CTLA Forum

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From The President's Notebook

By Joseph A. Mengacci

Recent judicial history, in Connecticut and throughout the United States, reflects ever increasing challenges to plaintiff rights. We've become accustomed to regular legislative initiatives to grant immunities, erode worker rights, erect process "stumbling blocks," cap damages, impose arbitration, and on and on.

Since our beginning CTLA has attempted to counteract whatever has threatened our ability to effectively advocate for our clients. Very often our legislative agenda has largely consisted of this reactive "damage control."

This year's legislative session, however, brought something unusual – an expansion of plaintiff rights resulting from the concern, initiative and perserverance of a client!

Two years ago Beth Bania found herself the plaintiff in a medical malpractice action against three defendants. She became incensed when her attorney was not only outgunned three-to-one on premp-

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Review of 2000 Supreme and Appellate Court Tort Cases

By Dale P. Faulkner

Mr. Faulkner practices in New London. He is a former editor of the Forum. He is the author, with Shelley Graves, of The Connecticut Trial Evidence Notebook *(2nd Ed.) published by Lexis Law Publishing.*

I. INTRODUCTION

What follows are summaries of the significant decisions of the Connecticut Supreme Court and Appellate Court in 2000 in the area of torts. The cases selected are those deemed by the writer to be important or, at least, worthy of comment. No effort was made to make this presentation exhaustive and all-inclusive.

II. CASES

A. Damages

1.

CITATION:

Wichers v. Hatch, 252 Conn. 174 (2000).

FACTS:

(1) The jury returned a verdict for the plaintiff awarding only economic damages.
(2) The trial court granted the plaintiff's motion for an additur as to noneconomic damages which the defendant refused. (Mr. Faulkner practices in New London. He is a former editor of the Forum. He is the author, with Shelley Graves, of The Connecticut Trial Evidence Notebook (2nd Ed.) published by Lexis Law Publishing.)
(3) The trial court rendered judgment for the plaintiff and ordered a new trial from which the defendant appealed.

ISSUE:

Whether a jury verdict awarding economic damages but not noneconomic damages is improper as a matter of law?

RULE:

A verdict which awards economic, but not noneconomic damages, is not improper as a matter of law. Since trial courts can remedy awards of inadequate damages, a case-specific standard should apply.

COMMENT:

In overruling *Johnson v. Franklin*, 112 Conn. 228 (1930), the Court adopts one way to process the tide of niggardly verdicts.

2.

CITATION:

Herrera v. Madrak, 58 Conn. App. 320 (2000).

FACTS:

(1) At trial, the plaintiff produced evidence that, in an accident, she sustained neck, back, and shoulder injuries.
(2) The evidence also showed that the plaintiff missed more than 12 scheduled physical therapy sessions over a 7 month period and that for a 10 month period she received no treatment.
(3) In its charge, the trial court instructed the jury as to the rule of mitigation of damages. Following a verdict in her favor, the plaintiff ap-

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pealed the court's denial of her motion to set aside and for an additur.

ISSUES:
(1) Whether, under the facts, it was proper to give an instruction on mitigation of damages?
(2) In giving such a charge is the court bound to instruct on the burden of proof?

RULE:
Whether to charge on mitigation is in the court's discretion, after an analysis of the facts, and depends on whether the instruction is likely to provide helpful guidance to the jury. If given, it should be accompanied by an instruction that the burden of proof as to mitigation rests on the defendant.

COMMENT:
That the damages to the bus in which the plaintiff was a passenger were repaired for $120.00, might have had something to do with another (although not indicated) niggardly verdict.

B. Tort Reform

1.

CITATION:
Eskin v. Castiglia, 253 Conn. 516 (2000).

FACTS:
(1) The plaintiff alleged she was injured when the vehicle in which she was a passenger was struck by the defendant's vehicle.
(2) The defendant filed apportionment complaints against the plaintiff's driver and against the driver of another vehicle, claiming that the latter's negligent conduct was a substantial factor in causing the plaintiff's damages.
(3) The trial court granted the plaintiff's motion to strike the apportionment complaint against the unidentified driver and the defendant appealed.

ISSUE:
Whether, pursuant to § 52-102b, an apportionment complaint may be filed against an unidentified person?

RULE:
Since the texts and legislative histories of § 51-102b and 52-572h indicate a legislative intent to restrict the universe of potential apportionment defendants to identified persons, the motion to strike was properly granted.

COMMENT:
A supreme exercise of common sense.

2.

CITATION:
Allard v. Liberty Oil Equipment Co., 253 Conn. 787 (2000).

FACTS:
(1) The plaintiff alleged he was injured in a fall while descending steps on the ladder of his oil truck while it was at the defendant's service area.
(2) The plaintiff claimed that the defendant was negligent in several respects relating to its maintenance of and control over its property.
(3) The defendant filed an apportionment complaint alleging that the part of the oil truck from which the plaintiff fell was "designed, manufactured, installed, distributed, or sold" by an apportionment defendant, whose negligence contributed to the plaintiff's damages.
(4) The trial court granted the apportionment defendant's motion to strike on the grounds that, despite the allegations of negligence, the apportionment complaint alleged a products liability theory and, under tort reform, apportionment can be based solely on negligence and the defendant appealed.

ISSUE:
Whether a defendant sued in negligence may apportion liability to a product seller, as defined by the product liability statutes, against whom the defendant alleges only a theory of negligence?

RULE:
The apportionment principles of § 52-572h do not apply where the apportionment complaint rests on any basis other than negligence and since the product liability statutes provide the exclusive basis for a seller's liability it cannot be a basis for apportionment.

COMMENT:
Looking behind the curtain of pleadings produces another sensible result.

3.

CITATION:
Danko v. Redway Enterprises, Inc., 254 Conn. 369 (2000).

FACTS:
(1) The plaintiff sued the possessor and controller of premises at which she fell while dancing at a wedding.
(2) The defendant filed an apportionment complaint against the lessor of the dance floor which complaint was stricken.
(3) The trial court excluded the stricken apportionment complaint when it was offered by the plaintiff as an evidential admission.
(4) Following a verdict for the defendant, the plaintiff appealed to the Appellate Court which affirmed the trial court which caused the plaintiff to appeal.

ISSUE:
Whether statements in a stricken apportionment complaint are subject to the general rule that statements in a stricken pleading may be admitted into evidence as evidential admissions of the party making them?

RULE:
Since allegations in a withdrawn, superseded or stricken complaint are admissible as evidential admissions of the plaintiff, there is no reason to treat a defendant's allegations in a stricken apportionment complaint differently.

COMMENT:
A good review of the law of evidentiary admissions.

C. Medical Malpractice

1.

CITATION:
Sherwood v. Danbury Hospital, 252 Conn. 193 (2000).

FACTS:
(1) Early in 1985, the defendant's director of its blood bank learned that the FDA had approved the ELISA test for screening blood for antibodies associated with HIV.
(2) In April of 1985, the plaintiff underwent a spinal fusion during which she received 4 units of blood.
(3) The plaintiff, before surgery, was not told that the test was available for screening and the director assumed that the transfused blood had not been screened.
(4) The plaintiff and the defendant had no relationship after her discharge on May 14, 1985.
(5) On March 14, 1995, the plaintiff, having contracted HIV, learned that its source was contaminated blood given during the April 1985 transfusion.
(6) The plaintiff filed a complaint in July of 1996.

(7) In its answer, the defendant pleaded a special defense that the statute of repose, § 52-584, barred the claim and filed a motion for summary judgment relying on that defense.
(8) The plaintiff, in opposing the defendant's motion, submitted an affidavit from an expert witness which provided that good practice required the defendant to notify the plaintiff that the blood she had received had not been tested.
(9) The trial court, in granting the motion, concluded because the plaintiff's action had been filed more than 11 years following the transfusion the action was barred by § 52-584. The Appellate Court affirmed.

ISSUE:
Was there a genuine issue of material fact as to whether the statute of repose was tolled by the continuing course of conduct doctrine?

RULES:
(1) Whether the defendant committed an initial wrong on the plaintiff by failing to inform her that the transfused blood had not been screened is a question of fact.
(2) Whether the defendant's failure to notify the plaintiff, after she received the blood, that it had not been tested was a breach of a continuing duty is a question of fact.
(3) These questions of fact are for the trier to determine whether the statute of repose was tolled.

COMMENT:
Unanimously, a 7 member court, helps clarify a chronic, nagging issue.

2.

CITATION:
Witt v. St. Vincent's Medical Center, 252 Conn. 363 (2000).

FACTS:
(1) In September 1983, the defendant, a pathologist, excised and examined a cervical lymph node and reported that his diagnosis was atypical lymphoid hyperplasia.
(2) Relying on that diagnosis, the plaintiff did not pursue any treatment for his persistent neck swelling.
(3) In November 1994, the plaintiff was diagnosed with non-Hodgkin's lymphoma.
(4) In complying with a request of the plaintiff's oncologist, the defendant noted that in 1983, he was concerned that the plaintiff "might" be developing a lymphoma.
(5) In Mach of 1995, the plaintiff filed suit against the defendant more than 11 years after the biopsy.
(6) In his answer the defendant pleaded a special defense that the statute of repose, § 52-584, barred the claim and filed a motion for summary judgment relying on that defense.
(7) The trial court granted the motion and the Appellate Court affirmed concluding that there was no issue of material fact regarding the continuous course of conduct doctrine that could toll the statute.

ISSUE:
Did the Appellate Court properly conclude that the defendant had no continuing duty to report his findings and diagnosis concerning the plaintiff's suspected medical condition?

RULES:
(1) Although the defendant was aware of the possibility of cancer, his failure to disclose it was equal to a failure of his ongoing duty to warn, a duty that triggered the continuing course of conduct rule.
(2) As held previously, wrongful conduct may include acts of omission as well as affirmative acts of misconduct.

COMMENT:
Stupidity by a pathologist causes, inter alia, a sound, expansive decision, deserving of thoughtful study.

3.

CITATION:
Godwin v. Danbury Eye Physicians & Surgeons, P.C., 254 Conn. 131 (2000).

FACTS:
(1) The plaintiff, prior to laser treatment by the defendant ophthalmologist, signed a written consent, after being told that the area behind the eyeball would be anesthetized by retrobulbar anesthesia. That treatment was unsuccessful.
(2) The plaintiff agreed orally to a second laser treatment, acknowledging that he knew that the second procedure, including the retrobulbar anesthesia, would be the same as the first.
(3) During the second treatment, in the course of the retrobulbar anesthesia, the needle perforated the globe of the plaintiff's eyeball, permanently damaging his vision.
(4) The complaint alleged in four counts —assault and battery; lack of informed consent; medical malpractice; and res ipsa loquitur.
(5) The trial court directed a defendant's verdict on the assault and battery claim, refused to charge on res ipsa loquitur and instructed the jury that in order to prevail on the informed consent claim it was necessary that the plaintiff produce expert testimony to establish the duty to inform. The jury returned a defendant's verdict.

ISSUES:
(1) Did the trial court properly direct the verdict as to assault and battery?
(2) Did the trial court properly refuse to charge as to res ipsa loquitur?
(3) Did the trial court properly charge as to the requirement of expert testimony to establish the duty to inform?

RULES:
(1) Since the plaintiff admitted that he had given verbal consent to the second procedure and understood that it would follow the first, there was no basis on which a jury could find that consent had not been obtained.
(2) Since experts for both parties testified that the injury to the eyeball could have occurred in the absence of negligence, res ipsa was not applicable.
(3) In a case where only one physician treats the plaintiff, it is not necessary to establish through expert testimony that the physician had a duty to inform the patient prior to a surgical procedure. Thus, the trial court's instructions were improper.

COMMENT:
The final piece of a positive medical malpractice trilogy.

D. Causation

1.

CITATION:
Medcalf v. Washington Heights Condominium Assn., Inc., 57 Conn. App. 12 (2000).

FACTS:
(1) The plaintiff proved that her entry into a friend's condominium was delayed because the electronic buzzer system was not functioning. While she was waiting to be admitted, the plaintiff was attacked and injured.
(2) She did not prove that the malfunctioning intercom system was designed

to provide security to a person outside the building.
(3) The trial court refused to set aside the plaintiff's verdict.

ISSUE:
Was there a causal connection between the assault and the failure to maintain the intercom security system?

RULE:
Since the plaintiff offered no evidence that the intercom system was meant to protect persons outside the building, the defendants' failure to maintain the system was inconsequential and was not the proximate cause of the assault.

COMMENT:
This decision is consistent with previous decisions of this court in the area of premise security. Consistently bad.

2.

CITATION:
Card v. State, 57 Conn. App. 134 (2000).

FACTS:
(1) Within six months, the plaintiff was an innocent victim in three motor vehicle accidents.
(2) Following each casualty, she received treatment from the same doctor.
(3) She brought an action for each. She settled with the defendant in the third matter, following which the other two cases were tried together.
(4) At trial, the doctor testified that, because the accidents happened in such a short period of time, he was unable to state with reasonable medical certainty that the disability from the first accident was more or less than those resulting from the other two accidents.
(5) He also testified, within a reasonable degree of medical certainty, that each accident contributed equally to the plaintiff's condition.
(6) The trial court set the plaintiff's verdicts aside after finding that the doctor's apportionment of damages was based on speculation.

ISSUE:
Should the trial court have ruled that the doctor's opinion as to apportionment was speculative?

RULE:
Since the sum of the doctor's testimony was that it was impossible to apportion the injury because the accidents were too close in time, his opinion apportioning the injury equally among the three accidents was speculation and should not have been heard by the jury.

COMMENT:
Victims in multiple accidents suffer legally as well as physically.

E. Claims Against Governments

1.

CITATION:
Shay v. Rossi, 253 Conn. 134 (2000).

FACTS:
(1) The defendants, employees of the State, in the department of children and family, allegedly (a) pursued an unwarranted investigation of possible child abuse by the plaintiff parents; (b) unlawfully issued a hold for the removal of one of the children; and (c) filed neglect and abuse petitions without probable cause.
(2) The defendants moved to dismiss the claims against them in their official capacities on the ground of sovereign immunity. The trial court denied the motion since the plaintiffs' allegations alleged conduct that fell within the exception to statutory immunity for conduct in excess of their statutory authority.
(3) The defendants also moved to dismiss the claims against them in their individual capacities on the ground that they were immune under § 4-165. The trial court granted the motion finding that the defendants' conduct was not wanton, reckless, or malicious.
(4) The motion of the defendants was accompanied by affidavits and other documentary evidence.

ISSUES:
(1) Whether the facts presented bring the plaintiffs' claims within any recognized exception to sovereign immunity?
(2) Whether the plaintiffs' claims against the defendants in their individual capacities were barred by the immunity provided in § 4-165?

RULES:
(1) The totality of the facts, contained in the papers, if proved, would permit a trier to infer that the defendants' actions were sufficiently egregious as to constitute conduct in excess of their statutory authority.
(2) Predicated on the same facts, a trier could find that their conduct indicated a reckless disregard of the plaintiffs' rights and that it fell within the standard of highly unreasonable conduct, involving an extreme departure from ordinary care.

COMMENT:
The opinion, unanimously agreed to by a seven member court and brilliantly written, simply demonstrates how good motives can go bad—real bad.

2.

CITATION:
Tryon v. North Branford, 58 Conn. App. 702 (2000).

FACTS:
(1) The plaintiff, a fire fighter in uniform, attended a Fireman's Convention Parade, as did a fire fighter from the defendant town. The latter brought his dalmatian to the parade.
(2) While the fire fighters were in the parade's staging area, one waved a bagel at the dog, but the dog's jump for it was prevented by the owner who had a tight grip on the dog's leash.
(3) Thereafter, the plaintiff approached the dog, grabbed its ears, and pulled the dog's face toward hers, whereupon the dog bit the plaintiff's nose.
(4) The trial court granted the defendant's motion for summary judgment concluding that the defendant employee was performing a governmental duty of a discretionary nature and was, therefore, entitled to qualified governmental immunity and that the plaintiff failed to prove that she qualified for an exception to the immunity under the identifiable person to imminent harm exception.
(5) The trial court also concluded that §22-357 (dog damage statute) does not apply to a municipal employee who is immune for discretionary governmental acts.

ISSUES:
(1) Did the trial court properly conclude that the defendant's employee was engaged in a discretionary act?
(2) Did the trial court properly conclude that the plaintiff failed to prove that she was an identifiable person subject to imminent harm?
(3) Did the trial court properly conclude that the doctrine of governmental immunity bars the plaintiff's claims for strict liability under § 22-357?

RULES:
(1) The participation in the parade by the defendant's employee was a discretionary act, shielding him with qualified immunity.
(2) Since the damage occurred within a framework limited in duration, place, and condition, the plaintiff was an "identifiable person" within the exception and was, thus, owed a duty by the defendant's employee. However, whether that duty was violated because he put the plaintiff in imminent harm is a question of fact and should not, on the basis of the facts presented in the papers, be decided by summary judgment.
(3) Abrogating the effects of sovereign immunity, § 52-557n contains those instances in which a municipality may be liable for damages. Since the statute does not include liability imposed by § 22-357, claims predicated on that law are barred.

COMMENT:
A good review of a complex, but active, area.

3.

CITATION:
Colon v. New Haven, 60 Conn. App. 178 (2000).

FACTS:
(1) The plaintiff, a minor, sued the named defendant's Board of Education alleging that its employee's negligence, in swinging open a door within a school hallway caused the plaintiff to receive injuries to her face and head.
(2) The trial court granted the defendant's motion for summary judgment finding, initially, that the action of the teacher was discretionary and that, accordingly, the defendant was immune from liability because of sovereign immunity unless the claim came within one of the exceptions to the rule of immunity, and finding, secondly, that the only exception relevant to this case, the identifiable person—imminent harm exception did not apply.

ISSUES:
(1) Did the court improperly determine that the teacher's act in opening the door was discretionary?
(2) Does the absence in § 52-557n(a)(2) of the exception to governmental immunity for discretionary acts where the failure to act would subject an identifiable person to imminent harm eliminate that exception?
(3) Did the court improperly determine that the plaintiff was not an identifiable person subject to imminent harm as to come within an exception to governmental immunity?

RULES:
(1) Since the complaint does not allege that the defendant was performing a ministerial duty and since there was no directive describing the manner in which doors were to be opened, the trial court correctly found that the defendant's actions were discretionary.
(2) Since the statute does not evince a legislative intent to vitiate the exception, the statute does not bar recovery where this exception applies.
(3) School children who are statutorily required to attend school are an identifiable class of foreseeable victims. And, since the alleged danger to the plaintiff was limited in duration and that the potential for harm was significant and foreseeable, the imminent harm exception applied.

COMMENT:
The common theme in this case and others in the area, after peeling back some unnecessary language, is that the "identifiable person—imminent harm" exception is fact dominated.

F. Worker' Compensation—Exclusivity

1.

CITATION:
Doe v. Yale University, 252 Conn. 641 (2000).

FACTS:
(1) The plaintiff was a medical intern in the second month of her first year in the residency program at Yale-New Haven Hospital (hospital) and a graduate student of Yale University (defendant).
(2) At the direction of her supervisor, a third year resident, the plaintiff attempted an arterial line insertion and withdrawal during which she pricked her finger causing her blood to contact that of the patient. She later was diagnosed as having HIV as a result.
(3) The trial court struck the defendant's special defense that claimed immunity under the Workers' Compensation Act and instructed the jury that it could find the defendant liable without relying on expert testimony. Specifically, the court told the jury that "you may consider the evidence of the medical experts on what standard of care was appropriate."

ISSUES:
(1) May a joint venture between two nonprofit organizations be an employer as that term is defined in the Act?
(2) Was it necessary that liability be predicated on expert testimony regarding the standard of care and any breach of that standard?

RULES:
(1) (a) A joint venture, such as the relationship between the hospital and the defendant, while not specifically named in the Act, can be an employer since the language of the Act as to who may be an employer is expansive.
(b) The absence of a profit motive is not fatal to the existence of a joint venture.
(c) Whether an employment relationship exists for purposes of the Act is a question of the right to control, and not whether an employee is a direct employee of one or the other joint venturers.
(d) Depending on the evidence, a medical resident who is to be educated and trained may be an employee for purposes of the Act.
(2) Since the plaintiff alleged that the defendant was negligent, credible expert testimony was needed to establish the standard of care and any breach.

COMMENTS:
(1) Be fully awake when analyzing the 50 page majority and 16 page dissenting opinions.
(2) The artfully drafted, persuasive dissent is in contrast to the vitriolic (although many times correct) dissents of previous years.

2.

CITATION:
Driscoll v. General Nutrition Corp., 252 Conn. 215 (2000).

FACTS:
(1) During a robbery of the store at which she was employed, the plaintiff was seized by the neck by the robber who, then, sexually assaulted her by forcing her to perform oral sex on him.

(2) In her complaint against her employer, the plaintiff alleged that she was assaulted physically and emotionally. Her claim for recovery was solely for emotional distress and emotional injury.
(3) Finding that the involved question had not been previously answered, the U. S. District Court certified the question.

ISSUE:
Whether the exclusivity provision of the Workers' Compensation Act bars an employee from pursuing a tort claim for damages for emotional distress resulting from a physical and sexual assault that occurred during and in the course of her employment?

RULE:
To avoid the exclusivity of the Act, an emotional injury may not arise from a personal injury. Since forcible fellatio is a personal injury, the plaintiff's remedy is limited to the benefits of the Act.

COMMENT:
The ingenuity of plaintiffs' counsel is always at work. But is not always successful.

3.

CITATION:
Antignani v. Britt Airways, Inc., 58 Conn. App. 109 (2000).

FACTS:
(1) The plaintiff's decedent, an employee of the defendant, was an airport agent whose duties included ticketing, serving customers, loading luggage on and off aircraft, guiding arriving and departing planes, and the like.
(2) On a day off while at the airport to take a personal trip, the decedent volunteered to assist a co-worker with baggage duties and other ramp responsibilities. At the conclusion of those activities, she walked near the front of a plane and was struck by a propeller and killed.
(3) The plaintiff sued the defendant alleging negligence. The defendant claimed by a special defense that the action was barred by the exclusivity provisions of the Act since the decedent was in the course of her employment at the time.
(4) The trial court denied the defendant's motion for summary judgment and, prior to trial, the court ruled as a matter of law that the plaintiff's death did not occur during the course of her employment because she was injured on her day off and, consequently, the Workers' Compensation Act did not apply.
(5) The defendant's offer of proof included a job description of an airport agent which, inter alia, required employees to volunteer to help whenever a need arose; and developed a management policy of teamwork which instructed employees to volunteer to help whether on or off duty.

ISSUE:
Is an employee who is on the employer's premises on her day off and who is volunteering to perform her duties by the demand of and with the approval of her employer not in the course of employment as a matter of law?

RULE:
Whether the employee was in the course of her employment, even though her death occurred on her day off, is a question of fact for the trier weighing all of the relevant circumstances.

COMMENT:
Juries should be allowed to decide facts and appellate courts should allow jury decisions to stand.

G. Duties Owed to Helpless Persons

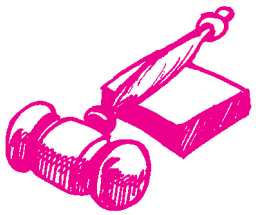
CITATION:
Coville v. Liberty Mutual Ins. Co., 57 Conn. App. 275 (2000).

FACTS:
(1) The plaintiff, who was intoxicated, was without her consent, involuntarily hoisted up and put into the passenger's seat of the truck of her boyfriend who was also drunk.
(2) During the course of the drive, the plaintiff twice opened the door but the boyfriend driver closed it. Thereafter, the boyfriend heard the door close, saw that the plaintiff was not in the truck, and through the rearview mirror, saw the plaintiff lying in the road.
(3) In this case for underinsured motorist benefits, the plaintiff requested that the trial court charge under § 314A(4) and § 324 of 2 Restatement (Second) of Torts, which the court failed to give and the plaintiff claimed that the court should not have told the jury that, in considering whether the plaintiff was negligent, it could consider whether she exited the truck while it was moving.
(4) Judgment was for the defendant after the jury found the plaintiff to be 65% negligent.

ISSUES:
(1) Should the court have charged under §314A which provides, in part, that one "who voluntarily takes the custody of another . . . such as to deprive the other of . . . her normal opportunities for protection is under a special duty to the other . . . ."?
(2) Should the court have charged under §324 which provides, in part, that one "who voluntarily takes charge of a helpless person must exercise reasonable care for (her) welfare and safety . . . ."?
(3) Should the court have charged that the plaintiff's exiting the truck could be considered in determining her negligence when the evidence on her exit was contradictory?

RULES:
(1) &
(2) Although not previously adopted by Connecticut's appellate courts, the Restatement sections are consistent with the recognized principle that one who gratuitously undertakes an act will be liable for performing it negligently. The evidence that the boyfriend took physical custody of the plaintiff against her will by taking her to his truck, lifting her inside, and forcing her to remain in it provides a factual basis to permit the charge.
(3) Since the jury could infer that the plaintiff intentionally exited the truck, even though there was no direct evidence that she did, the charge that such conduct could be considered in assessing the plaintiff's negligence was proper.

COMMENT:
Judge Stoughton, dissenting on the applicability of the Restatement sections, aptly comments on the social phenomenon that the case is "not unique in our times, of a couple out for the evening, each of whom had consumed too much alcohol, with the unhappy result, described in the majority opinion." ■



CTLA Law Reporter

By Kathleen L. Nastri, Associate Editor

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

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

JURY VERDICT:
Automobile accident; 31 year old male; 5% cervical disability; 3% lumbar disability;
VERDICT OF $50,000 PLUS OFFER OF JUDGMENT INTEREST.
CARRIER: ALLSTATE.

In the case of *John Scott v. Tanya Moreno*, Docket No. 96-0566243S, filed in the Superior Court for the Judicial District of Hartford, a jury returned a verdict in favor of the plaintiff in the amount of $55,112.81 ($5,112.81 economic; $50,000.00 non-economic). The plaintiff stipulated to a collateral source reduction of $5,112.81. The judgment amount paid to the plaintiff was $60,000.00, which included offer of judgment interest and the bill of costs.

The highest offer was $10,000.00; the lowest demand was $12,000.00. Plaintiff filed an offer of judgment for $14,000.00.

On September 16, 1996, the plaintiff was driving his vehicle on Silver Lane in East Hartford. He slowed to turn into a convenience store and his vehicle was hit from behind by the defendant's vehicle.

The plaintiff was taken to Hartford Hospital and had follow up care with a chiropractor for soft tissue neck and back injuries. Upon completion of chiropractic care, the plaintiff received a 5% partial disability to the lumbar spine and a 3% disability to the cervical spine. Plaintiff's medical bills totaled $5,112.81. The chiropractor testified at trial. The defendant's IME doctor, Myron Schaffer, an orthopedic surgeon, also testified. The cross-examination of Dr. Schaffer had an adverse effect on his credibility.

On the day of trial the defendant conceded liability and defended the claim on the basis of that the impact could not have caused serious injury.

Submitted by David H. Siegel, Esq., of Polinsky, Santos, Siegel & Polinsky, Hartford, Connecticut, counsel for the plaintiff.

JURY VERDICT:
Injury to town constable; hip fracture;
VERDICT OF $147,535.
DATE OF VERDICT: MARCH 2, 2001.

In the case of *James R. Levandoski v. Douglas Cone*, Docket No. CV 97 0542714S, filed in the Superior Court for the Judicial District of New London at New London, the jury returned a verdict in favor of the plaintiff. The jury awarded economic damages totaling $82,535 (which included $30,000 for the probable hip replacement surgery) and non-economic damages of $65,000, for a total verdict of $147,535. The jury assessed 15 percent comparative responsibility to the plaintiff. The plaintiff, age 35, is a constable with the Town of East Lyme, Connecticut. He works under the supervision of a Resident State Trooper. On May 16, 1996, he and another police officer were dispatched to a loud party in Niantic, Connecticut. There were 20 to 30 guests at a party at that location. Most were underage, and most were drinking alcohol. The defendant was a 20-year-old guest of this party. He was confronted by the plaintiff when he was seen stuffing contraband into his pants. The plaintiff asked him to stop so that the contraband could be inspected. Instead, the defendant turned and ran towards dark woods. They were very close together during this foot chase. As they entered the woods, there was a significant drop off in the terrain. The plaintiff fell, suffering a fracture and dislocation of his right hip.The plaintiff underwent a closed reduction of his hip followed by an open reduction. It is probable that he will need a total hip replacement in the future.The plaintiff did not bring suit against the homeowner due to the Firefighters' Rule. An action was brought against the defendant for negligently failing to stop when properly requested to and for engaging the police officer in a reckless foot chase.The case was originally tried in February of 2000, and it resulted in a hung jury. The case was retried in February, 2001, and resulted in a plaintiff's verdict. Submitted by John J. Houlihan, Jr., of RisCassi & Davis, P.C., Hartford, Connecticut, counsel for the plaintiff.

SETTLEMENT:
Automobile/ambulance collision; 40% impairment of right leg;
SETTLEMENT OF $600,000.00.

In the case of *Lynne Rice, et al, v. New England Ambulance Service, Inc., et al*, Docket No. 3:99CV342 (DJS), filed in the United States District Court for the District of Connecticut, the parties settled for $600,000 on August 30, 2000, after conferences before Magistrate Thomas Smith and Judge Dominick Squatrito. Jury selection scheduled was for the next day. The court ordered the adjuster for the carrier, Providence Washington, to attend jury selection and the trial.

The accident occurred on Route 6 in Foster, Rhode Island, on February 2, 1998. Plaintiff was driving from her home in Glastonbury to Providence, where she was employed by Fleet Bank. The defendant's ambulance failed to yield the right of way at an intersection and drove directly into the path of the plaintiff. The resulting front-end collision totaled her car.

Plaintiff was extricated with the jaws of life and taken to Rhode Island Hospital, where she was diagnosed with multiple fractures of the right ankle, mid foot and left patella; internal derangement of the right knee; and sprains of the cervical and thoracic spine. The plaintiff was hospitalized for two weeks and underwent several surgeries before her discharge home. She was unable to walk and remained confined to her home for several months, where she was assisted by a visiting nurse and her husband. After completing physical therapy, she returned to work in July, 1998 on a part-time basis until a necessary third surgery for removal of the hardware and arthroscopy of the knee in October. She returned again to work on a part-time basis in November, 1998, but was unable to perform her responsibilities and qualified for disability leave in April, 1999, with benefits. In March, 2000, the plaintiff underwent surgery for fusion of the mid foot and, at the time of settlement, was still recuperating.

Plaintiff incurred medical bills of $50,250 and received a permanency rating of 40% to the right lower extremity.

The duration and extent of earnings losses and impairment were hotly contested. A workers' compensation lien of $87,718 was compromised by 50% in return for a final stipulation.

Submitted by F. Jerome O'Malley, Esq., of Tobin, Carberry, O'Malley, Riley & Selinger, PC, New London, Connecticut, counsel for the plaintiffs.

JURY VERDICT:
Medical malpractice;
31-year-old female;
Failure to obtain informed consent and length second stage of labor;
VERDICT OF $493,000.00.

In the case of *Heather S. Bond, et al, v. David A. Kalla, M.D. and OB/GYN Services, P.C.*, Docket No. CV-97-0543295, filed in the Superior Court for the District of New London at New London, the jury returned a verdict on June 16, 2000 in the amount of $493,000.

The Plaintiff began treating with the defendant, an obstetrician, and his practice when she became pregnant with her first child in 1990. The plaintiff had a lengthy labor and delivery, with the second stage of labor (i.e., the active "pushing" stage of labor) lasting over 3.5 hours. After the use of a vacuum extractor and forceps, both of which failed, the defendant performed a Cesarean section to deliver the plaintiff's first child.

When the plaintiff became pregnant with her second child, she again presented to the defendant and his practice. All experts in the case, for plaintiff and defendants, agreed that the standard of care requires that a doctor obtain informed consent before performing a Vaginal Birth After Cesarean Section ("VBAC"), which is a procedure that has gained favor over the last ten to fifteen years. The defendants did not document their records to indicate clearly if they had obtained this informed consent. All experts agreed that an obstetrician must give a woman the option of having a repeat C-section. The plaintiff testified that she was never given this option, and that if given the option she would have chosen a repeat C-section.

The plaintiff went into labor on August 25, 1995. Despite a lengthy labor and delivery and repeated requests for a C-section, the defendant did not perform a C-section. During the second stage of labor, the plaintiff pushed for over three hours. The defendant used a vacuum extractor which failed, and then utilized forceps until the baby came out.

The plaintiff's expert, Edward Goldberg, M.D., a gastroenterologist from Manhattan, testified that the pressure of the child on the wall between the birth canal and rectum caused permanent damage to the plaintiff's ability to move her bowels. Consequently, she suffers from permanent, chronic constipation, and will require over-the-counter medications to move her bowels for the rest of her life.

The jury returned a verdict in the plaintiff's favor in the amount of $493,000, $60,000 of which was attributed to economic damages and $433,000 attributed to non-economic damages.

Submitted by Ralph J. Monaco, Esq., of Conway & Londregan, P.C., New London, Connecticut, counsel for the plaintiffs.

JUDGMENT:
Passenger in one car collision with a tree; 21-year-old single male;
massive brain damage resulting in death;
AWARD OF $1,084,000.00.

In a case tried to the Court in April of 2000, *Palchick v. Oliveira*, Docket No. CV-97-0142886-S filed the Superior Court for the Judicial District of Waterbury, Judge Robert F. McWeeny awarded the plaintiff's estate $1,084,000.00.

The Court awarded economic damages as follows:

Loss of future earnings:	$700,000.00
Medical and funeral expenses:	+ 34,000.00
Total:	$734,000.00

Non-economic damages:

Loss of life experiences:	$ 350,000.00
Total:	$1,084,000.00

No claim was made for pain and suffering. The plaintiff's decedent did not regain consciousness and was declared brain dead on arrival at the hospital.

The plaintiff and the defendant left a nightclub in Brewster, New York, and were headed in the early morning hours toward Manhattan when the defendant lost control of his car and struck a tree on the right side of the highway. Several friends and relatives testified in behalf of the plaintiff's decedent, who was from a closely-knit Portuguese/American family.

The award of $1,084,000.00 was reduced by $300,000.00 for a prior partial settlement, and prejudgment interest was added in the amount of $224,474.88, plus $350.00 for attorney's fees and taxable costs of $960.40 for a total judgment of $987,817.28.

Submitted by Kevin T. Nixon, Sr., Esq. and James A. Mulhall, Jr., Esq. of Nixon & Mulhall, Naugatuck, Connecticut, counsel for the plaintiff.

JURY VERDICT:
Automobile accident;
rear-end collision;
two plaintiffs;
defendant's insurer: Allstate;
VERDICT OF $75,000 FOR PLAINTIFF #1;
VERDICT OF $50, 000 FOR PLAINTIFF #2;
PLUS OFFER OF JUDGMENT INTEREST.

In the case of *Leslye Skyner, et al, v. Charles M. Visconti,* Docket No. CV 97-0339765S, filed in the Superior Court for the Judicial District of Fairfield at Bridgeport, the jury returned verdicts in favor of Lesley Boyes in the amount of $75,000.00 and Leslye Skyner in the amount of $50,000.00, on April 4, 2000. Allstate insured the defendant.

The plaintiffs, Leslye Skyner, age 28, and Lesley Boyes, age 24, are both originally from Liverpool, England, and were working as nannies in Westport, Connecticut, at the time of the accident.

On September 8, 1996, the plaintiffs were stopped on Route 1 in Norwalk, Connecticut, with their left-hand signal on to make a left-hand turn into the Silver Star Diner. Their vehicle was rear-ended by a vehicle owned and operated by the defendant. Following the accident, the defendant admitted to both the plaintiffs and the Norwalk police officer that he was looking at a bus that was parked on the opposite side of the street and that he did not see the plaintiff's vehicle until it was too late. The plaintiffs claim that the defendant was traveling between 35-40 m.p.h. when he struck their vehicle, which was pushed forward as a result of the collision. The defendant claimed that he was traveling less than 30 m.p.h. and he described the collision as "a bump". There was extensive damage to both vehicles, which were ultimately towed from the scene.

Later that evening, both plaintiffs began to experience headaches and neck pain. The following day, they sought treatment with Dr. Patrick Guerin, a chiropractor from Westport. Dr. Guerin subsequently referred both plaintiffs for lumbar MRIs at Norwalk Hospital. The MRI for Lesley Boyes, the passenger, showed that she had a fracture at the right L-5 pars. The MRI for Leslye Skyner was negative. Dr. Guerin subse-

quently referred both plaintiffs for physical therapy at the Wellness Center in Weston, Connecticut. On April 8, 1997, Dr. Guerin indicated in his final report that Lesley Boyes had sustained a 16% permanent partial impairment to her spine as a result of this accident. Dr. Guerin indicated that she had sustained a 6% disability due to the fracture of the lumbar vertebrae, a 7% disability to her cervical spine and a 3% disability to her lumbar spine. In addition, Dr. Guerin also found that Leslye Skyner had sustained a 7% disability to the cervical spine and a 5% disability to the lumbar spine, for a total disability of 12% of the spine.

The plaintiffs' medical bills were all out of pocket, as there was no health insurance. Lesley Boyes' medical bills totaled $7,341.00 and Leslye Skyner's medical bills totaled $8,202.50.

After suit was filed, Allstate, which insured the defendant, arranged for Lesley Boyes to be examined by Dr. Tracy Schmidt, an orthopedic from Stamford. In his report, Dr. Schmidt opined that Ms. Boyes had sustained a 4-5% disability to the lumbar spine and a 2-3% disability to the cervical spine as a result of the accident. Dr. Schmidt indicated that the L-5 pars fracture appeared to be an older injury because it did not have the appearance of an acute fracture.

During a pre-trial that was held before the Honorable William A. Mottolese in May, 1999, Allstate offered the sum of $19,000.00 in Lesley Boyes's case and $9,500.00 in Leslye Skyner's case. Both of these offers were rejected. Judge Mottolese then referred the parties to arbitration.

On July 15, 1999, the case proceeded to arbitration before Attorney James Gaston. Lesley Boyes did not appear for the arbitration, as she had returned to Liverpool shortly after she was examined by Dr. Schmidt. Her deposition was submitted at the arbitration. Attorney Gaston subsequently awarded Lesley Boyes damages in the amount of $37,341.00 and awarded Leslye Skyner damages in the amount of $27,281.00. The plaintiffs would have accepted both of these awards but counsel for the defendant immediately filed a Motion for Trial De Novo. Thereafter, counsel for the plaintiffs filed offers of judgment for the arbitrator's figures.

The trial was scheduled to commence during the week beginning March 20, 2000. After counsel were called in for the trial, the attorney for the defendant indicated that Allstate would not increase their settlement offers and that the file had been "Dolfed" (Defense of litigation files).

Lesley Boyes returned to Connecticut from Liverpool in order to testify at the trial, which was heard before the Honorable William B. Rush. The plaintiffs did not call Dr. Guerin as a witness and instead introduced all of the medical reports. The defense called Dr. Schmidt as an expert witness, who testified in accordance with his report. On April 4, 2000, following a two-day trial, the jury awarded Lesley Boyes the sum of $75,000.00 and Leslye Skyner the sum of $50,000.00, which were the figures that had been requested by counsel for the plaintiffs during final argument. With offer of judgment interest, these awards totaled $80,720.56 for Lesley Boyes and $53,813.71 for Leslye Skyner, plus costs.

Submitted by Michael P. Foley, Jr., Esq., Cheshire, Connecticut, counsel for the plaintiffs.

SETTLEMENT:
Medical malpractice;
failure to diagnose lung cancer;
50-year-old female;
SETTLEMENT OF $2,000,000.00.

The plaintiff was a 50-year-old female who presented to her family doctor complaining of rib pain. The family doctor ordered chest x-rays which were performed the next day at the defendant hospital. The defendant doctor reviewed the x-rays and issued a written report concluding that the plaintiff's lungs were normal. A right lower lobe nodule was apparent on the x-rays, but the defendant doctor failed to detect and report it. As a result of the report, no further diagnostic testing or treatment was ordered for the plaintiff.

One year and seven months later, after a routine breast exam revealed a nodule in or around the plaintiff's right armpit, her family physician again ordered her to undergo diagnostic studies including chest x-rays. The new x-rays showed that the right lower lung nodule was 1.5 cm in size. The plaintiff had developed a right hilar and infrahilar enlargement, and the right side of the mediastinum had widened consistent with adenopathy. Two months after the new x-rays were taken, the plaintiff was diagnosed as terminally ill with a primary atypical carcanoid tumor of the lower lobe of the right lung, a cancer which had spread during the 19 month period into other areas of her body including the lymph nodes of her armpit and her mediastinum.

Suit was brought on behalf of the plaintiff and her husband against the doctor who read the original x-rays and the hospital. The complaint was later amended to cite in the radiology group that employed the defendant doctor. Because the plaintiff was terminally ill, the case was claimed privileged under P.A. 98-54.

The plaintiff alleged that the nodule was apparent and should have been detected on the earlier x-rays, and had not yet metastasized. If properly detected after the first x-rays, the nodule could have been surgically removed likely resulting in the plaintiff then being free of cancer. By the time it was finally detected, her cancer had spread to the point that it was no longer operable and no curative treatments were available. The plaintiff was made to endure painful chemotherapy and steroid injections which caused her to develop diabetes.

The plaintiff enjoyed a well-paying career, but lost excessive amounts of time from her employment and was ultimately forced to resign. The plaintiff's future earning capacity was estimated at $1,000,000.00. Her physicians reported a life expectancy of less than two years due to her cancer, which otherwise would have been 31 years.

At a pretrial, plaintiff's counsel demanded $3 million and an affidavit of no other insurance. By this time, the plaintiff had lost her hearing due to medications, and her cancer had spread to her liver and left lung. The defendant doctor admitted liability and the defendant hospital was determined not to be liable. The defendant doctor disclosed $2 million in malpractice coverage, and the judge recommended a settlement for $1.85 million. The defendants requested time to consider this figure, and another pretrial was scheduled.

Shortly thereafter, offers of judgment were filed by the plaintiffs as to each defendant for $2 million without costs. Another pretrial was held six weeks later, at which the plaintiff rejected an offer of $1.85 million. The case was assigned a date for jury selection.

After continued negotiations, the case was ultimately settled for $2,000,000.00, and a confidentiality agreement was executed.

Submitted by Robert I. Reardon, Jr., Esq., of The Reardon Law Firm, New London, Connecticut, counsel for the plaintiffs.

JURY VERDICT:
Slip and fall; 70-year-old female;
5% ppd of right knee;
2% ppd of whole person;
JURY VERDICT OF $98,120.00.

In the case of *Mary Braun v. Stop & Shop Companies*, Docket No. CV-98-0084838 S, filed in the Superior Court for the Judicial District of Middlesex at Middletown, a jury returned a verdict in favor of the plaintiff in the amount of $98,120.00 on October 12, 2000.

The plaintiff was 72 years old when she was injured at the Stop & Shop located in Cromwell, Connecticut. While shopping at the store, she was passing in front of the Meat Department when she slipped and fell on a pea pod which was on the floor. The store manager immediately responded, picked up the pea pod and called 911 as the plaintiff was obviously in great pain. After being taken by ambulance to Middlesex Memorial Hospital, x-rays revealed a non-displaced fracture of her right knee. Treatment of this non-displaced fracture required complete immobilization. Therefore, Mary Braun was confined to a convalescent home for eight weeks.

The plaintiff testified that at the time she fell, there was a store employee in the immediate vicinity. Evidence at trial revealed that this store employee was one who worked in the Produce Department. Sweeping logs maintained by Stop & Shop Company did not document any sweeping for at least three hours before the incident and, in fact, on the incident report itself, the line which indicates "time last cleaned" was left blank.

The plaintiff was treated by Dr. Terry Reardon of Middletown, who provided testimony that the plaintiff sustained a 5% permanent partial disability of her right knee and 2% of the whole person. The plaintiff's medical specials totaled $15,120.00.

The defense filed a special defense of contributory negligence but did not press this defense.

The jury returned a verdict in the amount of $15,120.00 in economic damage and $83,000.00 in non-economic damages for a total verdict of $98,120.00. The jury did not find the plaintiff guilty of any comparative negligence. Throughout the entire course of this litigation, the defense never made an offer of settlement.

Submitted by M. Hatcher Norris, Esq., of Butler Norris & Gold, Hartford, Connecticut, counsel for the plaintiff.

JURY VERDICT:
Motor vehicle accident;
57-year-old male; spinal fusion;
JURY VERDICT OF $4,514,930.00.

In the case of *Rocco O. Tofano, et al, v. Tobacco Valley Sanitation Service Company,* Docket No. CV 99 0590331S, filed in the Superior Court for the Judicial District of Hartford at Hartford, the jury returned a verdict in favor of the plaintiffs in the amount of $4,514,930.00 on October 17, 2000.

This case arose out of a two vehicle collision that occurred on July 2, 1997, on Route 9 in Cromwell, Connecticut. The plaintiff, an Italian immigrant living as a permanent resident alien, was 57 years of age at the time of the accident. He was southbound in the right-hand lane of Route 9. The defendant, Tobacco Valley Sanitation Service Company, was a South Windsor company that operated a fleet of refuse and recycling vehicles. One such truck was operating in the center southbound lane of Route 9. For some unknown reason, the dump body of the recycling truck was in a partially elevated position. The top of the dump body collided with an overpass causing it to become separated from the truck itself. The dump body then collided with the plaintiff's vehicle, causing him to be ejected from the car.

The plaintiff suffered a burst fracture at T11 with complete paraplegia at that level. He also suffered a comminuted fracture of his right clavicle. The plaintiff was confined to Hartford Hospital for approximately 55 days. He underwent spinal fusion from T8 though L1 using extensive instrumentation. He was discharged to Gaylord Hospital where he spent approximately 5½ months of further rehabilitation. He has since lived with his son in a small apartment in Hartford.

The plaintiff worked in a small machine shop in Cromwell at the time of the injury. Past medical bills totaled approximately $250,000. They were not introduced at trial in an agreement with the defendant. The defendant had made advance liability payments to the plaintiff of roughly the same amount as the medical bills. Therefore, no past medical bills were sought, and no evidence of advanced liability payments was presented to the jury.

The amount of future economic damages was in dispute. The plaintiff offered a life care plan and economic testimony that the present value of his future life needs were $1,595,000. The defendant had a life care planner and accountant. The defense figure was approximately $900,000 for such items.

The jury returned a verdict for $1,214,930 in economic damages and $3,300,000 in non-economic damages for a total verdict of $4,514,930.

Submitted by John J. Houlihan, Jr., Esq., of RisCassi and Davis, P.C., Hartford, Connecticut, and Arnaldo J. Sierra, Esq. of Law Offices of Arnaldo J. Sierra, LLC, counsel for the plaintiff.

ARBITRATION AWARD:
Motor vehicle/motorcycle collision;
45-year-old male; permanent partial disability of right leg;
AWARD OF $725,000.00.

In the case of *Drew Smith v. Jeffrey St. Onge and Northeast Auto Body, Inc.*, Docket No. CV 98-00578975, filed in the Superior Court for the Judicial District of Windham at Putnam, the parties submitted the case to Dale Faulkner for arbitration. The defendants admitted liability, and the arbitration proceeded as a hearing in damages. The arbitrator awarded $745,697.50 to the plaintiff.

On June 14, 1997, at approximately 4:45 p.m., the plaintiff was driving his motorcycle southbound on Route 12, in Thompson, Connecticut. The defendant backed a Chevy Van owned by his employer, Northeast Auto Body Shop, Inc., from the driveway of his home onto southbound Route 12. The rear driver-side of the van crashed into the plaintiff's motorcycle, making impact with the plaintiff's right side. The plaintiff was thrown from the motorcycle, slid down the road and landed on the embankment of Route 12 northbound. The plaintiff testified at his deposition that he remembered very little of how the collision occurred.

The paramedics found him with no pulse in his right lower extremity. He was taken to the Emergency Room at Day Kimball Hospital in Putnam, Connecticut, and then transported by Life Flight to UMass Medical Center in Worcester, Massachusetts. He was diagnosed with an avulsion fracture of the right heel, where the heel pad had been torn away from the back and bottom of the heel bone, remaining attached to the foot by skin alone. A horseshoe-shaped scar now extends across the back of the heel. The plaintiff endured months of daily dressing changes and physical therapy to regain range of motion to his right lower extremity.

Plaintiff's medical expenses totaled $36,191.05. After the collateral source analysis, the total amount of medical bills

awarded by the arbitrator was $9,520.50.

At the time of the collision, the plaintiff was self-employed, operating his own floor cleaning business for which he reported income of approximately $10,000 annually in the years preceding the collision. He did not return to significant floor cleaning employment until approximately one year post-collision. In January, 1999, he was hired as a cable splicer and began earning more than he had earned pre-collision. The total lost wages awarded by the arbitrator was $11,177.00. No future wages were awarded. The total economic damages awarded were $20,697.50.

A variety of permanent partial disability ratings was offered at the arbitration. Plaintiff's treating plastic surgeon, Dr. Elliot Lach of Worcester, Massachusetts, testified via videotape that the plaintiff sustained a 39% permanent partial disability of the right lower extremity.

Plaintiff's treating physiatrist, Dr. Edward Allcock of New London, Connecticut, testified at the arbitration that the plaintiff sustained a 48% permanent partial disability rating of the right lower extremity. The plaintiff also offered the report of the defense expert, Dr. Raymond Sullivan, an orthopedist from Farmington, Connecticut, in which he stated that the plaintiff sustained a 15% whole body permanent partial disability. However, the plaintiff's treating orthopedist, Dr. Eui Chung, from Putnam, Connecticut, stated that the plaintiff sustained a 10% permanent partial disability of the right lower extremity. This rating was clearly wrong and created an insurmountable obstacle to resolving the case.

As a result of the collision, the plaintiff experiences pain in his right foot upon walking and consequently wears a brace to cushion the heel strike. He also has diminished range of motion and sensation in the right lower extremity. Plaintiff's recreational activities, such as fishing, skiing, and hiking, have been reduced, altered, or eliminated. The plaintiff is 45 years old and has a life expectancy of 31.9 years. The arbitrator awarded $725,000 in non-economic damages, $300,000 representing past damages and $425,000 representing future damages.

Submitted by Michael Ewing, Esq. and Robert Adelman, Esq., of Adelman, Hirsch & Newman, LLP, Bridgeport, Connecticut, counsel for the plaintiff.

JURY VERDICT:
Slip and fall; 32-year-old male;
multiple fractures;
VERDICT OF $630,669.69;
SETTLEMENT DURING APPEAL
OF $750,000.00.

In the case of *Richard Domogala v. Esther Molin, et al*, Docket No. CV 94-0311246S, filed in the Superior Court for Judicial District of Fairfield at Bridgeport, the plaintiff was awarded $14,669.69 for economic damages and $616,000.00 for non-economic damages for a total award of $630,669.69. Pending appeal, the case settled for $750,000.00.

On January 26, 1993, the plaintiff drove to the rear parking area of the commercial building located at 3606-3610 Main Street, Bridgeport. The plaintiff intended to call on a business acquaintance who, unknown to the plaintiff, had been earlier evicted by the defendant, Esther Molin. The sole store in business at the location at the time was Nutmeg Surgical Supply. At the time of the incident the acquaintance of the plaintiff was at the location retrieving property stored in the basement which he could not remove earlier due to flooding. Upon exiting his truck, the plaintiff slipped on ice, catching his leg in a wooden pallet.

The plaintiff sustained a fracture to the left ankle, requiring open reduction surgery. As a result of the injury the plaintiff incurred atrophy and weakness to the left leg and subsequently fell down steps three and one half years later. The plaintiff suffered a tibial fracture of the right leg from the subsequent fall. The plaintiff was assessed a 20% permanent partial disability to the left leg and a 15% permanent partial disability to the right leg by his treating chiropractor and orthopedist. An independent medical examination was performed at the time of trial by an orthopedist, Dr. Laurence Leftkowitz, who diagnosed a 5% permanent partial disability. Dr. Leftkowitz opined that there was no atrophy to the plaintiff's left leg and the fall was not causally related to the January 26, 1993 incident. The plaintiff, a landscaper, claimed no lost earnings. The plaintiff was thirty two years old at the time of the incident.

The plaintiff's theory of liability included the failure to salt, sand, and/or remove ice from several days prior from the parking lot area. He also claimed water was pumped from the basement onto the parking lot area. The defendants vigorously denied any ice on the premises or having pumped water from the basement.

At closing argument the plaintiff argued for fair, just and reasonable damages of $175,000.00. An offer of judgment for $90,000.00 had previously been rejected by the defendant.

The defendants appealed and the case was settled before oral argument for $750,000.00.

Submitted by James O. Gaston, Esq., of Gaston & Ruane, Bridgeport, Connecticut, counsel for the plaintiff.

JURY VERDICT:
Slip and fall; 76-year-old female;
25% ppd of left leg;
VERDICT OF $189,870.22
PLUS INTEREST

In the case of *Ruth Solek v. Naomi Ciambriello*, Docket No. CV 94-0311752S, filed in the Superior Court for the Judicial District of Fairfield at Bridgeport, judgment for the plaintiff for $189,870.22 plus interest for a total award of $292,863.22.

The case arose out of a fall that occurred in the plaintiff's daughter's house. On September 9, 1993, the plaintiff and her husband were visiting their daughter and family in Connecticut. During the time they stayed with their daughter, they used their daughter's bedroom. While the plaintiff and her husband were out visiting friends on the day before the incident, their daughter left a step stool in the travel path of the bedroom. Upon their return in the evening, the couple went to bed. The plaintiff got up at approximately 4:30 a.m. to use the bathroom and to get ready to go to breakfast with a friend at a nearby restaurant. The plaintiff intended to shower and dress early so as to not interfere with her daughter's family morning activities. She did not turn on the overhead bedroom light because she did not want to wake her husband. After using the bathroom she was walking between the bed and wall to a wardrobe closet when she fell over the misplaced stool. The defendant testified she had earlier used the stool and left it in the pathway forgetting to return it next to the wardrobe closet where it was normally stored.

The plaintiff fractured her left hip. She sustained a displaced fracture which required open reduction and internal fixation with a compression screw. Medical bills totaled $17,337.78. She was assigned a 25% permanent partial disability to the left leg.

The defense claimed the obvious placement of the stool in the room was not negligence, that the plaintiff may have fallen over the edge of the bed, and that the

plaintiff s failure to turn on a light exceeded any responsibility of the defendant. The defendant rejected an offer of judgment of $75,000.00. The plaintiff argued for a verdict of $150,000.00. The jury award of $237,337.78 less 20% comparative responsibility for a total of $189,870.22. Interest on the award equated to a judgment of $292,863.22.

Submitted by James O. Gaston, Esq., Gaston & Ruane, Bridgeport, Connecticut, counsel for the plaintiff.

SETTLEMENT:
DPT vaccine case;
SETTLEMENT OF $2.2 MILLION.

In the case of *Louis Sacco v. Secretary of the Department of Health and Human Services*, the parties entered into a structured settlement in the amount of $8.5 million dollars paid over 30 years, the present value of which is $2.2 million.

This was an action brought in the Federal Court of Claims under the Federal Vaccine Statute that provides for compensation to those injured as a result of a vaccine. 42 U.S.C. Section 300aa-1, *et seq*.

In this matter, Louis Sacco, now age 30, had DPT shots at infancy. Sacco claimed that the DPT shots caused neurological damage resulting in him being mentally retarded, in need of full care and not able to be employed. The statute provides that if certain signs and symptoms manifest themselves within three days of a shot, it is presumed (though rebutable) that it is the result of a vaccine. The cases are defended by the United States Justice Department. In this matter, since it was an earlier vaccine case, there is no award for pain and suffering. All that can be awarded is compensation for pecuniary losses.

The Government took the position in this matter that Louis Sacco's parents, who had cared for him since infancy, should continue to care for him. The government argued that when his parents are no longer able to do so, a sister should be able to care for him. Therefore, the cost of residential care should be nominal. They maintained this position right up until a few days before trial when an agreement was reached regarding the plaintiff's life care plan. The plan provided for an initial payment of $50,924.30 per year. At the end of five years, the amount substantially increases, with a total value of $8.5 million dollars paid out over 30 years. Regardless of whether the plaintiff ultimately requires residential care, these proceeds are available to him.

The Vaccine Fund Legislation was passed in the early 80's with a contribution being made by the vaccine companies and the Government. In exchange for a plaintiff foregoing malpractice action or actions against the manufacturers of the vaccine, a plaintiff can opt to participate in the program. There are approximately 700 cases in the system.

Submitted by Joseph R. Mirrione, Esq., New Haven, Connecticut, and Ronald Homer, Esq., of Conway, Crowley & Homer, Boston, Massachusetts, counsel for the plaintiff.

JURY VERDICT:
Negligence of police department;
VERDICT $1,437.506.40.

In the case of *Maria Sanchez, Conservatrix of the Estate of Linda O'Neil v. City of Middletown, et al*, Docket No. CV 94 0318363 S, filed in the Superior Court for the Judicial District of Fairfield at Bridgeport, a jury returned a verdict in the amount of $1,437,506.40. The jury verdict was entered on August 13, 1999. The insurance company was Corregis Insurance. The matter was tried in front of Judge Edward Stodolink.

The plaintiff, Linda O'Neil, is 51 years old. She was diagnosed at an early age as being mentally retarded and suffering from paranoid schizophrenia. She spent much of her childhood residing at the Southbury Training School. Following her discharge from the Southbury Training School she lived at several group homes until the mid-1980s. From the mid-1980s until 1993 she lived in an apartment in the City of Middletown with her boyfriend. By all accounts, that was an extremely abusive relationship. The plaintiff would receive daily visits from a social worker to make sure that Linda was doing okay and that she was taking her medication to control her schizophrenia.

Linda had a unique way of responding to stresses in her life. Whenever she felt stress, she would call 911 and report that she was having a seizure. Records submitted into evidence reveal that Linda at times would call 911 every single day for weeks at a time. Middletown emergency personnel, including the Middletown Police Department, would visit Linda and make a determination that she was not in fact having any type of medical difficulties. At that point they would leave. As a result of these frequent calls, Linda was well known to the Middletown Police Department.

On November 12, 1993, Linda made one of her 911 calls requesting assistance. The defendant, Officer Larry Botting of the Middletown Police Department, responded to that call and made a determination that Linda was once again not having a seizure. Sometime later that same evening, Officer Botting was parked in a police cruiser on Rte. 9 northbound in the City of Middletown. He was seated in the cruiser with the defendant, Officer Andrew Saltus, also of the Middletown Police Department. While the two officers were seated in the cruiser, they observed Linda O'Neil walking across four southbound lanes of traffic of Rte. 9. The officers testified that they immediately recognized that she was in danger and told her to stop at the median. At that point the officers claimed that they went to the median. Linda was agitated and pacing in the middle of the median. They instructed her to leave the highway and return home. The officers never offered to walk Linda across the highway. Linda then turned to go to her apartment at which point she was struck by a van.

As a result of the accident, Linda suffered a traumatic brain injury, multiple rib fractures, a fracture of her left clavicle, a fracture of her tibia and fibula, a fracture of her left humerus, and pneumonia. Linda was taken by helicopter to Hartford Hospital where she was admitted for six weeks. Following her admission to Hartford Hospital she was admitted to the Hospital for Special Care in New Britain for an additional six weeks. From there, Linda was admitted to Elmcrest Psychiatric Hospital for three weeks. She was then transferred to the Riverside Health Care Center in East Hartford for five months. In May of 1995 she was admitted to the Silver Springs Nursing Center in Meriden where she continued to reside until the time of trial. The medical bills for Linda O'Neil were $381,843.14. Those medical bills included the costs of her nursing care at the Silver Springs Nursing Center since 1994. There was no lost wage claim.

Dr. Jeffrey Deitz, a psychiatrist, testified on behalf of the plaintiff that she will require life long care as a result of her traumatic brain injury. The care that will be necessary will have to be in a nursing setting where she is receiving 24-hour supervision. Dr. Richard Shuster, a rehabilitation specialist, testified as to what the nature and extent of that care will be. Dr. Gary Crakes, an economist, testified regarding the cost of that care. Specifically, Dr. Crakes testified that the cost of that future care would be anywhere from $2 million to $7.56 million. Edward M. Staub, an orthopedic surgeon, testified on

the extent of the plaintiff's orthopedic injuries. He testified the plaintiff was left with a 30 percent permanent partial disability of her left upper extremity, as well as a 10 percent permanent partial disability of her lower extremity. Further, he testified that she will require future surgery on her arm as a result of a malunion which will cost approximately $12,000.

The defendants did not contest the plaintiff's orthopedic injuries. Rather, the defendants contested the plaintiff's cognitive injuries. Kimberlee Sass, PhD, a neuro-psychologist, testified on behalf of the defendants that while the plaintiff did suffer a traumatic brain injury, that there is no significant change in her intellectual functioning as a result of that injury. Further, Dr. Sass testified that Ms. O'Neil's level of functioning was so low before the accident as a result of her mental retardation and schizophrenia that she never should have been allowed to live on her own in the apartment in which she resided. Rather, it was his opinion that she always should have been in a facility such as Silver Springs Nursing Center, which provides her with the supervision that she needs.

As to the liability issues, the plaintiff's position was simply that the defendant Officer Botting should have walked Linda O'Neil across the highway. The plaintiff asserted that because Officer Botting knew that she was not "normal," that he had a duty to bring her across the street, a duty which he would not have owed to a normal person. The plaintiff retained Leonard Ternto, police expert, to testify on her behalf. Dr. Territo testified consistent with the plaintiff's position.

The defendants' position on liability was that they had no duty to walk Linda O'Neil across the street. The defendants argued that for years Linda had been walking around the streets of Middletown and had always been able to navigate the streets on her own. Therefore, the defendants owed no duty to her.

On August 13, 1999, the jury entered a verdict in favor of the plaintiff against the defendant Botting and the City of Middletown. The jury awarded Linda O'Neil $180,000 in non-economic damages. The jury awarded $2,215,844 in economic damages. The total jury award was $2,395,844. The jury then found Linda O'Neil to be 40 percent comparatively negligent. The net jury verdict was $1,437,506.40.

Submitted by Robert R. Sheldon, Esq. and Douglas P. Mahoney, Esq., Tremont & Sheldon, P.C., Bridgeport, Connecticut, counsel for the plaintiff.

SETTLEMENT:
Carbon monoxide poisoning from forklift: 41-year-old male;
SETTLEMENT OF $640,000
PLUS WAIVER OF $155,000
WORKERS' COMPENSATION LIEN.

In the case of *Kenneth Jones, et al, v. Material Handling Products Corporation*, Docket No. X02 CV 97 01415445, the parties settled at a conference held before the trial judge, the Honorable Michael Sheldon.

On January 17, 1996, 41-year-old Kenneth Jones was helping his employer set up a new warehouse in the Albany, New York area. The employer had recently purchased a used forklift which was used to assist that day in the operations. For a total of approximately five hours throughout the day, the plaintiff was exposed in the warehouse to the propane-powered forklift emissions. On the way home to Connecticut, the plaintiff experienced headache and vomited several times. From Manchester Hospital he was transferred to the hyperbaric oxygen facility at Norwalk Hospital for treatment of carbon monoxide poisoning. He was eventually diagnosed and treated by neurologist Amarin Katz, M.D. and UConn toxicologist Mark Bayer, M.D. Because the forklift operator also became ill, the local gas company in Albany responded to the warehouse the next day where it was determined that the forklift was emitting more than 200 times the OSHA-acceptable level of carbon monoxide. The ambient air contained five times the acceptable limit.

The plaintiff attempted to continue as a salesman for his employer but he was overwhelmed by unrelenting headaches, mental confusion and fatigue. Discovery in the case, disclosed that the defendant, Material Handling Products Corporation, a forklift dealership, had purchased the forklift eight months before its sale to the employer from a company that abandoned the forklift at the dealer's lot after being informed of the extensive nature of the repairs necessary to return it to safe operating condition. Although the defendant represented the forklift at sale to the plaintiff's employer as having been thoroughly reconditioned, one of defendant's mechanics who inspected the forklift after the plaintiff's exposure commented that it appeared that all the defendant had done was slap a bright coat of yellow paint on it.

Although multiple MRIs showed damage to the globus palladus, that part of the brain typically affected by carbon monoxide, three neuropsychologists who tested the plaintiff over the years were in strong disagreement as to whether the plaintiff suffered any permanent neurological deficits. One theory was that the plaintiff tended to somatisize his temporary deficits. The workers' compensation carrier also retained neurologist John Hornblow, M.D. and neuroradiologist Richard Goldman, M.D., who refuted the claim of objective findings of permanent injury. On all of the neuropsychological tests, the plaintiff uniformly performed above average in those areas of claimed injury. The workers' compensation experts became the defendant's experts in the third-party case. The defendant's case was buttressed by Denver toxicologist Jeffrey Brent, M.D., who opined that because Jones hadn't lost consciousness or experienced syncope, his deficits, according to the medical literature, were, by definition, transitory. The defendant also contended that lack of ventilation in the employer's warehouse and possibly the ceiling heaters contributed to the injuries.

At the time of the incident, the plaintiff earned $650.00 per week, however, his employer was prepared to testify that his job performance was less than exemplary. His medical bills were approximately $56,000.00. The total workers' compensation lien was approximately $155,000.00. In addition to the previously identified treating physicians, plaintiff's experts were neuropsychologist Robert Novelly, Ph.D., internal combustion engine expert Ralph Ridgeway, forklift dealer Robert Loederstedt and economist Gary Crakes.

In the settlement, the defendant contributed $515,000.00; the workers' compensation carrier waived its lien and contributed $125,000.00.

Submitted by Stephen Jacques, Esq. of Moore, O'Brien, Jacques & Yelenak of Cheshire, Connecticut, attorneys for the plaintiffs.

MEDICAL MALPRACTICE
Massachusetts wrongful death settlement; failure to diagnose cardiac contusion of 16 year old male;
SETTLEMENT OF $750,000.
DOE V. ROE

On September 12, 1994, at approximately 6:40 p.m., the Plaintiffs' Decedent, age 16, was driving his parents' 1984 Dodge pickup truck when it struck a tree

in a rural town in Massachusetts shortly after leaving his home. As a result of said collision, the Plaintiffs' Decedent sustained blunt trauma to the chest from striking the steering wheel hub, lacerations to his head and injuries to his legs and knees.

He was transported by ambulance to the Defendant hospital where he was examined and treated by the Defendant doctor and other employees of the hospital. The Defendant doctor was on duty as an emergency room physician at the time he treated the Plaintiffs' Decedent. The Plaintiffs' Decedent remained in the emergency room of said Defendant hospital for approximately four (4) hours. During that time, the only diagnostic testing performed was an EKG which showed a slight abnormality with the possibility of a septal infarction. The Plaintiffs' Decedent was not placed on a cardiac monitor nor were repeat EKGs or cardiac enzymes performed. No cardiology consult of cardiovascular surgical consult was obtained and no echocardiography was performed. The Plaintiffs' Decedent complained of chest pain and shortness of breath but was admitted to an orthopedic ward for treatment of his knee injuries where he was hospitalized overnight. When released from the Defendant hospital the next day on crutches with a leg cast, there was no follow-up care arranged for his chest injury.

Over the next several weeks, the Plaintiffs' Decedent complained of occasional shortness of breath and chest pain to his visiting nurses and, on November 6, 1994, seven (7) weeks after the accident, the Plaintiffs' Decedent suddenly lost consciousness. Shortly thereafter, he was transported by ambulance to another hospital where he was pronounced dead on arrival. An autopsy, performed by the State Medical Examiner, determined that the Plaintiffs' Decedent died from a cardiac contusion of the left ventricle of his heart that was caused by the trauma suffered in the September 12, 1994, automobile accident.

The Plaintiffs alleged that there was substantial evidence from the symptoms which the Plaintiffs' Decedent presented with on September 12, 1994, to suggest that he had suffered a traumatic injury to his heart during the automobile accident, but the Defendant doctor failed to conduct repeat EKGs, monitor his heart or perform enzyme studies. Had those studies been performed, the cardiac contusion would have been diagnosed and treated by monitoring and possible surgical intervention and his heart would not have ruptured seven (7) weeks later.

The lawsuit was brought in Massachusetts Superior Court where the Plaintiffs presented tribunal testimony of an emergency room doctor who directs a large emergency room in upstate New York. The Plaintiffs' expert on emergency medicine testified that the standard of care required an emergency room doctor to hospitalize the Plaintiffs' Decedent for continuous cardiac monitoring for at least 24 to 48 hours and to conduct repeat EKGs and cardiac enzymes. The Plaintiffs also presented a cardiac surgeon as an expert who testified that, if he had been called in for a cardiovascular consult, he would have monitored the patient and, if necessary, performed surgery to repair the bruise on the heart before it ruptured. He testified that he had performed this procedure on a number of patients successfully in the past.

The defense presented four (4) experts that controverted the testimony of the Plaintiffs' experts. Specifically, they claimed that repeat EKGs and cardiac enzyme studies would not have revealed the cardiac contusion that the Plaintiffs' Decedent apparently suffered during the automobile accident and that since the contusion would have gone undetected, the outcome would have been the same regardless of whether the patient was hospitalized in a cardiac unit for a few days.

The Plaintiffs then identified and called a rebuttal medical expert who is internationally known for his studies on the diagnosis and treatment of cardiac contusions. The Plaintiffs' rebuttal expert, a board certified cardiologist, testified that he had presented the results of his studies on the diagnosis of cardiac contusions to the national medical community approximately one year before the accident at issue. He testified that, from his studies, it had been concluded that there were subtle changes in EKGs that could be found which would allow a diagnosis of a cardiac contusion if serial EKGs were conducted. Further, his studies revealed that there were also changes in cardiac troponins, one of the cardiac enzymes, which would suggest a cardiac contusion. He concluded, based on his own published research, that the defense experts were wrong and that the standard of care in 1994 required these studies and that the studies would have resulted in a diagnosis of the condition which eventually caused the Plaintiffs' Decedent's death.

The measure of damages in a wrongful death action in Massachusetts differs significantly from Connecticut. In Massachusetts, such damages are measured by the loss to the survivors, rather than the loss to the estate. As a result, since the Decedent was a 16-year old high school student living with his parents, who had no survivors, the economic losses were limited. In addition, there is a cap on damages to be paid by non-profit hospitals in the state of Massachusetts of $20,000.00 regardless of the loss. The Defendant hospital was non-profit. Since we also named the emergency room doctor individually as a defendant, it was claimed by the Plaintiffs that he was an employee of the hospital and his liability could be vicariously imputed to the hospital, thereby avoiding the $20,000.00 cap on damages. Massachusetts also caps pain and suffering in medical malpractice cases at $250,000.00. Faced with all of these tort reform measures that the value of the recoverable loss was substantially less under Massachusetts law than it would be in Connecticut.

Nonetheless, Plaintiffs retained an economist who determined the present value of the Plaintiffs' Decedent's lost earnings at $861,000.00, assuming that his parents, who were retired, would rely upon him for support for the rest of their lives. Without that assumption, no significant economic loss could be claimed under Massachusetts law. Fortunately, however, Massachusetts allows recovery by the parents of the Decedent for their loss of consortium and each was named individually as a Plaintiff.

The case was submitted to a private mediator in Boston who recommended settlement in the amount of $450,000.00. Despite the limitations on recovery in a wrongful death case in Massachusetts, the Plaintiffs rejected this settlement proposal and the case was scheduled for trial. Shortly before the trial was to commence, the case finally settled for $750,000.00. The Plaintiffs were represented by Robert I. Reardon, Jr., Mark A. Dubois and Scott D. Camassar of The Reardon Law Firm, P.C. of New London, Connecticut. ■

Making The Most of The CTLA List Serve

By Douglas W. Hammond

You are reading the first printed summary of CTLA online discussions. I have tried to compile messages that demonstrate the breadth of the topics discussed online. In the next issue, I plan to take a different approach, concentrating on the narrower topic of liens and reimbursement rights, which has generated extensive online debate.

If you would like to join the CTLA discussion group, you may contact Diana Roe at droe@ct-tla.org or visit http://lyris.depoconnect.com/scripts/lyris.pl?join=cttlamembers

Q. I have a case where my client was killed by an operator with limited liability, and the carrier delayed offering the entire policy because there was another claimant—whose injuries were minor. It seems plausible to me that the carrier has a duty to accept a time-limited settlement offer from me that would let its insured off the hook for my large claim, even if by doing so the insured would remain exposed to the other, small, claim. The carrier of course said that it had to reject my offer to prevent its insured from being exposed to the other claim and to prevent itself from being exposed to a bad faith claim. My response is that failure to pay me is the bad faith. Has anyone encountered this scenario or have any thoughts or suggestions?

—David N. Rosen
david.rosen@rosendolan.com

A. The question really is "at what point in time has the insurer breached its duty to act in good faith and deal fairly with its insured?". That is the standard for first party cases. Assuming you file a reasonable offer of judgment for less than the policy limits—leaving reasonable room for the additional claim to also be settled, the insurer better have a darn good reason for rejecting your offer. . . Has the insurer adequately investigated the minor claim? Have they evaluated the value of that claim? What was the basis of their evaluation?

Ultimately, when you pursue the insurer under the direct action statute, you must prove that this duty to act in good faith was breached. As long as they have been given sufficient time to evaluate both claims, and there is no good faith basis to believe that there is not enough money left for the minor claim—I think they are breaching their duty. In the final analysis there is no grounds that I am aware of that would allow an insurer to avoid settlement merely because another claim is still pending. . .

—Michael A. Stratton
mstratton@koskoff.com

* * * * *

Q. Does anyone have experience in requesting an autopsy in a potential wrongful death case? Please advise.

—Karen Linder, klinder@rbce.com

A. State ME will examine according to statutory criteria only. Call them; they are very helpful. Most hospitals will do no charge especially if there is some question of problem in medical care. There is a service in Newington for private autopsy but they are expensive.

—Bruce H. Stanger,
bstangerlaw@home.com

* * * * *

Q. We have been using a computer software program called Trial Links for the past several years to project exhibits during trial. We did this with the assistance of a court reporting company that provided support services for this software. That company is getting out of this business and we are considering whether to buy the software, and want to know if anyone else is using similar software at trial, and if so, what is it and how well does it work?

—Christopher D. Bernard,
cbernard@koskoff.com

A. In probably the first fen/phen death case to commence trial in the U.S. we used Animation Technologies from Boston for this and many other hi-tech purposes. We tried the case, representing the plaintiff, of course, for about two weeks in Superior Court in Cambridge, and then settled. It was essentially a paperless trial, and the animation of the heart lung with the fatal progression of the disease (PPH) was especially impressive. Unfortunately, this technology does not come cheap.

—David Thomas Ryan
dryan@rc.com

* * * * *

Q. What is wrong with this picture? UIM case. We represent plaintiff insured, age 86, some of whose medical bills were paid by Medicare. Carrier claims credit against UM/UIM policy limit for collateral sources, including plaintiff's Medicare benefits. Medicare is presumably going to claim 100% reimbursement right: Medicare will claim reimbursement from a settlement or verdict which (unless we defeat the defense) specifically excludes Medicare-paid specials. How do you avoid working entirely for Medicare to this extent?

—Lee Cole-Chu, lcc@c-cc.com

A. Firstly, the carrier is not entitled to reduce their policy limits by collateral sources, collateral sources only reduce damages, not limits. See Smith, 225 Conn. 566. Secondly, since Medicare is entitled to reimbursement for a portion of their payments, such amounts would not constitute a collateral source under CONN.GEN.STAT. § 52-225. See e.g. Faires v. Pageau, 5 Conn. Ops. 1441 (1999).

—Paul A. Morello,
pam@donmorlaw.com

* * * * *

Q. I am looking for an attorney who has handled FECA claims to refer a postal worker injured in the course of her employment.

—John N. Montalbano,
jmontalbano@dpapc.com

A. Good luck finding an attorney who will handle FECA claims. I have done a few in the past and they are filled with red tape, the scheduled permanencies are ridiculous and trying to get your fees approved calls for getting your Congressperson involved. Al McGrail out of Hartford used to handle these claims, however I am not sure if he still does.

—Don Walsh, dwalsh1988@aol.com

* * * * *

A. I received a jury verdict in January and Allstate (defense) moved for a Collateral Source hearing. The hearing was held before Judge Berger in February 2001. Various facts were stipulated to, including that the verdict must be reduced by the amount of medpay coverage plaintiff received under her own liability policy. However, I claimed that plaintiff was then entitled to a credit/setoff for the amount of total premiums paid. The defense claimed that plaintiff was only

entitled to a setoff for that portion of the premium specifically allocated for medpay. Judge Berger ordered briefs, which were filed in March. We just received Judge Berger's decision and I quote, "This court holds that the injured plaintiff is entitled to an offset for the entire amount of premiums paid as it is that amount that was necessary to secure her right to the collateral source benefit."

—David P. Mester,
[sent via e-mail account of another]

* * * * *

Q. I have a judgment against a defendant who will not pay. The defendant is an employee of the Mohegan Sun. Does anyone have experience/guidance in executing judgment by garnishing the wages of a Mohegan Sun employee? I had called the Sun's HR department, and they tell me that without a signed authorization from the employee herself they cannot do anything.

—Barbara A. Arnold,
arnold@acylaw.com

A. On the matter of execution against wages or incentives earned by an employee or a tribal member, you have to go to the tribal court for an order of garnishment. Before that you need to have the state court judgment recognized by the tribal court as a foreign judgment. I suspect that a default for failure to appear in state court would not qualify (although I'm not sure). After recognition you apply for a garnishment. Our office has attorneys admitted to those courts. We were the first firm in the state to collect a civil judgment by garnishing the incentives paid by the Tribes to a tribal member.

By the way, I am awaiting a Memorandum of Decision in another case against a tribal member. We expect the damages will be one or two million. We will then see how tribal garnishment works with those kinds of numbers.

[Further reply:] At the tribal court an admitted attorney can ask the court to issue a subpoena to compel attendance of an employee or a tribal member—the tribes have their own marshals who serve papers at modest fees—an admitted attorney must make the application for the subpoena—in support matters the state support enforcement division can tell you how to subpoena wage records from the tribes—HOWEVER—if the respondent is a tribal member the tribe will not reveal the amount of their incentives—tribe will reveal only wages—for support purposes only wages can be considered in calculating payments—for execution after a general civil judgment all sources of income whether wages or incentives are subject to execution.

—Chester W. Fairlie,
attyfairlie@snet.net

* * * * *

Q. Has anyone had any experience objecting to a Motion to Enforce An Oral Agreement to Settle a PI Case? For example, a client were to give you authority to settle and you conveyed that on the phone to opposing counsel and it was reported to Court and then your client changed his mind over night and both counsel and plaintiff appeared for the Pre-Trial the next day.

—Edward C. Burt Jr.,
edward.c.burt@snet.net

A. Look at Garofalo v. Yankee Linen Supply Co., 2000 Conn. Super. LEXIS 191 as a starting point.

—Thomas A. Kaelin,
tkaelin@kaelinlaw.com

A. I had almost the exact same facts except my client authorized me to settle after a pre-trial. Oral argument was granted and we lost. This was heard by Judge Gordon who also conducted the pre-trial. Check Audubon Parking Assoc. Ltd. Partnership v. Barclay and Stubbs, Inc. 225 Conn. 804, 810-811.

—George V. Lawler Jr.,
gvljr@erols.com

A. I have a brief objecting to a motion to enforce an oral settlement agreement citing caselaw that supported the argument that there was no final meeting of the minds.

—James F. Sullivan,
JFS@HKSFlaw.com

A. I recently filed a motion to enforce a settlement agreement made by an insurance adjuster, who then reneged on the agreement. Although it was settled prior to a hearing on the motion, I did collect some of the cases on this issue. In addition to the Audubon Parking Assoc. v. Barclay case, you may also want to look at: Zauner v. Brewer, 1992 Conn. Super. Lexis 2479 (Gill, J.); Moran v. Gallo, 1999 Conn. Super. Lexis 2229 (Melville, J.); Burton v. Anjone, 1993 Conn. Super. Lexis 2703 (Mihalakos, J.) and Windsor Housing Authority v. Fonsworth, 2000 Conn. Super. Lexis 1670 (Tanzer, J.).

—Christopher D. Bernard,
cbernard@koskoff.com

* * * * *

Q. In April of last year the client's ex-wife filed an affidavit with DSS claiming a large arrearage in child support dating back over nine years, and although DSS gave him notice of his right to contest the claim, WHICH HE DID, they also immediately put a notice of delinquency on the state computer system, sought an immediate wage withholding order from the Family Support Magistrate, and started taking money out of his pay check every week. At that point no evidentiary hearing had been held to consider the validity of the claim or of his defenses.

When I came into the case in September I demanded an evidentiary hearing and challenged the wage withholding order. Support Enforcement claimed that it was "a mistake," and the Magistrate vacated it. In October an evidentiary hearing was conducted (before a visiting Magistrate) in which the entire arrearage claim was challenged on several grounds: (1) that the ex-wife had no records to support her claim, (2) that nine years earlier, after the client had been in a terrible accident rendering him physically unable to resume his work, he and his ex had informally agreed to a significant reduction in the child support, which reduced amount he then paid religiously, and (3) that the claim was barred by the doctrines of laches and equitable estoppel.

In December the case was erroneously printed on the Magistrate's calendar, and although the clerk acknowledged that it had been printed in error and that she "would take care of it," when the client and I did not appear at the calendar call, notwithstanding that the file was not before the court (the visiting Magistrate had it) Support Enforcement failed to inform the Magistrate that a hearing had been held and decision was pending, and a capias was issued with bond set at $10,000! Fortunately I learned of the capias quickly and persuaded Support Enforcement not to execute it, and the Magistrate later granted my motion to vacate it. Another "mistake."

But then, two days later, while the visiting Magistrate was still deciding the case, DSS did a bank match and froze the client's savings account (from which he drew funds to live week-to-week), and since then they and Support Enforcement have claimed that the freeze was proper because there was a "valid order and an arrearage." Of course, that was precisely what the Magistrate had been called upon to decide, and consequently I believe that any enforcement action—wage withholding, bank freeze, or whatever—executed BEFORE the Magistrate's ruling, was a violation of due process and hence illegal.

continued on page 24

CTLA ATLA Report

By Robert I. Reardon, Jr.

ATLA Mid-Winter Convention in New Orleans

The evening before the Mid-Winter Convention began in February, ATLA received great news from Florida about the constitutional challenge to that state's comprehensive Tort Reform Legislation enacted in 1999 which drastically limited the legal rights of citizens and the authority of juries. As a result of the efforts of ATLA and The Academy of Florida Trial Lawyers, Judge Nikki Clark of the Florida Superior Court declared this sweeping tort reform law unconstitutional in that it violated the state constitutional ban on laws that embrace more than one subject. Judge Clark ruled that the enactment amounted to a "Classic case of log rolling" since it encompassed legislative enactments on no fewer than 20 wholly unrelated subjects. This victory follows successful challenges to tort reform legislation by ATLA in Illinois, Indiana, Oregon, Ohio and Nebraska.

Governor Vilsack of Iowa, a former plaintiff's trial lawyer, addressed the Board of Governors with an inspiring speech affirming his commitment to plaintiffs rights and to protecting the civil justice system. Molly Ivins, a nationally syndicated columnist, also spoke and was presented with the ATLA Amicus Award for her advocacy on behalf of every American's legal rights. Paul Begala, a former White House staffer and current MSNBC political commentator, gave a very insightful talk regarding the challenges we will face with the current administration.

On the morning of the Board of Governors meeting, President Bush announced his intention to place a tax on what he termed "excessive" legal fees as his first step in his tort reform efforts. Bush has previously announced that tort reform measures limiting the liability of negligent doctors and hospitals would be a critical component of the Patient's Bill of Rights. Director of Public Affairs Linda Lipsen reported that this legislative year will be a challenge to those interested in protecting the civil justice system. Since we can count on the support of a number of Republicans in this Senate, the upper body will be the major line of defense against assaults on the system. With the addition of Senators Barbara Boxer of California, Jean Carnahan of Missouri and John Edwards of North Carolina, the Senate Commerce Committee is well balanced between those who side with the rights of the injured and those who side with big business. More problematic is the Senate Judiciary Committee that remains in the control of corporate interests.

Lipsen outlined some of the issues that will be considered in the 107th Congress. These include:

1) Federal No-Fault Auto Insurance Bill—Representative Dick Armey will again introduce his "Auto Choice" legislation.
2) Class Actions—Legislation has been introduced to federalize virtually all state class actions thereby allowing defendants to forum shop and requiring plaintiffs greater expense and delay.
3) Small Business Liability Protection Act—this proposal will cap punitive damages and eliminate joint liability for non-economic damages in any civil action against a business (including physicians in malpractice cases) with fewer than 20 full time employees, regardless of its sales or gross revenues.
4) Teacher Liability Protection Act—this bill would immunize teachers, principals and administrators when their negligence injures students. Not only would this radical legislation make teachers unaccountable but it would preempt the laws of all 50 states.

ATLA also expects to see many other efforts to limit the rights of civil claimants, including a bill to eliminate vicarious liability for rental companies and to limit the liability of asbestos companies.

Looking ahead to the election 2002, there are many opportunities to bring to the Senate those who respect the right to jury trial and civil compensation. With your help, ATLA intends to mobilize now to see that these individuals are elected.

The Board of Governors approved the formation of the ATLA Center for Constitution Litigation. This is a new law firm that will be staffed by, what up until now, has been the Legal Affairs Department. From the standpoint of members, nothing will change other than the Center for Constitutional Litigation will be permitted to collect fees for certain types of cases after succeeding in a constitutional challenge. These fees will be then used to partially support the Center's budget.

Ed Lazarus, ATLA Director of State Affairs, reported on the status of the research ATLA has undertaken made possible by a grant from the ATLA Endowment. A series of national focus groups have been completed and a national survey is scheduled to get underway soon to study juror biases in the current political and social environment. Once completed, this study will be available to ATLA members to provide a better understanding of the thought processes of potential jurors.

ATLA Vice President Mary Alexander reported that the ATLA Drive for Documents to improve the ATLA Exchange has produced a total of more than 25,000 new documents pledged, in transit or in hand. The ATLA Exchange is a valuable tool for all plaintiff's lawyers in preparing their cases. It offers legal research, pleadings and depositions of experts. Documents may be submitted by e-mail to docdrive@atlahq.org or mail to the ATLA Exchange Drive for Documents at 1050 31st Street, N.W., Washington, D.C. 20007.

We are pleased that ATLA membership is up 5.5% over last year. This is by far the largest annual increase in membership in a one year period. The Mid-Winter Convention in New Orleans was the most well attended Mid-Winter Convention in ATLA's history. The educational programs were very informative and varied, providing a wealth of data, research and practical advice to the attendees for use in their practices.

The ATLA Annual Meeting will be held on July 14-18 in Montreal, Canada. It is expected that ATLA will be assembling the largest number of speakers in the history of the organization to present seminars on a wide variety of current topics. It should be an exciting conference. ■

A Conservative Viewpoint on The Judiciary, Legislature and Trial Lawyers

By The Hon. Richard B. Sanders

Richard B. Sanders is a Justice of the State of Washington Supreme Court. This speech was given to the National Association of Trial Lawyer Executives at the Westin Hotel in Seattle, Washington, on November 10, 2000. It is reprinted with permission of Justice Sanders.

My assigned topic is the "conservative viewpoint on the respective roles of the legislature and judiciary on protecting individual rights." My thesis is this: conservatives and trial lawyers have much in common although both groups work very hard to pretend they don't. Before my election to the Washington Supreme Court in 1995 I led a double life: I was active in conservative Republican politics and I was also a trial lawyer. As a political conservative, Barry Goldwater was my hero. I was philosophically dedicated to individual freedom, limited government, and the protection of individual rights.

As a trial lawyer I was an advocate for the civil justice system. I was a member of the Washington State Trial Lawyers Association, attended its trial lawyer seminars, conventions, and business meetings. When I attended Republican meetings, I had to introduce myself like I was at an AA meeting, "Hello, I'm Richard and I'm a trial lawyer." And when I went to trial lawyer meetings, I confessed my political sins in a similar fashion. But I never saw a contradiction in this double life. Rather, I saw the civil justice system as the embodiment of my ideals of individual rights and personal freedom. Sometimes, however, this took some explaining to my conservative friends. I would tell them of all the institutions of government, only one—the judicial system—is dedicated to the individual.

In court every man is not only the equal of his neighbor, but also the equal of the largest corporation, and even the government itself. The role of the courts—and the lawyers who are absolutely necessary for their proper function—is simply to protect our legal rights—including the rights of conservatives, Republicans, and businesses. But I would warn them protection of our rights is not for free. There is a cost. That cost is making sure that the legal rights of each of our fellow citizens is also protected, without compromise, without exception. Like an alcoholic who takes that first drink, when we start compromising the legal rights of our "less worthy" neighbors, there may be no end until finally our own rights are swept away as well. I would also remind them what they, as conservatives, already knew: in America each individual is endowed with certain rights that nobody, not even the government, can take away. And, by golly, we trial lawyers are there to fight for those rights as well. Sometimes a friend would point to a large verdict against a business, as if this demonstrates some problem with the system. Let's think about this. Don't we conservatives believe that with freedom necessarily comes individual responsibility and accountability? If someone violates your rights shouldn't they be held accountable? And isn't it better for business that it be held responsible on those few occasions that it violates individual legal rights than be smothered with a myriad of governmental rules and regulations which destroy freedom, and profitability, even when no one's existing legal rights are at issue? And what about those awards of compensatory damages? When the government takes our house to build a freeway through it we conservatives expect to be compensated—and compensated in full, not just in part. So what's the difference when someone costs you an arm or a leg by running a red light? Isn't an award of compensation in that instance just as much to compensate for your loss of property as when you lose your house or wreck your car? We conservatives agree with James Madison and John Locke that our first right of property is in ourselves, and includes "the safety and liberty of [our] person." When someone takes it from us in violation of our legal rights compensation for what we have lost is the least that can be expected. And if we are robbed of that which most of us take for granted, a healthy pain—free life, the same principle applies, and probably more so. And if our suffering is worth $1,000,000, we want $1,000,000 in compensation, not $500,000 or some lesser amount big government decides we should have. It is simply unjust to shield the wrongdoer from the consequences of his misconduct at our expense. Devil get behind me. Of course sometimes, it is true, courts make mistakes. But those mistakes are only little ones because they harm only those people who are actual parties to the suit—not all of society. In contrast when the legislature passes a bad law, we all suffer. When the courts screw up we can appeal; however, there is no appeal from the legislature. The courts are ideal for conservatives in another way as well—they are not there to dictate social policy or promote a radical agenda. Their role is only to protect the legal rights of those in the courtroom that day. But when I went to trial lawyer meetings I was also put to my proof. Why is it, I would ask, that we dilute our civil justice message by promoting social legislation which has nothing to do with our profession? In one such meeting I moved that our lobbyist—the moderator of this panel as a matter of fact—be horsewhipped for promoting an increase in the minimum wage, something which I thought had nothing to do with our role as trial lawyers. Well, after ample opportunity to fully explain my reasoning, the motion was defeated 405 to 1—I had even turned off my second, it seemed. Such is my power of persuasion, a skill I have brought with me to the Supreme Court where I now hold the record for the number of dissenting opinions.

So if the civil justice system is the embodiment of individual rights, what about the legislature? Unlike the courts, the legislature is an exercise in one size fits all. Its statutes apply across the board without regard to individual differences or situations. For example, mandatory sentencing laws may fit broad categories of crime but can never fit the individual criminal—only the courts can do that. But the legislature can and does have a role to play in the protection of individual rights. After all the whole purpose of government, according to the Declaration of Independence and our state constitution, is to "secure" our rights.

The legislature can make sure the courts have adequate resources to do their job—enough judges, courtrooms, etc. And the legislature can provide financial assistance to the needy so that they can access the judicial system in a meaningful way—which means help them get a lawyer. But beyond that the legislature can facilitate our judicial system in other ways as well. For example in our last legislative session my two distinguished copanelists, Democrat State Senator Adam Kline and Republican State Senator Pam Roach, cosponsored the Civil Rights Act of 2000 which would have provided individuals a civil cause of action for violation of their state constitutional rights, with an award of their reasonable attorney fees on top of that if they won. After all, government lawyers always get paid to justify violation of our rights, isn't it time the government pays the freight for vindicating them as well?

So, in summary, the protection of individual rights is a game we all can play: conservatives, trial lawyers, judiciary, and legislature. But protection of our legal rights comes with a price. That price is making sure everyone else's rights are protected as well. A bargain at twice the price! ■

Anti-Plaintiff Bias in The Federal Appellate Courts

By Kevin M. Clermont & Theodore Eisenberg

A recent study of appellate outcomes reveals that defendants succeed significantly more often than plaintiffs on appeal from civil trials—especially from jury trials

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Odd things are happening in the legal world, things even those who study the system do not fully understand because the information needed to analyze them has only recently become available. Not until fiscal year 1988 did the Administrative Office of the United States Courts include the district court docket number in its courts of appeals' data set, allowing a bridge to be built between the office's two data sets and the possibility of systematic empirical study of outcome on appeal. Until now, no one has done this. Here, we offer a small glimpse of understanding into appellate court behavior by combining for the first time the appellate and trial court data gathered by the Administrative Office.

This new database reveals an unlevel appellate playing field: defendants succeed significantly more often than plaintiffs on appeal from civil trials—especially from jury trials. Defendants appealing their losses after trial by jury obtain reversals at a rate of 31 percent, while losing plaintiffs succeed in only 13 percent of their appeals from jury trials. The most plausible explanation seems based on appellate judges' attitudes toward trial-level adjudicators—many appellate judges, it appears, exhibit a bias in favor of defendants because of a perceived pro-plaintiff bias at the trial court level.

This article describes the methods used to correlate federal civil trial and appellate outcome data sets, offers observations gleaned from study of the combined data sets, and forwards possible explanations for the anti-plaintiff effect discovered.

Methods

Data gathered by the Administrative Office of the United States Courts, assembled by the Federal Judicial Center, and disseminated by the Interuniversity Consortium for Political and Social Research convey the outcomes of all cases terminated in the federal courts since fiscal year 1970.[1] When any civil case terminates in a federal district court or court of appeals, the court clerk transmits a form to the Administrative Office containing information about the case. The forms include data regarding the names of the parties, the subject category, the jurisdictional basis of the case, the case's origin in the district (original, removed, or transferred), the amount demanded, the dates of filing and termination in the district court or court of appeals, the procedural stage of the case at termination, the procedural method of disposition, and, if the court entered judgment or reached *a* decision, who prevailed. The computerized database, compiled from these forms, contains all of the millions of federal civil cases from across the country.

To limit this huge database to those cases that would best reveal the effect of appeal on outcome of civil trials, we looked only at cases terminated in fiscal years 1988-97; these were the years during which cases could be traced from trial to appellate level.[2] Moreover, we used only the 13 tort and contract case categories that most clearly lead to *a* choice between jury and judge trial.[3] The 13 case categories tellingly divide into personal-injury categories (airplane personal injury; federal employers' liability; assault, libel, slander; marine personal injury; other personal injury; motor vehicle; product liability; and medical malpractice) and non-personal-injury categories (general contract; torts to personal property; torts to land; negotiable instruments; and fraud).

We then had to clean up this smaller data set, eliminating duplicate case records and adjusting for cross, consolidated, and reopened appeals to limit the set to those cases for which we could reliably match district and appellate court data. To match the data sets, we identified and linked the district court's docket number and filing date in the district data set and the appellate data set. Our ultimate aim was to compute the appeal rate and, among the decided appeals, the reversal rate.

The appeal rate was calculated as the percentage of district court judgments formally for one side that the other side put on the appellate court docket.[4] The reversal rate was calculated as the percentage of those appeals that reached a decisive outcome and emerged as reversed rather than affirmed. We define the appellate outcome of reversed as comprising the three codes for reversed, remanded, and affirmed in part and reversed in part, while we narrowly define affirmed as comprising only the codes for affirmed and dismissed on the merits.

Plaintiffs' Disadvantage

Appeal and reversal rates. Upon losing a completed trial, defendants appealed slightly less often than did plaintiffs.[5] Table 1, in the rows labeled "defendants' appeal rate" and "plaintiffs' appeal rate," reveals that defendants appealed 20 percent of their losses, and plaintiffs 22 percent. The rates are quite close. By the time the docket dwindled to tried cases, plaintiffs and defendants were almost equally inclined to litigate further, and they appealed at about the same rate.

Much more interestingly, upon appealing a loss after a completed trial, defendants succeeded much more often than did plaintiffs on plaintiffs' appeals.[6] Table 1 shows that defendants reversed 28 percent of their losses, but plaintiffs only 15 percent. In other words, the overall reversal rate of 21 percent masks some significant differences between defendants and plaintiffs. It appears that the appellate courts exhibited concern that the trial court favored the plaintiff.

Other reversal-rate results. We further analyzed these data, but do not here report detailed results. For example, we examined the data separately for each of the 13 substantive subject matter categories and found that the reversal-rate disadvantage of plaintiffs did not depend on particular categories of cases. In every category large enough to show a significant difference, defendants fared better on appeal than did plaintiffs.

Moreover, this reversal-rate disadvantage of plaintiffs did not depend on whether the type of party was corporate or individual. Corporate parties appealed more and obtained more reversals than did their individual counterparts. But corporate defendants fared better than corporate plaintiffs as appellants, just as individual defendants fared better than

individual plaintiffs as appellants. Corporate parties may do better than individuals on appeal because of their greater legal resources, but there is nonetheless a separate plaintiffs' disadvantage worthy of study.

We also studied non-tried cases, including settlements and pretrial adjudications. There, plaintiffs' appealed much more often and got fewer reversals than defendants. It seems likely that losing plaintiffs are not so apt to give up at this early stage, while victorious plaintiffs might be willing to settle to avoid appeal. Such a scenario would lead to plaintiffs getting fewer reversals. The pro-defendant tilt in the appellate court might also generate fewer reversals for plaintiff appellants. The common element before and after trial, then, is the defendants' considerable success on appeal.

Jury and judge trials. Table 1 shows that jury wins by plaintiffs were, relative to jury wins by defendants, heavily reversed, while jury wins by defendant were relatively solid. The defendant/plaintiff reversal rates for jury trials were 31 versus 13 percent. These results are highly statistically significant. Judge trials show the same pattern to a lesser degree: here, the defendant/plaintiff reversal rates were 23 versus 19 percent. It appears that appellate courts are exhibiting particular concern that juries, more so than judges, favor the plaintiff.

The insight that the appellate courts could be leaning toward undoing trial-court and especially jury-trial favoring of plaintiffs would predict a perceptible difference between personal-injury case categories and non-personal-injury case categories, since the former rests on the format of little victim against big defendant. The appellate courts, the prediction runs, stand ready to counteract pro-plaintiff bias in personal-injury cases—and they especially mistrust the jury. The biggest differential between defendants' and plaintiffs' reversal rates, then, should be for personal-injury jury cases, and the smallest for non-personal-injury judge cases. Our data bear this prediction out: the differential between defendants' and plaintiffs' reversal rates was 19 percent for personal-injury jury trials, while the differential disappeared for non-personal-injury judge trials; the differential was about 15 percent for both personal-injury judge trials and non-personal injury jury trials. The same pattern shows up in governmental, corporate, foreign, and out-of-state data. In each situation where the trial court, and especially the jury, might be suspected of showing pro-plaintiff bias, the appellate courts have stepped in to favor the defendant.

Explanations

Selection theory. The data seem to imply that plaintiffs are at a disadvantage on appeal. The most reasonable reaction to such data is to try to construct an explanation of the outcome pattern in terms of selection of cases filtering through the adjudicative system. Because the set of cases selected for litigation or appeal can be a biased sample of the underlying mass of disputes, an appropriate selection effect could explain any observed outcome pattern. If the proposed selection effect is plausible, it will prevent concluding anything after observing the outcome data. In short, selection theory often renders outcome data ambiguous.

A typical selection explanation would rest on the parties' different stakes in outcome or incentives to drop and settle appeals; it would aim at showing that plaintiffs push weaker cases on appeal and therefore succeed less often. But this explanation is not plausible.

First, the data do not behave in accordance with the premise. Plaintiffs have a win rate of more than 50 percent at trial, as one can see by comparing plaintiffs' and defendants trial wins in the table. This indication of higher stakes for the plaintiffs predicts a high appeal rate and low success rate for defendants. But defendants in fact appeal less and succeed more often than plaintiffs. Similarly, the premise that defendants more effectively settle on appeal not only is improbable but also fails to predict special observations such as the disappearance of the plaintiffs' disadvantage in non-personal-injury judge cases.

Second, regression analysis shows that, by the time of disposition on appeal, the only important variable is whether the plaintiff or defendant won after the completed trial. On the one hand, the insignificance of other variables suggests that case selection on appeal functions largely as a random sampling, rather than a systematic screening. On the other hand, the significance of the plaintiff/defendant variable indicates a real difference between appellate and trial courts in treatment of the litigants.

A selection theorist might, as a final strategy, assert that plaintiffs' appeals fail more than defendants' appeals simply because plaintiffs differ from defendants. Perhaps defendants select their appeals rationally, while plaintiffs select their appeals emotionally.[7] Analogously, defendants might select which of their losses to appeal on a cost-benefit basis, while losing plaintiffs might reflect their disappointment in the process by seeking to be heard fully on appeal regardless of their chances of reversal.[8] Subsequent settlement while on appeal would only increase the defendants' edge. Thus, the argument goes, defendants do better as appellants because they have stronger cases.

This argument in some ways restates the empirical results, but nonetheless is unconvincing. First, no evidence exists in our data set for the premise that plaintiffs differ from defendants in rationality. Plaintiffs, after all, have a win rate of more than 50 percent at trial. Second, this rationality argument would likely forecast much higher appeal rates by plaintiffs, but plaintiffs' and defendants' appeal rates hardly differ. Rationality differences also fail to explain the pattern regarding personal-injury, governmental, corporate, foreign, and out-of-state trials. Third, any rationality difference between the parties would presumably be highly dependent on case category, because prior work has repeatedly shown that win rates vary greatly with the parties' different characteristics in the various case categories.[9] Yet the data reveal no category-specific effects; again, the only important regression variable is who won in the lower court. Appellate favoring of the defendant remains a better explanation than selection effect.

The basic problem with any selection explanation in this context is that case selection seems to break down on appeal—or rather that the appellate stage marks a clean break from the trial stage, a fresh start in the case selection process when case strength ceases to be influential.

The usual brand of selection theory says that appeals should act like trials.[10] Appeals that clearly favor either the appellant or the appellee should tend to be dropped or settled readily, because both sides can save costs by acting in light of their knowledge of all aspects of the case. Appeals falling close to the applicable decisional criterion tend not to settle, because the parties are more likely to disagree substantially with respect to their predicted outcomes. These unsettled, difficult appeals entailing divergent expectations fall more or less equally on either side of the decisional criterion, regardless of both the position of that criterion and the underlying distribution of disputes. Case selection, then, should leave for appellate adjudication a residue of unsettled appeals exhibiting some non-extreme affirmance rate. Indeed, under simplifying assumptions, and as a limiting implication, selection-theorizing would predict a 50 percent affirmance rate.

That prediction is clearly wrong, as the data prove. The affirmance rate for this set of tried judgments is instead around 79 percent, which is the complement of the 21 percent reversal rate. All plaintiffs' and defendants' judgments—both tried and nontried—show an 81 percent affirmance rate.

Consider what one might expect if the parties were appealing all judgments. Then, one might expect a high affirmance rate because of appellate deference to the district court's result.[11] One might even expect a high affirmance rate when review is de novo, because of the tendency of experts to agree at about a 75 percent rate.[12] Combining expert agreement with appellate deference would push the expected affirmance rate even higher. Appellate judges should lean toward affirmance as the usual course. If every case underwent appeal, one might expect about an 80 percent affirmance rate.

In fact, only around one-fifth of cases in our data set underwent appeal, and yet one still sees about an 80 percent affirmance rate. It seems as if the parties chose, by whatever selection method they employed, a set of cases to appeal that functions, at least with regard to overall affirmance, as if it were a random sampling. Therefore, case selection seems to have limited effect in systematically filtering the cases for adjudication on appeal on the basis of case strength. The probable cause is the low cost of appeal, but the effect is that we can interpret the resulting data in a straightforward way. Since case selection on appeal appears more or less consistent with randomness, the outcome data become easier to interpret. If defendants prevail more often than plaintiffs on appeal, for example, that result does indeed suggest that appellate courts favor defendants more than trial courts do.

An attitudinal explanation of plaintiffs' low reversal rate. Of course, many biases affect outcomes at trial and on appeal. The starkly higher reversal rate for defendants implies some sort of decisional bias—perhaps an attitudinal bias regarding plaintiffs and defendants at work in our data that accounts for how trial and appellate courts differ systematically.

On the one hand, trial courts might be pro-plaintiff because of their natural empathy with a victim and willingness to dip into a defendant's deep pockets. Trial courts might also focus on the case immediately before them to the exclusion of any long-term view. The appellate courts are not so naturally pro-plaintiff, dealing instead with a cold record and expressing a "pro-law" attitude. Appellate judges are also more constrained by their opinion-writing task and the force of precedent, just as they are more concerned with their decisions' future effect. So it would make sense if trial courts were pro-plaintiff relative to appellate courts.

On the other hand, an improper pro-plaintiff tilt of the trial court may exist only or mainly in the appellate court's imagination. By imagining a trial court tilt, appellate court judges might lead themselves to behave in favor of defendants. Or they might do so because of their social and political differences from trial court judges and juries.

The differing reversal rates therefore imply merely that the trial court *either* is pro-plaintiff *or* is seen by the appellate court as being pro-plaintiff.

Which court is being realistic and which court is showing bias: is the trial court biased in favor of the plaintiff or is the appellate court overcorrecting? This question generates an empirical inquiry: is the trial court exhibiting the particular bias of being pro-plaintiff?

In fact, empirical studies on this point show little pro-plaintiff bias at the trial level. The studies contradict popular media portrayals of modern 'American culture' as pro-plaintiff."[13] Indeed, those who are actually adjudicating the cases appear to do a pretty neutral job. The defendants' high reversal rate more likely results in good part from appellate court judges' misperceptions of the trial process than from bias within the trial process. (While almost all circuits show the defendants' higher reversal rate, some show it insignificantly and others show it substantially. These variations in local culture are consistent with an attitudinal explanation.)

Before development of our data, researchers had not studied the particular possibility of appellate courts misperceptions. But we do know that persistent misperceptions of the liability crisis pervade both the populace and legal professionals,[14] who often imagine a biased and incompetent trial system handing vast sums over to undeserving plaintiffs.[15] Why should appellate judges, who remain human after all, be immune? If trial attorneys fall prey to misperceptions, then the more distanced appellate judges should be even more susceptible to misperceptions about the adjudicators. Attorneys' misperceptions are subject to correction by actual adjudication, but appellate judges are free to exercise their biases without any check. If they believe that the trial court has improperly favored the plaintiff, they can simply reverse on the defendant's appeal, without further check.

One can well imagine that when a defendant has managed to eke out a victory, an appellate court might think—as the rest of us do when reading a newspaper report of the case—that this defendant must have been really innocent, indeed outrageously accused. So the plaintiff faces an uphill battle to overturn the outcome, on whatever grounds. One can just as easily imagine that when our trial system rewards yet another plaintiff, an appellate court might be suspicious of the judgment. The defendant, then, faces a receptive audience on appeal. We all have lost some faith in our trial system, and those—such as appellate judges-in a position to work "reform" would be apt to act, or rather lean, in accordance with their beliefs.

We are not forwarding a simplistic political explanation for this difference between appellate and trial courts. After all, Presidents Reagan and Bush appointed approximately equal proportions of judges to the courts of appeals *and* to the district courts.[16] Moreover, political leanings seem not to affect judicial decisions in run-of-the-mill as opposed to politically charged cases.[17] It is not that appellate judges differ politically from trial judges, but that they as a group see the trial courts' output differently.

What kind of appellate leaning, specifically, is this article envisaging? The tobacco litigation provides examples. To date, every trial court judgment awarding damages for smoking liability has suffered reversal.[18] Illustrative is Florida state jury verdict[19] for a million dollars awarded Angela Widdick against Brown & Williamson; the appellate court reversed for failure to transfer venue from Duval County to Palm Beach County.[20] The appellate court did not get into the facts—indeed, it failed even to mention the jury verdict—but found a legal ground to reverse. More generally, a judicial predisposition or suspicion would increase the chances of an appellate court's locking onto some such legal error and overturning a plaintiff's victory.

A converse example would be the celebrated Woburn toxic tort case. The federal trial judge there led the jury to a verdict for the defendant. Despite tragic facts and questionable rulings that were appealing enough to make the later trip to the bestseller list and to Hollywood as A *Civil* A*ction,* the court of appeals affirmed.[21] More generally, by finding no abuse of discretion, an appellate court could indulge a leaning to overlook even serious error, and thereby uphold a defendant's victory.

In sum, even discounting for the baleful effects of hindsight, we would have found it quite surprising if the data did not show a plaintiffs' disadvantage on appeal. The appellate judges tend to act on their perceptions of a pro-plaintiff trial court. That tendency would be appropriate if the trial courts were in fact biased in favor of the plaintiff. But as empirical evidence accumulates in refutation of trial court bias, the appellate judges' perceptions appear increasingly to be misperceptions.

An attitudinal explanation of jury

and judge differences. Consider now the special contrast between jury and judge trials. The plaintiffs disadvantage is much more pronounced on appeal from jury trial. A defendant jury win appears sacrosanct, but a plaintiff jury win is surprisingly fragile. These observations provide the strongest evidence in support of our explanation of appellate bias.

Does the defendants' especially high reversal rate mean that juries actually act more pro-plaintiff than trial judges do? This is unlikely. The trial judge has had the opportunity to correct serious jury mistakes, and the data used here reflect any such correction in their report of who finally won in the district court. Also, considerable research indicated that juries are not substantially different from judges. Indeed, "virtually no evidence exists to support the prevailing ingrained intuitions about juries"; instead, "the evidence, such as it is, consistently supports a view of the jury as generally unbiased and competent."[22]

Yet appellate courts treat jury trials very differently from judge trials. Plaintiffs' jury wins meet much more suspicion than do defendants' jury wins. It seems likely that appellate judges' misperceptions are the explanation. Such appellate misperceptions of juries should not be too surprising, given how widespread these misperceptions are.[23] Most professional people hold anti-jury views, and the appellate judges are in a position to put these views into action. It is not simply that appellate judges might view juries as the sickest organ of a sick trial system, but that they are naturally inclined to attribute bias to juries more than to fellow judges, with whom they identify.[24] Moreover, the fact that trial judges get to explain their decisions, while juries do not, might further influence appellate judges.

* * * * *

In sum, our thesis is a simple one: widespread misperceptions of the trial process exist, and these misperceptions affect appellate outcome. The plaintiffs' lower reversal rate stems from real but hitherto unappreciated differences between appellate and trial courts. The appellate court is less favorable to the plaintiff than are the trial judge and jury. While the fairly small difference between appellate and trial judges likely owes to the appellate court's misperception of trial court bias, it might owe to the appellate court's relative decisional remoteness or could even be a mere selection effect. However, the big difference between appellate judges and trial jury more surely owes to the appellate judges' sizable misperceptions regarding the jury.

The discovery of this plaintiffs' disadvantage on appeal contains lessons for appellate judges. Any suppositions about trial court and jury biases should cease to affect appellate decisions. Each appellate judge could approach that goal by recognizing some of their views as misperceptions that play an undesirable role in their decision-making process. ■

Footnotes:

More detailed results and analyses are forthcoming in Clermont and Eisneberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 Am. L. & ECON. REV. 125 (2001).

[1]*See* 11 Administrative Office of the U.S. Courts, GUIDE TO JUDICIARY POLICIES AND PROCEDURES transmittal 64, at II-18-28 (1985) (district court); 11 Administrative Office of the U.S. Courts, STATISTICS MANUAL ch. I at 7-43 (1989) (court of appeals). For a complete description of the database, see Inter-university Consortium for Political and Social Research, FEDERAL COURT CASES: INTERGRATED DATA BASE, 1970-1997, ICPSR 8429 (1998). For easy access to part of the database, see Eisenberg and Clermont, *Judicial Statical Inquiry Form* (last modified Nov. 15, 1998) http://teddy.law.cornell.edu:8090/ questata.htm.

[2]Data after fiscal year 1997 were not yet available. In order to pick up those appeals that had not yet terminated by Sept. 30, 1997, and thereby accurately to calculate the appeal rate, we added the set of appellate cases pending in fiscal year 1997 (court clerks transmit a form upon each case filing, as well as upon each case termination).

[3]*See* Clermont and Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1135-36 (1992). This narrowing of focus also involved eliminating cases in which the United States was the defendant; usually, no jury right exists there.

[4]If the initial judgment was for plaintiff, we inferred that the defendant was the appellant. However, examining the parties' names revealed that in more than a quarter of the appeals from judgment for plaintiff, a dissatisfied plaintiff is the appellant. So we discarded those appeals from judgment for plaintiff in which the plaintiff is the appellant or the defendant is appellee. By looking at the remaining appeals, we are more truly comparing appeals by plaintiffs and defendants from judgments entered against them. If we were somehow to treat rather than discard the special category of appeals by plaintiffs from judgment for plaintiff, the effect would be to raise the defendants' appeal rate, because the denominator (plaintiffs' wins at trial) would decrease. Moreover, if we were to recognize that these cases and others might involve plaintiff trial losses despite the formal judgment for plaintiff, the effect would be to lower the plaintiffs' trial win rate. (Incidentally, the reversal rate for this special category of appeals is virtually identical to the defendants' reversal rate).

[5]A regression of the appealed variable with other independent variables of case category, jury trial, year of district court termination, district, status as a reopened appeal or not, and origin status gives the independent variable of plaintiff win at trial a coefficient of -.207 with p.<.0005.

[6]A regression of the affirmed variable with other independent variables of case category, jury trial, year, district, status as a reopened appeal or not, and origin status gives the independent variable of plaintiff win at trial a coefficient of -.735 with p<.0005. Indeed, this plaintiff-win variable is the only variable left by this advanced stage of the litigation process that has an important effect on reversal rate.

[7]This hypotheses is similar to the asymmetric information theory described in Waldfogel, *Reconciling Asymmetric Information and Divergent Expectations Theories of Litigation*, 41 J.L. & ECON. 451, 451-52 (1998). Alternatively, the hypothesis could run along any of several other dimensions. For example, defendants might have better lawyers than do plaintiffs. *But see* Wheeler, Cartwright, Kagan and Friedman, *Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Courts*, 1870-1970, 21 l. & SOC'Y REV. 403, 432-37 (1987. Or defendants might tend to be "entrepreneurial" in nature, focusing on the case at hand, while plaintiffs might express more "social-welfare" concerns, focusing on long-run reform or positioning themselves in a narrower interest group. *See* Rathjen, *Lawyers and the Appellate Choice: An Analysis of Factors Affecting the Decision to Appeal*, 6 Am. POL. Q. 387, 401-02 (1978).

[8]*See* Posner, The Federal Courts: Crisis and Reform 7-10 (1985); and Barclay, An Appealing Act: Why Parties Appeal in Civil Cases 12-14 (1999).

[9]*See e.g.* Clermont and Eisenberg, *supra* n. 3, at 1137-38.

[10]*See* Priest and Klein, *The Selection of Disputes for Litigation*, 13 J. Legal STDU. 1, 29, 54 (1984). They claim their model "applies indistinguishably to trial and appellate disputes."

[11]*See* Clermont, *Procedure's Magical Number Three: Psychological Bases for Standards of Decision*, 72 CORNELL L. REV. 1115, 1126-31 (1987).

[12]*See* Clermont and Eisenberg, *supra* n. 3 at1153-54.

[13]Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective,* 40 ARIZ. L. REV. 849, 870 (1998). *See also* Lempert, *Why Do Juries Get a Bum Rap? Reflections on the Work of Valerie Hans,* 48 DEPAUL L. REV. 453, 454-55 (1998); and Saks, *Public Opinion About the Civil Jury: Can Reality Be Found in the Illusions?* 48 DEPAUL. L. REV. 221, 229-30 (1998); *cf. infra* note 22 and accompanying text (similarity of judges to juries).

[14]See Clermont and Eisenberg, *supra* n. 3 at 1119-51,1172; and Glaberson, *When the Verdict Is just a Fantasy*, N.Y. Times, June 6, 1999, § 4, at 1.

[15]*E.G.,* Cantor, IMAGINING THE LAW 227 (1997). ("In American courts—with juries wanting to sock it to big corporations with seemingly infinitely deep pockets, and lax or populist of incompetent judges letting the liability bar run riot—anything can happen.")

[16]Goldman, *Bush's judicial legacy: the final imprint*, 76 JUDICATURE 282, 295 (1993). The author shows that Regan-Bush judges constituted 61 percent of the courts of appeals' bench and 60 percent of the district courts' bench in 1992.

[17]See Ashenfelter, Eisenberg, and Schwab, Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes, 24 J. LEGAL STUD. 257 (1995); cf. Blume and Eisenberg, Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study, 72 5. CAL. L. REV. 465 (1999) (showing little effect of mode of choosing judges); Sisk,

Heise, and Morriss, Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning, 73 N.Y.U. L. REV. 1377,1465-70 (1998) (showing little effect of party affiliation in cases on sentencing guidelines) Pinello, Linking Party to Judicial Ideology in American Courts: A Meta-analysis, 20 JUST. SYS. J. 219 (1999) (showing the influence of judges' political leanings using cases on civil rights, criminal justice, and economic regulation); Revesz, Ideology, Collegiality, and the D. C. Circuit: A Reply to Chief Judge Harry T. Edwards, 85 VA. L. REV. 805 (1999) (showing the influence of D.C. circuit judges' political leanings on environmental regulation cases); Tiller and Cross, A Modest Proposal for Improving American Justice, 99 COLUM. L. REV. 215 (1999) (showing the influence of judges' political leanings on appellate outcome in discrimination and environmental cases).

[18]*See* N.Y. Times, Mar.31, 1999, at A14. Of course tobacco's perfect record will likely not last forever. The recent massive shift in public attitude against tobacco should eventually reach the appellate judges. *See* Ieyoub and Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of* Parens Patriae, 74 TUL. L. REV. 1859 (2000)

[19]The illustration could as easily be a federal case, tried by a judge. *E.g., Irving V. United States,* 162 F.3d 154 (1st Cir. 1998), *cert. denied,* 120 S. Ct. 47 (1999).

[20]*Brown & Williamson Tobacco Corp. v. Widdick* 717 So. 2d 572 (Fla. Dist. Ct. App. 1998); see Florida Appellate Court Vacates $1 Million Verdict, Order Case Transferred, LITIG. REP.: TOBACCO**,** Feb. 4 1999 at 3.

[21]*Anderson v. Beatrice Foods Co.,* 900 F.2d 388 (1st cir. 1990); *see* Harr, A CIVIL ACTION 467 (1996) ("To Schlichtmann, it was apparent that the appeals court wanted to clean up the allegations of malfeasance without in any way disturbing the verdict.")

[22]Clermont and Eisenberg, *supra* n. 3, at 1151-52; *See also* Helland and Tabarrak, *Runaway Judges? Selection Effects and the Jury,* 16J. L. ECON. AND ORG. 306 (2000) (most judge/jury differences are explained by differences in their samples of case) Osborne, *Courts as Casinos? An Empirical Investigation of Randomness and Efficiency in Civil Litigation* 28 J. LEGAL**.** STUD. 187, 197-98 (1999); Vidmar , *supra* n. 13, at 868-70, 884-85; *cf.* Posner, *An Economic Approach to the Law of Evidence,* 51 STAN. L. REV. 1477, 1487-502 (1999) (slight evidence of small differences).

[23]*See* Saks, *supra n.* 13, at 243-45. *How Judges View Civil Juries,* 48 DEPAUL L. REV. 247, 247-51 (1998)

[24]*See* Clermont and Eisenberg, *supra* n. 3, at 1125; and Rachlinski, "Heuristics and Biases in the Courts: Ignorance or Adaptation?" (Fall 1999) (unpublished manuscript, on file with the authors).

Making The Most of The CTLA List Serve

continued from page 17

I'm considering a federal action (probably under section 1983) to challenge this whole process. I've been informed on the QT that Support Enforcement does things like this all the time, seeking enforcement orders even though the claimed arrearage has been challenged and ignoring the statutory and constitutional rights of obligors unless someone challenges them, and then backing off so that their actions are never subject to scrutiny. This really stinks, and someone needs to put a stop to it.

Has anyone dealt with this situation before, or with a similar problem? If I take this on it will be a big job, and so I'm seeking opinions, suggestions, and any offers of help I can get.

—Christopher C. Burdett
ccbesq@aol.com

A. I almost put in a complaint against a support enforcement agent who I believed was practicing law without a license, giving advice to the payee even against the AAG's position on a large arrearage case, telling her not to settle, and creating a toxic atmosphere where thousands of dollars in legal fees were incurred and a total waste of court time. I believe you can put in a complaint to the agency which by statute establishes the support enforcement division, which I believe is the judicial branch. You should research carefully what actions they are allowed to take to secure assets in a contested hearing before spending too much time on a 1983 action. Between DSS and Support Enforcement, things may tend to go by rote, with no thought or care, simply following standard procedure and using computer generated numbers which may or may not be accurate. I never trust any of their information. I don't do a lot of this, but know several lawyers who do.

—Kathryn L. Braun
KLBESQ@aol.com

* * * * *

In the next issue of the *CTLA Forum*, we will take a look at some of the discussion on the list serv regarding reimbursement rights for claimed liens by Medicare, HMOs, ERISA plans, the Medical Care Recovery Act, and the State of Connecticut. To participate in these and other discussions, follow the instructions in the second paragraph of this column.

CTLA staff have indicated that messages will be reprinted here only if they have obtained the permission of the author. Some messages have been edited for length, relevance, spelling, punctuation, etc., and some replies to inquiries have been omitted. I have redacted greetings and thank you messages. E-mail addresses shown were those given when the messages were posted. They may since have changed. Neither your compiler nor CTLA vouches for the accuracy of these messages, a fact which should be obvious from the occasional conflicting replies to questions on the list serve. Whether you are reading this column or the list serve, you need to perform your own legal research to investigate any leads you may develop. ■

From The President's Notebook

continued from page 1

tory challenges, but also at the three defense attorneys' opportunity to cullude in their challenges against her.

Jim Bartolini, her attorney, explained that the plaintiff's verdict in Rivera vs. Saint Francis Hospital had been reversed on the grounds that the four defendants in the case should have enjoyed four challenges each, instead of the aggregate four they had been allowed during jury selection. Because of this decision, this precedent now prevailed.

Beth set out to change it. With her experience lobbying the legislature, she found a legislator to sponsor a bill.Then, she worked assiduously for its passage. Now the law, it calls for the equalization of plaintiff and defendant challenges at four each, presumption of unity of interest in the absence of apportionment or cross claims, and never more than a two-to-one ratio of challenges between all plaintiffs and defendants.

In addition to Beth's bill, during this session CTLA succeeded in passing legislation expediting the decision processes of the Claims Commissioner as well as a bill achieving more equitable assignment of costs for professional testimony and technical assistance.

Beth's experience is a lesson to each of us, that an individual still has the power to affect important change. That indignation in the face of injustice can generate great energy. That initiating rather than reacting, even in the face of a seemingly irrevocable situation, can be successful and produce results.

Discovery of Video Surveillance Materials in A Personal Injury Case

—What You Don't Know Could Kill Your Case—

By James A. Hall, IV

James A. Hall, IV practices with O'Brien, Shafner, Stuart, Kelly & Morris, PC in Groton.

Introduction

Video surveillance in a personal injury case has come to be an expected tool in a defendant's arsenal of discovery weapons. The prospective evidence is gathered by clandestine individuals paid exclusively by the defendant. They attempt to collect video footage of the plaintiff performing life's daily activities by hiding behind walls and peeping out of tinted car windows. As plaintiff's attorneys, we must handle the fallout of such video surveillance, often during the last moments before a trial commences. Often it is too late to conduct further meaningful discovery and we are faced with a daunting series of questions about potentially damaging evidence—was the footage really of the plaintiff, was the tape edited to conceal the plaintiff in pain after some activity was attempted, did the videographer pick and choose with selective bias the scenes that were recorded?

Often, the first warning that such footage exists will occur shortly before trial, as exhibits are being marked, or potentially during trial, when it is mentioned by defense counsel as rebuttal evidence. No matter when the videotape is disclosed, the playing field is clearly uneven and a "trial by ambush" is about to commence unless both sides are able to view the evidence before the jury is presented with evidence.

This trend is increasingly common with the advent of newer and more portable technologies; yet, Connecticut Appellate courts have not yet grappled with the issue of whether a defendant must produce video surveillance tapes prior to trial. Indeed, the standard set of interrogatories served in virtually all automobile and premises cases fails to specifically ask if such surveillance tapes have been taken. In the balance rests a plaintiff's right to a fair trial.

I. Learning of the Existence of Surveillance Videotapes

Prior to compelling the disclosure of video surveillance tapes, the plaintiff must ascertain whether any such tapes exist. Plaintiffs who are alerted to the possibility of being videotaped are often able to recognize that this is occurring and should be encouraged to report to their counsel any suspicious activities. One example of such activity was observed by a plaintiff-delivery person who noticed the same two vehicles following him around his work route. That plaintiff then alerted his counsel and the issue was brought before a judge to compel disclosure of the surveillance footage.

More formal means of discovery as to the existence of surveillance activity has been complicated by Connecticut's standardization of interrogatories limiting the written discovery in personal injury actions involving automobile or premises claims.[1] While these standardized interrogatories do not pose questions directly about video tapes in the defendant's possession it could be readily argued that the standard questions regarding photographs in the defendant's possession apply to all images of the plaintiff—regardless of whether the images are captured chemically on photo paper or through electronic scanning on a videotape.[2]

Where video surveillance is suspected, a motion to file additional discovery for the limited purpose of ascertaining whether video surveillance has been conducted should be filed with the court.[3] Counsel should file such a motion early on in the case with the understanding that the defendant's duty to disclose is ongoing until trial. The effect of filing such a motion early in the case brings the issue of video surveillance to the judge's attention at a time when the plaintiff can react to the judge's position on the matter. If discovery is granted, such a motion keeps the defendant honest in its video taping endeavors by requiring that the plaintiff receive notice of surveillance activity prior to trial.[4]

Such a motion was filed and granted in the case of *Labonte v. Grossman's Inc.,* 1995 WL 731756 (Conn. Super., 1995). In that case Judge Fasano reflected upon the underlying purposes served by such additional discovery:

> [i]n analyzing a discovery issue of this nature, it is important to bear in mind the purposes underlying the broad rules of discovery in this state; that is, to encourage agreement and settlement, to avoid surprise and "trial by ambush," to limit the issues for trial, and to basically make a trial "less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practical extent." *Hartford v. Anderson Fairoaks, Inc.,* 7 Conn.App. 591, 600 (1986); *Pool v. Bell*, 209 Conn. 536, 541 (1989); *Perry v. Hospital Of St. Raphael*, 17 Conn.App. 121, 123 (1988); *Tessmann v. Tiger Lee Construction Co.,* 228 Conn. 42, 50 (1993).

II. Requiring Production of Surveillance Videotapes

Once the plaintiff has ascertained the existence of surveillance videotapes, the question becomes whether the defendant must produce such tapes of the plaintiff prior to trial. No Connecticut Appeals Court has addressed this issue and the trial courts appear split as to what is fair.[5]

However, the more recent, and well reasoned, opinions engage in a King Solomon-styled justice.[6] The defendant is required to disclose the videotapes prior to trial but the defendant is also allowed to depose the plaintiff (even if already deposed previously) for the limited purpose of questioning the plaintiff about the activities found on the tape. Only after the plaintiff has provided potentially impeachable testimony must the defendant disclose the surveillance material. This compromise is fair provided the defendant does not unduly delay the taking of the plaintiff's deposition before trial. Additionally, timely disclosure may well encourage settlement by the parties.

III. Surveillance Tapes Are Discoverable Under The Connecticut Rules of Practice

Connecticut Practice Book Sections 13-2 and 13-3 must be considered when demanding the production of surveillance tapes.[7] While the individual sections are discussed below, the application of any discovery rule must begin with the purpose behind the creation of discovery rules: "[t]he driving force [behind our rules of discovery] was the avoidance of surprise, in belief that the path to judicial

efficiency and fairness was to be paved with knowledge."[8]

A. Plaintiff Has Substantial Need to Review Surveillance Footage

Section 13-2 requires disclosure if the Judicial authority finds it "reasonably probable" that the discovery material sought will be required in either making or defending against the claim and that material can be provided to the other side with "substantially greater facility than it could otherwise be obtained by the party seeking disclosure." Section 12-3 further considers "substantial need" when the defendant raises the claim that the surveillance film was prepared in anticipation of litigation. The trial court decision of *Labonte v. Grossman's*[9] deals squarely with this section, noting that video surveillance footage "might well constitute a defense to the action or, at least, a strong tool for the purposes of impeachment of the plaintiff or its witnesses." There is no question that a review of the material would be of assistance to the plaintiff (pursuant to section 13-2).[10]

Supreme Courts of other states have considered the same issue and similarly found that a personal injury plaintiff has a "substantial need" to review surveillance footage prior to trial. The New Jersey Supreme Court in *Jenkins v. Rainner*[11] unhesitatingly held that it would pose an undue hardship upon the plaintiff if the materials were not disclosed: "[i]f the evidence is unique, such that a party cannot copy or otherwise recreate it, then the hardship in obtaining the substantial equivalent seems manifest."[12] The Jenkins court further held that the potential damage caused by such a tape should be considered when determining substantial need:

> The surprise which results from distortion or misidentification is plainly unfair. If it is unleashed at the time of trial, the opportunity for an adversary to protect against its damaging interference by attacking the integrity of the film and developing counter-evidence is gone or at least greatly diminished. The delay which would inevitably ensue from an interruption of the trial to permit examination and perhaps testing of the films should be avoided. If on the other hand the motion pictures actually portray plaintiff engaged in some strenuous activity which on depositions she had already testified is beyond her capacity, then it is not probable that pretrial disclosure of that kind will enable her to salvage the case; more likely it will hasten a settlement. If the inconsistency is not glaring or is susceptible of explanation, or if for other reasons settlement opportunities are not enhanced, then the adversarial system will be called upon to work; but now, in the environment in which it works most effectively—where the parties are aware of all the evidence.[13]

Other state appeals courts to find in favor of disclosure due to the substantial hardship placed upon the plaintiff include the neighboring states of Rhode Island[14] and New York.[15]

B. What Plaintiff "Generally" Does in Public Is not The Issue

The defendant's likely argument: the tapes were taken in public and the plaintiff should already know what he or she is doing in public has been successfully raised by defense counsel in Connecticut.[16] However, "[t]his observation fails to take into account authentication problems presented by a surveillance film."[17] In making this logical invalidation of the defendant's argument, Judge Corradino further observed that:

> the camera may be an instrument of deception. It can be misused. Distances may be minimized or exaggerated. Lighting, focal lengths and camera angles all make a difference, action may be slowed down or speeded up. The editing or splicing of films may change the chronology of events. An emergency situation may be made to appear common place. That which has occurred once can be described as an example of an event which recurs frequently . . . . that which purports to be a means to reach the truth may be distorted, misleading and false.[18]

It is simply too much to ask a plaintiff to remember the details surrounding every public event in which he or she engages over the course of a law suit.

C. Surveillance Tapes Are not Privileged Mental Impressions

Where the defendant asserts the additional claim that the materials are prepared in anticipation of litigation, section 13-3 of the practice book requires the defendant bears the burden of proving that the surveillance tape contains "mental impressions, conclusions, opinions, or legal theories . . ." However, no court in the state of Connecticut has yet been able to articulate what mental impressions might be lurking within unedited surveillance footage of the plaintiff. Judge Corradino, in his Torre decision notes: "[t]o say that disclosure of surveillance films would unfairly reveal to the other side that the defense contemplates an attack on the plaintiff's damage claim says nothing more than what has already been said in the case."[19] Indeed:

> [t]he defense has a right to and more often than not explicitly contests all of the plaintiff's claims including claims for damages. If that wasn't so, why would the defense counsel have a surveillance film made in the first place. The fact that a surveillance film has been made makes clear that the defense contests the injuries—to then preclude discovery of the surveillance film on that ground would go beyond any further interest the defendant would have a right to protect.[20]

It is sufficient to state that the burden of proving a privilege that outweighs the plaintiff's need for discovery truly rests upon the defendant.[21]

CONCLUSION

The Connecticut Supreme Court has long followed the lead of the United States Supreme Court in fashioning rules of discovery designed to "make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed *to the fullest practicable extent.*"[22] It is indeed "practicable," and more importantly "fair," to require disclosure of all surveillance material prior to trial. Already many Connecticut trial courts and many appellate courts across the country recognize this natural extension of the discovery rules.[23] They compel disclosure of the surveillance material in exchange for allowing the defendant a very limited opportunity to depose the plaintiff prior to turning over the surveillance material.[24] Whether the defendant claims the evidence is substantive or for impeachment purposes, this balance of interests levels the playing field and promotes the possibility of settlement. ■

Footnotes:

[1]Connecticut Practice Book Sec. 13-6 (requiring the use of standard interrogatories) and Sec. 13-9 (requiring the use of standard requests for production) neither of which references videos or surveillance activities.

[2]See, *Rullo v. General Motors Corp*., 208 Conn. 74, 543 A.2d 279, 1988; S*tate v. Deleon*, 230 Conn. 351, 645 A.2d 518, 1994 (applying the same standard of admissibility to both photographs and videotapes in both civil and criminal cases).

[3]Pursuant to Conn. P.B. Sec. 13-6(b).

[4]Arguably, this is why the defendant is required to disclose photographs as part of the standard set of "Form" interrogatories. In comparison, the Federal Rules of Procedure, Rule 34 allows any party to request disclosure of "Writings, drawings, graphs, charts, photographs, phonorecords, *and other data compilations from which information can be obtained*." Expanding Connecticut's standard "Form" interrogatories in this manner to include video

surveillance would level the playing field in a similar manner.

[5]Superior Court decisions refusing to compel discovery include *Dzurenda v. Burdo*, 9 Conn. L. Rptr. 60 (1993); *Spooner v. Champney*, 7 Conn. L. Rptr. 25 (1992); *Kriskey v. Chestnut Hill Bus Company,* 1 Conn. L Rptr. 610 (1990)

[6]Superior Court decisions compelling discovery include *Torre v. New Haven Orthopedic Group, P.C., et al.*, 1996 WL 222391 (April 11, 1996) (Corradino, J.); *Labonte v. Grossman's,* Inc., 15 Conn. L. Rptr. 445 (Nov. 22, 1995) (Fasano, J.); *Pappalardo v. Pellicci*, 14 Conn. L. Rptr 320 (April 28, 1995) (Nadeau, J.); *Jiser v. Boraway*, 13 Conn. L. Rptr. No. 2, 75 (1995) (Maiocco, J.); *Gall v. Ergmann*, 7 Conn. L. Rptr. 227 (1992) ((Moraghan, J.); *Davis v. Dadonna*, 1 Conn. L. Rptr. 445 (1990) (Lewis, J.); *Woodward v. City of New London*, CV-99-0552336S (12-02-00) (Robaina, J.) (following Torre).

[7]A thorough trial court analysis of the issue is found in Judge Corradino's *Torre v. New Haven Orthopedic Group, P.C., et al.*, *Supra*.

[8]*Pappalardo v. Pellicci, Supra*, (favoring the disclosure of surveillance footage as a means to further both settlements and a fair trial).

[9]*Supra*.

[10]*Supra*. See also, *Davis v. Dadonna, Supra*.

[11]350 A.2d 473 (N.J. 1976)

[12]*Id.* at 477.

[13]*Id.*

[14]*Cabral v. Arruda*, 56 A.2d 47 (R.I. 1989) (finding that "the presentation of surveillance materials places at issue whether and to what extent the plaintiff is injured. As the existence and extent of injury is the very essence of plaintiff's claim, surveillance materials need to be scrutinized carefully. To allow surreptitiously obtained photographs or films to be sprung on the plaintiff at trial creates undue hardship.")

[15]*DiMichael v. So. Buffalo Railway Co.*, 80 N.Y.2d 184 (1992). As of 1993, the New York discovery rules were amended to make all surveillance tapes discoverable, even those not offered into evidence.

[16]See *Spooner v. Champney, Supra.*

[17]*Torre v. New Haven Orthopedic, Supra.*

[18]*Id.*

[19]*Id.*

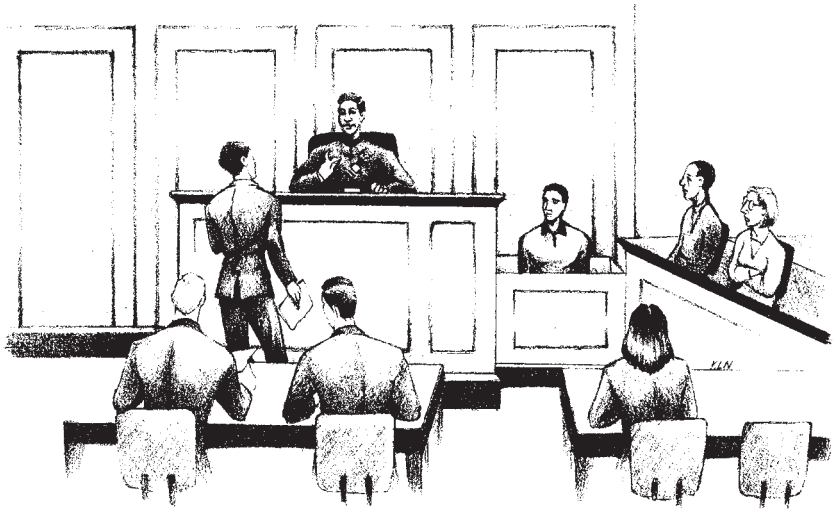
[20]*Id.*

[21]Of note, Practice Book Section 13-3(b) allows complete access to a "party's own statement" regardless of whether that statement is otherwise privileged. While it has yet to be raised, the argument that an individuals bodily movements represent his own "statement" is not so far fetched in light of the Supreme Court's freedom of expression cases involving bodily movements.

[22]*Tessmann v. Tiger Lee Construction Co.*, 228 Conn. 42, 50, 634 A.2d 870 (1993); *Knock v. Knock,* 224 Conn. 776, 782, 621 A.2d 267 (1993); *Picketts v. International Playtex, Inc.,* 215 Conn. 490, 508, 576 A.2d 518 (1990); *United States v. Proctor & Gamble,* 356 U.S. 677, 682, 78 S.Ct. 983, 986-87, 2 L.Ed 2d 1077 (1958); (emphasis added).

[23]For additional national cases not cited in the above article allowing pre-trial discovery of video surveillance tapes see, *Golumbus v. Consolidated Freightways Corp.,* 64 G.T.F. 468 (N.D. Inc. 1974); *Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148 (E.D. Pa. 1973); *Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513 (5th Cir. 1993), *cert denied* 114 S. Ct 1536 (1994); *Zimmerman v. Superior Court,* 402 P.2d 212 (Ariz. 1965) (en banc); *Crist v. Goody*, 507 P.2d 478 (Colo.Ct. App. 1972) (holding surveillance films are primarily substantive evidence and discoverable at the pre-trial phase); *Olszewski v. Howell,* 253 A.2d 77 (Del.Super.Ct. 1969); *Dodson v. Persell*, 390 So.2d 704 (Fla. 1980); *Ross v. West,* 543 So.2d 307 (Fla. Dist.Ct.App. 1989); *Shenk v. Berger*, 587 A.2d 551 (Md. 1991); *Boldt v. Sanders,* 111 N.W.2d 225(Minn. 1961); *Williams v. Dixie Elec. Power Ass'n*, 514 So.2d 332 (Miss. 1987).

[24]For further comment on the national trends of surveillance film discovery see *Discovery of Surveillance Materials,* Steven H. Schafer, Esq., JOURNAL OF MASSACHUSETTS ACAD. OF TRIAL ATTORNEYS, Vol. 2, #2 (Oct. 1994).



How to Handle A Sick Building Case

By Thomas X. Glancy, Jr.

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The subject of sick buildings has garnered increasing attention recently. In December, one hundred office workers demonstrated outside of the Investment Building, a commercial office building in Towson, alleging that unhealthy conditions in that building were making them ill and demanding to be relocated. Three occupants of that building filed an $18 million lawsuit against the building owner, charging that they were sickened by bacteria in the building[1].

In addition, workers in two Baltimore City courthouses, the Mitchell Courthouse and Courthouse East, have complained of respiratory infections, coughing, eye irritation and other problems that they associate with conditions in those buildings.[2] In 1999, a 60 Minutes segment reported complaints by employees of the Environmental Protection Agency that unhealthy indoor air at the EPA national headquarters in Washington, D.C. had made them ill. In June of 2000, the District of Columbia Court of Appeals upheld substantial verdicts that had been awarded in favor of five of those employees.[3]

Notwithstanding this recent spate of attention, the "sick building syndrome" phenomenon is not a new one. During the oil embargo and energy crises of the 1970s, many buildings were "weatherized" or "tightened" as owners and landlords undertook energy conservation measures. As the amount of outdoor air supplied to these buildings was reduced, pollutants and toxins that previously had been circulated out of the buildings, such as formaldehyde, cleaning materials, and off-gases from carpets and furniture, began to accumulate unhealthy levels. Office workers who were exposed to these pollutants and toxins became ill.

The adverse health effects associated with indoor air pollution are varied. Exposure to indoor contaminants most commonly affects the pulmonary, neurological, and immunological systems. Symptoms are typically multiple and commonly include headache, fatigue, depression, anxiety difficulty in concentrating, dry cough, upper respiratory difficulties, chemical hypersensitivity, repeated infections, and eye, nose, or throat irritation.

The scope of the problem is staggering. It has been estimated that of the ten million commercial office buildings in the United States, as many as 20 percent, or two million, may be "sick."[4]

Litigation of indoor air quality issues has increased substantially in the last decade as the number of people who have become ill from exposure to toxic indoor air rises, and as those individuals begin to realize that their illnesses are caused by their indoor environment. This article discusses steps that plaintiffs' counsel should take in evaluating and litigating sick building cases. It primarily focuses on cases in which a number of building occupants complain of chronic illnesses that they attribute to conditions in the building in which they work.

Evaluation

An important first step in evaluating a potential sick building case is to conduct thorough interviews with the potential clients. Those interviews should be supplemented with a comprehensive questionnaire that each prospective client should be asked to complete.

During this process, counsel should obtain a complete medical history from each client as the issue of causation will, in most cases, be hotly contested. That history should include a family medical history, particularly for illnesses such as chronic asthma, chronic bronchospasms, repeated pneumonias, interstitial lung fibrosis, and other respiratory illnesses. Counsel should also ask clients about any past and current treatment with mental health care providers, as defendants frequently attempt to attribute a sick building claimant's physical complaints to a somatization disorder or other psychological condition.

Potential clients should also be asked whether they have filed workers' compensation claims for their occupational illnesses and to identify treating doctors whom they believe will support their claims that they became ill as result of exposure to toxins in the building.

Following the interview, a complete set of the client's medical records should be ordered promptly. Counsel should then review the completed interviews, questionnaires and medical records for evidence of a pattern of similar symptoms by occupants throughout the building or for a cluster of complaints in certain areas of the building.

After the clients' medical records have been collected and reviewed by counsel, they should be submitted to a physician with a background and experience in environmental or occupational medicine. It is important to have at least one medical expert examine most, if not all, of the potential clients so as to determine whether there is a pattern of symptoms consistent with a toxic exposure that can be explained by no common factor other than that the clients worked together in the same building.

The selection of the appropriate medical team will usually depend upon the nature of the illnesses from which the clients suffer. If their principal symptoms are respiratory, such as coughing, wheezing, and difficulty breathing, a physician specializing in pulmonary medicine should be consulted. Clients who exhibit symptoms consistent with cognitive impairments, such as memory loss, fatigue, or loss of concentration, should undergo a neuropsychological evaluation. Clients who are suspected of being immune-compromised should ordinarily be evaluated by an immunologist.

Liability Investigation

An attorney who is satisfied that medical causation can be proven should consult an expert in building management and operations to evaluate standard-of-care issues. In recent years, a number of building engineers and other experts in the indoor air quality field have formed businesses that investigate sick building complaints on behalf of building owners and managers, and provide suggestions for remediating any unsafe conditions that they find. By virtue of that experience, such individuals may be ideal candidates to address standard-of-care and causation issues.

Industrial hygienists can also help in determining the environmental factors that may have caused building-related illnesses. They can also identify remedial measures that a reasonable owner or

landlord should undertake after learning of potentially toxic conditions in a building or of complaints of potential building-related illnesses. Any liability expert who is selected should be familiar with existing industry guidelines for indoor air quality and related subjects.

Defendants

Typically, the potential defendants in sick building cases include the building owners, landlords, and/or management companies who contract with the owners or landlords to maintain and repair the building, including the HVAC system. The owner or lessor of the building may not escape liability by retaining an independent contractor to manage and operate the building.[5] However, if the building is owned and managed by the claimants' employer, workers' compensation may be the only remedy available to them.

Other potential defendants include manufacturers of products used in the building that emit toxins and the contractors who installed them. However, in chronic exposure cases, a more convincing claim can often be made against the owner or management company that has ultimate responsibility for providing reasonably safe work environment, rather than a claim against a contractor or supplier who introduced only one of potentially many sources of indoor air pollution.

Negligence

The principal cause of action in most indoor air quality cases is negligence.[6] Landlords are not guarantors of the safety of people on their premises and the law does not require them to incur unreasonable burdens to maintain their premises in a safe condition. However, they do have a duty to maintain those portions of the premises under their control in a reasonably safe condition for use by tenants and others lawfully on the premises. The issue of control is often contested, as defendants may argue that the plaintiffs' illnesses resulted from actions undertaken by the tenant or by the plaintiffs' co-employees.

There may be additional sources of a building owner or landlord's duty to exercise reasonable care to avoid exposing building occupants to harmful contaminants. A landlord's duty to provide and maintain reasonably safe leased property can arise from provisions of a lease, such as covenants by the landlord to maintain the leased premises in good repair and tenantable condition. For that reason, counsel should obtain copies of all relevant leases and their amendments. Particular attention should be directed to lease provisions that allocate responsibility for the maintenance of the HVAC system, particularly if inadequate ventilation is suspected of contributing to the harmful exposures. Further, some leases contain criteria on acceptable temperature ranges, relative humidities, and require compliance by the landlord with industry standards such as those established by the American Society of Heating, Refrigerating and Air Conditioning Engineers.

Building codes and other statutes and regulations may also establish minimum requirements for indoor air quality, or for temperature and humidity ranges. If these provisions exist, a violation may constitute negligence *per se*.

Absent evidence that the defendants created the dangerous conditions that made building occupants ill, plaintiffs must establish that the building owner, manager, or landlord had actual or constructive notice of those conditions. Notice may be established in a number of ways. Landlords and building managers often become aware of health complaints through workers' compensation claims filed by their own employees and from complaints made by affected office workers or their supervisors. Complaints about conditions in the building are often recorded in maintenance logs and in other repair and service records. Additionally, HVAC deficiencies are often listed on service records. For that reason, all maintenance and repair logs, and mechanical and service records for the HVAC system should be requested and reviewed.

Identification of Contaminants

Counsel must also establish that as a result of the defendant's negligence, building occupants were exposed to harmful levels of contaminants. That is often difficult to do as the conditions responsible for occupant illness vary from building to building and are often difficult to identify. Causation may be especially elusive when there is no single episode or toxic exposure that precipitates an acute reaction in building occupants.

Inadequate ventilation, renovations, and microbial infestations are among the most common causes of sick building syndrome. In the early 1990s, the National Institute for Occupational Safety and Health reported that building ventilation had been found to he inadequate in a majority of the buildings in which it had conducted indoor air quality investigations. In some instances, building activities such as renovations involving the use of organic solvents in products such as paints and glues result in the release of volatile organic compounds, thereby increasing a building's "chemical load" to unhealthy levels. More recently, attention has increasingly focused upon the growth of potentially poisonous or allergy-producing concentrations of molds and fungi that are frequently found in offices and homes with severe water damage or chronic moisture problems. Often times, a number of these processes are at work in a single building, creating a "chemical soup" that, over time, leads to the chronic health problems complained of by building occupants.

An industrial hygienist can often suggest environmental tests that should he conducted in the building that will identify sources of contamination. Such tests may measure the level of outdoor air introduced into the building, the volume of air circulated by the ventilation system, the nature and extent of air distribution within the building, the level of carbon dioxide and other chemicals in the air, and indoor concentrations of fungi and bacteria.

The industrial hygienist will usually not obtain access to the building to conduct environmental testing until after suit has been filed, which may occur months or even years after conditions in the building have begun to make occupants ill. Therefore, as a result of intervening remediation efforts or other changes in the building environment, the conditions that caused building occupants to become ill may no longer exist and may not be detected at the time of that subsequent environmental testing.

Even if environmental testing detects unhealthy levels of contaminants, their relevance *may* be challenged by the defendants unless the plaintiffs can establish that the conditions found during testing also existed at the time the plaintiffs became ill. For that reason, discovery concerning intervening changes in the building environment, or the absence of changes, is important. Discovery should also be directed to determining whether the building owner or public health authorities conducted environmental testing at the time the claimants became ill, as sometime occurs in response to health complaints made by building occupants.

Causation

Proving that contaminants in a building have caused a plaintiff's illness is a two-step process. First, the plaintiff must establish that his exposure to such contaminants *can* cause the illness from which he suffers. That is sometimes referred to as general causation. Specific causation is then established by testimony that that exposure has caused the plaintiff's illness.

Depending upon the theory of exposure, general causation testimony may be provided by a toxicologist, microbiologist, chemist, or similar expert. One or more of the plaintiff's physicians will usually pro-

vide testimony that the plaintiff's illness was actually caused by a harmful exposure in the defendant's building.

To the extent that causation is disputed, the plaintiff's expert should be prepared to support his opinion with medical and scientific literature, preferably research that has been subjected to peer review, as well as rely upon his or her own professional experience. The admissibility of causation testimony will often depend upon whether it is supported by sound scientific principles.

In federal courts, those opinions will be admitted only if they satisfy the criteria enunciated by the Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals*, 590 U.S. 579 (1993) and its progeny.[7] Maryland state courts apply the *Frye/Reed* standard, which provides that parties seeking to introduce evidence based upon a novel scientific technique or methodology must first demonstrate that the technique or methodology is considered reliable by those qualified to make such an assessment.[8] However, medical opinions are usually held to be admissible to the extent the physician's opinions are based upon his medical experience, as opposed to novel techniques or new scientific tests, provided the physician holds those opinions to a reasonable degree of medical probability.[9]

A temporal connection between an exposure and the onset of illness, standing alone, may be insufficient to establish medical causation. However, to the extent a physician conducts a differential diagnosis, a technique by which alternative causes of an illness and diagnosis are considered and eliminated, his opinion that the plaintiff's injuries were caused by conditions in the building is more likely to be admitted.[10]

Trial

Counsel should try to simplify the case as much as possible. Since most jurors will not have heard of sick building syndrome, but will he able to identify with some forms of occupational illnesses, the plaintiffs' illnesses should be presented in such terms. When a number of plaintiffs have fallen ill, counsel should also focus on the common pattern of illness. A theme should be established that conditions in the building must be to blame for the plaintiffs' illnesses because the plaintiffs had nothing in common with one another in terms of age, gender, living arrangements, and previous exposures to toxins, other than the fact that they worked in the same building and became ill while doing so. The lack of a plausible alternative explanation for the plaintiffs' illnesses may be the most effective way in which to overcome a jury's skepticism towards environmental and medical concepts that are foreign to them. ■

Footnotes:

[1]The Baltimore Sun, December 6, 2000, Page 3B.

[2]The Daily Record, Volume 1, Number 33, August 5, 2000.

[3]Bahura v S.E.W. Investors, 754 A.2d 928 (D.C. 2000).

[4]Subcommittee on Health and the Environment. House Committee on Energy and Commerce, April 10, 1991; testimony on The Indoor Air Quality Act of 1991, introduced by Rep. Joseph P. Kennedy, II, to set standards for indoor air quality.

[5]Juisti v. Hyatt Hotel Corp. of Md., 876 F.Supp. 83, 85 (D.Md. 1995) (vacated on other grounds, 94 F.3d 169 (4th Cir. 1996)).

[6]Other possible legal theories include breach of express warranty and breach of the implied warranty of habitability. Also, a supplier of a product that exposes occupants to potentially toxic substances may be held strictly liable. See Board of Education v. A. C. and S. Inc. 546 N.E.2d 580 (I11.1989) (supplier of friable asbestos).

[7]Effective December 1, 2000, Rule 702 of the Federal Rules of Evidence requires. as a condition to the admission of expert testimony, that the testimony be based upon sufficient facts or data and be the product of reliable principles and methods that have been reliably applied to the facts of the case.

[8]Reed v. State, 283 Md 374, 381, 391 A.2d 364 (Md. 1978) (citing Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)).

[9]Owens Corning v. Bauman, 125 Md. App. 454,726 A.2d 745, 767 (1999).

[10]See. e.g. Berry v. CSX Transp. Inc., 704 So.2d 633 (Fla. 1997).

TLPJ Foundation Projects

By Robert I. Reardon, Jr.

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Project Access Challenges Secrecy in Goodyear Tire Safety Case

Press Reports Note Alarming Deaths, But Key Documents Remain Secret

Trial Lawyers for Public Justice and Consumers for Auto Reliability and Safety (CARS) are seeking public access to key documents and testimony about the dangers of Goodyear 16-inch Load Range E light truck tires. Press reports have disclosed a growing number of deaths and injuries involving these tires, but the documents and testimony about the tires' dangers remain under seal in a New Jersey case. The case was filed after three U.S. Air Force personnel riding in a General Motors Suburban were killed and three others were injured when a Goodyear tire came apart and their vehicle rolled over.

TLPJ and CARS moved to unseal the documents because of their concern for public safety. The challenge to secrecy in the case was filed as part of Project ACCESS, TLPJ's 12-year-old nationwide campaign against unnecessary secrecy in the courts.

"Court secrecy should not be used to hide potential dangers from the public," said TLPJ Foundation President Peter Perlman of the Peter Perlman Law Offices in Lexington, Kentucky. "Dozens of people were killed or maimed before Firestone's and Bridgestone's tires were recalled because crucial evidence of the defects was hidden by protective orders. The public has the right to learn the truth now about whether these Goodyear tires are unsafe."

The critical documents and testimony are currently under seal in *Frankl v. Goodyear Tire and Rubber Company* in the Superior Court of New Jersey, Mercer County. On November 1, TLPJ formally moved to intervene, vacate or modify the protective order, and seek public access to the documents. The motion was filed on behalf of CARS, a national, non-profit automobile and consumer safety organization that works to promote auto safety and prevent motor vehicle-related deaths, injuries and economic losses through public policy and advocacy.

"Goodyear has admitted that these light truck tires may have been a factor in at least 30 accidents, including 120 injuries and 15 deaths," said CARS President Rosemary Shahan. "How many more drivers and passengers have to be maimed or die before Goodyear discloses its full knowledge of how and why these tires are failing?"

Incredibly, Goodyear filed its brief in opposition to TLPJ's motion under seal, even though the brief neither contained nor referred to any arguable trade secrets. Goodyear's brief did not address the central concern raised by TLPJ's motion. As TLPJ's reply brief, filed in public on November 15, notes, "Goodyear's submission fails to even mention the most important factor to be considered by the Court: the public's interest in determining whether Goodyear's tires pose a threat to public safety."

The potential dangers of Goodyear's tires were first brought to light by plaintiffs' counsel in *Frankl*, Christine D. Spagnoli of Greene, Broillet, Taylor, Wheeler & Panish in Santa Monica, California. Spagnoli had previously represented Brian Mathews, a Los Angeles police officer who was rendered a paraplegic when tire treads on the bomb squad vehicle he was driving separated and the vehicle rolled over. At that time, Goodyear's lawyers told her there were no similar accidents involving similar tires in which any person was injured or killed. The case settled for a total of $7.9 million and Spagnoli returned the evidence she had gathered, as required by a protective order in the case.

After Spagnoli was retained in the *Frankl* case, she learned of at least eight other similar crashes on similar Goodyear tires, which involved 28 occupants and nine deaths. She then filed a legal challenge to Goodyear's efforts to keep these matters secret. In a letter to TLPJ Executive Director Arthur H. Bryant, she wrote that she did not believe the documents involved trade secrets, that "the public has a strong interest in disclosure because of the public safety issues," and that this "is a case that demands action to prevent further injuries or death."

"This crucial evidence should not be kept secret," said Christopher M. Placitella of Wilentz, Goldman & Spitzer in Woodbridge, New Jersey, TLPJ cooperating counsel in the case. "These documents are supposed to be open to the public unless Goodyear can prove that its interest in secrecy outweighs the public interest in access. We do not believe Goodyear can meet that burden."

The danger of these tires has been highlighted by recent press reports. On October 25, the *Los Angeles Times* reported that Goodyear had learned five years ago of a problem with the tires, which Goodyear engineers themselves acknowledged as "alarming." The company changed the design of the tires in an attempt to strengthen them. However, Goodyear chose not to notify the federal government or recall the millions of tires already on the road. The tires are sold under numerous names, including Goodyear Wrangler AT and HT, Goodyear All-Season Workhorse, Kelly-Springfield Power King, and Kelly-Springfield Trailbuster. They are primarily used on light trucks, passenger vans, and large sport utility vehicles.

The possible danger of these tires is particularly significant in light of the recent debacle involving Bridgestone/Firestone tires, which led to the recall of 6.5 million of the company's passenger tires. Goodyear Chairman Samir G. Gibara stated on October 24 that his company hopes to sell even more of its tires in the wake of this recall.

On November 21, after TLPJ filed its Project ACCESS challenge and the *Frankl* case received national press attention, the National Highway Traffic Safety Administration (NHTSA) opened a preliminary investigation into some 27 million Goodyear Load Range E tires manufactured between 1991 and 1999. This is the first stage of an investigation that could potentially lead to a tire recall. Given NHTSA's ongoing investigation of Bridgestone/Firestone tires, a former senior enforcement attorney for NHTSA commented: "The body of evidence on Goodyear must be pretty compelling if, during this extraordinary time when the agency is overwhelmed, . . . [they] open[ed] a new investigation. I can't imagine NHTSA opening up such a large investigation without significant concern."

TLPJ filed a reply on February 7, 2001, to an *amicus* brief filed by the Washington Legal Foundation (WLF). WLF had opposed the motions to vacate

or modify the protective order filed by TLPJ on behalf of CARS. However, WLF failed to address the substantive arguments presented in the TLPJ briefs.

Copies of TLPJ's briefs are available online at www.tlpj.org. A hearing on TLPJ's motion to intervene and vacate the protective order is expected soon.

TLPJ launched Project ACCESS in 1989 because of the grave threat posed by court secrecy to the public health and safety, the fair and efficient administration of justice, and our democratic form of government. Through Project ACCESS, TLPJ helps victims oppose unduly restrictive protective orders, intervenes in specific cases to fight for the public's right to know, and educates the courts and the public about the problems posed by litigating in secret. In addition to Placitella and Bryant, TLPJ's legal team in *Frankl* includes Robert T. Haefele of Wilentz, Goldman & Spitzer and TLPJ's Rebecca E. Epstein.

If you would like more information about TLPJ's battle against Goodyear, or if you have a case to refer, please contact the author at 860-442-0444.

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TLPJ Sues Kaiser Permanente for Forcing HMO Members to Split Pills

Mandatory Pill-Splitting Policy Values Profits Over Patients' Health

Trial Lawyers for Public Justice filed a class action lawsuit on December 6, charging that the country's largest HMO, Kaiser Permanente, is violating California law by forcing its members to split prescription pills. The suit contends that Kaiser's mandatory pill-splitting policy endangers patients' health solely to enhance the HMO's profits. It seeks a court order barring Kaiser from forcing its members to split pills and requiring the HMO to disgorge all profits it made from this dangerous policy.

"Kaiser's mandatory pill-splitting policy is an outrageous example of an HMO valuing its profits over its members' health and safety," said TLPJ lead co-counsel Sharon J. Arkin of Robinson, Calcagnie & Robinson in Newport Beach, California. "It makes Kaiser millions, but it has no possible therapeutic value and it puts patients' health at risk."

Kaiser adopted its pill-splitting policy because it allows Kaiser to profit from the fact that smaller dose versions of most prescription pills cost Kaiser almost as much as larger dose versions of the same pills. So, Kaiser forces patients prescribed the smaller dose pills to accept and split the larger dose pills—and pockets the enormous cost difference. For example, 50-milligram tablets of Zoloft, a commonly used anti-depressant, cost approximately $227 per 100 pills, so it would ordinarily cost Kaiser $454 to provide a patient prescribed 50 milligrams per day with 200 daily doses. But 100-milligram tablets of Zoloft cost about $233 per 100 pills, so Kaiser can increase its profits by $221 on a single prescription by forcing the patient to accept and split the 100-milligram tablets to obtain 50 milligrams per day. That is exactly what Kaiser does, telling some patients to split the pills by hand and providing others with a small "pill splitter"—a razor blade centered in a plastic frame. It does not share the savings with the patients or warn them of the health risks involved.

"Kaiser promises in its advertisements that patients come first and that cost is the last consideration, but its pill-splitting policy puts patients last and money first," said TLPJ Executive Director Arthur H. Bryant, co-counsel in the case. "It is hard to imagine a more blatant consumer fraud. And it is particularly disturbing that Kaiser is endangering those who need its help the most—the elderly, frail, and sick."

The American Medical Association (AMA), the American Society of Consultant Pharmacists (ASCP), and the American Pharmaceutical Association (APhA) have all condemned mandatory pill-splitting because of the health risks involved. Medical research shows that, even when able-bodied people try to split pills, dosages can vary by up to 40%. Pills split unevenly, crumble, and shatter. As a result, pill-splitting causes both overdoses and underdoses—a serious danger to many patients. Pill-splitting is nearly impossible for some elderly patients, patients with Parkinson's disease or other conditions that cause hand tremors, and patients with cognitive or visual impairments. And it is confusing to patients taking many medications, who struggle to remember which pills to split and which not to split. Yet Kaiser requires splitting of a wide variety of pills—including blood pressure medicine, anti-depressants, and certain antibiotics—without regard to the patients' condition.

The named plaintiffs in TLPJ's class action lawsuit, *Timmis v. Kaiser Permanente*, are six patients who Kaiser forced to split pills and Dr. Charles Phillips, a physician with 31 years of experience who witnessed the effects of the policy while working in a Kaiser Permanente emergency room in Fresno, California. Phillips discovered that many patients suffering from severe hypertension, heart attacks, and strokes had been receiving uneven dosages of their blood pressure medication because Kaiser had told them to split pills. Phillips was even forced to split pills when he tried to fill a personal prescription at a Kaiser pharmacy.

"As a doctor, I have a duty to prevent harm to my patients," said Phillips. "I have seen the dangers of requiring patients to split pills, and I cannot conceive of any health benefit from this risky practice. I am also troubled by the role that Kaiser is making its pharmacists play. The laws against compounding prohibit pharmacists from splitting pills. Kaiser should not be allowed to skirt those laws by having its pharmacists force patients to split pills themselves."

Plaintiff Audrey Timmis, a 72-year-old woman who suffers from severe emphysema, said, "When I tried to split the pills—which were slightly smaller than an aspirin—I usually ended up launching them across the room like tiddly-winks or crushing them into powder between my fingers. When I finally managed to get two pieces, they were certainly not the same size. I took them, but I started getting intense headaches every afternoon."

Ms. Timmis recounted her futile attempts to change her prescription to a dosage that would not require splitting. "I complained about my headaches and the uneven split pills to my Kaiser doctor, but the doctor refused to change my prescription," recalled Ms. Timmis. "Because my complaints went unanswered, it was clear to me then that Kaiser didn't care about me or my health. All they cared about was saving money."

The complaint in *Timmis v. Kaiser Permanente* was filed in California Superior Court in Oakland. It charges the HMO with violating California Business and Professions Code Section 17200, which bars unfair business practices; Section 17500, which bars false advertising; and the state Consumer Legal Remedies Act. The complaint is available online at www.tlpj.org.

In addition to Arkin and Bryant, TLPJ's litigation team in the case includes lead co-counsel Mark P. Robinson, Jr., of Robinson, Calcagnie & Robinson in Newport Beach, California, and TLPJ Staff Attorney Victoria Ni.

If you would like more information about TLPJ's pill splitting case, or if you have a case to refer, please contact the author at 860-442-0444. Copies of TLPJ's briefs are available online at www.tlpj.org.

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Proposed Mass Mutual National Class Action Settlement Withdrawn After TLPJ Objects to Outrageous Terms

Proposal Would Have Paid Class Members Zero, Two Class Reps $350,000, and Class Counsel $5 Million Cash, $3 Million in Insurance, and $250,000 Annually for Life

A proposed national class action settlement of consumer protection claims by the Massachusetts Mutual Life Insurance Company was withdrawn and a hearing on the fairness of the settlement was canceled after Trial Lawyers for Public Justice (TLPJ) challenged the deal as an abuse of both the class action device and class members. The hearing was scheduled to take place on February 26.

The withdrawn settlement proposal in *Wilson v. Massachusetts Mutual Life Insurance Company*, currently pending in the First Judicial District Court of New Mexico in Santa Fe County, would have paid nothing to the 6.5 million class members. The two class representatives, however, would have received a total of $350,000 and class counsel would have been paid $5 million in cash, a $3 million life insurance policy, and annual payments of $250,000 for life.

"TLPJ objected to the proposed settlement as a rare but outrageous abuse of the kind of class action litigation that has historically protected consumers," stated TLPJ Executive Director Arthur H. Bryant. "Both the class and our system of justice are better off without the deal taking place."

The class action lawsuit charges that Mass Mutual failed to disclose adequately the fees that its life and disability policyholders would incur if they chose to pay their premiums on a monthly, quarterly, or semiannual basis, instead of in a yearly lump sum. The complaint in the case, filed in 1998 on behalf of approximately 6.5 million Mass Mutual policyholders, seeks both damages and injunctive relief, i.e., a court order requiring appropriate disclosures in the future.

Under the terms of the proposed settlement, the Springfield, Massachusetts-based insurer would have provided better disclosures in the future, but would have paid no damages to the class. Even the improved disclosures, moreover, would not have benefitted most of the class members—approximately 5 million of the class members are no longer Mass Mutual policyholders. All of the class members, however, would have released their potential claims against the insurer.

For helping obtain this deal for the class, the two named class representatives would have received one-time "incentive payments" of $250,000 and $100,000, respectively. Class counsel George Gary Duncan of Santa Fe would have received an immediate payment of $5 million in cash, plus a $3 million guaranteed life insurance policy, and annuity payments of $250,000 annually for life.

TLPJ's objections, filed February 5 in New Mexico, charged that the proposed settlement was blatantly unfair and urged the court to reject the proposed deal, the incentive payments, and class counsel's requested fee. The objections were filed on behalf of class members from California, Connecticut, Kansas, Massachusetts, Pennsylvania, Texas, and West Virginia. TLPJ also provided formal notice that it intended to appear and oppose approval at the February 26 hearing on the fairness of the proposed settlement. Shortly before that date, TLPJ was notified that the hearing was canceled and the proposed settlement had been withdrawn by class counsel.

"We are gratified that class counsel recognized that the settlement simply could not be approved," said TLPJ Staff Attorney F. Paul Bland, Jr., who was scheduled to appear at the hearing for the TLPJ objectors. "It violated class members' rights and paid the attorney and class representatives unreasonable sums, while letting the defendant off the hook for failing to adequately notify its policyholders of unfair, hidden fees."

In addition to challenging the amounts to be paid under the settlement, TLPJ objected both to the notice sent to class members and to the secrecy surrounding parts of the deal. The Class Notice states in capital letters that "THE CLASS WILL NOT HAVE TO PAY ANY ATTORNEYS' FEES OR EXPENSES." But Mass Mutual is a mutual insurance company—that is, a company owned by its policyholders—and the 1 million class members still holding policies would, therefore, inevitably bear the cost of the fees indirectly, in the form of reduced dividends.

The settlement agreement also referred to a "Supplemental Agreement" between the named plaintiffs and Mass Mutual, but gave no hint of the contents of that secret agreement. Similarly, it required Mass Mutual to provide class counsel with a record of how many policyholders change their payment practices as a result of the new improved disclosures—but provided that all such records be kept secret from the public.

"The notice and the secrecy in this deal were no more acceptable than Mass Mutual's willingness to pay everyone but the 6.5 million class members," said TLPJ Staff Attorney Leslie A. Brueckner, co-counsel for the TLPJ objectors. "Mass Mutual took a legitimate class action and tried to turn it into a poster child for class action abuse. We weren't going to let that happen."

Class counsel Duncan stated in a notice filed on February 19 that he was withdrawing the settlement proposal in "light of the many objections to the proposed Settlement Agreement that have expressed displeasure that class members have no opportunity to obtain restitution for past overpayments as the agreement is presently structured." Duncan explained, "Class counsel concludes that the Court cannot reasonably find that the public benefit of the proposed disclosures alone is of such overriding importance as to allow it to find that the agreement is fair, adequate and reasonable to the inactive class members."

TLPJ's objections to the settlement in Wilson were filed as part of its Class Action Abuse Prevention Project, a nationwide campaign dedicated to monitoring, exposing, and fighting class action abuse nationwide. In addition to Bryant, Bland and Brueckner, TLPJ's legal team includes local counsel William E. Snead of the Law Office of William E. Snead in Albuquerque and TLPJ Consumer Rights Fellow Michael Quirk.

If you would like more information about TLPJ's Class Action Abuse Prevention Project, or if you have a case to refer, please contact the author at 860-442-0444. Copies of TLPJ's briefs are available online at www.tlpj.org. ■

Our Courts Shouldn't Be Keeping Deadly Secrets

By Thomas A. Cloutier

Attorney Cloutier practices in Old Saybrook. He is president-elect of CTLA. This article was published on The Hartford Courant's Op-Ed page on February 13, 2001.

Until August, 2000 nobody knew bad tires were killing and injuring people. Nobody, that is, except victims and their families, the tire companies, and the courts. In 1991 when the deaths began, survivors began to sue. Yet adults and children continued to die, month after month, year after year.

In the early years, each successive case saw a new plaintiff up against the big corporations—each exasperated lawyer reinventing the legal wheel of incriminating documents, witnesses, and reconstructed crashes that were often carbon copies of those in a different year, in a different state.

Why didn't these victims and their lawyers know what was going on? Because while each of these lawsuits was going forward—and after the companies succeeded in resolving them without a public trial—something called "secrecy in settlements" or "protective orders" stopped victims and their lawyers from telling the rest of us. Speaking out meant the loss of whatever compensation the victims or their families were able to secure.

How could such a deadly condition persist? Because this was exactly the way Ford and Firestone, and thousands of powerful corporations before them, wanted it! Their profit strategies call for as little information as possible about hazardous products. Only when their harmful products become public relations disasters or the money penalties rise do they come clean and fix the dangerous product.

We got here because for decades corporations have been able to persuade courts that any information about their products constitutes "trade secrets," and that disclosing the fact that their products are killing people is unfair and threatens their corporate integrity.

Tires are just the latest in a long list of products that continue to injure and kill long after their early victims sued—internal birth control devices, garage door openers, the Bjork-Shiley heart valve, auto fuel tanks, bad doctors and dentists, asbestos, and hundreds more.

What can be done? The bipartisan moral outrage that came from the U.S. House and Senate in the wake of the Ford/Firestone exposé called for holding corporate executives criminally responsible when their companies' products caused harm and they knew it. Passed in the last Congress, public law 106-414 now imposes civil and criminal penalties on auto and tire manufacturers' employees for knowingly failing to disclose product defects and dangers to the Department of Transportation. We need to press our Connecticut delegation to monitor compliance with this law. But this law doesn't address the issue of public disclosure.

In 1991 Ford and Firestone began settling cases with "highly restrictive protective orders." Yet Ford claimed that the number of lawsuits wasn't great enough to cause alarm. Case after case against bad products of all kinds show companies continue to engage in a ghastly "cost-benefit analysis" assigning a dollar value to injuries and deaths weighed against the cost of fixing a dangerous product at the expense of profits.

On December 19 of last year (Tire Safeguards Not Being Used, Manufacturers Pressed To Cut Costs) the Courant reported on Page One that according to safety advocates, cap plies or safety strips developed decades ago could have prevented many of the tread separations that killed so many people riding on Firestone tires. These modifications cost only pennies to a dollar. Yet, apparently, multiplied by millions, this cost was too much for profit-guarding executives to approve—even while people were being killed and injured and other tire companies were fitting their tires with these same safety features. And all this was going on while "settlement secrecy" was protecting Ford and Firestone, and the car-buying public was left in jeopardy!

What can we do? The most important thing we can do to safeguard ourselves and our families from the next hidden danger is to support legislation opening court records to the public, to the press, to subsequent victims looking for accountability for hazardous products and behavior.

We presume that these public institutions, our courts, are open. Secrecy agreements that result in public harm undermine the public's faith in the courts' ability to function for the public good. We must stop state and federal courts from imposing secrecy orders that prevent life-saving information from reaching the public. ■

GUEST EDITORIAL

The Civil Justice System Is The Sole and Ultimate Check on The Big and Powerful for Unconscionable Behavior

By Richard A. LaVerdiere

Ford-Firestone Tragedy Affords An Opportunity to Reveal The True Agenda of The Tort "Reformers" and Help Sharpen The Focus on The Real Issues: Accountability, Justice and Public Safety

This article appeared as a President's Column in the Minnesota Trial Lawyers Magazine*, Winter 2001. Mr. LaVerdiere is president of the Minnesota Trial Lawyers Association. Reprinted with permission.*

The Ford SUV rollover and Firestone tire separation fiasco brings to the forefront, once more, the continuing tension between corporate profit and consumer safety. This corporate cover-up of deadly defects was revealed not by government agencies or consumer watchdog groups, but by our Civil Justice System. But for our Civil Justice System, consumers would not have learned the deadly truth, our families would have remained at risk, and no safety recall would have been initiated.

Over the past decade, Ford became aware of increasing numbers of rollover accidents with the Ford Explorer SUV. Firestone, a supplier to Ford during the same time, became aware of increasing numbers of accidents related to disintegrating tires. Ford, in an effort to minimize its rollover liability, recommended to its customers a lower tire pressure than that recommended by Firestone. The lowered air pressure increased tire temperatures, and as a result there were increased incidents of tire separation. Firestone could have avoided the tire separation defect altogether in its manufacturing process by layering nylon between the steel belts and the rubber compound. Firestone was already using this process for tires produced for the European market.

The National Highway Transportation Safety Administration (NHTSA) reports that the Ford SUV rollover and Firestone tire separation defect has claimed more than 100 American lives. Even as the death toll climbed, and thousands of complaints poured into Ford and Firestone, action was delayed. NHTSA was never notified of the overseas recalls, or of the incidents of claimed defect here in the United States.

Families of victims brought suit against Ford/Firestone throughout the country. The cases were subjected to protective orders by the court and secret settlement agreements, which prevented the spread of information to families at risk of injury, or death. As the number of cases grew, and trial lawyers began networking around the country, the deadly truth was eventually brought to light.

What is the consequence for those officials at Ford and Firestone, who knew they were selling products that would injure and kill their customers? Even though more than 100 people have been killed and more than 250 seriously injured in the U.S. alone, the NHTSA has been denied the power to invoke criminal sanctions against such willful and reckless behavior. This, in spite of the fact that other safety regulatory agencies, such as OSHA and EPA, have such power. Congress responded with hearings, and passed within 30 days of its introduction the Transportation Recall Enhancement, Accountability and Documentation Act. The new law provides for criminal sanctions for failure to report relevant safety recalls in foreign countries to the Secretary of Transportation. However, Consumer groups criticized the bill as window dressing for not going far enough in enforcing criminal penalties and for actually repealing a key reporting requirement of auto manufacturers. Although appearing to pass a get-tough bill, the new law actually repealed the auto manufacturer's obligation to evaluate data on their vehicles to determine if safety defects have arisen. This strange result stems from the powerful auto and insurance industry lobbyists who descended on Washington in desperation to prevent any meaningful legislation. While Congressional Committees provided a sounding board for public outrage, the lobbyists worked behind the scene to remove any teeth from the proposed legislation. Public Citizen, in a special report entitled "Auto Safety Legislation Rolled by Special Interests", criticizes the legislation and the legislative process. This consumer group reports:

> Public Citizen concludes that the auto industry's success in persuading Congress to pass a measure that keeps key safety data secret from the public and provides no new criminal penalties demonstrates the influence-peddling that controls our political system. It is what a frustrated Sen. John McCain referred to on the Senate floor when he stated that "the fix is in by the special interests."
>
> "This new law is a face-saving bill for lawmakers, who wanted some kind of legislation to boast about to voters back home, and not a real life-saving bill for the public," Public Citizen President Joan Claybrook said. "It is a sad testament to the need for campaign finance reform that the powers of persuasion marshaled by the families victimized by Ford and Firestone who came to Washington to lobby lawmakers could not match the influence of the auto industry and its allies."

For a time, the facts surrounding the Ford/Firestone defects were hidden with court orders and secret settlements, and the powerful lobbyists were able to keep meaningful regulation from occurring even in the midst of public outrage. Nevertheless, these companies could not escape disclosure of their unconscionable behavior by our most democratic and fair institution, the Civil Justice System.

The Civil Justice System remains as the sole and ultimate check on the big and powerful for unconscionable behavior. It is for this reason that the powerful continue to push tort

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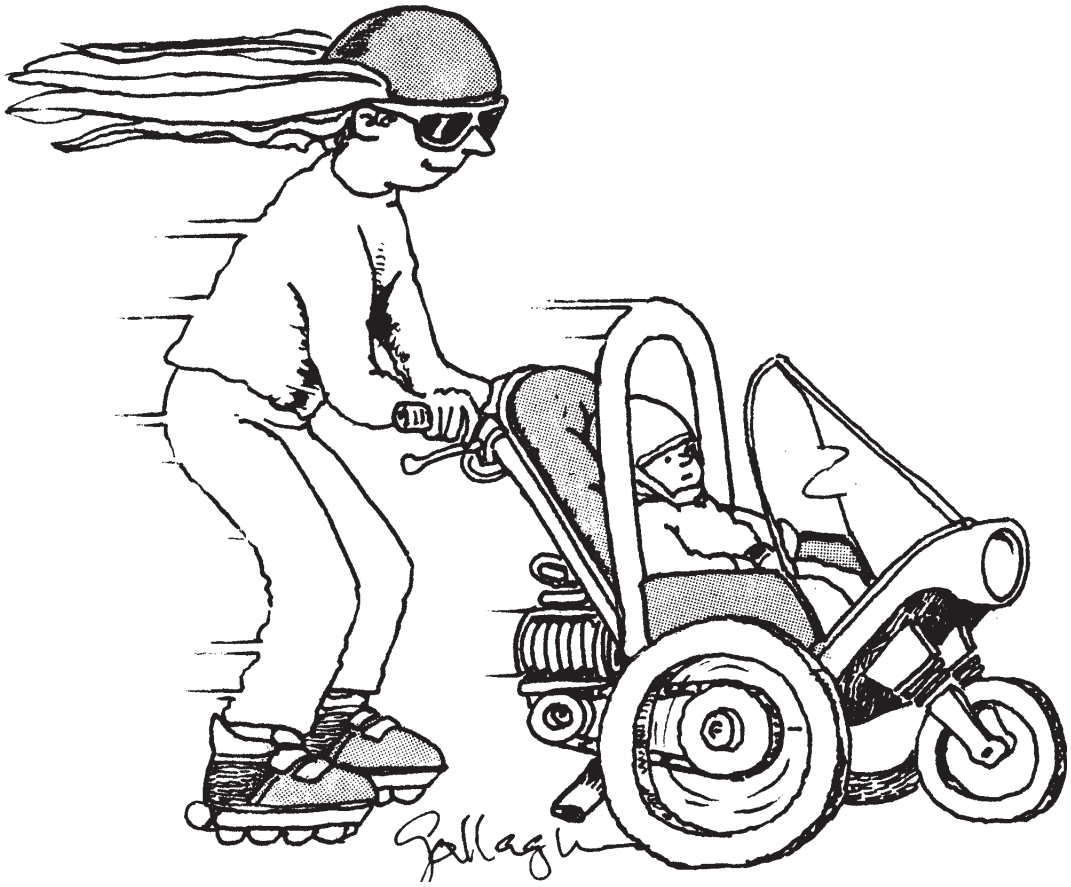

EDITORIAL

Governmental Immunity or Doctrinal Inanity?

By Steven D. Ecker

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One pretty good sign that a legal doctrine needs revision is when you cannot apply the doctrine without sounding like you are auditioning for an appearance on the Comedy Channel. If an appellate decision reads like a parody of itself, then perhaps it's time to go back to the drawing board.

The Connecticut law of governmental immunity finds itself in this situation. We have managed to take a sensible policy concern (the notion that governmental functions may be unduly hampered if governmental actors cannot make policy decisions without getting sued every time they do anything) and turned it into a mindless mechanical pigeonholing exercise without connection to any discernable rationale. As lawyers and judges, we spend our time forcing municipal negligence cases into abstract doctrinal pigeonholes with labels like "governmental" or "proprietary," "ministerial" or "discretionary," "identifiable person/imminent harm," and the like. No wonder the public is skeptical about the law being unconnected to reality.

Examples of this doctrinal pathology abound. The best recent example is the decision of the Connecticut Appellate Court in *Colon v. New Haven**. In *Colon*, the Appellate Court held that a teacher who carelessly opens a door into a student's face is entitled to governmental immunity because opening a door is a "discretionary" rather than a "ministerial" act. This ruling may come as a relief to those who insist upon the importance of selecting public school teachers (and administrators too, unless their offices have no doors) with experience and judgment in this important field of educational policy. For the rest of us, however, the *Colon* Court's "discretionary duty" analysis of door-opening is bizarre.

But in the great tradition of tempering justice with mercy, the *Colon* Court "left the door open," as it were, by finding a way to preserve the plaintiff's personal injury claim without violating the distinction between opening a door (discretion) and, say, opening a door at bell time (ministerial). It did so by invoking the "identifiable victim/imminent harm" exception to the discretionary act exception to the governmental immunity exception to the law of negligence. Because the student who was injured was a student at the school—an *identifiable* person—the claim could proceed, explained the Court. Thank goodness that the victim of the teacher's careless exercise in door-opening discretion this particular day was not an unforeseeable victim—a visitor, for example!

We must not be too critical of the judicial branch here. Although our judges (aided, to be sure, by our lawyers) created the doctrinal morass known as "governmental immunity," the doctrine is now enshrined in legislation. As part of the Tort Reform Act of 1986, the legislature adopted the basic framework of common law governmental immunity for "discretionary acts" in an enactment codified in C.G.S. 52-557n (a)(2)(B).

So who do we look to for change? The 1986 codification of governmental immunity may mean that any significant alteration of the doctrine must come from the legislative branch. This is unfortunate because it is often much harder to amend a statute than to get it right the first time.

Short of legislative amendment, in our view there is substantial room for an active judicial role in making sense of the statutory standard governing governmental immunity. After all, the direct source of the statutory standard is judge-made law. Perhaps more importantly, the broad statutory language—granting immunity for negligent acts "which require the exercise of judgment or discretion as an official function of the (defendant's) authority"—is hardly transparent or self-executing, and fairly demands judicial interpretation. In the absence of any legislative history suggesting that the legislature intended some precise or particular meaning, the judiciary should continue to interpret and apply the statutory formulation in the same common law tradition from which it came.

Whether by legislative or judicial initiative, the law of governmental immunity should be reconnected to its rationale, and thereby limited by the purpose it was meant to serve. Connecticut should follow the Restatement of Torts approach to municipal immunity. Except for acts of negligence arising in circumstances specifically exempted by statute, municipal actors should be liable for their negligent acts unless those acts arise as part of that person's determination of fundamental governmental policy. This means that planning-level functions or other core governmental activity sharing the attributes of legislative, judicial or administrative decisionmaking should not be subject to judicial oversight via tort law. But otherwise, government employees must be accountable in the same manner as the rest of us. ■

*60 Conn. App. 178, *cert. denied* 255 Conn. 908 (2000).

The Novice Expert: 20 Rules for Deposition Testimony

By Kurt D. Holzer

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The generally prevailing rule on experts is that a witness qualified by "knowledge, skill, training or experience" may testify about "scientific, technical or other specialized knowledge" "in the form of opinions or otherwise" if the testimony will assist the trier of fact. At some point all trial lawyers have a witness they want to offer as an expert who has never testified before. The witness, be it a CPA, a bartender; a contractor or whatever; can provide crucial testimony for our client's cause.

The following "20 Rules" can be reviewed with your expert while readying him or her to provide deposition testimony. Most of the rules apply to experienced witnesses as well, but it is intended as one piece of the litigation roadmap that a lawyer must give a novice witness. It is an outline of technique, not substance.

The lawyer must, of course, insure that the expert has a grasp of the relevant testimony and record. A lawyer who decides what facts and testimony are important without consulting with the expert is courting disaster. Make a point of reviewing what information is available with the expert to be sure that he or she has all the information needed.

You, the expert, MUST:

1. **Be Prepared.** Well in advance of your deposition, review all pleadings, depositions, discovery and testing that you are provided and discuss with the attorney; in plenty of time, any additional materials you might want. Avoid last minute crunch preparation.

2. **Understand The Game Plan.**
   A. Take the time to understand the theories on your side of the case as well as the other side's theories.
   B. Make sure you understand what areas the lawyer you are working with expects you to testify about.
   C. Usually, the other lawyer is trying to exhaust your knowledge and opinions so he or she understands exactly what your testimony will be at trial. He or she wants to put your testimony "in a box." Your only goal is to answer questions truthfully. Leave yourself room for further reflection on or assessment of the issue.

   For example:
   "Q: Are those all your opinions?"
   "A: They are all I can think of now, if I am asked to do additional work I may form other opinions."

3. **Maintain Impartiality.** You are an expert not an advocate. Be fair in both your preparation and testimony.

4. **Don't Overreach.** Stay within your own area of expertise.

5. **Understand The Question.** Do not answer a question you do not understand. Inform the questioner that you do not understand the question and ask that he or she reword the question.

6. **Do not Volunteer.** Answer only the questions that are put to you. Listen carefully for the question, and only answer the question. You are not obligated to, nor should you, educate the opposition about the problems with their case.

7. **Do not Exaggerate.** Do not try to improve upon the facts of the case. Getting outside the facts just lets the other side damage your credibility.

8. **Talk Clearly.** The court reporter is recording everything you say, which later may be used in Court. You should speak audibly and clearly so that the court reporter properly records precisely what you have said.

9. **Do not Guess.** If the opposing attorney indicates to you that he or she only wants your best judgment with respect to facts, but you are unable to make a reliable judgment, indicate that you cannot make a reasonable estimate and would only be guessing.

10. **Wait for Instructions.** If an attorney objects during the deposition, refrain from answering further until the matter has been resolved. The objection will be noted for the record and you will be directed as to whether an answer is required.

11. **Be ready for Frequently Asked Questions:**
    A. Dates, times and places related to the case
    B. Your residence and work history
    C. Facts leading up to, during and following any particular incident
    D. Your opinion and basis for your opinion.

12. **Listen for Problem Questions:**
    A. *Vague, Ambiguous Questions.* If a question seems vague or non-specific, then ask that the question be made more specific or that the lawyer define what be or she means to avoid confusion. If you need to clarify the question yourself, make clear in your answer that you are doing so. For example commence your answer "If you mean _____, then the answer is _____."
    B. *Leading Questions*. If the question is a leading question (a question to which the answer is suggested or for which the witness is simply ask to agree), then be particularly careful. Do not agree to the statement unless you can do so completely and without reservation.
    C. *Compound Questions.* Be careful of questions with multiple parts because the question may be designed to confuse you. Break down the question into the separate elements and state that you are going to discuss each element one at a time.
    D. *Hypothetical Questions.* A careless answer to a hypothetical question is a trap for a later date. If you are asked a hypothetical question, carefully examine the basis for the proposition of the question. To preface your response to a hypothetical question, you may answer as follows:
    "I do not agree with all of your assumptions, but assuming they are accurate, then. . ." or "I think there are additional facts that make your assumptions inaccurate. . .
    E. *Catch-All Questions*. These are questions basically asking you to state everything you know about a subject in one fell swoop. They are also "trap" questions. If you forget something at the time of the depo-

sition or earlier in your testimony at trial, then it is difficult for you to change it later. Catch-all questions and regularly used responses include:

Q: "Tell us all you know about. . ."

A: "That is all I can think of at this time."

Q. "Is that everything that happened?"

A: "That is all I can remember right now, if you know something specific that I have not discussed, please let me know."

F. *Yes or No Questions.* If you are asked a question that requires a yes or no answer, but need to explain your answer to the question, then simply answer "yes, but" or "no, but." If the questioner will not allow you to explain the "but" you will have the opportunity to clarify your answer later.

G. *Questions that Put Words in Your Mouth.* Be alert for any questions that begin with the questioner telling you what your testimony is.

Q: "Let me see if I understand you correctly . . ."

or

Q: "So your testimony is. . ."

Any question that begins this way should place you on alert. Point out any inaccurate description of what the questioner has said. Lawyers use this technique because witnesses seem to relax when they hear their testimony paraphrased and miss inaccuracies.

H. *Questions About Documents.* If you are handed a document and asked to identity it, or it has been a document previously identified, then read it carefully before answering any questions. If you need it, ask for a recess to have an opportunity to digest and read it before proceeding further. If it is not complete, accurate or relevant then those points must be made.

I. *Questions About Conversations.* When asked to give information about a conversation with someone else, be sure to specify whether you are paraphrasing it or quoting it word-for-word.

J. *Questions About Your Relationship With Your Client or the Client's Lawyer.* There is nothing wrong with meeting with the lawyer or client prior to the deposition. All experts do it. All you are being asked to do is testify to the truth on the facts you know. Be honest about your interactions with the lawyer. If there is something that is protected from disclosure, the lawyer working with you will make objections and tell you not to discuss it.

K. *Questions About the Opposing Expert*. Lawyers sometimes try to get the other side's expert to lend credibility to their own expert. An honest, response to this question is usually a noncommittal one. For example:

Q: "What is _____'s reputation as a _____?"

A: "I have never discussed _____'s reputation with anyone else. I have no opinion as to his reputation."

13. Be Careful with Unanticipated Questions. If you get "hit" with what feels like a dangerous question, take a second to think the question through slowly in your mind, answer it as best you can without caving in on the rest of your testimony.

14. Stay Alert. Take a break if you need it. If you are tired or need to go to the bathroom, just ask for a break.

15. Fix Your Mistakes. If you realize you have made a mistake, then interrupt at any time and say "It occurs to me that an answer I gave earlier may be inaccurate and I'd like to clarify that answer now." Remember—you are the expert. You know more about your position than the opposing counsel does.

16. Sustain Your Contentions. Again, you are the expert. Just because opposing counsel does not like your answer that doesn't mean you should back off your conclusion. You have nothing to apologize for. Be consistent and confident.

17. Don't Use Jargon. Explain the subject and your opinions thoroughly in layman's terms.

18. Testify Forthrightly. When necessary admit damaging facts or acknowledge that you do not know an answer.

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Writing to Win

By Steven D. Stark

Writing to Win, The Legal Writer*, by Steven D. Stark is a 283 page book on legal writing, now available in paperback, published by Random House, Inc. We have received permission of the author and the publisher to print the introduction and Part I, "The Fundamentals of Legal Writing," which consists of three chapters. The Introduction and Chapter 1 appear in this issue. Chapters 2 and 3 will appear in the Forum later this year.*

Writing to Win *is divided into five parts:*

- *I The Fundamentals of Legal Writing*
- *II The Fundamentals of Argument for All Lawyers*
- *III Writing in Litigation*
- *IV Writing in Legal Practice*
- *V Conclusion: The Real Damage of Bad Legal Writing*

Steven D. Stark is a graduate of Yale Law School. He was a Lecturer In Law for twelve years at Harvard Law School, where he gave several upper-level courses on writing. He is a former judicial law clerk, litigator, and columnist for the Boston Globe, and has given courses on legal writing to thousands of practicing lawyers.

Introduction

If you don't need a weatherman to know which way the wind blows, you don't need a literary critic to know how badly most lawyers write. You only need to turn to any page of most legal memos, briefs, judicial opinions, and law review articles to find convoluted sentences, tortuous phrasing, and boring passages filled with passive verbs. Charles Dickens was neither the first nor the last to complain about lawyers' "liking for the legal repetitions and prolixities." In fact, the term "legal writing" has become synonymous with poor writing: specifically, verbose and inflated prose that reads like . . . well, like it was written by a lawyer. Like the late Justice Potter Stewart on pornography, we know it when we see it, and we see it all the time.

Here is an example. Over a decade ago, Joel Henning, a legal consultant and writer, noted a little-publicized case. In *David* v. *Heckler,* 591 F. Supp. 1033 (E.D.N.Y. 1984), United States District Court Judge Jack Weinstein, one of the federal judiciary's more distinguished judges and better writers, ruled that bad writing in government documents violates the due process clause of the Fourteenth Amendment of the Constitution. Judge Weinstein took the highly laudable step of ordering the Department of Health and Human Services to rewrite its review letters to Medicare claimants because they were "incomprehensible" and contained "insufficient and misleading" information.

One of the sentences in the letters that so upset Judge Weinstein read:

> The amounts are based on statistics covering customary charges of an individual physician and prevailing rates by all physicians rendering similar services in a given locality.

Given the dismal level of a lot of legal writing, that hardly seems so bad. It looks especially good in comparison to this sentence which comes from Judge Weinstein's own opinion in the matter:

> Doubt as to whether this type of claim should be construed as barred by section 205(h), 42 U.S.C. §405(h), should be resolved in favor of finding jurisdiction since the availability of judicial review for constitutional questions is generally "presumed."

The point isn't simply that we might find Judge Weinstein himself in violation of the Constitution. "Whenever I read something and I can't understand it," Will Rogers said in a line that never failed to draw a laugh, "I know it was written by a lawyer." Robert D. White, in his book *Trials and Tribulations: Appealing Legal Humor,* identified these ten unfortunate characteristics of legal writing:

1. Never use one word where ten will do.
2. Never use a small word where a big one will suffice.
3. Never use a simple statement where it appears that one of substantially greater complexity will achieve comparable goals.
4. Never use English where Latin, *mutatis mutandis*, will do.
5. Qualify virtually everything.
6. Do not be embarrassed about repeating yourself. Do not be embarrassed about repeating yourself.
7. Worry about the difference between "which" and "that."
8. In pleadings and briefs, that which is defensible should be stated. That which is indefensible but you wish were true should merely be suggested.
9. Never refer to your opponent's "argument," he only makes "assertions," and his assertions are always "bald."
10. If a layperson can read a document from beginning to end without falling asleep, it needs work.

Yet legal writing doesn't have to be this way, and this book is my small attempt to try to turn things around. It's based on an advanced legal writing seminar I taught to third-year students at Harvard Law School for twelve years and continue to give to practicing lawyers and paralegals around the country.

Numerous eminent books on legal writing are already on the market, so I've tried to make this one different. First, as an attorney and a former litigator myself, I've tried to focus on the writing of lawyers, not judges. Most writers, after all, learn by emulation. Budding poets read Yeats, Eliot, and Stevens, young novelists immerse themselves in the works of Fitzgerald, Faulkner, and Austen. Law students and lawyers are the great exception; they train for a lifetime of advocacy or corporate practice by reading thousands of opinions of the sort they will never write, but few briefs or memos of the sort they will. Attorneys who can write like Cardozo or Holmes may become brilliant *judges*, but unfortunately, they are utterly unprepared for their work as *practicing lawyers*.

This book seeks to remedy that, first by providing dozens of good examples that lawyers can follow, written by other lawyers. Many of the rules I provide also come from interviews with judges and lawyers. When I practiced as a litigator and had to write a brief in, say, an administrative case, the first thing I wanted to see was a selection from a comparable brief by a Laurence Tribe or a Kathleen Sullivan. Yet there was nowhere to find such examples easily. Not all such selections, I should add, are from winning briefs—a reminder, perhaps, that even the best advocates can play only the hand they've been dealt.

Second, as in my courses, I've tried to include examples and maxims from the worlds of journalism, advertising, and fic-

tion writing. Anyone who can write a good ad can probably write a good legal argument, just as any good journalist probably knows how to compose a good statement of facts in an appellate brief. My view is that good writing tends to be pretty much the same everywhere. Sure, there are things that make legal writing different from other types of writing—especially if you have to do a lot of drafting of contracts and legislation or you are a judge crafting rules and decisions. Yet the differences tend to be exaggerated by lawyers and legal educators. Almost everything students learn in law school convinces them that legal prose is a domain unto itself. They hear their professors laud judicial opinions that often seem closer to a foreign language than to English. And unlike most other professional people, who entrust their written products to competent editors, legal academics give their articles to third-year students serving on law reviews, with the predictable consequence that no one but lawyers will read them. In fact, Harvard Summer School used to offer a course called "Legal Writing for Non-Lawyers." I guess the professor taught the students how to write pompous-sounding contracts no one can understand. I hope this book will be an antidote.

Third, I've tried throughout to deal with some of the ways in which writing and communication have been transformed in the past few decades. It's always been difficult to be an effective writer, but it has become even harder in the past twenty-five years, thanks to radio, television, and computers. Writing has changed more in recent decades than in any other period in the past few centuries. In other eras, when the pace of life was slower, writing could be more stylized and pieces longer. Now attention spans have shortened, and communicators have to get to the point far more quickly than they once did. Furthermore, radio and TV turn even the most serious commentary into a form of entertainment. Because of television and computers, readers are far more passive than they once were. They expect writing to be interesting, even if the ideas it contains are not.

Lawyers do not have to pander to this desire, but they do have to acknowledge that it exists. In school, our professors have to read our papers no matter what we write, so we grow accustomed to expounding at a leisurely pace. The real world is different: Judges and lawyers live in the same accelerated culture as everyone else, and can choose to read a document quickly—or not at all.

Thus, what made business and legal communication effective thirty—or even twenty—years ago is not exactly what makes communication good today. Dictation is less important, writing a good e-mail message is now a necessary skill. Over the years, I've even noticed a generation gap between senior and junior lawyers as to what constitutes good writing, with senior lawyers much more insistent on writing lengthy documents replete with Latinate terms. (They also tend to know the rules of grammar better, which is not a bad thing.) Though we're dealing with nuances here, I think much of the gap lies in these recent changes.

The discerning reader will notice dozens of writing "rules" scattered throughout the text. Of course, the best writers know that writing is not a dogmatic enterprise and the rules are made to be broken. The problem for those of us who have yet to achieve greatness, however, is that it's hard to break the rules effectively without knowing them. Picasso couldn't have become Picasso without learning to sketch a simple still life first.

I've attempted to make the organization of the book simple. Rather than provide dozens of pages of straight text, I've organized each chapter around a set of rules that lawyers and students can apply easily. In Part I, I deal with the problems lawyers face as writers (organizing, strengthening prose, and editing). In Part II, I address how lawyers can improve their written arguments, whether they are litigators or not. Part III treats litigation writing in all its manifold varieties (writing facts, arguments, complaints, and in discovery), as well as oral argument. Part IV encompasses the everyday writing most lawyers must do (technical writing, memos, letters, and the drafting of rules and contracts). In the conclusion, I discuss some of the philosophical reasons that lawyers have traditionally been poor writers. I've written the book so that one can read it straight through, or consult a specific chapter if one needs to write a specific type of legal document, such as a complaint. Every jurisdiction, of course, has its own idiosyncrasies. So, while I've attempted to provide general principles for legal writing, *always check* your *local rules before filing any document.*

Many of my examples of both good and bad writing were given to me over the years by lawyers and judges who were assured they would remain anonymous. In many cases, I have identified the authors of my examples and the cases in which the examples appeared. In many instances, however, I cannot do so without disclosing too much about who sent me what, or unduly humiliating the author of a shabby document. In several examples, I have changed the names of the parties to avoid embarrassing them unnecessarily. In no case is the omitted information relevant, it is the writing, not the individual, that is important.

I've also included more examples from the world of litigation than from corporate law, principally because documents such as internal memos tend to be private and privileged, while briefs are filed in a public forum. For future editions, I welcome submissions, both good and bad, in any area, from readers, the promise of anonymity applies.

One final caveat: I have tried to inject a note of practicality where necessary, especially in reminding readers how judges read legal documents in the real world. At times my views may seem a little disrespectful. Yet after years of discussing the subject with dozens of lawyers, clerks, and members of the judiciary, I think it's helpful to remind readers that judges were once lawyers, which means they suffer from all the occupational faults we have—if not more.

Like any writer, I stand on the tall shoulders of those who have addressed this subject previously. That's particularly true when you write a book based on lecture notes compiled over a decade and a half and that seem to have suggestions from half the lawyers in America attached. I've tried to be accurate and credit everyone whose ideas crept into the text, and I have also provided an extensive bibliography. To those who have given me an idea or example somewhere along the line that remains unacknowledged—including my numerous research assistants at Harvard—I apologize, and thank you again.

But enough blabbering. The place to begin the process of improvement is with the basics that confront all legal writers: organization, the rules of the road, and editing. It is to these that we now turn.

Part I
THE FUNDAMENTALS OF LEGAL WRITING

Chapter 1
ORGANIZING YOUR MATERIAL

I. THE OVERVIEW: GETTING STARTED BY LEADING WITH YOUR CONCLUSION

II. ORGANIZING YOUR WORKPLACE AROUND SEVEN RULES

1. Remember that most writing difficulties are organizational difficulties.
2. Writing is something that most people do best alone.
3. Most writers need a regular time to compose.
4. The person who does the research should do the writing.
5. Don't divide the drafting of a docu-

ment among many writers.
6. Keep a notebook and learn from other lawyers.
7. Don't dictate anything important.

I. THE OVERVIEW: GETTING STARTED BY LEADING WITH YOUR CONCLUSION

For supposedly logical thinkers, lawyers often write surprisingly disorganized prose. Ask a lawyer what he or she intends to say, and you usually get a crisp, simple answer. Somehow, though, in the process of transferring that thought to writing, the clarity vanishes. Take this opening to a brief, filed in the U.S. Court of Appeals for the Fifth Circuit and cited in Tom Goldstein and Jethro Lieberman's *The Lawyer's Guide to Writing Well:*

> Appellee initially filed a motion to strike appendices to brief for appellant on July 22, 1983. Appellant filed a brief in response, which appellee replied to. Appellant has subsequently filed another brief on this motion, Appellant's Reply to Appellant's Brief in Response to Appellee's Motion to Strike Appendices to Brief for Appellant (appellant's most recent brief), to which the appellee herein responds.

A large part of the problem here is the way lawyers organize and compose their material. Like everyone else, lawyers write in many ways. Some dictate off the top of their heads and then edit. Others ponder the matter for hours and draw up a lengthy outline. Still others discuss the issue with a colleague and try several lead sentences before finally hitting the screen or pad and dashing off a few paragraphs in a blaze of glory.

If a method works for you and you can't conceive of doing things any other way, stick with your habit. Tradition has it that Ernest Hemingway used to sharpen close to twenty pencils and then go for a walk before writing. That said, however, one method of organization has tended to work well for legal writers in the past.

First, you must have a clear idea of what you're going to say before you begin to write. Compare it to driving: If you're going to travel from New York to Washington and you get into the car without having figured out what route you're taking, you may still eventually arrive in Washington. The problem is that you may take your passengers to Albany or Providence before you finally get your bearings and head for Washington in the most direct fashion.

To get your direction straight, outlining can help. Yet not just any outline will do. Rather, before you sit down to write anything, whether it's a two-page letter or a thirty-page brief, you should ask: If you had to condense your message in two or three sentences, what would those sentences be? If the judge or reader stopped you on the street and said, "I only have about a half a minute, so who are you, what do you want, and why?" what would you say? Having figured out those two or three sentences, you're ready to write and something more. Those first few sentences should be the first paragraph of any document. *In legal writing, we always lead with our conclusions.*

Good lawyers do this all the time. Here's how one advocate appealing a criminal conviction began her brief (the names have been changed):

> The State's entire case against Max Hugo turned on Trooper Dora Clayhorn's testimony about her success in disguising herself as a college student, entering the enclosed porch of appellant's home uninvited, proceeding into his living room, and there soliciting the sale of a quarter-gram of cocaine for only $25.00. That evidence was admitted only because the district court declined to suppress it as the fruit of an unlawful search, ruling that the New York police may target an individual and invite themselves to his residence for an undercover sting operation within the sanctity of his own home without a warrant and without any probable cause to believe either that appellant was selling drugs from his home or that he was even selling drugs at all.
>
> Whether the government may roam at large in people's homes as freely as it did in this case is an issue of first impression in this Court.

Most lawyers find it terribly difficult to come up with an approximation of these initial sentences. After all, we're taught from day one in law school that nothing is black or white—everything is a shade of gray. "If you want to understand this, Your Honor," we seem to say, "please sit down for four hours while I explain to you every nuance, detail, and comma." There's no truth but the whole truth, or so we think. Moreover, the essence of an academic paper is to take a two-page idea and write about it for twenty-five pages. In law school, one way we are trained to write is like law professors composing law review articles. That's the genre, as the late Judge Harold Leventhal of the U.S. Court of Appeals for the D.C. Circuit once said, that spends thirty pages describing a problem you never knew existed and then spends fifty pages explaining why it will never be solved.

In contrast, in the real legal world, the core of effective communication and argument, at least initially, is simplification. Unless readers know right up front where you're heading and why, it's very difficult for them to follow a complicated explanation or argument, much less be convinced by it.

I understand lawyers' reluctance to commit themselves to those first few sentences. However, even though it seems difficult at first, anything can be condensed to such a summary. Take the recent U.S. Department of Justice antitrust action against Microsoft. It's complicated by many issues, and there's probably enough discovery in the case to fill hundreds of boxes. Still, if you were arguing that case for the government, you could try to boil it down to this issue: Can Microsoft use its near monopoly on one product, Windows, to force consumers to take another, integrated product they may not want?

Or take Herman Melville's *Moby-Dick*. Sure it's long, but essentially it's a novel about a group of sailors from Massachusetts who chase a giant white whale, eventually find it, and harpoon it while Captain Ahab gets chained to it. I know Melville would be terribly upset with such a condensation, yet even this one sentence gives us a rough sense of the novel.

What we're doing here is similar to what journalists are supposed to do when they apply the "pyramid style" to a story, leading with who, what, when, where, and why. Think of it as an upside-down triangle.

After the first paragraph, the reader has gotten, say, 50 percent of the meaning; after the next paragraph, another 20 percent, and so on with diminishing returns until the story finishes.

Take an example from your own legal experience. When you read a case in the bound legal reporters, undoubtedly you look at the headnotes first, They give you a brief idea of what the case means, which makes it easier to read on. By leading with your conclusion as you write, you give your readers a similar set of headnotes.

Why is it important for legal writers to lead with their conclusions? There are four main reasons.

It's more convincing. Basically, writers have two ways to present an argument or explanation to a reader. Under the first method—the one lawyers usually use—you lay out your evidence or examples and then draw a definitive conclusion at the end. In contrast, using our recommended second method, you tell the reader the bottom line briefly up front and go on to explain how the evidence or examples support this conclusion.

This is precisely what University of Minnesota Law School professor Judith Younger did in an excellent *amicus* brief

filed in the Minnesota Supreme Court in the case of *In Re the Marriage of McKee-Johnson v. Johnson,* 444 N.W.2d 259 (1989). She began:

> I submit this brief at the invitation of the Court (Order of Dec. 1, 1988). It deals with a single issue: the meaning of Minn. Stat. §519.11. The Court of Appeals held that the statute precludes antenuptial agreements dealing with marital property. That holding is wrong. The language of the statute, its legislative history, and the failure of the legislature to repeal Minn. Stat. §518.54 (5)(e) all support the opposite conclusion, that is that antenuptial agreements dealing with marital property are still permissible in Minnesota if they comply with the requirements set forth in §519.11 and the common law. If the Court of Appeals' interpretation of §519.11 is allowed to stand the usefulness of antenuptial agreements in Minnesota will be severely diminished, the freedom of Minnesota couples to contract will be impaired, and Minnesota law will be inconsistent with that of most other states.

You can see that this second form of argument or explanation is far more convincing and understandable to a first-time reader. After all, each argument now seems to head in the same direction. In contrast, with the first method, you have to read the analysis once to see what it means and then several more times to see if it makes sense. Legal arguments or explanations should not be like an O. Henry short story, where you get to page 19 and suddenly exclaim, "Now I know what he meant—what a surprise!" Yet legal documents frequently read in just such a way because they back into their main points.

Of course, lawyers weren't born backing into their conclusions. The main culprit is the way they are traditionally trained to write and think in law school. From the beginning, law students are taught to think like judges, using the "IRAC" method: divine the Issue (I), then the Rule (R), then the Analysis (A), and finally the Conclusion (C). Naturally, this forces them to get to the bottom line at the end. As we'll discuss in Chapter 7, on legal argument, it's far better to present your Conclusion (C) first, then a brief statement of the Rule (R), then an Analysis (A) of the facts, and finally your Cases (C). Use "CRAC" (Conclusion, Rule, Analysis, Cases), not "IRAC" (Issue, Rule, Analysis, Conclusion).

You've probably heard the truism "First impressions leave the strongest impressions." Like all truisms, that's true. It's reminiscent of a story old lawyers like to tell about the late Judge Henry Friendly of the U.S. Court of Appeals for the Second Circuit. "I've got five arguments I'd like to make," a lawyer began in oral argument. Judge Friendly put up his hand. "Just give me your best one," he said. That's the way good judges and lawyers think: They want the key information in the beginning, and it's important for you to give it to them.

Thus, if you're writing a letter or memo and begin a middle paragraph, "Most important. . ." you've written a bad letter or memo. If it's "most important," put it first; don't bury it.

It's easier to read for the first time. As lawyers, we often get too close to our material. We've been living with it for months, sometimes even years, so we forget what it's like for someone else to read about this unfamiliar matter. Forcing yourself to condense your material to your conclusion and then explain further puts you in a mode of explication where you don't lose the forest for the trees but you also don't leave out key facts that a first-time reader needs to understand the matter.

A hasty or dimwitted reader can still understand it. In law school, we often get the impression that judges or attorneys will carefully savor each sentence we write. Most lawyers know better. They understand that judges and lawyers often read our submissions while they're on the commuter train or trying to cook dinner for their children or watching *ER*. Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit estimates that he has to read 3,500 pages of briefs a month. If you don't get to the point quickly and convincingly, chances are that your readers are not hanging around until you do.

What's more, let's be honest: Some judges and lawyers aren't terribly bright. These readers are probably not going to understand much of what you say under any circumstances. If you lead with a simple statement of your conclusion, at least they get the most important information.

So for all these reasons, lead with your conclusion. There's a saying in the military: Tell them what you're going to tell them; tell them; tell them what you just told them. The same principle applies here. If you can relate the argument in a way that hooks the reader, so much the better. That's what Andrew L. Frey and Evan Tager, two noted Washington lawyers, did in this recent case in Arkansas trial court:

> There is an old riddle: Which weighs more, a ton of feathers or a ton of bricks? While many find the question deceptive at first, the correct answer, that a ton is a ton regardless of what is being weighed, becomes irrefutably clear once explained. But in enacting and now defending the NR exemption, the State has managed to get the answer wrong—a ton of soybeans or chicken feed is treated as though it weighs less than a ton of baked beans or dog food.

The problem with a lot of legal writing is that it meanders for pages before quickly coming to a definitive conclusion in the closing moments. It's as if you got into your car to drive to Washington from New York and cruised around for several hours before finally realizing how to get on the New Jersey Turnpike and then speeding at 125 mph. If you want to write in that fashion, so be it. If you do, however, you should cut about the first two thirds of everything you write. We readers don't want to sit in the car while you're figuring out what to do. We just want to get to the destination as quickly as possible.

II. ORGANIZING YOUR WORKPLACE AROUND SEVEN RULES

The law, William Prosser once wrote, is "one of the principal literary professions. One might hazard the supposition that the average lawyer in the course of a lifetime does more writing than a novelist." Yet we lawyers don't usually think of ourselves as professional writers. Once we do, it helps to approach writing as other seasoned experts do, by applying the following seven maxims.

1. Remember that most writing difficulties are organizational difficulties.

Writing is hard for everyone. It's one key way we present ourselves to the world; a certain amount of apprehension comes with the territory.

Sometimes, however, that anxiety can be paralyzing. This may seem over simple, but if you think you have writer's block or are taking too long to write, the problem is probably that you're spending too much time writing (or trying to) and not enough time thinking.

Reflection is a key part of the composition process. Novelists don't take long daily walks because they're all trying to walk off hangovers. They understand as professional writers that writers have to work through what they have to say, both consciously and subconsciously. Yes, lawyers are busy, but the more you try to short-circuit the process of reflection, the harder you are likely to make it for yourself.

As a former litigator, I understand the problem. You tell yourself, "If I can just get this committed to paper, I'll feel so much better about myself, and I can

change it later!" Yet you know what happens: Ten other things crop up and you don't have time to make changes. Moreover, it's human nature for writers to fall in love with their own prose, first draft or not. Word processors and computers have been wonderful boons to writing because they make it so easy to edit, but the new ease of revision has also encouraged many legal writers to begin drafts before they're ready—and to be less critical of their work than they should be.

I've also noticed two other odd notions circulating among attorneys. "I was taught in grammar school to use the writing process as a voyage of self-discovery, to find what I think," one lawyer once told me. That may be true in the more leisurely world of fiction writing, but not in this endeavor, The legal universe is a highly competitive, fast-moving world where readers prize well-planned, concentrated bursts of information. Another said, "If I'm writing a brief, I can bill that to a client, but if I'm thinking about what I'm going to write, I can't bill that." That lawyer was wrong. Clients should be paying you to think as well as to write. Do so.

2. Writing is something that most people do best alone.

The solitary act of composition runs against the group nature of most legal practice. Lawyers tend to work on briefs or memos in teams. They attack problems the way Ulysses Grant fought the Civil War—by throwing divisions at them.

Consultation with colleagues in the formative stages and in editing can be of great use. When crunch time comes, however, your coworkers can be distracting. The more you allow yourself to be interrupted or to take calls, the harder you're going to find it to get started and keep going.

3. Most writers need a regular time to compose.

The process of free association that makes writing effective is very different from the act of "thinking like a lawyer." Thus, most good legal writers need to create a routine in which they establish regular periods of isolation—say, every morning from ten to twelve, when they can go to a library without phones. Writing is like exercise: The more you make it part of an everyday schedule, the easier it becomes.

4. The person who does the research should do the writing.

Lawyers frequently have others do their research. It's as if two reporters were sent to the Middle East to spend weeks researching the continual crisis there. On their return, you wouldn't debrief them and then write the report yourself; you'd ask them to present their own findings. While discrete questions can be assigned to others, the process of research is usually inseparable from the process of writing, because we use our research to determine not only *what* we will say but *how* we will say it.

It's true that research is time-consuming. For most writers, however, that expenditure of time comes with the territory. When Leo Tolstoy set out to write *War and Peace*, he could have looked at the size of the project, hired thirty researchers, and, like many senior partners, spent his days meeting with clients and agents. If he had done that, his final text wouldn't have been the *War and Peace* we know and love, it would have been an inferior novel. So it goes with legal documents. Writing quickly and writing well tend to be contradictory propositions.

5. Don't divide the drafting of a document among many writers.

Lawyers seem to think they can magically split the work of writing among many with no damage to the final product. It's no surprise that in the overwhelming majority of such cases, the final draft has no one style.

Of course, some people are terrific researchers, ghostwriters, and speechwriters. Theodore Sorensen worked so well with President John F. Kennedy that after a while it was often hard to discern where Sorensen stopped and Kennedy began. Yet it took years to forge that relationship and its mutual style. If law offices insist on parceling out research and encouraging ghostwriting, they should find lawyers with compatible styles and have them work together for years so they learn one another's styles and work habits.

In my travels, I've noticed a sentiment in law firms that writing should be left to associates while the partners supervise. Unfortunately, the same attitude seems to pervade the judiciary, where most of the writing is left to the clerks. This makes little sense, though I understand the pressure judges must feel when they have to turn out dozens of opinions a year in complex matters. Yet in the rest of the culture, people recognize that the older one gets, the better one becomes as a writer. The owners of the Globe Theatre didn't go to William Shakespeare when he turned thirty-five, make him a partner so he could spend his time meeting with rich contributors, and take him out of the playwriting business. They understood that he still had his best years ahead of him. If litigators and judges aren't writing their own briefs and opinions—which is, after all, the most important work they do—what message does that send?

Younger lawyers and clerks may not be in a position to change the way the work they do gets parceled out. If nothing else, though, they should understand that any form of literature that is composed as most legal documents are will turn out to be awful. Treat writing as a commodity rather than a craft, and the results are predictable.

6. Keep a notebook and learn from other lawyers.

If most writers learn by emulation, law students are taught early on to model themselves on judges. That's a mistake. It's trite but true that the task of a judge is very different from that of a lawyer. And the differences surface in the writing of each. The job of a litigator is to persuade a judge or a group of them; the job of a judge is to decree, and to persuade a very different group of readers (lawyers, litigants, other judges) more subtly, without appearing to be persuading. The lawyer traffics in conflict, the judge in solutions. The lawyer writes for a small or even a single audience; the judge, in theory, writes for a larger one. Yes, Brandeis should be required reading for every law student. But it is Brandeis the advocate, not Brandeis the judge or law-review author, who ought to be the role model. Besides, most judges are very poor writers, in part because they farm out much of what they have to write to clerks who don't know what they're doing, and in part because no one ever gives them the editorial feedback they need to improve.

As the poet once put it, a good artist borrows; a great artist steals. One of the great deficiencies of legal education—and there are many—is that most students still graduate without ever having read more than a smattering of good writing by practicing lawyers. It would be hard to find a business school professor who hated capitalism and money, or a medical school professor who had never met a patient. Yet the elite law schools are full of professors who have never practiced law a day in their lives and actually look down on those who do.

Practicing lawyers who keep a notebook including impressive documents they have read can start to remedy that. Like other professional writers, lawyers ought to observe carefully what their colleagues are doing and learn to incorporate their better ideas. While you don't want to plagiarize, keeping a regular written record of phrases or approaches that others have used successfully is one of the best ways to learn how to improve your writing.

7. Don't dictate anything important.

Twenty years ago, almost all lawyers needed to dictate and dictate well.

Though it took years to develop the skill, the process of drafting and revising in longhand or on the typewriter was just too time-consuming.

Now, with computers and word processors, it's a different world. Most recent law school graduates can type on a keyboard almost as fast as older lawyers can dictate. By doing so, they're several steps ahead of the game. Many judges have told me that they can spot a dictated brief immediately, and they're right. Writers who dictate repeat themselves, often using nearly identical phrasing over and over. Sometimes long quotes are stuck in the text. The style tends to be hyperbolic.

What's more, very few of the professional writers I know dictate their important material. They say they need to see a document as they write it so they won't repeat themselves. These writers also describe the process of writing as being a bit like taking dictation, not giving it, as they listen to their inner voice. Constantly turning a dictaphone on and off interrupts and destroys the creative process.

There are still many good uses for dictation. I'd use it for short letters, memos to my files, and organizing my thoughts at an early stage. A tape recorder can be a substitute for the old reporter's notebook. However, unless you've been at it for years, avoid dictating anything important, lengthy, or for use in litigation. If you do dictate, you must edit carefully and extensively, along the lines discussed in Chapter 3.

Over the years I've run across firms where the associates are told, "You must dictate everything. It's the job of secretaries to transcribe it." This is a ridiculous notion, with roots in the old class system and the idea that banisters and solicitors were to give instructions to their scriveners, who then wrote them down. Even if the practice made sense two centuries ago, it doesn't any longer.

Tom Clancy and Stephen King may not be Americas greatest writers, but they are productive, turning out hundreds of pages a year. If, however, you put them in the conditions under which most lawyers try to write—grabbing a few minutes on the run, with the phone constantly ringing, their days scheduled to the last minute, no role models—they wouldn't be able to get much writing done either. The more you can try to remember the precepts outlined above, the easier you will make it for yourself as a legal writer. ■

Guest Editorial

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reform" at the Federal and State levels, in order to provide cover for unconscionable acts such as that of Ford/Firestone at the expense of all consumers.

These powerful interests continue to push for three major changes in our Civil Justice System to avoid accountability. First, they seek caps on non-economic damages. Non-economic damages are those losses other than income or out-of-pocket expenses. Caps would have the greatest effect on such losses as disability, amputation, paralysis, blindness, or the wrongful death of a child or non-income earning spouse. Non-economic damages are generally the greatest part of damages suffered by children, homemakers, or the elderly. This denial of justice to families allows Ford/Firestone and others like them, to escape the full consequence of their actions.

Second, big business and insurance interests are pushing for "loser pay" provisions in tort "reform" proposals. Our Civil Justice System allows individuals to challenge big corporations such as Ford/Firestone, but without any guarantee of recovery. Our system works because our contingent fee system allows victims to press their legitimate cases without incurring attorneys' fees unless the case is won. A "loser pay" system would discourage those wrongfully injured or killed from pursuing and holding accountable those responsible for their acts. How many of the families of those injured or killed by Ford/Firestone would have taken on these billion-dollar corporations under a "loser pay" system? If left unchallenged, what would prevent these corporations from continuing a cover-up as to their deadly defective products?

Third, the biggest effort to control the Civil Justice System is an attempt to curb punitive damages. Although punitive damages are rare, the mere threat sends a powerful message that any deliberate disregard of public safety will not be tolerated. As facts come out on Ford/Firestone, it appears that company officials may have known years ago of the lethal defect that existed in their products. If they consciously withheld that information from consumers and government regulators, why should they not face punitive damages? If punitive damages are eliminated or kept to an arbitrary meaninglessly low level, these two companies with their huge revenues and profits face no deterrence to their actions.

Our Civil Justice System, with access to the courts and juries, provides a recourse for injustice. This past presidential campaign saw George W. Bush tout his stand on tort "reform". He openly speaks for big business and insurance interests when it comes to the Civil Justice System. As an advocate for capital punishment, however, he trusts a jury to assign the death penalty in a criminal case. However, he does not trust a civil jury to decide that Ford/Firestone's deliberate actions were so egregious in the death of mothers and children, that they too must face serious punishment. He, and others, must eventually recognize that it is the ability of individuals and families to bring suit in such cases as Ford/Firestone that brings ultimate regulation for irresponsible behavior. Through the pursuit of justice in our Civil Justice System, those responsible are held accountable, and the standards for our public safety are affirmed.

For trial lawyers, the Ford/Firestone tragedy affords us an opportunity to reveal in part the true agenda of the tort "reformers". An agenda aimed at severely weakening the Civil Justice System to avert accountability for unconscionable behavior. As we speak out to oppose their rhetoric, let us add the words Ford/Firestone to our message. These words bring context to the subject, and help sharpen the focus on the real issues, accountability, justice, and public safety. ■

The Novice Expert: 20 Rules for Deposition Testimony

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19. **Be Courteous to All.** Show respect for the court, the parties, the court reporter as well as the opposing counsel.

20. **Remember You Are The Expert.** Be self-assured; confident and consistent, but not arrogant. Never argue with opposing counsel. If opposing counsel is badgering you, do not strike back, but do not let him put words in your mouth, twist your testimony or get you to make unreasonable admissions. ■

CTLA Miscellany

Newsworthy items of general interest

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The White House and The Bar

This editorial appeared in the New York Times *on March 23, 2001.*

President Bush has decided to end the American Bar Association's advisory role in the selection of federal judges. It is a misguided decision. The A.B.A.'s counsel has served the nation well for half a century. The decision also seems wildly at odds with Mr. Bush's campaign pledge to avoid ideological litmus tests in the appointment of judges. Finally, it could well backfire by making judicial confirmation battles more politicized than they would be without the A.B.A.'s professional seal of approval.

In 1953 President Dwight D. Eisenhower asked the lawyers' group to review the qualifications of nominees to the federal bench. His aim was to ensure that patronage would not lead to the lifetime appointment of mediocre judges. Every administration since then has benefited from the A.B.A.'s confidential role in evaluating potential nominees before they are named. The bar's stamp of approval also gave people confidence that federal judges were highly regarded members of the profession.

Mr. Bush's removal of the A.B.A. from the screening process is another signal that he appears willing to grant the most conservative elements within his party, led by Attorney General John Ashcroft, control over judicial matters. Right-wing Republicans have long made the selection of conservative judges one of their chief objectives.

Federal judges are the primary guardians of Americans' constitutional rights, and it will now be incumbent upon senators to guard against efforts to pack the court system with ideologues intent on eroding these rights. Because the retirement of a single senator could give Democrats a majority in that chamber and control over the confirmation process, the White House is eager to fill as many of the approximately 100 vacancies on the federal bench as quickly as possible. Conservative jurists, many affiliated with the Federalist Society, are overseeing the selection of judges within the White House and at the Justice Department. In that context, an additional layer of professional peer review from the A.B.A. could be a nuisance to an administration whose chief criterion seems increasingly to be ideological purity.

The Federalist Society and other conservatives have long argued that the bar Association is a liberal interest group, undeserving of its unique role. They point to A.B.A. positions on issues like the death penalty, abortion and affirmative action to bolster their argument. And Republicans were outraged that 4 of the 15 members of the A.B.A.'s Standing Committee on the Federal Judiciary found Robert Bork "not qualified" to serve on the Supreme Court in 1987, even though 10 voted him "well qualified."

Though the Bork vote still rankles conservatives, politics has played little role in the committee's deliberations, which have focused almost entirely on the integrity, professional competence and judicial temperament of hundreds of lower-profile nominees to the federal bench. Just as President Dwight D. Eisenhower intended, the A.B.A.'s involvement has served as a deterrent to the nomination of undeserving judges.

It is a shame that the White House is doing away with this confidence-building safeguard.

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Litigation Limits Provide Test of Lawmakers' Will

This article appeared in the Daytona Beach News-Journal *on February 14, 2001.*

The 1999 "reforms" of Florida's civil-litigation system amounted to little more than a giant goody bag, bursting with protections for businesses who feared lawsuits.

In one fell swoop, the Legislature—abetted by Gov. Jeb Bush—stripped Floridians of many important protections by limiting their ability to sue and collect damages.

The bill covered so many topics that it's impossible to list them all. Among the worst: A 12-year limit on product defects, tight restrictions on the use of punitive damages to control bad corporate behavior and special protections for car-rental companies and airplane manufacturers. The motive—as some Republicans were candid enough to admit—was pure political payback for big-business support in the 1998 election campaign that gave the GOP control of House, Senate and governor's mansion.

Circuit Judge Nikki Ann Clark of Tallahassee did the right thing last week when she knocked the 1999 law off the books, and she did it for the right reason, too. Florida law requires that legislative bills address one subject only—a measure that's been merrily ignored by lawmakers ever since it passed. Many have mastered the art of sliding anti-consumer language or special-interest favors into otherwise worthy legislation.

Clark's ruling is a devastating blow to the current way of doing business in Tallahassee—if lawmakers pay attention. At the least, her ruling forces this debate into the open where it belongs.

Representatives of the state's biggest business lobbies greeted the decision with the verbal equivalent of a yawn, saying they would simply push the same restrictions through in the coming legislative session, broken into separate bills. With a Senate and House packed with newcomers, and leadership that is, if anything, more friendly to business interests, their confidence seems to be justified.

But there's a reason that House leaders fought so hard in 1999 to roll all the provisions into one bill: Many of these individual measures won't stand the light-of-day test. Even Bush admitted that he was troubled by some of the provisions of the bill.

Most importantly, lawmakers will have to justify—on an individual basis—how each of these protections will make the lives of Floridians better and improve this state's tax base. They will be hard arguments to make.

This is an issue Floridians should pay attention to in the coming session, because it provides a bright-line test for House and Senate leaders. Stripped of the political cover and balance provided by the huge and rambling 1999 bill, are they willing to enact such definite anti-consumer measures on their own?

If the answer is no, Florida's consumers win. If it's yes, they will have, at least, learned an important lesson about their lawmakers' real priorities.

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Juries, Their Powers Under Siege, Find Their Role Is Being Eroded

By William Glaberson

This article appeared in the New York Times *on March 2, 2001.*

The role of the American jury, the central vehicle for citizen participation in the legal system, is being sharply limited by new laws, court rulings and a legal culture that is moving away from trials as a method of resolving disputes.

At the heart of the trend, some experts say, are fundamental questions about whether jurors who return huge awards and sometimes clear people who seem to be guilty are up to the task that has been assigned to them for centuries.

"We as a society have to decide: Do we want to have our justice system essentially run by experts—lawyers and judges—or do we want to retain a role for the jury?" said Valerie P. Hans, an expert on juries who is a professor at the University of Delaware.

Increased plea bargaining, tort-reform laws limiting jury awards, and Supreme Court rulings giving judges new power to screen the evidence presented to jurors are among many forces marginalizing the role of the jury, some lawyers and judges argue.

Court statistics show, for example, that jury trials are a rapidly shrinking part of federal court caseloads , with only 4.3 percent of federal criminal charges now ending in jury verdicts, down from 10.4 percent in 1988. The number of federal civil cases resolved by juries has also dropped, to 1.5 percent from 5.4 percent in 1962.

And those awards that civil juries do make are being overturned with greater frequency. Federal appeals courts are reversing certain types of civil jury awards twice as often as they did a few years ago.

Meanwhile, the explosive growth of private arbitration as an alternative to the courts for consumer, workplace and business disputes is channeling tens of thousands of cases away from jury trials annually.

This trend is likely to continue. Because George W. Bush made what proponents call "reform" of the civil justice system a priority when he was governor of Texas, some legal experts predict that his new administration will accelerate efforts to limit jury power.

Although jury trials in modern times have long accounted for a small part of the legal caseload, judges and court experts say the diminishing role of the jury in state and federal courts reflects rapidly changing attitudes about how much power jurors ought to have. The judicial system's commitment to the jury as an institution, they argue, is being tested as never before.

"Why have a jury at all?" one former juror, Michael McCarthy asked bitterly in an interview.

Mr. McCarthy said he and his fellow jurors were outraged in December when a Houston judge told them that Texas' tort-reform law would require a reduction of more than $100 million in an award they had given the family of a pipefitter killed in an industrial accident at a Phillips Petroleum plastics plant in 1999.

The worker, Juan Martinez Jr., died when highly volatile chemicals exploded in a 500-degree fireball. The jury concluded that the accident had resulted from lax safety measures at the complex, which had experienced three explosions over 12 years, including one that killed 23 workers and injured 132 others in 1989.

Not everyone is critical of the trend limiting the role of juries. Some legal scholars, judges and business lawyers say that reining in juries is a necessity in an overloaded legal system. Others argue that juries must be controlled to limit excesses, and curb prejudices like hostility to big corporations.

"Not every legal rule that constrains a jury's discretion is an attack on the jury system," said David F. Levi, a federal district judge in Sacramento. "It may be a limit on raw power, but that may be what we need to have a fair system."

Among appeals judges, the growing skepticism of juries is reflected by their increasing willingness to overturn verdicts. In an analysis prepared for this article, Kevin M. Clermont and Theodore Eisenberg, law professors at Cornell University, found that federal appeals courts reversed civil jury awards in injury and contract cases less than 20 percent of the time in 1987. Over the next decade, reversals rose to nearly 40 percent.

For those jurors who do decide cases, the experience can be mystifying. It can also be embittering.

Last spring, Tyrone N. Neal, a retired government printing worker, served on a case in which a young man had lost a leg because, he claimed, of improper care in a Maryland hospital. The jury Mr. Neal was on awarded the man $5.4 million.

When he learned during an interview that a judge had reduced the award to $515,000, Mr. Neal was disturbed. "It's like a slap in the face," he said. "We get your opinion and then we just go decide it our way."

McCarthy, the Houston juror, said his panel had concluded that only a big verdict would protect workers by showing the managers at Phillips Petroleum that there was a large cost associated with the repeated worker deaths. The award was $117 million, including $110 million in punitive damages, which Phillips' lawyers argued was excessive. They also said the complex was making strenuous efforts to improve safety for its workers.

The judge told the jurors it would almost certainly be cut to $11 million under Texas laws that sharply limit punitive damages.

"I felt betrayed," Mr. McCarthy said. "You think you've done a good service to the community and then you find out all your work has come to nothing."

Because the jury occupies a near mythical spot as the centerpiece of the justice system, its denigration has been discouraged by lawyers and judges in the past. Americans imported the vehicle from English common law, and it has long allowed for the expression of community values in the legal system.

But in recent years, events like the jury acquittal of O. J. Simpson on murder charges in 1995 have helped broaden the debate over the proper role of the jury.

In many states, advocates of tort reform have turned their cause into a populist political rallying cry, with billboards and radio advertising attacking "runaway juries." Some judges have spoken publicly about their skepticism of the jury system.

Last spring, John E. Babiarz Jr., a Superior Court judge in Delaware who headed a state jury study, made a speech proposing that the use of civil juries be sharply curtailed.

"It is simply impossible" Judge Babiarz said, "to achieve fairness when each case is decided by a different group of 12 people who are called to serve on a civil jury perhaps only once in their lives." In a new survey of 594 federal trial judges nationally, 27.4 percent said juries should decide fewer types of cases. The survey, conducted by The Dallas Morning News and the Southern Methodist University School of Law, is to be published this spring in the school's law review.

Some scholars argue that appeals judges are now substituting their own opinions for those of jurors.

In an age-discrimination case last spring, the Supreme Court reinstated a

jury verdict in favor of a man who said he had been dismissed from his job after being told he was "too damn old." A federal appeals court had overturned the verdict. The Supreme Court, in turn, overruled the appeals court, saying it had "impermissibly substituted its judgment concerning the weight of the evidence for the jury's."

But the Supreme Court itself has done as much as any court in the country to accelerate the trend. In two major rulings in 1993 and 1999, the justices directed trial judges to screen technical and scientific testimony before it gets to jurors.

The limits on juries are being instituted not only by courts but also by Congress and state legislatures. In a series of articles last spring, The Dallas Morning News found that, often through legislation, 41 states imposed some limits on the types of cases juries could hear. Included are rules banning jury trials dealing with issues like consumer fraud.

Some judges say jury trials are a shrinking part of the legal system because lawyers distrust them. They ask for jury trials less often and, in turn, lose their ability to argue before ordinary people.

"You have a bar that is increasingly lacking in jury skills, and they distrust juries so they stay away from them," said Judge Patrick E. Higgenbotham of the United States Court of Appeals for the Fifth Circuit, which hears cases from Louisiana, Mississippi and Texas.

In the Maryland hospital case, two of the jurors said in interviews, the jury spent considerable time trying to find an amount that would compensate Gilford V. Tyler Jr., the man who had lost his leg as a result, the jury found, of the hospital's negligence. A spokeswoman for the hospital, Prince George's Hospital Center, said Mr. Tyler had appropriate care.

The judge, Thomas P. Smith of Circuit Court in Prince George's County, agreed that the jury's verdict had been fairer than the reduction to the $515,000 the hospital's lawyers demanded.

"The thought that the injuries sustained by plaintiff are in any way compensated by $515,000," the judge said in a hearing, was "abhorrent."

But in January he ruled that Maryland law required him to reduce the jury award to the lower amount. Mr. Tyler's lawyers are appealing to Maryland's highest court, claiming the law is unconstitutional.

In the meantime, the jurors who heard Mr. Tyler's case are wondering whether the legal system values the work they did.

"In one sense," said Elizabeth Pearson, a retired postal worker who was on the jury, "it does seem like a waste of time."

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Let The ABA Evaluate Nominees

This editorial appeared in the Hartford Courant *on March 26, 2001.*

President Bush is making a mistake by saying he won't ask the American Bar Association to evaluate potential federal court nominees, a practice that began under President Dwight D. Eisenhower almost 50 years ago.

Every president, Republican and Democrat alike, since Mr. Eisenhower has recognized the value of having an independent panel of lawyers rate candidates on the basis of integrity, judicial temperament and competence. Professional peer review helps to sustain public confidence in the federal bench.

Some conservatives close to Mr. Bush have criticized the role of the ABA, citing its membership's approval of abortion rights and its call for a moratorium on capital punishment.

Such positions aside, the ABA's 15-member judicial evaluation committee is an independent body completely separate from the bar association. Committee members are prohibited from all political activity. Moreover, they are told not to consider a candidate's ideology in the evaluation process.

Some conservatives still are smarting over the 1987 Senate defeat of Robert Bork, who was nominated to the Supreme Court by President Ronald Reagan. Although the majority of the ABA's review panel rated Mr. Bork as qualified, four panel members found him unqualified.

There's no evidence, however, that the bar committee has skewed its recommendations to favor liberals. One could easily conclude that the opposite may be true. Since 1960, presidents have nominated about 2,000 people to be federal judges. The bar committee found 26 of them to be unqualified. Of those, 23 were names submitted by Democratic presidents.

Rather than eliminate partisan prejudice in the vetting process, Mr. Bush will foster it if he relies on a narrow group of conservative Republicans in the Justice Department and right-wing groups for judicial advice. It sounds disingenuous when the White House says that the ABA will be able to comment on nominees, just like anyone else, once their names are sent to the Senate.

Sending names to the ABA's evaluation committee beforehand has given the American people a sense that, for the most part, nominees to the federal court system are qualified for the important role they will play in dispensing justice and interpreting the U.S. Constitution. Mr. Bush has offered no convincing reason why that lofty tradition should end.

* * * * *

Women Are Close to Being Majority of Law Students

By Jonathan D. Glater

This article appeared in the New York Times *on March 26, 2001.*

Women are expected to be the majority of students entering law school this fall, a development that is already leading to changes in the way law is practiced. And the movement is ultimately expected to help propel more women into leadership positions in politics and business.

Women, who made up about 10 percent of first-year law students in 1970, accounted for 49.4 percent of the 43,518 students who began law school last fall, according to data to be released soon by the American Bar Association, and that rate of growth is expected to continue. As of March 9, more women than men had applied for admission to law schools this fall.

That trend will affect the way schools operate—perhaps making classes more teamlike and less adversarial, for instance—and change somewhat the way law firms operate, lawyers and professors said. But even more significant, as the number of women with law degrees grows, they may be more likely to pursue careers in business and politics where legal training has often been a springboard to positions of power.

"Women may go to medical school, and that's good for a variety of reasons," said Carol Gilligan, a Harvard University psychologist who teaches at New York University Law School. "But that doesn't affect the structure of our society."

Several factors are driving the increase, which is seen at very selective schools like Yale as well as at public institutions like the law school at the City University of New York. While certainly seeking the security, income and prestige that have long drawn men to the law, women are also reacting to the decline of real and perceived barriers in the profession. It used to be that many judges

would not hire women as law clerks, for example, and major law firms would not recruit them.

Some important obstacles still remain. Despite the increasing number of women graduating from law school and passing bar exams, the proportion of judges and partners at major law firms who are women has not kept pace. In New York, for example, where women represent more than 41 percent of the associates at law firms, fewer than 14 percent of the partners are women, according to the National Association of Law Placement.

Women have made serious inroads in other professional schools—notably medicine, where they accounted for about 46 percent of the students who started last fall. They also dominate schools of education and veterinary medicine. And women have moved in larger numbers into business schools, where, according to the International Association for Management Education, they accounted for 38 percent of M.B.A.'s awarded in 1998, the most recent data available.

But far more people attend law schools, and given their low starting point, women have made significantly greater advances there—women were just 4 percent of first-year law students 40 years ago.

There has been "a slow changing of assumptions about what women should consider doing," said Jean K. Webb, director of admissions at Yale Law School, where women accounted for a majority of the entering class for the first time last fall. Women were 46 percent of the entering class at Harvard Law School last fall, 44 percent at Stanford Law School, 51 percent at Columbia Law School and 50 percent at New York University School of Law.

More women in law school classes may lead professors to re-evaluate how they teach, to encourage more participation. Changing the adversarial environment fostered by some classes may better prepare all students for the real-world practice of law, according to Lani Guinier, a professor at Harvard Law School, because today most lawyers do not go to court and they work closely with other lawyers instead of practicing alone.

Law firms have already made some adjustments to the increasing numbers of women associates, who are quicker than men to raise concerns about balancing work and family, partners at several firms say. For example, when Judith Thoyer became the first woman to be a partner at Paul, Weiss, Rifkind, Wharton & Garrison, a large New York firm, in 1974, the firm had no flex-time or part-time schedules. Now, she said, it has adopted both.

But some experts worry that the greater number of women in the law may lead to a loss of prestige for the profession, if it becomes a "pink-collar ghetto."

Deborah Rhode, who teaches at Stanford Law School, said women receptionists at law firms are in such a ghetto. "Receptionists at law firms used to be men," and were accorded more respect, she said.

Lawyers are divided about when women may come closer to parity in the judiciary, on law school faculties, or in law firm partnerships. Of 655 federal district court judges, only 136 are women, according to the Alliance for Justice, a Washington-based organization for nonprofit advocacy groups. Women are about the same share—20 percent—of full law school professors, Professor Rhode said.

One result is that many women lawyers now serve as in-house counsels at companies. About 37 percent of the lawyers belonging to the American Corporate Counsel Association in 1998 were women. Others leave to work for the government or for public-interest groups, but statistics are hard to come by.

* * * * *

Praise for Albert Finney's Role in Erin Brockovich

The following is an excerpt from an article by Ron Rosenbaum in the New York Observer *on 3/19/01, which has been called to our attention by Dale Faulkner of New London.*

Yes, *Erin Brockovich* is slick popular art, but it's also slick *populist* art. It doesn't have the hand-held effects that film-buff types swoon over in *Traffic*, but *Erin Brockovich* dares to make a case for the single most despised pariah group in America, a group that all right-thinking Americans are taught—by talking heads, late-night comics and the specious anecdotes served up by corporate propagandists—to sneer at: personal-injury lawyers.

The film doesn't make the case that personal-injury lawyers take on corporate criminals for noble, idealistic reasons (the way, say, *A Civil Action* did). That's what's so great about Mr. Finney's funny, nuanced, badly be-rugged portrayal: He embodies the paradox that one can do good even when acting out of self-interest. It's a concept too complex for those who parrot the anti-trial-lawyer line peddled by the corporations who have the most to hide, the most to lose and the most to fear from the piranhas of the personal-injury bar—and the most to gain from making the piranhas pariahs.

I mean, do the people who unthinkingly mouth the anti-trial-lawyer platitudes actually believe they can depend on corporate-bought *governments* and bureaucrats to protect them from corporate power? Or that environmentally sensitive mutual funds will convince corporations to do the right thing? It's sad the way even those on the left fall for the specious anecdotes that corporations promote to blacken the name of their most dangerous opponents. As the outspoken and much-feared medical-malpractice lawyer Harvey Wachsman once pointed out to me, many of those anti-lawyer anecdots—like the woman who supposedly got $8 million from a fast-food chain simply because she spilled hot coffee on her thighs—completely misrepresent the situation (which, in that case, involved a policy of "super-heating" the coffee in order to discourage customers from taking advantage of their "free refill" policy, causing terrible burns to the woman's flesh).

Say this for Ralph Nader: He's been right on the money in identifying the demonization of trial lawyers as a key strategy of corporate power in America. Mr. Nader has consistently seen through the myths that have grown up around the phony "tort reform" crusade. Others on the left tend to insist that people must not only do the right thing, but they must also do it for the right *reasons* or else it's not good enough. And conservatives—who worship the market, and who should favor private rather than governmental solutions to social evils—can't see that *Erin Brockovich*-type lawsuits *are*, in fact, a "private-side" remedy, a market solution, a libertarian alternative to regulation.

And people in the media are reluctant to admit that, in fact, trial lawyers by default do some of the best investigative reporting around. That time after time, major prize-winning investigative coups result from a trial lawyer pursuing "discovery" in a lawsuit against a corporate wrongdoer. And that the much-disparaged practice of contingency fees can put a powerful weapon for redressing injustice in the hands of the poor, who otherwise would be shut out of the court system.

In some ways, it's a class thing. Ivy-

continued on page 54

CTLA What Others Say

Excerpts from selected editorials, news articles and items of interest from newspapers, magazines, professional publications and the like from across the country.

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Disclosing Doctors' Mistakes

This editorial appeared in the Hartford Courant *on January 17, 2001.*

In 1999, the federal government estimated that more than 44,000 Americans die each year because of medical errors. Even more disturbing, however, is the recent revelation that doctors have been able to block the release of peer-review reports that find them at fault in botched treatment of Medicare patients.

Federal law already provides that when such patients complain about poor care, they must be informed of any findings by government-financed peer-review groups. However, despite the clear intent of the law, federal rules for two decades had allowed any doctors to veto the release of a report critical of him or her.

Now the government is taking a significant step to reverse course by mandating that patients be given the results of investigations into their care. Finally, the regulations will comply with the law.

The ruling came about as a result of a complaint by Alan S. Levine, whose mother, Mary S. Levine, died in December 1998 in a hospital in Jacksonville, Fla., of a stroke several days after she was admitted with an asthma attack.

A peer review—conducted by a panel of doctors—concluded that the services provided to Mrs. Levine "did not meet professionally recognized standards of quality." But her son was not told this because her doctor blocked release of the report.

Mr. Levine protested that the secrecy violated federal law, and the Department of Health and Human Services agreed. The department's ruling is an important victory for patients—and their families—who find themselves victimized by negligent doctors.

Critics of the disclosure policy say it will discourage doctors' cooperation with investigators if the physicians know that patients may be informed of the results, including any disciplinary action. However, that's no reason to keep patients in the dark.

Doctors who mishandle cases—sometimes with fatal results—should be held accountable, and patients ought to be told when physicians' peers conclude that they have fouled up.

* * * * *

A Belated Sex Abuse Settlement

This editorial appeared in the Hartford Courant *on March 14, 2001.*

A special place in hell ought to be reserved for members of the clergy who sexually abuse children.

Many sickening cases of such abuse have surfaced in recent years. Too often, religious leaders either denied that a problem existed or transferred the offender to a different job.

It may be of some consolation to 26 individuals that the Roman Catholic Diocese of Bridgeport finally has reached a financial settlement with them in cases involving six priests accused of sex abuse. In a statement, the diocese apologized to the victims and asked for their forgiveness and understanding.

The victims can be excused for still feeling bitter, knowing that the diocese settled only after eight years of dragged-out litigation, during which church leaders denied the allegations and even threatened to sue the victims for defamation. Moreover, within days of the settlement, the diocese backtracked, saying it was not admitting that all the abuse allegations had merit, which raises the logical question: Then why did it settle?

Most of the victims were altar boys; some were members of church youth organizations. They trusted the priests who violated them, and they have to live with the trauma of abuse for a lifetime.

Some victims came from broken homes and were being counseled by the priests who took advantage of them. Some said priests urged them to perform sexual acts, likening them to a religious ritual.

Church authorities should not think twice about removing the offending priests from their duties so that they are no longer in a position to abuse other children. All too often, abusers have been reassigned to other parishes, where they've continued to prey on unsuspecting boys and girls, much to the church hierarchy's shame.

Beyond removal from their positions, priests who sexually abuse their flock should face criminal charges, although in the Bridgeport cases the legal time limit for charging them has expired.

The best way to deal with sexual abuse by clergy members is for their church hierarchies to quickly acknowledge the problem, offer help to the victims, remove the offenders from their jobs and notify authorities.

* * * * *

The Worth of Federal Judges

This editorial appeared in the Hartford Courant *on March 9, 2001.*

Chief Justice William H. Rehnquist says he considers "the need to increase judicial salaries to be the most pressing issue facing the federal judiciary."

He is not alone in reaching that conclusion. Last month, the American Bar Association and Federal Bar Association issued a joint report asserting that federal judges' pay had "reached such levels of inadequacy that they threaten to impair the quality and independence" of the judicial arm of government.

The warning, although hyperbolic, should not be dismissed. Between 1991 and 2000, 52 federal judges with lifetime appointments resigned or retired, many of them going into private practice. Their departure amounted to a significant erosion of judicial talent.

Viewed in isolation, federal judges' salaries may not appear miserly. U.S. District Court judges are paid $145,100 a year, appellate judges $153,900, associate Supreme Court justices $178,300 and the chief justice $186,300.

Although many lawyers in private practice command considerably higher salaries, it would be unrealistic to call for paying federal judges as much as lawyers in top firms. In fact, many outstanding jurists forgo the plumes of private practice in order to go into public service. They are attracted by the prestige of serving on the federal bench. Besides, once appointed, federal judges acquire tenure, serving unless impeached and convicted.

Still, by establishing a fairer and more stable compensation structure, Congress would make it easier to attract and retain high-caliber jurists to federal judgeships.

Much of the problem arises from the

fact that judicial salaries are statutorily linked to those of members of Congress, although the pay of other federal employees is not. Lawmakers are chronically reluctant to raise their own salaries.

During the past seven years, federal judges received only three cost-of-living adjustments. Because their salaries have not kept pace with inflation, judges have suffered a 13.4 percent decline in purchasing power since 1993.

To redress the situation, Congress ought to amend the law to separate the pay of elected representatives of the people from all other professional employees of the government, including those in military uniform and in judicial robes.

Americans have high expectations from those they entrust to serve on the bench. Federal judges play a crucial constitutional role in interpreting laws and resolving disputes on statutory and constitutional matters.

By attracting and retaining top legal minds to the federal bench, our nation ensures a fiercely independent judiciary and a vibrant democracy.

* * * * *

The Jury Is One of Our Great Strengths

By Allan Sobel

This editorial appeared in the American Judicature Society's March 2001 edition of "Columns." Allen Sobel is the executive vice president and director of the American Judicature Society.

Last month, I had the privilege of attending Jury Summit 2001, a gathering of 400 people in New York City. Billed as the first-ever national conference on jury issues, the Jury Summit was hosted by the National Center for State Courts and the New York Unified Court System. Following the summit, AJS convened a one-day meeting of 20 conference attendees to create a national jury pride agenda. The meeting was funded by the Good Samaritan Foundation.

Significant inroads were made toward developing a jury research plan and a national jury pride program, and understanding how best to promote and improve jury service at the local level. Beyond that, there was unanimous support for the creation of a permanent AJS jury center. It is my dream that such a center will become a reality in the coming months.

A jury center would further the commitment of AJS to strengthen the American justice system. As the cornerstone of justice in this country, the jury continues to be held in high regard. The preservation of the jury requires ongoing empirical scrutiny, ongoing encouragement of citizen participation, and vigilant efforts to maintain the integrity of jury trials. AJS is uniquely qualified to address these needs as it bridges the concerns of the judiciary, the scholarly community, state and federal courts, and, most importantly, the public.

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A New Prescription for Medical Errors

Hospital Touts Computer System That Alerts Doctors to Potential Mistakes Over Medication

By David Brown

David Brown is a staff writer for the Washington Post. *This article appeared in the* Washington Post *on March 18, 2001, page A03.*

Like all doctors, Shannon Heitritter knows that somewhere out there at the end of a long night or a bad day lies a mistake with her name on it.

It may be a stupid one or an understandable one. It may be harmless, fatal or something in between. All she knows is that, sooner or later, she'll make it.

But unlike most doctors in the United States, she has something that may help her at that fateful moment. It's a computer system that alerts doctors to potentially dangerous decisions and, thereby, reduces the chance they will hurt someone.

"It's definitely a reassurance having this," said the 26-year-old intern one morning recently as she stood at a computer terminal, entering orders for one of her patients at Brigham and Women's Hospital. "It keeps you from writing an order for something a person's allergic to. If there are drug interactions, it will tell you that, too."

In the two years after Brigham installed its system in 1993, the hospital's medication errors fell by 55 percent, and those harming patients dropped 17 percent. With further refinements, the system has cut medication errors 86 percent from what they were a decade ago.

Today, fewer than 5 percent of U.S. hospitals have such systems. That small number is testament to how slowly this country has embraced systematic efforts to improve patient safety—despite the public clamor over medical mistakes and American medicine's love of high-tech solutions to problems.

The Brigham experience shows that such improvements are possible only if a hospital is willing to spend the money, and to engage in the continual dialogue with its doctors and nurses, that such a system requires.

"These things represent a dramatic and fundamental change to processes that have been in place for so long. They're also a huge investment in time and financial resources," said James P. Keller, a researcher at ECRI, a nonprofit organization in Pennsylvania that functions as a kind of Consumer Reports for medical technology. "All that put together makes it tough to implement these systems."

A campaign against medical errors began two years ago with a National Academy of Sciences report estimating that at least 44,000 Americans, and perhaps as many as 98,000, die each year from preventable mistakes in hospitals. About one-fifth of mistakes are believed to occur because of drug complications: overdoses, underdoses, drug interactions, allergic reactions.

In the universe of medical errors, these are the most preventable—and the way to prevent them is with "computerized physician order entry" systems like the one at Brigham.

Off-the-shelf versions are only now becoming available at prices ranging from "a few million to tens of millions" of dollars, Keller said. However, some experts believe that by the end of the decade, computerized order entry systems may be like seat belts—people will have a hard time imagining how anyone ever felt safe without them.

The Leapfrog Group, a consortium of about 70 Fortune 500 companies providing medical insurance for 20 million people, recently chose computerized order entry systems as one of three immediately achievable reforms that it will push health plans to adopt. Malpractice lawsuits also may drive hospitals to implement them.

"Ultimately, it will become a matter of liability," said Molly Joel Coye, a physician and head of the Health Technology Center, a nonprofit consulting firm in San Francisco. "We will consider hospitals not up to standard if they don't use systems like that."

The Brigham and Women's system had a $1.9 million price tag for design and installation, and it costs about $500,000 a year to run. Its most essential feature is that it replaces paper—and consequently

eliminates all of paper's problems: illegible handwriting, unreadable third-carbon copies, order sheets stamped with the wrong patient's name.

But it also does far more.

It flashes a red signal if someone tries to prescribe a drug that a patient is allergic to. The computer informs the doctor if two drugs interact or if one duplicates another. With drugs that need to be adjusted in people with kidney problems, the computer consults the patient's most recent lab data and calculates the right dosage. It flags test results that might affect a drug's safety.

Stop-dates are built into every order, making it impossible for a drug to be started and then forgotten. The computer gives a 24-hour warning before an order expires, and if the drug is not renewed, a signal is sent to the locked medicine cabinet on the ward, preventing a nurse from dispensing the medication to the patient.

A doctor can override all prompts and warnings. But when doing so, he or she must provide an explanation, which is then reviewed by the pharmacist.

Because everything is now ordered through the computer, everything is subject to improvement, not just drug-ordering.

As with medication errors, the results of these interventions are measurable at Brigham: $500,000 saved by urging better use of an anti-nausea drug; redundant lab tests canceled 69 percent of the time; one-third of unnecessary abdominal X-rays canceled or changed.

"Most things that happen in a hospital occur because of a physician order," said David W. Bates, a Brigham physician and chief architect of the system. "So if you can control that process, it's an enormously powerful tool for improving quality and measuring quality."

Of course, the system isn't perfect. A visit to the hospital's pharmacy two floors below ground level shows the value of a wary human eye.

The facility is a miniature warehouse of vials, bottles, blister packs and bags of fluid, a warren of shelves, aisles, counter tops, computers and people. On weekdays, 27 pharmacists are on the job there or around the hospital.

For example, five people fill orders for the wards, two more are in the operating rooms, one is in the obstetrics suite and one in the cardiac catheterization lab. Others mix intravenous solutions, prepare chemotherapy, mix investigational drugs or dispense controlled substances from a vault. One person's job is simply to answer phoned-in questions about drugs from doctors and nurses.

On duty today is Michael C. Cotugno. He sits at a computer console. He has just finished a dialogue—conducted by text message on a pager and by phone—with a medical resident.

The antibiotic dosage for a woman on dialysis seemed a bit high. But the dosage was right for an unusual condition she had, and Cotugno has moved on, reviewing other orders for dozens of ill people many floors above him.

Each day, 2,500 drug orders come through the pharmacy. In about 1 in every 150, a pharmacist initiates a "clinical intervention" like the one Cotugno has just finished.

"I continually tell my staff—you have to pay attention to the alerts [programmed into the computer system], but don't rely on the computer to tell you what's right or wrong," said William W. Churchill, director of pharmacy services. "Look at what's in front of you."

So, has Cotugno, who has worked here for 10 years, ever averted a disaster? It's hard to know, he says. But he remembers one case from a few years back.

A resident prescribed a medication for a patient with Raynaud's disease, a rare condition in which blood flow to the fingers and toes is severely compromised, leading in some cases to gangrene. The drug, alprostadil, was more commonly used for newborns with certain heart defects, where it was given in micrograms, or millionths of a gram. Micrograms popped up when the name of the drug was typed into the system.

But Cotugno knew this was a thousand times higher than alprostadil's dose for Raynaud's. In that disease, it was prescribed in nanograms—billionths of a gram. Cotugno brought this to the young doctor's attention. The resident insisted on micrograms—it was what the attending physician wanted.

"He said, 'I'm sure of it,'" the pharmacist recalled. "I said, 'I'm not going to let this drug go. You're telling me the attending wants it this way, but that's not good enough for me. We're going to have to clarify this further.'"

It was clarified; the dose was changed to nanograms; and a potentially fatal mistake was averted.

After telling the story, Cotugno types "alprostadil" into the system. When the drug comes up, the default dose is still in micrograms. There's no notation about the dramatic difference in strength in the drug's two uses. It's still there, the seed of an accident waiting to germinate. Cotugno makes a note to bring it to someone's attention.

"I guess that's why we check the doses," he says.

* * * * *

Patients Are Blindsided by Dangers of Lasik

Thousands suffer lasting damage after procedure

By Susan Ferraro

Susan Ferraro is a staff writer for the Daily News. This article appeared in the New York Daily News *on February 25, 2001.*

Tom Babich can't see straight. "I see double and triple images on top of each other in the right eye," said Babich, 29, whose trouble began in August when he had Lasik surgery to correct nearsightedness.

These days, the computer programmer struggles through a third of the 1,000 pages of technical material he used to scan each week. Glasses won't help. To limit constant headaches, he wears an eye patch on his right eye.

Babich said his doctor—whom he saw for just 10 minutes, after preoperative work was done by an assistant—told jokes during the procedure and didn't properly adjust the treatment chair until after he'd done the right eye.

"He told me he was so good at Lasik, he didn't need to pay attention," Babich recalls. "He explained Lasik was like flying an airplane: You didn't need to pay attention when you were really good."

Marketed as a high-tech but simple and glamorous option to glasses, the $2.5 billion Lasik industry will be the eye care of choice for a million Americans this year who want to end their astigmatism, nearsightedness or farsightedness.

Lasik stands for laser-assisted in situ keratomileusis: Surgeons wield a special knife to cut a circular flap in the eye down to the cornea, reshape the cornea with the computer-calibrated laser, then replace the flap.

Approved by the Food and Drug Administration in 1995, the procedure takes no more than 15 minutes per eye. It improves vision by allowing light to focus or refract better.

When Lasik surgery is effective, it is great, say proponents. "There is nothing wrong with the procedure when it is done right," said Dr. Liviu Saimovici, a Manhattan laser eye surgeon who had his

own eyes done.

Lasik was the most common elective surgery in the United States last year and will be the most common of any kind in 2001—up 27% over last year to 1.8 million procedures, said Steve Kilmer at TLC, the Canadian-based laser eye company with 55 centers in the United States.

But also growing fast are complaints: Most of the millions of hits on the Web site for the Surgical Eyes Foundation, a New York-based group for people who have had problems with refractive surgery, are about Lasik, said founder Ron Link.

An estimated 3% of patients—30,000 people and 60,000 eyes in 2001—will have lasting complications such as double vision and halos, or starbursts, around lights at night. Some will have dry eyes or won't be able to read easily.

"Ordinary activities like the movies, candlelight dinners, sunset strolls, seeing your kids playing in the park, not being able to recognize them because of glare and halos—these are called side effects but ought to be called complications," said Link.

Critics, including some eye surgeons who perform Lasik, say hard-sell advertising, discount prices—the cost of the procedure ranges from $399 to $2,800 an eye—and sloppy screening of candidates leads to slipshod work.

"I tend to see four to six people a week who have had problems," said Dr. Barrie Soloway, head of vision correction at the New York Eye and Ear Infirmary.

New Jersey opthamologist Dr. Joseph Dello Russo said 10% to 15% of patients at his Manhattan office come to see him to repair Lasik surgery performed by other doctors.

Problems are bound to be more common with Lasik's mushrooming popularity in a fiercely competitive market, experts say. "This is the first time a medical procedure has been advertised to the public in a competitive way, the way you advertise a six-pack of Coke," said Ken Keith, a malpractice lawyer.

Saimovici said competition creates "a circus" in which opthamologists leave pre- and postoperative care to assistants and optometrists.

Adds Soloway: "We are forgetting it is medicine, and it is surgery on your eyes. If you are comfortable with glasses, it can be silly."

Companies that market Lasik aggressively say their critics protest too much.

"The doctors who object are threatened by the market share, and frightened of us," said Brian Fuqua, spokesman for LaserOne, a company endorsed in advertisements by New York Jets star Wayne Chrebet.

"It is a profit-driven business, a retail market, so how do you market it? Chrebet has worked very well for us," Fuqua said. In New York, "about six" LaserOne doctors perform up to 6,000 Lasik surgeries annually for a starting price of $1,000 an eye, Fuqua said.

Enthusiasm also is part of the marketing strategy at TLC, which charges about $2,200 for each eye. "There's the 'wow' factor—we keep a clock in surgery suites and they get up and they see the clock and read it [without glasses] for the first time," said Kilmer.

Ideally, Lasik delivers 20/20 or 20/40 vision. Many patients are ecstatic about being able to see in the shower, exercise and work without glasses. "It is a six-minute procedure, not invasive, relatively simple, not like removing cataracts," said Fuqua.

The key to successful Lasik surgery depends on screening and preparation, said Keith.

Complications that can occur during the procedure include wrinkling of the Saran Wrap-like flap when it is replaced on the cornea, which distorts vision, and not calibrating the laser or positioning the chair properly.

Elaine Menese, 58, a New Jersey accountant, first called Dello Russo, whose fee is $5,600. "I don't know what overcame my rationale, but I went to someone who charged less," she said.

Afterward, she saw glare at night around "streetlights, headlights, anything with light. It was a little scary. I gave it a couple of weeks. It didn't go away." She returned to Dello Russo, who did a correction for $3,000. Within a few days, the glare was gone.

"They pretend like they are so experienced," Menese said of her first doctors. "I felt very stupid, to be honest with you. I was angry at myself. I thought, 'How could you be such a jerk? It is your eyes.' "

Diane Iuliucci's first attempt to have Lasik stopped abruptly when somehow the flap the doctor cut on her right eye did not open properly. He stopped and sent her home to heal for three months.

"I got shaky," says Iuliucci, 34, a banker. She switched to Dello Russo, who found the middle of the flap had been left on the cornea, like a buttonhole. "If they had lasered, they would have lasered right on flap as well as cornea."

Dello Russo redid her procedure, and Iuliucci is delighted with her 20/20 results today. She has a "slight starburst" at night, "nothing that deters me from driving or affects anything."

Ultimately, said Keith, the industry needs better standards for choosing and protecting patients. Even very careful patients can be disappointed.

Yuri Mykolayevych, 46, a Manhattan engineer, waited until the latest technology was available and paid premium fees to an experienced Lasik physician to have his nearsightedness improved.

Instead, he is now farsighted in one eye and his vision in the other is worse than before, even with glasses. "I was appalled, I was in a cold sweat, I lost weight," said Mykolayevych.

Inhibiting lawsuits from less happy patients are consent forms patients sign. "So many give the problem in one sentence and in the next candy-coat it," Keith said.

Said Mykolayevych: "Part of my release says, 'All my questions have been answered,' but you don't know the questions to ask." But in April 2000, a 30-year-old student and salesman in Massachusetts won a $1.1 million judgment for Lasik malpractice, now being appealed, for improper use of the knife that lifts the flap.

And the American Trial Lawyers Association has formed a Lasik committee. "This is going to be a bumper crop for lawyers," said Keith. "People's lives are being destroyed."

Consumer Point List

What you should know before you have a Lasik procedure, according to the Council for Refractive Surgery Quality Assurance:

- Your current eyeglass prescription.
- Your pupil size.
- The cornea thickness and flatness.
- If you are pregnant, or have any disease.
- The type of work you do and recreational interests.
- Who you want for followup care.
- The experience of your surgeon: How many cases?
- What you can reasonably expect from the procedure.
- If anyone says the procedure is risk-free, leave.
- If you wear hard contact lenses, take them out a month before Lasik, if soft lenses, three to four days—so the cornea returns to its natural shape before being sculpted.

For more information, contact the Council for Refractive Surgery at www.ascrs.org or www.surgicaleyes.com.

* * * * *

Look Out Below; Falling Merchandise

The following is from the ABC News website, ABCnews.com, 3/16/01.

Warehouse and superstores have become wildly popular as a result of low prices, and the variety of stock that they carry. However, critics say shopping at stores like Home Depot and Wal-Mart can be dangerous. Heavy merchandise is often stacked high into the air and at Home Depot, forklifts operating during store hours can be hazardous to shoppers. The safety issue came into sharp focus last year, after three people died at Home Depot stores in an eight-month period. Home Depot stores are not the only stores where there have been deadly accidents caused by falling merchandise. In 1997, at a Wal-Mart in Virginia Beach, Va., a television cabinet killed a 2-year-old girl when it fell on her. At an Abilene, Texas, Sam's Club, a subsidiary of Wal-Mart, a 3-year-old boy died when a bookcase fell on him in 1996. In 1994, at a HomeBase store in Edmonds, Washington, a woman was crushed to death by a load of ceramic tile. Court documents from a suit filed against Wal-Mart reveal that the store had more than 17,000 falling-merchandise incidents between 1989 and 1994. Records from a lawsuit against Home Depot show that a few years ago that store received 185 injury claims per week, though most, they say, were minor. ■

CTLA Miscellany

continued from page 49

league educated elites, both liberal and conservative, can chuckle together about brash money-grubbing trial lawyers who often dress too flashily for their oh-so-refined taste, or who wear gold chains or commit some other affront to their fashion sense, which allows them to feel superior despite their own ineffectuality.

That's why Mr. Finney should win the Oscar for Best Supporting Actor. He plays that rare thing in films: a truly politically *complex* rather than politically correct character, one who challenges consensus myths on a key question of power in America. There's far more to Mr. Finney's performance than Benicio Del Toro's narky smirks and sunglasses. ■

TIPS ON INFLUENCING THE INFLUENTIAL

During the legislative session, CTLA will be sending weekly updates to members regarding the status of key pieces of legislation. Members should use the CTLA weekly updates as background information when contacting legislators. Letters from clients to legislators are also very helpful.

Your direct involvement with Connecticut Lawmakers can make a difference in improving the administration of justice in Connecticut!

Most issues are settled in the committees. Focus your contact on legislators from your district and on members of the particular committees handling the bills that concern you.

How to Write to Your Legislators:

Legislators want to hear from their constituents. Letters should be to the point. Follow these guidelines to get your message across:

1. Always identify the bill number and subject matter.
2. Write when the bills are being considered in committee or in the week before a floor vote.
3. State why you support or oppose the legislation, and how it would affect you, your employees, clients, and your business.
4. Write in your own words; do not copy someone else's letter or just sign your name to a printed letter.
5. Please do not send copies of CTLA Alerts.
6. Be constructive; do not make threats.
7. If a legislator does something that you appreciate, let him or her know.
8. Send a copy of correspondence to the CTLA office.
9. Write to the Governor as well as legislators.
10. Only write about one subject per letter. Use the proper form of address when writing:

The Honorable (Full Name) Connecticut State Legislature Legislative Office Building Hartford, CT 06106	Salutation: Dear Senator (last name) or Dear Representative (last name)

When writing to a committee, address the letter to: "The Honorable (full name), Chairman, and members of the (name) Committee." During the legislative session, always send your correspondence to the capitol address. Otherwise use the home address.

How to Phone Your Legislator:

Use these numbers to leave a message for your legislator. You can also get bill information, find out the status of measures, committee schedules, session times, or other information. During the session, call these numbers: Senate Ds—800-842-1420; Senate Rs—800-842-1421; House Ds—800-842-1902; House Rs—800-842-1423.

How to Write Your Legislator—Electronically

The legislators can be reached via the Internet. Some of the legislators have their own addresses but all correspondence can be sent to the legislature's home page and it will be forwarded. General information about the legislature, legislators' addresses, committee schedules, copies of bills, etc. are also available on the legislature's home page at www.cga.state.ct.us.

Also, visit the **Capitol Contacts** section of the CTLA website for state and federal legislators

www.ct-tla.org

JUROR BILL OF RIGHTS

A JUROR SHALL HAVE THE RIGHT:

- To privacy, to be free from harassment and to choose whether or not to discuss the verdict.
- To be treated courteously and with the respect due an officer of the court and to serve in a jury room with attention to physical comfort and convenience.
- To have the trial process explained.
- To safe passage to and from the courthouse.
- To proper compensation for jury service.
- To have input into scheduling and have schedules kept when possible.
- To be randomly selected for jury service and not excluded on the basis of race, sex, religion, physical disability, or country of origin.
- To be instructed on the law in plain language.
- To have judges and lawyers be sensitive to and supportive of the needs of jurors resulting from jury service.
- To express concerns, complaints and recommendations to courthouse authorities.
- To be free from exposure to billboards erected in proximity to the courthouse, placed by special interest groups or actual parties to a lawsuit who are attempting to influence their verdict.

FOUNDATION OF THE AMERICAN BOARD OF TRIAL ADVOCATES
5307 E. MOCKINGBIRD LANE, SUITE 1060
DALLAS, TEXAS 75206-5109

Four Reasons to Join ATLA

Last August, when the Ohio Supreme Court struck down the most radical tort "reform" law in the nation, it marked ATLA's FOURTH STRAIGHT CONSTITUTIONAL VICTORY for trial lawyers and plaintiffs everywhere.

As impressive as these victories are, our efforts could be enhanced and expanded if more members of CTLA were also members of ATLA.

That's why we strongly encourage CTLA members who are already members of ATLA to consider recruiting a colleague or law partner to support ATLA's Constitutional Challenge Program—unique among trial bars and so successful that it has received national recognition.

ATLA's important work speaks for itself.

Ohio

The Ohio legislature passed a law amounting to a tort "reform" wish list with caps on non-economic damages, limits on joint and several liability, abrogation of the collateral source rule, and certificates of merit in medical malpractice cases.

ATLA prepared and argued the unprecedented challenge, resulting in the Ohio Court finding the 246-page statute "unconstitutional in toto," saying that "the Ohio General Assembly attempted to exercise powers that the Ohio Constitution specifically granted only to the state's judiciary."

Indiana

ATLA changed the Indiana Supreme Court's attitude about a previously toothless constitutional provision. ATLA's winning strategy, based on the right to a remedy, resulted in a 4-1 vote in July 1999, declaring a two-year statute of limitations for medical malpractice victims unconstitutional as applied to the victim of undiagnosed breast cancer. The Indiana law had measured the limitations period from the time of treatment rather than reasonable discovery.

Oregon

In July 1999, the Oregon Supreme Court unanimously struck down a 12-year-old state law limiting non-economic damages, finding that a cap on damages violates the state constitutional guarantee of an "inviolate" right to trial by jury. Working with the Oregon ATLA members who challenged the law, the ATLA team wrote an amicus brief and contributed research to the merit brief that helped achieve this victory.

Illinois

In December 1997, the Illinois Supreme Court struck down another omnibus tort "reform" law as violative of separation of powers and the state constitutional bar on special legislation. ATLA played a major role in winning this decision, contributing to both the winning briefs and the underlying affidavits.

But the battle has just begun

Millions of dollars are spent each year in attempts to wipe out protections that we trial lawyers have sought to preserve for 200 years. This year, Alabama and Florida have enacted major tort "reform" measures, and incremental measures have passed in other states.

WE URGE YOU TO RECRUIT QUALIFIED COLLEAGUES TO JOIN ATLA IN ITS FIGHT

They may join ATLA at a special first-year introductory offer of just $100, regardless of their years in practice. ATLA's Membership Department has arranged several ways for you to obtain applications.

- Use ATLA's 24-hour, toll-free Fax-on-Demand service at 800-976-2190, or 888-267-0770 and request Document #1720.
- Visit ATLA Online at www.atla.-org/joinatla.ht You'll also find links to each of the above decisions.
- Phone 800-424-2727 or 202-965-3500, ext. 611.

Our opponents have virtually unlimited funds. ATLA has the U.S. and state constitutions on its side. Together with your help, we can assure the nation's lawmakers will listen, respond, and preserve access to jury trials and hold wrongdoers accountable.

Begin your membership recruitment today. ■

INSURANCE BAD FAITH

CTLA members may help themselves prove patterns or practices by sharing this information regarding insurance bad faith claims

Please check applicable boxes and complete form

☐ First Party Claim (insured v. insurer)
arising under coverage for
- ☐ Medical
- ☐ Disability
- ☐ Life
- ☐ Fire
- ☐ Property
- ☐ Other _____

and involving
- ☐ Defamation
- ☐ Unreasonable Delay
- ☐ Economic Coercion
- ☐ Refusal to Cooperate
- ☐ Any Insurance Company effort to interfere in the Attorney/Client relationship
- ☐ Unreasonable interpretation of policy language
- ☐ Other _____

☐ Third Party Claim (failure to settle)
involving
- ☐ Failure/refusal to defend
- ☐ Failure to settle within limits
- ☐ Failure to properly or timely investigate
- ☐ Failure/refusal to communicate or negotiate
- ☐ Unreasonable offers
- ☐ Pattern or practice of similar conduct
- ☐ Other _____

Brief description of facts and allegations

_____

_____

_____

_____

Claim Details

Claimant: _____
Ins. Co.: _____
Affiliated ins. group: _____
Adjuster involved in conduct: _____
Reported in Ins. Commissioner? ☐ Yes ☐ No
Date reported: _____
Commissioner action: _____

Bad faith claim made: ☐ Yes ☐ No
Suit filed v. insurer? ☐ Yes ☐ No
Court and location: _____
Docket #: _____
Reporting Atty: _____
Phone: (___) _____
Fax: (___) _____

Please send completed form to:

CTLA
100 Wells St., Suite 2H
Hartford, CT 06103
Phone: (860)-522-4345
Fax: (860)-522-1027

YOU CAN MAKE A DIFFERENCE!
What You Can do To Improve Lawyer Image

1. **Conduct your law practice and your personal life with the highest standards of ethics.** Show your community that you are a person of integrity and are concerned for its growth and development.

2. **Organize your client lists and let them know the score on the governor and legislators.** One method to tell clients about issues is to send them portions of the *Forum,* CTLA brochures and mailings received from CTLA throughout the year.

3. **Take an active role in citizen groups.** Follow up on your genuine interests with consumer groups such as Citizen Action, CCAG, AARP, MADD, religious groups, etc. Be there, be a voice, help develop policy.

4. **Don't abandon your interests.** Join your local Chamber of Commerce, be active in the Small Business Section. Your office is a business; perhaps you own or have a share in another business. CIBA represents the biggest corporations in the state, but it needs to couch its legislative arguments in "Mom and Pop" terms. Big business uses the local small businessperson's voice. Get involved.

5. **Spend time with your local legislative delegation.** NOW. Don't wait until the next session to know these legislators better. Give them a chance to know your clients' issues. There may not be time for that during the legislative session.

6. **Look at the political scene in your area** What vacancies will there be in the legislature. Consider open seats and possible primary races. And don't stop with a look at legislative races. Remember that school board, city council, and board of aldermen races create the farm club for future legislative races.

7. **Be an active member of your political party.** Become a player on that scene. You cannot remain uninterested and then be surprised if there is no candidate for whom you wish to vote. Be a delegate to stat and national conventions; run for the local governing board of the party; volunteer to work with the party staff on projects.

8. **Sign up for CTLA's speakers bureau.** Let your civil clubs, PTAs, consumer groups, labor groups, etc., know that you or we will furnish them with speakers on current issues. Don't let tort "reform" issues be explained only by insurance companies, or representatives of Big Money. Study, prepare, and go public with what you know on these topics. CTLA is a resource for you in this.

9. **Don't be alone.** How many lawyers are in your firm or share offices with you? How many of those pay dues to CTLA? You need a strong association representing you. Speak up about the need for membership.

10. **Be involved in the Connecticut Trial Lawyers Association.** Come to meetings, take part in discussions, let your voice be heard. Strengthen the group with your participation. ■

CTLA Supports Equal Access to Justice
Please contribute to your local legal services program

Send your tax-deductible donation to one of the following:

Connecticut Legal Services, Inc.
20th Anniversary Year—1997
(*Serving Fairfield, Litchfield, Middlesex, New London, Tolland, and Windham counties, as well as the Meriden, New Britain, and Waterbury areas.)*
62 Washington Street
Middletown, CT 06457
860-344-0447

New Haven Legal Assistance Association, Inc.
(Serving Greater New Haven.)
426 State Street
New Haven, CT 06510
203-946-4811

The Capital Area Foundation for Equal Justice, Inc.
(Supporting Greater Hartford Legal Assistance and serving Greater Hartford.)
80 Jefferson St.
Hartford, CT 06106
860-541-5051

Here's my check supporting equal access to justice:

Name _____

Firm _____

Street/P.O. _____

City State Zip _____

Phone _____

Amount Enclosed: _____

MEMORANDUM

To: All CTLA Members
From: Joseph A. Mengacci, President
Date: January 2001
Re: "Cases That Make A Difference"

In November, 1994, Bill Sweeney, then President of CTLA, sent notice to our members asking for their help. I am now repeating that request, and I hope that you will respond. Before you throw away this memo, please consider the following:

FACT: Trial Lawyers are under attack in Congress and by many local politicians!

FACT: Public opinion of trial lawyers is at an all-time low!

FACT: Big business and their lobbyists are leading the attack on us, and are twisting the information to convince the public and our legislators that we do more harm than good!

FACT: Organizations like the Chamber of Commerce, and the Connecticut Business and Industry Association have the upper hand in the Tort Reform battle because they are able to convince people that lawyers who fight for victims rights ultimately hurt the economy and all working Americans!

FACT: We can, and do, make a difference for the better. The civil justice system works. It provides a positive voice for social change. The civil justice system holds wrongdoers accountable for their conduct and it benefits everyone.

FACT: CTLA needs your help to get this message out!

Please consider sharing with us those cases in which you have made a difference, not just for your client, but for the consuming public. For example, as a result of a suit filed against the City of Stamford for failure to properly enforce regulations regarding smoke detectors, the City has adopted legislation designed to punish non-compliant landlords, and has expanded its enforcement programs.

We also need cases where your client's rights have been limited or destroyed because of onerous statutes or unjust case law. Tell us about the times when a seriously injured client was unable to file suit against a municipality because of statutory notice provision had expired before the client even contacted a lawyer. Have you ever had to tell a widow that she could only recover $20,000 from the bar who had served drinks to a patron until he was so intoxicated that he didn't even know he had crashed into and killed her husband? We want to hear about it, because we want to let legislators, voters, and consumers know that we are not motivated by greed. We want to help them see the truth about who we are and what we do. You know that you can make a difference—share the real facts with those who don't know that.

CTLA plans to share your reports with its members, by reporting some of the cases in the *Forum*. We also plan to keep our own data bank of the cases so that we have a reference guide for our conversations and debates with politicians, the media, big business, and the public.

You can help by sending reports of cases to Kathleen Nastri at Carmody & Torrance, 50 Leavenworth Street, Waterbury, CT 06721. If you have any questions about what we are looking for, or how to submit a report, or have suggestions to make, please call Kathleen at (203) 573 1200, or the CTLA offices at (860) 522-4345.

Product Liability Cases Create Positive Change

Civil cases brought by injured citizens have improved public safety. Civil lawsuits can correct bad corporate behavior by hitting companies right in the bottom line. The H.R 956 Conference Report would largely insulate defendants from such incentives.

Following are real life examples of cases that made a difference:

• • • •

Punitive Damages Force Recall of Dalkon Shield IUD

Eight punitive damages awards were required before A.H. Robins recalled the Dalkon Shield intrauterine device (IUD). In one case, a 27-year-old woman suffered a severe pelvic infection requiring a hysterectomy after wearing an IUD for several years. After the surgery, the woman's marriage disintegrated and she divorced. She must take synthetic hormones that increase her risk of developing endometrial cancer. Evidence established that Robins had known its IUD was associated with a high rate of pelvic disease and septic abortion, that it had misled doctors about the device's safety, and that it had dropped or concealed studies on the device when the results were unfavorable. A $1.7 million compensatory award and a $7.5 million punitive award were affirmed. *Tetuan v. A.H. Robins Co.,* 738 P.2d 1210 (Kan. 1987).

• • • •

Protecting Women's Health: Toxic Shock Syndrome and Super-Absorbent Tampons

Only after a $10 million punitive damage award against Playtex did that company remove from the market tampons linked to Toxic Shock Syndrome (TSS). In this instance, Betty O'Gilvie died from TSS after using Playtex's super-absorbent tampons. The 10th Circuit Court of Appeals found that "Playtex deliberately disregarded studies . . . linking high-absorbency tampon fibers with increased risk of toxic shock at a time when other manufacturers were responding . . . by modifying or withdrawing their high-absorbency tampons." *O'Gilvie* v. *International Playtex, Inc.,* 609 F. Supp. 817 (D. Kan. 1985), *rev'd,* 821 F.2d 1438 (10th Cir. 1987), *cert. denied,* 108 S.Ct. 2014 (1988).

• • • •

Tylenol Verdict Prompts Warning Labels

After a man's liver was destroyed by a toxic reaction when he took Tylenol and drank wine, the FDA announced that all pain relievers containing acetaminophen, including Tylenol, would bear warning labels. The labels instruct people who drink alcohol to consult their doctors before taking the drugs. Pharmacologists have said the link between Tylenol, alcohol and liver damage has been known since the late 1970s. The man, who required an emergency liver transplant, was awarded several million dollars by a jury. The FDA indicated it had been planning to require warnings before the verdict was rendered. Steve Bates and Charles W. Hall, "Tylenol Verdict Puts Spotlight on Drug Labels," *Washington Post,* October 22, 1994, at A1.

• • • •

Public Notified of Deadly Crib Defect

In 1983, a 13-month-old baby was found hanged to death on the headboard of a Bassett crib. The girl's head was caught in a cut-out between the top corner post and a blanket roll, lifting her feet off the mattress. A jury awarded the girl's parents $850,000, including $475,000 in punitive damages. The jury found the parents 5 percent responsible for the child's death. Bassett Furniture had stopped producing the cribs, which were associated with the deaths of nine children, in 1977, but had inadequately notified crib owners. The company had sent modification kits to stores rather than consumers and had refused a Consumer Product Safety Commission demand for a national press release, for which it was fined. The verdict prompted the company to speed up the recall and notify the public of the hazard. *Crusan v. Bassett Furniture Co.,* Cal., Sacramento Super. Ct., June 11, 1986.

• • • •

'Illusory Park' Transmission

Not until Ford lost two verdicts did it come to grips with the "illusory park" defect in auto transmissions it manufactured between 1970 and 1979. The defect gave operators the impression that their cars were secured, but vibration or slamming of a door could cause the autos to move in reverse. The defect resulted in about 90 injuries. In one case, a 1973 Lincoln suddenly moved backwards and ran over a woman's legs. A jury verdict for the woman was upheld on appeal. In another incident, a person was killed when a car reversed unexpectedly. A jury found the transmission design defective and Ford had failed to properly warn consumers. It awarded compensatory damages and assessed $4 million in punitive damages. A few months later, Ford eliminated the hazard. *Ford Motor Co. v. Bartholomew,* 297 S.E.2d 675 (Va. 1982); *Ford Motor Co. v. Nowak,* 638 S.W.2d 582 (Tex. App. 1982).

• • • •

Football Helmets Now Protect Players

Liability claims forced football helmet manufacturers to make their products safer, the National Center for Catastrophic Sports Injury Research in North Carolina reported. For the first time in 60 years no high school or college football player died from a head or spinal injury in 1990, and the number of young players killed has remained low in succeeding years. There were three deaths in 1991, two in 1992 and four in 1993, according to Professor Frederick Mueller. In contrast, there were 36 deaths as recently as the 1968 season. Mueller attributed the decrease in deaths to the improved safety and design of helmets and a rule change that prohibits head-first contact. He noted that high schools and colleges adopted helmet safety standards in 1980 and 1978, respectively. Steve Wulf, "The Safest Season; No One Died from a Football Related Injury Last Year," *Sports Illustrated,* April 29, 1991, at 16.

• • • •

Safeguarding Children: Punitive Damages Forced Flammable Pajamas Off The Market

In 1980, a manufacturer of highly flammable pajamas stopped making the garment only after a $1 million punitive damages award for the severe burns caused to a 4-year-old girl when her pa-

jama top caught on fire. She suffered 2nd and 3rd degree burns over her upper body. Her scars are permanent, and she has suffered several skin graft procedures. The company was well aware of the garment's flammability, as several other claims had been filed for similar injuries Regarding the product's flammability, the court quoted one company official as saying that the company was "always sitting on a powder keg," even though treating the pajamas with flame-retardant chemicals was economically feasible. *Gryc v. Dayton Hudson Corp.,* 297 N.W.2d 727 (Minn 1980), *cert. denied,* 101 S. Ct. 320 (1980).

• • • •

Jaw Implant Devices Taken Off The Market

In 1983, Vitek convinced the FDA that its synthetic jaw implants (made of Teflon FEP and Proplast laminated together) were "substantially equivalent" to a product on the market before enactment of a 1976 law regulating medical devices, circumventing rigorous testing of the implants. More than 25,000 patients had received the devices when their safety came into question. Many patients developed temporo-mandibular joint syndrome, a disorder that can cause arthritis, jaw and facial pain, headaches, earaches and restricted jaw movements. The joint itself permits the lower jaw, the mandible, to move up and down and side to side, and is critical in allowing a person to bite, chew, speak, laugh and smile. Medical experts predict that most, if not all, of the devices implanted in unsuspecting patients will fragment, causing a biochemical reaction that erodes the bone and creates painful complications. Product liability suits against Vitek and negligence claims against surgeons who implanted the devices began mounting in 1987. These claims caused liability-insurance problems for Vitek, which withdrew the jaw implant from the market in 1988. The FDA forced the company, which filed bankruptcy, to issue a safety alert in 1990. Maria Lopez, "Jury Awards Woman $3.1 Million for Failed Jaw Implant Surgery," *Tucson Citizen,* May 11, 1995.

• • • •

Ensuring The Safety of Patients: Faulty Surgical Ventilators Removed From The Marketplace

After a punitive damage award for defective design of the selector valve on an artificial breathing machine was upheld on appeal in 1982, a manufacturer voluntarily issued a medical device alert under auspices of the Food and Drug Administration. A woman in her mid-60s had suffered brain and lung damage from lack of oxygen during surgery in which the machine was used to assist her breathing. The design required switching between a bag and ventilator during surgery either by manually connecting a hose or by using an optional selector valve on the ventilator. At trial, the defendant doctors had testified that they would never use the ventilator in the same way again. *Airco, Inc. v. Simmons First National Bank,* 638 S.W.2d 660 (Ark. 1982).

• • • •

Drug Safety: Lawsuit Reveals Dangers of Arthritis Drug

An 81-year-old woman died from a kidney-liver ailment after taking the arthritis pain-relief drug Oraflex for about two months. Evidence at trial showed that the manufacturer had known of serious liver and kidney problems associated with the drug but had failed to warn doctors and patients and withheld relevant test results from the FDA. Further evidence established that health officials in England ordered the drug off the market in 1982 after linking 61 deaths to Oraflex. Eli Lilly subsequently removed the drug from the world market after it had been available in the U.S. for less than one year The jury awarded $6 million, all of which was for punitive damages. *Borom v. Eli Lilly & Co.,* No. 83-38-COL (M.D. Ga., Nov. 21, 1983).

• • • •

Asbestos Subject to Strict Regulation

In the wake of asbestos litigation, workers are protected by stricter standards and asbestos insulation is no longer sprayed in buildings and schools:

In one case, W.R. Grace in 1968 sprayed asbestos fireproofing onto the structural steel of a five-story office building in Bismarck, North Dakota. A 1988 engineering report showed airborne asbestos levels in the building were from 490 to 110,000 times normal The building's owner had to remove the asbestos immediately to protect the health of its workers. At trial to recover removal costs, evidence showed that in 1968 Grace was aware of the dangers of asbestos, knew the fireproofing contained asbestos, and had a readily available alternative. A feasible alternative had been trademarked as early as 1943. The court found for the building owner. *MDU Resources Group v. W.R. Grace & Co.,* 14 F.3d 1274 (8th Cir. 1994), cert. *denied,* 115 S. Ct. 89 (1994).

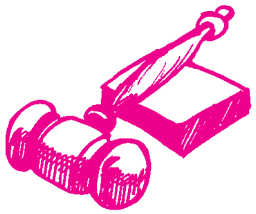
In another case, a man who had inhaled asbestos dust during more than 30 years as an insulation worker contracted asbestosis, which caused a form of lung cancer known as mesothelioma. The worker filed suit but died before trial; his widow continued the action. The Fifth Circuit Court of Appeals upheld a jury verdict in favor of the widow. The court ruled that an asbestos manufacturer could be held strictly liable for failing to adequately warn a worker that asbestos could cause terminal illnesses. Equally important, the court said that manufacturers had known about the dangers of inhaling asbestos as early as the 1930s and had failed to test asbestos to determine its effect on workers, even though they had a duty to do so. Since the hazards posed by asbestos were clearly foreseeable to the manufacturers, the Fifth Circuit said they had a duty to adequately warn. The court also noted that the "grave occupational health problems" posed by asbestos led, in part, to passage of the Occupational Safety and Health Act of 1970. *Borel v. Fibreboard Paper Prods. Co.,* 493 F.2d 1076 (5th Cir. 1974), *cert. denied,* 419 U.S. 869 (1974).

Finally, a state supreme court affirmed a punitive damage award against Johns-Manville because there was evidence that the manufacturer not only failed to warn workers of serious health hazards but took affirmative steps to conceal the dangers of asbestos from the public. *Fischer v. Johns-Manville Corp.*, 472 A.2d 577 (N.J. Super. 1984), *aff'd,* 512 A.2d 466 (N.J. 1986).

• • • •

Enhancing Public Safety: The Ford Pinto Case

Ford redesigned the Pinto only after a $125 million punitive damages award was assessed in a case where a 13-year-old boy was severely burned after the Pinto in which he was riding burst into flames on impact. The award may sound large; however, in one quarter Ford earned more than two times that amount from the sale of Pintos alone. On appeal, the award was reduced to $3.5 million, which is only 0.5 percent of Ford's assets. Evidence showed Ford knew how to design the car safely but deliberately disregarded the safety of millions of Americans in an effort to save money. *Grimshaw v. Ford Motor Co.,* 174 Cal. Rptr. 348 (Cal. App. 1981). ■



Attention CTLA Members !

Today's Political and Public
Information Climate
calls for Quick, Substantial Action

Please help by joining

CTLA's Telephone Tree/ Resource Project

Please recruit your
clients, staff, friends, relatives, clergy, civic leaders
who would be willing to do any of the following:

- write letters to legislators and editors
- sign CTLA-prepared letters to legislators
- phone legislators
- be willing to participate in TV, radio or newspaper interviews

Please fill out the form, opposite,
and fax the bottom portion only to CTLA

Act now — this program can succeed only with your help!

TELEPHONE TREE/RESOURCE PROJECT

Name	Name	Name	Name
Address	Address	Address	Address
Occupation	Occupation	Occupation	Occupation
Home Tel.	Home Tel.	Home Tel.	Home Tel.
Business Tel.	Business Tel.	Business Tel.	Business Tel.
Type of Case	Type of Case	Type of Case	Type of Case

Check all that apply

- letter to legislator _____ _____ _____ _____
- phone call to legislator _____ _____ _____ _____
- visit to legislator _____ _____ _____ _____
- print editorial response _____ _____ _____ _____
- radio/TV interview _____ _____ _____ _____

Please check next to the appropriate number(s) indicating type of response. Then, if applicable, specify the subject areas by checking in spaces provided on response line according to the following key:

A. Medical Malpractice; B. Product Liability; C. Serious Non-economic Damages; D. Workers' Compensation

Member Name _____ Firm _____

I (we) have enlisted individuals for the CTLA Telephone Tree/Resource Project who:

1. _____ Will write and/or sign letters to legislators A _____ B _____ C _____ D _____
2. _____ Will make phone calls to legislators A _____ B _____ C _____ D _____
3. _____ Will visit legislators (within Connecticut) A _____ B _____ C _____ D _____
4. _____ Will write (or sign) letters to editors A _____ B _____ C _____ D _____
5. _____ Will participate in TV, radio, or newspaper interviews A _____ B _____ C _____ D _____

Please detach bottom portion and return by mail or FAX: (860) 522-1027 to CTLA office. *Thank you.*

Club Members —— Through July 2001

The CTLA Legislative Program is supported in large part by the major contributors listed below. There are, in addition, several donors who wish to remain anonymous. Congratulations and thanks are due to these individuals whose dedication to the civil justice system is demonstrated clearly by their participation in the Clubs, CTLA's Major Donor Program. We thank them for their support and for making the sacrifice necessary to achieve our goals.

Members of the $7200 Club

Richard A. Bieder	Bridgeport
William R. Davis	Hartford
Ira B. Grudberg	New Haven
R. Bartley Halloran	Hartford
Michael P. Koskoff	Bridgeport
Garrett M. Moore	Cheshire
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