or rocks do not have scales on their premises. As a consequence, these businesses frequently release overloaded trucks onto a state highway in violation of state weight laws. *See, e.g*., *Shaffer v. ACME Limestone, supra.* The company to which the load is being transported, which may be a mill or other similar facility, depending on the product being transported, will customarily weigh the load when it arrives in order to determine how much to pay the suppliers. Thus, the actual weight of the load becomes known at the truck's destination point. As stated in the Technical Release 01-R-7 of the Forest Resources Association, Inc., "Wood consuming companies that consistently accept overweight loads can be accused of being 'negligent' in a tort liability case involving a log truck accident. Mills may have their scale house records subpoenaed to find out whether a log truck driver involved in an accident had consistently hauled into the mill overweight."

Attorneys involved in this type of litigation should take heed from the foregoing statement and seek to obtain such records from the mills or other "destination" companies to establish a pattern of overweight hauling.

Hauling Excess Weight as an Unlawful Business Practice. Aside from fines and other penalties meted out by the courts to guilty drivers and trucking companies, there is anecdotal evidence that trucking companies whose trucks regularly receive overweight tickets are also being targeted by city and county authorities for violating state unfair competition laws. Defense attorneys representing these trucking companies report that their clients face unfair competition allegations that carry hefty penalties and allow for injunctive relief. For example, unfair competition under the California law includes any unlawful business act or practice. *See* Cal. Business and Professions Code § 17200. The logic is simple. Driving overweight trucks is unlawful. Those who comply with the law in this scenario become economically disadvantaged when they have to compete with other suppliers or trucking companies who consistently haul overweight loads. Therefore, those who abide by the law should receive the protection of the unfair competition laws that are on the books.

Conclusion. Placing excess weight on trucks has many consequences and provides different avenues for litigation. Attorneys involved in the commercial trucking field should be aware of the often overlooked factor of weight, which may yield a key to protecting a client's business or succeeding in obtaining a fair recovery in a tort case.

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22 of 41 DOCUMENTS

Arthur Best on Hesse v. McClintic, 176 P.3d 759 (Colo. 2008)

2008 Emerging Issues 2326

Arthur Best on Hesse v. McClintic, 176 P.3d 759 (Colo. 2008)

By Arthur Best

May 23, 2008

SUMMARY: Should a driver's conduct be evaluated under a general duty of care or under a more specific duty of care that could permit a directed verdict on the driver's claimed negligence? Arthur Best, Professor of Law at the University of Denver Sturm College of Law, comments on the Colorado Supreme Court's decision in *Hesse v. McClintic, 176 P.3d 759 (Colo. 2008).*

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ARTICLE: Overview

Should a driver's conduct be evaluated under a general duty of care or under a more specific duty of care that could permit a directed verdict on the driver's claimed negligence? In *Hesse v. McClintic, 176 P.3d 759 (Colo. 2008),* the plaintiff in a two-vehicle accident encountered sheep on the road and slowed down, and the defendant then hit the plaintiff's vehicle from the rear. The plaintiff sought damages and the defendant claimed that the plaintiff had been negligent. The plaintiff sought a directed verdict on her comparative negligence. The trial court denied it, but the Court of Appeals reversed, saying that the plaintiff had no duty to pull off the road and that the sudden emergency doctrine also precluded a finding of negligence. In a 4-3 decision, the Supreme Court considered the sudden emergency rule and also decided that this kind of case should be treated under a general duty of care.

Summary of the Case

The plaintiff was driving in the right-hand lane on a highway when she encountered a number of bighorn sheep ahead of her, with some on the highway and some on the shoulder. She slowed up, and the defendant then drove his van from the left-hand lane into her lane and into her car. His view of her car was partly hampered because he had been driving behind a semi-trailer truck. The plaintiff was injured and sought damages from the defendant, and the defendant asserted a claim of plaintiff's comparative negligence. The defendant claimed that the plaintiff acted negligently by slowing down instead of pulling onto the right shoulder.

Testimony showed that the plaintiff thought it might have been safer to have pulled on to the shoulder. It also showed that a driver creates a hazard on a highway if she nearly stops her car in the presence of other speedily-driven cars. The plaintiff moved for a directed verdict on her negligence, but the trial court denied that motion. A jury found

that both drivers had been negligent, and assigned 30% of the responsibility to the plaintiff.

On appeal, the Court of Appeals reversed. It held that, as a matter of law, the defendant was solely negligent because the plaintiff was under no duty to pull onto the shoulder and because in the context of the sudden emergency posed by the sheep the plaintiff exercised the same care that a reasonable person would have exercised.

Pertinent Legal Principles

Comparative Fault. C.R.S. § 13-21-111 (1) establishes that the 49% form of comparative fault governs Colorado negligence cases. It states:

(1) Contributory negligence shall not bar recovery in any action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage, or death recovery is made.

"Sudden emergency" doctrine. This doctrine establishes that "a person confronted with sudden or unexpected circumstances calling for immediate action is not expected to exercise the judgment of one acting under normal conditions." *Young v. Clark, 814 P.2d 364, 365 (Colo. 1991).*

Ringsby Truck Lines, Inc. v. Bradfield, 193 Colo. 151, 563 P.2d 939 (1977). In this case, the Supreme Court affirmed lower court rulings that a plaintiff was free from contributory negligence as a matter of law. Traffic had been re-routed on a highway, so that the direction of travel on one lane was opposite to its usual direction. The plaintiff, driving on that highway, saw the defendant's vehicle coming towards him. He sought to avoid that car by slowing down and pulling off the road (but did not drive into a ditch next to the road). The defendant's car hit the plaintiff's and the plaintiff was injured. The Supreme Court stated that "[R]easonable minds would have to agree that [the plaintiff] did all he was legally required to do in the dangerous situation which suddenly confronted him. His initial rate of speed was not unreasonable under the circumstances. He slowed his vehicle markedly and pulled almost entirely onto the shoulder of the highway. [The plaintiff] was not required to drive his vehicle into the ditch. When a driver sees a vehicle approaching him in the wrong lane, he is entitled to assume that the other driver will return to his proper lane of traffic." With regard to a claim for indemnity by a paving contractor against the defendant driver, the court stated that the driver owed no duty to protect the contractor.

The Supreme Court's Decision

General Duty of Care. The majority noted that to evaluate whether the plaintiff had been negligent, the first step is to determine whether she owed a duty of care under the circumstances, and that this issue is a question of law. The Court of Appeals had found that a driver does not have a duty to pull onto the shoulder when there are animals in the roadway. The majority rejected this position. It relied on *Ringsby Truck Lines, Inc. v. Bradfield, 563 P.2d 939 (Colo. 1977)* for the proposition that drivers owe other drivers a duty to drive with reasonable care under the circumstances. The plaintiff in *Ringsby* did not pull off the road and was free from negligence. For the majority, this holding indicates that under the total circumstances of *Ringsby*, the plaintiff's conduct was reasonable. This is different, the majority stated, from a holding that there can never be circumstances in which reasonable care *would* require a driver to pull over to the side of the road. The majority stated:

Pulling to the shoulder will sometimes be the best decision under the circumstances, but other times, the safest course of action will be to stay on the road. There will be some circumstances in which the animals appear suddenly, and the driver has no time to react and pull over. In other situations, the animals could be farther in the distance, and the driver can slow and pull over in a safe fashion. There are undoubtedly hundreds, if not thousands, of variations on the "vehicle meets animals" fact pattern. As a result, we conclude that the court of appeals erred when it held that as a matter of law, there is no duty to pull over when confronted with animals on the road. Rather, a driver is under a duty to act reasonably under the circumstances -- a duty that may be violated in some circumstances by not pulling over.

Hesse v. McClintic, 176 P.3d 759, 763 (Colo. 2008)

Sudden Emergency. The Court of Appeals in this case relied on the sudden emergency doctrine as another basis for protecting the plaintiff from being found negligent. The Supreme Court majority held that this doctrine requires recognition of unexpected circumstances that call for immediate action, but that it does not preclude a finding that an actor confronted with a sudden emergency acted negligently. Since evaluating whether an actor has been negligent is ordinarily a question of fact for the jury, the sudden emergency doctrine should not have been treated as a basis for a directed verdict on the issue of the plaintiff's negligence.

Dissenting Opinion. Three justices dissented. Their view was that duty should be defined with specificity in some cases, and that the current case represents the kind of situation in which the uniform standard of ordinary care should be withdrawn. To consider whether a particularized duty should replace the typical standard, the dissenting opinion examined a group of factors: the risk involved, the foreseeability of the injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against injury or harm, and the consequences of placing the burden on the actor. The dissent's analysis concluded that the plaintiff's actions did not create a great risk of harm, that it was not foreseeable that a collision would result when she cautiously slowed for the sheep rather than pulling to the shoulder, and that there could be significant consequences of imposing a duty to pull to the side of the road.

Comments

A directed verdict of "no negligence" is unusual in tort cases. However, for any party, having the issue of negligence taken from the jury is ideal. Once the negligence question is left to a jury, any jury verdict is likely to be adequately supported in the record because in most cases there are many factual considerations in the negligence analysis. The authors of the current draft Restatement (Third) have grappled with whether "duty" should be limited or general. The current Proposed Final Draft states:

§ 7 Duty. (a) An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm. (b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.

Restatement of the Law, Third, Torts: Liability for Physical Harm (Proposed Final Draft No. 1)

Comment a to that section states:

There are two different legal doctrines for withholding liability: no-duty rules and scope-of-liability doctrines (often called "proximate cause"). An important difference between them is that no-duty rules are matters of law decided by the courts, while the defendant's scope of liability is a question of fact for the factfinder. When liability depends on factors specific to an individual case, the appropriate rubric is scope of liability. On the other hand, when liability depends on factors applicable to categories of actors or patterns of conduct, the appropriate rubric is duty. No-duty rules are appropriate only when a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases.

The authors of the proposed Restatement would likely suggest that highway accidents are less suitable for "no-duty" rules than are situations that can be defined more clearly: an example of a possible no-duty rule consistent with the proposed Restatement would be one that states that those engaging in competitive sports have no duty to refrain from negligent conduct.

RELATED LINKS: For analysis of the sudden emergency doctrine, see
- 4-12 Personal Injury--Actions, Defenses, Damages § 1

For a review of the related issue of liability for harms caused by trespassing animals, see

- 2-6 Personal Injury--Actions, Defenses, Damages § 6.02

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Nissenberg on Hazmat Highways: Transporting Hazardous Materials on Roadways

2008 Emerging Issues 2202

David Nissenberg on Hazmat Highways: Transporting Hazardous Materials on the Roadways and the Legal Issues that Arise when Spilled Materials Cause Fatalities and Injuries

By David N. Nissenberg

April 25, 2008

SUMMARY: Each day in America there are more than 800,000 shipments of hazardous materials transported across U.S. highways by tractor-tailor rigs. In Hazmat Highways: Transporting Hazardous Materials on the Roadways and the Legal Issues that Arise when Spilled Materials Cause Fatalities and Injuries, renowned truck-accident litigation expert David Nissenberg discusses the legal issues that arise when one of these big rigs is involved in a crash.

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ARTICLE: Introduction. When a gasoline tanker loaded with 8,600 gallons of unleaded gasoline hit a guardrail near the San Francisco-Oakland Bay Bridge on an early April morning in 2007, it exploded with such ferocity that the huge flames leaping from the rig melted the steel underbelly of a highway overpass, causing it to collapse onto the roadway below. Damages were in the tens of millions of dollars, and traffic was disrupted for weeks as repairs to the freeway system were made.

Gasoline, of course, is a hazardous material like so many other types of flammable liquids that are transported in tanker trucks on our nation"s highways. (For a list of hazardous materials, *see* 49 C.F.R. § 172.101.) Each day there are more than 800,000 shipments like the one involved in the Bay Bridge accident. From 1991 through 2000, fatal truck crashes accounted for 636 cargo spills involving hazardous materials. (*See* May 2004 report of The Office of Information Management of the Federal Motor Carrier Safety Administration (FMCSA) titled "Crashes Involving Trucks Carrying Hazardous Materials" (Pub. # FMCSA-R1-04-024)). Because of the potential dangers of such accidents, the possibility of a hazardous material spill catches the attention of local firefighters and environmental protection professionals throughout the country.

In an article in newsvirginian.com titled "Hazards On The Highway" published on January 25, 2008, it was estimated that 216,000 gallons of flammable liquid-more than 25 times the amount in the Bay Bridge fire-travel north and south on Interstate 81 in Augusta County, Virginia, every 60 minutes. The County Fire and Rescue Deputy Chief was quoted as saying, "Any interstate with the amount of material we"ve got going up and down [I-81] is a time bomb."

The FMCSA report notes that, of the trucks involved in fatal and nonfatal accidents each year, less than 5% were carrying hazardous materials at the time. That is the good news. The bad news, however, is expressed in the Report's

concluding paragraph: "... a single crash of a truck transporting hazmat in a crowded area has the potential for deaths and injuries far beyond that of a truck carrying non-hazmat cargo. Extensive property damage and economic and personal disruption from immobilizing traffic and/or evacuation of homes and businesses is not uncommon in hazmat crashes."

Strict Liability Issues. When personal injury litigation involving hazardous materials spills reaches the appellate level, one particular issue seems to grab the attention of the court, and that is the issue of strict liability. The seminal case on this topic is *Siegler v. Kuhlman, 81 Wn. 2d 448, 502 P.2d 1181 (Wash. 1972),* where tragically a young lady drove her car into a pool of thousands of gallons of spilled gasoline and died in the flames of a subsequent gasoline explosion. This spill was caused when a tank trailer disengaged as it was being driven down an off-ramp. It then catapulted off the freeway through a chain-link fence and landed upside down on the road on which the young lady was driving. Why the accident happened was a mystery since evidence of the driver's negligence was sketchy at best; the rig had been well maintained and conformed to ICC standards, and there was no evidence of patent defects in the metal connection between the truck and the trailer. With this in mind, the Washington Supreme Court decided to apply strict liability as set forth in the Restatement of Torts (2d) § 519, and stated as follows at p. 1187:

Transporting gasoline as freight by truck along the public highways and streets is obviously an activity involving a high degree of risk; it is a risk of great harm and injury; it creates dangers that cannot be eliminated by the exercise of reasonable care. That gasoline cannot be practicably transported except upon the public highways does not decrease the abnormally high risk arising from its transportation. Nor will the exercise of due and reasonable care assure protection to the public from the disastrous consequences of concealed or latent mechanical or metallurgical defects in the carrier"s equipment, from the negligence of third parties, from latent defects in the highways and streets, and from all of the other hazards not generally disclosed or guarded against by reasonable care, prudence and foresight. Hauling gasoline in great quantities as freight, we think, is an activity that calls for the application of the principles of strict liability.

See also Zero Wholesale Gas Co. v. Stroud, 571 S.W.2d 74 (Ark. 1978) (delivery of propane gas found to be an ultra-hazardous activity).

As the law evolved, an exception to the application of strict liability in the transport of hazardous materials began to take hold, culminating in Restatement of Torts (2d) § 521. Known as the common carrier or public duty exception, it is premised on the belief that, if a common carrier is legally obligated to carry abnormally dangerous cargo, it should not be held liable for damage that may result in the course of that transportation (such as, for instance, that which would be caused by an explosion of dynamite), absent some showing of negligence on the part of the carrier. *See, e.g., Christ Church Parish v. Cadet Chemical Corp., 25 Conn. Supp. 191, 199 A.2d 707 (Conn. Super. 1964).*

This exception has its detractors. *See, e.g., Chavez v. Southern Pacific Transportation Co., 413 F. Supp. 1203 (E.D. Cal. 1976); National Steel Service Center, Inc. v. Gibbon, 319 N.W.2d 269 (Iowa 1982)* (strict liability applied to the common carrier for abnormally dangerous activities such as transporting liquefied propane gas). Nevertheless, it must be pointed out that there are far more reported cases rejecting the label of ultra-hazardous or abnormally dangerous activity to the transportation, storage, or use of flammable liquids, which are otherwise considered to be hazardous materials. *See, e.g., Indiana Harbor Belt R.R. v. American Cyanamid Co., 916 F.2d 1174 (7th Cir. 1990); Smith v. Kauffman, 366 N.E.2d 1195 (Ind. App. 1977);* 750 *Old Country Road Realty Corp. v. Exxon Corp., 229 A.D.2d 1034, 645 N.Y.S.2d 186 (1996).*

Discovering Potential Defendants and Cross-Defendants. Determining the applicable law of hazardous materials spill litigation is not the only task that an attorney will encounter in his or her efforts to prepare the best possible case. It is important to understand the cause of the spill and whether the spill was preventable. By engaging in this exercise, potential defendants and cross-defendants, other than the obvious ones, may become apparent. An excellent source to consider, particularly in high-profile spill cases, is found in the Highway Accident Reports prepared by the National Transportation Safety Board (NTSB), which detail probable causes of such accidents and make recommendations based on a comprehensive investigation of the facts underlying the accident. Some examples follow:

(1) A collision between a car and a tractor-trailer loaded with dynamite resulted in a fire and an explosion 10 to 15 minutes later. A contributing cause to some of the fatalities was the decision by firemen, not properly trained in emergency responses, to try to contain the hazardous fire rather than evacuate the area. (NTSB No. HAR-72/05).

(2) A car collided with a truck carrying a cargo of poisonous chemicals stored in steel cylinders. Several cylinders were punctured and others experienced valve failures precipitating the release of the poison into the atmosphere, resulting in the deaths of four people exposed to the spilled cargo. The crashworthiness of the cylinders was called into question due to the absence of fail-closed shut-off valves. (NTSB No. HAR-72/03).

(3) Orange-colored vapors began escaping from a cargo tank containing 3,200 gallons of mixed hazardous waste while parked at a truck dealership, resulting in serious injuries to persons who came into contact with the vapors and causing an evacuation of a three square mile area. The shipper had failed to specify the need for a cargo tanks constructed of materials compatible with the hazardous waste acids to be shipped, which resulted in a severe corrosive reaction and disintegration of the cargo tank shell. (NTSB No. HZM-8501).

(4) A gas company sent one of its cargo tank semi-trailers to a steel company to be loaded with anhydrous ammonia, a poisonous and corrosive gas. While the cargo tank was being loaded, its front head cracked open releasing vapor that caused inhalation injuries and an evacuation. The Hazardous Materials Regulations (49 C.F.R. Parts 171-180) require that, if anhydrous ammonia is to be transported on the highway in a cargo tank constructed of quenched and tempered steel, as was the tank at issue, then there must be a minimum water content in the anhydrous ammonia of .02%, otherwise the tank will crack. The gas being loaded did not have the minimum water content. The steel company had failed to establish and implement loading procedures that would prohibit using the wrong type of cargo tank, and the gas company had failed to tell its drivers that anhydrous ammonia containing less than .02% water should not be loaded into cargo tanks manufactured of quenched and tempered steel.

These few examples show how potential defendants and cross-defendants can be better identified once the cause of the accident is reported in the NTSB Highway Accident Reports. Other potential defendants and cross-defendants in hazardous materials litigation include the manufacturers of trailer trucks. A truck manufactured without bottom-damage protection devices, which are meant to protect external product piping or "load lines," is most probably an unsafe vehicle. These lines, which run beneath the truck, are supposed to be relatively free of hazardous materials because they are vulnerable to damage in an accident. When struck, these lines can release fuel which, in turn, can precipitate the type of explosion and fire that can consume the entire truck. *See* 49 C.F.R. Part 173, "Hazardous Materials: Safety Requirement for External Product Piping in Cargo Tanks Transporting Flammable Liquids" at Federal Register, Feb. 10, 2003 (Vol. 68, No. 27).

Additionally, rollovers of cargo tanks are increasingly becoming a subject of study. *See* "Cargo Tank Roll Stability Study," conducted by Battelle for the Federal Motor Carrier Safety Administration. The study shows an annual number of cargo tank rollovers in excess of 1,260, many of which are fatal to the truck driver. And further, the study reported that rollovers "are among the most serious crashes for cargo tank motor vehicles carrying hazardous materials." As an attorney involved in a cargo tank rollover case, your investigation should center on driver training, electronic stability systems for tractors and trailers, improvements in vehicle design, and highway design factors. Also, be aware of new technology in the form of rollover warning devices. Actual warnings may be entered into a data logging unit, which is an electronic memory device that records data on truck and component performance and may later be downloaded. For more information, *see* the October 1, 2007, edition of *Bulk Transporter Magazine*.

Finally, an attorney handling this type of litigation should never overlook the possibility of poor highway design factoring into the cause of a trailer truck collision. In the June 2006 "Risk Analysis Study of Hazardous Materials Trucks Through Eisenhower/Johnson Memorial Tunnels," prepared for the Colorado Department of Transportation, one of the recommendations concerning U.S. Route 6 was that it "should undergo evaluation to determine if investigations to the route geometry and roadway conditions could be done to help reduce the problems faced by hazmat truck drivers with side-to-side sloshing of liquid cargo in bulk containers while traveling over Loveland Pass."

Any accident on Route 6 involving a tanker truck that is causally related to the scenario set forth in the aforementioned study would require the attorneys on the case to do an in-depth analysis of the accident to determine if the DOT or state is exposed to liability for having failed to provide a safe roadway for tanker trucks to travel.

Conclusion. The phrase "there is more than meets the eye" perfectly describes what awaits an attorney handling a death or injury case when the transportation of hazardous materials is involved. Proper research into the law and the facts and an investigation of potential causes is a necessity for successful resolution of the case.

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24 of 41 DOCUMENTS

Arthur Best on Lanahan v. Chi Psi Fraternity, 175 P.3d 97 (Colo. 2008)

2008 Emerging Issues 2181

Arthur Best on the Colorado Wrongful Death Act Ceiling On Noneconomic Damages, Lanahan v. Chi Psi Fraternity, 175 P.3d 97 (Colo. 2008)

By Arthur Best

April 16, 2008

SUMMARY: The Colorado Supreme Court determined that the Colorado Wrongful Death Act ceiling on noneconomic damages is on a per claim basis rather than on a per defendant basis. Arthur Best, Professor of Law at the University of Denver Sturm College of Law, comments on *Lanahan v. Chi Psi Fraternity, 175 P.3d 97 (Colo. 2008).*

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ARTICLE: Overview

Colorado's Wrongful Death Act includes a cap on noneconomic damages but is arguably ambiguous regarding whether the cap applies to a plaintiff's total recovery or applies to damages obtainable from each defendant in a case with multiple defendants. The Colorado Supreme Court interpreted the statute as setting a ceiling on a per claim basis rather than on a per defendant basis.

Summary of the Case

The plaintiff's decedent died as a consequence of hazing at the University of Colorado-Boulder chapter of the defendant fraternity. The suit sought both economic and noneconomic damages from nine defendants (nine fraternity members and two fraternity entities). One defendant moved for a determination of law that the plaintiff's total recovery for noneconomic damages should be limited to the inflation-adjusted cap under the Wrongful Death Act. The trial judge granted that motion, ruling that "damages as to all defendants are jointly capped at the inflation adjusted statutory maximum." The plaintiff sought review of this order, and the Colorado Supreme Court issued a rule to show cause.

Pertinent Legal Principles

Wrongful Death Act, C. R. S. § 13-21-203(1)(a). This statute provides:

There shall be only one civil action under this part 2 for recovery of damages for the wrongful death of any one decedent. Notwithstanding anything in this section or in section 13-21-102.5 to the contrary, there shall be no recovery under this part 2 for noneconomic loss or injury in excess of two hundred fifty thousand dollars, unless the wrongful act, neglect, or default causing death constitutes a felonious killing, as defined in section 15-11-803(1)(b), C.R.S., and as

determined in the manner described in section 15-11-803(7), C.R.S.

Statutory cap on noneconomic damages, C. R. S. § 13-21-102.5(3)(a). This statute, applicable in most tort cases, provides:

In any civil action in which damages for noneconomic loss or injury may be awarded, the total of such damages shall not exceed the sum of two hundred fifty thousand dollars, unless the court finds justification by clear and convincing evidence therefor. In no case shall the amount of such damages exceed five hundred thousand dollars.

***Lira v. Davis**, 832 P.2d 240 (Colo. 1992).* This case interpreted the word "award" used in a statute limiting exemplary damages, holding that it meant a plaintiff's reduced pro rata amount of recovery, the amount of recovery calculated to reflect any reduction required by comparative negligence principles.

***General Electric Co. v. Niemet**, 866 P.2d 1361 (Colo. 1994).* This case considered whether the noneconomic damages cap in section 13-21-102.5 applies on a per defendant basis or a per claim basis. It held that, because the legislative intent was to protect individual defendants from excessive liability without unduly restricting plaintiffs" recoveries, the statutory cap in section would apply on a per defendant basis.

The Supreme Court's Decision

Statute's plain language. The court held that the noneconomic damages cap in section 13-21-203 applies on a per claim basis. The court emphasized the portions of the provision that state: "there shall be no recovery ... for noneconomic loss or injury in excess of two hundred fifty thousand dollars." The court stated that the section allows only one action per decedent, and that no more than $ 250,000 may be recovered.

The court noted that if the plaintiff's position were to be adopted, her maximum possible recovery for noneconomic damages would be $ 2,250,000 (nine defendants times $ 250,000 each), and that this would be a recovery in excess of $ 250,000 in noneconomic damages, which the plain language of section 13-21-203 prohibits.

The court focused on the word recovery in the statute. *See* § 13-21-203(1)(a) (*"[T]here shall be no recovery . . .* for noneconomic loss or injury *in excess of two hundred fifty thousand dollars."*) (emphasis added). Citing a legal dictionary, the court stated that the term "recovery," in the context of a lawsuit, ordinarily means the monetary amount to which a plaintiff is entitled. The court stated, "The term 'recovery' thus refers to what the plaintiff is entitled to-period, not on a per defendant basis." *Lanahan v. Chi Psi Fraternity, 175 P.3d 97, 101 (Colo. 2008).*

The court additionally relied on prior opinions interpreting earlier versions of the Wrongful Death Act, such as *Lewis v. Great W. Distrib. Co. of Borger, Inc., 168 Colo. 424, 428, 451 P.2d 754, 755 (1969),* which held that that plaintiffs could not recover more than the statutory maximum of $ 25,000 in a wrongful death action against two defendants, and *Moffatt v. Tenney, 17 Colo. 189, 197, 30 P. 348, 350 (1892),* which applied a statutory damages cap of $ 5,000 in a wrongful death action against four defendants. In sum, a plaintiff"s "recovery" is the total amount she is entitled to, regardless of whether the source of that recovery is one or more defendants.

The court considered and rejected an argument that its holding in *General Electric Co. v. Niemet, 866 P.2d 1361, 1368 (Colo. 1994)* required a different result. In that case, the court held that the noneconomic damages cap in section 13-21-102.5 applies on a per defendant basis rather than on a per claim basis. That statute states, "In any civil action . . . in which damages for noneconomic loss or injury may be awarded, the total of such damages shall not exceed the sum of two hundred fifty thousand dollars." The court held that the concept of "total damages awarded" was ambiguous. It held that because the legislature intended to protect individual defendants from excessive liability without unduly restricting plaintiffs" recoveries the cap should apply on a per defendant basis.

The court rejected a parallel between the current case and *Niemet,* because the Wrongful Death Act language uses the word recovery while the statute interpreted in *Niemet* used the words total damages awarded. It also noted that

Niemet was based in part on *Lira v. Davis, 832 P.2d 240, 241 (Colo. 1992)* which similarly involved analysis of the meaning of the word recovery, rather than the words total damages awarded.

Comments

Despite the Court's description of the Wrongful Death Act as having a plain meaning, the clarity of the statute suffers by comparison with the clarity of the damages cap statute that applies to medical malpractice. That statute states: "The total amount recoverable for all damages for a course of care for all defendants in any civil action for damages in tort brought against a health care professional . . . shall not exceed one million dollars, present value per patient ..." See *Colorado Permanente Medical Group, P.C. v. Evans, 926 P.2d 1218 (Colo. 1996)* (interpreting the statute).

Doubt and consequent litigation of the type in the current case would be avoided if all the state's tort reform statutes paid explicit attention to the likelihood that cases may involve more than two parties.

RELATED LINKS: For an overview of the Colorado Wrongful Death Act see,
- 4-29 Damages in Tort Actions § 29.03

For analysis of primary doctrines related to determination of punitive damages see,
- 4-40 Damages in Tort Actions § 40.08

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Levy on City of Santa Barbara v. Superior Court (2007)

2008 Emerging Issues 2020

Levy on City of Santa Barbara v. Superior Court (2007)

By Neil M. Levy

March 14, 2008

SUMMARY: In City of Santa Barbara v. Superior Court (2007), the CA Supreme Court held that an exculpatory clause did not shield a defendant from liability for gross negligence. Although the exculpatory clause did not contain explicit language waiving liability for gross negligence, the logic of the court leads to the conclusion that any such explicit clause also would be void.

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ARTICLE: Background. In a ground-breaking 1963 decision dealing with exculpation of ordinary negligence, the California Supreme Court stated in *Tunkl v. Regents of University of California (1963) 60 Cal. 2d 92, 32 Cal. Rptr 33:*

> In placing particular contracts within or without the category of those affected with a public interest, the courts have revealed a rough outline of that type of transaction in which exculpatory provisions will be held invalid. Thus the attempted but invalid exemption involves a transaction which exhibits some or all of the following characteristics. It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

Since that time a number of states, but not California, have gone further and have disallowed contracts attempting to exculpate liability for any degree of negligence. *See, e.g., Dalury v. S-K-I Ltd, 164 Vt. 329, 670 A.2d 795 (1995)* and *Hanks v. Powder Ridge Restaurant Corp. 276 Conn. 314, 885 A.2d 734 (2005).*

City Of Santa Barbara v. Superior Court. Plaintiff's decedent was a 14-year-old, developmentally disabled girl, who had a tendency to epileptic seizures which often occurred when she was near water. She was attending a summer

camp run for disabled children by the City of Santa Barbara. About an hour after she had suffered a minor seizure, she was allowed to go swimming while being watched by one of the camp's counselor. The counselor took her eye off the girl for a period of fifteen seconds while the girl was in the pool. During that period, the girl disappeared under the surface of the water and was found minutes later at the bottom of the pool. She died the next day.

The city sought summary judgment on the basis of an exculpatory agreement signed by the girl's mother that purported to exculpate the city "from all liability...whether caused by any negligence." The trial court refused to grant summary judgment to the defendants based upon that agreement and the City filed a petition for writ of mandate from the Court of Appeal. The Court of Appeal refused defendant's writ on the same grounds that trial court had denied the summary judgment motion. The California Supreme Court upheld the ruling, stating that "an agreement made in the context of sports or recreational programs or services, purporting to release liability for future gross negligence, generally is unenforceable as a matter of law." (California Official Reports Summary). The Court reasoned that while allowing a party to shield itself from liability for negligence may be justified in order to create an incentive for that party to provide a valuable service for the public, exculpation from liability for gross negligence exceeds the protection necessary to create such an incentive and instead removes any obligation to adhere to even a minimal standard of care. It termed this the majority rule in the United States. *See 41 Cal. 4th at 758.*

Analysis. The Court hedged on its holding. It stated that waiving liability for gross negligence will "generally" be unacceptable. It is possible that the Court wished to give itself some wiggle room in the future to allow such waivers in commercial settings, though the logic of the opinion would not point in that direction. Although the Court never discussed any specific exceptions to its rule, at several places it stated that it was dealing here with a sports/recreation case. It identified the issue before it as "whether a release of liability relating to recreational activities generally is effective as to *gross* negligence." *41 Cal. 4th at 750.*

The Court rejected the notion developed by Justice Kennard in concurrence and Justice Baxter in dissent that the *Tunkl* factors are the only ones which expand the limitations of Civ. Code § 1668, which states:

All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law whether willful or negligent, are against the policy of the law.

The Court could have ruled for plaintiff on a narrow ground by holding that to exculpate for gross negligence the agreement must explicitly say so. Although California law does not require that the word "negligence" be used to exculpate liability for ordinary negligence, for the release to be valid as to negligently caused harm, it must be "sufficiently clear, explicit, and comprehensible in each of its essential details." *Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd. (1983) 147 Cal. App. 3d 309, 195 Cal. Rptr. 90.* See also *Cohen v. Five Brooks Stable (2008) 159 Cal. App. 4th 1476. See generally,* California Torts, § 4.03[3][a].

From the fact that the Court did not hold on this narrow ground, it can be assumed that the court means its opinion to be read broadly. In dissent, Justice Baxter termed the majority opinion a "sweeping holding." For practitioners, the opinion presents both opportunities and challenges, described below.

Drafting Exculpatory Clauses. Attorneys drafting exculpatory clauses need to be explicit as to the scope of the limitation of liability. It is probably best practice always to use the word "negligence" if the purpose of the document is to preclude liability even if the drafting party acts negligently. Based on the reasoning of *City of Santa Barbara*, it seems unlikely that an explicit waiver of liability for gross negligence will be held valid, at least in sports and recreational situations.

Effect on Pleading. Plaintiffs, of course, are not required to anticipate defenses, such as a pre-accident signed release. *City of Santa Barbara, 41 Cal. 4th 747, 780.* However, if the facts support a charge of gross negligence, plaintiffs' attorneys may wish to plead those facts from the beginning. Plaintiff may also raise the issue in response to

defendant pleading a defense based upon an exculpatory clause. It appears that the majority in *City of Santa Barbara* understates the ability of a plaintiff to avoid a summary judgment when he or she has a colorable claim of gross negligence.

Effect on the Doctrine of Primary Assumption of Risk. *City of Santa Barbara* generally forbids the waiver of liability for gross negligence, at least in sports and recreation cases. "Gross negligence" is defined by the court (citing previous California cases) as "want of even scant care" or "an extreme departure from the ordinary standard of conduct." In footnote 4, the Court defines "reckless misconduct" as "conduct by a person who may have no intent to cause harm, but who intentionally performs an act so unreasonable and dangerous that he or she knows or should know it is highly probable that harm will result."

It seems clear that "recklessness" is more difficult for plaintiffs to prove than "gross negligence" under these definitions. At least before *City of Santa Barbara*, a sports participant could prevail against a co-participant, only by proving the co-participant engaged in conduct that was intentional or "so reckless as to be totally outside the range of the ordinary activity involved in the sport." *Knight v. Jewett (1990) 3 Cal. 4th 296, 320, 11 Cal. Rptr. 2d 2. Accord* for suits against coaches, *Kahn v. East Side Union High School District (2003) 31 Cal. 4th 990; 4 Cal. Rptr. 3d 103.*

Exculpatory clauses are also known as express assumption of risk. (See 1-400 CACI 451 and *Sainz v. Whitewater Voyages, Inc. (1990) 226 Cal.App. 3d 758, 276 Cal. Rptr. 672.* In *City of Santa Barbara*, the Court in footnote 57 states "Our decision in *Knight* explains that an express agreement releasing future liability for negligence, such as we consider in the present case can "be viewed as analogous to primary assumption of risk." Thus, unless the rule for avoiding an implied assumption of risk is changed, we would have the result that a plaintiff could prevail on invalidating an exculpatory clause by proving "gross negligence," yet lose the suit by being unable to prove "recklessness." This, to say the least, would be anomalous. We therefore think that in primary assumption of risk cases, plaintiffs may wish to argue that *City of Santa Barbara sub silencio* has lowered the level of misconduct needed to defeat the primary assumption of risk defense.

This is not a novel suggestion. Justice Werdegar, concurring in *Kahn v. East Side Union High School Dist., 31 Cal. 4th 990, 1020, 4 Cal Rptr. 103,* wrote "Finally, I believe a standard akin to gross negligence will provide sufficient protection...." to sports instructors. In *Kahn,* Justice Kennard, concurring and dissenting, would have applied an ordinary negligence standard.

Appellate Practice. In *City of Santa Barbara,* defense counsel argued that allowing plaintiff to prevail would have dire consequence on businesses and agencies involved in sports and recreational activities. Defense counsel often make such arguments before appellate courts. The Court was not impressed because the defense presented no empirical evidence to support the assertion. The Court's tone seemed annoyed at this. It even went so far to have its own research staff gather such evidence from other states. *City of Santa Barbara, 41 Cal. 4th 747, 773-776.* Defense counsel wishing to make such arguments would do well to attempt to gather empirical evidence as to the effect in other states on various issues in contention.

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Prof. Levy is a graduate of Cornell University and the University of Chicago School of Law, where he served as an editor on the law review.

Information referenced herein is provided for educational purposes only. For legal advice applicable to the facts of your particular situation, you should obtain the services of a qualified attorney licensed to practice law in your state.

Alford on Dickey v. Midstream Fuel Services

2009 Emerging Issues 4033

Margie Searcy Alford on Dickey v. Midstream Fuel Services, 963 So. 2d 632 (Ala. Civ. App. 2007)

By Margie Alford

March 11, 2008

SUMMARY: In an opinion of first impression, the Alabama Court of Civil Appeals recognized negligent aggravation and negligent assignment causes of action under the Jones Act for a seaman seeking damages for exposure to paint fumes. Toxic tort litigator and author Margie Searcy Alford reviews the courts decision and offers practical tips relating to statute of limitation defenses, which were attempted in this case.

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ARTICLE: Background

In September 1997, plaintiff Benny Dickey began working for defendant Midstream Fueling Services, Inc., a tugboat company. He served on boats that pushed barges containing petroleum products. In September 1998 a doctor, David Eaton, hired by Midstream diagnosed Dickey with severe airway obstruction and determined that Dickey's condition prevented him from wearing a safety respirator on a regular basis. The doctor informed both Midstream and Dickey of these findings. That same month, Midstream's safety director forwarded Dr. Eaton's report to Industrial Drug Testing (IDT) for analysis. IDT confirmed that Dickey's condition prevented him from wearing a safety respirator. However, the safety director did not alert Midstream's operations department-which made Dickey's job assignments-of Dr. Eaton's or IDT's findings.

Dickey's personal physician, Dr. Charles Yeager, diagnosed him with chronic obstructive pulmonary disease (COPD) in October 1998. Later that month, Dickey saw a pulmonologist, Maher Sahawneh, for a second opinion. Dr. Sahawneh concurred with the COPD diagnosis and explained to Dickey that toxic fumes had caused or contribution to his COPD.

In May 2001, Midstream again had Dickey tested by IDT. Again, IDT determined that Dickey's condition prevented him from wearing a safety respirator. Another Midstream doctor, William Hicks, examined Dickey in the following three months. Dr. Hicks also concluded that Dickey could not wear a respirator and found abnormalities based on Dickey's EKG, stress test, and pulmonary function tests.

Despite all of the above findings, Midstream assigned Dickey to paint the engine room of a tugboat in August 2001. While Dickey painted he was exposed to paint and diesel fumes in an enclosed ventilated space. Dickey ceased

working for Midstream in October 2003.

Dickey's Lawsuit and Summary Judgment by the Trial Court

Dickey sued Midstream in July of 2004 to recover for his COPD due to exposure to toxic fumes while working for the defendant. Dickey based his suit on the Jones Act and general maritime law. Midstream answered a three-year statute of limitations for maritime torts barred Dickey's claim and then filed a motion for summary judgment. Dickey agreed he could not collect for his injuries that had occurred more than three years before he filed, but argued he had been negligently assigned to a job that was too dangerous for him with his lung condition and that this was done within three years of the filing of the suit. He also pleaded that Midstream negligently aggravated his COPD within three years of his filing suit.

The trial court granted a summary judgment on all three claims. The case was appealed to the Alabama Supreme Court which transferred the case to the Alabama Court of Civil Appeals.

Court of Civil Appeals Recognizes Negligent Assignment and Negligent Aggravation

The Court of Civil Appeals of Alabama affirmed that lower court's holding that the three-year statute of limitation had run for acts that caused Dickey's COPD. The court also concluded that the Alabama Supreme Court would recognize "separate, cognizable claims alleging negligent aggravation and negligent assignment under the Jones Act." *Dickey v. Midstream Fuel Servs., 963 So. 2d 632, 638 (Ala. Civ. App. 2007).* The court then held that the lower court erred in entering summary judgment based the three-year statute of limitation for Dickey's negligent assignment and negligent aggravation claims. The court remanded the case to the Mobile County Circuit Court for further proceedings on these two remaining causes of action.

The negligent aggravation cause of action was first recognized in Alabama in the case of *Chatham v. CSX Transp., 613 So. 2d 341 (Ala. 1993)* and had been recognized in nine other appellate cases prior to *Dickey*. However, it had never before in Alabama been recognized in a Jones Act or general maritime law case until *Dickey*.

Negligent assignment too was first recognized in Alabama in the *Chatham* case. It too had not been recognized in a Jones Act or general maritime law case until *Dickey*.

Lastly, the court rejected the modified continuing tort theory of liability (also raised by *Dickey*) for Jones Act and general maritime law claims.

Practice Tips Relating to Statutes of Limitation Defenses

Keep Up With Changes in Statutes of Limitations and Causes of Action

Keep up with changes in the laws concerning when statutes of limitations begin to run and about new causes of action. Turning down a case because you think the statute of limitations has run may have dire consequences for the client and malpractice consequences for the practitioner.

Best practice dictates that the practitioner stay on top of changes in the law and new interpretations in law. In *Griffin v. Unocal Corp., 2008 Ala. LEXIS 19* (Ala. 2008 Jan. 25, 2008), the Alabama Supreme court decided that its previous interpretation of the laws about when a statute of limitations began to run in a toxic tort case was wrong. It said the statute of limitations did not begin to run until the date of *last exposure* to the toxic substance.

Look for Ways to Get Around Statute of Limitation Problems

If you are looking at a case where the statute of limitations has run for one cause of action, look for other causes of actions with longer statute of limitations. If all the statutes of limitations have run in your state, look for another state where the case might be brought that has a good long-arm statute and that has a longer statute of limitations.

For example, in a case where people were exposed to a herbicide in Alabama and the statute of limitations has run in Alabama, determine where the herbicide was manufactured, where the company that manufactured the product is headquartered, and where the company that sprayed the herbicide is headquartered. Determine where components that went into a dangerous product were manufactured and where those manufacturers are headquartered.

Alabama Attorneys: Remember that Art. 1, § 13, Ala. Const. 1901 provides "that every person for any injury done him. . . shall have a remedy by due process of law."

When looking at federal statutes, remember the Alabama courts may be open to recognizing causes of actions that have not previously recognized in conjunction with those federal acts. Also if a person has suffered an injury, even if a cause of action is not readily recognized, look for a creative way to fit the injury into existing laws.

RELATED LINKS: See the Dickey v. Midstream Fuel Services opinion at
- 963 So. 2d 632 (Ala. Civ. App. 2007)

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ABOUT THE AUTHOR(S):

Margie Searcy Alford is the principal author and editor-in-chief of the five-volume set *A Guide to Toxic Torts* (LexisNexis), a contributing author to the four volume set *Drug Product Liability* (LexisNexis), a contributing author to the two volume set *Alabama Civil Practice Forms* (LexisNexis), and a contributor to many other publications and commentaries.

She served two years as National Chairperson of the American Association for Justice Section on Toxic, Environmental, and Pharmaceutical Tort Law and two years as National Chairperson of the Women Trial Lawyer's Caucus of the American Association for Justice. Also, she was National Chair of the Dioxin Litigation Group for three years.

Margie Searcy Alford practices in the area of serious personal injury with a special focus on toxic torts. Attorney Alford has handled toxic tort cases in sixteen states.

She graduated from The University of Alabama School of Law in 1974. She is a Fellow with the National College of Advocacy and a Trial Warrior for Justice.

Attorney Alford was chosen the most outstanding young career women in Alabama by the Alabama Federation of Business and Professional Women and is in more than a hundred Who's Who type publications. She has served on many boards, committees, and commissions.

Best on Pringle v. Valdez, 171 P.3d 624 (Colo. 2007)

2008 Emerging Issues 1940

Best on Pringle v. Valdez, 171 P.3d 624 (Colo. 2007)

By Arthur Best

February 22, 2008

SUMMARY: Under CO's "seatbelt defense" statute, if a person who is injured in an vehicular accident was required by statute to use a seatbelt, evidence that the person failed to use a seatbelt is admissible for mitigation of "pain and suffering" damages. However, the statute precludes application of this mitigation to "recovery of economic loss."

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ARTICLE: Overview

Under the state's "seatbelt defense" statute, if a person who is injured in an vehicular accident was required by statute to use a seatbelt, evidence that the person failed to use a seatbelt is admissible for mitigation of "pain and suffering" damages. However, the statute precludes application of this mitigation to "recovery of economic loss." In this case, the Colorado Supreme Court was required to decide whether each of two categories of damages should be characterized as "pain and suffering" or "economic loss" damages. The plaintiff claimed damages for: 1) "inconvenience, emotional stress, and impairment of life," and 2) "physical impairment and disfigurement." The Court concluded that the first of these two categories of damages is covered by the seatbelt defense statute and that the second of these two categories of damages is outside the coverage of the statute.

Summary of the Case

The plaintiff was riding in the front passenger's seat of a vehicle driven by the defendant when the defendant drove the car into a concrete barrier. The plaintiff was not wearing a seatbelt. He was thrown into the windshield and now has permanent scars on his face, nose, ear, forehead and cheek. In addition, he has permanent nerve damage causing pain in his face, and loss of sensation in the areas of the scars.

The plaintiff sought damages from the defendant, alleging negligence. At trial, he requested damages for impairment and disfigurement, and noneconomic losses including inconvenience, emotional stress, and impairment of quality of life. The defendant requested that the jury be instructed on the seatbelt defense, arguing that the term "pain and suffering" in the statute encompasses all forms of noneconomic damages. However, because the plaintiff requested damages for "inconvenience, emotional stress, and impairment of life," but not for "pain and suffering," the trial court refused to instruct the jury on the seatbelt defense. The trial court instructed the jury not to consider the plaintiff's failure

to wear his seatbelt when determining his damages for physical impairment and disfigurement, inconvenience, emotional stress, and impairment of the quality of life.

The jury returned a verdict awarding $ 400,000 for physical impairment and disfigurement and $ 100,000 for his noneconomic losses. On appeal, the Court of Appeals affirmed the trial court. At the Colorado Supreme Court, the defendant argued that "inconvenience, emotional distress, and impairment of life" and "physical impairment and disfigurement" damages should all have been treated as within the seatbelt statute's definition of "pain and suffering."

Pertinent Legal Principles

Seatbelt statute. The Colorado seatbelt statute, C.R.S. section 42-4-237(7), provides:

Evidence of failure to comply with the [seatbelt] requirement of subsection (2) of this section shall be admissible to mitigate damages with respect to any person who was involved in a motor vehicle accident and who seeks in any subsequent litigation to recover damages for injuries resulting from the accident. Such mitigation shall be limited to awards for pain and suffering and shall not be used for limiting recovery of economic loss and medical payments.

This statute does not explicitly create a defense, but it has been referred to as a "seatbelt defense" statute, and the Supreme Court used that terminology.

Damages in Tort Actions § 16.04 provides a detailed analysis of the seatbelt defense.

Traditional Treatment of Physical Impairment and Disfigurement Damages. In *Preston v. Dupont, 35 P.3d 433 (Colo. 2001),* the Court held that physical impairment and disfigurement are often the worst consequences of negligent conduct, and that living with a permanent injury is a consequence separate from living with pain and suffering.

Health Care Availability Act. C.R.S. section 13-64-302 defines claims subject to a cap on recovery of noneconomic damages; it includes "physical impairment and disfigurement" damages. This explicit treatment of physical impairment and disfigurement was adopted by the legislature in response to the Supreme Court's *Preston* decision.

The Supreme Court's Decision

"Inconvenience, Emotional Stress, and Impairment of the Quality of Life." The Supreme Court held that when the legislature used the expression "pain and suffering" in the seatbelt statute, it meant the expression to have broad meaning. It based that conclusion on legal dictionaries, treatises, Colorado precedents and cases from other jurisdictions. Also, it stated that this understanding is consistent with the legislative purpose of encouraging the use of seatbelts and penalizing those who do not use them.

The Court noted also that the express language of the statute contrasts "pain and suffering" damages with "economic loss" damages. This suggests "pain and suffering" was meant to cover all noneconomic damages in contrast with economic damages.

In earlier case involving an attempt to multiply damages by devising additional nomenclature, the Court held that "loss of ability to enjoy life" should be treated as equivalent to "mental suffering." See *Trimble v. City & County of Denver, 697 P.2d 716, 730 (Colo. 1985).*

For these reasons, the Court concluded that the trial court wrongly denied a seatbelt mitigation instruction with regard to the damages for inconvenience, emotional stress and impairment of the quality of life.

Damages in Tort Actions § 3.05 provides an overview of economic and noneconomic damages in tort cases.

"Physical Impairment and Disfigurement Damages." The Supreme Court held that physical impairment and disfigurement are permanent injuries irrespective of any pain or inconvenience associated with them. The Court noted that the legislature had rejected that analysis in the context of the Health Care Availability Act when it redefined noneconomic damages in response to the *Preston* case. However, the Court took the position that this legislative overruling applies only in the specific setting of recovery caps in health care cases.

On this basis, the Court concluded that the trial court had acted properly in denying a seatbelt mitigation instruction with regard to the damages for physical impairment and disfigurement.

Comments

Application of the seatbelt defense to damages that the plaintiff called "inconvenience, emotional stress, and impairment of the quality of life" does not mean that the plaintiff is barred from recovery for those harms. The jury will be instructed that it may reduce the amount of damages based on a causation finding. The relevant jury instruction, CJI-Civ. 4th 5:2A ("Affirmative Defense -- Nonuse of Safety Belt"), states:

If you find the defendant has proved by a preponderance of the evidence that the plaintiff was not wearing an available safety belt, then you must determine the amount of pain and suffering damages, if any, caused by the plaintiff's failure to use a safety belt. If you award noneconomic damages for pain and suffering, this amount must be deducted from that award.

Two justices dissented with regard to the exclusion of physical impairment and disfigurement damages from coverage under the seatbelt mitigation statute. This may be significant in terms of providing impetus for legislative action. The Court noted that "If our conclusion does not comport with the General Assembly's intention, it is the legislature, and not the court, that must rewrite it." This, of course, would be true whether or not the Court expressly stated it. As has been the case with most tort reform issues, it would not be surprising to see a legislative reaction to this treatment of the scope of the seatbelt defense.

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28 of 41 DOCUMENTS

Raiter & Swanson: Cy Pres doctrine on distributing unclaimed settlement funds

2008 Emerging Issues 1912

Raiter & Swanson: Cy Pres doctrine on distributing unclaimed settlement funds

By Shawn M. Raiter and Kelly A. Swanson

February 13, 2008

SUMMARY: Class action settlement funds often have money remaining after class members have filed all their claims. If the settlement agreement does not address how unused funds are to be distributed, the courts can rely on their general equity powers or on the Cy Pres doctrine, which permits a court to disburse funds in a way that most closely approximates the intended benefits of the class settlement.

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ARTICLE: Introduction. Class action settlement funds often have money remaining after class members have filed claims. This may result from class members not being located or because class members, for a variety of reasons, fail to file a claim -- leaving the total value of perfected claims less than the set aside fund. The unclaimed money can be substantial. *See, e.g., Fears v. Wilhelmina Model Agency, Inc.*, No. 02-4911 (HB) (S.D.N.Y. July 5, 2007) ($6 million remaining in $22 million settlement fund after satisfaction of all claims); *West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710, 722-723, 734 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079* (2d Cir.), *cert. denied, 404 U.S. 871 (1971)* ($32 million in unclaimed funds from $100 million settlement).

If the settlement agreement does not address how unused funds will be handled, the presiding court must necessarily decide what will be done with such funds. *In re Wells Fargo Sec. Litig., 991 F. Supp. 1193, 1194 (N.D. Cal. 1998); Powell v. Georgia-Pacific Corp., 843 F. Supp. 491, 499 (W.D. Ark. 1994), aff'd, 119 F.3d 703 (8th Cir. 1997); see also* James William Moore, 5 Moore's Federal Practice -- Civil § 23.171 (3d ed. 2007) (hereinafter "Moore") ("[w]hen a class settlement agreement is silent concerning distribution of any surplus . . . the court will have to make a determination about the distribution of the surplus"). In distributing residual funds, courts rely on their general equity power or on the *cy pres* doctrine. "Until the settlement funds are completely distributed, the court retains its traditional equitable powers." *Powell, 843 F. Supp. at 495.* "A court may utilize *cy pres* principles to distribute unclaimed funds from a class action settlement." *Schwartz v. Dallas Cowboys Football Club, Ltd., 362 F. Supp. 2d 574, 576 (E.D. Pa. 2005).* To avoid surprises or unintended *cy pres* distributions, settling parties need to pay close attention to provisions in settlement agreements that deal with the use of unclaimed settlement monies.

Background of *Cy Pres* Distributions. The *cy pres* doctrine takes its name from the Norman French expression *cy pres comme possible*, which means "as near as possible." *In re Airline Ticket Commission Antitrust Litig., 307 F.3d 679, 682 (8th Cir. 2002).* The doctrine permits residual class action funds to be put to their next best use for the aggregate,

indirect, prospective benefit of class members. S*ee generally* Moore at § 23.171. *Cy pres* (sometimes called fluid-class) distribution has traditionally been used in class actions in which class members are difficult to identify or where they change constantly, as when an employer experiences a high-rate of employee turnover or where a utility is found liable for overcharging its customers. *Powell, 119 F.3d at 706; see also* Moore at § 23.171.

The scope of the courts' discretion in disposing of unclaimed or otherwise undistributed class action settlement funds under the *cy pres* doctrine has expanded significantly in recent years, providing courts with greater flexibility in awarding leftover funds to third-party entities that may bear only a tangential relation to the subject matter of the settling lawsuit. *In re Motorsports Merchandise Antitrust Litig., 160 F. Supp. 2d 1392, 1394 (N.D. Ga. 2001); Superior Beverage Co., Inc. v. Owens-Illinois, Inc., 827 F. Supp. 477, 478-479 (N.D. Ill. 1993); see also* Adam Liptak, *Doling Out Other People's Money*, N.Y. Times (Nov. 26, 2007), *available at:* http://www.nytimes.com/2007/11/26/washington/26bar.html?_r=1&oref=slogin.

Settlement Provisions Relating to Unclaimed Settlement Funds. In some class action settlements, the settlement agreement fails to address what will happen to money left after class member claims have been processed. This may be the result of an oversight or in some cases is intentional because the parties hope to make the settlement payout look larger with no stated reversion to the defendant. In any case, a settlement agreement's silence about how to dispose of unused settlement monies will empower the court to determine where the money will be distributed.

With the foregoing in mind, prudent parties will anticipate the possibility of residual class action funds during settlement negotiations and will provide for distribution of such funds in the settlement agreement. For example, settling parties to a class action might wish to consider including a provision in their agreement similar to the following:

All funds remaining in the Settlement Fund following the completion of the allocation process as set forth in this Agreement are to be designated as a Cy Pres Fund, with such funds to be distributed equally to the following non-profit charitable organizations . . . , subject to the Court's approval.

In cases where the parties have not yet identified possible *cy pres* beneficiaries, the parties may include the following terms in their agreement:

The Court shall, in its discretion, determine the disposition of any amount remaining in the Settlement Fund after the final distribution of funds to all Authorized Claimants who submit valid and timely proof of claim forms, upon hearing the views of the parties hereto as to such disposition.

Or, in cases where the parties agree that residual funds shall not revert to the defendant but where defendant asserts no interest in designating appropriate beneficiaries of such funds, the settlement agreement should include language to that effect:

To the extent the settlement consideration to the Plaintiff Class is not fully distributed to the Plaintiff Class under the claims procedure set forth in this Agreement, the remaining settlement consideration shall not revert to Defendant. Instead, any remaining settlement consideration shall be distributed to a *cy pres* beneficiary designated by Plaintiffs' Counsel and approved by the Court. Plaintiffs' Counsel shall make such designation if and when it appears there is a remainder, and notify Defendant and receive Court approval of the proposed designation prior to disbursement of any funds.

These or similar terms provide the parties with the best means of insuring that the settlement funds are distributed in accordance with the parties' true intent. Moreover, as one recent commentator pointed out, "if the court-approved settlement provides for this distribution, there can be no question of the court's power to order that the terms of the agreement be carried out." K. Forde, *What Can a Court Do with Leftover Class Action Funds? Almost Anything!*, 35 No. 3 Judges' J. 19, 44 (Summer 1996).

Parties who do not include terms in the settlement agreement providing for the disbursement or reversion of

unused funds can find themselves back before the court having waived any interest in the remainder of the settlement fund. For instance, in *Powell v. Georgia-Pacific Corp., 843 F. Supp. at 495,* the parties had settled an employment discrimination class action but their agreement was silent about what was to be done with any unclaimed portion of the settlement fund. Facing significant excess funds following the claims period, the *Powell* court observed that neither party negotiated a provision in the consent decree providing for the disbursement or reversion of funds to that party. As such, neither the plaintiffs nor the defendant had any legal right to the unclaimed funds. *Id.*; *In re Folding Carton Antitrust Litig., 744 F.2d 1252, 1254 (7th Cir. 1984); Schwartz, 362 F. Supp. 2d at 576; SEC v. Golconda Mining Co., 327 F. Supp. 257, 259 (S.D.N.Y. 1971); see* Moore at § 23.171. In light of the consent decree's silence on the matter, the *Powell* court ultimately ruled that the most appropriate and equitable disposition of the excess funds was to create a scholarship fund for African-American high school students pursuant to the *cy pres* doctrine. *Powell, 843 F. Supp. at 499.*

Similarly, *In re Motorsports Merchandise Antitrust Litig.*, involved a consumer class action against vendors of merchandise sold at professional stock car races. *160 F. Supp. 2d 1392 (N.D. Ga. 2001).* There, the court rejected defendants' request to have excess settlement funds returned to them where the settlement documents failed to address the issue of their distribution. *Id. at 1394.* The court held that "where no legal claim to settlement benefits exists, a court can exercise its equitable powers to distribute the remaining funds" and "attempt to identify charitable organizations that may at least indirectly benefit the members of the class . . . ." *Id. at 1393, 1395; accord Schwartz, 362 F. Supp. 2d at 576.* The *Motorsports* court then opted to distribute $2.4 million in residual funds to ten different charities (*e.g.*, Make-A-Wish Foundation, Atlanta Legal Aid Society, and Lawyers Foundation of Georgia) -- each arguably unrelated to the settling lawsuit. *Motorsports, 160 F. Supp. 2d at 1396-1398; see also* Robert E. Draba, Note, *Motorsports Merchandise: A Cy Pres Distribution Not Quite "As Near As Possible, 16 Loy. Consumer L. Rev. 121 (2004).*

The cases discussed above illustrate the potential pitfalls created by failing to address the treatment of unused settlement funds in class action settlement agreements. Any party that has an interest in how those funds will be distributed at the close of a class action settlement should ensure the settlement agreement covers the distribution.

Choosing *Cy Pres* Recipients. Parties that address the distribution of settlement funds in their settlement agreement often agree that those funds will revert to the defendant in whole or in part or will be distributed on a *cy pres* basis. Courts have recently paid increased attention to the parties' choice of *cy pres* recipients. As such, settling parties should carefully select recipients whose interests or functions serve the purpose of *cy pres* distributions.

While *In re Motorsports* illustrates the expanding scope of the courts' power to distribute residual class action settlement funds to entities that are only tangentially related to the subject matter of the settling lawsuit, the majority of the courts still follow the traditional rule requiring that some "nexus" exist between the direct harm plaintiffs have suffered and the indirect benefit the *cy pres* distribution is to provide them. *See, e.g., In re Airline Ticket Comm'n Antitrust Litig., 307 F.3d at 683; In re Lease Oil Antitrust Litig., MDL No. 1206, 2007 U.S. Dist. LEXIS 91467* (S.D. Tex. Dec. 12, 2007); *Schwartz, 362 F. Supp. 2d at 577.* According to one commentator, "[c]harities that do not satisfy the nexus requirement, regardless of how worthy they might otherwise be, are inappropriate under the case law because of the lack of benefit to absent class members." Patricia Sturdevant, *Using the Cy Pres Doctrine to Fund Consumer Advocacy*, 33-NOV Trial 80, 83 (1997). Necessarily then, courts are paying increased attention to the selection of *cy pres* beneficiaries and to how those entities may or may not be related to the subject matter of the settling dispute.

For example, in *In re Airline Ticket Commission Antitrust Litigation,* the Eighth Circuit Court of Appeals overturned the trial court's *cy pres* distribution in a nationwide class action on two separate occasions due to the trial court's failure to tailor its *cy pres* distribution to the nature of the underlying lawsuit. The first reversal by the Eighth Circuit was *In re Airline Ticket Commission Antitrust Litigation, 268 F.3d 619, 626 (8th Cir. 2001).* The second reversal was *In re Airline Ticket Commission Antitrust Litigation, 307 F.3d 679, 680 (8th Cir. 2002).* Similarly, the court in *Fears v. Wilhelmina Model Agency, Inc., 2005 U.S. Dist. LEXIS 7961* (S.D.N.Y. May 5, 2005), recently confronted a situation in which only 5% of the eligible fashion model class members perfected claims against a $22 million settlement fund. Faced with more than $6 million in residual settlement funds and no obvious direct use for the

money, the court invoked the *cy pres* doctrine and ordered that the residual funds be distributed to seven different charities and non-profit organizations likely to assist at least a portion of the class, including an eating disorder program and a substance abuse program. *Id.* at *33-35; *In re Lease Oil Antitrust Litig., 2007 U.S. Dist. LEXIS 91467,* at *80 (noting that in such circumstances, courts "should search for a use of the [excess] fund which has at least a 'thin' link to the suit"); *Schwartz, 362 F. Supp. 2d at 577.*

On appeal, the Second Circuit Court of Appeals indicated that it was uncomfortable with the trial court's *cy pres* distribution. *Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 434-436 (2d Cir. 2007).* The Second Circuit encouraged the trial court on remand to consider giving the residual funds to actual plaintiffs. *Id. at 436.* On remand, however, the trial court having undertaken considerable effort to identify appropriate beneficiaries of the excess funds, concluded that *cy pres* distribution of the funds would avoid providing a windfall to the relatively few models who had made claims and remained the "next best" use for the indirect benefit of the class. Order and Op. at 18; *Fears, 2007 U.S. Dist. LEXIS 48151* (S.D.N.Y. July 5, 2007).

Where the settling parties agree that funds residing in the settlement fund after the final distribution to class members should be designated for *cy pres* distribution, their agreement may designate intended *cy pres* beneficiaries. In doing so, however, the parties must bear in mind that the court ultimately retains the discretion to decide how to distribute *cy pres* funds. *In re Tyco Int'l, Ltd., 2007 U.S. Dist. LEXIS 66930* (D.N.H. Dec. 19, 2007). In fact, some courts have recently rejected *cy pres* beneficiaries proposed by the parties and have instead selected beneficiaries of their own choosing. *See, e.g.*, Findings and Order, *Russo v. NCS Pearson, Inc.*, No. 06-1481 (D. Minn. Aug. 29, 2007) (directing that *cy pres* funds, if any, will be awarded at the discretion of the court); *Schwartz, 362 F. Supp. 2d at 577 n. 2* (rejecting *cy pres* distribution advocated by plaintiffs); *Shaw v. Toshiba Am. Info. Sys., Inc., 91 F. Supp. 2d 942, 981 (E.D. Tex. 2000)* (creating a charity with unclaimed funds).

These cases counsel parties to craft settlement agreements to tailor any proposed *cy pres* distribution to the nature of the underlying lawsuit or risk the possibility of being rejected by the court. Ultimately, where the settlement agreement outlines possible *cy pres* remedies the greater the likelihood that the terms of the settlement will be carried out consistent with the parties' true intent. When *cy pres* will be used, the parties should pay close attention to the selection of the recipients.

Conclusion. A fairly extensive body of case law has developed -- and continues to develop -- on issues relating to the disposition of unclaimed settlement funds in class action litigation. The cases underscore the need for parties to consider the possibility of unused class action settlement funds during settlement negotiations and to carefully draft settlement documents to avoid disputes about the disposition of such funds.

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Data Base Security Breaches: Rulings in the TJX Litigation and Future Actions

2008 Emerging Issues 1873

Data Base Security Breaches: Rulings in the TJX Litigation and Future Actions

By Fredric D. Bellamy and Mark E. Freeze

February 6, 2008

SUMMARY: Attorneys Frederic Bellamy and Mark Freeze of Steptoe & Johnson examine the ground-breaking TJX litigation in the U.S. District Court in Massachusetts involving the largest known data base security breach in history. Analyzing the court's actions in this litigation offers the authors the chance to speculate on how these important issues will be treated by future courts.

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ARTICLE: Introduction. Recent federal litigation over the largest known data breach to date raises important questions about the legal theories and procedural vehicles for handling such electronically based mass torts. Indeed, a December 18, 2007 ruling by U.S. District Court Judge William G. Young expressly left open more questions than it answered. The Court grappled with information-technology related issues that are likely to generate legal controversy for years, including the suitability of such suits for class action certification, related questions regarding the type of proof required to establish causation and damages, and the fundamental question of when and whether data may be deemed "property" for purposes of tort liability.

Background. *In re TJX Cos. Retail Sec. Breach Litig.*, No. 07-10162-*WGY, 2007 U.S. Dist. Lexis 92782* (D. Mass. Dec. 18, 2007), involves federal litigation arising from the largest known data heist to date. In January 2007, the Massachusetts-headquartered TJX Companies, owner of retail chains including T J Maxx and Marshalls, disclosed that computer hackers had breached TJX's computer systems and stolen data regarding more than 45 million consumer credit and debit card accounts. TJX's investigations revealed that the data breaches dated back to 2005.

Numerous class actions were subsequently filed against TJX and its bank (Fifth Third), and the federal actions were transferred and consolidated in the District of Massachusetts. Consumers brought a class action seeking "credit monitoring" damages, and this matter has reportedly been settled in principle. A speedy settlement of the consumer class action was expected because of the significant difficulties faced by plaintiffs in proving damages. Similar claims in other actions for credit monitoring damages, like claims for medical monitoring damages in toxic tort cases, have met with mixed results. Plus, since the individual consumer accounts were protected from fraudulent charges by federal regulations that place the financial burden of such losses on the part of the credit card issuing banks, the actual out-of-pocket losses by the consumer plaintiffs with respect to their accounts was likely to be relatively small.

The settlement of the consumer class action, however, did not end the *TJX* litigation. In addition to the consumer action, a coalition of credit card issuing banks filed multiple suits against the TJX defendants, and sought class certification from the Court. As noted above, federal banking regulations and policies mandate that credit card issuing banks must bear all the financial responsibility (with highly limited exceptions based largely on notice requirements) for consumer losses stemming from fraudulent credit or debit card transactions. Thus, this potential class of plaintiff banks is the group that ultimately could incur the greatest monetary loss in the event of any fraudulent charges.

The case of the plaintiff banks follows a winding and complicated line of promises, contracts, and regulations that goes as follows: When customers presented a debit or credit card during a sale, TJX sent the account information to its bank, Fifth Third, for verification. Fifth Third then transmitted the account information to the issuing banks, which would authorize the transactions through credit card networks operated by VISA and MasterCard. Integral to this process are the Contractual Card Operating Regulations issued by Visa and MasterCard, which mandate that retailers safeguard their cardholder information. Pursuant to contracts with VISA and MasterCard, Fifth Third agreed to comply with these safeguarding regulations. Fifth Third and TJX had a contract between themselves that similarly required TJX to comply with the Visa and Master Card safeguarding regulations. According to the plaintiff banks, the process broke down when TJX and Fifth Third allegedly failed to take the necessary steps to safeguard the consumer information, leading to the security breach.

As the ultimate bearers (along with their insurers) of the fraud losses, the issuing banks brought claims for breach of contract against TJX and Fifth Third alleging that the banks were third-party beneficiaries of the contracts between TJX and Fifth Third and between Fifth Third and the credit card associations to safeguard consumer data. The issuing banks also alleged a claim for negligent misrepresentation on the grounds that TJX and Fifth Third made implied representations to the issuing banks that they took adequate security measures to safeguard the consumer information-when in fact they did not.

The Court dismissed the plaintiff banks' contract claims on the ground that the contracts had expressly disclaimed the existence of any intended third-party beneficiaries. However, the Court did allow the plaintiff banks to proceed with their claims for negligent misrepresentation, although the Court denied that the claims could proceed as a class action. The issuing banks sought leave to amend the complaint to bring a tort claim for conversion, perhaps on the hope that this claim would allow class certification, but the motion was denied by the Court's ruling on December 18, 2007, and the Court reaffirmed its intention (as previously announced in a ruling dated November 29, 2007) to transfer the case to a Massachusetts state court.

The Nature of Data as "Property" for Purposes of Conversion. The key question addressed in the Court's December 18, 2007 ruling is when and whether electronic data constitute "property" for purposes of the tort of conversion. This ruling reflects a division among the states that likely will continue to generate legal controversy for years as data-related litigation inevitably grows in importance. The District Court in the *TJX* case predicted that Massachusetts would decline to follow the 2007 precedent from New York in *Thyroff v. Nationwide Mut. Ins. Co., 864 N.E.2d 1272 (N.Y. Ct. App. 2007).* In *Thyroff*, the New York Court of Appeals answered a certified question from the Second Circuit regarding whether electronic data could be considered property.

The New York court accepted the invitation to "reevaluat[e] the appropriate application of conversion" in the digital age, noting that "[i]t is the strength of the common law to respond, albeit cautiously and intelligently, to the demands of commonsense justice in an evolving society" (quoting *Madden v. Creative Servs., Inc., 84 N.Y.2d 738, 744 (1995)).* Observing that "society's reliance on computers and electronic data is substantial, if not essential," and that even the Court's "opinion was drafted in electronic form, stored in a computer's memory and disseminated to the Judges of this Court via email," *864 N.E.2d at 1277-1278,* the Court concluded that it "cannot conceive of any reason in law or logic why this process of virtual creation should be treated any differently from production by pen on paper or quill on parchment." *Id.* Therefore, the Court reasoned, "the tort of conversion must keep pace with the contemporary realities of widespread computer use," holding that the unauthorized possession of electronic data "are subject to a claim of conversion in New York." *Id.*

In *TJX*, the bank plaintiffs asserted that the retail stores' retention of sensitive customer data longer than needed or authorized constituted conversion on the part of the TJX defendants, and sought leave to allege conversion claims, citing the *Thyroff* decision. The plaintiffs alleged that "by failing to safeguard and by storing the cardholder information and data, [the defendants] knowingly and wrongfully exceeded [their] authorized use of the Plaintiff Banks' property and wrongfully exercised control and dominion over this property." *2007 U.S. Dist. Lexis 92782* *8. The plaintiffs argued that Massachusetts would be predisposed to follow New York's lead in extending the tort of conversion to intangible property in the form of electronically stored information.

However, the District Court declined to accept the plaintiffs' prediction that Massachusetts would adopt the reasoning in *Thyroff*, instead observing that case law "strongly suggests" that "a claim for conversion based on the type of intangible property at issue here likely is not cognizable in Massachusetts." *Id*. at *13. While the District Court was reluctant to predict a change in Massachusetts law based principally on a recent New York precedent, the Court also attempted to distinguish *Thryoff* based on the supposed different nature of the data involved in *TJX*. The District Court stated that *Thryoff* was limited to situations where the electronic data were "indistinguishable from printed documents." *Id*. at *15.

The Court in *TJX* believed that the customer data in the matter before it failed this test-a tenuous distinction given the ease with which data can be converted into "printed documents." It is true that the New York Court of Appeals limited its ruling by noting that it did not "consider whether any of the myriad other forms of virtual information should be protected by the tort." *Thryoff, 864 N.E.2d at 1278.* However, the New York court had also reasoned that "[i]n the absence of a significant difference in the value of the information, the protections of the law should apply equally to both forms-physical and virtual." *Id*.

Placing legal significance on whether electronic information is "indistinguishable from printed documents" is a dubious test at best, and likely presents an issue that will be litigated in other data breach cases as they arise throughout the country. By this logic, an email that contained only text could be the subject of a conversion tort, but an otherwise identical email that contained a ".wav" or other sound file (perhaps attaching a voice mail) could not. It seems doubtful that the New York Court of Appeals intended to adopt such a test, which ignores the rapidly evolving concepts of what constitutes a "document" at a time when, for example, many courts accept the filing of legal briefs that have embedded hyperlinks-stretching the notion of what constitutes a traditional "printed document."

Transfer and Dismissal to State Court. Having denied (without prejudice) the plaintiff banks' motion for leave to amend the complaint to allege conversion claims, the District Court ordered that the consolidated cases be transferred to the Massachusetts Superior Court. The Court had previously denied motions for class certification, based on the need for individualized proof of reliance in establishing claims based on negligent misrepresentations. *In re TJX Cos. Retail Sec. Breach Litig., 246 F.R.D. 389 (D. Mass. 2007).* In doing so, the Court took away on one hand what the other hand had given: In its October 12, 2007 ruling, *In re TJX Cos. Retail Sec. Breach Litig.*, No. 07-10162-*WGY, 2007 U.S. Dist. Lexis 77236* (D. Mass. Oct. 12, 2007), the Court had denied a motion to dismiss these negligent misrepresentation claims in what was then hailed by the *Wall Street Journal* as a "legal breakthrough" for the banks. This ruling allowed claims based on allegations that TJX had negligently misrepresented facts relating to its compliance with and implementation of security standards.

In essence the Court concluded that, while the claims of negligent misrepresentation might be legally viable, they require such individualized proof that they are not suitable for class certification. Yet, in a massive data breach case where individualized proof of damages may be difficult to obtain, and where most individual claims are likely to be small, the unavailability of class treatment may make such litigation highly problematic for plaintiffs to pursue. In other words, the Court has potentially set up a classic Catch-22 situation for similar plaintiffs in future data breach cases. Nonetheless, the Court's recognition of these negligent misrepresentation theories ultimately may prove to be a significant milestone in determining what sorts of claims are viable in data breach litigation. *See In re TJX Cos. Retail Sec. Breach Litig.*, No. 07-10162-*WGY, 2007 U.S. Dist. Lexis 77236* (D. Mass. Oct. 12, 2007).

Allowing the negligent misrepresentation claims to go forward (though presumably in state court) reflected a potential legal milestone in electronic data breach litigation because the claims avoid the need for contractual privity-a frequently fatal flaw in such litigation when it is based on contract theories. The bank plaintiffs had based their claims on allegations that TJX violated standards and contractual regulations imposed by Visa and MasterCard. Yet in its October 12, 2007 ruling, the Court found these claims unavailing because the Visa and MasterCard agreements themselves expressly negated the standing of any third parties to enforce the card agreements with the retailers. In contrast, the Federal Government has been subject to data breach litigation, most recently as a result of the theft of personal data from the Veteran's Administration, alleging violations of the Federal Privacy Act. There is currently no counterpart to the Federal Privacy Act applicable to the private sector.

The issuing banks appealed the Court's denial of class certification. Yet, in late December 2007, six of the seven named plaintiff banks entered into a settlement. Part of the settlement involves a promise by TJX to strengthen its security to achieve full compliance with the Payment Card Industry Data Security Standards. Should the one remaining plaintiff pursue an appeal on the class certification issue, it is not likely to be successful given the deference that will be afforded the District Court's certification decision and acknowledgement in the case law of the hurdles to certification for fraud-type actions involving individual issues of reliance.

Conclusion. This case, with its procedural and substantive twists and turns, points to many of the legal uncertainties regarding liability for electronic data security breaches. Despite the procedural detour to state court, the federal *TJX* litigation allowed at least one vehicle to move forward with the plaintiffs' electronic data security breach claims-the alleged misrepresentations by defendants regarding their electronic security measures. Practitioners representing clients with data bases that possess sensitive third-party data should carefully scrutinize any express or implied statements by the client regarding data base security measures. As demonstrated in the *TJX* litigation, any actual or implied misrepresentations by the client may later serve as the basis for a claim of negligent misrepresentation in a data base security breach case.

At the same time, the Court's denial of the banks' motion for class certification, based on the need for individualized proof of reliance, reveals the inherent difficulties in proving such claims because of the difficulty of linking particular security breaches to particular instances of consumer fraud. In a world where sensitive data regarding millions of consumers, once breached, can be uploaded to the Internet for criminal use in far-flung locations, the courts' handling of such electronic mass torts bears watching.

In the meantime, companies possessing sensitive data belonging to third parties would be well advised to follow necessary security measures to safeguard the data. In addition, such companies may want to ensure that their relevant contracts contain language expressly disclaiming the intention to benefit third parties, and expressly disclaiming the right of any third parties to rely on representations contained in the contract documents. Additionally, such companies may want to include in their contracts a choice of law provision selecting the governing law of a state, such as Massachusetts, that does not recognize the tort of conversion for electronic data.

Finally, companies possessing sensitive data belonging to third parties should not keep such data any longer than required. It is not entirely clear in the instant case why TJX was keeping data regarding its customers' debit and credit cards, but TJX would have been better off destroying the information shortly after the transactions. In fact, the State of Minnesota recently passed a law that prohibits the retention of specified credit card information for more than 48 hours after the transaction is authorized. Several other states, such as Illinois and New Jersey, are considering similar legislation.

RELATED LINKS: For a discussion of state laws addressing data base security breaches, please refer to
- 4-35 Business Torts § 35.12

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30 of 41 DOCUMENTS

Big Rig Underride Crashes -- Products Liability Theory in Underride Collisions

2008 Emerging Issues 1875

Nissenberg on Big Rig Underride Crashes -- Products Liability Theory in Underride Collisions

By David N. Nissenberg

February 6, 2008

SUMMARY: The image of a passenger car being trapped under a large commercial truck is one of the most horrifying scenes on America's roadways. These "underride crashes" occur when a car collides with and slides under the rear, side, or front of a truck. While statistics show that close to 80% of all underride crashes occur with the front (60%) or side (20%) of the truck, there are no federal safety regulations on front or side underride crashes.

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ARTICLE: It is perhaps the most gruesome image on America's roadways. Everyone has experienced it at one time or another when pulling up along side the behemoth that is a large commercial tractor-trailer truck -- the horrifying image of careening into and sliding under the big rig. Such incidents are called "underride" crashes for obvious reasons, and for the everyday driver on America's roadways, there may be no more frightening a thought.

While most people probably fear the possibility of sliding under the rear of a truck when they think of an underride accident, a surprising study published in 1997 showed that less than a quarter of all underride crashes involved the rear of the truck. Indeed, the study showed that almost 60% of all "underride" crashes involved the front of the truck, while approximately 20% involved the side of the truck. The study looked at fatal underride crashes from 1988 to 1993 based on data collected by the National Accident Sampling System Crashworthiness Data System (NASS/CDS). The results of the study, which were published in the Transportation Research Record (Vol. 1595, pp. 27-33, 1997), found that of 1,108 underride accidents, 634 involved the front of the truck, 248 involved the rear, and 226 involved the side of the truck.

Based on these figures, almost 80% of the fatal underride crashes reported in the 1997 study involved collisions with a part of the truck other than the rear. What is most alarming about these findings is that federal regulations in this country-more than a decade later-still only require that tractor-trailers be equipped with rear underride guards. Side and front underride guards are not required, although such requirements are mandated for tractor-trailers operating within the countries of the European Union ("EU"). Presently, although there are few underride-related lawsuits in the U.S., as time goes on, the failure of trailers to be fitted with side underride protection, and of tractors to have front underrun protection, is likely to be the basis of increasing numbers of liability claims in this country.

Rear Underride Crashes. As rear end crashes go, those involving a smaller, lighter, lower-to-the-ground vehicle

smashing into the rear of a tractor-trailor have the greatest potential for the famously ghastly injuries-such as decapitation-that are reported in the media and dramatized in the movies. Known commonly as rear underride collisions, what typically happens after impact is that the smaller vehicle, instead of stopping on impact with the much larger truck, continues to slide under the truck's trailer bed until the back corner or rear portion of the trailer pierces the smaller vehicle's windshield and strikes the heads of the passengers in the smaller car. Seatbelts obviously provide no protection in this horrifying circumstance.

Recognizing the need to make heavy trucks and tractor-trailer combinations safe for members of the traveling public who might have the bad fortune of colliding with the rear of one of these highway giants, the Bureau of Motor Carriers of the Interstate Commerce Commission (ICC) in 1952 issued a regulation requiring heavy trucks, trailers and semi-trailers to be equipped with an underride guard on the rear of the truck. The original underride guard was required to have a ground clearance of no more than 30 inches when the vehicle was empty (49 C.F.R. § 393.86.) The guard, known as an ICC bumper, was mandated until 1998 when, after constant efforts by safety groups to get the federal government to require the use of an improved device, the National Highway Traffic Safety Administration (NHTSA) enacted new safety standards covering rear impact protection. (See 49 C.F.R. §§ 571.223 and 571.224.) This led to an amendment of 49 C.F.R. § 393.86 requiring compliance with the safety standards (FMVSS 223 and 224) that, in sum, implemented new strength, configuration and energy absorption characteristics and lowered the ground clearance requirement to 22 inches. This device, which is now called a rear impact guard, is presently the law. Thus, with certain exceptions set forth in the regulation, trailers and semi-trailers with a gross vehicle rating of 10,000 pounds or more, and manufactured on or after January 26, 1998, must be equipped with rear impact guards that meet the requirements of FMVSS 223 and 224. For a background and history of the adoption of the new safety standards, *see Federal Register*, January 24, 1996, Vol. 61, No. 16, pages 2003-2036.

Defective Product Claims In Rear Underride Litigation. As a general principle, a manufacturer is under no duty to manufacture a vehicle with which it is safe to collide. See *Mieher v. Brown, 301 N.E. 2d 307 (Ill. 1973); Beattie v. Lindelof, 633 N.E. 2d 1227 (Ill. App. 1st Dist. 1994); Rivers v. Great Dane Trailers, Inc., 816 F. Supp. 1525 (M.D. Ala. 1993); Hatch v. Ford Motor Co., 163 Cal. App. 2d 393, 329 P2d 605 (1958).* The safety standards, though, were designed to address a safety problem, namely, the danger posed to passengers in a car that collides with the rear of a trailer. Therefore, the general principle in this instance must give way to the federal regulation. However, it must be remembered that NHTSA standards are minimum standards only. In NHTSA's response to Petitions for Reconsideration of its Final Rule on FMVSS 223 and 224 at *Federal Register*, January 26, 1998, Vol. 63, No. 16, page 3656, it is stated "..mere compliance with NHTSA's vehicle safety standards does not insulate any guard or trailer manufacturer from civil liability. *49 U.S.C. 30103*(e) explicitly states '[c]ompliance with a motor vehicle safety standard..does not exempt a person from liability at common law.' NHTSA's standards are minimum standards that specify a floor, not a ceiling, for performance. They are intended to allow manufacturers flexibility in the selection of means of compliance."

A prime example of the application of the federal law arose in a Louisiana case, *Detillier v. Sullivan, 714 So. 2d 244 (La. App. 5th Cir. 1998).* A 1985 Nissan Maxima ran into the rear of a 1987 18-wheeler. The ICC bumper on the rear of the trailer was 27[frac14] inches from the ground, well within the 30-inch minimum required by federal regulations on the date of the guard's manufacture. The plaintiff's experts, whose conclusions were disputed by the defense, testified that the difference in speed between the two colliding vehicles was 10-15 miles per hour. According to plaintiff's experts, this difference, though not excessive, was still sufficient for the passenger car to underride the rear of the trailer, causing plaintiff severe head and facial injuries. Simply put, the underride guard did not accomplish its purpose, despite the fact that it fell within the allowable limits established by the federal regulations. Contending that the guard was defective for the purpose it was intended, that it was outdated even at the time of manufacture, and that the trailer manufacturer was aware of "the changes and circumstances calling for a lower bumper in the interest of highway safety," the plaintiff succeeded in her claim based on products liability principles.

A claim of product defect was also the central issue in the case of *Rapp v. Singh, 152 F. Supp. 2d 694 (E.D. Pa. 2001),* although there was no contention that the rear impact guard was too high or not strong enough. Instead, the plaintiff argued that the deaths of two persons killed when their vehicle collided with the rear of a tractor-trailer could

have been prevented if the guard had been fitted with a vertical attachment between the edges of the horizontal member and the rear corners of the trailer. Plaintiff's experts opined that the vertical attachment would have deflected the plaintiff's car from the corner of the trailer-thus eliminating the passenger compartment intrusion by the right rear corner of the trailer.

On a motion for summary judgment, the defendant trailer manufacturer challenged the admissibility of the plaintiff's expert evidence on the ground that the experts' testimony did not meet the admissibility test set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).* In so doing, the defendant attacked the very heart of the plaintiff's case, which was based on a crashworthiness theory that required the plaintiff to show proof of defect, alternative design, or enhanced injury. The defense succeeded. Neither the plaintiff's forensic/accident reconstruction engineer nor her auto safety design consultant were able to state what would have happened with the addition of a vertical attachment. Despite a rigorous analysis of the accident as it occurred, plaintiff's experts failed to provide measurements, calculations, or analysis of a hypothetical accident in which the trailer rear guard was equipped with the suggested vertical attachments. Since the case stood or fell on the basis of the plaintiff's expert testimony, the deficiencies in the presentation resulted in the granting of the defense motion.

Side Underride Crashes. Unlike the situation in EU countries, there is no federal requirement in the United States that trailers be equipped with side underride bars. Given that the bottom of some trailers and intermodal chassis are so high off the ground that a small car can almost fit underneath, the extreme danger of a side collision with a trailer cannot be overestimated. Surprisingly, however, such accidents rarely result in claims based on a products liability theory that the tractor-trailer is defective and unreasonably dangerous as a result of the lack of side underride guards.

One such case, reported by lawyersusaonline.com in its listing of the top ten jury verdicts in 2006, is the Texas case of *Falcon v. Lufkin Industries,* in which a jury awarded $38.5 million to two plaintiffs. The plaintiffs were riding in a car that skidded under the side of an 18-wheeler that had pulled out in front of them from a stop sign in order to cross a highway. One plaintiff was a 25 year old woman who suffered severe brain injuries. The other plaintiff was the family of a woman who was fatally injured in the accident. Defense engineers testified, in essence, that without government regulations mandating the use of side underride guards, the manufacturer would be under no duty to add one. Evidence of the defense position that side underride guards were not cost effective was barred because of the plaintiff's successful *Daubert* objection.

In light of the $38.5 million jury verdict, this case may very well be the precursor to future side underride litigation.

Front Underride Protection. In a February 3, 1997 issue of *Transport Topics*, in an article titled "Front Underride Comes to Europe" (p.14), it was reported that of the approximately 50,000 highway fatalities in Europe each year, around 4,000 are attributable to head-on collisions between cars and large trucks. Responding to this problem, European truck builders (Volvo, Renault, Scania, and Mercedes-Benz) developed a front underride bar weighing about 60 pounds that is connected to both the bumper and the chassis and positioned to make direct contact with a car's front so as to prevent the car from submarining beneath the truck. Through the use of this bar, it was estimated that 1,000 lives per year would be saved.

Regulations in EU countries now require front underride protection on all heavy trucks. Remarkably, however, there are no similar requirements for large commercial rigs in the United States, notwithstanding the NASS/CDS data referred to above showing that almost 60% of all underride crashes involved cars colliding with the front of the truck..

More recently, the subject of front underride guards was addressed in a May 8, 2006 Safety Recommendation of the National Transportation Safety Board (NTSB) (Ref. H-06-15), which was addressed to the Department of Energy as the lead department for the Federal research and development component of the 21st Century Truck Program. Reference was made to NTSB's investigation report titled "Multi-vehicle Collision on Interstate 90, Hampshire-Marengo Toll Plaza, Near Hampshire, Illinois, October 1, 2003," which involved many vehicles crashing into each other, including a

collision between the front of a Freightliner truck and the rear of a specialty bus, where the truck "overrode the bus bumper and entered the passenger compartment because of differences in vehicle weights and structural stiffness and because of geometric mismatch."

The NTSB Safety Recommendation stated the following: "Research has shown that geometric height differences and a lack of forgiving front truck structures can be modified to help reduce heavy truck aggressivity and to mitigate the severity of these types of accidents. Examples of these modifications, often referred to as 'front underride protection systems-which can result in reduced intrusion or occupant injury-include energy-absorbing front structures to offset the weight differences between two impacting vehicles, as well as bumpers designed to deflect the impacted vehicle away from the front of the truck, thereby reducing the total change in velocity of the smaller vehicle."

Thus, front underrun protection can accomplish two purposes: 1) preventing a car involved in a head-on collision with a truck from getting trapped under the truck, and 2) reducing the intrusion of the front of a truck into the rear passenger compartment of a smaller vehicle when the front of the truck collides with the rear of a vehicle.

Practitioners considering various liability theories in these types of accidents should look first and foremost at a theory based on product defect. Is a heavy truck that is not equipped with front underrun protection an unreasonably dangerous product? There is growing evidence on this issue, not the least of which includes the European safety regulations requiring front underride protection and the impressive number of lives saved by this requirement. This products liability theory and the European experiences should not go unnoticed by plaintiff's attorneys representing front underride crash victims or by defense attorneys representing trucking companies who are looking to shift or share liability with truck manufacturers who fail to provide front underride protection.

Conclusion. Considering the number of fatalities and serious injuries occurring in underride crashes with tractor-trailers, the amount of litigation on the topic is surprisingly minimal. However, practitioners have an ever-increasing opportunity to change that, and the potential use of products liability theories in such cases may be the quickest way to bring about such change. It is particularly important for the American attorney involved in underride litigation to be aware of the safety advances developed in Europe and to understand how those developments can factor into viable causes of action in the U.S. courts. For the text of the European regulations on front underride (ECE -- R 93) and rear underride (ECE -- R 58) collisions, please log onto: http://www.unece.org/trans/main/wp29/wp29regs.html.

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Radigan on Recovery for Wrongful Death and Survival Action for Personal Injuries

2008 Emerging Issues 1782

Radigan on Recovery for Wrongful Death and Survival Action for Personal Injuries

By C. Raymond Radigan

January 14, 2008

SUMMARY: While a wrongdoer causing the death of a decedent may retain an interest in property owned with decedent, that interest may be captured in a wrongful death and survival personal injury action. The Honorable C. Raymond Radigan, a retired Nassau County, New York Surrogate, explains such a wrongdoer's survival interest in property and how that interest might be recovered by the fiduciary of the decedent's estate.

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ARTICLE: Insight

While a wrongdoer causing the death of a decedent may retain an interest in property owned with decedent, that interest may be captured in a wrongful death and survival personal injury action.

Analysis

Wrongdoer's survival interest in property. A wrongdoer who causes the death of a decedent and, but for the wrongful act, would have succeeded as survivor to an interest in the decedent's property may thus be precluded because of his wrongdoing to survivorship rights, but nonetheless does not forfeit rights vested previous to the commission of the wrongdoing because he had a vested right in his own right and not by survivorship rights. Accordingly, wrongdoing survivors generally are entitled to the commuted value of a life estate in one-half of the property in question or, if the property be sold, in the commuted value of one-half of the sale proceeds of a life interest therein (*In re Guldbrandsen, 2007 NY Slip Op 50443U (N.Y. Misc. 2007); See Wrongdoers Entitlement New York*, by Radigan and Gottlieb, N.Y.L.J., July 6, 2007, at 3, col. 1).

For example, in *In re Estate of Mathew, 270 A.D.2d 416 (N.Y. App. Div. 2000),* petitioner allegedly killed his wife and, while awaiting trial, arranged for the sale of a house which he and his wife had owned as tenants by the entirety. Proceeds from the sale were placed in an escrow account. Petitioner commenced a proceeding to compel the administratrix of his wife's estate to consent to the release of a share of the proceeds to him. Under New York law, it has long been held that one who wrongfully takes the life of another is not allowed to profit thereby. However, the criminal conviction of a person does not work a forfeiture of any right or interest in real or personal property. Accordingly, the petitioner did not forfeit his own undivided interest in the house which he and his wife held as tenants by the entirety

and was entitled to the commuted value of a life estate in one-half of the property or the proceeds from its sale.

Recovery of wrongdoer's vested rights. Although the wrongdoer may retain his or her vested rights that interest may be recovered by the fiduciary of the decedent's estate through the commencement of a wrongful death action pursuant to NY CLS EPTL § 5-4.1 on behalf of the decedent's distributees suffering a pecuniary loss and a recovery for his estate for personal injuries pursuant to NY CLS EPTL § 11-3.2 (*See Wrongdoers Entitlement New York*, by Radigan and Gottlieb, N.Y.L.J., July 6, 2007, at 3, col. 1).

The case of *In re Guldbrandsen, 2007 NY Slip Op 50443U (N.Y. Misc. 2007)* illustrates this point. Decedent's wife was criminally charged with his death. The Surrogate held that one who causes the death of another is precluded from survivorship rights, but does not forfeit property rights vested previous to the wrongdoing. However, such property rights can be subsequently forfeited. The court noted that the decedent's fiduciary retained an option to pursue a wrongful death action against the wife, for the benefit of the decedent's surviving distributees who suffered a pecuniary loss as a result of her actions, and a claim for personal injury, for the benefit of the decedent's estate by way of a survival action against the wife for the injuries inflicted upon the deceased.

For further discussion of the issue, *see* 1-2 NY Practice Guide: Probate & Estate Admin § 2.07: Duties of the Voluntary Administrator; New York Practice Guide: Probate and Estate Administration § 15.01: Appearance by Guardian Ad Litem; 2-27 NY Practice Guide: Probate & Estate Admin § 27.03: Actions for Wrongful Death; 2-31 NY Practice Guide: Probate & Estate Admin § 31.01: Intestate Succession; 2-41 NY Practice Guide: Probate & Estate Admin § 41.03: Account Schedules; 1-2 LexisNexis AnswerGuide New York Negligence § 2.06[5]: Conducting Initial Client Interview; 1-3 LexisNexis AnswerGuide New York Negligence § 3.06: Determining Applicable Statute of Limitations; 1-6 LexisNexis AnswerGuide New York Negligence § 6.03: Identifying Statutes That Provide for Shortened Time for Commencement of Action; 2-34 Warren's Heaton on Surrogate's Court Practice § 34.04: Powers and Duties of the Temporary Administrator; 5-62 Warren's Heaton on Surrogate's Court Practice § 62.06: Personal Property; 9-122 Warren's Heaton on Surrogate's Court Practice § 122.02: Actions by or Against Personal Representatives for Injury to Person or Property of Decedent; 9-124 Warren's Heaton on Surrogate's Court Practice § 124.01: Action for Wrongful Death; 9-124 Warren's Heaton on Surrogate's Court Practice § 124.03: Wrongful Death Action Distinguished from Other Actions; 9-124 Warren's Heaton on Surrogate's Court Practice § 124.13: Allocation and Distribution of Wrongful Death Damages to Distributees; Warren's Weed: New York Real Property Ch. 44, 5-44 Warren's Weed New York Real Property 44.syn, et seq.: Equitable Distribution.

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This article was updated and expanded by Kelliann Kavanagh, Esq.

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Nissenberg on Hauling Hidden Dangers on Our Roadways

2008 Emerging Issues 1692

Nissenberg on Hauling Hidden Dangers on Our Roadways

By David N. Nissenberg

December 26, 2007

SUMMARY: Truck-accident litigation expert David Nissenberg examines the federal and state regulations designed to insure that our roadways are free from things like flying trailer hitches, wheel assemblies, tires, brakes, brake drums, mufflers, muffler assemblies, and even the loads themselves all of which present deadly dangers to drivers.

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ARTICLE: In late December 2006, a trailer hitch weighing five to six pounds fell from a truck, bounced up and down on one of San Diego's freeways and smashed into the windshield of a sports utility vehicle, tragically killing its 32-year-old driver. As everyone knows, trailer hitches are installed at the rear of one vehicle so that it can tow another vehicle or trailer or boat or virtually anything on wheels that can be pulled. When properly installed and maintained, trailer hitches do not simply fall off.

Most drivers have enough to keep themselves occupied while traveling on the roadway without having the additional worry of being struck by a flying object or facing an obstacle in their path that has escaped from a truck or tractor-trailer. Unfortunately, however, hazards to safe travel are becoming more common as increased numbers of big rigs use our highways. These hazards include not only detached trailer hitches, but other components that have either disintegrated or fallen off a truck, such as wheels, tires, wheel assemblies, brakes, brake drums, mufflers, muffler assemblies and, too often, the loads themselves.

Improper Installation, Inspection, And Maintenance Of Parts. In *Gautreaux v. W.W. Rowland Trucking Co., 757 So. 2d 87* (La. Ct. App., Fifth Cir. 2000), litigation ensued when the rear axles of the trailer portion of a tractor-trailer rig separated from the chassis, striking an automobile and injuring its driver. From an attorney's perspective, the court's recitation of the parties in the action is instructive on the complexities involved in covering all potential liability sources in this type of litigation. Defendants included the driver, the trucking company, the owner of the tractor, the insurer of the tractor and tractor operator, the owner of the chassis, the lessee of the chassis, the manufacturer of the trailer and tandem axles, and the operator of the terminal where the chassis was stored prior to the accident.

Discovery established that only the driver and his employer, the trucking company, could ultimately face liability in the case. All others, with the exception of the insurer, were dismissed from the suit on summary judgment.

Liability was imposed on the driver and his employer for their failure to comply with the applicable federal regulations governing "Parts and Accessories Necessary for Safe Operation" of commercial motor vehicles. 49 C.F.R. 393.1 et seq. These regulations set forth certain standards that must be met by drivers and motor carriers in the inspection and maintenance of commercial motor vehicles operating on the highway. In this case, the driver's duty was to inspect the chassis and axles to confirm that they were properly locked.

Unfortunately, the driver made only a visual inspection and could not, therefore, confirm that the chassis and axles were locked properly prior to the accident. Moreover, there was no evidence of anything unusual before the accident that could have caused the chassis and axle to become disengaged, such as hitting a pothole or slamming the brakes or a sudden lane change. And most significantly, the axles were reattached to the chassis after the accident, and the unit worked properly. For a general discussion on a truck driver's duties under the Federal Motor Carrier Safety Regulations, *see Indian Trucking v. Harber, 752 N.E. 2d 168 (Ind. App. Ct. 2001).*

The loss of a wheel and tire from a tractor-trailer presents a particularly lethal situation. Several years ago on the Santa Ana freeway in Irvine, California, a 200-pound wheel spun off the axle of a tractor-trailer and sailed into traffic, crushing the cab of a pickup truck and leaving the driver blind, with impaired speech, a faulty memory, and a reduced ability to walk steadily. A lawsuit brought against the trucking company and its tire servicing firm resulted in a $13 million settlement for the victim.

The sad part, of course, is that many of these types of accidents can easily be prevented. Take, for instance, the trailer hitch failure. Trailer hitch accidents often result from the fact that the size of the load being hauled exceeds the appropriate hitch capacity. Whoever loads the trailer must know the weight of the load, as well as the design specifications of the hitch being used.

In most wheel-loss accidents, the post-accident analysis leads straight back to improper installation or maintenance of the wheel. A few simple questions- Were the wheel nuts and bolts torqued in the wrong direction? Were they overtightened? Was there a failure to lubricate them?-can quickly reveal the cause of the accident.

Given the potentially fatal consequences of improper installation or maintenance, federal and state motor carrier safety regulations require motor carriers and trucks to service their rigs on a regular basis. *See* 49 C.F.R. 396.3(a), which states: "Every motor carrier shall systematically inspect, repair, and maintain, or cause to be systematically inspected, repaired, and maintained, all motor vehicles subject to its control." *See also* 49 C.F.R. 396.17 listing the requirements for a periodic inspection of commercial motor vehicles.

Federal regulations also require the driver to make a detailed pre-trip inspection before hitting the road. *See* 49 C.F.R. 396.11 (daily driver inspection reports); *see also* 49 C.F.R. 396.13 ("Before driving a motor vehicle, the driver shall: (a) Be satisfied that the motor vehicle is in safe operating condition.."). The operation of a commercial motor vehicle in a condition likely to cause an accident or a breakdown of the vehicle is specifically forbidden. 49 C.F.R. 396.7.

Sometimes the fault lies with the failed component itself. Often, these failures result from the fact that the parts in question are counterfeit and inferior in quality to the original parts. Thus, they are not able to stand up to the stress requirements found in heavyduty truck operations. It is not unheard of to find lug nuts and bolts that simply disintegrated under the stress of the big rig, many of them turning out to be counterfeit parts. In the event that a commercial motor carrier company "unknowingly" installs counterfeit parts, then the truck driver himself can hardly be expected to anticipate a failure when he conducts a pre-trip inspection.

But in some instances, the failure of a part can be traced directly back to the fault of the driver. If the part has been abused by poor driving habits that create heat buildup and high pressure, as can happen to brake drums, then blame must be placed at the feet of the driver when the part cracks and is propelled into highway traffic.

Improperly Secured Loads. A major hidden problem-hidden to the public, that is-has to do with loads that are

improperly secured on a truck or trailer. Striking a piece of pipe on the highway or a mattress that has fallen from the top of a refuse truck is the end result of poor and unlawful loading practices, and can result in tragic consequences.

In *Railway Express Agency, Inc. v. Garland, 269 So. 2d 708 (Fla. App. 1972),* the court addressed the fatal circumstances that occurred when a bus driver stopped his vehicle in the center lane of an expressway to pick up a box that had fallen from a truck. The bus driver's action precipitated a rear-end collision between another truck and the bus, resulting in the death of the truck driver. Suit was brought against the trucking company whose truck had created the original danger by dropping the box on the roadway. One of the trucking company's defenses was that the bus driver's act of stopping the bus in the center lane of the expressway was an independent, intervening cause of the accident that relieved the defendant from liability. This defense, though, was rejected by the court on the ground that the stopping of the bus was a foreseeable consequence of the box falling from the first truck. The court, quoting the long-standing rule of intervening cause, stated that "..an intervening cause is only efficient if it is independent of and not set in motion by the original wrongful act. *269 So. 2d at 710.*

Another example of the dangers presented by improperly secured loads involves large flatbed trailers that haul crushed automobiles to the junkyards. We've all seen this potentially frightening scene: layers of crushed automobiles stacked on flatbed trailers that are, shockingly, often secured with nothing more than straps tying down each pile of crushed cars. A sudden stop, a quick lane change, a jackknife in bad weather, or almost any unexpected happening could throw these crushed automobiles off the trailer and into the traffic. So dangerous is this situation that the Federal motor carrier safety regulations specifically require transportation of crushed vehicles on vehicles that have containment walls or comparable means on four sides that extend to the full height of the load to block movement of the cargo in any direction. *See* 49 C.F.R. 393.132(c).

Debris from a truck need not be as large and frightful as a crushed car to have devastating consequences. In *Coon v. American Compressed Steel, Inc., 207 S.W.3d 629* (Mo. App. Ct., W.D. 2006), a 37-pound metal plate flew out of the top and over the sides of a truck owned and operated by American Compressed Steel (ACS). Later that same day, another semi-truck struck the metal plate and sent it airborne through the widow of an oncoming car, killing the driver of the car. The driver of the ACS truck was charged with and pled guilty to a misdemeanor violation of failing to sufficiently secure his load.

At the civil trial for the wrongful death of the driver of the car, plaintiff sought to impose punitive damages on ACS. Plaintiff argued that punitive damages were appropriate because ACS's conduct showed a conscious disregard for public safety. Specifically, the plaintiff charged that ACS failed to routinely require its drivers to secure loose pieces of scrap metal by tarping or by otherwise covering the loads. Interestingly, the court noted that one week after the fatal accident, ACS changed its policy and required drivers to place a tarp cover over all loads that would be hauled at highway speeds.

The trial court agreed with the plaintiff's assertion that there was sufficient evidence to submit the claim for punitive damages to the jury. The jury responded with a punitive damages award of $1 million. This award, and the $2 million awarded by the jury in compensatory damages, was upheld by the court on appeal.

On a final note, it is important to remember that besides a trucker's duty to properly secure a load before leaving a shipper's premises, the trucker is also required to stop within the first 50 miles of the trip to see if the load has shifted and, if so, to make appropriate adjustments for the safety of everyone. 49 C.F.R. 392.9(b)(2).

Conclusion. The public's first line of defense in the fight against hidden and tragic dangers on the nation's roadways is, of course, the prudent and responsible conduct of truck drivers and commercial trucking companies. Extensive federal and state guidelines exist to govern the installation, inspection, and maintenance of large commercial trucks. If properly followed and enforced, these regulations should minimize the likelihood that truck parts will come flying off vehicles or that unsecured loads will come loose on our roadways.

Nevertheless, the public's reliance on truck drivers and the commercial trucking companies to abide by federal and state regulations can only go so far in protecting our highways. Cautious driving by everyone, as well as aggressive reporting by the public of any visible signs of hauling dangers, will be necessary to combat these hidden dangers with trucks.

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ABOUT THE AUTHOR(S):

David N. Nissenberg is a member of the California and Florida bars and is currently a practicing attorney in San Diego, California. He lectures frequently throughout the United States on the topic of truck-accident litigation and is the author of the widely-used book, *The Law of Commercial Trucking: Damages to Persons and Property* (LexisNexis Matthew Bender 2007). Mr. Nissenberg is a graduate of Brown University and the University of Miami School of Law. He may be contacted at dnnesq@yahoo.com. He may also be contacted through the Truck Litigation Resource Center, L.L.C. at www.truckaccidentexperts.com.

Eades on Steel Techs., Inc. v. Congleton, 2007 Ky. LEXIS 125 (Ky. 2007)

2008 Emerging Issues 1632

Eades on Steel Techs., Inc. v. Congleton, 2007 Ky. LEXIS 125 (Ky. 2007)

By Ronald W. Eades

December 19, 2007

SUMMARY: In *Steel Techs., Inc. v. Congleton, 2007 Ky. LEXIS 125 (Ky. 2007),* the Kentucky Supreme Court weighed in on three key issues that many of the state's personal injury litigators often confront.

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ARTICLE: ANALYSIS. The opinion in *Steel Techs., Inc. v. Congleton, 2007 Ky. LEXIS 125 (Ky. 2007)* covers three major issues. It discusses the Constitutionality of the punitive damages award, the preservation of error where the claim was insufficiency of evidence, and the nature of the claim for negligent emotional distress. Those claims were raised in a wrongful death action that arose from a trucking accident. The defendant's driver had an accident that caused steel coils weighing approximately 37,000 pounds to fall from the back of the defendant's truck and strike the driver's side of a following vehicle. The driver of the following vehicle was killed at the scene. At trial, the jury ruled in favor of the plaintiffs and returned a total award of $ 3,767,267, broken down into the following amounts: $ 667,267 in compensatory damages for the wrongful death; $ 1,000,000 in loss of consortium damages for each child; $ 100,000 in pre-impact fear damages; and $ 1,000,000 in punitive damages. Defendants appealed the jury's award of pre-impact fear damages, the loss of parental consortium damages and the punitive damages award.

A. Preservation of error for insufficiency of evidence

The preservation of error issue was resolved with an indication of clear guidelines for practicing attorneys. The failure to preserve the error will work to the disadvantage of the attorney seeking to raise that error on appeal. Here, the defendants sought to raise several insufficiency of evidence issues pertaining to the amount of compensatory and punitive damages. The Kentucky Supreme Court, however, noted that the issues were not properly preserved at the trial court level.

The Court stressed that counsel seeking to properly preserve an insufficiency of evidence claim for purposes of appeal must make " . . . a motion for a JNOV, which in turn *must be predicated on a directed verdict motion at the close of all the proof.*" *Steel Techs., Inc. v. Congleton, 2007 Ky. LEXIS 125 (Ky. 2007) citing Baker v. Commonwealth, 973 S.W.2d 54, 55 (Ky. 1998)* (emphasis added). In addition, the Court stressed that a record of the motion for directed verdict must be made. *Steel Techs., Inc. v. Congleton, 2007 Ky. LEXIS 125 (Ky. 2007).*

Here, the defendant claimed that its trial counsel made a motion for directed verdict at the close of trial. However, the only record of the trial consisted of a video recording which had a gap of approximately 20 minutes. If the motion for directed verdict was made, it would have been made during this period. Where there is a gap in the record, the parties need to make a narrative supplement to the record pursuant to Ky. CR Rule 75.13. That was not done here. Since the directed verdict motion did not appear on the record, nor was there a narrative supplement, the error was not properly preserved and the Court refused to review it. *Steel Techs., Inc. v. Congleton, 2007 Ky. LEXIS 125 (Ky. 2007).*

The defandant's failure to create a proper record led to disastrous results for the defendant's appeal. Significantly, the lack of a proper record led the Supreme Court to refuse to review the defendant's claims of error regarding the insufficiency of evidence to support the jury's award of loss of consortium damages and $1 million in punitive damages.

B. Constitutionality of the punitive damages award

Stripped of its insufficient evidence arguments, the defendant's challenge of the punitive damages award was reduced to the sole legal issue of determining whether the award violated the Due Process Clause of the 14th Amendment to the U.S. Constitution, in light of the guideposts established by *State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (U.S. 2003)* and *Bmw of N. Am. V. Gore, 517 U.S. 559 (U.S. 1996).* Conducting a de novo review, the Court evaluated the award pursuant to the three factors identified by the U.S. Supreme Court in *Campbell* and *Gore*: (1) degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual damages and the punitive damages; and (3) the difference between the punitive damages and the penalties that could be imposed by civil or criminal statutes.

The Court noted that the defendant's degree of reprehensibility was low. The conduct was not intentional and was reckless at the most. *Steel Techs., Inc. v. Congleton, 2007 Ky. LEXIS 125 (Ky. 2007).* Significantly, in a concurring opinion, Justice McAnulty expressed concern that the facts in this particular case simply demonstrated negligence and therefore, future plaintiffs should not cite the opinion to support the contention that punitive damages are warrated in cases of simple negligence. To the contrary, Justice McAnulty noted that "gross negligence is still required by both our statutory and common laws." *Steel Techs., Inc. v. Congleton, 2007 Ky. LEXIS 125 (Ky. 2007)* (McAnulty, J., concurring) *citing* KRS § 411.130 and *Horton v. Union Light, Heat & Power Co., 690 S.W.2d 382, 388 (Ky. 1985).*

The second guidepost was easily resolved. The actual damage (i.e., compensatory damage) for the wrongful death was $667,267 and the punitive damage award was $1,000,000. That is well within the 4(punitive) to 1(actual) established by the U.S. Supreme Court in *Gore* and *Campbell*. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1524 (U.S. 2003).*

Reviewing the third punitive damage guidepost, the Court noted that the defendant had to pay a civil fine of $10,000 because its driver failed to secure the steel coils with a sufficient number of chains, as required by regulations promulgated by the Federal Motor Carrier Safety Administration. The Court noted that the difference between that fine and the punitive damage award was not as great as those the United States Supreme Court had reviewed in other cases.

In light of this analysis, the Court upheld the jury's $1 million punitive damage award.

C. Pre-impact fear or emotional distress

The major legal issue in the opinion was the jury's award of $100,000 for the decedent's pre-impact fear. The courts in Kentucky have maintained that, to recover for emotional distress in a negligence action, there must be a physical impact. The plaintiffs in this case claimed that there was an impact that caused the death, and that the recognition on the part of the deceased that the impact was about to occur, caused substantial fear. Specifically, plaintiffs contended that skid marks left by the decedent's vehicle, coupled with the gruesome post-accident description of her face appearing to have been frozen in a scream, sufficiently showed that the decedent experienced compensable, pre-impact fear.

The Court reaffirmed its previous holdings and held that impact was required. In addition, the Court noted that the impact must cause, and not simply accompnay, the emotional distress. *Steel Techs., Inc. v. Congleton, 2007 Ky. LEXIS 125 (Ky. 2007) quoting Deutsch v. Shein, 597 S.W.2d 141, 145 (Ky. 1980).* Here, it was not sufficient to prove a fear of a future impact. This portion of the opinion appears to confirm traditional Kentucky principles regarding emotional distress claims.

The Court's majority opinion, however, went a step further and speculated on the potential future evolution of the claim. The majority noted that this case did not appear to be a good set of facts to change the law. There was not sufficient expert evidence of the possibility of fear being suffered. The Court suggested, however, that future cases may change the law. The Court suggested that a future case could mount "a strong challenge to the impact rule in the future if the victim can give a first-hand account or reliable eye-witness testimony is available, and there is demonstrable evidence of mental distress manifesting in a medical injury proven through expert testimony." *Steel Techs., Inc. v. Congleton, 2007 Ky. LEXIS 125 (Ky. 2007).*

CONCLUSION. The Kentucky Supreme Court's *Congleton* opinion discusses three issues that should assist counsel in the preparation and trial of future personal injury and wrongful death actions.

First, the issue of preservation of error on insufficiency of evidence is now clearly stated. If counsel plans on raising evedentiary issues on appeal, a motion for directed verdict must be made at the close of all of the proof. In addition, the party seeking to raise that issue must make sure that the motion is preserved in the record. It must appear in the transcript, on the video or be raised as a part of a narrative supplement pursuant to Ky. CR Rule 75.13. Failure to follow these requirements will result in a loss of that issue on appeal.

Second, in cases where punitive damages are sought, the court must and will closely follow the U.S. Supreme Court guideposts established by *State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (U.S. 2003)* and *Bmw of N. Am. v. Gore, 517 U.S. 559 (U.S. 1996).* In preparation for trial and appeal of punitive damage awards, counsel must analyze the facts of the case in light of those rules. One key issue to consider in this respect is whether any civil or criminal fines were levied against the defendant for the conduct that is at issue in the personal injury action. During trial and post-trial, analysis should focus on the degree of reprehensibility and the ratio of punitive damages to actual harm sustained.

Third, the issue of negligent infliction of emotional distress in the absence of impact raises the most interesting problem of the case. Although the Court reaffirmed the traditional Kentucky rule, the opinion set out how plaintiffs' lawyers are to raise this issue in the future. To make a strong challenge to the traditional impact rule, plaintiffs must offer several items of proof:

(1) victim's first-hand account or eye-witness evidence that the plaintiff observed the frightening events and suffered emotional shock;

(2) demonstrable evidence of the emotional distress;

(3) the emotional distress must manifest in a medically provable injury; and

(4) the emotional distress and manifest medical injury must be proven through expert testimony.

The Kentucky Supreme Court did not, of course, promise that the law would change in the future. The Court did, however, suggest that the proper proof would present a "strong challenge" to the existing impact rule.

RELATED LINKS: For general discussions of negligent emotional distress, see

- 1-5 Damages in Tort Actions 5.syn;
- 13-55A Personal Injury--Actions, Defenses, Damages 55A.syn

For a discussion and suggested jury instructions on damages in automobile accident cases, see Ronald W. Eades,
- 1-16 Jury Instructions in Auto Actions 4th Edition 16.syn

For cases on the appropriate standard to review punitive damage awards, see
- State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (U.S. 2003);
- Bmw of N. Am. v. Gore, 517 U.S. 559 (U.S. 1996)

For a discussion and suggested jury instructions on negligent infliction of emotional distress, see Ronald W. Eades,
- 1-7 Jury Instructions on Damages in Tort Actions 7.syn

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Professor Eades teaches torts and evidence. He is the author of numerous works in those same legal fields. He is the author of Jury Instructions on Products Liability (LexisNexis); Jury Instructions on Damages in Tort Actions (LexisNexis); Jury Instructions on Medical Issues (LexisNexis); Jury Instructions on Automobile Actions (LexisNexis); Jury Instructions in Commercial Litigation (LexisNexis); and Jury Instructions in Real Estate Litigation (LexisNexis).

Professor Eades has also been active in the research and development of evidence law. He has served on the Kentucky State Evidence Rules Review Commission. In the academic arena, Professor Eades has been an active teacher. He has also been active in the development of technology resources for legal education. He served as a Fellow for the Center for Computer Assisted Legal Instruction where he wrote computer lessons in tort law for law students. He also serves on the Editorial Board and the Governing Board for the Center for Computer Assisted Legal Instruction.

Nissenberg on Trucking in Adverse Weather Conditions: Preventing Asphalt Carnage

2008 Emerging Issues 1468

Nissenberg on Trucking in Adverse Weather Conditions: Preventing Asphalt Carnage

By David N. Nissenberg

December 13, 2007

SUMMARY: David Nissenberg, a leading expert and author in the field of truck accident litigation, reviews the practical, legal, and technological issues arising in connection with driving large commercial vehicles in adverse weather conditions. This Emerging Issues Analysis discusses various weather conditions giving rise to large-truck accidents and ensuing litigation.

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ARTICLE: In November 1998, one of California's worst multiple-vehicle accidents occurred in dense fog on a one-mile stretch of Highway 99 in Tulare County. Seventy-four vehicles were involved, including 19 tractor-trailer rigs. Some 51 people were injured, 10 critically, and two died.

According to figures released by the Truck Safety Coalition, a total of 5,190 large-truck related fatalities were recorded nationwide in 2004 by the Fatality Analysis Reporting System. Of those 5,190 fatalities, 415 of them occurred in California-that number being the second-highest state total in the nation.

California is one state subject to extended periods of heavy fog that completely envelop lanes of travel and all the traffic on them. There are also other times that smoke or dust totally covers a highway or interstate, leading to catastrophic collisions between big rigs and cars. The California Highway Patrol states that, over a 10-year period (1996 to 2006), there have been a total of 370,558 truck-involved collisions due to bad weather conditions. From that total, 3,848 of them were fatal.

The driver who is unlucky enough to be behind the wheel of a large commercial motor vehicle when it has been enveloped in dust, smoke, or fog is often faced with a "Hobson's choice" of deciding whether to stop or to slow down when either may result in disaster. One of the best analyses of this classic situation can be found in the decision of the Washington Supreme Court in *Blaak v. Davidson, 84 Wn.2d 882, 529 P.2d 1048 (1975).* It involved a situation where the vision of the driver of a gasoline truck was completely obscured by a dust cloud. His response was to reduce the speed of the truck to 5 to 10 miles per hour. Why the decision to slow rather than stop? The court recited three reasons: (1) the driver's fear of being struck from behind if he stopped because large wheat trucks and petroleum tankers regularly traveled that road; (2) the fact that his truck was too large to fit on the shoulder; and (3) the driver's knowledge of a pull-out not too far ahead that he thought he could reach, and safely wait out the storm.

Unfortunately, the truck rear-ended a car that had slowed to only two or three miles per hour.

The issue before the court was simply this: If a driver fails to stop when visibility becomes negligible because of atmospheric conditions, does that failure constitute negligence as a matter of law or is it a question for a jury to decide-taking into account the facts and circumstances of the situation? Opting for the less rigid rule, the court found that there was no absolute duty to stop because, "... it is at least debatable whether stopping on the highway for an indeterminate period of time would be safer, with respect to other users of the highway, than slowly proceeding to a known, safe, pull-out a short distance ahead." *Blaak v. Davidson, 84 Wn.2d at 886, 529 P.2d at 1050) See also Quick v. Crane, 111 Idaho 759, 727 P.2d 1187 (1986).*

While the fact that the numerous accidents caused by lack of visibility in California is alarming, even more frightening is that much of the asphalt carnage can be prevented, in large part, by new technology and safer truck-dispatching policies.

Though fog and other such visual impediments can never be eliminated, they are usually predictable, particularly in certain areas of the state. On the occasion of the 1998 Tulare County accident, the California Highway Patrol had been issuing statements about the dangers of dense fog for 48 hours before the pile-up.

Trucking-company dispatchers who send 18-wheelers across our interstates now are only a click away from up-to-date weather information covering all parts of the state and nation. A substantial number of tractor-trailers operating for major motor carriers have computers installed in their cabs and can receive e-mails from their home offices. When dense fog is predicted in an area through which a company rig will be traveling, is it too much to expect companies to direct their vehicles to a truck stop to wait out the fog or to re-route the truck through a less affected area?

In fact, drivers of heavy commercial motor vehicles, whether on an interstate or intrastate trip, must comply with a federal motor carrier safety regulation mandating the exercise of extreme caution when hazardous conditions such as those caused by snow, ice, sleet, mist, rain, dust, smoke, or fog adversely affect a driver's visibility or the traction of the vehicle. The regulation, 49 C.F.R. 392.14, also requires drivers to discontinue use of the rig if the conditions become so dangerous that safe operation is compromised. This federal regulation pre-empts a state's ordinary standard of care and creates a higher standard of care for commercial vehicle operators driving in the afore-listed adverse weather conditions. *See* 49 C.F.R.392.2.

In *Weaver v. Chavez, 133 Cal. App. 4th 1350, 35 Cal. Rptr. 3d 514 (Ct. App. 2d Dist. 2005)*, the California appellate court reversed a defense verdict in a traffic accident case involving a tractor-trailer that was traveling one mile over the speed limit in rain. Reversal was based on the fact that the trial judge had refused plaintiff's request for an instruction to the jury regarding the federal extreme caution standard. In fact, this regulation, 49 C.F.R. 392.14, has been adopted by 44 states and made a part of each of their laws. *See* Nissenberg, The Law of Commercial Trucking, Sec 6.05 [4][d]. Therefore, the standard would apply even where the truck was not engaged in interstate transportation at the time of the accident. For the appropriateness of giving the instruction, *see also Whitfield Tank Lines v. Navajo Freight Lines, 90 N.M. 454, 564 P.2d 1336 (N.M. Ct. App. 1977).*

The fallibility of the human response to driving in adverse conditions can never be overstated. So when technology offers an answer to the problems associated with driving in dense fog, no rational person or trucking company should turn a deaf ear. The advent of radar-based, collision-avoidance systems is now upon us. As of 2005, such systems were in use in more than 50,000 trucks operated in the United States.

With California's extreme climate conditions, it is imperative that an even greater number of trucks operating on the California roadways be outfitted with safety in mind. Given the new collision-avoidance technology, drivers can receive audio and visual warnings of objects up to 500 feet ahead, even around curves. The systems also check adjacent lanes for obstacles, helping drivers maintain a safe following distance between vehicles.

A 2005 National Transportation Safety Board report on the causes of a 22-vehicle, chain-reaction collision

involving tractor-trailer rigs on a smoky Interstate 10 in north Florida concluded that, if the trucks had been fitted with available collision-avoidance systems, there was a strong potential the accident would have been prevented or been substantially less severe.

In the constantly evolving field of truck accident litigation, this new technology is bound to result in new theories of liability and new standards of care based on the availability and use of these systems. Whether liability will be imposed on motor carriers for failing to install such devices when they are available is a question that awaits a future decision.

In the meantime, commercial trucking companies owe it to the driving public to make sure they do everything possible to keep our highways safe. That includes obeying federal laws, dispatching drivers off the roadways during adverse conditions and, most of all, taking advantage of technology that is here today and can save lives.

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David N. Nissenberg is a member of the California and Florida bars and is currently a practicing attorney in San Diego, California. He lectures frequently throughout the United States on the topic of truck-accident litigation and is the author of the widely-used book, The Law of Commercial Trucking: Damages to Persons and Property (LexisNexis Matthew Bender 2007). Mr. Nissenberg is a graduate of Brown University and the University of Miami School of Law. He may be contacted at dnnesq@yahoo.com. He may also be contacted through the Truck Litigation Resource Center, L.L.C. at www.truckaccidentexperts.com.

35 of 41 DOCUMENTS

Class Certification Trends: Non-Injury Class Actions & Issue Certification

2008 Emerging Issues 1474

Wilson Jr. on Class Certification Trends: Non-Injury Class Actions and Issue Certification

By James M. Wilson Jr.

December 13, 2007

SUMMARY: In September 2006, the federal district court for the Eastern District of New York certified a $200 billion national class action lawsuit made up of tens of millions of smokers of "light" cigarettes, alleging that health-conscious smokers relied on these terms to buy what they thought was a safer product. This Emerging Issues Analysis demonstrates how the class action mechanism is being utilized to seek recovery purely of economic damages.

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ARTICLE: In September 2006, the Honorable Jack B. Weinstein of the federal district court for the Eastern District of New York certified a $200 billion national class action lawsuit made up of tens of millions of smokers of "light" cigarettes. The gravamen of the complaint is that the tobacco industry for many years utilized the terms "light" and "ultra-light" to convey the message that such cigarettes were less harmful than regular cigarettes, when in fact, they were not. The complaint alleges that health-conscious smokers relied on these terms to buy what they thought was a safer product. The class does not assert personal injury damages, but rather seeks to recover financial damages suffered because these smokers did not get what they thought they were buying -- a safer cigarette. *Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992 (E.D.N.Y. 2006).* The case demonstrates how the class action mechanism is being utilized to seek recovery purely of economic damages. However, many expect that the Second Circuit Court of Appeals will reverse certification among other reasons, because the determination of whether a smoker bought "light" cigarettes due to health concerns or due to non-health reasons requires an individualized examination of each class member's decision-making process. One of the requirements for certifying a class action is that common proof may be used to establish the claims. If individualized examination of proof is required, then a court will deny a request to certify a class. This type of case demonstrate the potential utility of Rule 23(c)(4) of the Federal Rules of Civil Procedure, which permits the certification of issue class or subclasses.

Rule 23 of The Federal Rules of Civil Procedure. Rule 23(a) sets out four basic elements that a plaintiff must show in order for the court to allow the case to proceed as a class action: (1) the class be so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims and defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). n1

Additionally, because there typically will be some level of individualized issues arising in a class action, Rule

23(b) allows a court to certify a class only if "questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members" and "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P.23(b)(3) (emphasis added). The predominance factor is met where the issues that are applicable to the entire class predominate over issues that are subject only to individualized proof. *Veal v. Crown Auto Dealerships, Inc., 236 F.R.D. 572, 579 (M.D. Fla. 2006)* (quoting *Kerr v. City of West Palm Beach, 875 F.2d 1546, 1558 (11th Cir. 1989))* (alteration in original). n2

"Non-Injury" Class Actions. The *Schwab v. Philip Morris USA* case illustrates a trend to seek certification under Rule 23 of a class of individuals who suffered economic damages from actions that also may have resulted in personal injury claims. Indeed, there have been hundreds of personal injury lawsuits filed against the tobacco companies arising from the very same facts as alleged in *Schwab.* But, personal injury claims do not always lend themselves well to class action treatment.

Personal injury claims that are tied to a complex course of conduct engaged in by a defendant over a long period of time typically have not been viewed as well suited for class action treatment by the courts. *Clay v. American Tobacco Company, 188 F.R.D. 483, 492 (S.D. Ill. 1994)* (citing cases). Even a single act causing injury to a large number of individuals has been difficult to certify. *See, e.g., In re Paxil Litigation, 212 F.R.D. 539, 550 (C.D.Cal. 2003)* (the typicality requirement will not be met where factual differences exist among plaintiffs, even in a case with a single defendant and a single product because differences may force the named representatives to make arguments at trial that may be adverse to another class member's claim). n3 The *Schwab* case involves numerous brands and different variations of "light" cigarettes, even though the product itself, *i.e.*, cigarettes, is the same. Moreover, as with medical product liability cases, defendants argued that whether a "light" cigarette was safer or not depended on consumption and how each smoker held and puffed on the cigarette.

Thus, plaintiffs may seek to recover economic damages on behalf of a class pursuant to claims that focus on the defendants' actions. One example is a claim for restitution or unjust enrichment. Commonality may be demonstrated where a common course of wrongful conduct affects the class. *See* Newberg and Conte, Newberg on Class Actions ("Newberg"), § 3.10 at 3-51 (3d ed.1992) ("When the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action, one or more of the elements of that cause of action will be common to all of the persons affected."); *see also, e.g., Kennedy v. Tallant, 710 F.2d 711, 717 (11 Cir. 1983)* (finding the commonality requirement satisfied in a case involving "a single conspiracy or fraudulent scheme against a large number of individuals."). An unjust enrichment claim focuses on a defendant's conduct rather than each individual plaintiff's conduct.

In *Schwab,* plaintiffs also argued that common issues of the defendants' conduct predominated over individual issues and sought recovery of unjust profits. *Schwab, 449 F. Supp. 2d at 1042* ("Plaintiffs' proposed jury instructions would make this distinction [of not seeking personal injury damages] clear. 'Damages that are recoverable include, for example, the payment of money, unjust profits, and overcharges. They do not include, for example, claims for personal injury or mental anguish.' "). Other cases against the tobacco companies also assert claims for unjust enrichment (among other claims as well), arguing the defendant tobacco companies' conduct is the focus of the inquiry to determine liability. *See e.g., Good v. Altria Group, Inc., 436 F. Supp. 2d 132 (D. Maine 2006)* vacated and remanded *501 F.3d 29 (1st Cir. 2007); Virden v. Altria Group, Inc., 304 F. Supp. 2d 832 (N.D.W.Va. 2004).*

Nevertheless, S*chwab* is at heart, a fraud case:

It is plaintiffs' view that this campaign caused smokers to buy "light" cigarettes, in large amounts, at a price greater than they would have paid had the truth been acknowledged by defendants. Defendants' acts, plaintiffs contend, constituted a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C. §§ 1961ff,* warranting trebled money damages. *18 U.S.C. § 1964*(c).

Schwab, 436 F. Supp. 2d at 1018.

Even Judge Weinstein, in his certification order, recognized the difficulties that plaintiffs faced regarding Rule 23's requirement that common issues of proof, in this case the proof of each individual's reliance and injury, must predominate:

While evidence of fraud on the class appears to be quite strong-and defendants have been less than candid in insisting that there was no fraud-evidence of the percentage of the class which was defrauded and the amount of economic damages it suffered appears to be quite weak-and plaintiffs have been less than candid in failing to acknowledge that deficiency in their proof.

Schwab, 436 F. Supp. 2d at 1021.

Many who have followed the *Schwab* case believe that Judge Weinstein identified the very basis on which the Court of Appeals will reverse his order certifying smokers of "light" as a class.

Issue Certification. Rule 23(c)(4)(A) allows a court to sever certain common issues for class certification while leaving those issues that require an individualized resolution for later in the same case or in subsequent individual cases. Numerous courts have endorsed the application of Rule 23(c)(4)(A) "issue class" certification in mass tort or analogous cases presenting a common core of issues concerning the defendant's conduct or product, notwithstanding downstream variability in specific causation and damages. *See e.g., Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1196-97 (6th Cir. 1988); see also, R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39 (Fla. App. 1996)* (granting res judicata effect, under a Rule 23(c)(4)(A) rationale and under Florida law, to members of a decertified class on "basic issues of liability common to all class members" decided in the class trial, for use in their individual cases). n4

Not all questions need to be common, "only that some questions are common and that they predominate . . . ." *Veal, 236 F.R.D. at 580.* Common issues of fact or law predominate if they "ha[ve] a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief." *Klay v. Humana, Inc., 382 F.3d 1241, 1250 (11th Cir. 2004)* (citation omitted). "To predominate,' common issues must constitute a significant part of the individual cases." *Jenkins, 782 F.2d at 470.* n5

Some courts seem to have eschewed a strict application of the predominance element if the issues sought to be certified "will materially advance a disposition of the litigation as a whole." *In re Tetracycline Cases, 107 F.R.D. 719, 727 (W.D.Mo. 1985).* "The admitted effect of this determination is to lessen-for Rule 23(c)(4)(A) purposes-the importance of the predominance requirement, as such. . . . In fact, [] the predominance requirement, in connection with a Rule 23(c)(4)(A) request, [should be viewed] as subsumed to a considerable extent within [Rule 23(b)(3)'s] superiority requirement." *Id; see also In re Tri-State Crematory Litig., 215 F.R.D. 600, 694-700 (N.D.Ga. 2003)* (certifying common liability issues and several individual injury issues, in the context of Rule 23(b)(3) predominance and superiority analyses that determined predominance on a claim-by-claim basis).

The analysis conducted under Rules 23(b)(3) and 23(c)(4)(A) are nearly the same: the examination focuses on the presence of common and individual issues and which common issues are of sufficient significance to merit class treatment.

Many attorneys defending against class certification argue that Rule 23(c)(4) is merely a "housekeeping" provision and cannot be relied upon as an independent basis to certify narrow issues. *See e.g.*, Laura J. Hines, *The Dangerous Allure of the Issue Class Action, 79 Ind. L.J. 567, 587-88 (Ind. L.J. 2004).* In other words, Rule 23(c)(4) provides a basis on which the court can manage a class action after it has determined that all the requirements of Rules 23(a) and (b) have been met. The Seventh and Fifth Circuits appear to have adopted this position. *See In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995); Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996).*

Until the Supreme Court weighs in on this issue however, Rule 23(c)(4)(A) remains a viable tool to be used to

address difficult certification issues when there is a common course of conduct by a defendant resulting in some form of injury on a large number of individuals.

Return to Text

n1 . Class certification is essentially a procedural matter that is determined prior to determinations on the merits of the case. *See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974);* see also Fed. R. Civ. P. 23 (c)(1) (mandating that the court determine whether to certify the action as a class action "at an early practicable time"). Plaintiffs seeking certification must also identify who will be in the class based on an objective and ascertainable basis. Fed. R. Civ. P. 23(a); s*ee also* Manual for Complex Litigation 4th, §21.222.

n2 A Rule 23(b)(3) class action allows members of the class the right to opt out if they chose after receiving notice of the action. In contrast, Rule 23(b)(1) permits class actions without a right to opt out where individual interests could be harmed by inconsistent adjudications or individual adjudications that would essentially be dispositive of the claims asserted by other members of the proposed class. Rule 23(b)(2) also allows for class actions without the right to opt out for cases seeking injunctive relief.

n3 Nevertheless, plaintiffs whose claims center around only one product, one defect and who can demonstrate that causation will not be the overarching issue sometimes obtain class certification for personal injury claims. *See e.g., St. Jude Medical, Inc. Silzone Heart Valves Products Liability Litigation, 2003 U.S. Dist. LEXIS 5188 (D. Minn. 2003)* (court certified a personal injury class in an action involving an allegedly defective heart valve).

n4 *See Cordes & Co. Financial Services, Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 108-09 (2d Cir. 2007); In re Nassau County Strip Search Cases, 461 F.3d 219, 227 (2d Cir. 2006)* (reversing denial of class certification); *In re Chiang, 385 F.3d 256 (3d Cir. 2004); Smilow v. Southwestern Bell Mobile Sys., Inc., 323 F.3d 32, 41 (1st Cir. 2003); Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996); Cent. Wesleyan Coll. v. W.R. Grace & Co., 6 F.3d 177 (4th Cir. 1993); Watson v. Shell Oil Co., 979 F.2d 1014 (5th Cir. 1992); Jenkins v. Raymark Industries Inc., 782 F.2d 468 (5th Cir. 1986); In re School Asbestos Litigation, 789 F.2d 996 (3d Cir. 1986).*

n5 "It is well-established that, individual issues will often be present in a class action, especially in connection with individual defenses against class plaintiffs, rights of individual class members to recover in the event a violation is established, and the type or amount of relief individual class members may be entitled to receive. Nevertheless, it is settled that the common issues need not be dispositive of the litigation. The fact that class members must individually demonstrate their right to recover, or that they may suffer varying degrees of injury, will not bar a class action; nor is a class action precluded by the presence of individual defenses against

class plaintiffs. Moreover, a court has the discretion to limit a class suit to liability issues only, or to select[] common claims and defenses." 1 Newberg § 3:12.

RELATED LINKS: For further discussion on class actions, see
- 5-23 Moore's Federal Practice -- Civil 23.syn

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Longstreth Reflects on Two Years of Hurricane Katrina Litigation Against the US

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Longstreth Reflects on Two Years of Hurricane Katrina Litigation Against the US

By Robert C. Longstreth

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SUMMARY: With the benefit of looking back on two years of recovery and litigation from the devastation of Hurricane Katrina, Robert Longstreth reflects on the legal strategies that have evolved in the lawsuits filed against the United States. Longstreth is one of the foremost legal authorities on the Federal Tort Claims Act, and is co-author of the leading treatise in the field, Jayson & Longstreth, Handling Federal Tort Claims. (LexisNexis, 2007.

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ARTICLE: The startling images of Hurricane Katrina's devastation in the Gulf Coast remain vivid more than two years later. The raw statistics from that August 2005 disaster are equally chilling: nearly 2,000 people dead; insured losses currently estimated at over $40 billion; total losses projected eventually to reach more than $80 billion.

In the aftermath of one of the nation's greatest disasters, attention immediately focused on the federal government's role, both in contributing to the events that brought about the damage and in failing to speed relief to the devastated areas. Questions were raised regarding the Army Corps of Engineers' design and maintenance of the canal walls and levees that failed to protect New Orleans from the flooding. Significant charges were also leveled at the federal government's purported mismanagement of the recovery efforts, including suspicions that issues of race and class contributed to the deficiency of the federal government's response to the disaster.

Accordingly, it was apparent from the outset that Katrina-related litigation would inevitably target the United States. n1 Today, with the benefit of looking back over more than two years of recovery and litigation, we are able to see how various strategies have evolved both in the prosecution and defense of Katrina claims involving the United States.

Overview of Katrina Litigation Against the Federal Government. In the time since the disaster struck, Katrina-related suits against the United States have taken many forms. These include:

- Admiralty claims alleging defective design, maintenance, and construction of the Mississippi River Gulf Outlet ("MRGO"), the Gulf Intracoastal Waterway ("GICW"), the Industrial Canal, and the levees and floodwalls containing these waterways. n2

- Admiralty claims challenging the failure, before the storm, to sink a barge that damaged a levee during the storm. n3
- Admiralty claims alleging that dredging by the Army Corps of Engineers destroyed protective wetlands, exacerbating the effects of the hurricane. n4
- Federal Tort Claims Act (FTCA) and admiralty claims challenging the design and maintenance of the MRGO, the 17th Street and London Avenue Canal levees and flood walls, the Inner Harbor Navigation Canal, the GICW, and the Lake Pontchartrain, Louisiana and Vicinity Hurricane Protection Project. n5
- Wrongful death claims for failure to provide proper treatment at evacuation centers. n6
- Third-party claims against the United States by nursing home operators sued for failing to properly safeguard their patients. n7
- Injunctive relief claims under the Stafford Disaster Relief and Emergency Assistance Act and the United States Constitution regarding the provision of temporary housing and other emergency assistance. n8
- Claims against the Federal Emergency Management Authority (FEMA) for improper adjustment of flood insurance claims. n9
- Citizen suit claims against the Army Corps of Engineers for environmental violations. n10

Despite the wide variety of these claims, recovery from the United States largely turns on two factors: (i) whether the claim against the United States involves the government's exercise of a discretionary function and (ii) whether the claim arises from operation of a flood control project.

The Discretionary Function Exception. The discretionary function exception to the Federal Tort Claims Act bars suit when the government action being challenged involves an element of judgment or choice and also implicates the weighing of policy alternatives or the balancing of competing public interest factors. The United States Supreme Court's first discussion of the discretionary function exception arose from an earlier disaster on the Gulf Coast. That disaster resulted from an explosion in the port of Texas City, Texas of ammonium nitrate fertilizer that had been manufactured and shipped at the government's direction as part of a program to increase the food supply in Europe following World War II. The explosion killed over 560 people, injured 3,000 others, and caused widespread property damage.

Ruling the government immune from suit, the court held that the government's decisions relating to the program involved protected policy choices. n11 Specifically, the Court pointed to the government's decisions regarding: (i) the institution and implementation of the fertilizer export program; (ii) the manner in which the Coast Guard policed the storage and loading of the fertilizer; and (iii) the Coast Guard's efforts in fighting the fire caused by the explosion.

Although first formally codified in the FTCA, the discretionary function exception has been generally applied to other types of suits against the government. Most notably, the United States Courts of Appeals, including the Fifth Circuit that covers Louisiana and Mississippi, have now uniformly held that the exception applies to admiralty suits brought against the government under the Suits in Admiralty Act, the Public Vessels Act, and the Admiralty Extension Act. n12 Courts have reasoned that the doctrine of separation of powers between the branches of government precludes judges from imposing tort liability on the government for discretionary actions taken by the Executive Branch. Similarly, the Stafford Disaster Relief and Emergency Assistance Act expressly incorporates a discretionary function exception, which largely tracks the language found in the FTCA and has generally been interpreted in the same way. n13 Suits seeking meaningful relief against the government must therefore overcome the exception.

Application of the Discretionary Function Exception to Katrina Claims. A half century ago, Justice Jackson concluded his dissent in the *Dalehite* case by stating: "the ancient and discredited doctrine that 'The King can do no wrong' has not been uprooted; it has merely been amended to read, 'The King can do only little wrongs.' " n14 While this may be overstated, chances of recovery in FTCA actions are significantly enhanced when the government conduct involved is analogized to "garden-variety torts" or "quotidian wrongs" rather than high-level policy decisions. n15 Many of the allegations in the Katrina cases-for example, those referring to MRGO as "a shotgun pointed straight at New Orleans" or a "deadly hurricane highway," and those stating that "its design would only exacerbate a hurricane's power and destructive effect," n16 -implicate the government's basic policy decision to construct the waterway in the first place and are unlikely to survive a discretionary function challenge. Similarly, generalized allegations that the

government issued a dredging permit without considering, or negligently considering, the effect on flood control n17 touch on the government's discretionary functions and do not assert garden-variety conduct that would avoid application of the discretionary function exception.

The discretionary function exclusion has also been applied to claims challenging the government's rescue efforts. In those cases the courts have held that, if decisions on when, where, and how to remove hurricane debris are committed to agency judgment, they are deemed "policy-imbued decisions" protected by the exclusion. n18 Similarly, it has been held that decisions regarding "the timing and scope" of FEMA's allocation of resources in the aftermath of Katrina likewise fall within the discretionary function exception. The court noted that such decisions not only include an element of judgment necessary on the part of the acting agency employees, but also involve an element of choice that is clearly grounded in social, economic, and public policy." n19

On the other hand, claims that the government violated constitutional prohibitions in distributing disaster benefits have survived the discretionary function defense. However, such claims have largely been dismissed on the merits. n20

Given the wide range of governmental actions involved in constructing and maintaining the MRGO, the GICW, and the other projects at issue, it is certainly possible that further discovery and factual development may disclose agency decisions that either contradicted sufficiently specific mandates or involved only non-policy-based technical considerations. In such cases, plaintiffs may be able to overcome the discretionary function exclusion and tie such decisions to specified losses. n21

The Federal Flood Control Act Immunity. Another important immunity is set forth in the Flood Control Act of 1928, which provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." n22 This provision has twice been considered by the Supreme Court. In *United States v. James*, n23 the court held that the phrase "floods or flood waters" encompasses not just waters that have caused damage by escaping confinement or control, but also those that have been released when a reservoir is at flood stage.

In *Central Green Co. v. United States*, n24 the Court held that the immunity attaches only to waters in a federal flood control project that have reached the flood stage, not waters flowing through the project in the normal course. Although the Supreme Court has not addressed the issue, courts have also held that the immunity applies only if a flood control project is involved. n25

Application of the Federal Flood Control Act Immunity to Katrina Claims. As its language implies, the Flood Control Act's immunity provision applies generally to all asserted statutory bases of liability against the United States. Thus, the provision has barred an environmental suit brought under the Resource Conservation and Recovery Act for damages allegedly resulting from the Army Corps of Engineers' failure to maintain adequate containment structures around a canal, which allowed hazardous waste to discharge into a neighborhood, thereby creating an imminent and substantial endangerment. n26

There is little doubt that the damages asserted in the Katrina suits as resulting from pre-storm negligence on the part of the government were caused by flood waters as opposed to waters flowing normally. Accordingly, immunity will turn on the extent to which the various waterways at issue are considered part of a flood control project. The London Avenue Canal, which is included in the Lake Pontchartrain and Vicinity, Louisiana Hurricane Project, has been held to be part of a federal flood control project, and suits arising from its failure have been barred. n27 By contrast, the trial court has found a factual issue as to the relationship between the Lake Pontchartrain and Vicinity, Louisiana Hurricane Project, and MRGO, concluding that MRGO might be better characterized as a navigation project rather than a flood control project. n28

Conclusion. The stakes for the plaintiffs and the government in the Katrina lawsuits are momentous, as are the protections and immunities afforded the government. While some actions against the government have and likely will

founder on other grounds, such as the failure to follow procedural prerequisites to suit, resolution of the discretionary function exception and flood control immunity issues will have the greatest bearing on the ultimate scope of the government's liability.

Return to Text

n1 Longstreth, "Tort Suits Against the Federal Government as a Result of Hurricane Katrina," LexisNexis Litigation Spotlight (Sept. 2005).

n2 *In re Ingram Barge Co.*, No. 05-4419 (E.D. La.), reported at *435 F. Supp. 2d 524 (E.D. La. 2006), 2007 U.S. Dist. LEXIS 11338* (E.D. La. Feb. 12, 2007) and *2007 U.S. Dist. LEXIS 23158* (E.D. La. Mar. 14, 2007).

n3 *In re Ingram Barge Co.*, No. 05-4419 (E.D. La.), reported at *435 F. Supp. 2d 524 (E.D. La. 2006).*

n4 *In re Ingram Barge Co.*, No. 05-4419 (E.D. La.), reported at *2007 U.S. Dist. LEXIS 23158* (E.D. La. Mar. 14, 2007).

n5 *In re Katrina Canal Breaches Litigation*, No. 05-4182, reported at *471 F. Supp. 2d 684 (E.D. La. 2007)* and *2007 U.S. Dist. LEXIS 66483* (E.D. La. Aug. 29, 2007); *see also Berthelot v. Boh Bros. Construction Co.*, No. 05-4182 (E.D. La.), reported at *2006 U.S. Dist. LEXIS 57817* (E.D. La. July 19, 2006) and *2007 U.S. Dist. LEXIS 32027* (E.D. La. Apr. 27, 2007); *Banks v. United States, 2007 U.S. Dist. LEXIS 24454 (E.D. La. 2007).*

n6 *Freeman v. U.S. Dep't of Homeland Security*, No. 06-4846 (E.D. La.), reported at *2007 U.S. Dist. LEXIS 31827* (E.D. La. Apr. 30, 2007).

n7 *Martin v. Lafon Nursing Facility of the Holy Family*, No. 06-5108 (E.D. La.), reported at *2007 U.S. Dist. LEXIS 85956 (D. La. 2007)* (E.D. La. Nov. 19, 2007); *In re Katrina Canal Breaches Litigation*, Nos. 05-4182 and 06-7400 et al. (E.D. La.), reported at *2007 U.S. Dist. LEXIS 37397* (E.D. La. May 16, 2007); *In re Katrina Canal Breaches Litigation*, Nos. 05-4182 and 06-7400 (E.D. La.), reported at *2007 U.S. Dist. LEXIS 35422* (E.D. La. May 15, 2007).

n8 *McWaters v. Federal Emergency Management Agency*, No. 05-5488 (E.D. La.), reported at *408 F. Supp. 2d 221 (E.D. La. 2006)* and *436 F. Supp. 2d 802 (E.D. La. 2006).*

n9 *Bolden v. Federal Emergency Management Agency*, No. 06-4171 (E.D. La.), reported at *2007 U.S. Dist. LEXIS 63452* (E.D. La. Aug. 28, 2007) and *2007 U.S. Dist. LEXIS 76769* (E.D. La. Oct. 11, 2007).

n10 *In re Katrina Canal Breaches Litigation*, Nos. 05-4182 and 06-9147 (E.D. La.), reported at *2007 U.S. Dist. LEXIS 83528* (E.D. La. Nov. 2, 2007).

n11 *Dalehite v. United States, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953)*, discussed in Jayson & Longstreth, *Handling Federal Tort Claims*, Section 3.18 (LexisNexis Matthew Bender).

n12 *Baldassaro v. United States, 64 F.3d 206, 208 (5th Cir. 1995); B&F Trawlers, Inc. v. United States, 841 F.2d 626, 630 (5th Cir. 1988). See also* cases collected in *Handling Federal Tort Claims*, Section 1.07 at note 18. The Fourth Circuit long ago held that the discretionary function exception did not apply to admiralty claims, but these holdings were overruled en banc in *McMellon v. United States, 387 F.3d 329 (4th Cir. 2004), cert. denied, 544 U.S. 974, 125 S. Ct. 1828, 161 L. Ed.2d 724 (2004).*

n13 *42 U.S.C.S. § 5148. See McWaters v. Federal Emergency Management Agency, 436 F. Supp. 2d 802, 809 (E.D. La. 2006)*, citing *City of San Bruno v. Federal Emergency Management Agency, 181 F. Supp. 2d 1010, 1014-1015 (N.D. Cal. 2001)* and *Sunrise Village Mobile Home Park, L.C. v. United States, 42 Fed. Cl. 392, 399 (1998).*

n14 *Dalehite v. United States, 346 U.S. 15, 60, 73 S. Ct. 956, 97 L. Ed. 1427 (1953).*

n15 *Sosa v. Alvarez-Machain, 542 U.S. 692, 707 n.4, 757 n.5, 124 S. Ct. 2739, 2751 n.4, 2780 n.5, 159 L. Ed.2d 718, 737 n.4, 769 n.5 (2004).*

n16 Complaint, *Robinson, et al. v. United States*, No. 06-2268 (E.D. La.), 62, 71, 88).

n17 Complaint, *Greer, et al. v. United States,* No. 07-674 (E.D. La.), 77.

n18 *Weggeman v. Ashbritt, Inc.*, No. 1:06*CV1256, 2007 U.S. Dist. LEXIS 49197,* *6 (S.D. Miss. July 6, 2007).

n19 *Freeman v. United States Dep't of Homeland Security, 2007 U.S. Dist. LEXIS 31827,* *26 (E.D. La. Apr. 30, 2007).

n20 *McWaters v. Federal Emergency Management Agency, 436 F. Supp. 2d 802, 814-821 (E.D. La. 2006).*

n21 *See In re Katrina Canal Breaches Litigation, 471 F. Supp. 2d 684, 705 (E.D. La. 2007).* The discretionary function exception is discussed at length in *Handling Federal Tort Claims*, Chapter 12.

n22 *33 U.S.C.S. §702c.*

n23 *478 U.S. 597, 106 S. Ct. 3116, 92 L. Ed. 2d 483 (1986),* discussed in Section 3.45 of *Handling Federal Tort Claims.*

n24 *531 U.S. 425, 121 S. Ct. 1005, 148 L. Ed. 2d 919 (2001),* discussed in Section 3.58 of *Handling Federal Tort Claims.*

n25 *See, e.g., Graci v. United States, 456 F.2d 20 (5th Cir. 1971).* This exclusion is addressed in Section 11.04[6] of *Handling Federal Tort Claims.*

n26 *In re Katrina Canal Breaches Litigation, 2007 U.S. Dist. LEXIS 83528* (E.D. La. Nov. 2, 2007)

n27 *In re Katrina Canal Breaches Litigation, 2007 U.S. Dist. LEXIS 83528,* *257-261 (E.D. La. Nov. 2, 2007).

n28 *In re Katrina Canal Breaches Litigation, 471 F. Supp. 2d 684, 694-696 (E.D. La. 2007). Cf. Graci v. United States, 456 F.2d 20, 22 (5th Cir. 1971)* (holding that MRGO is not a flood control project).

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The Loss of Chance and Increased Risk Doctrines in New Hampshire Tort Cases

2008 Emerging Issues 1414

The Loss of Chance and Increased Risk Doctrines in New Hampshire Tort Cases

By Ralph F. Holmes

December 10, 2007

SUMMARY: Lord v. Lovett, had the potential of becoming one of the NH Supreme Court's most significant medical negligence decisions. In a carefully reasoned opinion, the Court adopted the "loss of a chance" doctrine, ruled that the loss of a chance of a better recovery, even if that chance is less than probable, is a compensable loss. The decision represented a dramatic departure from existing law.

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ARTICLE: Overview

Lord v. Lovett n1 had the potential of becoming one of the New Hampshire Supreme Court's most significant medical negligence decisions. In a carefully reasoned opinion, the Court adopted the "loss of a chance" doctrine and ruled, "a plaintiff may recover for a loss of opportunity injury in medical malpractice cases when the defendant's alleged negligence aggravates the plaintiff's preexisting injury such that it deprives the plaintiff of a substantially better outcome." n2 The Court ruled that the loss of a chance of a better recovery, *even if that chance is less than probable,* is a compensable loss. The decision represented a dramatic departure from existing law and offered for the first time a remedy to a significant class of injured patients. The decision's impact, however, was short-lived as the Legislature amended N.H. Rev. Stat. Ann. 507-E:2, the statute governing proof required in medical injury actions, to provide:

The requirements of this section are not satisfied by evidence of loss of opportunity for a substantially better outcome. However, this paragraph shall not bar claims based on evidence that negligent conduct by the defendant medical provider or providers proximately caused the ultimate harm, regardless of the chance of survival or recovery from an underlying condition.

N.H. Rev. Stat. Ann. 507-E:2,III (emphasis added). The question arises: does *Lord* have any viability left? My own view is that *Lord* signals that the Court may be receptive to two possible further changes to New Hampshire tort law: allowance of loss of chance recoveries in non-medical injury cases and adoption of the "increased risk doctrine" to permit damages in medical injury cases for future risks of complications or other harm, if those risks are substantial, but less than probable.

Analysis

The plaintiff in *Lord* had suffered a spinal cord injury in a car accident and was treated at the hospital by the defendants. She claimed that negligent failures by her medical providers to immobilize her properly and to administer steroid therapy denied her the opportunity of a better recovery. The Superior Court dismissed the suit because, according to an offer of proof by plaintiff, her expert would testify that the "defendants' negligence deprived her of the opportunity for a substantially better recovery.. [but the expert] could not quantify the degree to which she was deprived of a better recovery by their negligence." n3 Thus, plaintiff could not prove that it was more probable than not that she would have had a better recovery but for the defendants' negligence.

On appeal, the Court reversed, adopting a variant of the "loss of a chance" doctrine. The Court reviewed three approaches to what it referred to as "loss of opportunity claims." n4 First, the Court discussed the "traditional tort approach," which permits a plaintiff to recover only if she can prove to a degree of probability that a better recovery would have occurred but for the defendant's negligence. The Superior Court in *Lord* followed this approach n5, consistent with settled law. The Supreme Court commented on the injustice and the arbitrariness of this traditional "all-or-nothing rule," which provides that a plaintiff is entitled to recovery for "all" injuries if she proves to a degree of probability that a better recovery was lost and "nothing" if she proves anything less. n6

The second approach is a "relaxed proof variation[] of the traditional rule." n7 "Courts following this approach have stated that proof that the defendant negligently increased the risk of harm or destroyed a substantial possibility of achieving a more favorable outcome is enough to permit the plaintiff to present his case to the jury." n8 If this rule had been followed by the Superior Court in *Lord*, the plaintiff would have reached the jury, notwithstanding the absence of expert testimony that she probably would have enjoyed a better recovery but for the defendants' negligence. While the proof requirement is relaxed in terms of whether the plaintiff's case sustains a motion to dismiss, the requirement is not relaxed with respect to the charge given the jury. "[T]he relaxed proof approach .. require[s] that the jury decide whether the defendant's negligence was more likely than not a cause of the ultimate injury claimed." n9 As stated by our Court, "This approach 'represents the worst of both worlds [because it] continues the arbitrariness of the all-or-nothing rule, but by relaxing the proof requirements, it increases the likelihood that a plaintiff will be able to convince a jury to award full damages.'" n10

In *Lord*, the Court adopted a third approach, which expands what constitutes a compensable injury. Unlike the traditional and the relaxed proof approaches, which permit a plaintiff to recover for the loss of a better recovery, this approach permits a plaintiff to recover for the lost chance of a better recovery. "Under the third approach, the lost opportunity for a better outcome is, itself, the injury for which the negligently injured person may recover." n11 "Under this approach, "[b]y defining the injury as the loss of chance.., the traditional rule of preponderance [of the evidence] is fully satisfied." n12 Animating the Court's decision is the recognition of the injustice and inadequacy of prior law, which denied recovery to someone such as the plaintiff in *Lord* who suffered a substantial injury but simply could not establish to a degree of probability that the better recovery would have been realized but for the defendant's negligence.

Applicability To Non-Medical Cases

According to the Court, "[t]he loss of opportunity doctrine, in its many forms, is *a medical malpractice form of recovery* which allows a plaintiff, whose preexisting injury or illness is aggravated by the alleged negligence of a physician or health care worker, to recover for her lost opportunity to obtain a better degree of recovery." n13 In negligence cases n14, the loss of a chance doctrine has been adopted, perhaps exclusively, in medical malpractice actions, n15 particularly those alleging a delay in cancer diagnosis. n16 Professor King, who is "invariably cited in all discussions of the topic," n17 argues that application of the doctrine requires the defendant to have a "duty.. to protect or preserve the victim's prospects for some favorable outcome" and that the duty in most instances must be "based on a special relationship, undertaking, or other basis sufficient to support a preexisting duty to protect the victim's likelihood of a more favorable outcome." n18 It is hard to imagine a defendant, other than a medical provider, who would satisfy this description.

Nonetheless, the logic and fairness of extension of the doctrine to claims against other defendants is compelling.

Consider this variation of the facts in *Lord*: 1) the plaintiff was involved in a second automobile accident directly after the one referenced in the case; 2) she suffered non-spinal injuries in the second accident that delayed the diagnosis and treatment of her spinal injuries from the first accident; and 3) her medical expert at the trial of her claim against the second driver testified that the second accident deprived her of a chance of a substantially better outcome of her spinal injuries, but was unable to say to a degree of probability that the better recovery would have occurred but for the second accident. If the doctrine is conceived solely as a "medical malpractice form of recovery," the plaintiff could not recover the value of her lost chance damages, even though the facts giving rise to the damages are highly analogous to the facts of *Lord*.

Although a healthcare provider, unlike another type of defendant undertakes a duty of care with respect to the underlying condition, n19 this does not seem a persuasive basis for limiting the doctrine to healthcare defendants. In the second motorist scenario posited above, the motorist had the same level of duty, ordinary care, as a physician and took the plaintiff as he found her, that is, with spinal injuries needing prompt attention. If the second motorist by his negligence deprived the plaintiff of needed medical care resulting in lost chance damages, there does not appear to be a good reason for limitation of the doctrine, especially given that the Court adopted it to address the arbitrariness and injustice of the "all-or-nothing rule." Why should victims of negligent driving, but not negligent medical care, suffer under this rule?

Applicability To Risks of Future Harm

In *Lord*, the plaintiff claimed "significant residual paralysis, weakness and sensitivity." n20 The opinion does not disclose whether the plaintiff claimed *future unrealized damages*, such as future complications or treatments. If she presented evidence that such damages were probable, then she could recover for these future losses under traditional tort law. n21 If, however, her evidence was that she had a substantial, but less than probable, risk of certain future losses, such as a 40% chance of progressive paralysis, could she recover for this risk? Although its reasoning suggests that such risks are recoverable, *Lord* does not reach the issue.

As understood by some courts, a less than probable risk of future harm is not within the scope of the loss of a chance doctrine, but rather the closely related "increased risk doctrine." n22 Discussing the relationship between these doctrines, one commentator notes:

Increased risk cases are related conceptually to loss of chance situations. In both circumstances, negligent defendants cause statistically measurable harm to plaintiffs. Courts which permit recovery for loss of chance and increased risk do not include the chance in their determination of the causation of the manifested physical injury, but instead recognize chances as protected interests. Thus, *many courts have permitted recovery for increased risk using a rationale similar to that utilized by courts permitting recovery in loss of chance cases.* n23

In U.S. v. Anderson, n24 the Delaware Supreme Court considered the relationship between the loss of a chance and the increased risk doctrines. Anderson presented the transferred question from the Delaware federal court whether a plaintiff who proved medical negligence in the diagnosis of his cancer could recover for the increased risk of recurrence of the disease if the risk was less than probable. After an extensive discussion of the case law, the court held that the increased risk of future harm was compensable.

Increased risk can be viewed, however, as merely one element of damages when negligence has caused harm. As the certified question is posed, defendant's negligence caused the cancer to spread. But for the missed diagnosis, accepted treatments would, almost to a certainty, have stopped the cancer. *The missed diagnosis caused the cancer to spread, and Plaintiff suffered surgery and chemotherapy. One additional element of his damages is the increased risk of a recurrence. In view of the risk of recurrence, he certainly has suffered an injury which is significantly greater than that which he would have suffered in the absence of negligence.* n25

This reasoning is compelling and the only approach consistent with *Lord*. Future risks of recurrence or progression

of disease are no less injuries than a lost chance of recovery. Unless the law is radically changed to suspend the statute of limitations to permit a plaintiff to bring a new claim every time a once-anticipated risk becomes manifest, n26 a refusal to allow future risk damages would be incongruous, illogical, and inconsistent with *Lord*'s rejection of the all-or-nothing rule. As one commentator notes:

The underlying rationale for permitting recovery for increased risk and loss of chance is the recognition of chances as protected interests. *Thus, a jurisdiction which recognizes a cause of action for either increased risk or loss of chance should necessarily recognize a cause of action for the other.* Recognition of both causes of action would result in the most equitable distribution of resources among litigants. n27

Although the amendment of N.H. Rev. Stat. Ann. 507-E:2 in 2003 to preclude lost chance damages in medical injury cases nullified the holding of *Lord*, the decision signals that the Court may be receptive to allowance of loss of chance recoveries in non-medical negligence cases and adoption of the "increased risk doctrine" to permit damages for future risks of complications or other harm if substantial, but less than probable. *Lord* might still fulfill its promise as one of the Court's most significant tort decisions.

Return to Text

n1 *Lord v. Lovett, 146 N.H. 232, 770 A.2d 1103; 2001 N.H. LEXIS 63 (2001).*

n2 *Lord v. Lovett, 146 N.H. 232, 236 (2001).*

n3 *Lord v. Lovett, 146 N.H. 232, 234 (2001).*

n4 *Lord v. Lovett, 146 N.H. 232, 234 (2001).*

n5 *Lord v. Lovett, 146 N.H. 232, 234 (2001).*

n6 *Lord v. Lovett, 146 N.H. 232, 234* -- 236 (2001).

n7 King, "'Reduction of Likelihood' Reformulation and Other Retrofitting of the Loss-of-a-Chance Doctrine," *28 U. Mem. L. Rev. 492, 506* -- 508 (1998) (cited extensively by the Court in *Lord*).

n8 *Lord v. Lovett, 146 N.H. 232, 507 (2001).*

n9 *Lord v. Lovett, 146 N.H. 232, 507 (2001).*

n10 *Lord v. Lovett, 146 N.H. 232, 236 n.1 (2001)* (*quoting* King, above n.7, at 508).

n11 *Lord v. Lovett, 146 N.H. 232, 236 n.1 (2001)* (*quoting* King, above n.7, at 508).

n12 *Lord v. Lovett, 146 N.H. 232, 236 (2001)* (*quoting Perez v. Las Vegas Medical Center, 805 P.2d 589, 592 (Nev. 1991)).*

n13 *Lord v. Lovett, 146 N.H. 232, 234 (2001)* (emphasis added).

n14 The reasoning underlying the doctrine has been followed in several contract cases. *See, e.g., Wachtel v. National Alfalfa Journal Co., 190 Iowa 1293, 176 N.W. 801 (1920)* (contestant in a magazine contest offering valuable prizes allowed to recover damages for the value of the right to compete when the contest was discontinued in her district); *Hall v. Nassau Consumers' Ice Co., 260 N.Y. 417, 183 N.E. 903 (1933)* (plaintiff allowed to recover for the loss of a chance to win $5,000.00 in a lottery when the defendant failed to make any drawing whatsoever); *Kansas City, M. & O. Ry. Co. v. Bell, 197 S.W. 322, 323 (Tex. Civ. App. 1917)* (in action for damages due to the delay in a shipment of hogs for exhibition at a stock show, Texas court held that the plaintiff could recover for the loss of his chance in winning prize money, although damages could not be based upon the amount of the lost prize).

n15 *See, e.g., Hard v. Southwestern Bell Telephone Co., 1996 Ok. 4, 910 P.2d 1024 (1996)* (refuse to extend doctrine to legal malpractice claim).

n16 *King, above* n.7, at 547.

n17 Dobbs, The Law of Torts, 178, p. 436 (2001).

n18 *King*, *above* n.7, at p. 559.

n19 *See* Restat 2d of Torts, § 323(a) (1963)

n20 *Lord v. Lovett, 146 N.H. 232, 233* -- 234 (2001).

n21 *Jolicoeur v. Conrad, 106 N.H. 496, 498 (1965)* ("It is well settled in this jurisdiction, as the plaintiff recognizes, that there can be no recovery for future damages unless there is evidence from which it can be found to be more probable than not that they will occur.").

n22 *See, e.g., U.S. v. Anderson, 669 A.2d 73, 75-76 (Del. Supr. 1995); King*, *above* n.7, at p. 550, n. 64 (citing cases including *Anderson* that have applied the loss-of-a-chance doctrine in the future consequences situation").

n23 Feldman, "Chances As Protected Interests: Recovery for the Loss of a Chance and Increased Risk," *17 U. Balt. L. Rev. 139, 151 (1987)* (citing *Martin v. City of New Orleans, 678 F.2d 1321 (5th Cir. 1982)* (applying Louisiana law) (plaintiff incurred a risk of future medical complications due to bullet lodged in his neck), cert. denied, *459 U.S. 1203 (1983); Sterling v. Velsicol Chemical Corp., 647 F. Supp. 303 (W.D. Tenn. 1986)* (recovery allowed for increased susceptibility to liver and kidney cancer); *Starlings v. Ski Roundtop Corp., 493 F. Supp. 507 (M.D. Pa. 1980)* (recovery allowed for increased risk of developing arthritis); *McCall v. United States, 206 F. Supp. 421 (E.D. Va. 1962)* (recovery allowed for an increased chance of becoming epileptic); *Linsay v. Appleby, 91 Ill. App. 3d 705, 414 N.E.2d 885 (1980)* (recovery allowed for risk of injury related to plaintiff's predisposition to seizures); *Davis v. Graviss, 672 S.W.2d 928 (Ky. 1984)* (recovery allowed for increased susceptibility to meningitis); *Charlton Bros. Transp. Co. v. Garrettson, 188 Md. 85, 51 A.2d 642 (1947)* (recovery allowed for increase hazard of a recurring hernia); *Feist v. Sears, Roebuck & Co., 267 Or. 402, 517 P.2d 675 (1973)* (recovery allowed for increased susceptibility to meningitis); *Schwegel v. Goldberg, 209 Pa. Super. 280, 228 A.2d 405 (1967)* (recovery allowed for increased chance of developing seizures)) (emphasis added).

n24 *U.S. v. Andersons, 669 A.2d 73 (Del. Supr. 1995).*

n25 *U.S. v. Andersons, 669 A.2d 73, 78 (Del. Supr. 1995)* (emphasis added).

n26 Professor King proposes the unorthodox and highly impractical idea that plaintiffs be allowed to split their causes of action and assert in the future beyond the expiration of the statue of limitations claims for increased risk damages after they materialize. King, above, n.7, at p. 496.

n27 Feldman, above n.23, at p. 154 (emphasis added).

RELATED LINKS: For further discussion, see
- 8 New Hampshire Practice Series: Tort & Insurance Practice, Ch. 6 Liability of Health Care Providers

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Eades on Smith v. Carbide, 226 S.W.3d 52 (Ky. 2007)

2008 Emerging Issues 1167

Eades on Smith v. Carbide, 226 S.W.3d 52 (Ky. 2007)

By Ronald W. Eades

November 28, 2007

SUMMARY: In Smith v. Carbide & Chems. Corp., the Kentucky Supreme Court responded to two certified questions from the U.S. Sixth Circuit Court of Appeals on matters of state tort law concerning intentional trespass. The Supreme Court held that proof of actual harm is not required to state a claim for an intentional trespass, and that plaintiffs alleging such a claim can recover damages for diminution in their property values.

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ARTICLE: Overview

In *Smith v. Carbide & Chems. Corp., 226 S.W.3d 52 (Ky. 2007),* the Kentucky Supreme Court answered two certified questions from the U.S. Sixth Circuit Court of Appeals and held that proof of actual harm is not necessary for an intentional trespass action and that, under proof of appropriate facts, diminution in value is recoverable for intentional trespass.

Analysis

A. The Two Questions Posed. The U.S. Sixth Circuit Court of Appeals posed two certified questions of state law to the Kentucky Supreme Court:

1. Is proof of actual harm required to state a claim for intentional trespass?

2. If the plaintiffs can prove a diminution in their property values due to an intentional trespass, do they have a right of recovery under Kentucky Law?

The Kentucky Supreme Court answered, "no" to the first question, and provided a qualified, "yes" to the second. As a result of those answers, the Sixth Circuit reversed and remanded the federal case to the U.S. District Court in *Smith v. Carbide & Chems. Corp., 2007 U.S. App. LEXIS 25644 (6th Cir. 2007).* The Kentucky Supreme Court's decision and it's implications for practitioners is discussed below.

B. Proof of Actual Harm and the Claim for Intentional Trespass. Kentucky has a rich history concerning the law of trespass to land. The landmark case of *Randall v. Shelton, 293 S.W.2d 559 (Ky. 1956)* is a universally recognized

decision setting out the basic principles in this area of the law. There had been some thought that interference with the possession of land could permit an action for recovery when the conduct of the defendant was innocent. This would have allowed a strict liability claim. The decision in *Randall v. Shelton, 293 S.W.2d 559 (Ky. 1956)* made it clear that there were three bases of claims for such interference with real property. The claim could be based on intent, negligence or extra-hazardous activities. This was noted in *Smith v. Carbide & Chems. Corp., 226 S.W.3d 52 (Ky. 2007).*

The citation to *Randall* is important because it suggests the answer to the first question. Although actions in negligence or even extra-hazardous activities may require proof of actual harm before the claim may be brought, actions for intentional torts, including trespass to land, do not require that proof. "Even if the plaintiff suffered no actual damages as a result of the trespass, the plaintiff is entitled to nominal damages." *Smith v. Carbide & Chems. Corp., 226 S.W.3d 52, 55 (Ky. 2007),* citing *Ellison v. R & B Contr., Inc., 32 S.W.3d 66 (Ky. 2000).*

The answer to the first question is, therefore, clear. When asked, "Is proof of actual harm required to state a claim for intentional trespass?", the answer is "no."

Justice Minton dissented to this portion of the opinion, contendint that an action for intentional trespass should not be recognized without proof of actual harm.

C. Recovery of Diminution Value of Property. Whether the plaintiff may recover diminution value of property, however, was a more difficult question. The Kentucky Supreme Court was unable to give a simple yes or no answer.

The Court noted that property may suffer a diminution in value because of mere injury to the reputation of the realty. That alone will not allow the plaintiff to recover compensatory damages for the trespass. Although the plaintiff may bring an action for trespass and recover nominal damages without the proof of actual injury, the plaintiff may not recover compensatory damages without the proof of actual injury. *Smith v. Carbide & Chems. Corp., 226 S.W.3d 52, 56 (Ky. 2007).*

The question posed by the Sixth Circuit Court of Appeals seemed to mix the issues of the right to bring the action and the proper measure of loss. As answered in the first question, the plaintiff may bring an action for intentional trespass without proof of actual harm. The second question, however -- "If the plaintiffs can prove a diminution in their property values due to an intentional trespass, do they have a right of recovery under Kentucky law?" -- must be answered with a qualified yes. The plaintiff may recover for diminution of value of the property only if that diminution of value is the result of some actual injury.

Justice Cunningham dissented to this portion of the opinion, contending that plaintiffs should be able to recover compensatory damages for diminution of value without the additional requirement of proof of actual injury.

Conclusion

In *Smith v. Carbide & Chems. Corp., 226 S.W.3d 52 (Ky. 2007),* the Kentucky Supreme Court confirmed that Kentucky law does not require proof of actual injury to assert a viable claim for intentional trespass. In order to recover compensatory damages, however, proof of that actual injury is required. Without proof of actual injury, the plaintiff will be limited to nominal damages.

Strategic Points -- Plaintiff: Plaintiff's attorneys will find that a claim for trespass to land may be filed and survive a motion for summary judgment without allegations of actual harm. Without that proof of actual harm, however, plaintiff will only be able to recover nominal damages. Plaintiff's counsel will have to carefully consider the purposes and goals of the plaintiff in filing the litigation. If the plaintiff only seeks to confirm rightful possession in the land, getting a judgment of nominal damages will accomplish that. The plaintiff's counsel should consider the possibility of adding a punitive damage claim to the nominal damage case if appropriate facts to support the claim exist. Such a judgment may also assist the plaintiff in future dealings with the defendant. If the defendant continues the trespass, especially in cases of long-term pollution, future actions may result in substantial harm, compensatory damages and

punitive damages.

If the plaintiff seeks a substantial damage award, the plaintiff's counsel will need to plead and prove actual harm to the land in order to recovery just a judgment. The attorney will need to find fact and expert witnesses that can testify to more than a mere loss of general reputation value of the land. The witnesses will need to offer evidence of some actual harm.

Strategic Points -- Defendant: For defense counsel, the same issues arise. If the plaintiff fails to plead and prove actual harm, that will not provide the defendant with an opportunity for a summary judgment or directed verdict. The defendant will still have to try the case. The plaintiff will get a verdict, but it will only be for nominal damages. If the case reaches court in this posture, however, it may provide defense counsel an excellent opportunity for settlement. The plaintiff will be only able to expect an award of $1.00 and may be willing to seriously consider an offer.

RELATED LINKS: For a general discussion of diminution values, see
- 1-1 Damages in Tort Actions § 1.02

For examples of jury instructions on diminution measure of damage, see Ronald W. Eades,
- 1-9 Jury Instructions on Damages in Tort Actions § 9.01;
- 1-15 Jury Instructions in Real Estate Litigation § 15.01

For an example of a jury instruction on trespass to land, see Ronald W. Eades,
- 1-12 Jury Instructions in Real Estate Litigation § 12.16

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Ronald W. Eades is a Professor of Law at the Louis D. Brandeis School of Law, University of Louisville. He also holds the title of Distinguished University Scholar. He received his B.A. degree in 1970 from Rhodes College in Memphis, Tennessee. He received his J.D. from the University of Memphis in 1973, and an LL.M. from the Harvard Law School in 1977.

Professor Eades teaches in the torts and evidence areas. He is the author of numerous works in those same areas. He is, for example, the author of Jury Instructions on Products Liability (LexisNexis); Jury Instructions on Damages in Tort Actions (LexisNexis); Jury Instructions on Medical Issues (LexisNexis); Jury Instructions on Automobile Actions (LexisNexis); Jury Instructions in Commercial Litigation (LexisNexis); and Jury Instructions in Real Estate Litigation (LexisNexis).

Professor Eades has also been active in the research and development of evidence law. He has served on the Kentucky State Evidence Rules Review Commission. In service on that commission, he has had the opportunity to testify before the Kentucky General Assembly House Judiciary Committee concerning rules of evidence.

In the academic areas, Professor Eades has been an active teacher. He has also been active in the development of technology resources for legal education. He served as a Fellow for the Center for Computer Assisted Legal Instruction where he wrote computer lessons in tort law for law students. He also serves on the Editorial Board and the Governing Board for the Center for Computer Assisted Legal Instruction.

Steenson on Minneapolis Bridge Collapse Raises Multitude of Legal Issues

2008 Emerging Issues 940

Steenson on Minneapolis Bridge Collapse Raises Multitude of Legal Issues

By Michael K. Steenson

November 14, 2007

SUMMARY: Professor Michael Steenson provides an overview of the numerous legal issues arising in the aftermath of the Minneapolis bridge collapse. This Emerging Issues Analysis contains a discussion of the potential defendants, theories of liability, and defenses, as well as a discussion of bridge conditions in Minnesota and throughout the United States.

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ARTICLE: On August 1, 2007, the 40-year-old I-35W Bridge over the Mississippi River in Minneapolis collapsed, causing 13 deaths, injuring numerous others, and raising the specter of massive problems with scores of other structurally deficient bridges in the United States. Speculation concerning the cause or causes of the collapse ensued immediately, although it may be a year or more before the National Transportation Safety Board completes its investigation and renders an opinion on causation.

Prominent law firms became involved almost immediately after the bridge collapsed. One firm took some of the cases on a pro bono basis, while another firm took them on a contingent fee basis. Less than two weeks after the collapse, one of the involved firms, Schwebel, Goetz & Sieben, which had been retained in three injury and two death cases, filed a petition in the U.S. District Court for the District of Minnesota, asking the court to order the federal, state, and local authorities controlling the collapse site to permit three of the firm's attorneys, along with two retained experts, to immediately inspect the bridge remains. The petition alleged that because of the imminent dismantling of the bridge, immediate inspection was essential to the firm's representation of the interests of its clients. Characterizing the request as "highly unusual," and noting the absence of authority on the issue, the court denied the petition, ultimately concluding that it was unnecessary to grant it in the interest of justice. n1 That was the first legal volley arising out of the bridge collapse.

Potential Defendants & Theories of Liability. There is a wide range of potential defendants in bridge collapse cases, ranging from the governmental entities responsible for the bridge and specified government officials for negligent failure to properly construct, maintain, or inspect a bridge, to private firms, including construction and engineering firms responsible for the design, construction, or maintenance of the bridge. In a similar prior case, the *Silver Bridge Disaster Litigation*, plaintiffs brought wrongful death claims against the United States. n2 The numerous legal issues arising out of the bridge collapse in Minnesota will parallel the issues that have arisen in prior bridge failure litigation in

other jurisdictions. Besides a wide range of potential defendants, there will be a multitude of legal theories, including claims against governmental entities and private parties responsible for the design, construction, or maintenance of the bridges. The most common claims against government entities are based on negligence in the failure to properly inspect, maintain, or construct a bridge. n3

Claims against private parties may be based on negligence or strict liability, depending on the suspected cause of the collapse. Strict products liability claims could be based on flaws in components. n4 Claims against construction and engineering firms are common in the litigation, although private entities may be shielded from liability if they simply follow government specifications in bridge construction. n5

In an effort to provide some relief to victims of the bridge collapse while their legal claims proceed through the courts, Minnesota state representative Ryan Winkler (DFL -- Golden Valley & St. Louis Park) announced his intention to introduce a bill in the next legislative session to establish a Minnesota Disaster Survivors Compensation Fund. Representative Winkler noted that many victims face large and mounting medical bills, debilitating injuries, and severe emotional trauma. Some have lost family members and friends, while others have lost the ability to walk, work, and proceed with life as it was before the bridge fell. Further information on this proposed legislation can be found at http://www.house.leg.state.mn.us/members/pressreleasels85.asp?district=44B&pressid=3025&party=1.

Defenses. The liability of the State or other governmental entity is limited in various ways. Under Minnesota law, the State has statutory (discretionary) immunity n6 for policymaking activities at the planning level, and state officials have common law official immunity in cases where they are charged by law with the exercise of duties involving judgment or discretion. n7 In general, if a state official has official immunity, the State will have vicarious official immunity. The liability of the state is capped at "$300,000 when the claim is one for death by wrongful act or omission and $300,000 to any claimant in any other case," but at "$1,000,000 for any number of claims arising out of a single occurrence." n8

Lawsuits against private companies face a substantial obstacle in the form of Minnesota's statute of repose, a typical statute which, absent fraud, applies to any contract or tort action to recover personal injury, wrongful death, or property damage "against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property." The State also has a two-year statute of limitations, but in the bridge collapse case, the critical limitation is the limitation on any claims accruing "more than 10 years after substantial completion of the construction." n9

The Minnesota Supreme Court has applied the statute of repose broadly as a bar to recovery, n10 but the 40-year gap between construction and collapse will bar claims based on the original construction and design of the bridge. The statute is inapplicable "to actions for damages resulting from negligence in the maintenance, operation or inspection of the real property improvement against the owner or other person in possession" however. n11

The statute also has an exception for manufacturers or suppliers of "any equipment or machinery installed upon real property," n12 although application of the exception would be questionable in cases involving suppliers of bridge components, given the difficulties involved in attempting to classify building components as "equipment or machinery." n13

Claims based on negligent maintenance, operation, or inspection may survive the statute of repose, however, but if they do, there will be questions concerning governmental immunity in cases involving claims against the state or state officials. The specifics will have to await investigation by the National Transportation Safety Board.

Bridge Conditions in Minnesota and Throughout the Country. The I-35W Bridge was a steel-truss bridge. Thousands of similar bridges were built during the interstate highway construction boom of the 1950s and 1960s because they supported heavy traffic loads with minimal amounts of steel. Engineers stopped designing these types of bridges because they were labor-intensive, required substantial maintenance, and because newer technology developed.

There were no redundancies in the design against a collapse. The steel beams of the bridge were held together by flat steel gusset plates. A failure of one of the plates could be catastrophic.

The I-35W bridge had been deemed "structurally deficient" because of a relatively low rating of the bridge's superstructure, but the I-35W Bridge was not alone in that categorization. The National Bridge Inventory is composed of data on nearly 600,000 bridges, including 116,086 bridges on the National Highway System, as well as bridges that are maintained by various state and local entities.

Based on the Federal Highway Administration's National Bridge Inspection Standards, the Department of Transportation has classified almost 80,000 bridges as functionally obsolete and almost 72,500 as structurally deficient. In five of the states, more than 20 percent of the bridges are considered to be structurally deficient. The term "structurally deficient" includes bridges with major deterioration, cracks, or other structural component deficiencies, which includes decks, girders, or foundations. Most of the bridges classified as structurally deficient may safely serve traffic with proper inspections, proper calculation of the maximum load ratings, and, where necessary, posting of the proper maximum weight limits, but categorization of a bridge as structurally deficient does mean that additional engineering or construction is needed.

The National Highway System bridges carry over 70 percent of all bridge traffic. Of the bridges in that system, 6,149 have been classified as structurally deficient. A Federal Highway Administration report issued in January of 2007 estimated that some $65 billion could be invested immediately to deal with current deficiencies. Minnesota's record for bridge safety is better than all but 10 states, with only 3 percent of its bridges ranked as "structurally deficient."

The National Bridge Inspection Program was created in response to the 1967 collapse of the Silver Bridge over the Ohio River between West Virginia and Ohio, which resulted in the deaths of 46 people. It was the most lethal bridge collapse in our history. At that time there was no exact count of the number of highway bridges in the United States.

The Federal-aid Highway Act of 1968 directed the Secretary of Transportation, in cooperation with State highway officials, to establish a National Bridge Inspection Program. Bridges have to be inspected every year as required by federal law, unless the state transportation commissioner authorizes a two-year interval. In 1971, the Federal Highway Administration issued standards for identifying, inspecting, evaluating, and acting upon bridge deficiencies to ensure the safety of bridges.

Conclusion. Not only will the bridge collapse have a significant impact on the social, political, and economic landscape of Minnesota, but it will likely have a profound and lasting effect on the many areas of law touched by this disaster. As events continue to unfold, the myriad of legal issues likely to arise will be limited only by the facts of the cases and the creativity of the lawyers involved. With literally thousands of bridges throughout the United States categorized as either functionally obsolete or structurally deficient, these issues are of great significance in every state and virtually every locality in the country.

Return to Text

n1 *In re I-35W Bridge Collapse Site Inspection, 243 F.R.D. 349 (D. Minn. 2007).*

n2 *In re Silver Bridge Disaster Litigation, 381 F. Supp. 931 (S.D. W. Va. 1974).*

n3 See *Turner County v. Miller, 170 F.2d 820 (8th Cir. 1948); In Re Silver Bridge Disaster Litigation, 381 F. Supp. 931 (S.D. W. Va. 1974); Dep't of Transp. V. Ziegler, 642 So. 2d 788 (Fl. Dist. Ct. App. 1994); Austin v. State of Tennessee, 796 S.W.2d 449 (Tenn. 1990); Gage v. State of Vermont, 882 A.2d 1157 (Vt. 2005).*

n4 See *Miles v. Paulding, 837 F.2d 475 (6th Cir. 1988)* (allegedly defective components in bridge kit).

n5 See *Higginbotham v. U.S. Indus., Inc., 584 F. Supp. 1273 (S.D. Miss. 1982).* A bridge contractor would not be liable for following flawed plans unless the dangers were "so obviously dangerous and likely to cause injury to others that an ordinary and reasonable contractor of ordinary prudence in his field would or should not follow them." *Id. at 1284.*

n6 Minn. Stat. § 3.736, subd. 3(b) (2006) (the state and its employees are not liable for "a loss caused by the performance or failure to perform a discretionary duty"). In other states the immunity is simply termed "discretionary immunity." Minnesota characterizes it as statutory immunity to separate the concept from official immunity, which also turns on whether an individual official has exercised judgment or discretion.

n7 *Johnson v. State, 553 N.W.2d 40 (Minn. 1996).*

n8 Minn. Stat. § 3.736, subd. 4 (a), (c) (2006).

n9 Minn. Stat. § 541.051, subd. 1(a) (2006).

n10 *State Farm Fire and Cas. v. Aquila Inc., 718 N.W.2d 879 (Minn. 2006); Lietz v. Northern States Power Co., 718 N.W.2d 865, 872-73 (Minn. 2006).*

n11 Minn. Stat. § 541.051, subd. 1(c) (2006); *Olmanson v. LeSueur County, 693 N.W.2d 876, 881 (Minn. 2005).*

n12 Minn. Stat. § 541.051, subd. 1(d). The exception was construed narrowly in *Integrity Floorcovering, Inc. v. Broan-Nu Tone LLC, 503 F. Supp. 2d 1136 (D. Minn. 2007).*

n13 See *Integrity Floorcovering, Inc. v. Broan-Nu Tone LLC, 503 F. Supp. 2d 1136 (D. Minn. 2007).*

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Primary assumption of risk: Levy on Shin v. Ahn

2008 Emerging Issues 834

Primary assumption of risk: Levy on Shin v. Ahn

By Neil M. Levy

November 1, 2007

SUMMARY: In Shin v. Ahn, the CA Supreme Court applied the doctrine of primary assumption of risk to an action brought by a golfer hit by a ball. The Court thus made clear that primary assumption of risk can be applied to an injury occurring to a participant in a non-contact sport. The opinion's language and holding has implications for the use of assumption of risk doctrine in all sports cases.

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ARTICLE: Background. Before *Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2*, assumption of risk had been a moribund defense doctrine in California (*See Grey v. Fibreboard Paper Products Co. (1966) 65 Cal. 2d 240, 53 Cal. Rptr. 545*). The Supreme Court had insisted that for the doctrine to be applied, plaintiff must have been aware of the specific danger and voluntarily consented to it. S*ee e.g., Priebe v. Nelson (2006) 39 Cal. 4th 1112, 47 Cal. Rptr. 3d 553*.

In *Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2*, plaintiff and defendant had been playing a pick-up game of touch football when defendant accidentally injured the plaintiff. In its opinion, the California Supreme Court divided assumption of risk into two variants. Primary assumption of risk would be akin to the plaintiff relieving the defendant of a duty of due care. In an injury incurred in a sporting activity, the plaintiff would be barred from recovery from a co-participant unless the defendant's conduct was intentional or "so reckless as to be totally outside the range of the ordinary activity involved in the sport." Secondary assumption of risk would be used in cases in which defendant owes a duty of care but the plaintiff chose to encounter a known risk. Secondary assumption would merge into comparative negligence and thus only lower plaintiff's recovery, not eliminate it.

Since *Knight*, the California Supreme Court has continued to expand the scope of the doctrine of primary assumption of risk in cases arising from sporting activities. In *Kahn v. East Side Union High School Dist. (2003) 31 Cal. 4th 990, 4 Cal. Rptr. 3d 103*, the doctrine was applied when the defendant was a coach, rather than a co-participant. In *Avila v. Citrus Community College Dist. (2006) 38 Cal. 4th 148, 41 Cal. Rptr. 3d 299*, the Court allowed the doctrine to be used by a defendant responsible for maintaining a sports facility. *See also Connelly v. Mammoth Mt. Ski Area (1995) 39 Cal. App. 4th 8, 45 Cal. Rptr. 2d 855*.

Shin v. Ahn. On the narrowest level, the Supreme Court in *Shin* for the first time applied the doctrine of primary

assumption of risk to a non-contact sport, golf. Although in *Kahn* the assumption of risk doctrine had been applied in a suit by a swimmer against her coach, the court did not specifically classify swimming as a non-contact sport.

However, the lessons to be learned from *Shin* are much broader. Defendant in *Shin* hit a ball which struck plaintiff with whom he had been playing a round of golf. There was conflicting evidence as to whether defendant was aware that plaintiff was standing where he could be hit by an errant ball, Defendant shanked the ball and injured plaintiff. The court stated:

We hold that the primary assumption of risk doctrine does apply to golf and that being struck by a carelessly hit ball is an inherent risk of the sport.

The court continued, quoting from *Knight*, that liability would then depend on whether the conduct of the defendant could be shown to be "so reckless as to be totally outside the range of the ordinary activity involved...."

In a prior golf case, *Dilger v. Moyles (1997) 54 Cal. App. 4th 1452, 63 Cal. Rptr. 2d 591*, the Court of Appeal applied the primary assumption of risk doctrine and dismissed the case. In *Shin*, the trial court concluded that triable issues of fact remained and that summary judgment for the defendant therefore should not be granted. The Court of Appeal affirmed, reasoning that a duty of due care was owed by the defendant.

Although the Supreme Court allowed the case to proceed, it specifically rejected the reasoning of the Court of Appeal and held that "the primary assumption of risk doctrine regulates the duty a golfer owes to both playing partners and to other golfers on the course." However, the Court held that dismissal of the summary judgment motion was proper because factual issues remained as to whether defendant's conduct "was so reckless as to be totally outside the range of the ordinary activity involved in golf."

At first blush this may be seen as one more case that defendants will be pleased to see, expanding the doctrine of primary assumption, in effect limiting the duty owed by defendants. The Court stressed that golf is a non-contact sport. However, what should most please plaintiffs' lawyers is that the Court here makes clear that the issue of the recklessness of a defendant's action is an issue for the trier of fact. Reading *Knight* in light of *Kahn* and now *Shin*, the finding of no liability in *Knight* was simply that under the facts of the case, a woman injured in a pick-up football game, no reasonable jury could find defendant's actions so reckless as to be outside the ordinary activity of a touch football game.

Pleading Tip For Plaintiffs' Attorneys. Thus it becomes clear that a plaintiff's attorney in a case in which assumption of risk is likely to be raised by defendant should, if the facts warrant, plead facts showing the recklessness of the conduct of the defendant. If plaintiff gets past a summary judgment motion, the issue must be given to a jury. If recklessness is proven, under *Shin*, defendant's assumption of risk defense will not prevent recovery.

Plaintiff can also get around an assumption of risk defense by pleading and proving intentional misconduct. But this is always a dangerous path for a plaintiff. If defendant is found to have intentionally injured the plaintiff, Cal. Ins. Code § 533 forbids insurance coverage. Thus, if plaintiff prevails, he or she may be left with an uncollectible judgment.

Burdens of Proof. Defendant of course can move for summary judgment on the grounds that the facts can only lead to a conclusion that no reasonable jury could find the acts alleged were reckless or intentional. As with any summary judgment motion, the burden of proof for summary judgment will be on the moving party, the defendant. *Shin* seems clear that even if defendant failed on the summary judgment motion, defendant can still raise primary assumption of risk at trial, as well as secondary assumption.

If summary adjudication holds that primary assumption of risk applies, but there are triable issue of facts as to whether defendant had been reckless, the case goes to trial. The burden of coming forward and the burden of persuasion will be on the plaintiff to defeat the assumption of risk presented by the defendant. *Shin* made that clear as does:

Judicial Council of California Civil Jury Instruction No. 408 (1-400 CACI 408) -- Coparticipant in a Sports Activity, which states

[*Name of plaintiff*] claims [he/she] was harmed while participating in a sporting activity and that [*name of defendant*] is responsible for that harm. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of defendant*] either intentionally injured [*name of plaintiff*] or acted so recklessly that [his/her] conduct was entirely outside the range of ordinary activity involved in the sport...

RELATED LINKS: For an in depth discussion of the current law of assumption of risk, (including the expansion of the doctrine of occupational primary assumption of risk), see

- 1-4 California Torts § 4.03

See generally,

- 23-273 California Forms of Pleading and Practice--Annotated 273.syn

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Prof. Levy is a graduate of Cornell University and the University of Chicago Law School, where he served as an editor on the law review.

41 of 41 DOCUMENTS

Eades on the Strict Privity Requirements in Compex Int'l Co. v. Taylor.

2008 Emerging Issues 486

Eades on the Strict Privity Requirements in Compex Int'l Co. v. Taylor.

By Ronald W. Eades

September 4, 2007

SUMMARY: Although the majority of U.S. jurisdictions do not require privity between those plaintiffs listed as appropriate third parties and possible defendants in a chain of distribution in a products liability case, KY maintains that the listed third parties must have been in privity with the defendant who was sued.

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ARTICLE: Overview. Ronald W. Eades on the Kentucky Supreme Court's ruling upholding a strict privity requirement for implied warranty of merchantability claims.

The majority of U.S. jurisdictions do not require privity between a plaintiff who asserts a claim for breach of the implied warranty of merchantability and the defendant. But in *Compex Int'l Co. V. Taylor, 209 S.W.3d 462 (Ky. 2006),* the Kentucky Supreme Court held otherwise, and maintained that such plaintiffs must be in privity with the defendant. Since the Kentucky Products Liability Act limits liability for claims against retailers to negligence or express warranty when the manufacturer is identified, this case appears to eliminate claims for breach of the implied warranty of merchantability in products liability actions. This commentary is written by Prof. Ronald W. Eades, author of Jury Instructions on Products Liability, Jury Instructions in Commercial Litigation, and Jury Instructions on Damages in Tort Actions.

Analysis. *Compex Int'l Co. V. Taylor, 209 S.W.3d 462 (Ky. 2006)* involves the purchase, by parents, of a chair from a retailer. The buyers' son sustained injuries when the chair collapsed as he sat in it. The son sued the chair manufacturer, alleging, among other things, that the manufacturer had breached the implied warranty of merchantability. The son met the requirements of Kentucky's provision of the Uniform Commercial Code (KRS § 355.2-318), an exception to the common law privity requirement for breach of warranty claims. The issue was whether the statute's exception to strict privity would apply when the original buyer was not in privity with the manufacturer.

As a prerequisite to his breach of implied warranty of merchantability cause of action, the son alleged that he was a proper plaintiff under KRS § 355.2-318. That provision allows recovery for implied warranties by the buyer or family members of the buyer. The Supreme Court of Kentucky, however, denied recovery by noting that neither the buyer nor the son were in privity with the manufacturer. Since neither had the privity relationship with the manufacturer, neither could sue that party. The special exception for allowing family members of buyers to sue under an implied warranty

theory did not apply unless the original buyer was in privity with the proposed defendant. (*Compex Int'l Co. V. Taylor, 209 S.W.3d 462 (Ky. 2006)).*

In the *Compex* decision, the Kentucky Supreme Court overlooked the general distinction between horizontal and vertical privity. Horizontal privity refers to the relationships between buyer, family, household, and other third party plaintiffs. (1-4 Products Liability § 4.03; 2-9 Products Liability § 9.05). KRS § 355.2-318 adopted the Uniform Commercial Code's most restrictive form, but it still appeared to permit the buyers' son to recover. Vertical privity refers to the relationship among those within the chain of product distribution. That would include the manufacturer, wholesaler, and retailer. There is no suggested Uniform Commercial Code section that deals with vertical privity. Most jurisdictions have taken this absence to indicate that the requirement for vertical privity has been abolished. (2-9 Products Liability § 9.05). In short, a majority of jurisdictions would have allowed the son's implied warranty action against the manufacturer.

The *Compex* decision creates an additional, significant problem because, when viewed in conjunction with KRS § 411.340, it appears to prohibit the vast number of plaintiffs from bringing a cause of action for breach of the implied warranty of merchantability against any party. This is because KRS § 411.340 provides that, when a manufacturer is identified in a product liability action, the product's wholesaler and retailer may only be sued for negligence and express warranty. This indicates that when the manufacturer has been identified, the retailer cannot be sued for breaching the implied warranty of merchantability. Kentucky now has an odd inconsistency. If the injured plaintiff in a products liability action wishes to sue for the breach of an implied warranty of merchantability, that action will probably be completely barred if the plaintiff did not directly purchase the product from the manufacturer, and the manufacturer can be identified. In such a case, *Compex* would bar an implied warranty action against the manufacturer because the plaintiff is not in privity with the manufacturer. (*Compex Int'l Co. V. Taylor, 209 S.W.3d 462 (Ky. 2006)).* In addition, under KRS § 411.340, the plaintiff cannot bring an implied warranty action against the retailer, the party with whom they are in privity.

With the current state of the law, Kentucky plaintiffs will be forced to seek actions against the retailer in negligence and express warranty. Viable actions against others in the chain of distribution include negligence and strict liability.

To correct these inconsistencies, the Court may need to rethink its position on vertical privity. In the absence of Court action, the General Assembly may need to enact legislation to remedy the problem.

Conclusion. *Under Compex Int'l Co. V. Taylor, 209 S.W.3d 462 (Ky. 2006),* the Kentucky Supreme Court has created an internal inconsistency in Kentucky products liability law. In addition, the Court's opinion is outside the mainstream of developing law in the United States. The opinion overlooks the distinctions between horizontal and vertical privity while retaining a strict privity requirement for both. Finally, the operation of KRS § 411.340 appears to eliminate the possibility of using the implied warranty of merchantability where the manufacturer can be identified.

RELATED LINKS: For a good general discussion of the issue of horizontal and vertical privity requirements see
- 2-9 Products Liability § 9.05

For a more specific discussion of this topic as it relates to the issue of food and beverage cases, see
- 4-48 Products Liability § 48.16

For an example of a jury instruction dealing with the implied warranty of merchantability see
- 1-4 Jury Instructions on Products Liability § 4.04

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Ronald W. Eades is a Professor of Law at the Louis D. Brandeis School of Law, University of Louisville. He also holds the title of Distinguished University Scholar. He received his B.A. degree in 1970 from Rhodes College in Memphis, Tennessee. He received his J.D. from the University of Memphis in 1973, and an LL.M. from the Harvard Law School in 1977.

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Professor Eades has also been active in the research and development of evidence law. He has served on the Kentucky State Evidence Rules Review Commission. In service on that commission, he has had the opportunity to testify before the Kentucky General Assembly House Judiciary Committee concerning rules of evidence.