CTLA Forum

Did you know???
Previous issues of the **FORUM** are available on **LOIS**

January-March 2003

www.ct-tla.org

Volume 21, Number 1 Published by: **The Connecticut Trial Lawyers Association**

LAW REPORTER

From The President's Notebook
By Christopher D. Bernard

A young child eats at McDonald's every day for four years and becomes fat. A lawyer, having seen the results of the tobacco litigation, decides that McDonald's food, like cigarettes, is unhealthy. He files a lawsuit on behalf of his overweight client and soon finds himself on national television.

Is this lawsuit going anywhere? Is McDonald's going to pay this child compensation? Are fast food restaurants going to make their food healthier to the benefit of the public at large? Probably not. So what is the big deal about this case? The answer is that it brings us one step closer to national no-fault auto insurance. It makes caps on non-economic damages for truly devastated victims of dangerous products and medical malpractice more likely. It places thousands of people poisoned by asbestos and children disabled by vaccines in greater jeopardy of losing any hope of receiving compensation for the harm they have suffered.

continued on page 28

I Don't Feel Your Pain:
"No-Pain" Verdicts in Connecticut

Steven D. Ecker, *Cowdery, Ecker & Murphy, L.L.C.*

We are told in a hundred different ways that the courtroom is no place for unrestrained emotion. Juries in particular, since they are not professionals, are reminded to put aside their feelings in arriving at their decision in a case. Thus, in the field of tort law, a jury considering an award of damages is told to do so dispassionately and without sympathy.

So far, so good. But if we are going to try to banish emotion from the jury's decisionmaking when it comes to tort damages, then we should be fair about it. We should banish *all* emotions that we know tend to distort the award of fair, just and reasonable damages. If we are going to charge sympathy out of the case, what about callousness? If the law prohibits bleeding-heart compassion, what about heartless indifference?

Over the past decade, there have been many verdicts handed down by Connecticut juries awarding tort plaintiffs economic damages—based necessarily on a finding that the plaintiff suffered personal injuries caused by defendant's negligence—but *no* non-economic damages. (For lack of a better phrase, I will refer to this as the "No-Pain Verdict".) We cannot know if this trend is new, or merely newly visible since the so-called "Tort Reform" legislation (enacted in 1986) now requires the jury to state expressly the economic and non-economic components of its verdict. New or not, the No-Pain Verdict is a phenomenon worthy of our attention.

Between 1995 and 2000, the No-Pain Verdict made its presence known increasingly in reported decisions.[1] I first became aware of the frequency of such verdicts as a result of my peripheral involvement in *Wichers v. Hatch*. 252 Conn. 174 (2000), when the Connecticut Supreme Court confronted the legality of a No-Pain Verdict.[2] After conducting library research and conversing informally with trial lawyers around the state, it became clear to me that the No-Pain Verdict was by no means an anomalous event, but rather a relatively frequent occurrence of substantial concern among plaintiff's lawyers, if no one else. Over the past two years, since *Wichers*, it appears that the No-Pain Verdict has become a common outcome of jury trials in personal injury cases.[3]

But so what? Why should anyone care? Plaintiffs and their *lawyers* surely would be happier if No-Pain Verdicts were not so prevalent, but that fact hardly establishes a case for reform. After all, the Supreme Court held in *Wichers* that No-Pain Verdicts are not *per se* unlawful. Perhaps the dozens of juries who return these verdicts are right: perhaps the injury victims in those cases do not really feel pain, or misattribute their pain to their injury instead of some other source, or perhaps they simply don't experience enough pain to justify compensation.

Perhaps. But the sheer number of No-Pain Verdicts suggests that a more careful look is warranted. The unusual *Wichers*-type case may arise on rare occasion, where a person legitimately incurs substantial bills for medical treatment without suffering any compensable pain,

continued on page 51

In this Issue

CTLA Forum
January-March 2003

CONTENTS

WINNER
APEX'95®
AWARDS FOR PUBLICATION EXCELLENCE

CTLA FORUM
Published bi-monthly by the Connecticut Trial Lawyers Association
100 Wells Street
Hartford, Connecticut 06103-2920
(203) 522-4345

The *Forum* is published bi-monthly by the Connecticut Trial Lawyers Association, 100 Wells St., Hartford, CT 06103-2920 (tel: 1-860-522-4345). Inquiries regarding advertising rates and specifications should be made to the CTLA office. Articles and features should be sent to William F. Gallagher, Editor, The *Forum*, Gallagher, Gallagher & Calistro, 1377 Boulevard, P.O. Box 1925, New Haven, CT 06509. Settlement/verdict reports should be sent to Kathleen L. Nastri, Carmody & Torrance, 50 Leavenworth Street, P.O. Box 1110, Waterbury, CT 06721.

CTLA
Connecticut Trial Lawyers Association
100 Wells Street
Hartford, CT 06103-2920
(860) 522-4345
(860) 522-1027 Fax
http://www.ct-tla.org

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.

VERDICT:
Motor vehicle accident;
32-year-old female;
10% permanent impairment of left arm;
VERDICT OF $88,000.00.

In the case of *Defelice v. Estey*, Docket No. CV 95-0050522, filed in the Superior Court for the Judicial District of Milford at Derby, a jury returned a verdict in favor of the plaintiff in the amount of $88,000.00.

The plaintiff, a 32-year old-female, was rear-ended by the defendant on the Merritt Parkway when stopped for heavy traffic. The collision was low impact with minimal property damage.

The plaintiff had immediate neck pain and was treated conservatively. The neck pain resolved, but several months later the plaintiff noticed problems with pins and needles in her left hand and arm. Several nerve studies were done and some indicated a problem with her brachial plexus and others were inconclusive. The plaintiff's treating neurologist, Dr. Robert Levine, testified by videotape that the plaintiff's car accident probably caused a stretch injury to the brachial plexus or to cervical nerve roots that was causing her sensory problems.

The plaintiff testified, as did members of her family, concerning the problems she had with the feeling of pins and needles that she has in the arm and hand.

The defense had an IME performed by Dr. Jerold Perlman, an orthopedic surgeon, of Bridgeport. Dr. Perlman testified that a stretch injury to the brachial plexus could not occur with the mechanics of a typical whiplash type of injury. The defense challenged causation, relying on the testimony of Dr. Perlman and the four-month delay in the onset of symptoms.

The plaintiff incurred $13,500 in medical bills and was given a 10% permanent impairment of the left arm by Dr. Levine. There was testimony that future treatment was likely.

The insurance carrier was Allstate. The only offer made on the file was $15,000 and the file was "DOLFED" at that number. No settlement discussions therefore ever took place.

The jury awarded the plaintiff $13,870.06 for her past economic damages. All the bills were paid by insurance; however, since her treatment occurred over several years, the premiums paid for her health insurance totally offset the collateral source deduction. She was also awarded $33,269.94 for future economic damages and $40,000 for non-economic damages for a total of $88,000.

Submitted by William P. Yelenak, Esq., of Moore, O'Brien, Jacques and Yelenak, Cheshire, Connecticut, counsel for the plaintiff.

VERDICT:
Motor vehicle accident;
low impact and minor damage;
45 year old female;
5% permanency to the low back and 5% to neck;
VERDICT $315,000.00.

In the case of *Dess v. Clayton*, Docket No. CV 99-0496117, filed in the Superior Court for the Judicial District of New Britain, a jury returned a verdict in favor of the plaintiff on December 17, 2001 in the amount of $315,000.

The plaintiffs, a mother and her two minor children, were injured in a low impact rear end collision with minimal property damage. At the time the police arrived the road conditions were icy, but the defendant claimed that she did not know that the plaintiff had stopped for a stop sign. The defendant claimed later that she tried to brake but slid on black ice and could not avoid the collision.

The defense focused on liability, claiming that the black ice caused an unavoidable accident. Although there were references to "low speed impact" in the plaintiffs' ER records, those references were excluded because none was specifically attributed to the plaintiffs. The defendant called an engineer, Dr. Vincent Antonetti, to testify that, based on photographs and damage estimates that the closing speed of the defendant's car was 4.6 m.p.h. He was also prepared to testify regarding the minimal G-forces applied to the plaintiff in the collision and the similarity of such G-forces to activities of daily living, such as "plopping down into a chair" or "stepping off a curb" based on Society of Automotive Engineering studies. The plaintiff challenged such testimony in a Daubert/Porter hearing, and the court (Shortall, J.) ruled that Antonetti's testimony on the G-forces and comparison to activities of daily living was scientifically unreliable and therefore inadmissible. Antonetti was allowed to testify on the closing speed of 4.6 m.p.h. This opinion allowed the plaintiff to use the defendant's expert to prove, based on the plaintiff's estimate of the speed of defendant's car of 15 m.p.h., the defendant's estimate of the distance between the cars when she first realized the plaintiff was stopped and the normal perception and reaction time, that the defendant in fact never had the time to even apply her brakes before hitting the plaintiff's car.

The plaintiffs called as experts Dr. William Pesce, a physical medicine doctor and a physical therapist. Dr. Pesce testified regarding the plaintiff mother's soft tissue injuries, the chronic pain and the treatment he provided by trigger point injections. He assigned a 5% permanent partial disability to the plaintiff's low back and 5% to the neck. He also opined that the plaintiff would probably need future medical treatment. The plaintiff children suffered only minor injuries.

The defendant attempted to call an investigator who performed surveillance on the plaintiff and videotaped her over several days. The court precluded such evidence as it was never disclosed to the plaintiff until after the plaintiff testified at the trial and it was not rebuttal evidence but was offered as part of the defendant's case in chief.

The last demand was $100,000, and the last offer was $61,000. The jury returned a verdict for the plaintiff in the amount of $315,000, with $29,000.00 in past medical expenses, $140,000.00 in future medical expenses, $146,000 in non-economic damages. The defendant's insurer was Kemper.

Submitted by William P. Yelenak,

Esq., of Moore, O'Brien, Jacques and Yelenak of Cheshire, Connecticut.

SETTLEMENT:
Eighty-eight year old female;
premises liability;
fall down at hair salon;
10% permanent partial impairment right hip
SETTLEMENT OF $265,000.00.

In the case of *Mary Kuckel v. Bluma M. Becker d/b/a Hair Studio, et al.,* Docket No. CV 99-0498383-S, filed in the Superior Court for the New Britain Judicial District, the parties settled on the eve of jury selection in December of 2000.

On September 10, 1999, Mary Kuckel, walked into the defendants' hair salon for a haircut. It had been raining heavily for some time before her arrival. As she was sitting, getting her hair blow dried, Mary had to use the bathroom. She got up from the chair, and as she stepped forward, her feet hit a large puddle of water on the linoleum floor, causing her to fall. She fell on her right hip. Her right hip fractured.

Family members of Mary, who lived and worked nearby, rushed over to see Mary. When they arrived they found Mary on the floor with water all around her on the floor.

As a result of the fractured hip, Mary underwent surgery. She spent months rehabbing the hip in a nursing facility. She further suffered depression and related psychological symptoms as the result of the physical injury and the months spent laboring to regain her walking abilities. Prior to the injury, Mary was an active woman—taking walks with friends and family and helping out at her son's restaurant.

Mary Kuckel incurred approximately $40,828.59 in medical bills. She was left with a 10% permanent partial impairment of her right hip as found by John C. Grady-Benson, M.D.

Zurich Insurance Company, carrier for the defendants, paid out the total settlement.

Submitted by Vincent F. Sabatini, Esq. and James V. Sabatini, Esq. of Sabatini and Associates, LLC, Newington, Connecticut, counsel for the plaintiff.

JURY VERDICT:
Negligent commercial tree cutting;
41-year-old male;
5% impairment low back;
JURY VERDICT OF $70,176.00.

In the case of *Raymond Reynolds vs. Waters Construction Incorporated, Crele Construction Corporation, and Theodore Taraschuk*, Docket No. CV-99-0495698-S, filed in the Superior Court for the New Britain Judicial District, the jury returned a verdict in favor of the plaintiff in the amount of $70,176.00 against defendants Waters and Crele on April 24, 2001.

On May 19, 1998, Raymond Reynolds was employed as a police officer by the Town of Newington. In that capacity and on that date, he was working an overtime job. Specifically, he was assigned to work for defendant Waters Construction, which was engaged as the general contractor at a construction site located on Route 5 and 15, also known as the Berlin Turnpike.

Plaintiff arrived at the job site at approximately 8:00 a.m. He reported to defendant Waters. He was informed by defendant Waters that he would be doing traffic control on the Berlin Turnpike in the area south of Deming Road and that trees would be cut down along the side of the Turnpike. Defendant Crele Construction was on the job site as Waters' subcontractor. Defendant Crele was contracted by Waters to do the tree cutting.

Plaintiff began his traffic control duties. Defendant Crele began the tree cutting. The tree cutting continued through the morning hours. In the early afternoon hours, defendant Crele went to cut down a tree with an electrical power line running through it. Plaintiff alerted the defendant to the existence of the power line. Defendant Crele, through its superintendent, responded by telling plaintiff not to worry about it, that they knew what they were doing and that they were professionals.

With a cable wrapped around the tree which was attached to a skidder (machine used to aid in the felling of the tree), defendant Crele sawed the tree. The tree then spun on its axis, fell the wrong way, struck and then snapped the live electrical power line. Plaintiff saw a live electrical power line falling directly at him. In fear of electrocution, he ran. He was then hit by a motor vehicle owned and operated by defendant Taraschuk.

Defendant Waters and Crele claimed that they were not negligent in cutting down the tree. Defendant Crele claimed that a sudden, unforeseen gust of wind caused the tree to fall the wrong way. Defendant Crele's superintendent testified that he neither checked the wind direction or speed before cutting down the tree. The superintendent testified that the company classified certain trees as danger trees. One type of danger tree is a tree with a live electrical power line running through it. When presented with such a tree that needs to be cut down, it was customary for the company to call in a specialist to handle the job. No specialist was called. Plaintiff further showed, through his expert meteorologist, Mr. Robert Cox, that the wind conditions that existed at time this tree was cut down was substantially similar to the wind conditions that had existed for the previous two to three hours, putting defendant on notice.

As the general contractor and unable to relieve itself of liability by merely delegating the performance of a portion of the work to another, defendant Waters was held liable as well.

Plaintiff sustained a lumbar sprain. Dr. Mullaney testified, by way of his written medical reports, that the injury resulted in a 5% permanent partial disability to his back. Medical bills totaled $1,427.61. Lost wages including lost overtime work totaled $3,685.50. Economic damages totaled $5,113,11. Non-economic damages totaled $65,062.89.

Defendants filed an offer of judgment of $26,789.56. Plaintiff's demand before trial was $50,000.00. Subsequent to jury's verdict, defendants Waters and Crele filed motions for judgment notwithstanding the verdict, to set aside the verdict, and for remittitur. Motions to set aside the verdict and judgment notwithstanding the verdict were based on multiple issues including the Firefighter's Rule. The trial court (Shapiro, J.) denied defendants' motions.

Submitted by James V. Sabatini, Esq. of Sabatini and Associates, LLC, Newington, Connecticut, counsel for plaintiff.

VERDICT:
Medical malpractice;
72 year old female;
VERDICT OF $2.5 MILLION
REDUCED BY 70% FAULT
ATTRIBUTED TO RELEASED DEFENDANT
FOR TOTAL VERDICT OF $758,592

In the case of *Marilyn Malchik v. Thomas Manning, M.D.*, Docket No. CV 99-0549144S, filed in the Judicial District of New London at New London, a jury returned a verdict of $2,528,642.00 which was reduced by 70% attributable to the thoracic surgeon, William Crawford, M.D. The total verdict against the remaining defendant, Thomas Manning, M.D., was $758,592.00 or 30% of the total damage award. The case was tried before the Honorable Thomas Corradino.

On December 20, 1996 at Lawrence and Memorial Hospital, the plaintiff,

Marilyn Malchik, underwent ultrasound guided pericardiocentesis. The pericardiocentesis was performed by thoracic surgeon, William Crawford, M.D.. The ultrasound guidance was performed by the radiologist, Thomas Manning, M.D.. The purpose of the procedure was to withdraw excess fluid from the pericardium.

Instead of placing the needle and catheter inside the pericardial space, Dr. Crawford punctured the right ventricle and proceeded to aspirate over 1500ccs of bloody fluid directly from Mrs. Malchik's heart. The patient went into cardiovascular collapse and her blood pressure dropped to zero. A code was called and blood was rapidly squeezed into her through her right femoral vein.

She survived but suffered hypovolemic shock, renal failure, heart attack and anoxic brain damage. After coming out of a coma, she needed to be totally rehabilitated. She also developed a massive infection which led to four separate surgeries to remove ribs and cartilage. Mrs. Machik went from an independent lifestyle to a total dependence upon her family.

The plaintiff filed suit against William Crawford, M.D., Thomas Manning, M.D., and Lawrence and Memorial Hospital. After over two years of extensive discovery (9 depositions were taken), the Honorable Robert Martin held a full day settlement conference.

At the settlement conference, Dr. Crawford was released under a confidential agreement. Dr. Manning offered nothing at the pretrial and claimed he had nothing to do with the actual procedure. This upset the family and led to a complete break down in settlement negotiations. Lawrence and Memorial Hospital was let out because plaintiff's counsel believed the claim against the hospital would be a distraction and the key witnesses to the doctors' actions were employees to the hospital.

During opening, defense immediately attacked the released defendant by reading to the jury the original Complaint which blamed Dr. Crawford for everything. Although the jurors were apprised of Dr. Crawford's absence as a party in voir dire, the defense's opening made it appear obvious that Crawford had settled.

After Dr. Crawford testified, the prospects for a plaintiff's verdict appeared slim. The defense asked Dr. Crawford the ultimate question: "Were you misled by the radiologist?" Dr. Crawford responded, "No." The plaintiff's theory of liability was badly shaken.

Plaintiff slowly began to rehabilitate the case by next calling Dr. Manning. Dr. Manning claimed he was only there to assist the surgeon in determining where to place the needle through the skin, not to assist in determining if the needle was in the pericardial space. This claim did not make sense because Dr. Manning remained in the room for approximately 30 minutes while bloody fluid was being aspirated. Most telling was Dr. Manning's radiology report which read, "the scans during the procedure show the catheter in the pericardial space." This report was blown up and constantly referred to throughout the trial.

Although the nurses remembered very little, one nurse did recall that on at least three occasions Dr. Crawford asked Dr. Manning if the catheter was properly positioned and Dr. Manning told the surgeon it was, in fact, properly positioned. Dr. Manning denied that this occurred.

Jury returned a verdict as follows: economic damages: $428,642 and non-economic damages of $2,100,000 for a total damage owed of $2,528,642. The jury apportioned blame (pursuant to 52-572h) 70% for Dr. Crawford 30% for Dr. Manning. The total verdict against Dr. Manning was $758,592. Motions to Set Aside and Remittitur have been filed.

Submitted by Stephen M. Reck, Esq. of Trebisacci & Reck, LLC, Pawcatuck, Connecticut, counsel for the plaintiff.

VERDICT:
Slip and fall;
61-year-old female;
comminuted fracture of right femur;
VERDICT OF $147,459.77.

In the case of *Nancy Paull v. The Stop & Shop Companies, Inc.*, Docket No. CV 00-553867 filed in the Judicial District of New London at New London, a jury returned a verdict of $226,861.19 which was reduced by 35% comparative fault for total verdict of $147,861.19. The case was tried before the Honorable Seymour Hendel.

On August 5, 1999, the plaintiff was shopping in her wheelchair at the Stop and Shop in Pawcatuck, Connecticut. Her daughter was pushing her. When they went to check out, they first went to the only handicapped aisle, and they found that it was closed. The handicapped aisle is wider because it is designed for wheelchairs. They then went to a regular check out aisle. These check out aisles are very narrow because this is an older and smaller grocery store. Before entering they checked to see if the wheelchair could fit and asked the clerk if it was all right to enter.

They proceeded into the checkout aisle and the wheelchair became stuck. Nancy Paull then stood up and fell. There was no substance on the floor. She suffered a comminuted displaced fracture of the right femur requiring pins and plates, with lengthy rehabilitation, and a 10% permanent impairment of the leg.

Stop and Shop blamed the plaintiff for standing up when her right leg was already weak from a prior car accident. They also stated the plaintiff should have asked someone to open up the handicapped lane and that there were other exits out of the store that allowed for a wheelchair. Stop and Shop also sued the daughter for pushing her mother into a place where she became stuck.

The plaintiff would have accepted $10,000 to settle. Stop and Shop offered nothing. The two judges who reviewed the case all thought it was a worthless claim.

Plaintiff's counsel took depositions of the manager and the checkout clerk and prepared numerous visual exhibits as demonstrative evidence for the jury. The orthopedic surgeon prepared final reports for trial, but he did not testify.

At trial, the plaintiff admitted she could have taken more steps to assist herself in the store and admitted she should not have stood up. On the other hand, the manager of Stop and Shop took a fighting position and refused to acknowledge that the store did anything wrong. The manager testified that the handicapped checkout aisle was used for almost everything except to assist handicapped customers.

The jury awarded economic damages of $22,861.19 and non-economic damages of $204,000.00 for a total of $226,861.19. Nancy Paull was found 35% at fault and Robin Paull was found 0% at fault. Numerous post-trial motions have been filed by the defendant, including Remittur, Set Aside, and New Trial.

Submitted by Stephen M. Reck, Esq. of Trebisacci and Reck, LLC Pawcatuck, Connecticut, counsel for the plaintiff.

JURY VERDICT:
16-year-old female;
myofacial pain syndrome;
5% ppd of neck and back;
VERDICT: $210,566.30.

In the case of *Theresa Asarito v. Theodore Linstrum*, Docket No. CV 96-0325825S, filed in the Judicial District of Danbury, the jury awarded the plaintiff Theresa Asarito $210,566.30 on July 5, 2001. The defendant's insurance carrier, Allstate Insurance Company, offered only

$4,400.00 prior to trial.

On October 21, 1994, the then 16-year-old Ms. Asarito was involved in a two vehicle collision on White Street in Danbury. The facts of this incident were not in dispute: On the date in question at approximately 5:00 p.m., the plaintiff was attempting to exit the driveway of a automotive repair shop on White Street, when an unidentified vehicle stopped in a line of heavy traffic and waved her out. This unidentified vehicle was traveling westbound on White Street. The plaintiff exiting the parking lot, intending to travel east on White Street. As the plaintiff reached the center line of the roadway and while looking for a break in eastbound traffic, the defendant passed a line of vehicles and collided with the plaintiff. The defendant passed these vehicles, including the vehicle whose operator waved the plaintiff out of the driveway, without crossing the center line.

The plaintiff claimed that the defendant caused this collision by passing in a no passing zone. This claim was premised upon the fact that the center line in this area of White Street was a double yellow line and that there were no lines dividing this portion of White Street into more than one travel lane. The defendant claimed that the plaintiff caused this collision by violating Connecticut law, which prohibits leaving a private driveway unless it is safe to do so. The jury found for the plaintiff on this issue, specifically finding that the plaintiff was not negligent on the verdict form.

The plaintiff claimed that as a result of this impact, she suffered immediate pain in her neck and shoulder. She was taken by ambulance to Danbury Hospital, where she was examined and cervical x-rays were taken (the x-rays were read as negative by the radiologist). The plaintiff then saw her pediatrician one week after the collision, complaining of both neck and low back pain. This pediatrician saw the plaintiff three times over the next six weeks and diagnosed her as suffering from a sprain/strain and prescribed medication.

Five months later, the plaintiff was seen by Dr. George Lentini, a chiropractic physician from Brookfield. Dr. Lentini treated the plaintiff regularly from March, 1995 through October, 1995 and then again in April and May, 1996. Dr. Lentini diagnosed the plaintiff as suffering from a "moderate sprain/strain of the cervical and lumbar region." The total cost of Dr. Lentini's treatment was $3,905.00.

In May, 1996, the plaintiff began treating with Dr. Ronald Manoni, another chiropractic physician whose offices are in Danbury. The plaintiff testified that she switched to Dr. Manoni because her mother's insurance coverage changed and that Dr. Manoni participated in her new plan. Dr. Manoni treated the plaintiff for approximately one year and then issued a permanent disability report. According to Dr. Manoni's report Ms. Asarito suffered a 5% permanent partial disability to her cervical and lumbar spine as a result of the soft tissue injuries she suffered in this collision. Dr. Manoni's report was introduced into evidence; however, his rating was not specifically mentioned during the trial and neither Dr. Manoni nor Dr. Lentini testified for the plaintiff.

The plaintiff called as expert witnesses at trial Daniel Fish, M.D., an orthopedic surgeon from Brookfield and Randy Trowbridge, M.D., a physiatrist from Danbury. Dr. Fish began treating the plaintiff in August, 1996 (nearly 2 years after her motor vehicle accident), when the plaintiff injured her right knee while roller blading. Dr. Fish repaired this injury arthroscopically on August 23, 1996 and continued treating only the plaintiff's right knee until May, 1997, when she first mentioned her low back pain. The plaintiff testified that she was treating with Dr. Manoni for her back and neck and because she had not improved after nearly two years of chiropractic treatment, she wanted to see if Dr. Fish could help her.

Since May, 1997, Dr. Fish has been treating the plaintiff regularly. In addition to prescribing medications, he has referred the plaintiff for physical therapy. The first of these referrals was to Dr. Trowbridge who is board certified in rehabilitative medicine. Dr. Trowbridge diagnosed the plaintiff as suffering from myofacial pain syndrome and prescribed physical therapy and trigger point injections.

Dr. Trowbridge testified that he was able to objectively diagnose this condition by manually palpating the plaintiff's muscles and ligaments and by temporarily reliving the plaintiff's pain with trigger point injections. Dr. Trowbridge's bills for his services totaled over $8,000.00. Both Dr. Fish and Dr. Trowbridge testified that the plaintiff's medical bills of $18,566.30 were reasonable and that she would likely need similar treatment in the future in order to minimize her symptoms.

The plaintiff testified that she was unable to drive long distances or remain on her feet for long periods of time without pain. She testified that she worked full time during college and that the stress of this schedule often brought on pain in her neck and low back. Dr. Trowbridge testified that the plaintiff's injuries would cause pain when she dealt with the stresses and strains of everyday life, such as work or school. The plaintiff also testified that she has had to change her career objectives because she will be unable to pursue a career in law enforcement because of her injuries. The plaintiff obtained a B.A. in criminal justice from Western Connecticut State University in May, 2000.

The defendant took the position that the plaintiff's injuries were not objectively proven and that all of her tests, including MRI's of her neck and low back were negative. The defendant also pointed out that the plaintiff felt well enough in August, 1996 to go roller blading, that she was involved in another motor vehicle collision in 1996 and that she was not prevented from pursuing a career in law enforcement by her injuries, as she failed the only written test she had taken.

In closing, the plaintiff argued that the defendant had the right to an independent medical examination but did not do so. Given this fact, the plaintiff urged the jury to consider the opinions of Drs. Fish and Trowbridge. The plaintiff asked for $18,566.30 in past medical bills and $2,500 per year in future treatment for 20 years. The plaintiff then asked for $280,000.00 in noneconomic damages. This figure was arrived at by asking for $5,000 per year and by pointing out that this amount would permit the plaintiff to attend graduate school and/or law school (which she testified were her goals) without having to work part-time. Thus, the total figure requested was $350,000.00. The defendant did not respond with a specific figure in his closing.

The jury deliberated for approximately two hours before awarding the plaintiff $98,566.30 in economic damages and $112,000.00 in noneconomic damages, for a total award of $210,566.30. The defendant whose policy limits with Allstate were $300,000.00 never offered more than $4,400.00 at any time.

Submitted by Angelo A. Ziotas, Esq., Silver, Golub & Teitell, LLP, counsel for the plaintiff.

VERDICT:
Automobile accident;
45-year-old male;
13% ppd of the neck;
8% ppd of the low back
VERDICT OF $115,246.00.

In the case of *Joseph Benway vs. Jeramie Montgomery, et al*, Docket Number CV 00-0555715S, filed in the Superior Court for the Judicial District of New London, the jury returned a verdict in favor of the plaintiff on August 31, 2001, in the amount of $116,246.00.

On the evening of October, 1, 1998, the plaintiff was on his way home with his wife when the defendant made a left hand turn into the plaintiff's path of travel. The defendant was a 16-year-old who had three other teenage passengers in the car. The defendant claimed that he had a green arrow to make the left hand turn and that the plaintiff had signaled to make a right hand turn and, instead of turning right, proceeded straight through the intersection causing the collision.

The plaintiff was 45 years old at the time of the accident and had worked most of his adult life for the State of Connecticut. He had grown up as a ward of the state at the Manchester State Facility and then worked at the University of Connecticut in the kitchen as a dishwasher and then in the landscaping department. He started having problems with his lower back from comp injuries in 1994. He had been rated for the lower back problem, but was able to continue to work.

The plaintiff claimed that this accident had caused pain in his cervical, thoracic, and lumbar spine with radiation into both legs. He was out of work from the automobile accident for 15 days. He then hurt his back again at work in September of 1999, and went on to have a major fusion operation on the back.

His treating physician gave him a 13% impairment to the neck and 8% to the low back. He had previously been rated with a 6% to the low back before this accident.

The defendant was insured by the Allstate and had a $50,000.00 limit single policy. The plaintiff filed an Offer of Judgment in that amount. At the commencement of trial, the defendant filed an Offer of Judgment in the amount of $11,800.00.

Although this was a left hand turn case, the impact was actually a side-swipe so there was not a lot of property damage. A decision was made to give up the low back injury in its entirety to include even an exacerbation and try the case solely on the basis of the neck injury. All of the medicals that were related to anything other than the neck were taken out of the case. The medicals included a good bit of pain management and physical therapy and totaled $11,133.91. The lost wage claim was for $1,673.94.

The defendant, at the trial, contested liability and all of the medical bills except for the initial emergency room treatment. The jury awarded $12,246.00 of economic damage and $104,000.00 in non-economic damage. The trial court ordered a remittitur in the amount of $1,100.60 which was accepted by the plaintiff, and judgment entered in the amount of $115,244.60. Allstate paid the entirety of the interest accrued and the Bill of Costs which gave the plaintiff a total recovery of $131,723.05.

Submitted by Eugene K. Swain, Esq., of RisCassi & Davis, Hartford, Connecticut, counsel for the plaintiff.

SETTLEMENT
Automobile accident;
21-year old male;
multiple fractures; loss of vision;
SETTLEMENT OF $1,300,000.00.

In the case of *Michael Gesick v. Jason Mailhot*, Docket No. CV 00 0092967S, filed in the Superior Court for the Judicial District of Middlesex at Middletown, the parties settled for $1,300,000 in March of 2001.

The plaintiff was the front-seat passenger in a motor vehicle being driven by the defendant in the early morning hours of April 1, 2000, when the vehicle went off the road and hit a tree. Both the driver and passenger were taken by helicopter to Hartford Hospital. The plaintiff suffered several serious fractures. He has reduced vision in his right eye, and it is doubtful that the vision will return. He has had surgeries to repair bones in his face, right wrist, and back.

The plaintiff was a sophomore in college. Because of the extensive treatment he required, he has been unable to return to school so far. He is still enrolled in school, and hopes to continue classes in the fall of 2001.

The parties settled for the policy limits of $1,300,000.00.

Submitted by Joseph G. Walsh, Esq., of Cohen and Wolf, P.C., Danbury, Connecticut, counsel for the plaintiff.

VERDICT:
Automobile accident;
54-year-old male;
foot injury;
VERDICT OF $300,106.00.

In the case of *Philip J. Defeo v. Amy G. Howard, et al*, Docket No. CV 00-0072962S, filing in the Judicial District of Tolland at Rockville, a jury returned a verdict in favor of the plaintiff in the amount of $300,106.00 on March 14, 2002.

The plaintiff, a 54 year old postal worker, was injured in an intersection collision in which his vehicle had been cut off by a left-turning defendant.

After the testimony of the plaintiff and an eyewitness, the defense called the defendant to the stand, a 19-year old woman. On cross-examination, she denied knowing anything about the eight special defenses filed by her attorney. She did not know where the information came from that formed the basis for these special defenses and testified that it did not come from her. She then admitted that the accident was her fault, although the defense had previously blamed the plaintiff.

The plaintiff presented evidence of substantial injuries. The plaintiff had gone by ambulance to the local hospital where he complained of neck, chest and back injuries. The next day, he complained of numbness and pain in his left foot. He treated with orthopedists, neurologists, and a podiatrist with regard to the pain and numbness in his left foot.

The plaintiff had a history of a disk problem three years earlier that had caused a lot of pain into his left leg. At his deposition, he denied ever having left foot pain before this auto accident. The defense pointed to several inconsistencies in the medical records on this issue, including a report by the plaintiff to his doctor that he had foot pain in 1996. Before his 1996 back surgery, he also went to a chiropractor where he reported that he had some numbness in his left foot. The defense used this history to deny causation of the left foot injury to this accident. The treating podiatrist was not able to relate causation of the left foot pain to this accident as he had not seen the plaintiff for a year after the accident, but did not deny that it could be related.

All of the other medical records were supportive of causation of the foot injury to this accident. The treating orthopedic physician was Dr. James Kort of Vernon who testified by videotape. Testifying live was the treating neurologist, Dr. Michael Krinsky, also of Vernon. Both Drs. Kort and Krinsky related the foot injury to the motor vehicle accident. They gave testimony that the pain and disability could be a direct trauma to nerves in the foot or an exacerbation of the earlier back sur-

gery but, in either event, was related to the motor vehicle accident.

Before this accident, the plaintiff had worked in a large postal facility in Hartford on second shift and on weekends. Because of his foot injury, he had trouble walking on the concrete floors of this postal facility, and was forced to go to another facility to a window clerk's job. His medical specials were just over $10,000.00, and there was evidence of past and future wage loss because of the change in his job position.

Prior to trial, the plaintiff had filed an offer of judgment in the amount of $100,000.00; the defendant had filed one for $22,500.00. Counsel for the plaintiff argued for $10,000.00 per year in non-economic damages for the 21 year life expectancy of the plaintiff. The jury deliberated about one-half hour, before returning with the verdict of $300,106.00.

Submitted by Eugene K. Swain, Esq., of RisCassi and Davis, P.C., Hartford, Connecticut, counsel for the plaintiff.

JURY VERDICT:
Automobile accident;
29 year old female
5% lumbar disability; 3% right knee disability;
VERDICT OF $47,214.00 PLUS OFFER OF JUDGMENT INTEREST
CARRIER: ALLSTATE.

In the case of *Marcella Wilson v. Henry Drewa* Docket No. 97-05718805 filed in the Superior Court Judicial District of Hartford, a jury returned a verdict in favor of the plaintiff in the amount of $47,214.00 ($43,000.00 non-economic $4,214.00 economic).

An offer of judgment was filed for $9,000.00 which raised the judgment another $16,219.60 for a total judgment of $59,216.60 after collateral source reductions.

The defendant maintained a $25,000/50,000 policy. Prior to trial the last demand was $12,000.00 and the highest offer by Allstate was $7,500.00. In full satisfaction of judgment Allstate paid $48,000.00.

On September 19, 1996 the plaintiff was driving her vehicle on School Street in East Hartford, Connecticut, when the defendant pulled his vehicle into her lane of travel in order to avoid contacting slow moving traffic in front of him.

The plaintiff sought medical treatment with a medical doctor approximately one week after the accident and received a 5% permanent partial disability to the lumbar spine. Approximately six months after the accident, the plaintiff developed left knee pain and was provided a 3% permanent partial disability to the knee. The medical doctor did not testify at trial; his records were read to the jury.

On the day of the trial the defendant conceded liability and defended this claim on the basis that the impact could not have caused serious injury, that the back pain was due to the plaintiff's pregnancy and not the accident and that the knee injury was not related since it was not reported to the medical provider until 6 months post-accident.

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

VERDICT:
Wrongful death by drowning;
2-year-old child;
ATTRACTIVE NUISANCE VERDICT OF 2.2 MILLION
WITH OFFER OF JUDGMENT INTEREST—JUDGMENT OF $2,800,000.

In the case of *Bresnan v. Pachaug Marina and Campground Association Inc.*, Docket No. CV 99 0551308 S, filed in the Superior Court for the Judicial District of New London at New London, a jury returned a verdict of $2,200,000 for the wrongful death by drowning of two year-old Wyatt Bresnan.

The defendant, the Pachaug Marina and Campground Association, Inc., had placed a brightly colored portable playground and boat shaped sandbox less than eight yards away from the Pachaug Pond and floating docks in Griswold, Connecticut. In the afternoon of July 23, 1997, Wyatt Bresnan, age two, and his three year-old brother, Cory, were drawn to the waterfront from their family residence located adjacent to the campground by the colorful playground equipment which they could see from their bedroom window. Wyatt and Cory began playing on the playground when Wyatt walked onto the adjacent floating docks, fell in the pond, and drowned.

The marina facilities next to the playground included a boat launch, floating docks and beaches. The defendant Association owned and maintained the playground, campground, beach, marina facilities, and a portion of Pachaug Pond. The playground equipment had been placed near the water's edge by employees of the defendant campground, although there were many other secure sites available on the property. The marina dock ran from the beach where the playground was located directly out to the deep water and slips for motorboats. The defendants had not placed a fence or barrier between the playground and the water, nor had the defendant placed any gate or other safety device on the floating docks.

Cory Bresnan apparently witnessed the drowning and ran to his father after his brother fell in the water. In the meantime, campers who saw the two boys walking along the dock, saw Wyatt's body floating in the water and pulled the body onto the docks. Upon arriving on the scene, Wyatt's father attempted CPR and mouth to mouth resuscitation without success. Before he could be transported from the scene, Wyatt Bresnan's mother, plaintiff Tina Bresnan, arrived upon the scene and witnessed Timothy Bresnan and emergency medical personnel trying to save the life of their son. At trial emergency personnel testified that they tried to resuscitate Wyatt's body, which had been placed on the back of his father's pick up truck, multiple times without success. The plaintiffs' counsel presented testimony of the emergency room physician and the pathologist that Wyatt experienced conscious pain and suffering for several seconds as he struggled for air before finally drowning.

The plaintiffs alleged the playground constituted an attractive nuisance to small children pursuant to Restatement, Second Section 339. The plaintiffs presented expert testimony of two playground safety consultants; Arthur Mittelstaedt, Ph.D. and Thomas Bowler. Both testified that placing a colorful playground designed for two to five year-old children, located directly adjacent to a body of deep water and a marina and floating docks was very dangerous in that children would be drawn to the waterfront and be at risk of drowning. Mittelstaedt described the brightly colored playground and the glittering water as an irresistible draw to a two year old who would be attracted to these conditions as a fish would be to a shiny lure and that a two year old had no capacity to sense the dangers of deep water.

The defendant presented the expert testimony of Steven Berheim, a playground consultant from New York. He testified that the scene did not present any danger to children and did not breach the standard of care. Plaintiffs counsel discredited Berheim by cross-examining him on his credentials and his resume. The cross examination is available

through the CTLA Expert Witness Bank.

The plaintiff also presented the expert testimony of Professor Gary Crakes, an economist, regarding Wyatt's future earning capacity and the testimony of many family members regarding the quality of Wyatt's short life.

The court relied on the Connecticut Supreme Court case of *Crotta v. Home Depot*, 249 Conn. 634 (1999), when it instructed that the conduct of Wyatt's parents, including any claims that they failed to supervise him, were irrelevant to the case and should not be considered as the parents were not parties to the suit and the parental immunity doctrine precluded the defendant from asserting a claim against the parents.

After five hours of deliberation following the three-week trial, the jury awarded the plaintiff estate economic losses of $1,100,000, and another $1,100,000, for pain and suffering and the loss of enjoyment of life. A timely offer of judgment had been filed for one million dollars and, with interest, the total award came to $2,800,000.

As a final note, since this verdict was announced, the Campground has removed the playground equipment.

Submitted by Attorney Robert I. Reardon, Jr., Attorney Tracey Hardman and Attorney Mark Dubois, of the Reardon Law Firm, P.C., New London, Connecticut, counsel for the plaintiff.

SETTLEMENT:
Medical malpractice;
70-year-old female;
perforated esophagus;
SETTLEMENT OF $500,000.00.

In the case of *Jane Roe v. John Doe*, the parties settled for $500,000 after jury selection and two full days of evidence.

On August 24, 1995, the plaintiff, age 70, was admitted to the hospital for a left hip replacement. Prior to the surgical procedure by the defendant, John Doe, M.D., the anesthesiologist attempted to intubate the plaintiff on several occasions for purposes of general anesthesia. Ultimately that could not be accomplished and the surgery was performed under spinal anesthesia.

The left hip replacement was uneventful. The evidence, however, demonstrated that beginning in the recovery room and during the ensuing five or six days the plaintiff continued to complain of a sore throat, pain in her neck and shoulder, and nausea. There was also evidence of spiking temperatures and elevated white blood counts. The plaintiff had been coughing up blood on a periodic basis. It was not until September 1, 1995, that a determination was made that her esophagus had been perforated during the surgical procedure. In the interim, the plaintiff had continued to receive food and liquids which infiltrated her chest cavity and created a devastating sepsis.

The plaintiff remained hospitalized until October 30, 1995, and was thereafter transferred to Gaylord Hospital for a month. Subsequently, she was moved to the Southington Care Center wherein she remained until the middle of February 1996. During her initial hospitalization, it was necessary for the plaintiff to undergo three separate surgical procedures to treat the massive infection. After one of those procedures, the plaintiff suffered a mild stroke.

The plaintiff's medical specials were approximately $275,000. A substantial recovery had been obtained from the anesthesiologist after the initial suit was filed. The case against hospital was withdrawn without any payment. The case was tried against John Doe, M.D., who maintained the position that he was not responsible for the developing infection as the treating orthopedic surgeon and the attending physician. The evidence was that the anesthesiologist did, in fact, visit the plaintiff on three separate occasions post-operatively and that the orthopedic surgeon saw her on several occasions during the critical week prior to the diagnosis of the perforation. It was during the cross-examination of John Doe, M.D., that the matter was resolved.

The plaintiff offered the testimony of Dr. Jo Shapiro, an Otolaryngologist, at Brigham and Women's Hospital in Boston as to the standard of care applicable to a surgeon dealing with potential post-operative sepsis. The defendant moved to prevent that testimony because Dr. Shapiro was not an orthopedic surgeon. The court ruled that the particular specialty was of no moment provided that Dr. Shapiro was a surgeon and was familiar with the appropriate post-operative care applicable to an orthopedist or any surgeon.

Submitted by Richard J. Kenny, Esq., Hartford, Connecticut, counsel for the plaintiff.

VERDICT:
Motor vehicle accident;
soft tissue injuries;
VERDICT OF $16,444.00
REDUCED BY 10% FOR
COMPARATIVE NEGLIGENCE.

In the case of *Eileen Fitzgerald-Garbien v. Lorraine Brooks,* Docket No. CV 95 0052120S, filed in the Superior Court for the Judicial District of Ansonia/Milford at Milford, a jury returned a verdict in favor of the plaintiff in the amount of $16,444.00, reduced by 10% for plaintiff's comparative negligence. The case was tried before Judge Radcliff in Derby in June 2001.

The plaintiff had soft tissue injuries of the neck and back as a result of an accident at an intersection. Plaintiff's son, who was a passenger in her vehicle at the time of the accident, was uninjured. No police were called to the scene of the accident. Both plaintiff and defendant reported to the police later that day.

Plaintiff's first doctor's visit was two days after the accident. Her treating doctor stated that she had "no disability", but Dr. William Freed, plaintiff's expert chiropractor, gave plaintiff a total 10% impairment. He distinguished between a disability and impairment under AMA Guidelines.

The plaintiff's total medical bills were $1,544, $1,275 of which were for physical therapy. No claim was made for future medicals or for lost wages.

Plaintiff filed an offer of judgment in the amount of $11,275. The complaint was filed in August 1995. Therefore, interest amounted to approximately $8,000. The last offer by the defendant was $5,000. Last demand by plaintiff was $8,000. The case was previously arbitrated resulting in plaintiff's award of $11,000. The defendant's insurance carrier was Allstate.

Submitted by John Lino Ponzini, Esq., of Brandner & Ponzini, Stamford, Connecticut, counsel for the plaintiff.

SETTLEMENT:
Medical malpractice;
68-year-old male;
failure to timely diagnose
post-operative peritonitis;
SETTLEMENT OF $400,000.00.

In the case of *Leonard Kirpas v. John Zelem, M.D.*, Docket No. CV 98 0064231S, filed in the Superior Court for the Judicial District of Ansonia/Milford at Milford, the parties settled for $400,000.

On January 5, 1997, the plaintiff, 68 years old, underwent gallbladder surgery at Griffin Hospital by John Zelem, M.D. During the surgery Zelem discovered that Kirpas's gallbladder was extremely adherent to a portion of his duodenum. Upon dissection, Zelem found that portion of the duodenum to be extremely weak and friable and, as a result, over-

sewed the area with a portion of the plaintiff's omentum. Zelem also placed a drain, mainly for the purpose of monitoring the condition of the duodenal wall.

During the five-post-operative days the plaintiff remained in the hospital he drained unusual amounts of bile which, during the last two days of his stay, became tinged with blood. Nevertheless, because the vital signs were stable, Zelem discharged the plaintiff on the morning of January 10. The plaintiff rapidly deteriorated and was returned to the hospital that night. Exploratory surgery by Zelem's partner disclosed that the omentum patch had failed and that the plaintiff was septic. The plaintiff was subsequently transferred to the Hospital of St. Raphael with peritonitis, where he remained for 11 weeks. After several months of at-home recovery, the plaintiff largely returned to normal functioning.

Plaintiff's expert, surgeon Thomas Gouge, M.D., testified in deposition that the only breach of the standard of care by Zelem was in failing to timely diagnose and treat the intestinal leak between January 9-10, 1997. Gouge also testified that even absent the delay the plaintiff would have required one or two subsequent surgeries and four to six weeks of hospitalization. Therefore, the amount of medical specials attributable to the negligent delay was estimated by Gouge as $160,000. Defendant's expert was of the opinion that the intestinal patch did not fail until after plaintiff was discharged and that because the plaintiff's clinical picture was normal at the time of discharge it was not a breach of the standard of care for Zelem to have released him. At the time of the incident the plaintiff worked part time earning approximately $8,000 per year.

The parties settled for $400,000 three weeks before trial.

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

JURY VERDICT:
Motor vehicle accident;
24-year-old female;
6% ppd to cervical spine;
VERDICT OF $53,205.70.

In the case of *Leslie Valentine v. Julie Marchetti*, Docket No. CV 99 0495123 S, filed in the Superior Court for the Judicial District of New Britain at New Britain, the jury returned a verdict in favor of the plaintiff in the amount of $56,006.00 on November 1, 2000. The plaintiff was also found 5% comparatively at fault for the accident reducing the damage award by $2,800.30 but pre-judgment interest in the amount of $9,394.76 was added for a total award of $62,600.46.

The plaintiff was a 24-year-old nurse's assistant when, on May 20, 1998, at approximately 4:45 p.m. she was exiting a private drive to head westbound on North Street (Route 6) in Bristol, Connecticut. The defendant was attempting to pass stopped vehicles that had waved the plaintiff out onto North Street. The accident occurred as the plaintiff's vehicle crossed into the defendant's path.

The defendant denied liability and contended that the cause of the accident was the plaintiff improperly pulling out from a private drive and improperly taking a left turn. The investigating police officer was called as a witness and testified that nothing other than the defendant's vehicle prevented Ms. Valentine from exiting the private drive. He further testified that the area where the accident occurred was a single lane of traffic and that it was unlawful for the defendant to pass in that area. The defendant admitted on cross-examination that after the accident she was told by the police officer that she should not have been passing in that area in spite of her ability to stay on the right side of the yellow double lines. In other words, the area was marked for single lane travel at that point and the double lanes did not begin until further up on Route 6.

After the initial treatment at the hospital on the date of the accident, the plaintiff did not receive any other treatment for nearly nine months. On February 9, 1999, the plaintiff saw a chiropractor, Dr. David Spitz. Dr. Spitz testified that the treatment that followed was a direct result of the motor vehicle accident. He assigned a 6% permanent partial disability rating to her cervical spine following chiropractic care which lasted over 7 months. Medical specials including two visits to an orthopedic physician after Dr. Spitz totaled $7,006.00. The plaintiff testified that the orthopedic treatment was sought with respect to her shoulder which had popped out of joint. The orthopedic surgeon's bills were submitted but he did not testify at trial.

After approximately 1½ hours of deliberations, the jury returned a verdict totaling $56,006.00 less 5% for comparative negligence. The plaintiff had filed an offer of judgment in the amount of $17,500. The defendant's insurance carrier was Allstate and the only offer made was prior to the commencement of evidence in the amount of $3,000.

Submitted by Bruce E. Newman, Esq., of the Law Offices of Bruce E. Newman, LLC, Counsel for the plaintiff.

VERDICT:
Motor vehicle accident;
6% permanent disability of the lumbar spine;
verdict in the amount of $525,000.00 plus offer of judgment interest.
SETTLED ON APPEAL FOR $625,000.00.

In the case of *Driver v. Terminix, et al*, Docket No. CV 97 0345080 S, filed in the Superior Court for the Judicial District of Fairfield at Bridgeport, a jury returned a verdict in favor of the plaintiff in the amount of $525,000.00, plus offer of judgment interest, for a total of $679,503.59. The matter settled on appeal for $625,000.00.

Plaintiff lived at the end of a short cul-de-sac in Trumbull, and was leaving his home driving to work in May 1996. Terminix Exterminators maintained offices in a small corporate park on the same road. Terminix's driveway was approximately 75 feet beyond the end of the plaintiff's driveway heading toward the main roadway. As the plaintiff exited his driveway, he saw a Terminix pickup truck turn the corner onto his street approximately 150 feet away and begin traveling down Woodside Avenue, directly toward the plaintiff's vehicle. The plaintiff noticed that the Terminix vehicle was traveling at a high rate of speed. As the plaintiff passed the entrance to the Terminix facility, the Terminix truck attempted to turn left into the Terminix parking lot and collided with the driver's side of the plaintiff's vehicle.

The plaintiff was shaken up, but otherwise reported no injuries at the scene. Since the accident happened immediately outside his home, he was able to photograph and videotape the scene of the accident. Once the police finished their investigation, the plaintiff went inside to make phone calls. When he sat and crossed his legs, his right leg went numb. He subsequently treated with the same chiropractor who had treated him for an auto accident five years earlier, but these treatments brought only temporary relief. The plaintiff's symptoms worsened and his legs became numb if he walked more than a few hundred feet. Because of the mounting chiropractic bills, his own insurance company sent him for an inde-

pendent chiropractic evaluation with Dr. Kristen Kaczanowsky in Fairfield. Dr. Kaczanowsky confirmed the plaintiff's injuries and, in fact, stated that a neurosurgical consultation was in order for a possible serious disc injury.

The plaintiff was then seen by Dr. Kenneth Lipow in Bridgeport. An MRI revealed a bulging disc at L5-S1 and the presence of advanced pre-existing stenosis in the plaintiff's lumbar canal. Dr. Lipow recommended surgery. At this point, the plaintiff's medical coverage through his auto insurance had been exhausted and, because he was self-employed, he had no medical coverage and could not afford the recommended surgery. He never had the surgery. Dr. Lipow ascribed a permanent disability rating to the plaintiffs' lumbar spine of 6%. The plaintiff's medical bills totaled $14,000.00.

The defense obtained an IME with Dr. Kenaga Sena. Dr. Sena testified that the lapse of several hours before the onset of radiating pain ruled out the auto accident as the cause of the disc injury. Dr. Sena further testified that the recommended surgery would address the pre-existing conditions, not anything caused by the accident.

The plaintiff was a self-employed road cutter, operating the large machines with rotating blades which cut asphalt and concrete roadways in preparation for utility installations. He claimed that the back injury hampered his ability to carry out his livelihood since he had to walk several hundred feet to mark out the lines in the road in preparation for the cutting by the machine. Although the plaintiff's income spiked sharply the year after the accident, it dropped thereafter and the plaintiff eventually sold his business. The plaintiff retained Stuart Sachnin of Vocational Economics to testify as to the value of this diminished earning capacity.

The defense hired a private surveillance team to videotape the plaintiff. The plaintiff was able to obtain those tapes through discovery on the eve of trial.

At trial, Drs. Kaczanowsky and Lipow testified for the plaintiff, as did Stuart Sachnin. After two weeks of evidence the jury returned a verdict in favor of the plaintiff in the amount of $525,000.00. The plaintiff had also filed an offer of judgment which added $140,000.00 to that verdict. The case was settled on appeal for $625,000.00. The defendant was self insured.

Submitted by Lawrence H. Reilly, Esq., of Fogarty Cohen Selby & Nemiroff, LLC, Greenwich, Connecticut, counsel for the plaintiff.

SETTLEMENT:
Bad faith claim;
failure to pay $20,000.00;
auto liability limits;
SETTLEMENT OF $850,000.00.

This bad faith lawsuit against Infinity Insurance Company, which arose out of its failure to pay $20,000 in liability insurance coverage for a wrongful death claim, has settled for $850,000 after mediation. The suit resulted from Infinity Insurance Company's repeated bad faith refusal to pay its minimal liability policy limits to settle the underlying wrongful death claim of the Estate of Thierry Goncalves brought against Mario Oliveira. The Estate, represented by Attorneys Kevin Nixon and James Mulhall, Jr., of Waterbury, Connecticut, tried the wrongful death lawsuit to judgment, resulting in an award of $987,817.28. The wrongful death verdict was previously reported in The Forum, Volume 18, Number 1, January/March 2001.

Theirry Goncalves was killed on February 16, 1997, while a passenger in a 1991 Nissan Stanza driven by Mario Oliveira, and owned by his parents with whom he resided. Mario Oliveira was driving the car while his parents were on vacation. Mario Oliveira lost control of the Nissan on Route 22 in North Salem, New York, and subsequently struck a tree, killing his passenger, Thierry Goncalves. The Nissan vehicle was covered by a $300,000 Worcester Insurance Company policy, with the Oliveira parents as named insureds. Mario Oliveira was not listed as an insured on the Worcester policy. The Nissan vehicle was not regularly used or owned by Mario Oliveira. In fact, the vehicle Mario Oliveira regularly used was his 1989 Chevrolet that he had insured with the defendant Infinity for $20,000.

The plaintiffs attempted to settle the claim by letter dated August 29, 1997, in the amount of $320,000, the policy limits of both policies. Worcester Insurance promptly tendered its $300,000 policy, but on October 8, 1997, Infinity Insurance denied coverage claiming that Mario Oliveira regularly used the Nissan vehicle he was driving at the time of the accident. The relevant policy language stated in part: "[Infinity] will pay damages, up to the policy limits stated on the Declarations page, for which an insured person is legally liable because of bodily injury or property damage resulting from the ownership, maintenance or use of your insured car or a non-owned car. . ." The policy provided that a "non-owned" car means "[a] car used by you with the express permission of the owner," and the car "must not be . . . available for your regular use." Infinity made the assertion that Mario Oliveira regularly used the Nissan without conducting any investigation and then continued to deny coverage even after Oliveira's parents testified at deposition that their son had permission to use their car only while they were on vacation. On October 28, 1997, plaintiff's counsel advised Infinity that he intended to claim bad faith if the $20,000 was not paid within 30 days.

On November 18, 1997, the plaintiffs filed an offer of judgment for the policy limits of both parties in the amount of $320,000. Infinity formally denied coverage on December 2, 1997, advising Mario Oliveira by letter that his policy did not provide coverage for the incident and the offer of judgment expired without acceptance.

On September 8, 1998, defendant Infinity finally tendered its policy limits of $20,000 with the requirement that the plaintiff Estate release all claims against the defendant and Infinity, including all bad faith claims for its refusal to pay its policy limits for over eighteen months. This $20,000 offer was rejected, and an offer to settle for $1.5 million was extended by the plaintiffs on September 22, 1998 which was open until October 7, 1998. On October 7, 1998, Infinity requested an additional 30 days to consider the demand, and stated that it would "seek to clarify whether the vehicle was furnished for Mr. Oliveira's use which would preclude any coverage for the claim." This statement indicated that, for the 19 months during which it had denied coverage, it did not know the facts and had no sound basis for denying coverage. Nevertheless, Infinity again specifically denied coverage but offered to settle all claims, including bad faith claims, for only $20,000. At that point, Nixon and Mulhall, plaintiff's counsel in the wrongful death suit, notified Infinity that The Reardon Law Firm, P.C. henceforth would represent the Estate of Goncalves in any bad faith claims that were to be made against Infinity.

After the wrongful death judgment, the bad faith suit was brought in the Superior Court for the Judicial District of Waterbury at Waterbury alleging breach of the duty of good faith; reckless and un-

fair insurance claims settlement practices; and reckless and willful infliction of emotional distress. The suit was transferred to the Complex Litigation Docket where the parties agreed to mediate. The matter was submitted to Retired Chief Justice John Speziale for mediation, who recommended settlement in the amount of $850,000 in September 2000. After extensive negotiations, the matter finally settled in June, 2001 for $850,000.

Submitted by Attorney Robert I. Reardon, Jr., and Attorney Scott D. Camassar, of The Reardon Law Firm, P.C., New London, Connecticut, counsel for the plaintiffs in the bad faith lawsuit.

JURY VERDICT:
Medical malpractice;
48-year old male;
failure to diagnose and treat diverticulitis,
wrongful death;
VERDICT OF $1,800,000.00.

In the case of *Patricia M. Flynn, Administratrix, et al v. Raymond M. Gabriele, M.D., et al*, Docket No. CV 98 0356187 S, filed in the Superior Court for the Judicial District of Fairfield at Bridgeport, the jury returned a verdict in favor of the plaintiffs in the amount of $1,800,000.00. This case was tried before Judge Elizabeth Gallagher. The date of verdict was March 15, 2002. Insurance carrier: CMIC.

On January 5, 1998, the plaintiff's decedent went to the defendant Raymond M. Gabriele's office with complaints of severe abdominal pain, nausea, diarrhea and fever of one week's duration. The defendant doctor diagnosed the decedent's illness as gastroenteritis and sent him home with prescription medications. The decedent's wife called the defendant doctor's office the next morning to report that the decedent's condition had worsened through the night. The defendant doctor did not return the decedent's phone call until approximately 3:45 in the afternoon of January 6th.

A critical issue in the case was the content of the phone conversation between the decedent and the defendant doctor on the afternoon of January 6th. The decedent's spouse was a witness to the decedent's side of the conversation and the decedent reported to her what the doctor told him in response to the decedent's complaints. This evidence was admissible pursuant to the dead man statute. Plaintiffs contended that the decedent had reported to the defendant doctor that he was continuing to suffer from fever, severe abdominal pain, vomiting and diarrhea. The defendant doctor contended that the decedent told him that he was improving and there was no further need for treatment at that time. The decedent suffered a cardiac arrest at his home as a result of the acute peritonitis and endotoxic shock approximately 3½ hours after the phone call with the doctor.

Evidence showed that the decedent suffered a ruptured diverticulum prior to the decedent talking on the phone with the defendant doctor and that the decedent was in severe pain and distress at the time of the phone conversation with the doctor. On the issue of standard of care and breach thereof, the experts generally agreed that the plaintiff's version of the content of the January 6th telephone call would have required immediate hospitalization of the decedent.

On the issue of causation, the plaintiffs presented testimony from Dr. William Sardella of Hartford with respect to the treatment that would have been undertaken if the decedent had been referred to the hospital immediately following the phone call. Dr. Sardella indicated that the decedent probably would have been treated successfully. Instead, the decedent remained at home where he suffered a cardiac arrest. Although the decedent was resuscitated at home by EMTs he did not survive. He was placed on life support at St. Vincent's Hospital, but ultimately expired 36 hours after admission.

The decedent was a 48-year-old male employed by IBM as a Computer Service Technician. He was survived by his wife and two children. Dr. Gary Crakes provided expert opinion with respect to economic damages.

The verdict of $1,800,000.00 was broken down as follows: $500,000.00 economic damages to the Estate of William Flynn, $1,250,000.00 non-economic damages to the Estate of William Flynn and $50,000.00 damages on Patricia Flynn's loss of consortium claim.

Submitted by Joseph V. Meaney, Jr. of Cranmore, FitzGerald & Meaney of Hartford, Connecticut, counsel for the plaintiffs.

SETTLEMENT:
Riding lawnmower accident;
12-year-old boy;
severe foot injuries, including amputation of 2 toes;
SETTLEMENT OF $860,000.00.

In the case of *Skrzyniarz p.p.a. v. Votto,* Docket No. X04-CV-00-0122390-S, Norwich Complex Litigation Docket, the parties settled for $860,000.00.

The case concerns a lawn tractor accident involving two unsupervised 12 year old boys. The minor plaintiff had gone to his best friend's home (the minor defendant) to spend the night. When he arrived, the minor defendant was in the process of cutting his family's lawn using a lawn tractor.

There was a factual dispute as to whether the defendant parents told the plaintiff not to go near the lawnmower while it was in operation. However, there was no question that the defendant parents left for an appointment leaving both boys alone at the house.

Following the parents' departure, the boys thought it would be fun if they rode on the tractor together. The plaintiff climbed onto the hood of the tractor straddling the hood as if he were on a horse. Either due to horseplay or uneven terrain, the plaintiff fell off while the tractor was in operation, and his left foot was severely lacerated by the engaged blades of the mower. The laceration ran from the space between the fourth and fifth toes of his left foot to just above his ankle and literally sliced his left foot in half. He was rushed to the Yale New Haven Children's Hospital where he underwent numerous surgeries on the foot, including the amputation of the fourth and fifth toes as well as the pinning of several fractured bones in the foot.

The plaintiff was hospitalized for a total of 28 days but made a remarkable recovery. His treating physician rated him as having a 20% impairment of the left leg which most likely would progress to a 28% impairment of the leg as an adult. The accident-related medical expenses totaled approximately $108,000.00.

The plaintiffs' claim was that the defendant parents failed to properly supervise the use of the lawn tractor and/or negligently entrusted the lawnmower to their minor child. There was also a claim of negligent operation against the minor defendant.

The defendants raised a special defense of comparative negligence alleging that a 12 year old boy should know better than to ride on the hood of a lawn tractor while the blades were engaged.

The defendants impleaded the manufacturer and retailer of the tractor alleging various theories of liability including product liability as well as negligent instruction.

The case was made problematic by the

fact that by the time suit was instituted, the plaintiff was starting on the freshman soccer, basketball and baseball teams at his high school which is well-known for its competitive athletics.

The case settled in November of 2001. The homeowner's carrier was USAA which paid $800,000.00 of the settlement.

Submitted by Timothy W. Donahue, Esq., of Delaney, Zemetis, Donahue, Durham & Noonan, P.C., Wallingford.

SETTLEMENT:
One-car accident;
death of 16-year-old male;
SETTLEMENT OF $1,500,000.00.

In the case of *John MacCallum and Linda MacCallum, Co-administrators of the Estate of Michael J. MacCallum v. Elise K. Golembeski and David J. Golembeski*, Docket No. CV 01 0276676 S, filed in the Superior Court for the Judicial District of New Haven at Meriden, the parties settled for $1,500,000.00 at the time of a pretrial conference.

This case involved the death of a 16-year-old boy in a one-car automobile accident. The accident occurred on Moss Farm Road in Cheshire, Connecticut on December 15, 2000. The accident took place at approximately 11:00 p.m. The police reconstruction concluded that the vehicle left the roadway, traveled some distance, and collided with a tree at a minimum speed of 48 m.p.h. That would put the speed while on the roadway substantially greater than 48 m.p.h. The area had a 25 m.p.h. speed limit. There were no drugs or alcohol involved in the accident.

Unfortunately, the police investigation was faulty in that critical measurements were either not taken or were wrongly interpreted by the police. Plaintiff's counsel hired a forensic engineer to reconstruct the accident. That reconstruction verified the high speed nature of the crash. That engineer opined that the minimum speed (while on the roadway) as being 46 mph and the maximum speed as being 73 mph.

The decedent was a junior at Cheshire High School at the time of his death. His life expectancy was 57.38 years.

Submitted by John J. Houlihan, Jr., Esq., of RisCassi & Davis, P.C., Hartford, Connecticut, counsel for the plaintiff.

SETTLEMENT:
Fall from ladder;
subdural hematoma; coma;
SETTLEMENT OF $930,000
BEFORE LITIGATION.

In the case of *Chester Rakowski v. Holy Name Athletic Club, Inc.,* the parties settled for $930,000.00 before commencement of suit.

On December 29, 2000, the plaintiff, Chester Rakowski, age 58, fell from an eight-foot step-ladder on the premises of the Holy Name Athletic Club, Inc. in Stamford, Connecticut, struck his head on an adjacent table, and suffered a traumatic brain injury. The Holy Name Athletic Club owned the ladder. At the time of the accident, Mr. Rakowski had been assisting his wife's catering business, which was operated and conducted from the premises of the club, set up for a New Year's Eve party at the club. Mr. Rakowski was in the process of hanging decorations for the party, when the ladder, which was very old, unsafe and unsteady, began to wobble.

The plaintiff suffered a severe traumatic brain injury.

The plaintiff claimed that the ladder was dangerous and defective in that it had cracks in the side rails, and loose bolts. This caused the ladder to sway and become unsteady. While the club owned the ladder, the plaintiff had used the ladder on many previous occasions, and either his wife had suggested to him that he use it to hang the decorations on the date of the accident, or the plaintiff decided to use the ladder himself. At the time of the accident, no one from the Holy Name Athletic Club was present, nor did they instruct or suggest to the plaintiff that he use the ladder.

Mr. Rakowski spent approximately six weeks at Stamford Hospital, and then another six weeks at the Tandent Rehabilitation Center in Stamford. He is now incapacitated and confined to his bed or to a wheel chair at his home. The current medical bills total approximately $180,000. The future medical expenses will be $100,000-150,000 per year.

The Holy Name Athletic Club had a one million dollar ($1M) liability policy, with no excess or umbrella coverage.

The plaintiff was prevented from making any claim against his wife's catering business, due to the fact that he is an officer of the catering company, and therefore excluded by the policy.

The parties settled the claim for the sum of $930,000 in August, 2001.

The plaintiff's experts were Ralph Ridgeway, engineer at Robson Lapina, Wilbraham, MA, and Joseph Carfi, M.D., long-term care analysis, Great Neck, NY. The liability carrier was Hermitage Insurance Co., White Plains, NY.

Submitted by Mark D. Arons, Esq., of The Arons Law Firm, LLC, Westport, Connecticut, counsel for the plaintiff.

JURY VERDICT:
Automobile accident;
38-year-old male plaintiff;
No specific disability rating;
VERDICT OF $82,985.98.

In the case of *John Scott Kaye v. Cassandra King, et al,* Docket No. CV-99-0588406, filed in the Superior Court for the Judicial District of Hartford, the jury returned a verdict in favor of the plaintiff in the amount of $82,985.98.

On August 12, 1997, the plaintiff was traveling eastbound on Peacedale Street, approximately 1000 feet from his home in Bristol, Connecticut. He was approaching the intersection of Peacedale Street, Burlington Avenue and Maple Avenue, intending to continue straight onto Maple Avenue. The defendant was traveling west on Maple Avenue intending to turn left onto Burlington Avenue. Both drivers had a green light.

As the plaintiff was proceeding straight and approaching the intersection, the defendant turned left into his path and a collision occurred. The defendant was taken away by ambulance to Bristol Hospital Emergency Room. The plaintiff reported no injuries at the scene. Shortly thereafter, the plaintiff became stiff and sore and was taken to the emergency room by his father.

The plaintiff received a total of 10 months of chiropractic care. He was treated for two to three months in Bristol, Connecticut by a chiropractor, Glen Palmisano. He was initially seen five times per week through August, September and October at which time he relocated to New York City. Once in New York City, the plaintiff treated for an additional six to seven months at decreasing frequency.

The plaintiff was employed at ESPN at the time of the accident and left that job for CBS Television in Manhattan. The plaintiff's job as a production assistant was quite strenuous. Approximately three years following the accident, the plaintiff left that career because it had become too difficult given his injuries.

Medically, the plaintiff never received a specific disability and/or impairment rating. In June of 1998, his treating chiropractor indicated that he may suffer from exacerbations in the future, however no rating was mentioned.

The plaintiff's official demand was $17,000.00. This figure had been arrived at during a pretrial conference in Sep-

tember, 2000. An Offer of Judgment was filed at that time in the amount of $20,000.00, the limits of the defendant's liability policy. The defendant's offer throughout the proceedings was $9,500.00 and an Offer of Judgment was filed by the defendant in that amount. The defendant was insured by Infinity Insurance.

The defendant made a liability defense at trial. However, the jury determined that the defendant bore 100% of the liability in the accident. In its verdict, the jury deducted $180.00 for an eye exam that the plaintiff claimed that was brought about by concerns due to the car accident. Although the jury rejected the connection of that eye exam, they awarded the remainder of the plaintiff's medical bills and an additional $75,000.00 in non-economic damages. The only medical testimony in the case consisted of the video of Dr. Glen Palmisano, the chiropractor that treated the plaintiff for approximately two to three months.

Submitted by Paul M. Iannaccone, Esq., of RisCassi & Davis, P.C., Hartford, Connecticut, counsel for the plaintiff.

JURY VERDICT:
Dog bite to nose;
23-year-old female;
surgical reconstruction of nose;
5% permanent impairment
VERDICT OF $716,774.07
PLUS OFFER OF JUDGMENT INTEREST.

In the case of *Michele Tryon v. The Town of North Branford, et al*, Docket No. CV 96-539713S, 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 in the amount of $8,574.07 economic damages and $708,000.00 non-economic damages, for a total verdict of $716,774.07. Interest will be added because the plaintiff previously filed an offer of judgment in the amount of $250,000.00.

At the time of the bite, the plaintiff was 23 years old. On September 17, 1995, the plaintiff was attending a state Firefighter's Convention parade in Jewett City with her boyfriend. While in the parade assembly area, Ms. Tryon had the tip of her nose bitten off by a dalmatian that was scheduled to march in the parade with the defendant, Rush Turner, III, who was a member of the North Branford Fire Department.

A claim was filed against numerous defendants including the firefighter and the Town under Conn. Gen. Stat. Section 7-308. All defendants moved for summary judgment under governmental immunity. The judge granted all defendants summary judgment.

The plaintiff appealed and successfully argued the exception to governmental immunity: that Ms. Tryon was an identifiable person subject to imminent harm. The decision of the appellate court can be read at Tryon, 58 Conn. App. 702 (2000).

The Appellate Court determined that the plaintiff could not use the dog bite statute and, therefore, had to prove a common law negligence claim against the dog owner. Accordingly, the plaintiff was required to prove scientor (vicious propensities of the dog), commonly referred to as "the one free bite rule."

At his deposition, the defendant claimed the dog had never bitten anyone. The plaintiff took the depositions of the owner's parents who stated that the dog had, in fact, previously bitten a jogger.

At trial, the defendant fire fighter made the claim that the plaintiff dug her long fingernails into the dog's ears and yanked the dog into her face. The plaintiff was an EMT and therefore had short fingernails.

After the bite, the plaintiff was rushed to Backus Hospital where Thomas Sena, M.D., removed pieces of cartilage from her ear and sewed them onto her nose. While this surgery was going on, Mr. Turner, his dog, and the Town of North Branford were marching in the fireman's parade. Approximately nine months later, a second surgery was performed where different parts of her ear were used to reconstruct the nose. The surgeries were successful, but the plaintiff is left with a small deformity, and Dr. Sena testified she has a 5% whole person permanent impairment.

At trial the plaintiff argued for $408,000.00, and the jury took less than an hour to return a verdict of over $700,000.00.

At trial, the Honorable Antonio C. Robaina, after reviewing the Appellate Court decision, determined as a matter of law that the plaintiff was an identifiable person. The defendants plan on appealing this point. They have also moved to set aside and for remittitur. This case will likely end up before the Appellate Court once again.

Submitted by Stephen M. Reck, Esq., of Trebisacci & Reck, LLC, Pawcatuck, Connecticut, counsel for the plaintiff.

SETTLEMENT:
Hunting accident, tree stand collapse;
46-year-old male; paraplegic;
SETTLEMENT OF $2,341,000.00.

In the case of *Franco Siracusa v. Mario Facchini*, filed in the Superior Court for the Judicial District of Hartford, Docket No. CV-98-0579834, the parties reached a settlement on October 10, 2000 in the amount of $2,341,000.00.

On November 18, 1996, in the early morning hours, the plaintiff was sitting in a hunting tree stand on property owned by the defendant, located in North Afton, New York, when he fell approximately 10 feet to the ground, fractured his spine, severed his spinal cord, and rendering him a paraplegic. The defendant was an avid and experienced hunter, and had used the property in New York for hunting. He had an employee at his former business, Ward Manufacturing Company, construct the tree stand from his design. The defendant permanently installed the tree stand approximately 10 years before the accident.

On the date of the accident, the defendant directed the plaintiff to the tree stand, advising him that it was safe to use. No safety harness was provided to the plaintiff, nor was the tree stand inspected. The plaintiff was a novice hunter who had never used a tree stand. He was never given instructions on how to use the tree stand.

The plaintiff and his wife sued the defendant in negligence, alleging that the defendant failed to properly instruct the plaintiff on how to use the tree stand; failed to provide the plaintiff with a safety harness; failed to warn the plaintiff of the dangers inherent in tree stand use; and failed to inspect the tree stand to ensure that it was secured to the tree. The complaint was amended during pretrial discovery to include a willful and reckless misconduct claim, which is one of the exceptions to the New York recreational land use immunity law. Another exception to the immunity law, consideration, applied as well. The defendant offered to bring the plaintiff to his property to hunt, in exchange for tile work the plaintiff performed in the defendant's home.

The plaintiff suffered a T-11 burst fracture with complete obliteration of the spinal canal. He underwent multiple surgeries, including a T-10/T-11 thoracic laminectomy, open reduction of T-11 fracture, thoracic instrumentation at L-1/T-8, iliac bone graft harvest, and posterolateral fusion. Upon his release from the

hospital, the plaintiff spent approximately 22 months in the hospital for Special Care in New Britain. He requires ongoing, constant care and treatment for the numerous complications associated with his paraplegia. His medical expenses totaled approximately $725,000.00.

The plaintiff used the services of Geomatrix Productions of Avon, Connecticut to prepare a compelling "Day In the Life and Settlement" video. The plaintiff also employed the services of Jack Dahlberg of Colorado to present an extensive life care plan.

The plaintiff retained Ron Woods, engineer for the Tree Stand Manufacturers Association, as an expert in the design of the tree stand. The plaintiff also retained Jeffrey DeRegnaucourt of Grand Rapids, Michigan as an expert in hunting safety. Mr. DeRegnaucourt was instrumental in promulgating safety rules and standards regarding tree stand hunting safety.

On September 20, 2000 a day long - pre-trial settlement conference was held before the honorable Susan Peck. Appearing at the pre-trial with the plaintiff was Jack Caddy, a structured settlement specialist. After a full day of negotiations, the parties subsequently reached a settlement with a present day value in the amount of $2,341,000.00 paid by Travelers Indemnity Company.

The settlement provided for $1.2 million dollars up front, and $100,000.00 annuity per year for life with a 15 year guarantee.

In addition, the State of Connecticut Department of Administrative Services claimed a lien in the amount of $725,000.00 for medical expenses incurred. The state agreed to accept pay back of the lien in the form of an annuity with initial payment up front in the amount of $125,000.00 and the remainder of the payments made in 3 installments over a 15 year period. The total cost of the up front payment and annuity to the State of Connecticut was $405,000.00 resulting in substantial savings to the plaintiff.

Submitted by Steven F. Meo, Esq. and David M. Poirot, Esq., Hartford, Connecticut, counsel for the plaintiff.

SETTLEMENT:
Defective garbage truck;
29 year old male;
43% ppd of left upper extremity;
SETTLEMENT OF $560,000.00.

In the case of *Wayne Hansel v. Lodal, Inc. et al.*, Docket No. CV96-0563750 and *Wayne Hansel v. Sanitary Services, et al.*, Docket No. CV98-0578854, filed in the Superior Court for the Judicial District of Hartford, the parties reached a settlement on June 30, 2000 in the amount of $560,000.00.

On March 25, 1996 at approximately 8:30 a.m., the plaintiff was an employee of Sanitary Services, Inc. and was operating a garbage truck within the scope of his employment. When the compacting ram on the truck became jammed, the plaintiff attempted to restart the compacting ram when it suddenly lurched and started, crushing his left arm. The plaintiff had reached into the hopper of the truck in order to activate a limit switch that was situated behind the control panel when the compacting ram suddenly restarted.

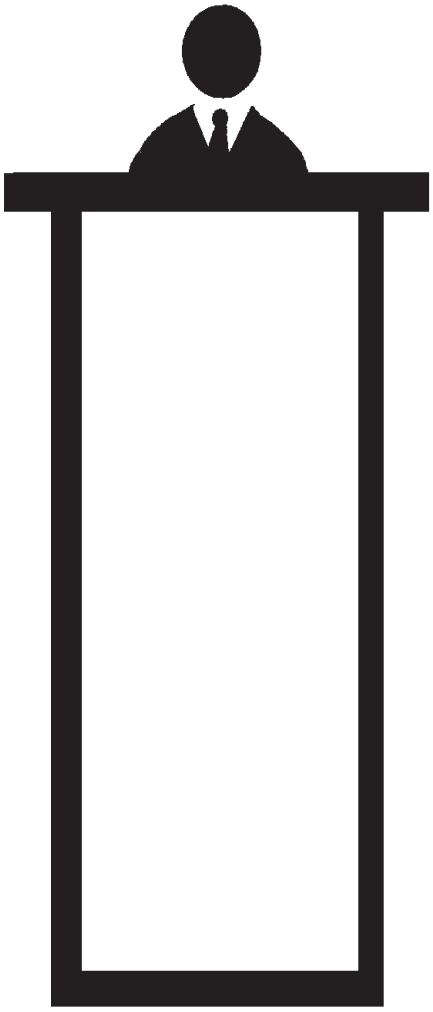
The plaintiff suffered an extensive crush injury to the left upper arm and forearm. The plaintiff underwent numerous surgeries during his initial hospital stay. On November 28, 1997 Dr. Jonathan Schreiber, the plaintiff's treating physician, assigned a 43% permanent partial disability of the left upper extremity.

The plaintiff brought a product liability claim against Lodal, Inc., the manufacturer of the truck, and against Sanitary Environmental Equipment Company, Inc., the distributor. In addition, a negligence count was added to the product liability claim against Sanitary Environmental for negligent maintenance and repair of the truck. A second action was brought and consolidated against Sanitary Services, Inc. under *Suarez v. Dickmont Plastics*. The product liability claim alleged that the truck was designed in a defective manner in several ways, including that the hopper area was unguarded; that the truck lacked fail safe automatic cycle controls to interrupt the cycle when the compactor ram jammed; and that the truck lacked warnings and instructions related to handling packing ram problems.

In addition, the plaintiff alleged negligent maintenance, repair, and service of the truck by Sanitary Environmental and recklessness on the part of Sanitary Services. The *Suarez* action alleged that Sanitary Services instructed the plaintiff to reach into the compactor blade area when a jam occurred; they failed to provide a protective cover guard or other device near the compactor ram area; and instructed the plaintiff to manually adjust a limit switch when the compactor ram jammed. The plaintiff was instructed not to turn the vehicle off to avoid unnecessary delays.

Prior to trial, the parties reached a settlement. The carrier for Sanitary Environmental, Zurich American Insurance Company paid a total of $178,000.00. Crum & Forster paid a total of $180,000.00 on behalf of Sanitary Services Corporation, and Great American Insurance paid a total of $202,000 on behalf of Lodal. The workers' compensation lien in the amount of $132,000.00 was waived in exchange for a full and final stipulation.

Submitted by Steven F. Meo, Esq. and David M. Poirot, Esq., Hartford, Connecticut, counsel for the plaintiff. ■



Making The Most of The CTLA ListServ

By Douglas W. Hammond

In this issue, we take a brief look at messages concerning proof of uninsured status, family medical leave, jailed witnesses, expert communications, and the release of information by treating physicians to defense counsel.

Q. We have an uninsured auto claim here in Connecticut with a New York tortfeasor who we can't locate. We have been unable to obtain an affidavit of no insurance and his current whereabouts are unknown, though the search continues. Does anyone have any ideas on how to get around this problem?
—Christopher Meisenkothen

A. . . . I suggested a statute be enacted to allow a presumption of no insurance if (1) the police report shows no insurance and/or (2) a correspondence from the listed insurer on a police report indicates that the tortfeasor is no longer insured with that company and/or was not insured at the time of loss. If this type of statute was adopted, the burden would shift to the UM carrier to show whether or not the tortfeasor was insured.

[. . . T]he insurance industry has the greater resources and networks available to determine if the tortfeasor is insured. This burden should not be shifted to the innocent victim [ ] of a bad driver. There would also be no hardship or prejudice to the UM carrier because it is assumed their investigation would be ongoing and they would have subrogation rights against the tortfeasor's carrier if and when they found out that indeed he or she had insurance later on.

Does anyone know the status of this matter? This would be a really helpful and fair piece of legislation. The insurance industry would have no viable reason to oppose it.

—Martin T. Weiss

[Compiler's Note: Substitute House Bill 5745, the final version of the bill to which Mr. Weiss referred, failed to pass. It would have provided as follows:

Section 1. Section 38a-336 of the general statutes is amended by adding subsection (h) as follows (*Effective October 1, 2002, and applicable to causes of action accruing on or after said date):*

(NEW) (h) There shall be a presumption that a tortfeasor is uninsured if an injured person provides a sworn, written statement to the insurer providing uninsured motorist coverage to such injured person that such injured person is unable to determine whether the tortfeasor was uninsured at the time of the accident that caused such person's injuries. Such sworn, written statement shall contain: (1) A statement by the injured person or such injured person's legal representative that, after reasonable efforts have been made, it cannot be determined whether the tortfeasor was insured at the time of the accident, and (2) a listing of the measures taken to ascertain whether the tortfeasor was insured at the time of the accident. If, at the time of the accident, the tortfeasor presented an insurance identification card to the investigating police officer and the information on such card was listed on the accident report, the injured person or such injured person's legal representative shall present documentation or information from the insurer designated in such insurance card that confirms that the tortfeasor was not insured by that insurer at the time of the accident. The insurer providing uninsured motorist coverage to such injured person may rebut such presumption by providing written information to its insured that provides the names of all liability insurance companies that provided coverage to the tortfeasor at the time of the accident and the applicable policy numbers and amounts of liability coverage.

The shifting of the burden of proof had been opposed by the insurance industry which argued that it was unnecessary and unfair to insurers. CTLA will be proposing this legislation again in the coming year.]

[There were some other replies to the Meisenkothen inquiry from other members suggesting a default against the tortfeasor would establish a presumption that the tortfeasor is uninsured. One message cited *Harnicar, Admr v. Nationwide*, 1995 WL 357741 (Conn. Super, Pickett, J.); *Mazziotti v. Allstate*, 1996 WL 60419 Conn. Super 1996, and *Walker v. Richardson*, 1996 WL 278326 Conn. Super 1996, for the proposition that a default against the tortfeasor satisfies the plaintiff's initial burden of going forward on the issue of a tortfeasor's "uninsured" status. Your compiler had some doubts regarding the interpretation of those decisions, and so posted the following message, in reply to those replies:]

A. . . . Although I agree that a default for nonappearance against a properly-served defendant ought to be considered as, at least, some evidence from which uninsured status might be inferred, I do not read the Superior Court decisions in *Harnicar*, or *Mazziotti* (*reversed*, 240 Conn. 799) or *Walker* to address the issue of proof of uninsured status. The cases all appeared to deal with collateral estoppel regarding the issue of tortfeasor negligence, as assessed by those Superior Court judges prior to the 1997 decision of the Supreme Court in *Mazziotti*, which held that the insurer was not bound by collateral estoppel to liability and damage determinations in the suit against the tortfeasor. Proof of uninsured status didn't even come up, insofar as I can see, in the cited Superior Court decisions. For example, in *Harnicar*, the opinion stated that the parties agreed that the tortfeasor was uninsured.

Am I misreading *Harnicar*, *Walker* and *Mazziotti*? Are there other Connecticut cases that do expressly find a presumption of uninsured status from a default for failure to appear?

—Doug Hammond

Q. I have made a discrimination claim in a workers' compensation claim. Had our first hearing yesterday. The commissioner was quite thoughtful and, to my client's delight, reprimanded the employer for its practices, but declined to find discrimination. He did, however, suggest the employer may have violated the provisions of the [Family Medical Leave Act (FMLA)] when it terminated her. Has anyone got any great advice?
—Christine L. Engel

A. The workers' comp commissioner is or should only be considering your case

in the context of a 31-290a claim for discrimination for filing for workers' compensation benefits.

Without the benefit of the facts and provided the statute of limitations hasn't lapsed, you should consider filing an FMLA complaint with the state Department of Labor under our state FMLA (16 weeks in a 2-year period) or a complaint alleging violation of the federal FMLA (12 weeks in a 1-year period). [The Department of Labor] will prosecute your claim if it has merit but there are differences between the statutes such as eligibility and recovery (e.g., no attorney fees with state). Call Attorney Heidi Lane at CT [Department of Labor], Div. of Wage & Workplace Standards, 200 Folly Brook Blvd., Wethersfield, CT 860-263-6755.

—Mickey Busca

Q. I have a PI case exposed for trial in 10 days and just found out that the reason I could not reach the witness is because he is incarcerated with about 4 years to go on his sentence. Does anyone know how to either 1) set up his deposition in jail, or 2) have him brought in to court to testify? Thank you in advance.

—Steven Walsh

A. To get an incarcerated witness into court to testify you need a Writ of habeus corpus ad testificandum. See *US v. Cruz-Jiminez,* 977 F.2d 95 3rd. Cir. 1992) (witness to testify in a criminal case). If you need a sample contact me.

—Peter Bartinik, Jr.

A. If you want to depose the witness in the jail (note the accommodations are awful) you should contact the jail and find out the name of the worker responsible for him. Then arrange a date and time through the worker for the deposition to be taken at the jail, issue your subpoena and notice of deposition for that date.

—Cynthia Crockett

Q. I remember reading in one of our many seminar booklets the proper response to a notice of deposition of a client's treating physician/records keeper with the caveat "records sent in lieu of your personal appearance will be acceptable" and to "call the undersigned attorney to discuss this matter upon receipt of your subpoena . . ."

I can't find the material! I called the doctor's office and was told that the entire file (including letters from my office, client's mother, and prior counsel) is being copied, as we spoke, and that they were sending them out to avoid sending a representative from their office to attend the deposition. More to the point, I'm told that the doctor and defense counsel had a long chat about my client, his treatment, his FAMILY history, prior work injuries, coughs, flu, nasal congestion, etc. etc. . .

I know *this is an abuse of discovery. I plan on faxing a motion to quash to counsel with a copy to the doctor with the strenuous suggestion that any records sent will be in violation of the limited authorization previously provided which calls for the production of medical treatment notes ONLY. How else can I stop them from sending this info out?*

Any other suggestions?

—Martin T. Weiss

A. I have had the same experience in several prior cases, and I found it to be infuriating. Send the doctor's office a copy of *Alexandru v. West Hartford* OB-GYN, 2000 WL 1872084, an invasion of privacy tort action in which the Superior Court in Hartford denied the Defense Motion to Strike where the defendant medical group had released records without the patient's consent. I would imagine this would make the doctor quite reluctant to turn over the requested records.

—Terence P. Sexton

A. This is a fight well worth fighting because defense attorneys do this all too often and will continue to do so as long as they are getting away with it. Here is some case law that I have cited in the past on this issue: Judge Pelligrino held in *Martini v. Shelter Rock Realty,* 1996 Ct. Sup. 459 that such conduct by an attorney was improper, potentially warranting sanctions. Judge DiPentima held in *Kelly v. Statewide Grievance Committee*, 1998 Ct. Sup. 9150 that even though the attorney may have ultimately been entitled to the records that the attorney's conduct was dishonest supporting a finding of misconduct. Good luck.

—Cynthia Crockett

Q. I have done some preliminary research and have been unable to find a conclusive answer on two questions: (1) Are ex parte communications with an opposing party's disclosed expert prohibited? and (2) are communications between an attorney and expert witness protected by any type of privilege, including the work product doctrine? I would be interested in knowing if anyone has come across specific cases that deal with these issues.

—Sabato P. Fiano

A. I have litigated a case against an expert for breach of contract and was required to research cases nationwide on the role of experts.

Having done so, but by way of disclaimer having not focused specifically on your issues, I can say that I am aware of no privilege between the communications of an attorney and his expert—in fact, the written communications between the attorney and expert are routinely discoverable in court—as are verbal communications.

The only argument I think that you have that an expert's communications are confidential is if you involve the expert as your agent in a discussion with your client—though I am unsure about this.

I am aware of nothing that would prevent you from speaking with the opposition's expert.

We were successful in suing an expert, but only under well defined circumstances, because experts are supposed to be independent witnesses who are considered to be sort of friends of the court—helping to get at the truth and ordinarily enjoy immunity for that very reason—so that they cannot speak the truth without fear of offending. The epitome of that principle is Dr. Henry Lee who testified as a defense witness in the OJ trial but freely spoke with the prosecutors as well and is known for calling them as he sees them.

For these reasons, I doubt strongly that there is any prohibition from speaking with the opposition's expert. As a practical matter, experts often will refuse to speak to the opposition as matter of preserving good client relations.

—Thomas Willcutts

I am not sure that I have any "theme" in this section, but I have tried to emphasize messages offering practical advice and helpful hints. I will start with an inquiry from Doug Mahoney regarding the right of a plaintiff's attorney to comment, in final argument, on the failure of a defendant to request an independent medical examination (IME). His inquiry generated responses that illustrate the approaches of several different trial court judges:

Q. Is anybody aware of caselaw indicating that it is proper for plaintiff's counsel to comment in closing argument upon the defendant's failure to request an IME?

—Douglas P. Mahoney,
<dmahoney@tremont-sheldon.com>

A. I have a transcript of an argument on the issue in which Judge Holzberg

ruled that the argument was proper, but he gave a cautionary instruction on the plaintiff's burden of proof. I am not aware of any written decision on the issue.
—William P. Yelenak,
wyelenak@rcn.com

A. [In reply to the above replies:] Thanks for your advice. I've argued it a bunch of times without objection but the defendant in this case has objected in advance. I had one situation where Judge Thim allowed it over objection but no decision. Thanks.
—Douglas P. Mahoney,
<dmahoney@tremont-sheldon.com>

Next, Tracy Collins offered some practical advice about researching the legislative history of Connecticut statutes.

Q. Is there a way to get the legislative history (including committee reports) of a Connecticut statute on-line?
—Mark J. Kovack,
<mkovack@wsdb.com>

A. Yes. You will need the bill no. and LCO no. The web site is www.cga.state.ct.us
—Tracy M. Collins <tmcollins@wallersmithpalmer.com>

Q. Isn't that just current bills, though? Or is there historical information on there somewhere too?
—Chris Meisenkothen,
<cmeisenkothen@elslaw.com>

A. I think it goes back to 1998. For anything older the state library will fax legislative histories with a reasonable turnaround time. It beats making the trip to Hartford.
—Tracy M. Collins <tmcollins@wallersmithpalmer.com>

I will briefly add my own comments on online legislative histories. You can use the Connecticut General Assembly web site to find bill numbers and LCO numbers, if you do not have them. You can also find the transcripts of legislative debate on particular topics by searching for occurrences of certain words. However, the entire site is less intuitive than might be ideal.

Peter Bartinik provided the following practical advice to a colleague whose client faced repayment of substantial medical bills from her settlement, because her health insurer had declined to pay the bills, for lack of a referral:

A. [Restating the question:] You asked the following: A client owes $8,000 in medical bills, and the client has health insurance but failed to get a referral to the treater when one was required under client's health insurance policy. The treater has a lien on the file, and wants his money. The health carrier won't pay because client never got the referral. The client wishes she didn't have to pay that large bill of $8,000. What does client do? Pay the $8,000, sue someone, or what?

This has worked in the past. You can negotiate with the client's health insurance carrier, and ask them to pay the bills as long as your client agrees to reimburse them for the amount that they actually pay to the treating doctor. They might agree to that because they get fully reimbursed for their payment. It is likely that their payment to the treater will be much less than the $8,000 that your client will be forced to pay under the lien on the file. The health insurance company might pay 50 cents on the dollar depending on the terms.
—Peter Bartinik, Jr.,
<pjb@grotonlaw.com>

One practical discussion gave a 'thumbs-up' to Casemaker, an online legal research tool, offered by the Connecticut Bar Association, free to its members. In response to an inquiry from John Quinn, Casemaker received a number of favorable reviews.

I do not wish to turn this into a column regarding the law of lien reimbursement, but liens continue to generate many messages. In this issue, I will highlight only one aspect of lien law, a recent discussion of the child support lien, as contrasted with the state assistance lien.

Q. What experience have you had with Connecticut's Child Support lien (as distinguished from the Welfare Lien) as it affects personal injury settlements. The state claims 100% off the top before attorney's fees, costs of litigation and medical bills. Further, that if it leaves nothing for the client so be it.

Also, I am told that an insurance carrier in Rhode Island before issuing its settlement check, inquired whether there were any child supports owed the State of Connecticut and if yes they sent the settlement to the State. I am told they think this is mandated.
—Frederick P. Leaf,
<frederick.p.leaf@snet.net>

A. I have recently dealt with this issue. My understanding is that the state will grab any amount due the client (up to the limit of the lien) AFTER payment of attorney's fees, medical expenses and costs of litigation. To do otherwise would eliminate any incentive for counsel to pursue the case (i.e., we do not litigate gratis). The onus is on the payor (insurance carrier) to check the state's website for the existence of a lien prior to issuing a check. Most of them do not check, but, I believe Safeco, in the case I had did check. Since my client had a 5 figure lien, the state grabbed all of the net funds, but counsel fees, medical expenses and my costs were not touched. This is contrasted against the welfare lien statute, which provides for 50% of the net due the client, not the whole thing.
—Paul V. Carty,
<pvcartyesq@aol.com>

A. GEICO has a practice of checking with Connecticut support enforcement after —after—it settles the case with you. Child support statutes allow for a 100% reimbursement to the State of the support lien. So, when you have a case with GEICO, and your client is male, you have to consider whether your client may owe child support. After you send in the release, GEICO will report the settlement to support enforcement. You have no recourse but to proceed with the settlement agreement, but GEICO will reimburse the State directly, and send you the remainder, i.e., your attorneys fees and costs, but your client may end up with nothing. Unbelievable.
—Gary Strickland, <Gars44@aol.com>

Readers interested in the Connecticut child support lien may wish to take a look at section 52-362d of the General Statutes.

There have also been a number of list serve messages discussing other lien issues, including *Great West Life & Annuity Insurance v. Knudson,* 122 S. Ct. 708 (2002), its impact on the validity of asserted ERISA liens, and the steps taken by some attorneys in response to that decision. I have not reprinted those messages here. I am not sure that justice can be done to the topic in the limited space available in this column. The effect of *Great West* and other recent ERISA decisions deserves, and has been receiving, fuller treatment elsewhere. Interested readers may wish to review the messages posted on the subject, however.

I conclude this issue of the Listserve summary with the customary etiquette tip. Please do not post a new message by replying to a recent message on another topic. If you must do this, be sure that you delete the entire contents of the prior message and change the subject line. A much better approach would be to send a new message to cttlamem-

continued on page 22

Civil Justice and Civil Society

By Kevin Sullivan

Editor's Note: The following was presented by Senator Sullivan at the CTLA Annual Meeting, June 20, 2002, Newington Lawn Club.

Thinking about the work of the trial bar, it occurs to me that Benjamin Barber may offer a helpful perspective. In his recent book, *Jihad vs. McWorld*, Barber writes about our "McWorld" as the globalized quest for virtual rather than virtuous society in which it is all to easy to denigrate the values of civil society. Noisy debate, clamorous rights in civil litigation and aggressive access to an independent judiciary are a poor fit for the homogenized marketplace that some would pass off as freedom. Alternatively, writes Barber, we see the rejectionist tendency of "Jihad" abroad and at home that also offers little room for civil society, civil rights, balanced government or justice under law.

However different in form, these trends are really two sides of the same devalued coin. If that's too obscure, just think about those who advocate "tort reform" or "jury nullification" and you'll begin to get the point in more familiar ways.

Now I'm not prone to hyperbole. Yet there is reason for concern even here in our "Constitution State." Post-September 11th anxieties, economic and budget discontents, distant corporate control, a growing attitude of executized government, and a more dependent and politicized judiciary all echo these global tensions here at home. So too, the ways in which populist comedy makes a joke of lawyers and the law while lawyers and the law too often make a dark comedy of justice.

My concern here is the steady erosion of civil justice in the name of corporatized harmony or intolerant tribalism of all kinds. We all recall 1986, when Connecticut took a leap backward in the "war on civil justice" with the passage of tort reform. Why? Because rights and remedies were being pursued with such vigor and conflict that the forces of corporate and bureaucratic harmony had to change the ground rules. The next year, my first as a State Senator, reversed much of the damage previously done to the fair balance between "rights" and "damages." Both sides have since been weary and wary of reopening the battle. Yet the skirmishing never ends.

If the hot war of tort reform has passed into more of a cold war around the edges, never believe that the fight is won. When we are threatened, whether by the sudden hand of terror in our midst or the equally sudden sputtering of our economy, the war on civil justice is always at the forefront of our discontents. It is then that we in public life especially must remind our constituents, and ourselves, that the law is not "an ass" but a precious asset. Yes it's messy. Yes it's expensive. Yes access to justice is unequal and court awards occasionally extreme. Yet our American system of justice, and the trial lawyers who serve it, remain the very core of what it means to be a civil society with the promise of "justice for all."

And for those quick to find fault with price of justice and the cost of government, imagine the cost to government if civil law offered no private remedies for damage done to the lives, property and well being of people. Who would pay the taxes necessary to turn the burden of remedying wrongs wholly over to the public pocketbook?

Yes, we probably are too litigious a society, increasingly asking common law to replace common sense. But when those who war on civil justice so-often cite "runaway" juries, massive damage awards, and the rising costs of being insured or doing business, we in public life have a duty to set the record straight. The fact of the matter is that this doesn't happen in Connecticut, because unlimited punitive damages do not exist under our state law.

Yet for legislators, where lawyers are increasingly and regrettably less in our numbers than ever before, civil liability law can be a difficult challenge in theory or practice. Think about how complicated the issues were when we took on managed care reform in the late 1990s. At first it seemed that managed care was safely hidden behind early interpretations of ERISA that prevented civil liability from attaching to mismanaged health care even when denials of coverage resulted in greater harm or death. As we examined the legal issues, however, our perceptions and positions changed. Soon, it became clear to those who spoke for patients and their families that courts, state and federal, were fast chipping away at preemption and opening the door to managed care liability for the consequences of medical treatment decisions clothed as coverage decisions.

Suddenly, as happens whenever an industry discovers the anti-competitive charms of regulation, insurers began to embrace the idea of statutorily defined and, more important, statutorily limited managed care liability. After years of pursuing civil liability, CTLA correctly and wisely warned of the legislation and the courts have since continued to offer broader liability and remedies. That was good advice then, and I am as glad as you are that your interests and the interests of those injured by the denial of care were so well represented.

Similarly, when governments from Washington to the states turn their backs on public law, civil society turns to civil litigation. For example, when polluters make policy at EPA and DEP, who but the Attorney General and trial bar are there to vindicate the public interest by litigating and remedying the private harm that is done?

I earlier alluded to yet another reason why CTLA, and the various sections of the Connecticut Bar Association, are more important than ever as participants in the halls of the State Legislature. With an increasingly fulltime "part-time legislature" and too much of an "eat only what you kill" practice of law, lawyer-legislators are by far the exception these days. In the current General Assembly, only a third of the State Senators are trained in the law. It's one-fifth in the House of Representatives. And non-lawyers outnumber lawyers even on our Judiciary Committee. While the General Assembly and our partisan caucuses are well served by skilled counsel, something is still lost in the process when the experience of lawyering is less directly evident in the lawmakers. All the more reason why CTLA's participation and advocacy in the public process is needed to sustain us a civil state of laws, not men.

For all its parody, and sometimes inadvertent self-parody, the trial bar in Connecticut is covering the front lines of defense in "the war on civil justice." As trial lawyers and advocates, you are there making a difference in keeping this a civil society under law. And as citizens actively engaged in the electoral process, you are there sustaining the representative democracy that in turn sustains our civil rights and civil liberties at a time when domestic adversity and global anxiety invite the worst in all of us.

As a legislator, I take no solace in the fact that lawyers and the media are all that stand between elected officials and

continued on page 22

SOCIAL SECURITY:

Thoughts on The Promise and The Reality for People With Disabilities

By Harriet McBryde Johnson

This article appeared in the Summer 2001 issue of The Bulletin. *Harriet McBryde Johnson is a SCTLA member and a solo practitioner whose practice emphasizes disability issues.*

It's called the American Dream. A nice home. A strong family. People working hard to pay the rent and put food on the table. Beyond that, the dream means having the "little bit extra" it takes to buy a home, launch children into a good life, and cover the losses and setbacks that happen in any life. For most people it includes some non-essentials like family vacations, music lessons, summer camps, or a home computer. A good quality of life.

During the 1930's New Deal, the Social Security Act was enacted to bring that dream closer for millions who had previously lived on wages that, at best, kept them at the precipice of catastrophe. In good times, they could pay rent, buy food, and keep the children clothed, but any setback—an illness, a job loss, and even a bad storm—could mean destitution. When a worker died or became unable to earn even subsistence wages, there was no cushion. Sometimes aged parents and orphaned children found shelter with relatives, but too often the relatives had nothing to spare. By ensuring basic income protection to wage earners and their families, the Social Security Act brought a new level of stability to families and to the economy as a whole.

So what went wrong? Why does it now seem that Social Security is telling many people with disabilities not to dream that American dream? Why is it saying that a hand-to-mouth existence, in poverty or at the brink of poverty, is all we can hope for?

I set out here to give a "big picture" answer to that question, but in the wonderful world of Social Security, the devil is in the details. Therefore, I have to start with a very lawyerly, very sincere disclaimer: This article is a discussion of public policy, not a source for how-to advice. It tells how the main Social Security programs work for most disabled people. Your client's individual situation is probably different. If you want to help someone escape regulatory bondage and chase either the American Dream or a personal dream, there are lots of creative things you can do. At most, this article may suggest some questions to ask. End of disclaimer.

Now, some background. I've prepared a table summarizing Social Security provisions that are key for people with disabilities. As the table shows, Social Security has evolved a lot since the 1930's.

The original program is now in Title II of the Social Security Act. In the disability community, Title II is often equated with SSDI, Social Security Disability Insurance. In fact, the correct acronym for Title II (and this is a world that lives and breathes acronyms) is RSDI, Retirement, Survivors' and Disability Insurance. Disabled people are among the beneficiaries of all three arms of Title II. Working the acronym back to front:

- **DI, Disability Insurance**, covers wage-earners who become disabled during their working years. It pays these disabled workers and their qualified dependents.
- **S, Survivors' benefits**, go to deceased wage-earners' minor children, their disabled spouses (along with some other categories of spouses), and their adult children who became disabled before age 22.
- **R**, is the granddaddy of them all—the big **Retirement** program. It covers not only the retired wage-earner but also disabled adult children of the wage-earner.

To sum up, if you're disabled, you might get Title II benefits based on your own Social Security account from working, or based on your spouse's account, or based on a parent's account. The common thread is that entitlement to benefits—and the amount of your check—is traced back to someone's contribution into the system in the form of FICA tax. These benefits are not means-tested or adjusted based on financial need. You can have a million dollars in the bank and still qualify for monthly benefits. However, to qualify as *disabled*, you must be unable to work. If you earn more than $740.00 per month, you will be presumed non-disabled. Disabled recipients of Title II also get Medicare coverage after a 29-month waiting period.

Title XVI, Supplemental Security Income, came later to the legislative scheme. One arm, SSI-D, covers disabled people. The other covers elderly people. SSI evolved when it became clear that Title II had failed to rescue many disabled and retired workers and their families from destitution. Because all Title II benefits are keyed to someone's paying into the RCA system over time, millions of people—people who lacked that FICA history and failed to qualify as a disabled adult child or disabled widow(er) of a Title II beneficiary—were completely left out of Social Security's promise. Others found that years of intermittent low-wage work produced a Title II check of only $50.00 or $100.00 per month. SSI was designed to "supplement" Title II by guaranteeing a minimum income to disabled and elderly people.

Title XVI's SSI, targeted at disabled and elderly people, was part of the same broad anti-poverty policy that produced Aid to Families with Dependent Children (AFDC, commonly known as Welfare), targeted at poor single parents. A political consensus had emerged that these three groups—people who were disabled, elderly, and single parents—were not to blame for their poverty and therefore deserved a minimum income without working. As to single parents, the consensus has eroded. In 1996, Welfare Reform ended AFDC as a long-term entitlement.

To qualify for SSI requires proof of poverty similar to what is required under Welfare. The rules are complex, but in general, you don't qualify if you own resources (SSA's word for what most of us call assets) worth more than $2,000.00. Your home isn't counted, and in some cases your car isn't counted, but most everything else is. If you meet the resources test and have no income, your SSI check will be $530.00 per month in most states. (A few states supplement the federal SSI amount; South Carolina does not.)

After a small exclusion, the $530.00 benefit is reduced by one dollar for every dollar of unearned income you get, including any Title II check. To encourage you to work, the government reduces your SSI by only 50 cents for each dollar you earn. If you get even one dollar per month in SSI, you are covered by Medicaid.

So the basic scheme is two programs for two kinds of people. Upon disability or old age, middle- and upper-class wage-earners get Title II and Medicare, usually supplemented by private pensions, insurance, savings, and investments. The very poor aged and disabled remain very poor—but stay alive—under Title XVI

(SSI) and Medicaid.

For vast numbers of people, these two programs work reasonably well. Any Social Security lawyer will tell you about very grateful clients. Winning a difficult Social Security claim can be the difference between life and death, and we may justifiably feel righteous about helping to redistribute wealth and building the social safety net. But when you factor in the real world lives of many people with disabilities, especially those with expensive disabilities, fundamental irrationalities in the system become clear.

First, the Social Security system (both Title II and Title XVI) irrationally divides the world between those who can work and those who cannot. Perhaps that division made some sense in the work world of the 1930's, dominated by an uneducated labor force concentrated in manufacturing and agricultural jobs. However, since then, advances in technology and pharmacology, the growth of service industries, and the rise of part-time, temporary and self-employment have changed what workers do and how they do it. With the right resources and job accommodations, the reality in today's world is that almost anyone can work.

Second, the rules usually cut off entitlement before the individual is reliably earning enough money to replace the steady monthly income and medical coverage offered by Social Security—for many people, working would be an unreasonable, self destructive choice. This is the irrationality addressed by most of the Work Incentives that have been written into the law over the past few years. By allowing certain income and resources to be excluded from SSI calculations, allowing certain people to keep medical coverage after leaving the rolls, and so forth, Work Incentives have enabled many Social Security recipients to work and keep the safety net intact. But these Work Incentives are difficult and complex. Most recipients don't even know they exist. They remain narrow exceptions to the general rule that you get benefits if and only if you're unable to work.

Third, poor people's Medicaid is (in many ways) better than middle-class people's Medicare. Medicare, finally signed into law by President Johnson, was first proposed by President Truman. It remained rooted in 1940's thinking on what basic medical coverage should look like. It covers a portion of doctor and hospital charges and has an acute-care focus. Medicaid was based on 1960's research on what people need. While low reimbursement rates limit the number of participating doctors and hospitals, the consumer gets full coverage of a broad range of services. If you have expensive needs like kidney dialysis, HIV drugs, or full-time attendant services, Medicaid can be worth tens—or even hundreds—of thousands of dollars a year.

Fourth, the income and resource limits of Title XVI are too low to guarantee economic stability, even at the level of bare subsistence. Living on $530.00 per month is a delicate balancing act requiring ingenuity, persistence in locating other benefits, and considerable good luck. Any disruption—the loss of that cheap rented room, the death of a loved one or even the death of a car—can make the whole structure come tumbling down. When that happens, there's a need for more public support. When public support fails, people who can't survive on the streets typically wind up in institutions. With institutionalization comes even more tragic loss of freedom, waste of human potential, and expensive dependence.

Do we have to accept a public policy that is aimed at helping people with disabilities, but doesn't reflect the reality of our lives? What can we do? There are lots of options.

The most radical—and rational—option would be to sweep away the categories that divide us. Don't restrict Medicaid to poor disabled and elderly people. Make universal, comprehensive health coverage a right of citizenship so no one has to trade a good job or a nest egg for the care they need to stay alive. Don't restrict minimal income support to those defined as unable to work. Assume people are rational. They will work if benefits are structured so that work makes them better off than not working.

For those who think more incrementally, here are some more modest proposals:

- First, make Medicare more like Medicaid so Title II recipients with expensive medical needs will not be forced to impoverish themselves to fund the services they need. Generally, Title II recognizes that both individuals and the broader public good are served by encouraging private savings and investments. To the extent that Title II recipients have private pensions, IRA's, and other resources, they enjoy a better quality of life with lower public investment.
- Second, allow more people to buy into Medicaid and Medicare without being poor or unemployed. The present structure encourages people to deplete assets and cut down earnings to "qualify." After qualifying, the law lets some of these people buy into benefits upon returning to work, but by then they have lost resources that may be necessary to true, long-term self-sufficiency.
- Third, restructure monthly benefits to reflect the reality that disability is not all-or-nothing. Allow people with work-related impairments to earn what they can, when they can. Over the course of our lifetimes, people who can work intermittently should be able to fall back on the rolls during periods of unemployment. Those who can work part-time should get a partial benefit.
- Fourth, make sure benefits are not cut off until the individual's income is of greater value to the individual than the benefits in question.
- Fifth, raise Title XVI income limits above the poverty line. Raise the resource limit to allow a reasonable financial cushion to prevent poverty over the individual's life. Make sure the limits keep up with inflation.
- Sixth, also under Title XVI, expand the categories of income and resources that are excluded from the limits. An obvious exclusion would be for medical expenses. Under current Medicaid law, medical expenses may be excluded from income, but only under a special "Medically Needy" program. Participation by states is optional and comes at a high price. Participating states must fund 100% of the medical expenses incurred by the Medically Needy population, as opposed to about 25% under regular Medicaid eligibility rules. (South Carolina does not participate.) In addition to making the medical exclusion routine, new rules could allow a wide range of dedicated savings accounts to exclude investments that make the individual and family self-sustainable. For example, just as home equity is excluded from resources, so might a savings account dedicated to home maintenance, taxes, and insurance.
- Seventh, push SSA, states, and the disability community to make full use of the Work Incentives, those lovely loopholes that already exist. These allow individuals to deduct impairment related work expenses (IRWE's) from earnings when determining whether the individual is capable of substantial gainful activity, to save money and shelter income to fund Plans for Achieving Self Sufficiency (PASS), and to purchase medical coverage after leaving the Social Security rolls. Some provisions are generally available, but underutilized. Others vary from state to state.

In pushing for a more rational Social Security system and a way out of the poverty trap, we need to be mindful that the effort is fraught with difficulty and danger. It's tempting to hammer in on the simple message that "All disabled people can and should work." It makes people like us so much! But the more compli-

cated truth is that for most of us with significant impairments, disabilities do limit the amount and kinds of work we can do. Many of us cannot hope to fund our expensive lives solely through work, at least not all the time. We cannot afford to lose our basic claim on the public largess or trade secure benefits for forced "workfare." We need to be wary of what happened to single parents when AFDC was revamped in 1996.

Like Welfare, the current disability benefits structure too often gets in the way of responsible work, savings, and investment. It pushes people into ever more expensive, dream-killing dependence. But we need to be sure everyone knows that the benefits are not the problem. Our beef is with the irrational restrictions that come with them. What we are after is a system that lets us *do all we can* for ourselves and our families. Nothing more, nothing less.

Some examples of how irrationalities of the system play out in real life:

- June has Down's Syndrome and lives on her own. She has a job structured to let her retain a small SSI check. She gets a rent subsidy under another government program. She can function independently with supports—Medicaid pays someone to come to her house to help her manage her money, plan her shopping and meals, and manage her asthma. Medicaid also pays $250.00 per month for her asthma medications. Her parents, still working, encourage her independence. They give her little extras, like the big fish tank she loves. Her father dies suddenly. She gets a monthly check on an annuity offered through his work, plus a Title II check as his survivor. A little wrinkle in the law would let her keep Medicaid without consideration of her Title II check. However, the annuity counts as unearned income and causes her to lose SSI and Medicaid. Her income is a few dollars higher, but not enough to pay for her own prescriptions and support services. She's devastated about losing her father and doesn't really understand what's happening.
- Leon and Marge retire after operating a corner grocery Leon inherited from his father. Over many years, the store barely turned a profit, but they hung on. The store employed many family members over the years and they loved the work. At age 65, they closed the store and sold the store building. Their Title II benefits are a pittance, but they figure the proceeds of the sale will see them through if they are careful. Then Leon becomes disabled. Even with Medicare, the medical bills are staggering. Leon has become unable to dress, bathe, or feed himself. Marge is unable to handle his care, and Medicare doesn't cover daily attendant services. He has expensive prescriptions. They are told they can qualify for attendant services and prescriptions under Medicaid if they spend their nest egg down, but the resource limit isn't enough to pay the taxes and insurance on their home for the next year. They decide to deed the house to their son, who will pay taxes, insurance, and upkeep and let them live in it for the rest of their lives. Then they are told that living rent-free in someone else's home is "income" that keeps them off SSI and Medicaid.
- Letitia is a research scientist with a unique combination of professional skills. A combination of chronic medical problems made her give up university teaching two years ago. Now a former colleague desperately wants her to be a consultant on an unusual government contract. Because her unique knowledge is what's needed, she will actually do very little work, and that mostly at home. They are ready to pay whatever she asks. At this stage, she's ready to jump on the opportunity. The problem is, the contract lasts three years and she doubts whether she will ever have another opportunity to work like this one. How will she go back to SSA and prove she "can't work," when she will have worked for three years, with her disability, at a very high salary?

A good benefits counselor could probably come up with a workable plan for each of these beneficiaries, and slug it out with SSA. However, for most people in these situations, dreams simply die. They accept dependence, poverty, and unemployment because that's what the system seems to have in mind for them.

For more information:

A vast amount of information about the nuts and bolts of Social Security is available at the official SSA website: *www.ssa.gov*. That site links to Medicaid and Medicare information.

The major professional organization is the National Association of Social Security Claimants' Representatives (NOSSCR), 6 Prospect Street, Midland Park, NJ 01432. NOSSCR publishes an excellent newsletter and offers frequent seminars for practitioners, from beginning to advanced. ■

Making The Most of The CTLA Listserv

continued from page 18

bers@lyris.depoconnect.com. You may wish to add that address to your address book now, for easy insertion later.

Also I want to congratulate the CTLA membership for having kept its Listserve focused on issues of interest to the members. The CTLA Listserve has maintained a higher percentage of meaningful, relevant posts than most others to which I subscribe, and has largely avoided the personal battles, political debates, and joke-swapping too common on other Listserves. Good work!

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. ■

Civil Justice and Civil Society

continued from page 19

the very bottom rung of public opinion. Conflict, opinion and spirited advocacy, whether in the courthouse or the statehouse, will always draw discomfort and criticism. Indeed, those are also the very virtues that keep us a civil society. Together, we must continue to stand against a society in which everything has a process and nothing has value.

Kevin Sullivan is President Pro Tempore of the State Senate, the third highest position in Connecticut state government. ■

AFTER *REEVES v. SANDERSON PLUMBING PRODUCTS, INC.*: Is Pretext Plus Still The Rule of Law in The Second Circuit?

By Jacques J. Parenteau Madsen, Prestley & Parenteau, LLC, 111 Huntington Street, New London, Connecticut

On June 12, 2000, the United States Supreme Court, in a unanimous decision, handed down *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed.2d 105 (2000). Lawyers regularly representing plaintiffs in employment discrimination cases employing the burden-shifting analysis discussed in *Reeves* declared a major victory. The pretext-plus rule for proving intentional discrimination had been rejected.[1] Indeed, the Supreme Court stated it had granted certiorari to resolve a conflict among the Courts of Appeal "as to whether a plaintiff's prima facie case of discrimination (as defined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)), combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." The Second Circuit's decision in *Fisher v. Vassar College*, 114 F.3d 1332, 1339 (2nd Cir. 1997) (en banc), was listed with those Courts of Appeal, including the Fifth Circuit, from which *Reeves* originated, where proof of the prima facie case and pretext alone was not enough. The Official Reporter's note in *Reeves* states the Court's holding as follows: "prima facie case and sufficient evidence of pretext may permit trier of fact to find unlawful discrimination, without additional, independent evidence of discrimination, though such showing will not always be adequate to sustain jury's finding of liability, abrogating *Fisher v. Vassar College*, 114 F.3d 1332, 1339 (C.A.2 1997)."

Following *Reeves*, a panel of the Second Circuit, which included Judge Leval, one of the authors of the *Fisher* opinion, reviewed its decision in *Fisher* in light of *Reeves*. The panel considered whether the rule adopted in *Fisher* had been overturned by *Reeves* and concluded "that the Supreme Court's reasoning in *Reeves* is wholly compatible and harmonious with our reasoning in *Fisher*. There is no inconsistency between the two rulings." *James v. New York Racing Association*, 233 F.3d 149, 155 (2nd Cir. 2000). Focusing on the Supreme Court's characterization of the *Fisher* decision, Judge Leval suggested that "the Supreme Court in *Reeves* introduced some confusion as to the meaning of the *Fisher* opinion" and declared: "With all respect the Court was mistaken." *James v. New York Racing Association*, 233 F.3d at 156 n.3. Judge Leval stated, "In conclusion, upon careful study of the *Reeves* opinion, we can find no indication in it that the Supreme Court has rejected what we said in *Fisher*." *Id.* This paper will first briefly review three of the United States Supreme Court's decisions that pre-dated *Fisher* and formed the basis for the burden shifting analysis discussed there. Having established the baseline, this paper will set forth the holdings in *Fisher* and *Reeves*, along with the new rule for indirect proof of discrimination in the Second Circuit following *Reeves*. It is hoped that the juxtaposition of all of these opinions will help to answer the question: "Did the Supreme Court mistakenly characterize *Fisher* as a pretext plus decision?"

In *McDonnell Douglas Corp. v. Green*, Percy Green, described by the Court as "a black civil rights activist," brought a race discrimination claim against his employer based upon discharge and the subsequent refusal to hire him. Referring to the policy behind Title VII of the Civil Rights Act of 1964, which "tolerates no racial discrimination, subtle or otherwise," the Court set forth the elements of "the initial burden under the statute of establishing a prima facie case of race discrimination."[2] *Id*. At 802. Once the prima facie case is established, the "burden must shift to the employer to articulate some legitimate, nondiscriminatory reasons for the employee's rejection." *Id*. After the employer articulates the reason for rejection, the Court stated the inquiry does not end there, because while Title VII does not compel rehiring of the employee, "neither does it permit [the employer] to use [the employee's] conduct as a pretext for the sort of discrimination prohibited by" Title VII. *Id*. at 804. Therefore, the employee must "be afforded a fair opportunity" to show that the employer's stated reason for refusing to hire was in fact "pretext." Especially relevant to this inquiry would be evidence of comparable treatment of other white employees who had engaged in similar conduct, the attitude of the company toward civil rights activities and whether there was a statistical pattern of discrimination against blacks. *Id.* at 804-05. In short, the employee must be given the "full and fair opportunity" to show that the presumptively valid reasons for rejection were in fact "a coverup for a racially discriminatory decision." *Id.* at 805.

Eight years later, the Supreme Court returned to the question of allocation of proof in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed.2d 207 (1981).[3] In this case, Joyce Ann Burdine, a female clerk, brought a discrimination suit claiming she had been denied promotion and terminated based on gender. Generally, the Court held that the employer's burden to produce a nondiscriminatory reason did not also impose a burden of proof on the employer. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff *Id.* at 253. The Court explained that the burden of establishing the prima facie case "was not onerous." A qualified plaintiff need only show that she was rejected under circumstances that "give rise to an inference of unlawful discrimination." *Id.* at 253.

The function of the prima facie case serves two purposes. First, by raising an inference of discrimination, if the employer does not otherwise explain the decision, then the challenged decision is "more likely than not based on the consideration of impermissible factors." *Id.* at 254, quoting *Furnco Construction Corp. v. Waters,* 438 US. 567, 577, 98 S. Ct. 2943, 2949, 57 L. Ed.2d 957 (1978). The establishment of the prima facie case creates a presumption. If the trier of fact believes the plaintiff's evidence and the defendant is "silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case." *Id.* at 254.[4] Second, as noted above, establishing a prima facie case compels the employer to come forward with an explanation sufficient enough to raise a genuine issue of fact. "To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.[5] *Id.* at 255.

If the defendant carries this burden then the "presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity." *Id.* at 255. The Court explained the effect of rebutting the presumption as follows:

> In saying that the presumption drops *from* the case, we do not imply that the trier of fact no longer may consider evidence previously

> introduced by the plaintiff to establish the prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and the inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. *Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.*

Id. at 255 n.10. At the new level of specificity, the plaintiff retains the burden of persuasion. With a fair opportunity to prove pretext that "burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence" *Id.* at 256.

The Court revisited the effect of the trier of facts rejection of the employer's asserted reasons twelve years later, in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed.2d 407 (1993), to decide whether the rejection of the employer's explanation (combined with the prima facie case) mandates a finding for the plaintiff. In this case, Melvin Hicks, a black man, claimed he was demoted and discharged from his position as a correctional officer at a halfway house operated by the Missouri Department of Corrections and Human Resources. Unlike the unanimous decisions in *McDonnell Douglas* and *Burdine*, *St. Mary's Honor Center v. Hicks* was decided by a 5-4 split vote with Justice Scalia writing for the majority and Justice Souter writing for the dissent. Adopting the "pre-text plus" approach to proof of intentional discrimination, the Court held that a prima facie case combined with disbelief of the employer's explanation did not compel a judgment in plaintiff's favor at the end of the case.[6] *St. Mary's Honor Center v. Hicks* dictated a rule that henceforth the trier of fact would be required to find the employer's explanation was a "pretext for discrimination." "But a reason cannot be proved to be 'pretext for discrimination' unless it shows *both* that the reason was false, *and* that discrimination was the real reason." *Id.* at 515.

Both Justice Scalia and Justice Souter discussed *Burdine* case at length, particularly the language in *Burdine* that stated the plaintiff was given the option of proving discrimination, "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* at 256. The dissent claimed that by holding plaintiffs to a higher burden of proof, because now, "it is not enough . . . to disbelieve the employer," the majority had "turn[ed] *Burdine* on its head." *Id.* at 535.[7] Justice Scalia admitted the dissent's reading of the language permitted no interpretation other than the disbelief of the employer's explanation alone was enough to prove the case, but that given other language in the *Burdine* and in *McDonnell Douglas, Burdine* certainly never meant to be authority for the proposition it states in *dicta*. He dismissed the language as "an inadvertence, to the extent that it describes disproof of the defendant's reason as a totally independent, rather than an auxiliary, means of proving unlawful intent." *Id.* at 518. The majority opinion viewed the burden-shifting test as merely a procedural device whereby the prima facie case "simply drops out of the picture" after serving as the method that forces the employer to explain its actions. *Id.* at 510-11. The majority explained that the combination of disbelief of the employer's explanation combined with the elements of the prima facie case would permit a finding in the plaintiff's favor; however, that result was not mandated.

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection "[no additional proof of discrimination is *required*, 1970 F.2d, at 493 (emphasis added).

Id. at 511. The ultimate burden of persuasion remains with the Title VII plaintiff to prove discrimination because the employer can be lying to coverup something else.[8]

The Second Circuit Court of Appeals decided *Fisher v. Vassar College*, 114 F.3d 1332, 1339 (2nd Cir. 1997) (en banc), in a 7-4 decision on June 5, 1997.[9] The issue before the in banc court for consideration is described in the opinion as follows: "whether a finding of discrimination that is based on a prima facie case and a supportable finding of pretext may be reversed on appeal as clearly erroneous, or whether such a finding of discrimination must be upheld absent some quantum of evidence that the employer took the adverse action for some other non-discriminatory reason." *Id.* at 1334[10]. After reviewing the *McDonnell Douglas/Burdine* burden-shifting test in light of *St. Mary's Honor Center v. Hicks*, the majority adopted Justice Scalia's reasoning in the following holding:

> Accordingly, a Title VII plaintiff may prevail only if an employer's proffered reasons are shown to be a pretext for *discrimination*, either because the pretext finding itself points to discrimination or because other evidence in the record points in that direction—or both. And the Supreme Court tells us that "a reason cannot be proved to be a *'pretext for discrimination'* unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Id.* at 515, 113 S. Ct. at 2752 (emphasis added). We have recognized again and again that a plaintiff does not necessarily satisfy the ultimate burden of showing intentional discrimination by showing pretext alone. A finding of pretext may advance the plaintiff's case, but a plaintiff cannot prevail without establishing intentional discrimination by a preponderance of the evidence.

Id. at 1339.

As in the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*, the opinions of the dissents and the majority and concurring opinions in *Fisher* engage in a spirited debate over the weight which should be afforded to the prima facie case and the finding of disbelief in the employer's explanation. In particular, what weight should be afforded the evidence of inference in the prima facie case, which is the fourth part of the test? What does the inference in the fourth prong of the test add when that evidence is combined with an employer's explanation that is not worthy of credence? It was settled law in *Burdine* that an unrebutted prima facie case will entitle the discrimination plaintiff to judgment based on the prima facie case alone, including the evidence of circumstances which give rise to the inference of a discriminatory motive. Yet, the majority writes that once the presumption disappears, "Discrimination and cause are no longer presumed. To sustain the burden of putting forth a case that can support a verdict in his favor, plaintiff must then (unlike the prima facie stage) point to sufficient evidence to reasonably support a finding that he was harmed by an employer's illegal discrimination." *Id.* at 1337. This holding seems to have the odd effect of placing the employer who

comes forward with a false explanation in a better position than the employer who remains silent, in the sense that an unrebutted prima facie case can sustain a finding of discrimination, but a false explanation by the employer combined with the prima facie case, and the inference of discrimination it supported in the first instance, is not always sufficient to prove discrimination).[11] "The point we make here is that evidence sufficient to satisfy the scaled-down requirements of the prima facie case under *McDonnell Douglas* does not necessarily tell much about whether discrimination played a role in the employment decision." *Id.* at 1337.

The question then becomes, what force does the prima facie case have when combined with a false explanation from the employer? According to the majority, if the inference is created by showing that the position was filled by member outside the protected class, then hardly any weight can be added to the disbelief of the employer's explanation and the plaintiff is not entitled to judgment. *Fisher's* view of the effect of a finding of pretext combined with the prima facie case holds that "a finding of pretext, together with the evidence comprising a prima facie case, is not always sufficient to sustain an ultimate finding of intentional discrimination." *Id.* at 1338. Put another way, the combination of the two "do[es] not necessarily add up to a sustainable case of discrimination." *Id.* at 1337.

Thus, the court is free to examine the record and consider the evidence as a whole to determine whether there is evidence of intentional discrimination and no particular weight is afforded to initial inference of discrimination and the employer's false explanation, except in some circumstances it will be enough. Chief Judge Newman's dissent referred to the fourth prong of the prima facie case and maintained that the circumstances that give rise to an inference of discrimination could not cease to exist just because the employer offered an explanation. The majority responded that indeed the inference of discrimination intention is a transitory thing. "In other words, the inference wholly depends on the presumption, which disappears once the employer has proffered an explanation." *Id.* at 1341. The ultimate holding is expressed as follows: "Under [the law of discrimination], notwithstanding the minimal requirement of the specially defined prima facie case, once the employer has proffered an explanation, a plaintiff may not prevail without evidence that, on its own, unaided by any artificially prescribed presumption, reasonably supports the inference of discrimination." *Id.* at 1344.

Reeves v. Sanderson Plumbing Products, Inc., supra, took up the issue of the kind and amount of evidence necessary to sustain a jury's verdict of discrimination based on the termination of Roger Reeves who claimed he was terminated based on his age.[12] The Court stated, "Specifically, we must resolve whether a defendant is entitled to judgment as a matter of law when the plaintiff's case consists exclusively of a prima facie case of discrimination and sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory explanation for its action." *Id.* at 2103. *Reeves* came to the Supreme Court from the Fifth Circuit Court of Appeals after a panel had reversed the district court's denial of a Rule 50 motion for judgment as a matter of law. The Fifth Circuit decision stated that a reasonable jury's finding of pretext was "not dispositive" of the ultimate issue, namely whether there was sufficient evidence of age discrimination, and reviewed the other evidence in the record against the circumstances of *Reeves'* discharge. The Supreme Court granted certiorari to resolve the issue of "whether a plaintiff's prima facie case of discrimination combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." *Id.* at 2104. Referring to the ultimate burden of persuading the trier of fact that defendant intentionally discriminated against the plaintiff after the employer articulated a nondiscriminatory reason, the Court stated:

> [P]laintiff may attempt to establish that he was a victim of intentional discrimination "by showing that the employer's proffered explanation is unworthy of credence." *Burdine, supra*, at 256, 101 S. Ct. 1089. Moreover, although the presumption of discrimination "drops out of the picture" once the defendant meets its burden of production, *St. Mary's Honor Center, supra*, at 511, 113 S. Ct. 2742, the trier of fact may still consider the evidence establishing the plaintiff's prima facie case "and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual," *Burdine, supra*, at 255, n. 10, 101 S. Ct. 1089.

Id. at 2106. Since the prima facie case was undisputed, the Court then reviewed the evidence which the Fifth Circuit considered, as well as the Fifth Circuit's "assumption that a prima facie case of discrimination, combined with sufficient evidence for the trier to disbelieve the defendant's legitimate, nondiscriminatory reason for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination."[13] *Id.* at 2108. The Court stated that the Fifth Circuit "misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination by indirect evidence." *Id*. Referring to the decision in *St. Mary's Honor Center*, the Court agreed that while the factfinder's rejection of the employer's nondiscriminatory explanation did not compel judgment for the plaintiff; it was "permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Id*. While acknowledging that an employer's false explanation is "simply one form of circumstantial evidence that is probative of intentional discrimination" which might be quite persuasive, the Court stated:

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt'. Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

Id. at 2108-09 (citations and parenthetical quotation omitted).

The Supreme Court also reaffirmed that the combination of the prima facie case and a showing that the employer's explanation is not worthy of credence will not always be sufficient to establish intentional discrimination. But, those instances seem to be limited to situations where "no rational factfinder could conclude that the action was discriminatory."[14] *Id.* at 2109. "Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the *prima facie* case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that may properly be considered on a motion for judgment as a matter of law." *Id.* at 2109. The Fifth Circuit Court of Appeals "erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination."[15] *Id.* at 2109.

The Second Circuit addressed the meaning of *Reeves* first in *Schnabel v. Abramson*, 232 F.3d 83 (2nd Cir. 2000). In this case, the court stated that the plaintiff had not "demonstrated that the asserted pretextual reasons were intended to mask age discrimination. In fact, beyond the minimal proof required to state a prima facie case, [the employee] has offered *no* evidence that he was discriminated against *because of his age.*"[16] *Id.* at 88. The court stated that the decision of the district court would have needed no further review but for the Supreme Court's decision in *Reeves*.[17] After reviewing the principles set forth above, the court concluded:

> In examining the impact of *Reeves* on our precedents, we conclude that *Reeves* prevents courts from imposing a *per se* rule requiring *in all instances* that an ADEA claimant offer more than a prima facie case and evidence of pretext. But the converse is not true; following *Reeves*, we decline to hold that no ADEA defendant may succeed on a summary judgment motion so long as the plaintiff has established a prima facie case and presented evidence of pretext. Rather, we hold that the Supreme Court's decision in *Reeves* clearly mandates a case-by-case approach, with a court examining the entire record to determine whether the plaintiff could easily satisfy his "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff.

Id. at 90. The court then ruled that because the plaintiff had presented "no evidence from which the inference could be drawn that he was discriminated against on the basis of age, he cannot meet what the *Reeves* Court reaffirmed was his "ultimate burden." *Id.* at 91. Query, what happened to the circumstances giving rise to an inference of age discrimination represented by the fact the plaintiff was replaced by someone half his age?

Schnabel v. Abramson was quickly followed by *James v. New York Racing Association, supra*. While *Schnabel* was authored by Judge Cabranes, who dissented in *Fisher, James v. New York Racing Association* was authored by Judge Leval, one of its co-authors. In *James*, the district court granted the employer's motion for summary judgment in a reduction in force case where the employer replaced a 59-year-old "Assistant Security Director" with a 42 year old "Assistant to the Director of Security" under circumstances where the employer claimed financial problems required downsizing of the work force. The NYRA claimed that the younger worker, who was paid $5,000 less than James, had assumed some of James' duties and a different grouping of duties. A year and a half prior to the termination of James' employment, the NYRA hired a 67-year-old Security Director. The Security Director initially promoted James, gave him a 30% raise and the use of a company car. He later made the decision to fire James as part of a reorganization where James' duties were transferred to others, including the 42 year old who James claimed replaced him. The NYRA also hired a 66-year-old president two years prior to the termination. The evidence showed that the claim to downsizing was controverted and a reasonable juror could find that explanation false based on a recent hire and promotion. James also offered testimony of remarks from senior management about the need to save the NYRA for younger workers and about the need for older supervisors to retire.

As the district court judge followed *Fisher* in reaching the conclusion there was not sufficient evidence of discrimination, Judge Leval stated the issue on appeal turned on the question of whether *Fisher* remains good law. *James v. New York Racing Association*, 233 F.3d at 152. After reviewing the evidence summarized here, Judge Leval stated there was "insufficient evidence to support a rational finding of age discrimination." *Id.* at 153. While acknowledging that James had presented a prima facie case and that a juror could find the downsizing explanation pretextual, the opinion frames the discussion of *Fisher* and *Reeves* in the following sentence. "If these elements are sufficient as a matter of law to require that the case go to the jury, notwithstanding the lack of sufficient evidence to support a reasonable finding of prohibited discrimination, then we may be obligated to overturn the grant of summary judgment." *Id.* The opinion then moves to an explanation of the holding in *Fisher* as a rejection of *Binder v. Long Island Lighting Co.*, 57 F.3d 193 (Third Cir. 1995) (described by the court as holding a prima facie case combined with pretext always goes to the jury), and then to *Reeves*. The opinion states that *Reeves* holds that once the presumption disappears "the governing standard is simply whether the evidence, taken as a whole, is sufficient to support a reasonable inference that prohibited discrimination occurred." *Id.* at 156. Referring to *Schnabel v. Abramson's* understanding of *Reeves*—that a court must take a case-by-case approach, examining the entire record for evidence to persuade the trier of fact that intentional discrimination occurred—Judge Leval took note of the factors which *Reeves* identified as bearing on the question of whether the combination of the prima facie case and disbelief was sufficient to allow the jury to decide whether discrimination occurred: (1) the strength of the plaintiff's prima facie case, (2) the probative value of the proof that the employer's explanation is false, and (3) any other evidence that supports or undermines the employer's case. *Id.* The opinion then sets forth the following test while ruling that the evidence in Raymond James' case was not sufficient under the "*Reeves*/*Fisher* standard," a standard which "impliedly rejects the *Binder* proposition—that evidence satisfying *McDonnell Douglas*'s minimal requirements of a prima facie case plus evidence from which a factfinder could find that the employer's explanation was false necessarily requires submission to the jury." *Id.* at 157.

> We believe that both opinions essentially stand for the same propositions—(i) evidence satisfying the minimal *McDonnell Douglas* prima facie case, coupled with evidence of falsity of the employer's explanation, may or may not be sufficient to sustain a finding of discrimination; (ii) once the employer has given an explanation, there is no arbitrary rule or presumption as to sufficiency; (iii) the way to tell whether a plaintiff's case is sufficient to sustain a verdict is to analyze the particular evidence to determine whether it reasonably supports an inference of the facts plaintiff must prove—particularly discrimination.

Id. at 156-57.

Following *Schnabel* and *James*, the affect of *Reeves* on Second Circuit employment discrimination decisions appears to be minimal. The panel decisions state that establishment of the prima facie case and pretext will not end the inquiry on whether there is sufficient evidence to allow the question of intentional discrimination to be decided by the jury. The court will review the record on a case-by-case basis to determine whether there is sufficient evidence of discrimination.[18] See *Roge v. NW Holdings, Inc.*, 257 F.3d 164, 168 (2nd Cir. 2001); *Slattery v. Swiss Reinsurance America Corp*., 248 F.3d 87, 93-94 (2nd Cir. 2001); *Zimmerman v. Associates First Capital Corporation*, 251 F.3d 376, 38 1-82 (2nd Cir. 2001); *Byrnie v. Town of Cromwell, Board of Education*, 243 F.3d 93, 102 (2nd Cir. 2001); *Tolbert v. Queens College*, 242 F.3d 58, 70 (2nd Cir. 2001); *Abdu-Brisson v. Delta Airlines*, Inc., 239 F.3d 456, 469-70 (2nd Cir. 2001).

In *Zimmerman v. Associates First Capital Corporation, supra*, Judge Newman, the author of one of the dissents in *Fisher*, noted the case law has been developing "as to what sort of record will per-

mit a plaintiff who presents evidence of a prima facie case and evidence of pretext to have a jury consider the ultimate issue of discrimination and what sort of record will entitle the defendant to judgment as a matter of *law*." *Id.* at 381. Judge Newman noted that the Fifth Circuit has interpreted *Reeves* to mean that a prima facie case and evidence of pretext will take the case to the jury "in the absence of 'unusual circumstances' that would prevent a rational fact-finder from concluding that the employer's reasons for failing to promote her were discriminatory and in violation of Title VII." Id. at 382-82, quoting, *Blow v. City of San Antonio*, 236 F.3d 293, 298 (5th Cir. 2001). Another Fifth Circuit opinion cited by Judge Newman emphasized the importance of jury fact finding and reiterated that evidence supporting the prima facie case and pretext may, *and usually does*, establish sufficient evidence for a jury to find discrimination. *Evans v. City of Bishop*, 238 F.3d 586, 592 (5th Cir. 2000). "The Fourth Circuit has observed that if the plaintiff proves a prima facie case and pretext, her claim must go to the jury unless "there is evidence that precludes a finding of discrimination." *Id.* at 382, quoting *Rowe v. Marley Co.*, 233 F.3d 825, 830 (4th Cir. 2000). Judge Newman then comments, "Our Circuit has not read *Reeves* quite so favorably for Title VII plaintiffs." *Id.*

The evidence suggests that the Second Circuit does not believe that *Reeves* made a change to the law in the Second Circuit as it existed after *Fisher* was decided, which the court in James declared was "wholly compatible and harmonious" with *Reeves*. Although the Supreme Court characterized *Fisher* as a "pretext plus" case, and presumably "abrogated" that holding in *Reeves*, the Second Circuit has not changed the way it views its role in deciding appeals in employment discrimination cases. The rule of law in the Second Circuit now requires a case-by-case approach to determine whether there is sufficient evidence in the record to sustain a finding of discrimination. Vigilance will be required in order to guard against fact-finding based on what appears in a case record on appeal. The analysis of evidence in the record in *James* clearly invaded the province of the jury by weighing the evidence and deciding the facts added up to one of two possible interpretations. In this respect, the holding in *James* is contrary to the admonition in *Reeves* that reviewing courts are not entitled to rely upon evidence the jury is not required to believe when reviewing a Rule 50 motion for judgment as a matter of law.

Juxtaposition of the Supreme Court's decisions with the decisions in the Second Circuit leads to the conclusion that pretext plus is not a dead issue in the Second Circuit. The Second Circuit's decisions after *Reeves* are not inclined to give weight to the inference created by establishing a "minimal" prima facie case. The Supreme Court in *Reeves* stated the strength of the prima facie case and the probative value of the employer's explanation should be weighed in the process of determining whether the case should go to the jury. Ultimately, the decision to allow the jury to have the final word will reflect an appellate court's bias over whether juries are competent to make the decisions in discrimination cases. Unlike the Fourth and Fifth Circuit decisions cited by Judge Newman, there is no expectation that the case will go to the jury when pretext is combined with the prima facie case, unless there are unusual circumstances. Employment lawyers representing plaintiffs in discrimination cases in the Second Circuit had better be prepared to develop evidence which will create a strong inference of discrimination beyond simply claiming a person in a protected class was replaced by someone not in the protected class. A combination of a weak prima facie case and pretext will not be enough to allow a jury to decide whether illegal discrimination affected an employment decision. ■

Footnotes:

[1]"Pretext-plus" in discrimination law refers to the need for the plaintiff to offer evidence beyond a combination of the prima facie case and a showing that the employer's explanation is false in order to sustain a jury's verdict of intentional discrimination. Under a pretext-plus rule, a plaintiff must introduce evidence sufficient for a jury to find "both that the employer's reason is false and the real reason was discrimination. *Fisher v. Vassar College*, 114 F.3d 1332, 1339 (2nd Cir. 1997) (en banc).

[2]"This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *Id.* at 802. The Court also pointed out that the elements of the prima facie case would vary depending on the circumstances.

[3]The Court noted that in a "Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Id at 255 a. 8.

[4]The Court referred to the "prima facie case" as creating a "legally mandatory, rebuttable presumption." *Id.* at 254 n. 7.

[5]Later in the opinion, the Court stated that the explanation "must be clear and reasonably specific" in order to provide a "'fill and fair opportunity' to demonstrate pretext." *Id.* at 258, citing *Loeb v. Textron, Inc*. 600 F.2d 1003, 1011-1012 n.5 (C.A. 1979).

[6]In *Hicks*, the case was tried to the District Court in a bench trial. The judge found that the employer's reason for discharge was not worthy of belief, but that he was not persuaded there was race discrimination at the root. The judge noted there was inconsistent evidence on the role race played in the decision since some of the decision makers were black, other blacks were not similarly punished and it appeared that the employer's representative was on a "personal crusade" to fire the plaintiff. The dissenting opinion pointed out that Hicks had not been given the opportunity to rebut the "personal crusade" reason later advanced by the trial judge. *Id.* at 542-43.

[7]Justice Souter stated, "This 'pretext-plus' approach would turn B*urdine* on its head, . . . and it would result in summary judgment for the employer in the many cases where the plaintiff has no evidence beyond that required to prove a prima facie case and to show that the employer's articulated reasons are unworthy of credence." *Id.* at 535.

[8]Justice Souter concluded his dissent with the following statement, "Because I can see no reason why Title VII interpretation should be driven by concern for employers who are too ashamed to be honest in court, at the expense of victims of discrimination who do not happen to have direct evidence of discriminatory intent, I respectfully dissent." *Id.* at 543.

[9]A majority of six judges of the court joined an opinion co-authored by Leval, J. and Jacobs, J, who also filed a concurring opinion. Four judges dissented joining each of the two opinions authored by Chief Judge Jon O. Newman and Winter, J. Judge Calebresi joined the majority on the issue of the weight to be afforded a prima facie case once the defendant has come forward with an explanation, and the significance to be afforded to the fact the explanation is found to be pretextual. *Id.* at 1354.

[10]A panel of the Second Circuit Court of Appeals had determined that the District Court's finding that the reasons stated for denial of tenure were pretextual was not clearly erroneous, but the finding of discrimination based on age and sex—plus marital status was clearly erroneous.

[11]This anomaly is explained by the opinion by reference to the "de minimus" nature of establishing the elements of the prima facie case that the Supreme Court described as "not onerous." *Id.* at 1335, 1340 n.7.

[12]The Supreme Court assumed, without deciding, that the *McDonnell Douglas* framework was fully applicable to the *Reeves* decision. *Id.* at 2105.

[13]The evidence to establish the prima facie case included, in the fourth prong, circumstances giving rise to an inference that age was a factor in the decision to terminate *Reeves*' employment which included the fact that the employer "successively hired three persons in their thirties to fill [*Reeves*'] position." *Id.* at 2106.

[14]The Court stated that this situation would be limited to those cases where "the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Id.* at 2109. In other words, in considering the evidence to support a verdict of discrimination, the court must show all reasonable inferences in favor of the plaintiff and it may not make credibility

determinations or weigh the evidence. *Id.* at 2110.

[15]In a concurring opinion, Justice Ginsburg stated, "evidence suggesting that a defendant accused of illegal discrimination has chosen to gives false explanation for its actions gives rise to a rational inference that the defendant could be masking its actual, illegal motivation. But the inference remains—unless it is conclusively demonstrated, by evidence that the district court is required to credit on a motion for judgment as a matter of law . . . that discrimination could not have been the defendant's true motivation." *Id.* at 2112.

[16]The evidence supporting the fourth prong, setting forth circumstantial evidence of age discrimination, consisted of the fact plaintiff (an employee over sixty years of age) was replaced by another individual who was 31 years old. Evidence of pretext consisted of the plaintiff's letter to his supervisor that recounted a conversation on the day before his termination, which a reasonable juror could find as evidence that the reasons given were pretextual. *Id.* at 88.

[17]The court stated it was "[arguable that the Supreme Court's reading of *Fisher* was inaccurate. We read Fisher as consonant with *Reeves:* Both hold that the quantum of evidence needed to sustain an inference of discrimination is the same as that needed to sustain the ultimate burden in any other civil case." *Id.* at 89 n.5. The court also allowed that any possible disagreement about whether *Fisher* imposed a per se rule requiring more than a prima facie case and evidence of pretext was rendered moot by *Reeves*, which now becomes the principle guide.

[18]In a Westlaw search of *Reeves v. Sanderson Plumbing Products, Inc.*, in the Second Circuit, twenty-four cases were identified. Of these, twelve were unpublished decisions. Out of the twenty-four decisions identified, seventeen were favorable to the employer and seven were favorable to the employee. In the published and unpublished decisions where the court reviewed the evidence of discrimination after the employee had established the prima facie case, and it was at least assumed that the employer's explanation was pretextual, the employer prevailed in 7 out of the 9 cases.

President's Notebook

continued from page 1

This is what happens when we are subjected to legislation by anecdote. Congress is not persuaded to pass laws to protect thousands of Americans riding on defective tires. They didn't lift an eyebrow when the Institute of Medicine informed the nation that 98,000 people die each year in the United States from avoidable medical errors. But a lawsuit for spilled coffee is an outrage that requires decisive action.

The very foundation of our jury system is in peril of perishing because of a sound byte. In a day and age when Americans get most of their news in 30 second spots on TV and radio, they are being persuaded to voluntarily and happily give up their fundamental right to have disputes resolved by a jury. And perhaps the greatest irony of this movement is that the public is being persuaded that they can't trust themselves to act as reasonable jurors! Their friends, family members and neighbors are so irresponsible that we need to place arbitrary limitations on the right to fair, just and adequate compensation.

In the last election trial lawyers spent millions of dollars to support candidates who would fight to preserve our civil justice system. Insurance companies, pharmaceutical manufactures and business organizations spent tens of millions of dollars to support candidates that would provide immunity for corporate wrongdoers. They won. When the battle comes down to who can spend the most money, they will always win.

Our great strength lies in one essential fact: we are right and they are wrong. Our challenge is to find a way to educate the public, and by extension our legislators, that they are being taken for a ride. They need to understand that if we place caps on non-economic damages those whose losses are primarily non-economic will suffer the most. An elderly woman abused in a nursing home may have little or no economic loss and will be far more affected by these caps than a middle-aged male executive who can't perform his job anymore. A young child who is sexually abused will be limited to recovering no more than a few thousand dollars a year for a lifetime of mental anguish.

Our legislators need to understand that class action reform will give comfort to corporate executives who defraud thousands of shareholders because no one of them individually will have the incentive to file a lawsuit. National no-fault auto insurance will preempt decisions made by state legislators such as ours in favor of a one-size-fits-all solution to a problem that doesn't even exist in our state. Placing the risk of avoidable medical errors on the shoulders of the injured instead of the doctor will certainly not provide encouragement for the medical profession to do better.

The message we need to convey is that the civil justice system is the only forum in which an average citizen has the same rights as the rich and the powerful. There is a reason that big business spends so much money on political campaigns, and it is not its concern for the American people. If we destroy the civil justice system we will be at the mercy of corporate executives who have proven to us over and over again that they do not deserve our blind trust.

The proposed so-called reforms are not even designed to address the sound byte issues that permeate our media. If the problem is "frivolous lawsuits", how is that remedied by caps on damages? Do we really have a problem with runaway verdicts in frivolous cases? When politicians talk about "lawsuit abuse", do you know what they are talking about? Do they? The problem we face is that they have not had to explain themselves—the sound bytes and anecdotes have been enough to sway public opinion.

We need to educate the public about the real agenda behind "tort reform". The "We" I am referring to however, is not the trial lawyers, at least not directly. We are not the right messengers because our credibility has been badly damaged. When we talk about the civil justice system we are perceived as being concerned only with our income. We don't help ourselves with embarrassing television ads and billboards that scream out to the public that our only interest is money—but that is a subject for another day.

The messengers we must rely upon, first and foremost, are our clients. They know better than anyone the importance of unrestricted access to the courts. The answer to legislation by anecdote is to demonstrate that tort reform doesn't affect anecdotes, it affects real people. It is much more difficult to take away someone's rights if you don't have to look them in the eye while you are doing it. We need to make these issues real, to put human faces on them, both for the public and for our leaders.

Unfortunately, our clients are largely unaware of what is about to happen, and those who are don't know how to make their voices heard. Our responsibility is to spread the word to our clients and to provide them with guidance on how they can participate in the battle. What has come as a pleasant surprise to me as we initiated this process is just how anxious our clients are to get involved. They feel empowered by participating in the fight to protect the rights of other injured people. They are justifiably offended by the characterization of plaintiffs in personal injury actions as greedy people looking to cash in on the "lawsuit lottery". Our clients understand that the notion of personal responsibility is a two-way street and that tort reform is nothing more than an attempt by tortfeasors to avoid having to accept the consequences of their own actions.

In order for us to stand a chance of stopping the wave of tort reform measures that are on the drawing board, we need all of our members to participate. We have included in this issue a special insert in the form of a newsletter that can be easily copied and sent to clients. You have the ability to give them a voice in this fight, and it is their voice that is essential to overcoming the money and propaganda that threatens to destroy our civil justice system. ■

SURVEY SAYS . . .

"Tort Reform" not a Priority for Business

Center for Justice and Democracy

INTRODUCTION

On March 30, 1999, the Business Council of New York State held a conference for hundreds of small business owners at which some of New York's top political leaders spoke, including New York's Governor, Senate Majority Leader, Assembly Speaker and the principal sponsor of broad tort reform legislation then being considered by the New York State legislature. "Tort reform" was a hot issue in Albany, being touted by corporate lobbyists as critical for the small business community and crucial to improving New York's upstate economy. So one might expect some discussion about it from politicians trying to assist the small business community. Yet not a single person even mentioned the issue.

In May 1999, following passage of radical tort reform legislation in Florida, Enterprise Florida, a private-public partnership that works to bring out-of-state companies to Florida, told the, *Miami Daily Business Review,* "tort reform was never a big priority for the group . . . The litigation environment isn't an issue that companies look at 'on a day-to-day basis' in deciding whether to relocate. If it were a frequent question, we would have been more active on this bill."

If you listen to corporate lobbyists, they will tell you that lawsuits by consumers are creating economic "crises" in states that are driving out businesses, doctors, and other professions. They tell lawmakers that "tort reform" legislation is needed for small businesses to survive and to attract new businesses to their state, and even more daunting, that unless "tort reform" is enacted, businesses and doctors will relocate to less "litigious" states. But as the two examples above illustrate, the notion that lawmakers must restrict the rights of injured consumers to sue in order for a state's business economy to grow or even survive is one of most sensationalized fictions driving the "tort reform" movement today.

The actions of those savvy New York politicians and the folks at Enterprise Florida reflected exactly what internal business surveys consistently show: when it comes to a state's business climate, liability issues rank far below other matters of far more importance, like workforce, healthcare and a range of tax and regulatory issues.

This White Paper addresses the disparity between what business owners believe and what lobbyists say about tort law's importance to small businesses and to a state's business environment. We examine several internal surveys by private business organizations, many of which are at the forefront of the "tort reform" movement. Whereas groups like the National Federation of Independent Businesses (NFIB), the U.S. Chamber of Commerce and the National Association of Manufacturers have all made "tort reform" one of their top legislative priorities at the federal and state level, survey after survey shows that their members believe other issues are far more pressing for their own survival and growth. Businesses virtually always put "lawsuits" or "liability" toward the bottom of their list of concerns, if they mention it at all.

We also debunk the common myth that liability laws are a significant factor that businesses consider when deciding where to locate. Based on extensive legal research, we rank states based on the number of major tort law limits enacted since 1985, and correlate those findings with the states that have built the most number of new facilities or plants. We find there to be absolutely no connection between a state's enactment of "tort reform" and the state's relative attraction for businesses.

And we conclude by showing that juries are actually far more "pro-business" than conventional wisdom suggests, and that liability costs for businesses are extremely small and in steady and steep decline.

A WORD ABOUT "TORT REFORM" SURVEYS

It is sometimes said that "tort reform" is a staff-driven issue—of far less a concern to the average business owner than it is to the lobbyists of major business organizations. That is why it is important to distinguish between unbiased polls that truly examine the views of business owners, and "push polls" that are conceived by business lobbyists seeking to demonstrate support for a pre-defined political or legislative agenda.

In 1995, a "poll" on the subject of "tort reform," conducted by Newt Gingrich's Contract with America pollster Frank Luntz, was roundly criticized for "push-poll" bias. Luntz admitted that he had "counted people as favoring 'tort reform' if they accepted the statement that 'we should stop excessive legal claims, frivolous lawsuits and overzealous lawyers.'" Diane Colasanto, former President of the American Association for Public Opinion Research, said, "You can't measure public opinion with leading questions like these." Similarly, Donald Ferret of the University of Connecticut's Roper Center said such leading questions "sharply overstate support for the measures in question."[1]

In 1997, the New York State Bar Association, which represents both the defense and plaintiffs' bar, criticized polls conducted by John Zogby for New York's major business "tort reform" coalition, New Yorkers for Civil Justice Reform (NYCJR). Richard Behn, who heads Numbercrunchers, a national polling organization, said, "Although John Zogby is a respected pollster, the survey he prepared for New Yorkers for Civil Justice Reform is clearly designed to test voter response to a set of arguments designed to enhance the positions of New Yorkers for Civil Justice Reform. There are no counter arguments included in the poll to provide any balance to these statements." Moreover, he called the polls "incendiary . . . filled with loaded language . . . [an effort to] move public opinion in a particular direction advantageous to the poll sponsor."[2]

More recently, the American Tort Reform Association (ATRA)—a coalition of more than 300 corporations and associations representing tobacco, pharmaceutical, automotive and chemical industries that seek immunity from lawsuits—paid the Center for Survey Research and Analysis at the University of Connecticut to call registered voters and ask them certain questions about class action lawsuits, including whether they agreed or disagreed with broad damaging statements about such lawsuits. This "poll" was similarly condemned. The *Connecticut Law Tribune,* which serves that state's entire legal community, put it this way: "By asking a handful of broad, disingenuous questions to a smattering of ill-prepared respondents, the tort reform crowd is trying to turn anecdotal, emotional responses into a quasi-official, scientifically measured poll that it can trot out before legislative bodies as 'evidence' that the public wants tort reform."[3]

In other words, even respected pollsters and polling organizations have been criticized for bias in their handling of sur-

veys commissioned by "tort reform" groups. So it should be no surprise that the U.S. Chamber of Commerce, which has made "tort reform" one of its priority political and legislative issues, has engaged in similarly skewed polling strategies.

In 1998, the Chamber created an offshoot called the Institute for Legal Reform to carry out the Chamber's attacks on juries, judges, lawsuits and the attorneys who represent consumers. Said the Institute's Chairman Lawrence B. Kraus, "The Chamber has been involved in this for years, but we've decided to make it a priority."[4] This announcement came just months after a number of state and local chambers, some with lawyers and law firms as prominent members, expressed strong opposition to highly-publicized lawyer bashing remarks by Chamber CEO Tom Donahue, including statements like, "trial lawyers are sapping the vitality out of American enterprise."[5]

In January 2001, the Chamber released a "survey" of its members, called the *2001 National Business Agenda Survey,* which the group said "will help shape the Chamber's policy agenda for the new Congress and administration."[6] Businesses were asked to respond to a series of statements containing "loaded" language like the other "push polls" described above. The survey yielded the following results:

> Member companies cited three top legal reform issues for 2001: leveling the litigation playing field by making the same rules apply to all parties including the government, with 95 percent of respondents giving it a high priority; reforming product and service liability laws so parties are only responsible for harms they actually caused (94 percent); and ending excessive punitive damages (93 percent).[7]

This led the Chamber to announce that its members ranked "legal reform" as one of its top priorities for 2001. In fact, seemingly to provide special emphasis, in its press release the Chamber lists "legal reform" first among four issues that are highlighted, followed by workforce and employee benefits, regulatory reform and tax issues.[8] This emphasis is consistent with statements made in 1998 by the head of the Chamber's "tort reform" lobby group, Lawrence B. Kraus, who said, "Perhaps no single issue generates as much intense emotion among businesses of all sizes as the excesses of America's legal system."[9]

The problem is, no other Chamber survey supports attaching this kind of political or legislative priority to "tort reform." For example, a 1999 survey of 100 executives of the 100 largest state and metro Chambers of Commerce examining workforce issues showed that an overwhelming 82 percent of those executives considered workforce and education as their top concern, representing a 23 percent increase from the previous year.[10] In fact, the Chamber states in its own publication, *U.S. Chamber Small Business News* (August 19, 2000), that "acquisition and retention of qualified employees," found by another organization to be the most critical issue for small businesses, "echoes the U.S. Chamber's recent survey of state and local chamber executives that also pinpointed the short supply of labor as businesses number one concern."[11]

Even in states where relatively few "tort reforms" have been enacted compared to other states, like Pennsylvania and Oklahoma,[12] Chamber surveys show that liability laws are irrelevant to businesses considering whether to stay or leave the state."[13] And when the Pennsylvania Chamber conducted its *Tenth Annual Pennsylvania Economic Survey* in 2000 in which respondents were asked to rank ten issues in order of importance, so-called "lawsuit abuse" was outpolled by business taxes, health care, workers compensation (workers compensation claims do not go through the tort system), education and workforce development and environmental law and regulation as more important issues.

LIABILITY LAWS DO NOT INFLUENCE BUSINESS LOCATION DECISIONS

Proponents of legislation to immunize corporations from suit make assertions such as: "states that enact laws restricting injured consumers' legal rights have a higher level of productivity and employment growth." During the recent 2000 elections, the Michigan Chamber of Commerce ran a three-week advertising campaign in Ohio, where in 1999 the state's highest court had struck down a package of draconian "tort reform" laws. The three-week campaign, directed at Ohio businesses, touted Michigan as more business-friendly because its "tort reform" laws had been *upheld* by its state Supreme Court."[35]

Yet survey after survey has shown that, for years, businesses have not considered a state's liability laws to be a significant factor in deciding where to locate. And Ohio certainly proves this point. For the second straight year, Ohio finished third in *Site Selection Magazine's* national ranking of states with the most new and expanded facilities. According to the magazine, Ohio not only had 1,129 new and expanded facilities, including 206 new manufacturing plants (which earned it the number two spot among the top 10 states) in the year 2000 but it also "had the largest contingent—22 cities—in *Site Selection's* annual rankings of top small towns based upon corporate expansion activity over the preceding 12-month period."[36] Moreover, from 1998 through 2000, Ohio's three largest cities ranked among the top 11 large metro areas in the United States in total number of new and expanded facilities.[37]

Ohio is not the only state to prove this point. We decided to test the following hypothesis: if tort law limits make a state more attractive to businesses, that should be evident in trends showing which states are attracting the most new plants or facilities and are witnessing the most employment growth. As tort law limits get more severe, there should be an increase in new facilities and jobs. We segregated the states into three categories: states that enacted the fewest number of tort law changes since 1985 (category 1); states that passed a mid-range level of tort law limits (category 2); and states that enacted the most "tort reform" (category 3)[38] We placed a state's tort severity ranking—1, 2 or 3—next to its listing in *Site Selection Magazine's* survey of states with the most new or expanded facilities, capital investment or job growth.

Looking at the following tables, it is obvious that all enactment of "tort reform" has no correlation to businesses location decisions or employment.

Despite what "tort reform" proponents may promise lawmakers, tort law limits enacted since the mid-1980s have not had any impact on business location decisions. States with little or no tort law restrictions are just as attractive to businesses as those states that enacted severe restrictions on victims' rights.

Other surveys also show that tort laws play no meaningful role in a business' site selection decision.[39] According to a 1998 survey of Fortune 500 companies, U.S.-based firms ranked "logistics" (access to customers and markets) as their highest priority when selecting sites.[40] Another recent *Site Selection* magazine survey found that "access to a skilled work force" remained the number one priority of corporate site seekers, which has "been the case for years."[41]

A 2000 Oklahoma Chamber of Commerce survey confirmed these findings. Oklahoma is a state that has enacted relatively few "tort reforms" compared to other states.[42] When asked to explain the reason(s) why companies in the community had left or were planning to leave, several labor and workers' compensation issues tied for first.[43] Other explanations included no direct air service to Oklahoma City or Tulsa, the state's personal income tax, financial business incentive packages and the perception that Oklahoma was "business unfriendly" relative

to the regulatory burden."[44] As Richard Rush, President & CEO of the state chamber, said in response to the survey results, "None of these answers are particularly surprising. For many years our members have expressed frustration over these important issues."[45]

Pennsylvania is another state that has enacted few tort restrictions relative to other states.[46] According to the Pennsylvania Chamber of Business and Industry's *10th Annual Economic Survey,* last year was a "record year for those [Chamber member] respondents who would not move their businesses out of Pennsylvania," with 80.8 percent saying they would not leave the state if they could, a 30 percent increase from 1996.[47] In addition, almost 60 percent of respondents rated the business climate in Pennsylvania as "good," with only 3.1 percent rating the climate as "poor," down from 22.4 percent in 1996.[48] Moreover, among those companies who would leave the state, the top reasons given were: business taxes, better labor force and environmental issues.[49] As in earlier Pennsylvania Chamber surveys, lawsuits or the state's tort laws were not mentioned.[50]

Moreover, other data show that Pennsylvania's economy continues to thrive. In the March 2001 edition of *Site Selection Magazine,* the state claimed sixth place for most new and expanded corporate facilities and ninth among the top 10 states in jobs per million in the year 2000.[51] In addition, Pennsylvania placed fourth in generating a high number of new manufacturing plants in 2000, while ranking eighth from 1998 through 2000.[52] Commenting on his state's accomplishment, Governor Tom Ridge said, "There are many reasons for our success over the past several years, but there is one in particular that has made Pennsylvania such an attractive location for site consultants: We get out of the way," meaning "slashing taxes at record rates, reducing burdensome regulations and reconnecting with our business customers."

MEDICAL MALPRACTICE LAWS AND PHYSICIAN LOCATION

One of the most contentious issues today concerns the impact of a state's medical malpractice laws on where physicians decide to practice. This is separate from the equally important question of the correlation between a state's liability law and insurance rates—a myth that is addressed below.

Over the last 25 years, the insurance industry has created medical malpractice insurance "crises," making malpractice insurance unaffordable for physicians and other health care workers. Like clockwork, this leads to frenetic calls for legislative limits on victims' rights. Doctors and their insurers say that physicians will leave the state and not return unless consumers' legal rights are taken away.

West Virginia is one state where such a malpractice insurance "crisis" is happening. The West Virginia Medical Association says that "meritless" malpractice claims are driving up insurance rates and causing a mass exodus of doctors from the state. However, *Charleston Gazette* reporters Lawrence Messina and Martha Leonard uncovered data proving just the opposite. In a landmark series, "The Price of Practice," Messina and Leonard found that the number of doctors in West Virginia has increased yearly, with the state seeing a 14.3 percent increase in its number of doctors between 1990 and 2000. This increase is at a rate about 20 times greater than the population.[53] The paper said in a March 1 editorial:

> The Medical Association has made much of the fact that Wheeling has lost all three of its neurosurgeons in the past year. But two of those neurosurgeons are near the top of the list for the number of malpractice suits brought against them. In all but one of the 19 lawsuits brought against those two doctors, the insurance company representing them settled out of court, apparently paying damages. The third neurosurgeon left town shortly after being sued for malpractice. That neurosurgeon admitted drilling into the wrong side of his patient's head during an operation, possibly leaving her permanently scarred. The same neurosurgeon lost a jury trial for $1.8 million for botching a surgery that caused multiple cerebral aneurysms and cardiac arrest. Is Wheeling really worse off for losing these doctors?

Other studies have found there to be no correlation between where physicians decide to practice and state liability laws. One recent study found that, "[D]espite anecdotal reports that favorable state tort environments with strict . . . tort and insurance reforms attract and retain physicians, no evidence suggests that states with strong . . . reforms have done so."[54] A 1995 study of the impact of Indiana's medical malpractice "tort reforms," which were enacted with the promise that the number of physicians would increase, found that "data indicate that Indiana's population continues to have considerably lower per capita access to physicians than the national average."[55]

While it is beyond the scope of this study to determine what is responsible for decisions by physicians to locate in a particular state, it is clear that factors other than a state's tort laws are the cause.

LIABILITY LAWS AND INSURANCE RATES

In the 1999 study, *Premium Deceit; The Failure of "Tort Reform" to Cut Insurance Prices,* J. Robert Hunter, former Texas insurance commissioner and Federal Insurance Administrator under Presidents Carter and Ford, and co-author Joanne Doroshow conducted the first-ever exhaustive look at the impact of tort restrictions on state-by-state insurance costs over the last 14 years. The study found that laws restricting injured consumers' rights to go to court do not reduce insurance prices for insurance consumers. These laws, while having terrible consequences for many innocent people, do nothing to improve the affordability or availability of liability insurance for businesses or professionals.

According to Hunter, "Despite years of claims by insurance companies that rates would go down following enactment of tort reform, we found that tort law limits enacted since the mid-1980s have not lowered insurance rates in the ensuing years. States with little or no tort law restrictions have experienced approximately the same changes in insurance rates as those states that have enacted severe restrictions on victims' rights."

Following the release of *Premium Deceit,* spokespeople for the American Tort Reform Association (ATRA) agreed. Both ATRA's president and general counsel said in published statements that lawmakers who enact restrictions on consumers' legal rights should not expect insurance rates to drop.[56] These remarks were a surprisingly honest admission by some of the nation's most vocal proponents of tort restrictions. Laws that restrict the rights of injured consumers to go to court do not produce lower insurance costs or rates, and insurance companies that claim they do are severely misleading this country's lawmakers.

THE EXPLANATION: JURIES AND THE COSTS OF LIABILITY FOR BUSINESSES

Despite what the lobbyists and heads of trade associations like the U.S. Chamber, NFIB and NAM say, there are reasons why lawsuits or liability issues barely rank as important for most businesses. The explanation has to do with the actual behavior of juries and the real cost of liability for businesses.

"Tort reform" proponents argue that juries are anti-business, often allowing emotions and sentimentality for the victim to enter improperly into their decision-making process. While there is no question that jurors have always introduced a sense of equity and fairness into the deliberative process—that is their historic purpose—there is no evidence at

all that they are arbitrary, emotional or anti-business.

In fact, contrary to popular belief, Professor Valerie P. Hans found in her recent book, *Business on Trial: The Civil Jury & Corporate Responsibility,* that jurors are often quite "pro-business." Hans discovered that jurors "expressed concern about the effect of an award on the business defendant, wondering whether it might lead to a loss of jobs or otherwise harm the company." Hans found that "jurors often show doubts about, and sometimes even hostility toward, injured plaintiffs."[57] She explained, "This is not to say that jurors are *never* sympathetic. Rather, they have a highly differentiated reaction to the civil plaintiff that flies in the face of the conventional wisdom that jurors are nothing more than bleeding hearts."[58] Also, jurors are "often suspicious and ambivalent toward people who bring lawsuits against business corporations."[59] According to Hans,

> . . . Most business litigants in the cases that were part of this study were described in a neutral or positive light. In a minority of cases, jurors levied some harsh comments against particular business defendants, but to the extent that I could determine through interviews, their criticism seemed to be linked largely to trial evidence of business wrongdoing rather than to jurors' preexisting anti-business hostility. In fact, general attitudes toward business were only modestly related, at best, to judgments of business wrongdoing.[60]

Indeed, according to the most current data available from the Bureau of Justice Statistics of the U.S. Justice Department, the overall median jury award for all tort cases in 1996 was relatively low, totaling only $30,000.[61] In 1992, it was 90 percent higher, at $57,000 (in 1996 dollars).[62]

This reality is certainly reflected in the Ernst & Young and the Risk & Insurance Management Society's annual survey of business liability costs, which recently found such costs to be the lowest in a decade. The study, which calculates annual insurance and claims costs for U.S. businesses including property damage, workers compensation and all other liability costs, found liability costs to be in steep decline—only $5.20 for every $1000 in revenue in 1999, down 37 percent from 1992 levels.[63]

Similarly, according to a June 1998 report by the Consumer Federation of America (CFA) based on data collected by the National Association of Insurance Commissioners, products liability insurance costs only 16 cents per $100 of a retail product—a tiny fraction equaling less than $^2/_{10}$ of 1 percent. Adjusted for inflation, products liability insurance costs have fallen about 75 percent over the last decade.

With liability costs so low, it is no wonder that business concerns lie elsewhere.

CONCLUSION

From the mid-1980s until today, the nation's largest businesses have been advancing a legislative agenda to limit their liability for causing injuries. One of the principal arguments on which they rely is that laws that make it more difficult for injured people to go to court *(i.e.,* "tort reform") are economically necessary for small businesses and for a state's economy. Using this argument, great pressure has been brought to bear on legislatures around the country to restrict the rights of innocent victims to recover for their injuries and to hold wrongdoers accountable in court.

However, surveys show that issues such as workforce development, healthcare and taxes are the issues businesses believe challenge their growth and viability, not civil lawsuits. By examining the inconsistency between public statements and private responses, we see that allegations that "tort reform" is critical for the small business community and crucial to improving a state's economy are merely spin designed to enlist public support for statutory limits that benefit companies at the expense of injured consumers.

Footnotes:

[1]*See,* "The GOP Contract: Luntz Admits Initial Polling was 'Flawed,' "*The Hotline,* November 14, 1995 (citing November 10, 1995 Knight-Ridder story by Frank Greve); http://www.aapor.org/press/release.html.

[2]Letter from Richard J. Behn, President, Numbercrunchers, Inc., to Joshua Pruzansky, President, New York State Bar Association, June 23, 1997.

[3]"Vox Populi Justice," *Connecticut Law Tribune,* February 5, 2001.

[4]Berkman, Harvey, "Sides Set to Fight on Tort Reform," *National Law Journal,* April 20, 1998.

[5]Carter, Terry, "A Lesson Learned; How a U.S. Chamber of Commerce plan to boost membership by attacking lawyers backfired before it was even launched," *ABA Journal* (May 1998).

[6]"U.S. Chamber Members Rank 2001 Issues in New Survey," January 9, 2001, found at http://www.uschamber.com/Press+Room/2001+Releases/January+2001/0l-04.htm.

[7]"U.S. Chamber Members Rank 2001 Issues in New Survey," January 9, 2001, found at http://www.uschamber.com/Press+Room/200l+Releases/January+2001/01-04.htm.

[8]"U.S. Chamber Members Rank 2001 Issues in New Survey," January 9, 2001, found at http://www.uschamber.com/Press+Room/2001+Releases/January+2001/01-04.htm.

[9]Lash, Steve, "Business group seeks to breathe new life into tort reform," *Chicago Daily Law Bulletin,* April 25, 1998.

[10]"Workforce Issues: A Top Priority for Chamber Members," found at http://www.uschamber.com/CWP/default.htm.

[11]"The Spirit of Enterprise," *U.S. Chamber Small Business News,* Vol. 1, Issue 1, August 18, 2000, found at http://www.uschamber.com/Small+Business/Small+Business+News/Small+Business+News+Archive/August+18.htm (Arthur Andersen and National Small Business United has released the findings from the eighth annual Survey of Small and Mid-Sized Businesses . . . The greatest challenge facing the growth and survival of their business, according to the respondents of the survey, is the acquisition and retention of qualified employees . . . This echoes the U.S. Chamber's recent survey of state and local chamber executives that also pinpointed the short supply of labor as businesses number one concern"); "Workforce Issues: A Top Priority for Chamber Members," found at http://www.uschamber.com/CWP/default.htm ("Chamber members see workforce development as a top priority today and expect to for at least the next three years").

[12]*See, e.g.,* Hunter, J. Robert and Joanne Doroshow, *Premium Deceit; The Failure of "Tort Reform" to Cut Insurance Prices,* Appendix A (ranking of states), Citizens for Corporate Accountability & Individual Rights, Center for Justice & Democracy, 1999.

[13]Richard Rush, President & CEO Oklahoma's Association of Business and Industry, "How do we keep and grow Oklahoma businesses?" September 1, 2000, found at http://www.Okstatechamber.com/media/survey9-1-00.asp; Pennsylvania Chamber of Business and Industry, "Tenth Annual Pennsylvania Economic Survey" (January 2001), found at www.pachamber.org.

[14]"Survey of small and mid-sized businesses: Trends for 2000." Conducted by Arthur Andersen and National Small Business United.

[15]*See, e.g.,* "Survey of Small and Mid-Size Businesses: Trends for 1998," found at http://www.nsbu.org/survey/7th/index.html; "Highlights of the 1997 NSBU/Arthur Andersen Survey of Small and Mid-Sized Businesses," found at http://www.nsbu.org/survey.htm; "1996 NSBU/AA Survey Highlights," NSBU News Release, June 27, 1996, found at http://www.nsbu.org/survey96.htm.

[16]"The Voice of Small Business Is Shaped: Final Results from Small Business Congress 2001," February 14, 2001, found at http://www.nsbu.org/media_center/pr021401.htm; "Final Results From Small Business Congress 2000," February 7, 2000, found at http://www.nsbu.org/pr/pr020700.htm; "Final Results From The 1999 Small Business Congress," February 9, 1999, found at http://www.nsbu.org/pr/pr020999.htm.

[17]"Small Business Says Affordable Healthcare is Their Highest Priority on the National Agenda: High Costs Prevent One Out of Two Small Firms from Offering Employees Healthcare Insurance," *Business Wire,* July 10, 2000.

[18]"Small Business Owners Want Improvements in Education and Affordable Healthcare—Top Concerns Ahead of Tax Cuts and Reductions in Regulatory Burdens," March 16, 2000, found at http://www.nsbu.org/pr/pr031600amex.htm.

[19]NFIB Education Foundation, "2000 Small Business Problems & Priorities," found at http://www.google.com/search?q=cache:www.n

fib.com/media/releases/sbet_prob.htm+NFIB+Education+Foundation&hl=en.

[20]"2000 Congressional Small Business Summit Referendum Summary," found at http://www.google.com/search?q=cache:www.nfib.com/2000summit/referendum.html+NFIB+Small+Business+Problems+Priorities&hl=en.

[21]"2000 NAM Small Manufacturers Operating Survey Results." found at http://www.nam.org/tertiaryprint.asp?TracID=&CategoryID=251 &DocumentID=1926.

[22]"1999 NAM Small Manufacturers Operating Survey Results," found at http://www.nam.org/tertiaryprint.asp?TrackID=&CatagoryID=251&Document ID=1928.

[23]*See,* Business Council of New York State, "Survey: Business Council Members See Improvement—and Room for More—in New York's Business Climate, Taxes," October 17, 2000. http://www.bcnys.org/whatsnew/2000/1017srvy.htm.

[24]"Health care mandates threaten New York small businesses, new NFIB survey finds," February 6, 2001. On file with CJ&D.

[25]"Barriers to Small Business Growth in New York State," Center for Governmental Research Inc. (November 1998).

[26]"Study: Property taxes, health-care costs hurt small businesses" (March 1999), on file with CJ&D. A 2000 survey of New York Business Council members echoes such concerns over taxes. *See.* "Survey: Business Council Members See Improvement—And Room For More—In New York's Business Climate, Taxes," October 17, 2000 found at http://www.bcnys.org/whatsnew/2000/1017srvy.htm.

[27]"Study: Property taxes, health-care costs hurt small businesses" (March 1999), on file with CJ&D.

[28]"Results of the 1999 NFIB/New Jersey Survey on the State Business Climate," on file with CJ&D.

[29]Pennsylvania Chamber of Business and Industry, "Tenth Annual Pennsylvania Economic Survey" (January 2001), found at www.pachamber.org.

[30]Sleeth, Amy, "Quality workers, regulatory reform top NFIB survey." *Puget Sound Business Journal,* February 5, 1999.

[31]Brown, Craig, "Insurance, Taxes Top Issues For Small Businesses, Report Says," *The Oregonian,* February 9, 2001.

[32]Miller, Michael, "Benefit costs are a top concern for Pennsylvania small business," *Pittsburgh Business Times,* April 9, 1999.

[33]"NFIB calls for tax/fee reductions," *Pacific Business News,* February 5, 1999.

[34]Janecke, Ron, "Illinois small-business owners weigh in on issues," *St. Louis Business Journal,* February 3, 1997.

[35]*See, e.g.,* "Michigan's Stable Legal Climate Credited With Giving State Strong Competitive Advantage." June 12, 2000, found at http://www.michamber.com/chamnews/june00.htm; Michael Bender, "Michigan Ads Seek Ohio's Fortunes," *Dayton Daily News,* June 6, 2000; "Michigan Chamber Launches Campaign to Bring Ohio Jobs to Michigan," June 5, 2000, found at http://www.michamber.com/chamnews/june00.htm.

[36]Starner, Ron and Tracy Heath, "It's MICH-AGAIN!" *Site Selection Magazine* (March 2001), found at http://www.siteselection.com/issues/2001/mar/p152.

[37]Starner, Ron and Tracy Heath, "It's MICH-AGAIN!" *Site Selection Magazine* (March 2001), found at http://www.siteselection.com/issues/2001/mar/p152.

[38]The methodology for determining the category designations can be found in Hunter, J. Robert and Joanne Doroshow, *Premium Deceit; The Failure of "Tort Reform" to Cut Insurance Prices,* Citizens for Corporate Accountability & Individual Rights, Center for Justice & Democracy, 1999. Only Ohio's designation has since been changed from "3" to "2" following the Ohio Supreme Court finding Ohio's 1996 "tort reform" law unconstitutional. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward,* 86 Ohio St.3d *451* (1999).

[39]*See, e.g.,* Lisa Love, "The Role of Quality of Life in Business (Re)Location Decisions," *Journal of Business Research,* March 1999; "Barriers to Small Business Growth in New York State," Center for Governmental Research Inc. (November 1998).

[40]"Firms pick sites based on logistics," *Logistics Management & Distribution Report,* September 30, 1998.

[41]Arend, Mark, "Survey Reveals New Factors Behind Site Location Decisions," *Site Selection* (May 1999).

[42]*See, e.g.,* Hunter, J. Robert and Joanne Doroshow, *Premium Deceit; The Failure of "Tort Reform" to Cut Insurance Prices,* "Appendix A (ranking of states), Citizens for Corporate Accountability & Individual Rights, Center for Justice & Democracy, 1999.

[43]Richard Rush, President & CEO Oklahoma's Association of Business and Industry, "How do we keep and grow Oklahoma businesses?" September 1, 2000, found at http://www.Okstatechamber.com/media/survey9-1-00.asp.

[44]*Id.*

[45]*Id.*

[46]*See, e.g.,* Hunter, J. Robert and Joanne Doroshow, *Premium Deceit; The Failure of "Tort Reform" to Cut Insurance Prices.* "Appendix A (ranking of states), Citizens for Corporate Accountability & Individual Rights, Center for Justice & Democracy, 1999.

[47]Pennsylvania Chamber of Business and Industry, "Tenth Annual Pennsylvania Economic Survey" (January 2001), found at www.pachamber.org.

[48]*Id.*

[49]*Id.*

[50]*Id.*

[51]Starner, Ron and Tracy Heath, "It's MICH-AGAIN!" *Site Selection Magazine* (March 2001), found at http://www.siteselection.com/issues/2001/mar/p152.

[52]Starner, Ron and Tracy Heath. "It's MICH-AGAIN!" *Site Selection Magazine* (March 2001), found at http://www.siteselection.com/issues/2001/mar/pl52.

[53]Leonard, Martha, "State has seen sharp increase in number of doctors," *Sunday Gazette Mail,* February 25, 2001.

[54]Kinney, "Malpractice Reform in the 1990s, Past Disappointment, Future Success?" 20 J, *Health Pol. Pol'y & L.* 99, 120 (1996), cited in Galanter, Marc, "Real World Torts," 55 *Maryland L. Rev.* 1093, 1152 (1996).

[55]Kinney and Gronfein, "Indiana's Malpractice System: No-Fault by Accident," *54 Law & Contemp. Probs.* 169, 188 (1991), cited in Galanter, Marc, "Real World Torts," *55 Maryland L. Rev.* 1093, 1152-1153 (1996).

[56]*Liability Week* (July 19, 1999); *Business Insurance* (July 19).

[57]*Business on Trial: The Civil Jury & Corporate Responsibility,* New Haven and London: Yale University Press (2000), p. 23.

[58]*Id.*

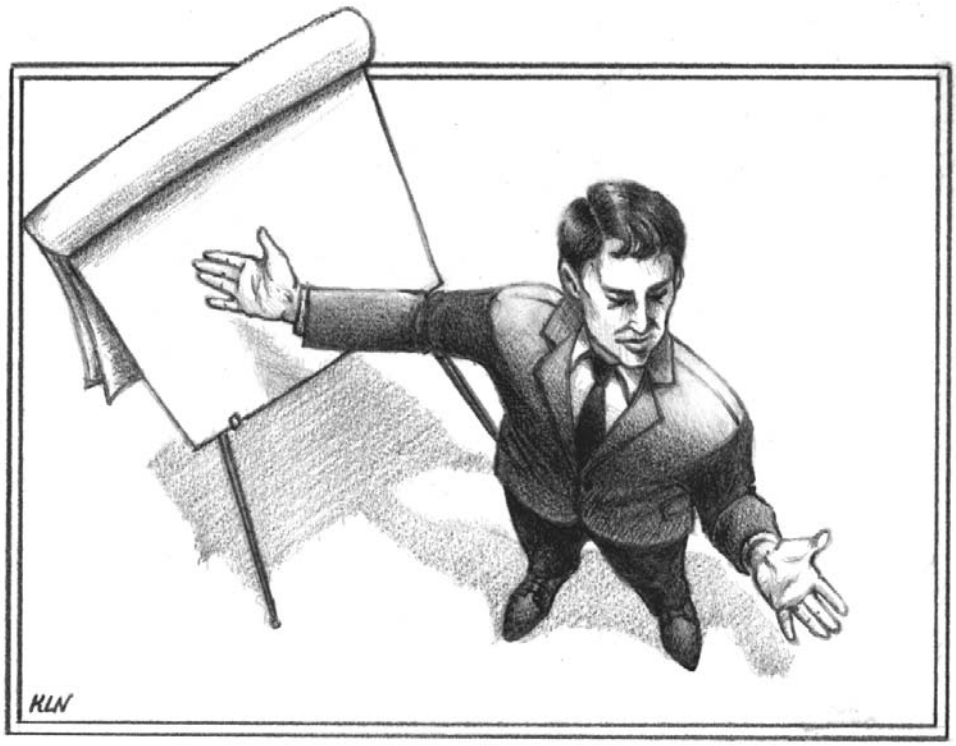
[59]*Id.* at 216.

[60]*Id.* at 217.

[61]"Tort Trials and Verdicts in Large Counties, 1996," U.S. Department of Justice, Bureau of Justice Statistics, NCJ- 179769 (August 2000), p.6.

[62]*Id.* at 9.

[63]*2000 RIMS Benchmark Survey,* Produced jointly by Ernst & Young LLP and RIMS, 2001.



GUEST EDITORIAL

The Spin Doctors Are at It Again

By Mary M. Bennett

This editorial appeared in the June 2001 issue of The Advocate*, the publication of the Consumer Attorneys Association of Los Angeles.*

In a recent *New York Times* article, it was suggested that trial lawyers who sued Ford and Firestone knew as early as 1996 that faulty tires resulted in fatal rollovers. The article then goes onto state that the trial lawyers didn't tell federal regulators (at NHTSA) for fear they would jeopardize their individual lawsuits. The implication, of course, is that consumer attorneys are the ones responsible for the subsequent injuries and deaths. Had NHTSA only been told earlier, we could have prevented harm!

Of course, the defendants in each of those cases, who had unique knowledge of all the cases arising out of their alleged product defects, disclosed nothing to NHTSA. The defendants' lawyers disclosed nothing to NHTSA. The courts who heard the cases disclosed nothing to NHTSA. The companies that ran tests for the manufacturers showing the Explorer's lack of vehicle stability and the propensity of the Firestone tires to suffer tread separation disclosed nothing to NHTSA. Bridgestone, the Japanese parent of Bridgestone/Firestone, which knew of the manufacturing problems in its Decatur plant in 1996, when it sent its own team of engineers to inspect the plant, disclosed nothing to NHTSA.

Yet, it is the trial lawyers who successfully (or unsuccessfully) represented plaintiffs in the earliest Firestone cases who are at fault for failing to disclose the existence of a defect. This is somewhat odd since each one of those lawyers filed a complaint—a public document disclosing defects—and not one was adverse to talking at length about the defects in the tires to the media.

What the *New York Times* article failed to point out was that the suggestion NHTSA would have done something is almost laughable. NHTSA's record on automobile safety related recalls could only be envied by the vehicle manufacturers themselves. NHTSA has never recalled any vehicles for lack of stability problems; has never recalled any gas tank designs; has failed to recall or warn about known seatbelt and airbag defects; "solved" the Ford park-to-reverse problems by agreeing to discontinue its investigation if Ford sent a sticker to owners advising them to place the vehicle in park; agreed to drop its defect investigation if Ford placed a plastic shield over the Pinto gas tank; and did not believe that the reports of deaths as a result of tread separation on Firestone tires warranted an investigation.

The explanation for this dismal record might have something to do with the fact that, with the notable exception of Joan Claybrook, virtually all of the former NHTSA heads have been hired by those they were supposed to regulate. The newest example, Sue Bailey, served as Acting Director of NHTSA under former President Bill Clinton and headed NHTSA during the time that it failed even to commence an investigation into the Firestone/Ford Explorer problems. She was hired as a consultant by Ford Motor Company this June, five months after leaving the Agency. Ford had earlier hired James Hall, who was Chairman of the National Transportation Safety Board until last December. The NTSB is the organizational parent of NHTSA. Mr. Hall was hired to help Ford address allegations that the Explorer is defective.

Fortunately, despite NHTSA's lack of interest, consumer attorneys continue to investigate and pursue the manufacturers of defective automotive products. ■

Attorney Swearing-in Ceremony
November 4, 2002
Remarks of Chief Justice William J. Sullivan

Good (morning) (afternoon). On behalf of myself and my colleagues on the Supreme Court, Justices David Borden, Flemming Norcott, Joette Katz, Richard Palmer, Christine Vertefeuille, and Peter Zarella, it is a pleasure to welcome you. We are fortunate that members of the appellate court, administrative judges of the Superior Court and a number of chief clerks have been able to take time from their busy schedules to celebrate with us. We are also pleased with the considerable presence of key representatives of the state and local bar associations.

Today marks the third time that candidates to the Connecticut bar have participated in admission ceremonies before the Supreme Court, a procedure that has been welcomed by both the judiciary and the bar as a most appropriate and fitting entrance for new attorneys into our legal society.

We have been gratified by the number of groups and individuals who have enthusiastically helped, once again, in the planning and implementation of today's events. I would be remiss if I did not take this opportunity to briefly recognize them.

The bar examining committee, represented by its chair, Attorney Raymond Beckwith, was most accommodating in managing the procedure by which you were all notified of the admission ceremony, and in assisting us in the process by which you will be registered as attorneys.

Leaders of the bar associations—Attorney Deborah Tedford, president of the Connecticut Bar Association, Attorney John Matulis, president of the Hartford County Bar Association, Attorney Patricia Kaplan, president of the New Haven County Bar Association, Attorney William Davis of the Connecticut Trial Lawyers Association, and the executive directors of those associations participated energetically in the planning stages.

I would also like to thank Justice Peter Zarella and the judicial branch members of his team—the staff of the clerk's office, the external affairs division, the facilities unit, the bar examining committee, the Supreme Court, our reporters, marshals and security officers. All worked diligently with the outstanding staff of the Bushnell to make our undertaking so successful.

Today's ceremony is the result of a suggestion that Justice Zarella made to me over two years ago. He told me there had to be a better way to welcome newly admitted attorneys to the bar. Prior to 2001, swearing in ceremonies took place in judicial district courthouses, often in jury assembly rooms. A judge entered, had you raise your hand and swore you in. The whole ceremony took 5-6 minutes, then everyone got on elevators, rode them to the first floor and left the courthouse. Justice Zarella said that when he was sworn in as an attorney in Boston many years ago, it was done before the Supreme Judicial Court during an impressive ceremony that underscored the importance of the day. He felt we should modify our swearing in ceremony to reflect those feelings, I agreed and gave him the responsibility of putting his idea into effect. The result is this ceremony today.

Today is an exceptional day. For you, the candidates, it is a culmination of years of study, as well as financial, and often personal, sacrifice. We congratulate you for your perseverance in negotiating every turn in the road. For the families and friends of the candidates, it is the completion of an equal number of years of encouraging the dreams of those closest to you. All of us can take pride in the accomplishments that the candidates have already achieved, and in those that will surely come.

Now that you are attorneys you will hear people disparage the profession you have chosen. Do not pay any attention to them. Be proud to be an attorney. Most of all, respect the legal profession; for if you do not respect the profession, people will not respect you. Always carry with you that fervor, that excitement, that energy that you have today—to do good for mankind. Never lose the desire to "make a difference." Never be afraid to take a position or defend a cause no matter how unpopular—as long as you do it ethically, honestly and with respect, congratulations to you all and welcome to the bar of the State of Connecticut. ■

Attorney Swearing-in Ceremony
November 4, 2002
Remarks of Justice Peter T. Zarella

Thank you Chief Justice Sullivan. I am pleased to have the opportunity to speak to you today. The Chief Justice has recognized the personally difficult journey that many of you have had to reach this milestone. I urge each of you, if you have not already done so, to thank those who have helped you along the path . . . without their reassuring support the way would have been even more arduous.

During your time in school, you have learned the law well. Now after years of study, months of cramming, and successful bar results, here you are minutes away from going forth as an attorney. But I must tell you that you have really only just begun the process of being an attorney. All of us who are members of the bar remain, throughout the length of our careers, part of this process—the process of the communal pursuit of justice.

In the past two admission ceremonies we discussed an attorney's responsibility for the legal welfare of clients, a lawyer's ethical obligations and duties as an officer of the court and the importance of mentoring in the profession. The point of those two addresses was to insure that the applicants recognized the importance of the oaths that they were about to take and to remind them that those obligations continued for as long as they practiced this learned profession of ours. We also attempted to impress upon the candidates the importance of participating in continuing legal education. We suggested that anyone who was serious about their profession would join and actively participate in their local and state bar associations where they not only would meet their fellow lawyers but could continue their education.

At the last admission ceremony we addressed the crisis that every judge and lawyer recognizes as a growing problem. That is the loss of civility. We discussed how important it is to recognize that "good lawyering" is not judged by the volume of one's argument or by the craftiness of one's action but rather the logical development of a well thought out legal strategy based upon solid research and delivered in an understandable and appealing manner. Respect for the profession, yourself and others and respect for the court are the trademarks of a lawyer who understands the importance of civility. These topics remain of grave importance to this court. Escalating incivility continues to have the unfortunate effect on the public perception of the role of an attorney as a personal gladiator and of the concept of our justice system as an arena for battle.

The recent spate of business scandals calling into question the integrity of the way that we conduct our affairs has caused law schools, as well as business schools, to review their obligations to educate students about ethical responsibilities.

Sometimes, however, even the best educational preparation cannot provide an answer to the knotty problems you will encounter. Often the nuances of the practice of law refuse to fit neatly within the confines of the ethical issues that you so readily identified in law school case studies. Being uncomfortable about following a particular course of action is often a fairly good indication that you should take a closer look at its ethical implications. Refer to the rules of professional conduct. Discuss your concerns with more experienced attorneys in your firm or with the Connecticut Bar Association committee on professional ethics. Be guided by their advice. By the same token, voice your own concerns when colleagues seek your counsel about ethical dilemmas.

The trust of this court is that as we become more aware of the often unintended effect that the professional conduct of attorneys has on society we will each become more cognizant of our individual duty to approach our colleagues of the bar and the court itself with greater respect. It is our hope that consideration of ethical issues and obligations will become an integral part of your daily professional life.

I would now like to detour for a moment into an area about which few remarks are ever offered.

The lawyer-poet Archibald Macleish observed that "the business of law is to make sense of the confusion of what we call human life—to reduce it to order but at the same time to give it possibility, scope, even dignity."

In law school most of you, like those of us who went before, tunneled your vision to accomplish your end. The study of law can be all-consuming. There seems to be an unending amount of material to digest and understand. Being prepared for class takes on a meaning that few of us could have conceived during our free-wheeling college days. In addition to school responsibilities, many of you had demanding jobs and family obligations as well.

But, if we are to be honest, families and jobs too often took a back seat to the law. We learned quickly the meaning of the adage "the law is a jealous mistress".

Today you can relax and celebrate with your friends and family all you have accomplished. Tomorrow, however, the pursuit of new goals begins. Looking for a job or beginning a new job, learning how to actually practice law, trying that first case, becoming partner, and so on and so on. The specific end or goal changes, but there is always something that must be accomplished.

This presents you with a dilemma, if you approach the practice of law with the same tunnel vision that served you so well in law school you will not be the best lawyer you can be nor will you be a very interesting person. The final advice given by one of my law school professors on how to be a good lawyer was "don't forget to read the great books". Twenty-seven years ago, I had very little idea what he meant. I think I know now. Aldous Huxley once said in talking about literature, "the proper study of mankind is books". In my opinion, literature is one way to keep you connected to the real world—the world in which your clients are trying to navigate. So too, does reading a story to a child, washing your car, or coaching little league.

The clients who will come to you are real people with real problems. They are in the midst of the confusion of human life. Lawyers are trained to argue, to dissect, and to analyze. We are not trained to understand the human emotions that our clients are coping with. If your vision remains tunneled, if you are disconnected from all society except a legal one, you will not truly understand those who come to you in distress. You will not see their worry or frustration. They will simply be a first impression issue or an interesting case. I encourage you to become part of the world again. I encourage you to, as my former law school professor exhorted, "read the great books". Acquiring the skills needed to help you understand what your client, opposing counsel and their clients are experiencing will make you a better lawyer and will help to give scope and dignity to your life and to the profession.

You are about to enter a noble profession. To uphold its honor with empathy, honesty, courage and respect is today, as it has always been, the worthiest of pursuits. I extend to you, on behalf of the justices of the Supreme Court and the men and women of the judicial branch our sincerest congratulations and best wishes. ■

Insurer's Price Wars Contributed to Doctors Facing Soaring Costs

Lawsuits - Alone Didn't Inflate Malpractice Premiums — Reserves at St. Paul Distorted Pricing Picture in 1990s

By Rachel Zimmerman and Christopher Oster, Staff Reporters of The Wall Street Journal

As medical malpractice premiums skyrocket in about a dozen states across the country, obstetricians and doctors in other risky specialties, such as neurosurgery, are moving, quitting or retiring. Insurers and many doctors blame the problem on rising jury awards in liability lawsuits.

"The real sickness is people sue at the drop of a hat, judgments are going up and up and up, and the people getting rich out of this are the plaintiff's attorneys, says David Golden of the National Association of Independent insurers, a trade group. The American Medical Association says Florida, Nevada, New York, Pennsylvania and eight other states face a "crisis" because "the legal system produces multimillion-dollar jury awards on a regular basis."

But while malpractice litigation has a big effect on premiums, insurers' pricing and accounting practices have played an equally important role. Following a cycle that recurs in many parts of the business, a price war that began in the early 1990s led insurers to sell malpractice coverage to obstetrician-gynecologists at rates that proved inadequate to cover claims.

Price Slashing

Some of these carriers had rushed into malpractice coverage because an accounting practice widely used in the industry made the area seem more profitable in the early 1990s than it really was. A decade of short-sighted price slashing led to industry losses of nearly $3 billion last year.

"I don't like to hear insurance company executives say it's the tort [injury-law] system—it's self-inflicted," says Donald B. Zuk, Chief Executive of Scpie Holdings Inc., a leading malpractice insurer in California.

What's more, the litigation statistics most insurers trumpet are incomplete. The statistics come from Jury Verdict Research, a Horsham, Pa., information service, which reports that since 1994;

> jury awards for medical malpractice cases have jumped 175%, to a median of $1 million in 2000. During that seven-year period, the median award for negligence in childbirth was $2,050,000—the highest for all types of medical malpractice cases, Jury Verdict Research says. (In any group of figures, half fall above the median, and half fall below.)

Gaps in Database

But Jury Verdict Research says its 2,951-case malpractice database has large gaps. It collects award information unsystematically, and it can't say how many cases it misses. It says it can't calculate the percentage change in the median for childbirth-negligence cases. More important, the database excludes trial victories by doctors and hospitals—verdicts that are worth zero dollars. That's a lot to ignore. Doctors and hospitals win about 62% of the time, Jury Verdict Research says. A separate database on settlements is less comprehensive.

A spokesman for Jury Verdict Research, Gary Bagin, confirms these and other holes in its statistics. He says the numbers nevertheless accurately reflect trends. The company, which sells its data to all corners, has reported jury information this way since 1961. "If we changed now, people looking back historically couldn't compare apples to apples," Mr. Bagin says.

Some doctors are beginning to acknowledge that the conventional focus on jury awards deflects attention from the insurance industry's behavior. The American College of Obstetricians and Gynecologists for the first time is conceding that carriers' business practices have contributed to the current problem, says Alice Kirkmari, a spokeswoman for the professional group. "We are admitting it's a much more complex problem than we have previously talked about," she says.

Scrambling for Doctors

The upshot is beyond dispute: Pregnant women across the country are scrambling for medical attention. Kimberly Maugaotega of Las Vegas is 13 weeks pregnant and hasn't seen an obstetrician. When she learned she was expecting, the 33-year-old mother of two called the doctor who delivered her second child but was told he wasn't taking any new pregnant patients. Dr. Shelby Wilboum plans to leave Nevada because of soaring medical-malpractice insurance rates there. Ms. Maugaotega says she called 28 obstetricians but couldn't find one who would take her.

Frustrated, she called the office of Nevada Gov. Kenny Guinn. A staff member gave her yet another name. She made an appointment to see that doctor today but says she is skeptical about the quality of care she will receive.

In the Las Vegas area, doctors say some 90 obstetricians have stopped accepting new patients since St. Paul Co.'s., formerly the country's leading provider of malpractice coverage, quit the business in December. St. Paul had insured more than half of Nevada's 240 obstetricians. Carriers still offering coverage in the state have raised rates by 100% to 400%, physicians say.

Dr. Wilbourn says his annual malpractice premium was due to jump to $80,000 next month, from $33,000. The 41-year-old solo practitioner says the increase would come straight out of his take-home pay of between $150,000 and $200,000 a year. In response, he is moving to Maine this summer.

Dr. Wilboum mourns having "to pick up and leave the patients I cared for and the practice I built up over 12 years." But in Maine, he has found a $200,000-a-year position with an insurance premium of only $9,800 for the first year, although the rate rises significantly after that. Premiums in Maine are relatively low because a dominant doctor-owned insurance cooperative there hasn't pushed to maximize rates, the heavily rural population isn't notably litigious and its court system employs an expert panel to screen out some suits, says Insurance Commissioner Alessandro Luppa.

Until the 1970s, few doctors faced big-dollar suits. Malpractice coverage was a small specialty. As courts expanded liability rules, malpractice suits became more common. Dozens of doctor-owned insurance cooperatives, or "bedpan mutuals,"

formed in response. Most stuck to their home states.

St. Paul, a mid-sized national carrier named for its base in Minnesota, saw an opportunity. An insurer of Main Street businesses, St. Paul became the leader in the malpractice field. By 1985, it had a 20% share of the national market. Overall, the company had revenue of $8.9 billion last year, with about 10% of its premium dollars coming from malpractice coverage.

The frequency and size of doctors' malpractice claims rose steadily in the early 1980s, industry officials say. St. Paul and its competitors raised rates sharply during the 1980s.

Expecting malpractice awards to continue rising rapidly, St. Paul increased its reserves. But the company miscalculated, says Kevin Rehnberg, a senior vice president. Claim frequency and size leveled off in the late 1980s, as more than 30 states enacted curbs on malpractice awards, Mr. Rehnberg says. The combination of this so-called tort reform and the industry's rate increases turned malpractice insurance into a very lucrative specialty.

A standard industry accounting device used by St. Paul and, on a smaller scale, by its rivals, made the field look even more attractive. Realizing that it had set aside too much money for malpractice claims, St. Paul "released" $1.1 billion in reserves between 1992 and 1997. The money flowed through its income statement and boosted its bottom line.

St. Paul stated clearly in its annual reports that excess reserves had enlarged its net income. But that part of the message didn't get through to some insurers—especially bedpan mutuals—dazzled by St. Paul's bottom line, according to industry officials.

In the 1990s, some bedpan mutuals began competing for business beyond their original territories. New Jersey's Medical Inter-Insurance Exchange, California's Southern California Physicians Insurance Exchange (now known as Scpie Holdings), and Pennsylvania Hospital Insurance Co., or Phico, fanned out across the country. Some publicly traded insurers also jumped into the business.

With St. Paul seeming to offer a model for big, quick profits, "no one wanted to sit still in their own backyard," says Scpie's Mr. Zuk. "The boards of directors said, 'We've got to grow.' "

Scpie expanded into Connecticut, Florida and Texas, among other states, starting in 1997.

As they entered new areas, smaller carriers often tried to attract customers by undercutting St. Paul. The price slashing became contagious, and premiums fell in many states. The mutuals "went in and aggravated the situation by saying, 'Look at all the money St. Paul is making,' says Tom Gose, President of MAG Mutual Insurance Co., which operates mainly in Georgia. "They came in late to the dance and undercut everyone."

The newer competitors soon discovered, however, that "the so-called profitability of the '90s was the result of those years in the mid-80s when the actuaries were predicting the terrible trends," says Donald J. Fager, president of Medical Liability Mutual Insurance Co., a bedpan mutual started in 1975 in New York. Except for two mergers in the past two years, his company mostly has held to its original single-state focus.

The competition intensified, even though some insurers "knew rates were inadequate from 1995 to 2000" to cover malpractice claims, says Bob Sanders, an actuary with Milliman USA, a Seattle consultancy serving insurance companies.

Alleged Fraud

In at least one case, aggressive pricing allegedly crossed the line into fraud. Pennsylvania regulators last year filed a civil suit in state court in Harrisburg against certain executives and board members of Phico. The state alleges the defendants misled the company's board on the adequacy of Phico's premium rates and funds set aside to pay claims. On the way to becoming the nation's seventh-largest malpractice insurer, the company had suffered mounting losses on policies for medical offices and nursing homes as far away as Miami.

Pennsylvania regulators took over Phico last August. The company filed for bankruptcy court protection from its creditors in December. A trial date hasn't been set for the state fraud suit. Phico executives and directors have denied wrongdoing.

In the late 1990s, the size of payouts for malpractice awards increased, carriers say. By 2000, many companies were losing money on malpractice coverage. Industrywide, carriers paid out $1.36 in claims and expenses for every premium dollar they collected, says Mr. Golden, the trade-group official.

The losses were exacerbated by carriers' declining investment returns. Some insurers had come to expect that big gains in the l990s from their bond and stock portfolios would continue, industry officials say. When the bull market stalled in 2000, investment gains that had patched over inadequate premium rates disappeared.

Some bedpan mutuals went home. Scpie stopped writing coverage in any state other than California. "We lost money, and we retreated," says the company's Mr. Zuk.

New Jersey's Medical Inter-Insurance Exchange, now known as MIIX, had expanded into 24 states by the time it had a loss of $164 million in the fourth quarter of 2001. The company says it is now refusing to renew policies for 7,000 physicians outside of New Jersey. It plans to reformulate as a new company operating only in that state.

St. Paul's malpractice business sank into the red. Last December, newly hired Chief Executive Jay Fishman, a former Citigroup Inc. executive, announced the company would drop the coverage line. St. Paul reported a $980 million loss on the business for 2001.

As carriers retrench, competition has slumped and prices in some states have shot up. Lauren Kline, 6½ months pregnant, changed obstetricians when her long-time Philadelphia doctor moved out of state because of rate increases. Now, her new doctor, Robert Friedman, may have to give up delivering babies at his suburban Philadelphia practice. His insurance expires at the end of the month, and he says he is having difficulty finding a carrier that will sell him a policy at any price.

Last year, Dr. Friedman says he paid $50,000 for coverage. If he gets a policy for next year, it will cost $90,000, he predicts, based on his broker's estimate. "I can't pass a single bit of that off to my patients," because managed-care companies don't allow it, he says.

Dr. Friedman says he is considering dropping the obstetrics part of his practice. Generally, delivering babies is seen as posing greater risks than most gynecological treatment. As a result, insurers offer less expensive policies to doctors who don't do deliveries.

Mr. Golden of the insurers' association argues that whatever role industry practices may play, the current turmoil stems from lawsuits. The association says that from 1995 through 2000, total industry payouts to cover losses and legal expenses jumped 52%, to $6.9 billion. "That says there are more really huge verdicts," Mr. Golden says. Even in the majority of cases in which doctors and hospitals win—the zero-dollar verdicts—there are still legal expenses that insurers have to pick up, he adds. Industry critics point to different sets of statistics. Bob Hunter, director for insurance at Consumer Federation of America, an advocacy group in Washington, prefers numbers generated by A.M. Best Co. The insurance-rating agency estimates that once all malpractice claims from 1991 through 2000 are

continued on page 42

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 appeared in the January-February-March 2001 issue of the* Forum*, and Chapter 2 appeared in the April-May-June 2001 issue. Reprinted here is Chapter 3.*

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.*

Chapter 3
The Mechanics of Editing

I. THE OVERVIEW: LAWYER, EDIT THYSELF

II. THE FOUR RULES OF SELF—EDITING

1. Print out your text before editing.
2. The more time you put between drafting a document and self-editing it, the better the edit will be.
3. Apply many of the rules discussed in Chapter 2 in the self-editing process.
4. Check for typographical errors.

III. THE OBJECTIVE EYE CAN'T HURT: THE FIVE RULES OF PROVIDING EFFECTIVE OUTSIDE EDITING

1. Always be polite.
2. Make the writer aware of alternatives.
3. If more than one editor works on a document, have a single editor convey all the criticism to the writer.
4. Remove jargon from the document.
5. Remember that the goal of editors is to make writers sound better but still sound like themselves.

I. THE OVERVIEW: LAWYER, EDIT THYSELF

"The art of writing is rewriting," the writer Sean O'Faolain said. But most lawyers underestimate the value of editing. All writers, whether they're Hemingway or the solicitor general, can benefit from a good editor. When writers produce a document, they know what they're trying to say, so they frequently read what they've composed with an eye toward what they think it is saying rather than what it actually says. Moreover, as mentioned previously, all writers have a tendency to fall in love with their own prose. An editor provides fresh, needed criticism.

In an ideal world, an objective person provides this editing. That's why all law offices or divisions should set up some kind of formal editing process. If one doesn't exist, try teaming up with friends and associates you can trust to give you honest feedback. If you are in practice alone, you might want to consider occasionally hiring another lawyer, or even a writing professional, to review important filings.

Finding an editor is especially important for judges, who need the feedback from someone with the authority or stature to make needed changes stick. While it's true that for ethical reasons judges cannot show drafts to noncourt personnel, they could begin hiring editors for their staffs. The lack of editing is one key reason that so much judicial writing is lengthy and unfocused, not to mention boring, Of course, no one on the outside ever tells a judge that he or she cannot write—at least, no one who wants to win another case in that court. Think of the riddle that Jacob Stein, a Washington lawyer, likes to tell about judges. Question: What do you get when you cross a parrot and a wild lion? Answer: I don't know, but you'd better be nice to it.

Even before an outside editor enters the picture, however—or because one never will—lawyers should be self-editing all their prose. Now that most writers compose on a computer, it is far easier to self-edit than it was in the past, when every mistake required a retyping of the draft or at least a careful application of White Out. Once lawyers get the hang of editing themselves, they can usually cover a double-spaced page in about two minutes. It's worth the time.

II. THE FOUR RULES OF SELF–EDITING

When self-editing, lawyers need to keep four rules in mind.

1. Print out your text before editing.

You want to read the document the same way a reader will. By editing on the computer screen, you are bound to miss something, since people tend to read more carelessly on the screen than they do on paper.

2. The more time you put between drafting a document and self–editing it, the better the edit will be.

If you reserve a decent interval between drafting and editing, you will read what you've drafted more as a first-time reader would. I know many lawyers write everything at the last minute, but doing so deprives you of one of the best tools you have for improvement. If at all possible, try to finish all drafts at least twenty-four hours before they are due, so you can review them.

3. Apply many of the rules discussed in Chapter 2 in the self-editing process.

You can do this by taking three steps. First look at your verbs and ask if you can strengthen any of them. Second, look at your sentences and see if you can shorten any, or move clauses to the beginning or end. Finally, cut words. For example, if you write on a computer, you can catch most adverbs by running "ly" through your "Find" search on your word processing program.

William Zinsser once described the process of editing as changing every page to a paragraph, every paragraph to a sentence, every sentence to a phrase, every phrase to a word, and then cutting the extra words. In self-editing, you are constantly honing your message. As the writer Isaac Bashevis Singer put it, "The wastepaper basket is the writer's best friend."

4. Check for typographical errors.

When you look for typos, don't rely on a computer spell-checker. It is bound to miss things, particularly when you've used a word improperly rather than misspelled it. The *Scribes Journal of Legal Writing* used to collect such misprints and came up with a few doozies. There was a court filing addressed to the "Horable U.S. District Judge." And the brief signed, "Rectfully submitted." And the sentence in an appellate brief that read, "In the index to this brief, the Court will find an extensive copulation of authorities on the subject."

I often hear students complain that they're being obsessive about editing, constantly changing and rearranging their prose until the last minute. That's actually a virtue. The greatest writers are more than a bit neurotic, as they anguish over each word and comma. Writing is a labor-intensive task.

III. THE OBJECTIVE EYE CAN'T HURT: THE FIVE RULES OF PROVIDING EFFECTIVE OUTSIDE EDITING

If you take only the four steps outlined above with everything you write, you will improve your prose a great deal. With important documents, though, such as a crucial submission to a client or a major brief, editing by others is essential, since no matter how well you self-edit, you will miss changes that should be made.

Finding an editor is only a first step. Many lawyers or law students whose work is edited discover that the criticism they get is so confused and contradictory, it ends up hurting their writing more than it helps. Editing is an art, and you should try to find an editor who knows that art, or remember to be constructive yourself when you edit others. Those who review the work of lawyers should remember the following five rules.

1. Always be polite.

Writers take criticism of their prose the way they would react to disapproval of their clothes or hair. It doesn't sit very well. "An editor should tell the author his writing is better than it is," T. S. Eliot once observed. "Not a lot better, a little better." To paraphrase W.B. Yeats, "Tread softly, because you tread on my prose."

Far too many legal editors are maladroit in their critiques. Years ago, when I covered boxing as a reporter, I hung around the training camp of Muhammad Ali. If his trainer, Angelo Dundee, offered a suggestion "Start throwing the jab", Ali would frequently do the opposite, just to show who was boss. So if Dundee wanted Ali to throw the jab, he learned to say, "Muhammad, I really like the way you've been using the jab." Then Ali would take the "suggestion." Dundee knew his pupil, which is why he had one key attribute of a good editor.

2. Make the writer aware of alternatives.

Because writers have difficulty seeing that there is more than one way to express a thought, much of the editing they receive is too vague. Telling lawyers, "This needs to be more argumentative" does nothing for them unless you show them specifically what you mean. That doesn't mean that editors must rewrite the document, but they must illustrate in a sentence or two the criticisms they pass on.

Editors should give legal writers two types of feedback. First, they need to provide a line-by-line edit along the lines we discussed in Chapter 2, examining sentence structure, verbs, and extra words. They should also make several comments at the end of a document about improving the piece as a whole. These suggestions should be limited in number if editors give a writer a dozen ideas to incorporate, the writer will hardly remember the suggestions. With these final comments, editors should concentrate on the big picture. If a piece is so bad that they believe a number of sweeping suggestions are called for, they are probably going to have to rewrite the piece themselves. A scattershot approach doesn't work any better with editing than it does in making arguments.

3. If more than one editor works on a document, have a single editor convey all the criticism to the writer.

If your office has a set-up in which more than one editor reviews a document, that's fine. It always helps, however, if all criticism is filtered to the writer through a single editor. Editing is a subjective process, and the comments of one editor are bound to conflict at times with those of another This is a matter of taste. You cannot put writers in the untenable position of having to resolve contradictions themselves. That often leads to poor writing and even poorer office politics.

4. Remove jargon from the document.

Lawyers don't just use jargon such as Latin phrases and old words. Over time, they also tend to become what they do. Tax lawyers start sounding like the tax code. Social Security lawyers begin to resemble the regulations of their field. Prosecutors start sounding like policemen, informing friends that they've got to go "move their motor vehicle."

A good editor removes the jargon, especially when the audience is not composed of specialists. A tax brief for a local tax board or the federal tax court in Washington should be written in a very different style from a brief dealing with the same points filed in a state or federal court of general jurisdiction, which is not staffed by tax specialists.

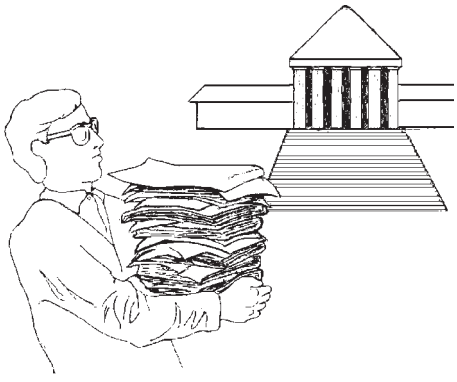
5. Remember that the goal of editors is to make writers sound better but still sound like themselves.

Many legal editors think the point of editing is to make writers sound just the way they would themselves. That's wrong. If you want something written precisely the way you would, you should draft it.

Obviously, an editor has to do many things—clean up the prose, for instance, or move a point that needs emphasis to the front of a document. Yet legal editors are generally heavy-handed. "[Ezra Pound] was a marvelous critic because he didn't try to turn you into an imitation of himself," T. S. Eliot once said. "He tried to see what you were trying to do." If lawyers are overly imperious in their editing, that is partly because of the extent to which they encourage ghostwriting in their practices, where the whole point is to get one writer to sound just like another. Associates frequently draft documents that partners then review and sign.

That's a disturbing trend. It's difficult to be an effective ghost writer, because it involves both learning someone else's style and subordinating your own style to that way of writing. Many years ago, I was a campaign issues director and occasional speechwriter for Jimmy Carter. It took me months of traveling with the future president before I could get his voice in my head so I could begin to sound like him.

It's especially difficult to be a ghostwriter for someone a writer doesn't like, yet lawyers ask others to do it all the time. This is an invitation to undertake a schizophrenic form of writing, which if nothing else further explains why legal prose is often as bad as it is. ■



Plain Words

By Joseph Kimble

This article appeared in the July 2001 issue of TRIAL *magazine. Joseph Kimble is a professor at Thomas Cooley Law School in Lansing, Michigan. Longer versions of these lists will appear soon in the* Michigan Bar Journal.

I offer the lists below with some trepidation. I will be accused of constricting and dumbing down the language, of denying writers their expressive voice, and of corrupting legal discourse. That's the fate of anyone who believes that lawyers should write in a plainer style.

I have tried to address these false charges against plain language in other articles. (*Answering the Critics of Plain Language*, 5 Scribes J. Legal Writing 51 (1994-1995); *The Great Myth That Plain Language Is Not Precise*, 7 Scribes J. Legal Writing 109 (1998-2000).) For now, I'll settle for just a few reminders about my lists.

First, they deal with the choice of words. And vocabulary is just one part of plain language. Plain language, rightly understood, involves all the techniques for clear communication: planning the document, designing it, organizing it, constructing sentences, choosing words, and testing mass documents on typical readers.

Second, plain language has nothing against expressiveness in the right place, like a persuasive brief. But there is little room for literary flair in statutes, rules, contracts, wills and trusts, forms, and most pleadings. Besides, the words under "Instead of," in the first list, are not so fresh or forceful that they might create a pleasing effect.

Third, some of those words are more stodgy than others, and we could argue about where each one falls along the line from "not so bad" to "never use." (I'd rather take a swift kick than use *cognizant of* or *requisite* or *utilize*, for instance.) Every writer has to make these choices, always with the audience and context in mind.

Fourth, the choice of words may depend on more than just simplicity. It may depend on the rhythm or sound of the sentence. And, of course, the choice may depend on precision. By all means, use the longer, less familiar word if you think it's more precise or accurate. When in doubt, check a book on usage or a dictionary that discriminates between synonyms. (*E.g.*, Theodore M. Bernstein, *The Careful Writer* (1979); Bryan A. Garner, *A Dictionary of Modern American Usage* (1998); *Webster's New Dictionary of Synonyms* (1973).)

Finally, your readers will not notice an occasional big word. But they will notice—even unconsciously—a tendency toward inflated diction, and they will not be impressed or persuaded.

The great H.W. Fowler got it right almost 100 years ago in *The King's English*:

Prefer the familiar word to the far-fetched.

Prefer the concrete word to the abstraction.

Prefer the single word to the circumlocution.

Prefer the short word to the long.

Prefer the Saxon word to the Romance.

In my high school English class (before English became "language arts"), we had to learn 10 vocabulary words each week. It occurred to me that I might be rewarded for sprinkling these words like salt on my papers. So in one essay, I did just that. When it came back, there were two words on the cover: "turgid, inflated." Grade: C–.

Remember what Fowler said. And remember what George Bernard Shaw said: "In literature the ambition of a novice is to acquire the literary language; the struggle of the adept is to get rid of it." (Quoted in John R. Trimble, *Writing with Style* 183 (2d ed. 2000).)

Go forth and simplify.

Instead of . . .	**Consider**
accede to	grant, allow
accompany	go with
accomplish	do, achieve
accordingly	so, therefore
additional	more, added, other
additionally	and, also
adjacent to	close to, near, next to
administer	manage
advise	tell, recommend
afford	give
allocate	give, divide, set aside
alteration	change
alternative	other, other choice
append	attach
apprise	tell, inform
approximately	about, almost, roughly
ascertain	find out, learn
assist	help
assistance	help
attain	reach, become
attempt (verb)	try
category	kind, class, group
cease	end, stop
cognizant of	aware of, know
commence	begin, start
commencement	beginning, start
commitment	promise
communicate	write, tell, talk
compensation	pay, payment
component	part
comprise	include
conceal	hide
concept	idea
concerning	about, on, for
concur	agree
consequently	so, therefore
consolidate	combine, join
constitute	make up
contiguous to	next to
currently	now (or cut it)
customary	usual
decrease (verb)	reduce, lower
deem	consider, think, treat as
defer	delay, put off
demonstrate	show, prove
depart	go, leave
designate	appoint, name, choose, set
desist	stop
detain	hold
diminish	lessen, reduce
discontinue	stop
disseminate	send out, distribute
donate	give
effectuate	carry out, bring about
elapse	pass
employment	work, job
encounter	meet, face, run into
endeavor (verb)	try
enumerate	list, name
equivalent	equal, the same

evince	show
exclude	leave out
exhibit (verb)	have, show
expedite	hasten, speed up
expend	spend
expenditure	payment, expense, cost
expiration	end
facilitate	make easier, help
following (preposition)	after
forward	send
frequently	often
furnish	give, provide
hence	so, therefore
however	but
identical	same
impact (verb)	affect, influence
implement	carry out, begin, start, create, set up
indicate	say, show, suggest
indication	sign
inform	tell
initial	first
initiate	begin, start
inquire	ask
institute	begin, start, set up
interrogate	question
locate	find, place
maintain	keep, continue, support
manner	way
maximum	most, largest, greatest
modification	change
necessitate	require
necessity	need, requirement
notification	notice
notwithstanding	despite
numerous	many
objective (noun)	goal, aim
obligation	debt, duty, responsibility
observe	see, watch, follow, obey
obtain	get
obviate	avoid
occasion (verb)	cause
occur	happen
opt for	choose
optimum	best
option	choice
participate	take part
peruse	read with care, review
portion	part
possess	have, own
preclude	prevent
premises	place, property
prescribed	set, required
previous	earlier, last, past
previously	before, earlier
principal	main, chief
prior	earlier
proceed	go, go ahead
procure	buy, get
promulgate	make, issue, pass
provide	give, send
provided that	if, but
purchase	buy
pursuant to	under
regarding	about, on, for
reimburse	repay, pay back
remainder	rest
request (verb)	ask
requisite (adjective)	needed, required
reside	live
respond	answer, reply
responsible for	causes, has charge of
retain	keep
selection	choice
specified	named, set out
submit	send, offer
subsequent	later
subsequently	later, then
sufficient	enough
terminate	end, stop
transmit	send
transpire	happen
utilize	use

Some wordy phrases

The substitutions should be easier—more automatic—with this list than with the list of individual words. You should rarely have to use any of these wordy phrases.

Wordy phrases	**Shorter, simpler**
as a consequence of	because of
as a means of	to
as a result of	from, because of
as regards	about, concerning
as to	on, for, about
at the time that	when
at this point in time	now, currently
by means of	by, with
by reason of	because of
by virtue of	by, under
concerning the matter of	about, concerning
despite the fact that	although, even though
due to the fact that	because
during such time as	while
during the period from	from
for a period of	for
for the purpose of	to, for
for the reason that	because
has the ability to	can
in a [negligent, precise] manner	negligently, precisely
in addition to	besides
inasmuch as	because
in back of	behind
in close proximity to	near
in connection with	with, about, concerning
in excess of	more than
in favor of	for
in the course of	during
in the event that	if
in the near future	soon
in the place in which	where
it is [necessary, important] that	must, should
it is probable that	probably
a large [number, percentage] of	many
on a [daily, regular] basis	daily, every day, regularly
prior to	before
subsequent to	after
under the provisions of	under
until such time as	until
with a view to	to
with reference to	about, concerning
with regard to	about, concerning
with respect to	on, about
with the exception of	except for ■

The Wall Street Journal Insurers' Price Wars

continued from page 38

resolved—which will take until about 2010—the average payout per claim will have risen 47%, to $42,473. That projection includes legal expenses and suits in which doctors or hospitals prevail.

While the statistical debate rages, pregnant women adjust to new limits and inconveniences. Kelly Biesecker, 35, spent many extra hours on the highway this spring, driving from her home in Villanova, Pa., to Delran, N.J., so she could continue to use her obstetrician. Dr. Richard Krauss says he moved the obstetrics part of his practice from Philadelphia because malpractice rates had skyrocketed in Pennsylvania. Ms. Biesecker, who gave birth to a healthy boy on June 5, says Dr. Krauss was the doctor she trusted to guard her health and the health of her baby: "You stick with that guy no matter what the distance."

Dr. Krauss, 53, left Philadelphia last year only after his malpractice premium rose to $54,000, from $38,000, and then was canceled by a carrier getting out of the business, he says. After getting quotes of about $80,000 on a new policy, he moved. New Jersey hasn't been a panacea, however. His policy there expires July 1, and the carrier refuses to renew it. The doctor says he hopes to go to work for a hospital that will pay for his coverage. ■

CTLA Miscellany

Newsworthy items of general interest.

Be Direct During Direct Examination

This article appeared in the "Good Counsel" section of the July 2001 issue of TRIAL *magazine, submitted by Gordon S. Rather, Jr. of Little Rock, Arkansas.*

The plaintiff lawyer sets the tempo of the trial and should present the case as quickly and efficiently as possible. In conducting direct examination of your witnesses:

1. Train yourself to speak in plain English rather than legal jargon so you will be easily understood by jurors.
2. Ask questions that allow the witness to give jurors a picture of what happened so they can visualize it.
3. Remember to give the witness and the jurors an indication of where you are going with your questions, and tell them when you are moving from one area of inquiry to another.
4. Ask questions that will get the witness to the point of the testimony quickly.
5. Always take the blame if the witness does not understand your question, and rephrase it clearly.
6. Stop your examination after presenting the most the witness has to offer.
7. Avoid redirect whenever you can.

Jurors consistently criticize lawyers for repeating questions and trying to prove the same point over and over again. You may be tempted to belabor a favorable point in your direct examination. Don't do it.

* * * * *

'Silver Bullet' Questions to Use in Depositions

This article appeared in the "Good Counsel" section of the July 2001 issue of TRIAL *magazine, submitted by John F. Romano of West Palm Beach, Florida.*

For years, I have been searching for "silver bullet" questions to use when deposing defense expert witnesses. Here are a few I have developed:

1. *"What do you perceive as your purpose and function in this case?"* Understanding what a witness believes to be his or her role in the litigation will help you show the witness's bias. A doctor may testify that his or her function is to evaluate your client objectively and neutrally. Yet you may know that the insurance company and law firm in the case hired this doctor to testify that there was no injury or causation in dozens of other cases. This question opens an area of inquiry about the doctor's motives, biases, and relationship with the law firm or insurance company.

2. *"Assume your opinion is wrong or invalid. What steps would you go through to analyze the opinion and find out your error?"* You will probably get an objection to the form of this question. Regardless, the witness must answer. Usually, the steps the expert describes in the deposition differ from the ones he or she took in the initial analysis. The inconsistencies will demonstrate bias and erroneous conclusions.

3. *"What further work do you intend to do, and what further work have you been asked to do?"* This question lets you determine whether the expert's analysis of the case was thorough and, if not, helps you identify his or her position. This may show the flaws of the expert's already-formed opinion.

4. *"Do you have any criticism of the plaintiff's experts and their analysis techniques?"* This question prompts the expert to concede those areas where your expert has not erred and clarifies any real disagreement between them.

5. *"Have you made any credibility judgments as a part of your analysis in this case?"* Most experts do, in fact, make credibility judgments. If the witness denies this, it will be difficult for him or her to explain certain conclusions or findings when they are based solely on "objective" evidence. On the other hand, if the witness admits making credibility judgments—especially about your client—you have an opportunity to explore them in detail.

No matter how experienced you are as a litigator, prepare for and take every deposition as if it were your first. Approach a deposition as an important event, not as a routine procedure.

* * * * *

Lawyers Who Share Office Space May Be Vicariously Liable for Malpractice

By Jennifer L. Reichert

This article appeared in the "News and Trends" section of the July 2001 issue of TRIAL *magazine.*

Lawyers who share office space and certain expenses and who practice under the same trade name—but are not in fact partners in a law firm—may be held liable for one lawyer's misconduct, the First Circuit has held. (*Gosselin v. Webb*, 242 F.3d 412 (1st Cir. Mar. 16, 2001).)

Plaintiff counsel Joseph Reinhardt of Boston said, "This decision should be a wake-up call to lawyers who share space but operate independent practices."

"These lawyers have to let the public know of the arrangement," said Boston attorney Philip Brown, co-counsel for the plaintiffs. "To do otherwise is an open invitation to adverse results for other lawyers in the group who were not involved in the malpractice."

In *Gosselin v. Webb*, plaintiff William Gosselin was discharged from his job as a second mate on a merchant marine freighter in April 1992. He filed a grievance through his union contesting the discharge, and in August 1992, an arbitrator conducted a hearing.

A month or so later, Gosselin and his wife had a chance meeting with James O'Dea, an attorney licensed to practice law in Massachusetts and Washington, D.C. O'Dea told the couple that he was "with Field, Hurley, Webb & Sullivan" in Lowell, Massachusetts, and asked Gosselin to let him know the results of the arbitration.

Shortly thereafter, the arbitrator decided Gosselin's case, reinstating his employment with certain conditions. The decision did not provide for any payment of back wages.

According to court documents, before he contacted O'Dea with the news, Gosselin "wanted to make sure that Mr. O'Dea had the backing and support of an established law firm [that] could provide him with advice and support." Mrs. Gosselin's brother, who lived near Lowell, Massachusetts, assured the couple that Field, Hurley "was a well-respected law firm in Lowell." The Gosselins then called O'Dea at his Washington, D.C., office and arranged to meet with him at the Field, Hurley offices in November 1992 to discuss claims.

In the foyer of the building, a directory

listed "Field, Hurley, Webb & Sullivan, Attorneys at Law." O'Dea's name appeared beneath the names of Marshall Field, William Hurley, and Arthur Sullivan. The listing did not indicate that Field, Hurley was not a partnership, nor was there any notation describing O'Dea's relationship with the group or the individual attorneys listed. Gosselin eventually enlisted O'Dea to represent him when his employment was again terminated at the end of 1992.

In January 1993, the Gosselins went to the Field, Hurley offices to sign bankruptcy documents. O'Dea was at his Washington, D.C., office at the time, so Sullivan assisted the couple in O'Dea's absence. On at least two occasions, Sullivan spoke with the Gosselins in person and on the phone about their case. In addition, notes to the Gosselins' file indicated that Sullivan had received at least three phone calls from O'Dea regarding the case.

At some point, Sullivan recommended to O'Dea another attorney who could file the bankruptcy documents on O'Dea's behalf, as the Gosselins lived in New Hampshire and only an attorney licensed to practice there could file them.

Throughout his representation of Gosselin, O'Dea used letterhead stationery with only his name on it when he communicated in writing. However, the letterhead listed the addresses of his Washington, D.C., office and the Field, Hurley office.

In August 1993, O'Dea represented Gosselin at an arbitration hearing to contest the second discharge. Gosselin rejected the final settlement offer at O'Dea's suggestion, and in November 1993, the arbitrator ruled against Gosselin. It was then that Gosselin learned O'Dea had failed to file a timely administrative claim and that he had not filed a claim for back wages. Gosselin filed suit against O'Dea as well as the other lawyers who practiced under the name Field, Hurley, Webb & Sullivan, alleging legal malpractice.

Gosselin settled his claim against O'Dea while the suit was pending in district court. The court granted the remaining defendants' motion for summary judgment.

On appeal, the First Circuit found that the district court "seemed to focus on the fact that neither O'Dea nor the [other attorneys] ever expressly described O'Dea as a partner in the firm . . . [and] discounted other facts (both words and conduct)" that suggested a partnership existed.

Writing for a unanimous three-judge panel, Judge Mary Lisi, sitting on designation from the District of Rhode Island, wrote, "O'Dea told the Gosselins he was 'with' Field, Hurley. While the term 'with' may be ambiguous, . . . when viewed in the light most favorable to the Gosselins, it, along with . . . other evidence . . . may convey to a reasonable fact finder that O'Dea shared equal standing with the other attorneys who make up the 'firm' Field, Hurley."

Lisi also commented that the lobby directory implied a partnership-like arrangement and that O'Dea's meeting with the Gosselins at the Field, Hurley offices and arranging for them to sign papers there in his absence "imply that he had the authority to use the Field, Hurley offices as an equal member of the 'firm.'"

The court reversed the district court decision on the ground that "there exists a genuine issue of material fact as to whether a partnership by estoppel existed between O'Dea and appellees."

* * * * *

Tempers Seem to Be Growing Shorter in Many Jury Rooms

By Katherine E. Finkelstein

This article appeared in the Metro Section of the New York Times *on August 3, 2001.*

On the fourth day of yelling and pacing in the small, drab deliberation room, the jurors in a routine trial of a man charged with selling a $10 bag of heroin sent yet another note to the judge. Because of one holdout juror who was impervious to reason, the note stated, "tension is high, nerves are frayed and all minds are not sound."

Five minutes later, the holdout juror, who favored acquittal, sent the judge a note complaining that, in her view, jury duty seemed "worse than a prison sentence" because at least someone in prison gets three meals a day and a free education.

How had things gotten so bad, so quickly, in Room 1523 of State Supreme Court in Manhattan? Social views played a role. So did the inevitable personality conflicts. And the close quarters didn't help. Of course, jury rage and distress of this nature are nothing new; consider the 1957 courtroom film "12 Angry Men." The court system has tried in recent years to relieve some of the tension by improving the trappings of jury duty, with shorter waits to be selected and more courteous clerks.

Despite those and other measures, New Yorkers who have deliberated on several recent juries say they have emerged feeling personally attacked, outraged and disillusioned. Court officers mention fistfights they broke up, chairs hurled out windows and jurors who screamed so loudly they were heard on other floors. In some cases, the officers say, jurors simply stroll off and have to be brought back; one juror leapt from the jury bus to get out of deliberations.

Some judges and lawyers who see increasing conflict in the jury room attribute this to several new factors, from longer trials and heavier sentences facing defendants to more intense news coverage and increased cynicism after the O.J. Simpson acquittal. One Manhattan judge said that as more educated professionals are required to sit on juries and can no longer get exemptions, the social and political views in the jury room have become more varied and the rancor during deliberations has increased accordingly.

In the drug trial last March in Room 1628, the jury forewoman, Elaine C. Cora, described an atmosphere of personal attacks in which even the quietest person in the room blew up, shouting "shut up" at the holdout juror. "It was such a bad experience that I don't ever want to go through it again," said Ms. Cora, a secretary for a community board in the Bronx. The case ended in a hung jury, and the judge declared a mistrial.

Similar scenes are surfacing in many parts of the country. Actual data on juror conflict is scant, in large part because jury deliberations are private and viewed as sacrosanct, and few studies have been done. But in recent trials across the nation, jurors have complained about being bullied and humiliated during deliberations.

Legal experts say that more jurors are now being reprimanded or dismissed by judges for ignoring evidence or not following rules. In an extreme case five black jurors gouged the eye of a holdout white juror and accused him of racism, according to a judge in a 1996 survey on juror conduct the most recent one conducted.

That sort of conduct has led courts around the country to give jurors booklets on how to debate while being courteous and even-tempered. Other courts are focusing on reducing juror stress, using suggestions laid out in a 1998 study by

the National Center for State Courts. These include giving jurors' helpful hints on how to deliberate and making them more physically comfortable.

Another source of conflict comes from jurors who increasingly allow their politics or their consciences to enter the deliberations, legal experts say. That practice has led to open warfare in a number of jury rooms.

One in May involved a juror in Las Vegas at the trial of Margaret Rudin, charged with murdering her husband, Ron Rudin, a real estate developer. The juror, Coreen Kovacs, told fellow jurors she did not believe that the laws in the case were just and urged the jury to ignore them, said John J. Momot, the defense lawyer in the case.

The jurors then sent out competing and angry notes to the judge. The foreman, Ronald Vest, a special education teacher, asked that Ms. Kovacs be removed, contending that she "isn't thinking clearly, rationally or logically. Please help"! Mr. Momot later received a statement from Ms. Kovacs, who described the conflict in the jury room.

After the jury send back a unanimous guilty verdict, Ms. Kovacs stated publicly, that she had been coerced. Several other jurors then denounced her publicly, telling the *Las Vegas Review-Journal* that they were livid and sick to their stomachs.

Neither Mr. Vest nor Ms. Kovacs returned several telephone calls seeking comment.

Like many defense lawyers, Mr. Momot likes conflict in the jury room. He says it can help to sharpen differences and flush our potentially exonerating information. "The positive side is that everyone is paying attention," he said. "They're not just like a herd of sheep."

Experts say tension in the deliberation room is particularly high in cases involving controversial statutes, like death penalty laws, California's "three strikes" laws for repeat offenders or New York's Rockefeller-era drug laws, which mandate long prison terms. The weight of these deliberations can greatly increase jurors' stress, the experts say, and some refuse to convict in cases where they feel the punishment exceeds the crime.

The Manhattan jurors in Room 1523 were grappling with the Rockefeller drug laws as they battled over the fate of the defendant, Calvin Baker, who was facing a sentence of four to nine years in prison, if convicted as a repeat drug seller.

After a mistrial was declared, the holdout juror, Paula Thomson, posted $10,000 in bail for Mr. Baker, who will be retired this fall. She also befriended him, retained a new lawyer for him and took him to rallies to protest the Rockefeller drug laws.

Ms. Thomson said she had not heard of the Rockefeller drug laws at the time of the trial, but felt generally that drug laws were not equally enforced along racial lines. She said that while she had stuck to reason, other jurors had personally attacked her, asking if she had any friends or could hold a job. "They spent a lot of those three days talking about what was wrong with me," she said.

Another juror, Orest Kirshak, echoed the sentiments of other jurors who heard the Baker case. "The story is, you're locked in the room with a banana, a nut, and you have to get out of there," he said.

This sort of the claustrophobia plays a part in most jury conflicts, particularly in today's lengthier trials, legal experts say. It is the "dread of being locked in a room with 11 other people and not being able to get out until you reach a verdict," said Valerie Hans, a professor of sociology and criminal justice at the University of Delaware.

In the book "A Trial by Jury," to be published by Alfred A. Knopf in September, D. Graham Burnett, the author, describes how being sequestered in a remote hotel with disconnected telephones and televisions in their rooms substantially added to the jurors' stress. (A New York law enacted in May that ends the mandatory sequestering of juries during criminal cases is expected by many lawyers to relieve jury tension.)

Writing about his experience as the foreman in a recent murder trial in State Supreme Court in Manhattan, Mr. Burnett, said that he presided over a bedlam of shouting, collapsing and weeping. At one point, he said, one juror tried to flee from the deliberations.

"We ran the gamut of group dynamics: a clutch of strangers yelled, cursed, rolled on the floor, vomited, whispered, embraced, sobbed and invoked both God and necromancy," Mr. Graham, a historian, writes.

While jurors often threaten to quit during deliberations, increasingly they are dismissed from the jury or charged with contempt when judges discover they have lied about their political views or experiences during the initial screening process, or when they misbehave in the jury room.

Last December, during the trial of a stockbroker who has plotted to kill a Manhattan judge, one juror, a doctor, demanded to be released from jury duty in time for his Christmas holiday. After Justice Carol Berkman of State Supreme Court denied his request, telling the juror sarcastically, "You're in the military," he became so irate during deliberations that he had to be replaced, said lawyers involved in the case.

For rage and conflict, however, it's hard to beat the Bronx jury that in December 1999 overthrew its foreperson and then leveled accusations against three jurors that led to one being prosecuted.

It was a month long rape trial, and after five days of bitter deliberations and four nights in a bad hotel, a group of seven jurors in favor of conviction mutinied and appointed their own foreperson.

They sent out a furious and misspelled note to Justice Phyllis Skloot Bamberger of State Supreme Court, complaining that one juror refused to deliberate, another could not face the defendant's mother and a third "feels that no one should be enconserated no matter what the charge."

Upon investigation, Justice Bamberger learned that the third juror, Frederick Lynch, was a convicted felon who was not eligible to serve. But on receiving this jury summons, he grew confused and said that he had never been convicted of a felony, thinking that his 1990 drug conviction was a misdemeanor, his lawyer, David Feige, said.

The charges of perjury against Mr. Lynch were ultimately dropped and the next jury in the rape case deliberated for two hours before acquitting the defendant. Six months later, Mr. Lynch again mistakenly received a jury summons and immediately called his lawyer.

* * * * *

Subrogation Statute Is Unconstitutional

This article appeared in Lawyers Weekly USA *on July 23, 2001. © 2001 Lawyers Weekly Inc.*

Where an injured worker's tort settlement was subject to his workers' comp insurer's right of subrogation, this state statute is unconstitutional, says the Ohio Supreme Court.

The provisions that the court found violated the state constitution are unique to Ohio. But this is apparently the first state supreme court in the country to strike down a subrogation statute.

Experts say that subrogation is a very hot issue for plaintiffs' lawyers.

"Every state I know of has a statute that allows subrogation for workers' comp payments," says University of South Dakota law professor Roger Baron.

"All plaintiffs' lawyers are [having] to face these problems because workers' comp carriers have become more aggressive," says Steven Goren, a plaintiffs' personal injury lawyer in Bingham Farms, Mich.

However, the Ohio statute "is much more onerous than 95% of other state's statute," notes Toledo, Ohio, attorney Jack Fynes, who represented the plaintiff. "It suffers from deficiencies that other states have provided safeguards against."

Construction Worker

In this case, a highway construction worker was injured on the job. He received over $190,000 in workers' comp benefits. The state filed a subrogation claim against any settlement or judgment that he might receive from tort claims arising from the accident.

The plaintiff challenged the state's right to subrogation, arguing that the statute was unconstitutional.

The statute provides that a "subrogation interest includes past payments of compensation and medical benefits and estimated future values of compensation and medical benefits."

The state argued that this prevented workers from receiving a "double recovery."

But the court said that "[b]y giving the subrogee a current collectible interest in estimated future expenditures, [the statute] creates the conditions under which a prohibited taking may occur. This would happen in those situations where the amount of reimbursement . . . proves to be substantially greater than the subrogee's eventual compensation outlay. In other words, [the statute] requires the claimant to reimburse the [workers' comp board] or self-insuring employer for future benefits that the claimant may never receive. In that event, the statute operates not to prevent the claimant from keeping a double recovery but to provide the statutory subrogee with a windfall at the expense of the claimant's tort recovery.

"The only . . . resolution achieved by [the statute] is to provide immediate recovery to the subrogee by imposing the risk of liability for overestimated future expenditures upon the claimant . . . [But] unlike the tortfeasor, the claimant is innocent; and it is irrational and arbitrary to impose this kind of risk upon an innocent party."

The statute also provides that "[t]he entire amount of any settlement . . . is subject to the subrogation rights . . . regardless of the manner in which the settlement or compromise is characterized."

The court said this was unconstitutional as well.

"The problem with this procedure is that it assumes that settlements are always reached with third-party defendants who possess sufficient wealth or insurance to satisfy the claimants' actual total damages and thus that the retention of the settlement proceeds and workers' compensation would result in a double recovery. However, this assumption proves false in those situations where the claimant is forced to settle his or her tort claim for the limits of an insurance policy and the combined amount of the insurance proceeds and workers' compensation benefits is insufficient to cover all of the claimant's actual loss . . .

"It can hardly be said that a double recovery results where a tort victim is allowed to retain two recoveries that, when combined, still do not make him or her whole . . . [The] statute operates unconstitutionally in these situations because it allows for reimbursement from proceeds that do not constitute a double recovery."

Ohio Supreme Court. Holeton v. Crouse Cartage Co*., No. 00-428. June 27, 2001. Lawyers Weekly USA No. 9921118.*

* * * * *

Malpractice Time Bar Starts When Mistake Is Made, Not When Claim Is Dismissed

This article appeared in Lawyers Weekly USA *on July 9, 2001. © 2001 Lawyers Weekly Inc.*

Where a client waited until after his age discrimination claim was dismissed to sue his lawyer for failing to file a timely complaint, his malpractice suit is time-barred, says the Alabama Supreme Court in affirming a dismissal.

Six months after the statute of limitations expired on the plaintiff's discrimination claim his lawyer sent him a letter admitting his mistake. The plaintiff hired a new lawyer, who filed suit and argued that the statute of limitations should be equitably tolled. A court rejected the argument and dismissed the complaint.

More than two years after the statute of limitations expired on his discrimination claim, but less than two years after the case was dismissed, the plaintiff sued his first lawyer for malpractice.

The lawyer claimed the suit was time-barred.

The plaintiff argued that his malpractice claim didn't accrue until the court entered a final judgment in the discrimination suit, because he hadn't suffered any injury until then.

But the court said that "to accept [the plaintiff's] argument would mean that if no lawsuit was ever filed there would be no injury. There was a legal injury to [the plaintiff) on the date the statute of limitations barred his age-discrimination claim. That was the date the right to sue [his first lawyer for legal malpractice accrued . . . Although [the plaintiff] may not have known on [that date] that . . . his age discrimination claim would be barred by the statute of limitations, he certainly knew . . . that the limitations period had expired . . . [when the lawyer] gave him the letter . . .

"To require a person in [the plaintiff's] situation to file a lawsuit and pursue it to a judgment in order to have a legal malpractice cause of action would violate [the] public policy of quickly resolving legal malpractice claims. To allow a party to pursue a lawsuit that would have the effect of extending the time allowed by statute for filing an action, or the effect of reviving an action already barred, would likewise violate . . . public policy."

* * * * *

Surgeon Can't Be Sued for Nurses' Negligence

This article appeared in Lawyers Weekly USA *on July 9, 2001. © 2001 Lawyers Weekly Inc.*

Where two nurses incorrectly counted the number of sponges used during an operation and accidentally left one inside the patient, the surgeon isn't vicariously liable for their negligence as the "captain of the ship," says the Wisconsin Supreme Court.

The plaintiff underwent gallbladder surgery at a county hospital. The nurses were employed by the hospital, not the surgeon. Under hospital policy, the nurses were responsible for making sure that all the sponges used during the surgery were accounted for.

After the surgery, the plaintiff suffered complications. He underwent additional surgery and a sponge was discovered inside his abdomen. He sued the hospital,

but its liability was capped at $50,000 by state law.

The plaintiff then sued the surgeon, arguing that because he was the "captain of the ship," he was vicariously liable for any negligence that occurred during the operation.

But the court refused to adopt the doctrine.

It said that it was "an outgrowth of the . . . 'charitable immunity' doctrine, which granted immunity to most hospitals prior to 1940 . . . But now . . . modern health care facilities are in a better position to protect patients against negligence from their employees and insure against the corresponding liability . . . [than the] charitable hospitals of the late nineteenth and early twentieth century, [which] lacked the financial wherewithal to survive a negligence action . . .

"We are mindful of the harsh consequences [the plaintiff] must endure because [the hospital] was a county hospital and therefore its liability was capped at $50,000 . . . [But] if we . . . imposed liability on [the doctor], we would discourage doctors from working at government-owned hospitals because they would incur the liability of the hospital's assisting employees, whom they had no hand in selecting. To attach this nondelegable liability to doctors utilizing government-owned health care facilities would create a disturbing dichotomy between government hospitals and private hospitals, which do not attach such nondelegable liability . . . Thereby we would induce doctors to practice only at private hospitals, which are liable for the full amount of damages a negligent employee may inflict upon a patient."

Wisconsin Supreme Court. Lewis v. Physicians Insurance Co. of Wisconsin*, No. 99-0001. June 13, 2001. Lawyers Weekly USA No. 9921002.*

* * * * *

Lawyer Advertising

Man from Uncle Ad Ruled Inherently Misleading

By North Carolina Court

This article is reprinted with permission from the 8/1/01 "Current Reports" issue of the Lawyers Manual on Professional Conduct*, © 2001 by the American Bar Association and the Bureau of National Affairs, Inc. The North Carolina state bar has posted the opinion on its website at http:\\www.ncbar.com\home\fedopinion.asp*

Rejecting a constitutional challenge to a restrictive ethics opinion on lawyer advertising adopted by the North Carolina State Bar, the U.S. District Court for the Middle District of North Carolina, July 19 held that a dramatized television advertisement used by personal injury lawyers to drum up clients was inherently misleading and therefore was not the type of commercial speech protected by the First Amendment (*Farrin v. Thigpen,* M.D. N.C., No. QO-CV-1122, 7/19/01).

Judge William L. Osteen found that the so-called "Strategy Session" television spot was likely to create unjustified expectations that the lawyers named in the ad could extract settlements solely on the strength of their reputation, regardless of the facts. Because the ad was misleading on its face, the state bar did not have to produce extrinsic evidence that consumers were misled, Osteen decided.

"The ad may win awards for a clever approach, but it violates the prohibition against misleading ads just the same," the court declared.

Fictional Adjusters Cry Uncle. According to the court, the 30-second spot depicts a fictional meeting of insurance adjusters discussing a claim arising from a car accident—A younger man suggests a strategy of denying or delaying the claim to "see if they'll crack." An older man asks "Who's the lawyer representing the victim?" After the junior man reluctantly names the firm, a loud gong sounds and the senior man's calm expression changes to alarm or dismay. The senior man exclaims the name of the firm as a question, and the junior man nods grimly. The senior man then says, "Let's settle this one."

In the second part of the vignette, actor Robert Vaughan looks into the camera and says "North Carolina insurance companies know the name [advertising lawyer or firm]. If you've been injured in an auto accident, tell them you mean business. Call [name and phone number) right now."

The "Strategy Session" ad was produced by Market Masters, a Massachusetts company, and was used in North Carolina by Michael Lewis and David D. Daggett of Lewis & Daggett, which aired the ad 2,900 times before two state bar members filed a grievance against Lewis. The ad also was used in North Carolina by Scott Farrin, who ran it 8,500 times before the state bar issued Formal Ethics Op. 2000-6 (2000), which took the position that bar members could be disciplined for using the ad because it was misleading and created unjustified expectations in violation of North Carolina Revised Rule of Professional Conduct 7.1.

The three lawyers, along with Market Masters, sued the members of the state bar's governing council in federal district court, challenging Op. 2000-6 on First Amendment grounds. The plaintiffs emphasized the lack of any empirical studies showing the actual effects of the ad on consumers, and contended that without evidence that actual consumers had either complained about the ad or been harmed by it, the state bar could not prohibit lawyers from airing the ad.

No Studies Needed. The court disagreed, holding that the bar was not required to produce extrinsic evidence that consumers were misled by the advertisement. Case law plainly requires such evidence only where the ad in question contains a truthful statement that is nonetheless misleading, and not where the ad itself is inherently misleading, Osteen explained.

The "Strategy Session" ad fell into the latter category, the court determined. The ad's "self-evident" implied message was inherently misleading in violation of Rule 7.1 in two respects, the court said. "Put simply, the ad creates the impression that insurance companies that would otherwise contemplate bad-faith tactics will decide to settle at the mere mention of a certain attorney's name," Osteen wrote.

The ad misrepresented the method employed by insurance adjusters in determining whether to settle a case, the court found, Osteen relied in part on the testimony of trial lawyers who disputed that adjusters would simply "delay or deny" a claim and who insisted that adjusters would base their decisions on factors other than a lawyer's reputation. The court rejected as irrelevant the opinion of an advertising expert who testified that the ad was not deceptive.

The court also found that the vignette was likely to create unjustified expectations that the advertising lawyers could obtain settlements based solely on their reputation. Although the text of the ad did not say so outright, the spot implied that insurance companies would settle with the advertising lawyer because they would be afraid to go to trial against him, the court observed.

In essence, the court said, the ad served the same purpose as a client testimonial: it persuaded people to call the advertising lawyer by using a fictional adjuster and an actor to endorse him.

Other courts have rejected similar ads that either use testimonials or hint at the lawyers ability to obtain settlements, the court said. It cited, for example, *In re Wamsley*, 725 N.E.2d 75, 16 Law. Man. Prof. Conduct 126 (Ind. 2000), which held that a lawyer's telephone directory advertisement proclaiming "Best Possible Settlement . . . Least Amount of Time" violated Rule 7.1.

The court distinguished *Mason v. Florida Bar*, 208 F.3d 252, 16 Law. Man. Prof. Conduct 161 (11th Cir. 2000), which held that a Florida practitioner enjoys a First Amendment right to advertise himself as having Martindale-Hubbell's "highest rating" without being forced to inform readers that the directory's ratings are based on subjective criteria from confidential sources. That ad involved a truthful statement that qualified as commercial speech, Osteen explained, whereas "Strategy Session" involved an inaccurate portrayal of insurance industry practices that was misleading and therefore not protected by the First Amendment.

Consumer Deception. The plaintiffs urged the court to apply principles taken from decisions of the Federal Trade Commission with regard to consumer advertising. Considering that staff counsel for the state bar informally approved the ad and that Op. 2000-6 was adopted after a split vote, the ad could not be deemed inherently misleading under the FTC "reasonable consumer" standard, the plaintiffs contended.

Osteen rejected that argument. Supreme Court precedent leaves the determination of whether an advertisement is inherently misleading or false to the court, even if reasonable minds can differ, the court said. And under the FTC's standards, the ad here would be considered deceptive, the court concluded.

Furthermore, the court decided that the inclusion of a disclaimer stating "no specific results implied" did not neutralize the misleading nature of "Strategy Session." It would defeat the purpose of Rule 7.1 if the advertising lawyer could employ deceptive and misleading methods so long as the ad included a disclaimer of what was portrayed, the court said. It also called the disclaimer "entirely ineffective," in that it was small, light in appearance, and on the screen for only a few seconds.

Harrell Hugh Stevens Jr. of Everett Gaskins Hancock & Stevens, Raleigh, N.C., represented Farrin and Market Masters. Lewis and Daggett were represented by Stevens and by David B. Freedman, White and Crumpler, Winston-Salem, NC.

The defendants were represented by Norma S. Farrell and Thomas F. Moffitt, North Carolina Department of Justice, Raleigh, and by Aldert Root Edmonson of the North Carolina State Bar in Raleigh.

* * * * *

Well Suited

Law Professor Carl Bogus Debunks The Conventional Wisdom of The Legal System

By Melanie Nayer

This article appeared in the Rhode Island Law Tribune *for the week of 9/19 to 9/25/01. Melanie Nayer is a* Law Tribune *Contributing Writer.*

While the very notion of a lawsuit could send a majority of the general population into a panic, law school professor Carl Bogus argues that such litigation is nothing to be feared.

"The idea that lawsuits are good for America is not a minority view among scholars, but more so to the general population," said Bogus, who teaches at Roger Williams University School of Law. "The conventional wisdom is that lawsuits are a plague."

He has put his views to paper and recently released a book titled, "Why Lawsuits Are Good for America: Disciplined Democracy, Big Business and the Common Law." The theme of the book is centered on the idea that the common law system is a necessary system of regulation. Government agencies, such as the Food and Drug Administration and the Environmental Protection Agency, are the primary mechanism for regulating business and products.

Bogus, a professor of torts, products liability, evidence and administrative law, was "irked by the deliberate campaign of misinterpretation perpetrated by the industry and political values," and over a three-year time period researched high-profile lawsuits to prove the value they have on the American public and business.

To prove his point, Bogus refers to cases in his book that are held up as examples of a legal system out of control, but carefully demonstrates that the lawsuit can do more good for the general public and business franchising, despite the costly and sometimes embarrassing accusations that emerge in a courtroom.

In the famous McDonald's hot coffee case, Bogus reminds us in his book of the 79-year-old woman who suffered third-degree burns to her legs, thighs and groin area and spent eight days in the hospital with skin graphs before suing McDonald's and receiving a $2.9 million judgment.

Prior to this lawsuit being filed, Bogus reveals in his book that McDonald's received more than 700 complaints from people who had been burned by the fast food chain's coffee. In addition, he points out other facts pertinent to the case including that the temperature of the dispensed coffee was higher than 180 degrees—more than 40 degrees hotter than the coffee made at home in a regular coffee pot.

"This case became a symbol of a crazy system," said Bogus. "The woman's claim was seeking compensation between the severity of the burns she would have received from 140-degree coffee and the one's she did receive from 190-degree coffee. When this case hit the headlines, other fast food chains such as Wendy's realized they were serving coffee and hot chocolate at the same temperature and temporarily removed the items from their menu to avoid problems."

Good Out of Bad

Bogus researched the after-effects of this case in his book, asking fast food restaurants what temperature they originally served their coffee and at what temperature they are currently serving it. Although none of the restaurants would respond, his research assistant went out with a thermometer to check the coffee and hot chocolate at four different fast food restaurants to find that none of them were dispensing hot liquids at more than 157 degrees—proof to Bogus, and an example to the public, of why the McDonald's lawsuit was good for America.

While it may seem challenging to claim to the general public that lawsuits, often menacing to business and citizenry, can benefit all facets of the American public, Bogus says it was made all the more easy because facts were on his side.

"The principal myth is that the legal system is a mad-hatter world populated with wacky judges, fluff-headed jurors and avaricious lawyers and that system produces bizarre results," explains Bogus. "I set out to expose and demolish the conventional wisdom and misrepresentation of the legal system."

And one of those misinterpretations is that lawsuits are out of control and anyone can sue anybody for anything.

According to Bogus, the idea that Am-

erica is litigation-crazy is completely false.

"In fact, anyone can sue anybody for anything—that's the kind of legal system we have," acknowledged Bogus. "We do not have a system where a citizen needs a government bureaucracy to file a lawsuit. The issue isn't whether anyone can sue for anything—the issue is how intelligent you are about the lawsuit."

Bogus notes that the frivolous lawsuits, those that are not presented with adequate evidence to support the claim in court, are normally thrown out at the beginning stages of the process.

The Early Years

At Syracuse University School of Law, Bogus was the editor of the Law Review before graduating in 1973 and moving to Philadelphia where he eventually became partner of the law firm Mesirov Gelman Jaffe and Moore, practicing commercial litigation. After 18 years of practicing law and dedicating his time to teaching at Rutgers University in Camden, N.J., Bogus went to teach at Roger Williams University in 1996.

In addition to the books, the classes and the lectures, Bogus devotes his time as a member of the Board of Visitors of the law school at Syracuse, and recently received a letter acknowledging his accomplishments as one of the youngest people ever elected a life member of the board.

Bogus is a strong believer in individual rights and fairness and supports the notion of the Second Amendment.

"I believe the Second Amendment only grants the right to bear arms to people within the government organized militia—today it is the National Guard. It does not grant the individual right," he said. "I'm best known for saying that James Madison wrote the Second Amendment in order to ensure the South and the federal government would not use its newly acquired control over the state militia to submerse to the slave system."

He also holds steadfast to the notion that the legal system will provide a beneficial outcome for the general public of America.

"A person's part in the process of the jury is a very structured form of participation in the law and a very important part of American democracy—but it is a very disciplined democracy," he said. "As antique as it is, I believe the common law is more vital and more important than ever."

Lawyers May Not Give Personal Injury Clients Money for Expenses Unrelated to Litigation

This article appeared in the ABA/BNA Lawyers' Manual on Professional Conduct *on 9/29/01.*

Lawyers pursuing litigation for a financially strapped client may not furnish free housing or give the client money for living expenses or medical treatment, the Maryland State Bar's ethics panel has advised Maryland State Bar Ass'n Ethics Comm., Op. 2001-10, 5/22/01 and 7/18/01). Outright gifts to clients for personal needs, the committee stated, raise some of the same policy concerns as advances for humanitarian purposes, which have been held unethical under Maryland Rule of Professional Conduct 1.8(e) and its predecessor, DR 5-103(B). The only gifts permitted by Rule 1.8(e) in the context of litigation are those for court costs and litigation expenses on behalf of an indigent client, the opinion concludes.

Policy Concerns. The committee was asked whether a lawyer may provide free housing and gifts of other necessities to a person whom the lawyer is going to or already does represent in litigation, where the client could face extreme personal hardship and abuse by other parties without such gifts.

The inquiry implicated the state's Rule 1.8(e), which—like its counterpart in the ABA Model Rules prohibits financial assistance to a client in connection with pending or contemplated litigation except (1) advances of court costs and litigation expenses, the repayment of which may be contingent on the outcome of the matter, and (2) payment of court costs and litigation for an indigent client.

The panel acknowledged its advice in Maryland Ethics Op. 2000-42 (2000) that a gift of a small sum of money to an impoverished personal injury client was not barred by Rule 1.8(e) because the prior Maryland cases all deal with advances, and the practice of gift giving did not appear to be prohibited by the ethics rules.

But after consulting Maryland disciplinary cases and the *Restatement of the Law Governing Lawyers*, the panel concluded that in the context of litigation, gifts other than those for an indigent client's court costs and litigation expenses violate Rule 1.8(e).

The committee noted that Maryland disciplinary cases have consistently construed Rule 1.8(e) and DR 5-103(B) to prohibit advances for housing costs, medical treatment, car repairs, and other personal needs. Pure gifts should be treated no differently from loans, the committee found.

Discussing the policy considerations identified in the case law, the committee acknowledged that because gifts have no strings attached they do not pose the concern presented by advances of turning lawyers into creditors pitted against their clients. But even more than advances, gifts may give firms with deep pockets an unfair advantage in obtaining clients, the committee pointed out. It also insisted that the public policy against stirring up litigation is violated as much or more by a gift than by an advance.

Gifts Only for Litigation Costs. The committee also found guidance in the Reporter's Note to Section 36, Comment c, of the Restatement, which states: "Lawyer gifts to clients are allowed in some circumstances by ABA Model Rule 1.8(e) (2) and are not prohibited by the ABA Model Code, DR 5-103(B)."

The "gift" countenanced by Rule 1.8(e) is the right of a lawyer representing an indigent client to unconditionally pay court costs and expenses of litigation on behalf of the indigent client, the panel decided.

The committee considered it significant that the "gift" provision is new and was not found in the Code of Professional Responsibility. "Since the Rule now provides a specific situation in which a gift is permitted, it is reasonable to infer that any other gifts providing 'financial assistance to a client in connection with pending or contemplated litigation' are not permitted," the opinion states.

This conclusion applies even if the gift-giving lawyer acts out of humanitarian motives rather than greed or the desire for professional glory, the panel indicated. It emphasized that Rule 1.8(e) does not prevent a lawyer from forgoing representation in order to provide humanitarian assistance.

The panel noted that op. 2000-42 recognizes a "de minimis" exception to Rule 1.8(e). Furthermore, Rule 1.8(e) does not prohibit gifts or loans by a lawyer to a client where litigation is not contemplated or pending, the committee stated, citing Maryland Ethics Ops. 88-72 (real estate transaction) and 93-25 (1993) (fuel bill paid by gift after litigation ended).

A concurring opinion expressed agreement with the committee's conclusion,

but argued that the rule was not intended to prevent good deeds and perhaps needs to be rewritten. It is "negative public policy" to treat gifts as equivalent to loans, the concurring opinion asserted.

* * * * *

Ohio Lawyer Receives Public Reprimand for Helping Client with Living Expenses

This article appeared in the ABA/BNA Lawyers' Manual on Professional Conduct *on 9/29/01.*

The Ohio Supreme Court Aug. 15 publicly reprimanded an attorney who advanced $26,000 for living expenses to a personal injury client who was severely injured and unable to work (*Cleveland Bar Ass'n v. Nusbaum*, Ohio, No.01-145, 8/15/01).

The advances violated DR 5-103(B) of the Ohio Code of Professional Responsibility, which prohibits advances except for litigation expenses, the court explained in a per curiam opinion.

Living Expenses Advanced. For nearly three years Alan H. Nusbaum represented Mark Jaks in an effort to recover for severe injuries that Jaks sustained in a motorcycle-truck collision. During the last few months that the case was pending, Nusbaum advanced funds to Jaks for living expenses. After the case was settled, Jaks repaid the loans.

The Cleveland Bar Association filed a complaint charging that by making the loans to Jaks, Nusbaum violated DR 5-103(B). That rule provides:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, the repayment of which may be contingent on the outcome of the matter.

A panel of the Ohio Supreme Court's Board of Commissioners on Grievances and Discipline found, based on the parties' stipulations, that while representing Jaks, Nusbaum advanced living expenses to him in the approximate amount of $26,000. This conduct violated DR 5-103(B), the panel concluded.

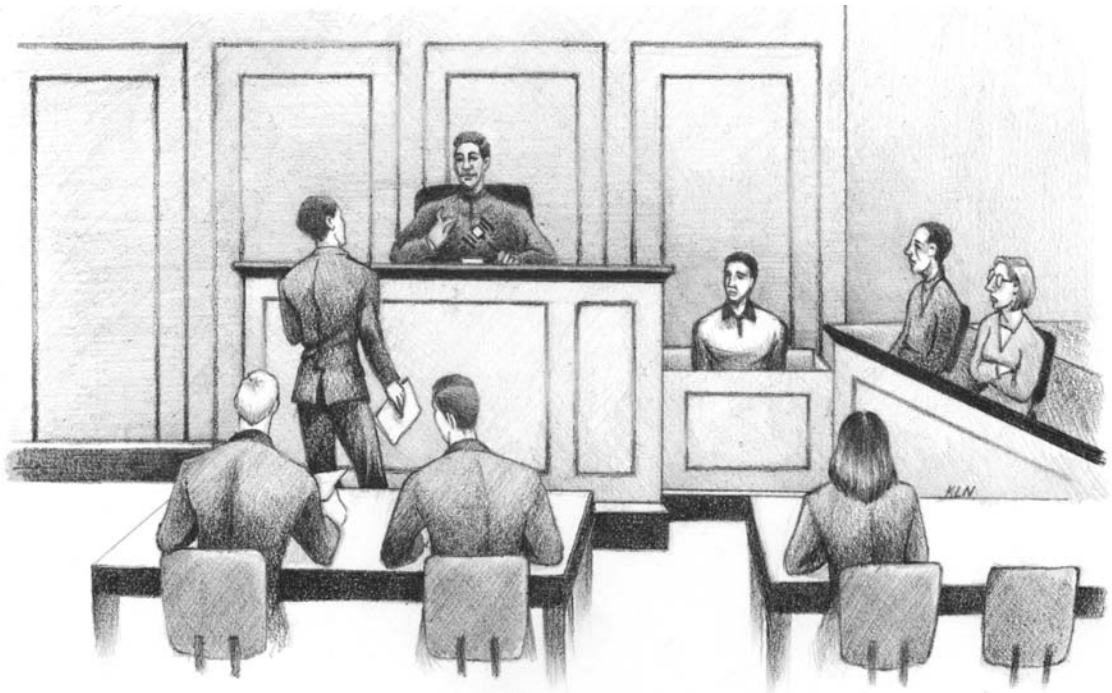
Client Unable to Work. In mitigation, the panel noted that Nusbaum had an otherwise clean disciplinary record during his 29 years of practice, that Jaks was not harmed but helped by the loans, and that the grievance was filed by Nusbaum's ex-wife.

The panel received numerous letters attesting to Nusbaum's good character, the court observed. Among the letters was one from Jaks stating that he considered Nusbaum to be a friend, that his injury forced him to undergo 20 operations and prevented him from working, and that he could not have survived without Nusbaum's help in obtaining the basic necessities of life. Jaks also claimed that without the loans, he would have had to settle earlier for a lesser amount.

The panel recommended that Nusbaum receive a public reprimand. The Board of Commissioners on Grievances and Discipline adopted the findings, conclusion, and recommendation of the panel, and the court in turn adopted the board's findings, conclusion, and recommendation. Accordingly, the court publicly reprimanded Nusbaum for violating DR 5-103(B).

In a concurring opinion, Justice Evelyn Lundberg Stratton noted that although the disciplinary rule was "quite clearly violated" and that "[g]ood reasons exist for the rule," Nusbaum's loan was purely altruistic and there was no financial incentive or gain for him. Lundberg Stratton said that she "reluctantly" concurred in the decision to reprimand Nusbaum because Jaks admitted that the assistance enabled him to hold out for a large settlement—"which is perhaps one of the justifications for the rule," she said.

Gary H. Goldwasser and Thomas R. Wolf of Reminger & Reminger Co., Cleveland, represented the bar association. Nusbaum was represented by Mary L. Cibella, Cleveland, and Gerald A. Messerman, Messerman & Messerman Co., also of Cleveland. ■



I Don't Feel Your Pain

continued from page 1

but it seems highly unlikely that such occurrences would happen with the frequency we are witnessing without some other, less acceptable, explanation.[4] This explanation is as obvious as it should be troubling: perhaps the juries are simply ignoring the pain—and ignoring the law governing tort damages in the process.

The remainder of this essay considers this possibility and its significance.

1. THE AWARD OF NON-ECONOMIC DAMAGES: GIVING MEANING TO THE "PAIN AND SUFFERING" OF STRANGERS.

A. The Two Meanings of " Pain and Suffering"

When we witness someone's "pain and suffering," we do not mock the experience. It is a sign of either gross immaturity or pathological insensitivity to act scornfully in the face of someone else's genuine distress. Yet, remarkably, the very same phrase, " pain and suffering," has become a shorthand reference of cynicism and derision in the context of the Tort Reform debate.[5] In this context, and this context only, the phrase has become a symbol of excess, irresponsibility, con—artistry, moral decay and the degradation of our civil justice system. The public, including members of the public sitting as judges and jurors, has become actively skeptical of personal injury claims and the lawyers and clients who bring them.

"Pain and suffering," then, is a phrase that has acquired two opposing meanings in our culture. On the one hand, it is an occasion for expressions of *compassion* and acts of human solidarity. On the other hand, it has become a rallying cry for skepticism and disdain.

This duality is not an accident.

At a superficial level, the duality arises from the ongoing fight between powerful interest groups over who gets the money. The Tort Reform battle is over money, and a great deal of money is being spent every year on both sides of the battle front to ensure that one meaning of "pain and suffering" prevails over the other in the courtroom of public opinion and public policy.

But more than money is at stake. We must pay attention to the rhetoric, because it helps us to understand what lies beneath its surface. Plaintiffs' lawyers speak in reverent tones about the "sacred" jury system and innocent "victims," as if the demise of the tort system as we know it would mark a significant move away from an essential component of democratic freedom. Tort Reform advocates talk about the rapacious greed of trial lawyers and their clients as if the failure to enact Tort Reform is a sure sign that irresponsibility has won out over rugged individualism as the defining feature of our national character. The themes are overtly political and moral because the ultimate issue is one of cultural identity and personal morality as much as it is about who gets (or keeps) the money.

I would insist that this dualism, this struggle over the meaning of "pain and suffering," reflects not only a "Tort Reform" battle over money, but also a struggle emanating from the deep ambivalence within our culture—and ourselves—about how we should respond to the pain and suffering of others. The jury verdict is a loaded event in this particular context because it is the one occasion in our public life when we are required by law to confront the pain of strangers and decide what to do about it. We cannot simply cross the street or turn off the television. We must judge.

B. What Is It About The Pain of Others That Causes Ambivalence?

We can locate one important source of our ambivalence about "pain and suffering" in the nature of physical pain and suffering itself.[6] The crucial set of characteristics that I want to discuss were identified by Elaine Scarry in her classic book on the subject, *The Body in Pain* (1975).[7] Scarry's most penetrating observation is her insight that physical pain is at the same time obvious to its sufferer and invisible to the rest of the world. The experience of physical pain is self-contained and self-referential in a way that perhaps makes it unique among human conditions. Unlike love or hate, jealousy or loyalty, despair or hope, pain has no external referent. It is non-relational and fundamentally unsharable.

A number of important characteristics of physical pain mark its essential unsharability:

First, pain is highly resistant, perhaps impervious, to language. It is inarticulate. It normally expresses itself as a grimace, a grunt, a scream or a whimper. Its expression may differ across cultures but it is the same in every language. Even in its most developed form, pain is expressed as an eighteen month old child speaks, in single words repeated over and over again, pleading "No, No," or "Help! Help!" or "Please! Please!" Indeed, the intensity of acute physical pain might be measured roughly by the degree to which the sufferer's access to language has been destroyed by the pain.[8]

Second, one consequence of the invisible, non-relational, inarticulate, unsharable nature of pain is that the correlative to the sufferer's experience of absolute certainty about his or her pain *is the doubt of others*. In Scarry's words: "[T]o have great pain is to have certainty; to hear that another person has pain is to have doubt." (7) The pain that holds another in its grip is ungraspable to the rest of us precisely because the condition of pain is so awesome: how can something so real and all-consuming to you actually exist in the same room, right now, without my feeling it too? Must not one of us be wrong. This point obviously carries important implications in the context of tort law.

Third, and relatedly, pain is supremely alienating to both the sufferer and the rest of us. A person in pain is shut off from the world and the people in it. Simple joy, simple sorrow, the interest or the pleasure or the mere distraction found in sharing the lives of others, the solace of time itself; all of this is gone, sucked out of the sufferer's universe by the black hole of present or imminent pain. Worse, the meaning and effect of these "simple" experiences are inverted, so that the sufferer's world is not only sealed off from them, but actively made worse by their continued existence and ready availability to others. Outside the world of pain, the continuity of everyday existence serves only to confirm, heartlessly, the sufferer's alienation; the world seems to turn its back on the sufferer. One is reminded of the closing lines of the great Frost poem, *Out Out:* "And they, since they! Were not the one dead, turned to their affairs." Similarly, the point brings to mind Sigmund Freud's insight that the goal of psychoanalysis is to return the patient to a state of "ordinary unhappiness"—which is the great aspiration of anyone in pain.

As the Frost/Freud references suggest, death is a useful analogy. Although not a legal formulation, it is accurate to say that pain is a foreshadowing of death situated in the midst of our daily existence. The meaning of pain is best understood as a negation, as a refusal itself to mean anything in a world of meaning. At the same time, of course, pain is different from death, and not only because it sometimes is not so permanent. Pain is also different from death because, for all of its unsharable and alienating impenetrability, *pain happens to the living.* This is worth pondering. Pain demands an explanation from the living to the living. The question that demands an answer is always some version of the unanswerable, "Why"? And the fact that the question is unanswerable may explain why jurors make mistakes when they try to answer it by awarding—or not awarding—money damages for pain and suffering.

C. A Theory of Juror Sympathy and Juror Callousness

While it is not the burden of this article to explain why jurors may refuse to award damages for pain and suffering in tort cases—despite their own findings of negligence, causation and physical injury—I hope that the foregoing analysis provides a useful framework for understanding at least a piece of the explanation as well as the importance of the solution. To summarize, the thesis of this essay is that one important reason why juries render No-Pain Verdicts is because the phenomena to be assessed by the jury—the plaintiff's pain and suffering—by its nature proves highly resistant to the jury's task. Pain does not translate into language; it is fundamentally non-relational, alienating, unshared and unsharable. Worse still, efforts by the pain-sufferer to share the experience easily can induce in others the opposite effect: Doubt. Under these circumstances, one way for the jury to get rid of the plaintiff's pain is to deny its existence.

To put the point in more familiar terms, our instincts (whether cultural or biological) instruct us, *not* how to take the pain of strangers into our own consciousness, but rather to avert our eyes and shut it out. Those who are particularly queasy cross the street to avoid the legless beggar; most of the rest of us stare at the sidewalk. We have turned off our television so many times to shut out the starving children of Africa that the cameras have stopped taking pictures. And conversely, on those occasions when we let in the pain of others—usually provoked by a "real life" story appearing on a televised "20/20 episode or a fictional account produced by Disney—we tend to overreact by melting into tears of mysterious origin, saved only by the commercial breaks and the happy ending. So why should we expect a jury confronted in the courtroom by the pain of a stranger to act otherwise?

This analysis, in the end, brings together the "opposing" emotions of callousness and sympathy. I suggest that these two very different feelings do not come from different places, they come from the same place. Both are aimed at eliminating pain. Sympathy seeks to eliminate pain by suffocating it with generosity, which is commendable in certain contexts but not in a jury's verdict. Likewise, callousness eliminates the pain too, in an equally unacceptable way—by denying its reality.

D. The Jury's Proper Role In Assessing Pain and Suffering.

The foregoing analysis points to a particular role for the jury in awarding damages for pain and suffering. The following three points establish the parameters of the Jury's task:

First, the jury's consideration of damages for pain and suffering should be personalized rather than pre-determined. If damages are scheduled by a remote legislature or administrative body, then the socially redemptive opportunity offered by the civil jury trial are largely lost. With pre-determined awards, we lose our only opportunity for an adjudication of the plaintiff's demand for acknowledgment of (among other things) his or her pain and suffering based on the particulars of that person's experience.[9] We lose our best chance as a social "body" to give meaning to the bodily pain of others. We replace that "live" social event with yet another experience characterized by bureaucratic, de-personalized, remote and ultimately alienating "administration" of our collective existence. Assuming that the jury is guided by a proper charge and its verdict is subject to judicial review, juries should be making pain and suffering determinations.

Second, juries must understand that with power comes responsibility. Jurors cannot play God. They cannot make the victim whole, Metaphor, even the metaphor of real money, has its limits. The jury cannot deliver the sufferer from the source of his or her pain, they cannot take the pain upon themselves, they cannot make the pain go away. Their award must recognize its limitations and acknowledge that it will be imperfect and incomplete. Jurors can award large sums of money for pain and suffering if the evidence supports such a verdict; they cannot award the Gross National Product to anyone, no matter how great the pain. This is why the jury is told that sympathy must not affect its verdict.

Third—I think this is the new part—the jury must also understand that it cannot fulfill its role by acting callously to deny that the plaintiff's pain is real. Just as the jury cannot make the pain go away by awarding too much, it cannot make the pain go away by awarding nothing. The world might be a better place without pain but jurors cannot use their authority to deny a fact of life; again, jurors cannot play God. Jurors are not authorized to prescribe stiff upper lips in lieu of money. A jury can find that there is no pain and suffering if the evidence supports such a verdict; it cannot refuse to make such an award because it wishes the plaintiff were a tougher person. If we must put aside our sympathy, we also must put aside our callousness.

II. A PROPOSED JURY CHARGE TO ADDRESS THE PROBLEM.

If there is any merit to the foregoing argument, one solution should be uncontroversial. The jury instruction governing the award of damages for "pain and suffering" currently used in Connecticut tells the jury to award damages that are "just, fair and reasonable." The standard charge also warns the jury not to be moved by "sympathy." But we have seen that sympathy is only half of the problem. As it stands, the standard jury charge is asymmetrical and hence unfair. Taken together, it admonishes the jury not to be overgenerous, but says nothing about being hard-hearted. This essay suggests that it is time to make the charge fair by making it bilateral.

My suggestion, simply, is to add the following underscored words to the charge on sympathy: "Obviously, your verdict must not be reached on the basis of *either* sympathy *or* callousness toward any party. . . ."

That is all. In reality, it probably isn't enough, but it's a start. It will give plaintiffs lawyers a foothold to make the same point, during voir dire and in their arguments to the jury, as defense lawyers do now based on the no-sympathy charge. Perhaps a juror will remember the admonition during deliberations. At least we can say that we tried. ■

Footnotes:

[1]The following reported decisions involving No-Pain Verdicts can be found in the Westlaw database: *Brodie v. Vinson*, No. CV 32-7552, 1999 WL 701789 (Aug. *25,* 1999) (jury award of $900 economic damages, zero non-economic damages); *Lidman v. Nugent*, No. CV 96-052905S, 1998 WL 779560 (Oct. 28, 1998) (jury award of $4,117.26 economic damages, zero non-economic damages); *Jacobson v. Baker*, No. CV 93-01326475, 1998 WL 708764 (Sept. 29, 1998) (jury award of $2,411.20 economic damages, zero non-economic damages); *Stem v. Allied Van Lines. Inc.,* 246 Conn. 170 (1998) (reviewing judgment after jury award of $31,084.08 economic damages, zero non-economic damages); *Diakomis v. Dias,* No. CV 95-0323511S, 1998 WL 83633 (Feb. 20, 1998) (jury awards of $2700, $1900 and $1700, respectively, to three different plaintiffs as economic damages, zero non-economic damages to all three plaintiffs); *Gladu v. Sousa*, No. CV 94-122949, 1998 WL 83208 (Feb. 18, 1998) (jury award of $13,650 economic damages, zero non-economic damages); *Pearson v. Dobies*, No. CV 95-0069399, 1997 WL 781953 (Dec. 10, 1997) (jury award of $3851 economic damages, zero non-economic damages); *Distasio v. Delpo*, No. CV 95-0127201, 1997 WL 430622 (July 18, 1997) (jury award of $3827.26 economic damages to one plaintiff and $3208.59 to second plaintiff; zero non-economic damages to each plaintiff); *Horan v. Seigel*, No. 534152, 1997 WL 242818 (May 1, 1997) (jury award of $4,023.50 economic damages, zero non-economic damages); *Brady v. Mac Candlewood Co.*, No. 315726, 1997 WL 120250 (Mar. 5, 1997) (jury award of $21,000 economic damages, zero non-economic damages); *Jaworski v. Kiernan*, No. CV 94-0464969S, 1996 WL 489038 (Aug. 28, 1996) (jury award of $20,910.33 economic damages, zero non-economic damages); *Simard v. Maryland Cas-*

ualty Co., No. 92-0513929S, 1995 WL 631883 (Oct. 18, 1995) (jury award of $3390 economic damages, zero non-economic damages); *Yapoujian v. Menashi*, No. 306293, 1995 WL 230995 (April 12, 1995) (jury award of $880.55 economic damages, zero non-economic damages); *Harrison v. Arlofski*, No. 094384, 1995 WL 94776 (Feb. 22, 1995) (jury award of $6029 economic damages, zero non-economic damages); *Anderson v. Frankel,* No. 111664, 1994 WL 503054 (Sept. 7, 1994) (jury award of $4,600 economic damages, zero non-economic damages); *Abdulgader v. Solek*, No. CV 90-0376197S, 1992 WL 331912 (Nov. 3, 1992) (jury award of $l400.00 economic damages, zero non-economic damages); *Jeffries v. Johnson*, No. 087382, 1991 WL 65797 (May 7, 1991) (jury award of $10,653.79 economic damages, zero non-economic damages).

[2]The issue in *Wichers* was whether a jury's award of zero non-economic damages is inconsistent, as a matter of law, with its award of economic damages for medical expenses incurred by a plaintiff as a result of an automobile collision caused by the defendant. The Supreme Court held that such a verdict was not necessarily inconsistent, and overruled an earlier case imposing what the *Wichers* Court characterized as a "per se rule" of inconsistency. 252 Conn. at 186 (overruling *Johnson v. Franklin,* 112 Conn. 228 (1930)). Under *Wichers,* cases involving an award of economic but no non-economic damages must be assessed by the trial judge on a case-by-case basis for "inadequacy" under C.G.S. § 52-216a. The present article does not take issue with the outcome in *Wichers*, and the proposal contained in Part III, below, is fully consistent with the holding in *Wichers*. In the interest of full disclosure, it should be noted that the author of the present article submitted an amicus curiae brief in *Wichers* on behalf of the Connecticut Trial Lawyers Association, urging the Supreme Court to conclude, among other things, that it was medically impossible (and thus legally inconsistent) to incur thousands of dollars in chiropractic bills without experiencing any pain and suffering. The CTLA argument was not addressed in the Court's decision.

[3]*See Schroeder v. Triangulum Associates*, 259 Conn. 325 (2002) (jury award of $750,400.00 economic damages, zero non-economic damages); *Santa Maria v. Klevecz,* 70 Conn. App. 10 (2002) (jury award of $2000 economic damages, zero non-economic damages); *Morrow v. Gogas*, CV 99-0065387S, 2002 WL 1815993 (July 2, 2002) (jury award of $100,000 economic damages, zero non-economic damages); *Petersen v. Gorman*, No. CV 99-0150279, 2002 WL 1295876 (May 14, 2002) (jury award of $4,055.35 economic damages, zero non-economic damages); *D'Ancona v. Metropolitan Property & Casualty Ins. Co.*, No. CV 98-0147204, 2002 WL 725514, (April 1, 2002) (jury award of $4,904.24 economic damages, zero non-economic damages); *Cyr v. General Insurance Co.,* No. CV 99-0498221S, 2002 WL 323533 (Feb. 6, 2002) (jury awarded two plaintiffs $6,461.75 and $4519.60 in economic damages, respectively, and zero non-economic damages); *Frazier v. Konopka,* No. CV 98-04903795, 2002 WL 323535 (Jan. *25,* 2002) (jury award of $4,294.90 economic damages, zero non-economic damages); *Pierce v. General Motors*, No. 546314, 2001 WL 1708071 (Dec. 20, 2001) (jury award of $103,120.63 economic damages, zero non-economic damages); *Ganim v. Kegler*, No. CV 97-0341002, 2001 WL 1429123 (Nov. 1, 2001) (jury award of $2600 economic damages, zero non-economic damages); *Gardetto v. Magoven*, CV-99-0433082S, 2001 WL 1098189 (Aug. 21, 2001) (jury award of $7120.00 economic damages, zero non-economic damages); *Showah v. Gardner*, No. CV 99-0335563S, 2001 WL 400365 (Mar. 30, 2001) (jury award of $9791.51 economic damages, zero non-economic damages); *Brae v. Yarmolovich*, No. CV 97-0397579, 2001 WL 283443 (Mar. 7, 2001) (jury award of $2,152.47 in economic damages, zero in non-economic damages); *Freeman v. Thompson*, No. CV 97 0571099S, 2000 WL 1618420 (Oct. 3, 2000) ($2,742.38 economic damages, zero non-economic damages); *LaFrance v. Hunchak*, No. CV 950376064S, 2000 WL 893244 (June 16, 2002) (jury award of $3417.56 economic damages, zero non-economic damages); *Johnson v. Strickland,* No. CV 980350826, 2000 WL 372910 (Mar. 30, 2000) (jury award of unspecified economic damages, no non-economic damages); *Palance v. Walsh*, No. CV 97-0569484, 2000 WL 279108 (Feb. 29, 2000) (jury award of $1197 economic damages, zero non-economic damages); *Darveau y. Lucas*, No. CV 97-0567237, 2000 WL 192802 (Feb. 1, 2000) (jury award of $2500 economic damages, zero non-economic damages).

[4]Medical science provides strong support for the intuition that juries rendering No-Pain Verdicts are ignoring the facts rather than arriving at reasoned conclusions. It is an established fact of medical science that physical injuries are accompanied by pain. Pain is not a reflection of character weakness, it is a biological response to actual or potential tissue damage caused by noxious stimuli. See Perry U. Fine, M.D. and Michael A. Ashbum, M.D., *Functional Neuroanatomy and Nociception*, in *The Management of Pain* 1 (Michael A. Ashbum, M.D. and Linda J. Rice, M.D., eds. 1998). Pain serves an essential biological function: "[i]t warns the individual that something is wrong and prompts him or her to seek medical counsel and is used by the physician as an important diagnostic aid." John J. Bonica, *Important Clinical Aspects of Acute and Chronic Pain*, in *Mechanisms of Pain and Analgesic Compounds* 14 (Roland F. Beers, Jr., M.D. and Edward U. Bassett, Ph.D., eds. 1979). It is definitively established that the subjective and sensory experience of pain has an anatomical basis and is caused by physiological mechanisms. *See* Michael Bond, M.D., *Pain: Its Nature. Analysis and Treatment* ch. 1 (2d ed. 1984) (describing anatomical basis for pain); R.E.S. Bullingham, M.D., *Physiological Mechanisms in Pain*, in *Acute Pain* ch. 1 (Graham Smith, M.D. and Benjamin G. Covino, M.D., eds. 1985); *see also. e.g., Molecular Neurobiology of Pain* (David Borsook, M.D., ed. 1997). The result of physical trauma is the sensation of pain and the experience of suffering.

[5]By "Tort Reform debate," I refer broadly to the exchange of ideas and rhetoric over the future of tort law that has taken place over the past thirty years among scholars, policy analysts of various ideological stripes, politicians and a wide if predictable set of powerful interest groups (insurance companies, medical, business and lawyers' associations, consumer advocacy groups, etc.). The central question in this debate is whether the common law of negligence, as administered through our civil jury system, should be changed, or even replaced altogether, as the principal means by which our society regulates the assignment of legal responsibility and award of compensation for people sustaining personal injuries caused by the conduct of another. Indeed, this summary description itself is loaded with controversy, as concepts like "responsibility" and "causation" are themselves part of the Tort Reform battleground; the disputants cannot even agree about the conceptual framework to be used or the goals to be achieved.

[6]For purposes of this essay, I wish to distinguish between physical pain on the one hand, and emotional distress on the other. The two components of suffering are conceptually distinct, and, for the sake of analytic simplicity, my subject here is only the former. I emphasize that this focus is not intended to imply that physical pain is somehow "worse" or any more "real" than emotional distress. Moreover, I recognize that a close relationship exists between these two categories of suffering. The membrane separating them is permeable, in both directions; physical pain causes emotional distress and emotional distress can cause physical pain. Nor do I wish to get into a war of definitional semantics here; the distinction between physical pain and emotional distress may well fade as these phenomena overlap. For present purposes, it is enough to say that physical pain, wherever it ends, *begins* with a physical insult causing bodily harm; it is not pain or suffering caused by emotional trauma as its primary precipitating event. I make this distinction, not because it necessarily is essential to the analysis that follows, but rather because it may simplify the discussion by removing one element that is not important here but is the subject of substantial contention in the larger Tort Reform debate (i.e., the compensability of non-physical injuries).

[7]Scarry's book remains the classic non-technical text in the field, but there are others well worth reading. *See. e.g.*, David B. Morris, *The Culture of Pain* (1991); Frank T. Vertosick, Jr., M.D., *Why We Hurt* (2000).

[8]Medical science has been working to develop a refined vocabulary for the diagnosis and treatment of physical pain, the McGill-Melzack Pain Questionnaire being the most established. I do not at all mean to suggest that this effort is without value. To the contrary. For present purposes, however, it only serves to underscore the point that such a language, if it is to exist, must be learned the way that a child first learns to speak.

[9]The analogy can be made to what has happened with criminal sentencing under the United States Sentencing Guidelines, according to some critics. See K. Stith and J. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 84 (1998) ("By largely eliminating from the sentencing proceedings the power of any individual to consider the circumstances of the crime and of the defendant in their entirety and to form a judgment on that basis, the Guidelines threaten to transform the venerable ritual of sentencing into a puppet theater in which defendants are not persons, but kinds of persons—abstract entities to be defined by a chart, their concrete existence systematically ignored and thus nullified.") If the tort system, in certain respects at least, is intended to operate roughly as a mirror image of the criminal justice system (compensating innocent victims rather than punishing guilty wrongdoers), then it would seem that this point should not be overlooked here.

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.

Membership Has Its Privileges

No other organization in CT represents the interests of the trial bar. CTLA has one of the most respected lobbying teams working full-time at the capitol to protect the rights of your clients—and your practice.

LOBBYING

CLE SEMINARS

You get the finest seminars—
innovative, timely, and taught by the best—at member prices!

Ask questions, share facts and knowledge, get answers fast on the CTLA ListServ!

CTLA LISTSERV

Simply email your inquiry to one address to reach hundreds of CTLA members!

Expert Witness Depositions & Trial Testimony Bank

Over 1300 depositions or trial testimonies of experts on file.
Only members can use this important resource.

CTLA's Case Strategy & Analysis Service—Have your case privately reviewed by a panel of CT's most skilled trial attorneys.

CASE STRATEGY & ANALYSIS SERVICE

THE FORUM

Delivered to your door and online at www.ct-tla.org
Articles, analyses, opinions—keeping you current on the law and government.

CTLA's most accomplished attorneys—sharing their invaluable knowledge and experience, through CTLA'S Mentor Program.

MENTOR PROGRAM

Workers' Comp Review Decision

Brings monthly updates in advance sheet format with subject matter index.

Social Networking

The New Lawyers Group, Women's Caucus, Membership Dinners with fascinating speakers, Golf Tournament, and CTLA's Annual Meeting—great opportunities for members and families to get together!

For important "information—membership,

WWW.CT-TLA.ORG

"members only Update your purchase materials and depositions online, and access convenient resource links—including the Forum online.

The CTLA Civil Justice Foundation

Continuing Legal Education Programs
January 2003—June 2003

**Look for Connecticut Civil Justice Foundation Seminar Brochures prior to the programs listed below!*

Developing, Proving and Arguing Damages Chairs: *Joseph R. Mirrione and Michael J. Walsh*	May 16, 2003 9:00 a.m. – 1:00 p.m. New Haven Lawn Club	CTLA members $119 Nonmembers $194
Winning Under Fire: Trying Cases in the 21st Century Chairs: *Michael P. Koskoff and Kathleen L. Nastri*	April 25, 2003 9:00 a.m. – 3:00 p.m. Omni Hotel, New Haven	CTLA members $169 Nonmembers $259
Annual Legal Support Staff Seminar Chair: *Kathleen L. Nastri*	May 9, 2003 9:00 a.m. – 1:00 p.m. Ramada Plaza Hotel, Meriden	CTLA members $149 Nonmembers $149

For more information contact the Civil Justice foundation, Inc., 100 Wells St., Suite 2H, Hartford CT 06103
Phone (860) 522-4345 Fax (860) 522-1027

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. ■

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

Core Funding Group, L.P.

Funding for the Legal Industry

Financing that fits YOUR needs.

- *Increase your cash flow*
- *Develop new cases*
- *Improve working capital*
- *Fund operating & expansion needs*

MONEY

for TRIAL expenses!

ADVANCES

on your FEES!

Reliable financial backing can determine the fate of your case.

Since 1991, **Core Funding Group, L.P.** has provided over $150 million dollars in funding to law firms and claimants.

You're welcome at **Core Funding** regardless of the size of your firm. So, whether you need several thousand dollars or several million dollars, **Core Funding** can help.

Connecticut Office

100 Pearl Street — 14th floor
Hartford, CT 06103
Contact: David J.D. Evans
Office: 860-249-7140
Cell: 860-202-3944
Fax: 860-722-9866

Home Office

11200 Westheimer Rd., Suite 620
Houston, Texas 77042
713-278-7700
FAX: 713-278-7704
Contact: **Thomas Emmick**

Call us today for more information.

1-800-836-0479

Houston • New Orleans • Washington, D.C. • New York • Los Angeles • Seattle

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 Street
Hartford, CT 06103-2920
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: Stewart Casper, President
Date: February 2003
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 —— As of March, 2003

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

MEMBERS OF THE $7200 CLUB

Bieder, Richard A.	Bridgeport
Davis, William R.	Hartford
Grudberg, Ira B.	New Haven
Halloran, R. Bartley	Farmington
Koskoff, Michael P.	Bridgeport
Moore, Garrett M.	Cheshire
Reardon, Robert I., Jr.	New London
Silver, Richard A.	Stamford

MEMBERS OF THE $5400 CLUB

Gallagher, William F.	New Haven
Jacobs, Howard A.	New Haven

MEMBERS OF THE $4800 CLUB

Adelman, Robert B.	Bridgeport
Anderson, Carl D.	Norwich
Bartolini, James D.	Hartford
Berkowitz, Russell, J.	Stamford
Bernard, Christopher D.	Bridgeport
Casper, Stewart M.	Stamford
Cloutier, Thomas A.	Old Saybrook
Groher, Andrew S.	Hartford
Jainchill, Michael C.	Hartford
Kennedy, John J., Jr.	New Haven
Mengacci, Joseph A.	Waterbury
Mirrione, Joseph R.	New Haven
Piazza, Anthony A.	Stamford
Sheldon, Robert R.	Bridgeport
Stratton, Michael A.	Bridgeport
Swain, Eugene K.	Hartford
Teitell, Ernest F.	Stamford
Walsh, Michael J.	Hartford

MEMBERS OF THE $3600 CLUB

Annunziata, Albert R.	New Haven
Auger, Matthew E.	New London
Bartinik, Peter J.	Groton
Bershtein, Richard A.	Hamden
Buckley, John F., Jr.	New Haven
Cadden, Thomas P.	Meriden
Calistro, Roger B.	New Haven
Cirillo, Frank L.	New Haven
Collins, John A., III	New London
Connors, Mary Ann	Bridgeport
Cooney, David W.	Hartford
DeLucia, Joseph J.	Bridgeport
DeLuca, Regina M.	Bridgeport
Dobrowolski, Joseph S.	New Haven
Dodd, Edward T., Jr.	Cheshire
Dwyer, J. Patrick	Glastonbury
Early, James F.	New Haven
Ecker, Steven D.	Hartford
Einhorn, Jonathan J.	New Haven
Emmett, Kathryn	Stamford
Errante, Steven J.	New Haven
Garrison, Joseph D.	New Haven
Gold, Gary R.	Hartford
Golub, David S.	Stamford
Hersh, Dennis G.	Hartford
Hirsch, Joram	Bridgeport
Houlihan, John J., Jr.	Hartford
Jacques, Stephen	Cheshire
Johnson, David H.	New Haven
Lapine, Lawrence M.	Stamford
Laska, Kenneth J.	Plainville
Lichtenstein, Joel H.	Bridgeport
Mahoney, Douglas P.	Bridgeport
McQuillan, Paul J.	New Britain
Meo, Steven F.	Hartford
Mercurio, Lucia M.	New London
Namnoum, Kenneth P., Jr.	Hartford
Nastri, Kathleen L.	Waterbury
Newman, Richard L.	Bridgeport
O'Brien, Gregory E.	Cheshire
Polito, Humbert, J., Jr.	Waterford
Price, Charles B., Jr.	New Haven
Robinson, Cindy L.	Bridgeport
Rosen, David N.	New Haven
Scott, Ronald T.	Hartford
Shafner, Matthew	Groton
Sinoway, Barry J.	North Haven
St. John, William J., Jr.	Waterbury
Sweeney, William J., Jr.	New Britain
Tremont, Jason E.	Bridgeport
Ury, Frederick S.	Fairfield
Woods, Kerin M.	New London
Wu, James	Danbury

MEMBERS OF THE $2400 CLUB

Apicella, Andrew	Milford
Arron, David	Fairfield
Bailey, Frank A.	Bridgeport
Belt, David L.	New Haven
Berryman, James P.	New London
D'Amico, Michael A.	Watertown
D'Elia, John J.	New Haven
DiNatale, Mario	Stamford
Donahue, Timothy W.	Wallingford
Dow, William F., III	New Haven
Embry, Stephen C.	Groton
Falcone, Vincent R.	West Haven
Faxon, Joel	Bridgeport
Gasidlo, John M.	Westport
Horwitz, James D.	Bridgeport
Jessep, John D.	Bridgeport
Josel, John D.	Stamford
Lazinger, Samuel J.	Bridgeport
Leone, Donald E., Jr.	Norwich
Levy, Michael W.	Hartford
Maresca, Robert A.	Bridgeport
Mastronardi, Gary A.	Bridgeport
Merly, Lawrence J.	Bridgeport
Murphy, Ronald T.	New Britain
Nastri, Robert, Jr.	Waterbury
Reilly, Carey B.	Bridgeport
Weiss, Martin T.	Danielson
Wocl, Nicholas E.	Stamford
Wynne, John F., Jr.	New Haven

MEMBERS OF THE $1800 CLUB

Alfano, Charles T., Jr.	Suffield
Bartinik, Peter, Jr.	Groton
Celotto, Donald W., Jr.	New Haven
DelPiano, Gerald A.	Hartford
Fasano, Leonard A.	New Haven
Fasano, Michael A.	Waterbury
Horgan, Daniel J.	New London
Hunt, Kimball Haines	Hartford
Iannaccone, Paul	Hartford
Jelly, Jefferson D.	West Hartford
Koskoff, Joshua D.	Bridgeport
McEnery, Gerard	North Haven
Moher, Michael	Ansonia
O'Donnell, John R.	New Haven
Paoletti, Frederick D., Jr.	Bridgeport
Polinsky, Jeffrey L.	Hartford
Reger, Robert S.	Hamden
Rosnick, Harold L.	Bridgeport
Sarantopoulos, Christian G.	Danielson
Sgrignari, Lawrence C.	Hamden
Shapera, Paul N.	Hartford
Skuret, Daniel D.	Ansonia
Smoragiewicz, Edward R.	Hartford
Spodnick, Jonathan E.	Trumbull
Walsh, Edward L.	New Haven
Walsh, Joseph G.	Danbury
Ziotas, Angelo A.	Stamford

Club Members —— As of March, 2003

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.

MEMBERS OF THE $1200 CLUB

Abels, Johathan M.	West Hartford
Airone, Thomas J.	New Haven
Ambrose, Peter	Fairfield
Anderson, Christopher P.	Norwich
Androski, John F. X.	Ansonia
Appleton, Peter M.	Hartford
August, Jon A.	Bridgeport
Balaban, Mark A.	Middletown
Bartholomew, Susan H.	New Haven
Beck, Bruce S.	Manchester
Benjamin, Daniel A.	Stamford
Berman, Jon D.	South Windsor
Biller, Jon D.	Hamden
Bloomenthal, Melvin L.	Stamford
Boath, George W., Jr.	Stratford
Bojka, Fanol	Waterbury
Bonadies, Anthony S.	Hamden
Borea, Morris R.	Hartford
Bronson, Christopher W.	Windsor Locks
Brophy, Joseph M.	Westport
Burt, Michael E.	New Haven
Burt, Edward C., Jr.	Hamden
Cahill, Michael W.	New Haven
Camassar, Scott D.	New London
Carrozzella, Christopher	Wallingford
Carter, Robert F.	Woodbridge
Casella, Charles L.	Naugatuck
Castiglioni, Richard E.	Stamford
Centrella, Scott S.	Stamford
Cipriano, Francis P.	Hamden
Cohen, Gary I.	Greenwich
Cole-Chu, Leeland J.	New London
Collins, Tracy M.	New London
Connors, Susan A.	West Hartford
Conti, Richard S.	Manchester
Corrigan, Bruce J., Jr.	Westport
Corsello, Michael R.	Norwalk
Czepiga, Edward F. II	Bridgeport
DeFrank, Steven J.	New Haven
Deneen, Michael P.	Windsor
DePanfilis, Anthony J.	Norwalk
Donovan, John R.	Cromwell
Dubois, Mark A.	Hartford
Durkin, Mark C.	Stamford
Eldergill, Kathleen	Manchester
Elkin, Sydney W.	West Hartford
Esposito, John J., Jr.	New Haven
Fairlie, Chester W.	New London
Falvey, David F.	Groton
Farcus, Joan I.	Bridgeport
Farren, Paul E., Jr.	New Haven
Ferdon, Dennis A.	Norwich
Ferrante, Victor M.	Bridgeport
Finn, Stephen A.	Stamford
Fitzgerald, Robert M.	Willimantic
FitzGerald, John C., Jr.	Hartford
Foley, Michael P., Jr.	Cheshire
Fracassini, John P.	Monroe
Friedler, Jeffrey A.	New Haven
Friedler, Joseph P.	New Haven
Ganim, George W., Jr.	Bridgeport
Gaudreau, Donald G.	Hartford
Gillooly, Dennis W.	New Haven
Giulietti, James J.	North Haven
Glucksman, L. Morris	Stamford
Gorman, Robert J., Jr.	Hartford
Gould, Jonathan L.	Hartford
Grater, Mark	Groton
Graves, Shelley L.	New London
Griffin, Mark F.	Watertown
Guernsey, Paul M.	Niantic
Hartley, James E., Jr.	Waterbury
Hayes, Margaret M.	Bristol
Healey, Mark A.	West Haven
Herrmann, David H.	Hartford
Hyde, John, R.	Hartford
Jacobs, Richard L.	New Haven
Jacobs, Steven D.	New Haven
Jewell, Michael E.	Norwich
Katz, Jonathan	New Haven
Katz, Mark F.	Stamford
Kenny, Richard J.	Hartford
Koskoff, David E.	Plainville
Kritzman, David R.	Manchester
LaCava, John J.	Stamford
Larracuente, Jerome J.	Bridgeport
Leone, Frank A.	East Hartford
Levine, Kenneth J.	Farmington
Leydon, Brenden P.	Stamford
Licari, Christopher M.	New Haven
Lonergan, Dana Paul	Trumbull
Luckart, John J., Jr.	Bridgeport
Maddox, Matthew M.	Stamford
Malowitz, Wesley M.	Stamford
Manion, Douglas K.	Vernon
Marano, Richard M.	Waterbury
Marder, I. David	Vernon
Marinelli, James M.	New Britain
McManus, Vincent T., Jr.	Wallingford
McNamara, Thomas M.	New Haven
McQuillan, Martin J.	New Britain
Meaney, Joseph V., Jr	Hartford
Meehan, Richard T., Jr.	Bridgeport
Messey, Robert C.	North Haven
Mester, David P.	Hartford
Monaco, Ralph J.	New London
Mullins, Thomas J.	New Britain
Musto, Vincent M.	Bridgeport
Naizby, John F.	Branford
Neistat, Mark	Newington
Noce, Vincent L., Jr.	Bridgeport
Norris, Charles K.	Norwich
O'Brien, Joseph A.	West Hartford
O'Malley, F. Jerome	New London
O'Sullivan, F. Patrick	Bristol
Oman, Charles E., III	Waterbury
Pacifico, Paul J.	Westport
Pagano, Anthony F.	Manchester
Parenteau, Jacques J.	New London
Parrino, Thomas P.	Westport
Perakos, Peter G., II	Hartford
Poliner, Bernard	Middletown
Prucker, Brian W.	Vernon
Reade, Steven C.	Hartford
Reeve, Robert J.	Unionville
Renehan, Richard P.	Waterbury
Richardson, Randolph E., II	Woodbury
Riley, Thomas J.	New London
Ritson, John D.	Hartford
Rothman, Saul A.	Stamford
Rutchik, Martin M.	Norwich
Sabatini, Vincent F.	Newington
Sauer, David	New Britain
Savvaides, Anastasios	Stamford
Secola, Joseph P.	Brookfield
Shafran, Peter W.	Stamford
Sherer, Donald B.	Stamford
Sponheimer, John P.	Ansonia
Strafaci, M. John	New London
Thomas, Dominick J., Jr.	Derby
Tobin, Robert D.	New London
Tomasiewicz, Patrick	West Hartford
Trebisacci, Raymond T.	Pawcatuck
Trembicki, Alexander J.	Westport
Trow, Griffith H.	Stamford
Tynan, William F.	Wolcott
VanDerWerff, Jan P.	West Hartford
Vishno, Jeremy G.	New Haven
Wall, R. Anthony, Jr.	Torrington
Weber, Robert F., Jr.	New Britain
Yelenak, William P.	Cheshire
Zagorsky, Peter J.	Plainville
Zayas, Richard L.	Hartford
Zipfel, David A.	East Hartford
Zyko, Eddi Z.	Middlebury

TO LEARN MORE ABOUT CTLA CLUB MEMBERSHIP, CONTACT DIANA ROE AT 860-522-4345

Talk to hundreds of CTLA attorneys and get answers to all your legal questions on . . .

THE CTLA LISTSERVE

Members can now access the best legal resources in Connecticut

Your Fellow CTLA Attorneys!

- Post legal questions and get answers **fast!**
- Talk strategy, case law, experts, IMEs, ***and more!***
- You get the expertise of **hundreds** of CT's finest attorneys—***free!***

It's EASY! Simply send your e-mail to:
cttlamembers@lyris.depoconnect.com

Your message automatically gets sent to all CTLA ListServe Subscribers.

Or

Contact Diana Roe at (860) 522-4345, or email droe@ct-tla.org

CTLA Forum
Connecticut Trial Lawyers Association
100 Wells Street
Hartford, Connecticut 06103-2920