

## From The President's Notebook By Thomas A. Cloutier



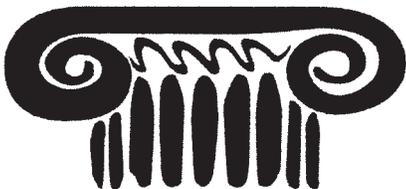
Let me share with you some material I recently read in a couple of our local newspapers:

"I've got a programming suggestion for *Court TV*: How about a weekly show called "The F-files"? It could feature two intrepid tort reformers investigating frivolous legal claims."

"The purpose of this show would not necessarily be to entertain (although viewers might find it amusing to see what absurd lengths some folks will go to in an effort to get rich through the legal system)."

"The litigation explosion costs consumers and businesses more than \$150 billion a year . . ."

That comes from an editorial written  
*continued on page 81*



## How to Create A Winning Documentary Record: From Initial Client Meeting Through Trial

By David B. Zabel and Stewart I. Edelstein

*David B. Zabel and Stewart I. Edelstein are commercial litigators resident in the Bridgeport office of Cohen and Wolf, PC. This article is available on the Cohen and Wolf, PC website at [www.cohenand-wolf.com](http://www.cohenand-wolf.com)*

In nearly every case, documents constitute the most compelling and persuasive evidence available, and are critical to your success at trial or at the settlement table. By establishing from the outset of your case a plan to identify, obtain, organize, and effectively use relevant documents, you will be well on the way toward a positive result.

### Identify and Obtain Relevant Documents From Your Client

From the time of your first discussion with your client, you should be thinking about—and talking with your client about—documents that may be relevant to your case. It is not enough to just ask: "What documents do you have concerning \_\_\_\_\_?" Instead, talk with your client in detail not only about the documents that the client currently has readily at hand, but also about sources of documents that the client may have forgotten

about and documents that likely exist but cannot presently be found. Ask questions like:

- What types of documents does the client typically create?
- Who typically generates documents?
- Who types the documents?
- To whom are documents ordinarily circulated internally?
- To whom were documents concerning the matter at issue sent?
- Who may have received documents concerning the matter at issue?
- Who else may have relevant documents?
- What types of files are ordinarily kept by the client?
- Are computer files kept at individual workstations or in a central database? Are there individual PCs that may have stored files that are not on the client's centralized computer systems? Have e-mail files been searched?
- What is the client's policy concerning retention of records? When was the policy implemented? Is the policy in writing? Has the policy ever changed? If so, when?

After you have received from your client copies of the documents gathered as a result of your initial discussions, follow up with the client to inquire whether any additional documents, or additional sources of documents, may exist. Not surprisingly, such follow-up inquiries often identify additional relevant documents that, for one reason or another, were overlooked initially.

### From Opposing Parties

Early in the litigation, serve appropriate document requests. See Practice Book §13-9 *et seq.*, and Fed. R. Civ. P. 34. Remember that in federal court in Connecticut, the definition of the term "document" contained in Fed. R. Civ. P. 34(a) is deemed incorporated by reference in all discovery requests in this District, and  
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# CTLA Forum

April/June 2001

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### CTLA FORUM

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By Kathleen L. Nastri, Associate Editor

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

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

#### **JURY VERDICT:**

**Slip and fall;  
non-displaced fracture  
of left elbow;  
VERDICT OF \$75,100.00.**

In the case of *Linda Feaser v. Richard Lillis*, Docket No. CV 97 0329457 S, filed in the Superior Court for the Judicial District of Danbury, a jury returned a verdict in favor of the plaintiff in the total amount of \$75,100.00 in March of 2000.

The plaintiff rented a house from the defendant. Water from leaking plumbing on the second floor dripped down and pooled in the first-floor hallway. Although he was not a plumber, the defendant made repeated efforts to repair the leaking plumbing. He did not hire a plumber. Early one morning the plaintiff, while walking in the hallway, slipped and fell in the pooled water and suffered a nondisplaced fracture of the radial head of her left elbow. It was not treated surgically, and was immobilized in a sling for approximately two weeks. Her total medical expenses were approximately \$2,100.00. The plaintiff offered a medical report in lieu of testimony.

The defendant claimed he thought he had repaired the leak, and that the plaintiff had never notified him that the leak had started again, after his last effort to repair it. Additionally, the defendant claimed that the plaintiff was contributorily negligent in failing to walk around the puddle of water.

After three hours of deliberation, the jury awarded the plaintiff her medical bills in the amount of \$2,100.00 and \$73,000.00 for non-economic damages. The jury found that the plaintiff was not contributorily negligent.

Submitted by Richard L. Newman, Esq., of Adelman Hirsch & Newman,

LLP, Bridgeport, Connecticut, counsel for the plaintiff.

#### **JURY VERDICT:**

**Automobile accident;  
cervical strain and  
left shoulder bursitis and capsulitis;  
VERDICT OF \$156,000.00.**

In the case of *Vasilica Marsanu v. John Jones, Inc., et al*, Docket No. CV 96 0325541 S, filed in the Superior Court for the Judicial District of Danbury, the jury returned a verdict in favor of the plaintiff in the amount of \$156,000.00.

On May 16, 1996, the plaintiff was stopped in traffic on Route 7 in Wilton, Connecticut, when her car was hit from behind by a tractor trailer driven by the defendant, Carleton Small. The plaintiff testified that the truck, although moving slowly, did not stop before it hit her car. In a statement given to the investigating police officer, the defendant Small indicated that his truck had been stopped behind the plaintiff's car, when his foot slipped off the clutch. In either event, it was undisputed that the force of the impact caused only minimal damage to the plaintiff's car. There was no damage to the frame, and the repair bill was only \$770.00. The plaintiff's right shoulder was bruised and her right arm was numb. She declined an ambulance and continued to her job. Later that day, however, she was treated and released at Danbury Hospital, and thereafter received a course of treatment from Mitchell Prywes, M.D., a physiatrist practicing in Danbury, Connecticut. He administered physical therapy, acupuncture, and repeated cortisone injections. Despite the treatment, she suffered from chronic bursitis and a small amount of adhesive capsulitis in her right shoulder. Dr. Prywes testified (by videotape) that the plaintiff suffered a 15% permanent impairment of her cervicothoracic-scapular region. Her medical bills were \$6,996.00. At the time of the collision the plaintiff was employed part-time, doing upholstery on furniture making \$15 per hour.

The defendants admitted negligence and recklessness. After opening statements, and over objection, the Court permitted the defendants to amend their answer and deny recklessness, although the prior pleading was admitted as an ev-

idential admission. Neither defendant was present at trial. Over objection, the Court permitted the defendants to introduce the police report, which contained a statement made by the defendant driver as to how the collision allegedly occurred.

The defendants had a surveillance video of the plaintiff which showed her using a full range of motion with both arms and shoulders. The Court ordered the defendants to produce a copy of the surveillance video before the commencement of trial, although the Court permitted the defendants to take a second deposition of the plaintiff before turning over the videotapes. The plaintiff offered the videotape in her case in chief.

The defendants retained Dr. Patrick Duffy, an orthopedic surgeon from Waterbury, to conduct a medical examination of the plaintiff. He testified that the plaintiff had suffered only a 3% injury to her neck, and was unable to render any opinion about the nature, extent, or severity of the injury to the plaintiff's right shoulder. He testified however, that the color of the bruise in the photograph showing the bruise on her shoulder was inconsistent with the plaintiff's testimony that the photo had been taken on the day of the collision. As a result, the defendants argued that the bruise pre-dated the motor vehicle collision.

The plaintiff offered no evidence of future medical expenses. With regard to impaired earning capacity, the evidence showed that the plaintiff had been fired from her employment six months after the collision, but apparently for reasons unrelated to her injuries. The defendants called her former employer who testified that her work had not been very good. At the time of trial, the plaintiff was working full-time, for \$10 an hour whereas at the time of the collision, she had been working part-time for \$15 per hour. The plaintiff testified, however, that it had been her intent to work full-time doing upholstery for \$15 hour; and that by virtue of her injuries she was no longer able to do so. Based upon that, and the assumption of a useful life expectancy, plaintiff's counsel argued for a claim of future lost earnings of \$126,000.00. The plaintiff had retained an economist, but made the decision not to call the economist at trial.

The defense argued that the case was

basically a fender-bender, that the economic loss was unsubstantiated, and the injuries claimed were not causally related.

After three hours of deliberations, the jury awarded the plaintiff the full amount of her medical bills. There was no award for earning capacity, and the jury did not award double or treble damages for recklessness. The jury did award \$150,000.00 for pain and suffering.

Submitted by Richard L. Newman, Esq., of Adelman Hirsch & Newman, Bridgeport, Connecticut, counsel for the plaintiff.

#### **SETTLEMENT:**

#### **Sale of motorcycle with defective brakes resulting in accident; SETTLEMENT OF \$157,500.00.**

In the case of *John Campbell v. Libby's Sales & Service*, Docket Number x-05-CV-99-017435s, filed in the Superior Court for the Judicial District of Stamford at Stamford, the parties settled for \$157,500.00.

On March 23, 1994, the plaintiff, a resident of Block Island, R.I., took the motorcycle he had bought the year before out of storage and, upon starting it up, discovered that the engine was running rough. In an attempt to correct the problem, he got on the motorcycle and drove it around the island at approximately 40 miles per hour. After approximately three miles, the brakes locked up and he was thrown over the handlebars to the ground. The plaintiff sustained serious injuries, including the removal of his spleen, rib fractures and multiple lacerations.

An inspection of the motorcycle disclosed the presence of reaction product in the master cylinder reservoir, which, according to the plaintiff's motorcycle expert, represented a chemical interaction between the moisture and the aluminum lining of certain component parts of the braking system. The motorcycle's history indicated that the bike had been stored outdoors for approximately 18 months before the sale to the plaintiff. The plaintiff purchased the bike on consignment from Libby's Sales & Services in New Haven.

The plaintiff alleged that at the time of the purchase, he told Libby's to perform a safety check on the vehicle which, if done properly, would have disclosed the presence of the reaction product in the brake fluid.

The accumulation of chunks of the reaction product, when the motorcycle was operated on the accident date, caused a chunk to lodge in a brake portal and the

brakes to seize. Defendant's expert contended that the real cause of the accident was the deterioration of the brake piston during the Block Island winter of 1993-1994. Defendant also claimed that plaintiff's expert spoliated the evidence during a pre-suit inspection of the vehicle. Defendant's chemistry expert analyzed the reaction product and concluded that it had not been exposed to brake fluid and, therefore, the reaction product, although found in the master cylinder reservoir, had never actually circulated in the brake fluid.

The parties settled the case for \$157,500.00 ten days before trial.

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

#### **JURY VERDICT:**

#### **Automobile accident; 19-year-old female; aggravation of pre-existing TMJ injury;**

#### **VERDICT OF \$73,046.29**

#### **Plus offer-of-judgment interest and costs.**

In the case of *Elizabeth Koziol v. Nahieli Rodriguez*, Docket No. CV 97 0348785 S, filed in the Superior Court in the Judicial District of Fairfield at Bridgeport, a jury returned a verdict in the amount of \$73,046.29. Following a hearing on post-verdict motions, the parties agreed to stipulate to judgment in the amount of \$90,000.00. The verdict was entered on March 17, 2000.

On January 23, 1997, the plaintiff was stopped at a red traffic light when her vehicle was struck in the rear by the defendant's vehicle. There was no damage to the defendant's vehicle and only minor damage to the plaintiff's vehicle.

The plaintiff had been earlier involved in a motor vehicle accident on September 5, 1996, at which time her car was broadsided. In that accident, both vehicles were declared total losses. In the earlier accident the plaintiff had struck her face on the window of her vehicle. She came under the care of Dr. Patricia Richards who diagnosed her with injuries to her TMJ. The plaintiff was complaining of clicking and popping in her jaw as a result of that accident. She received a mouthpiece from Dr. Richards and was still receiving treatment from Dr. Richards for that accident when she was involved in this accident.

Following the January 23, 1997 accident, the plaintiff claimed that the injury to her jaw was substantially worse. She

returned to Dr. Richards for several visits but then decided to change doctors. She came under the care of Dr. Richard Resnick, an oral surgeon in Bridgeport. Dr. Resnick sent her for an MRI of her jaw which showed internal derangement on one side. Dr. Resnick determined that the plaintiff would need surgery on her jaw as a result of this condition. The cost of future treatment over the plaintiff's lifetime would be \$20,000. At the time of trial, plaintiff had not had the surgery. It was Dr. Resnick's opinion that as she had been improving at the time of the second accident, that the majority of her problems were in fact due to the second accident. Her medical bills totaled \$3,046.29.

After one hour of deliberations the jury returned a verdict of \$23,046.29 in economic damages and \$50,000.00 in non-economic damages in favor of the plaintiff.

Allstate Insurance Company was the carrier for the defendant. Allstate classified the case as a MIST case or a DOLF case. Allstate's only offer on the case was \$2,000. The latest demand was \$15,000. The defendant only had a \$20,000 policy available to her. Allstate paid the complete judgment in the amount of \$90,000.

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

#### **JURY VERDICT:**

#### **Automobile accident;**

#### **21-year-old female;**

#### **5-6% disability to thoracic-lumbar spine;**

#### **VERDICT OF \$88,018.83**

#### **Plus offer-of-judgment interest and costs.**

In the case of *Kari Damato v. Ruby Thompson*, Docket No. CV 96 0335914 S, filed in the Superior Court for the Judicial District of Fairfield at Bridgeport, the jury entered a verdict in favor of the plaintiff in the amount of \$88,018.83. The verdict was accepted and recorded on March 24, 2000. The total judgment including offer-of-judgment interest and costs was \$127,601.22.

On December 2, 1995, the 17-year-old plaintiff was traveling in a northerly direction on Broad Street in Bridgeport, Connecticut. The defendant was traveling in a westerly direction on Canon Street in Bridgeport. Traffic for the defendant's vehicle had a stop sign. There was no stop sign for the plaintiff's vehicle. The vehicles collided at the intersection. The plaintiff claimed that the defendant did not stop at the stop sign. The defendant

claimed that the plaintiff was traveling at a high rate of speed as she was in an area of Bridgeport that her father did not allow her to be in at night.

Following the accident, plaintiff was transported to St. Vincent's Medical Center with complaints of neck and back pain. She was evaluated and released from the emergency room. She then came under the care of Dr. Donald Dworken, an orthopedic surgeon in Stratford. She received physical therapy through Dr. Dworken's offices for approximately three months. She then had one follow-up visit in June of 1996 at which time she was discharged from his care with a 5-6 percent disability of the thoraco-lumbar spine.

The plaintiff testified that she has continued to have daily low back pain as a result of her injuries. The plaintiff's back pain is such that it prevents her from ever being comfortable. It precludes her from working out at a gym. It also restricts her daily activities. She testified that she takes Advil for her back pain virtually every day.

After two hours of deliberations, the jury entered a verdict in favor of the plaintiff. The jury awarded the plaintiff \$4,023.54 in economic damages for her medical bills. The jury awarded the plaintiff \$106,000 in non-economic damages. The jury then found the plaintiff to have been 20 percent comparatively at fault for the accident, bringing the net verdict to \$88,018.83. With offer-of-judgment interest and costs, the total judgment was \$127,601.22.

Allstate Insurance Company was the carrier for the defendant. Allstate declared the trial a DOLF file at \$6,000. The plaintiff had filed an offer of judgment in the amount of \$17,500. Allstate refused to offer more than \$6,000 on the file prior to trial.

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

#### **MEDICAL MALPRACTICE:**

##### **Failure to timely diagnose colon cancer;**

##### **SETTLEMENT OF \$1,350,000.00.**

In the case of *Richard Renza v. Dr. Doe*, Docket No. CV 99-01560385, filed in the Superior Court for the Judicial District of Waterbury, the parties settled for \$1,350,000.00 approximately three months after the complaint was filed.

Between June, 1994 and April, 1999 the defendant, a Danbury internist/cardiologist, treated the plaintiff, age 60 at the

time of settlement, for cardiac problems and matters related to his general health. Early in the doctor/patient relationship the physician conducted fecal occult blood tests on the plaintiff. When the doctor changed his affiliation to another medical group, his records indicated his periodic intentions to conduct tests on the plaintiff for colon cancer. Those tests were not performed. The doctor never suggested to the plaintiff that he undergo a sigmoidoscopy or colonoscopy. Throughout the entire five-year relationship, the plaintiff's blood tests revealed anemia.

In late 1996, the plaintiff began to experience chronic fatigue, which he reported to the doctor. The doctor dismissed it as secondary to stress. By early 1999, the plaintiff was so dissatisfied with the doctor's lack of attention to his physical complaints, that he switched physicians. In June, 1999, the plaintiff's new physician performed an annual physical examination on him which revealed a tumor in the left colon at 23cm. Subsequent tests revealed metastatic cancer to the lung.

In the lawsuit, the plaintiff claimed the defendant negligently failed to annually conduct fecal occult blood tests and to suggest that he undergo a sigmoidoscopy or colonoscopy. The plaintiff also alleged a failure to perform follow up testing on his chronic anemia, a potential sign of colon cancer. The location of the subsequently diagnosed cancer was such that it would have been diagnosed by a sigmoidoscopy.

Following written discovery, the plaintiff filed an offer of judgment for \$1.5 million dollars. The case settled for \$1.35 million dollars.

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

#### **SETTLEMENT:**

##### **High speed chase;**

##### **28-year-old female;**

##### **multiple orthopedic injuries and post-traumatic stress disorder;**

##### **SETTLEMENT OF \$1,000,000.00.**

In the case of *Erika Raposh, et al v. State of Connecticut, et al*, No X01-CV-97-0152128-S, filed in the Superior Court for the Judicial District of Hartford at Hartford and transferred to the Complex Litigation Docket in Waterbury (Hodgson, J.), the parties settled shortly before trial for \$1,000,000.00.

On August 23, 1995, at approximately 8:30 p.m., the plaintiffs, Erika Raposh, Tracey Capron and Patricia Henry were traveling in Ms. Capron's car northbound

on Interstate 95 from their homes in Westchester County to Foxwoods Casino. Earlier that evening, the Connecticut State Police received a complaint from a bar in Old Lyme, Connecticut, that two men were harassing customers and causing a disturbance. Old Lyme constables were dispatched to the bar and observed that both men were visibly intoxicated. The constables spoke with the men outside the bar, calmed them down, and determined that the bartender did not wish to pursue any formal charges. The constables told both men to stay out of the bar and not to drive their vehicle.

Connecticut State Trooper Karen Nixon then responded to a call from the bar. When she arrived, she engaged in a verbal altercation with the two men. The constables calmed the men back down and left the scene. Trooper Nixon, however, remained outside the Ocean Spray Café to monitor the men. She then watched the men get into their car and drive away from the bar. Trooper Nixon made no effort to stop them from driving. Instead, she followed them in her car and radioed for assistance. After observing the car cross the center line twice, she signaled the driver to pull over, which he did. As Trooper Nixon approached the car on foot, the driver sped off.

Trooper Nixon then began a pursuit which reached speeds of 85 mph on Route 156 in Old Lyme, a local road with one lane in each direction. At the end of Route 156, State Trooper Kevin Slonski attempted to block the fleeing vehicle. The driver refused to stop and went onto the grassy portion of the shoulder to get around Trooper Slonski. A second blocking attempt also failed and the fleeing driver entered Interstate 95 northbound. The distance from the bar to Interstate 95 was approximately 3 miles. The pursuit then continued onto I-95 northbound at speeds in excess of 100 mph. After traveling approximately 2 miles on Interstate 95, the fleeing vehicle collided with the rear of the plaintiffs' car. None of the plaintiffs were wearing seatbelts and all three were ejected from the car. The driver of the fleeing vehicle was later determined to have a BAC of .23. The car that he was driving was not covered by insurance and he had no insurance of his own.

At the time of the accident, Erika Raposh was 23 years old. As a result of the accident, she sustained numerous injuries including a concussion; injuries to her seventh and eighth cranial nerves; injuries to her ribs, left foot, left knee, left

thumb and right shoulder; memory loss; and lacerations and abrasions to many parts of her body. Several months after the accident, she was also diagnosed as suffering from depression and post-traumatic stress disorder as a result of the accident. Since Ms. Raposh's New York orthopedic physicians were unwilling to assess permanent disability ratings for her injuries, she was evaluated by Matthew Skolnick, M.D. of Danbury, Connecticut. Dr. Skolnick determined that she sustained a 25% permanent disability of her right arm, a 20% permanent disability of her left thumb, an 11% permanent disability of her left leg, and a 10% permanent disability to her left foot as a result of the accident. Kimberlee Sass, Ph.D. also evaluated Ms. Raposh to confirm the cognitive deficits that she sustained as a result of her physical and psychological injuries. Her medical specials totaled approximately \$150,000.00. Despite her young age, Ms. Raposh had a long history of medical problems which pre-dated this accident and underlying personality issues which affected her symptomatology.

Immediately before the accident, Ms. Raposh had been employed as an administrative assistant at a publishing company in New York for approximately one year. She did not return to her job after the accident, but was sporadically employed by numerous other companies in comparable positions following the accident. Gary Crakes, Ph.D. was retained to calculate her lost wages and earning capacity as a result of the accident.

The plaintiff, Tracey Capron, was also 23 years old at the time of the accident. As a result of the accident, she sustained a fractured nose, a cervical sprain, a lumbar sprain, and multiple contusions, abrasions and bruises. Following the accident, she also began a short period of psychological counseling because of increased anxiety which she experienced while traveling in a car as a passenger. As a result of her injuries, Tracey Capron incurred approximately \$3,500.00 of medical expenses. She was not employed at the time of the accident and did not have a lost wage or earning capacity claim.

The plaintiff, Patricia Henry, was 49 years old at the time of the accident. As a result of the accident, she was diagnosed with a fractured pelvis, a cervical sprain, a laceration on her neck, multiple contusions, abrasions and bruises. Dr. Skolnick assessed that she sustained a 5% permanent disability of her right leg as a result of the injury to her pelvis. She was also

unemployed at the time of the accident and did not have a lost wage or earning capacity claim.

The plaintiffs bypassed the Claims Commissioner and filed suit directly against the State of Connecticut pursuant to the provisions of C.G.S. Sec. 52-556. In that suit, they also filed a separate count against Trooper Nixon which alleged that this accident was caused by her reckless conduct. The State of Connecticut and Trooper Nixon brought an apportionment claim against the driver of the fleeing vehicle. The plaintiffs then pled over against the apportionment defendant. Plaintiffs retained and disclosed Dr. Leonard Territo, a former patrol officer and a professor of criminology and Professor Geoffrey Alpert as their experts on issues of liability and causation.

The State of Connecticut was insured for this type of claim by a \$500,000.00 per occurrence insurance policy in excess of a self-insured retention of \$500,000.00. The State was also covered by a policy which provided excess coverage for amounts above \$1,000,000.00. Shortly before trial, the plaintiffs settled their claims against the State of Connecticut and Trooper Nixon for the total payment of \$1,000,000.00. Of this amount, \$960,000.00 was paid to Erika Raposh. The defendants claimed that Tracey Capron and Patricia Henry had been fully compensated for their injuries from other sources since they previously received insurance settlements which totaled approximately \$15,000.00 and \$155,000.00, respectively. Ms. Capron and Ms. Henry each received an additional \$20,000.00 in settlement of their claims in this action.

Submitted by Patrick J. Fitzgerald, Esq. and S. Dave Vatti, Esq. of Zeldes, Needle & Cooper, P.C., Bridgeport, Connecticut, counsel for the plaintiffs.

#### **SETTLEMENT:**

**Medical malpractice;  
Massachusetts wrongful death;  
failure to diagnose cardiac  
contusion of 16 year old male;  
SETTLEMENT OF \$750,000.00.**

In the case of *Doe v. Roe*, the parties settled for \$750,000.00.

On September 12, 1994, at approximately 6:40 p.m., the plaintiffs' decedent, age 16, was driving his parents' 1984 Dodge pickup truck when it struck a tree in a rural town in Massachusetts shortly after leaving his home. As a result of the collision, the plaintiffs' decedent sus-

tained blunt trauma to the chest from striking the steering wheel hub, lacerations to his head and injuries to his legs and knees.

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

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

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

The defense presented four experts that controverted the testimony of the plaintiffs' experts. Specifically, they

claimed that repeat EKGs and cardiac enzyme studies would not have revealed the cardiac contusion and that since the contusion would have gone undetected, the outcome would have been the same regardless of whether the patient was hospitalized in a cardiac unit for a few days.

The plaintiffs then identified and called a rebuttal medical expert who is internationally known for his studies on the diagnosis and treatment of cardiac contusions. The plaintiffs' rebuttal expert, a board certified cardiologist, testified that he had presented the results of his studies on the diagnosis of cardiac contusions to the national medical community approximately one year before the accident at issue. He testified, from his studies, that the defense experts were wrong and that the standard of care in 1994 required EKG's and cardiac enzyme tests, which would have resulted in a diagnosis of the condition that eventually caused the plaintiffs' decedent's death.

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

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

ually as a plaintiff.

The case was submitted to a private mediator in Boston who recommended settlement in the amount of \$450,000.00. Despite the limitations on recovery in a wrongful death case in Massachusetts, the plaintiffs rejected this settlement proposal and the case was scheduled for trial. Shortly before the trial was to commence, the case settled for \$750,000.00.

Submitted by Robert I. Reardon, Jr., Esq., Mark A. Dubois, Esq. and Scott D. Camassar, Esq., of The Reardon Law Firm, P.C., New London, Connecticut, counsel for the plaintiffs.

**SETTLEMENT AND VERDICT:  
Motor vehicle accident;  
wrongful death of 38-year-old male;  
TOTAL RECOVERY OF  
\$1.24 million.**

In the case of *Anitha Guillaume, Administratrix of the Estate of Mecane Joseph v. Wheelers Auto Service, Inc., et al*, Docket No. CV 97-0405593 S, filed in the Superior Court for the Judicial District of New Haven at New Haven, defendants William Wronski and his employer R&M Leasing, Inc. settled with plaintiff for the sum of \$505,000.00 before opening statements. On November 30, 2000, following trial, the jury returned a verdict against the remaining defendants, Raven Dotson and his employer Wheelers Auto Service, Inc., in the amount of \$740,512.50. The total recovery was \$1,245,512.50.

Mecane Joseph, a 38-old-year old man, was a passenger in a tow truck driven by Dotson, an employee of Wheelers Auto Service. Dotson was towing the decedent's vehicle. As Dotson was driving northbound on State Street in Hamden, he collided broadside into a tractor trailer truck driven by the defendant Wronski and owned by the defendant R&M Leasing.

The tractor trailer truck had exited a driveway and was making a wide turn across both the northbound and southbound lanes of State Street, effectively blocking the road. Just before impact, Dotson veered the tow truck to the left, so that the passenger side of the vehicle bore the brunt of the crash. Within minutes Hamden Fire Department was at the scene. Dotson was extricated sustaining minor injuries. Joseph was crushed to death.

Joseph was a cab driver for Stamford Taxi. He was not paid a salary, but earned income from his fares plus tips, less expenses. Because Joseph had not filed tax returns for several years before his death and had no financial books and records,

Owen Bregman, CPA was hired to research financial issues and file the necessary returns. Mr. Bregman concluded that Joseph's net income was \$23,000 per year, and the present value of lost earning capacity was \$380,000.00. Joseph was unmarried with three minor children from three different mothers. He supported his children to the best of his financial ability, and maintained good relationships with them. At the time of Joseph's death, he was residing with another girlfriend.

After the selection of the jury, but before evidence, plaintiff settled with Travelers Insurance, the insurer of the tractor trailer, for \$505,000.00. The best offer from Providence Washington, the insurer of the tow truck defendants, was \$300,000.00.

The investigating police officer testified as an expert witness as to sight lines, braking distances, that tractor trailer trucks regularly entered and exited State Street making wide turns, and that Dotson's minimum pre-braking speed was 46 mph, in a 45 mph zone. One eyewitness testified that immediately prior to Dotson slamming on the brakes, his head was turned to the right, apparently in conversation with his passenger. A contested issue was whether Joseph had conscious pain and suffering. Dr. McDonough, of the Chief Medical Examiner's Office, testified that Joseph died from traumatic asphyxia which is not instantaneous, that there were no injuries to the head which would have rendered Joseph unconscious, but that no pathologist could conclude from an autopsy alone whether Joseph was conscious post impact. Plaintiff argued that since a person's natural reaction to an impending collision is to protect the face, and that Joseph's left arm was found outstretched above his head and out the broken window of the tow truck post impact, a reasonable inference could be made that Joseph was conscious and struggling to escape before he died.

Dotson's defense was that the cause of the accident was the tractor trailer truck's wide turn. He also contended that the wide turn was made at a location immediately after a bend in the road, which limited Dotson's sight line, and that Dotson was not speeding. In support of these defenses, defendant's counsel used aerial photographs and elicited testimony from two eyewitnesses. Regarding damages, defendant's counsel argued that given a 23% tax bracket and Joseph's necessary expenses, his economic loss was minimal.

The jury verdict included economic damages of \$112,350.00 and non-economic damages of \$875,000.00. The jury allocated 75% liability against the tow truck driver and 25% against the tractor trailer driver. Pursuant to 52-572 h(f), the verdict against Dotson and Wheelers was 75% of \$987,350.00, equaling \$740,512.50.

Submitted by Daniel A. Benjamin, Esq., of Benjamin & Gold, P.C., Stamford, Connecticut, counsel for the plaintiff.

#### **JURY VERDICT:**

**Automobile accident;**

**31-year-old male;**

**5% cervical disability; 3% lumbar disability;**

**VERDICT OF \$50,000**

**Plus offer-of-judgment interest.**

**CARRIER: ALLSTATE**

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

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

On September 16, 1996, the plaintiff was driving his vehicle on Silver Lane in East Hartford. When he slowed to turn into a convenience store, his vehicle was hit from behind by defendant's vehicle. The plaintiff was taken to Hartford Hospital and had follow up care with a chiropractor for soft tissue, neck and back injuries.

Upon completion of chiropractic care, the plaintiff received a 5% partial disability to the lumbar spine and a 3% disability to the cervical spine. Plaintiff's medical bills totaled \$5,112.81. The chiropractor testified at trial as did the defendant's IME doctor, Myron Schaffer, an orthopedic surgeon. The cross-examination of Dr. Schaffer had an adverse effect on his credibility.

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

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

#### **SETTLEMENT:**

**Motor vehicle rollover accident;  
intoxicated driver(s);**

**33-year-old male passenger;**

**4 week coma;**

**12% impairment right shoulder;**

**10% impairment both lungs;**

**SETTLEMENT OF \$855,000.00.**

In the case of *Sean P. Dee v. Auto World Automotive Superstores, Inc., et al*, (DOA 2/11/00), filed in the Superior Court for the Judicial District of Hartford, the parties settled before trial at a private mediation before Tom Barrett on June 14, 2001 for \$850,000.00, plus \$5,000 for Dram Shop (9/21/01). The speedy trial track was assisted by the Langenbach, P.J. "counsel contract" method of pretrial scheduling.

On February 11, 2000 at approximately 10:20 p.m., the plaintiff, Sean P. Dee, was a passenger in a Kia Sportage owned and operated by Barbara Hunsecker traveling in a northerly direction on Interstate 91, near Exit 42. A Nissan Maxima owned by Auto World Automotive Superstores of Hartford and operated by Joseph Iarrusso, was traveling at speeds in excess of 90 miles per hour (120 mph by one witness' account) and weaving in and out of traffic. Iarrusso lost control of the Maxima and spun out of control. The defendants denied contact between the two vehicles. There was no physical evidence of contact between the two vehicles. All passengers in the Kia testified that contact did occur and one disinterested witness observed contact between the two vehicles. Regardless of whether contact occurred, the Maxima's actions causing the Kia to be vaulted over the guardrail and tumble down the embankment, finally striking a tree. Iarrusso fled the scene, but was arrested a short time later in South Windsor and charged with driving while intoxicated. Earlier in the evening, Iarrusso had been consuming alcohol with some of his co-workers at the Gold Club in Hartford, an exotic dancing establishment, located close to Auto World.

On February 2, 2000, Iarrusso had been hired by Auto World as a sales floor manager. As a mutual benefit, Iarrusso was given a demonstrator automobile, the Maxima, by Auto World, with full permission to operate.

The sticker price on the Maxima remained in the window, and if anyone at the Gold Club or anywhere else outside Auto World desired to purchase the Maxima, Iarrusso would have sold the car to that individual. Auto World claimed, as

indicated in the employee handbook, that the use of the demonstrator was to be used only for commuting, and incidental stops.

Approximately one week before the accident, a fax request was sent from Auto World to the "home office" in Albany to request and obtain a copy of Iarrusso's motor vehicle record. The motor vehicle record indicated 5 speeding violations, 3 accidents, and 2 suspensions of Iarrusso's license. Additionally, Iarrusso had been convicted of Reckless Driving and spent seven months in prison for insurance fraud.

A few days before the accident, Michael Lia in Albany, the son of Auto World's "owner", William Lia, Sr., saw Iarrusso's motor vehicle report and instructed his secretary to call Auto World with instructions to take the demonstrator plate from Iarrusso. Auto World's office manager then communicated these instructions to the acting general manager of Auto World. The general manager refused to take Iarrusso's plate. Iarrusso continued to operate the Maxima until the accident on February 11, 2000.

As a result of this accident on February 11, 2000, Dee was severely injured and was taken to Hartford Hospital by ambulance, where he remained until March 22, 2000. Upon arrival at the hospital, he was diagnosed with a multitude of injuries including traumatic brain injury, right lung contusion, right hemothorax, right lung empyema, staph pneumonia with bacteremia, multiple rib fractures, right scapula fracture, blunt abdominal trauma with a liver laceration, and respiratory failure. Dee spent four weeks in the Intensive Care Unit in a medication-induced unconscious state. He was maintained with a ventilator and a feeding tube. While in the ICU, Dee had to have emergency surgery to relieve the right lung empyema and a tracheotomy. Hunsecker and her husband, David Hunsecker, were also taken to Hartford Hospital where it was revealed that Barbara Hunsecker had a blood-alcohol content of approximately .10.

As a result of the accident, Dee's specials amounted to \$165,729.35, including 12 weeks lost from work. He underwent intensive rehabilitation, including several months of physical therapy. Dee has been given two permanency ratings: (1) 10% of both lungs and the whole person secondary to chest wall injury by Dr. Michael Conway; and (2) 12% of the right shoulder by Dr. Kevin Shea.

Dee is a business/sales analyst for the

Hartford Insurance Group in Hartford where he has worked since June, 1999. Before the accident, Dee was a very active 33-year-old, hearing-impaired man, with a B.S. from Rochester Institute of Technology and a M.B.A. from Northeastern University. In addition, he was a very accomplished hockey player, having represented the United States in several "deaf Olympics" around the world, including captain of the team one year and being part of a gold medal team. He played varsity hockey while in undergraduate and graduate school. He was also very active in local hockey leagues as a coach and as a player. Dee was also an accomplished golfer and enjoyed traveling around the country and abroad.

As a result of this accident and subsequent hospitalization, Dee has significant scarring on his back/right side, upper lip and the back of his neck. Dee has testified during deposition that the scarring causes him significant embarrassment and humiliation.

As a further result of the accident and his permanent disability, Dee's participation in his hockey and golf activities have been severely limited. Dr. Walter Borden opined in a written report certifying the extent of consequent mental and emotional distress and loss of enjoyment of life's activities.

After a lengthy mediation with Litigation Alternatives in West Hartford before Attorney Thomas Barrett, the parties reached a settlement: \$750,000.00 from Universal Underwriters on behalf of Iarrusso and Auto World and \$100,000.00 from HIG on behalf of Hunsecker for a total of \$850,000.00.

The Gold Club did not participate in the mediation. One of the major problems with arriving at a settlement with the Gold Club was the statutory exposure of \$20/50,000 under the dram shop statute. That count finally settled on the eve of trial on June 21, 2001 (consolidated with Hunsecker's case) for \$5,000 over the underlying settlement.

Submitted by John L. Bonee III, Esq., with assistance from his law partner Eric H. Rothausser, Esq., both of Bonee Law Offices, LLP, counsel for the plaintiff.

#### **JURY VERDICT:**

**Medical malpractice;  
VERDICT OF \$1,600,000.00.**

In the case of *Kittie Labanca, et al v. Hamden Internal Medicine, et al*, Docket No. CV 96 0388716S, filed in the Superior Court for the Judicial District of New Haven, a jury returned a \$1.6 million ver-

dict as a result of the 1994 death of a man diagnosed with heart disease five years earlier.

John Labanca was a 53-year-old married father of three grown children at the time of his death of a heart attack on May 7, 1994. Although the medical records reflected that the plaintiff had been told five years earlier that his electrocardiogram showed an abnormal condition, there was a claim that he had not been adequately advised of the importance of the condition. The estate claimed that the failure of the defendant to provide Mr. Labanca with the name of a specific cardiologist or to perform any further cardiac related testing was an indication that the defendant did not adequately advise Mr. Labanca of the importance of the abnormal EKG.

John Labanca, a veteran of the US Army Reserve, had worked for Bridgeport-based Swan Engraving for more than 25 years prior to his death. During the 15 years prior to his death, Mr. Labanca had suffered a number of work injuries that left him significantly disabled.

On June 18, 2001, the six-member jury ruled that Mr. Labanca's physician, Dr. Charles Rethy, and the physician's Hamden Internal Medicine, were liable for Mr. Labanca's death.

The trial before Superior Court Judge Clarence Jones lasted two weeks. Jurors deliberated a total of 5 hours before returning the verdict. The verdict included \$300,000 for loss of earnings and \$1.3 million for loss of enjoyment of life's activities and death.

Atty. James D. Horwitz of the Bridgeport law firm Koskoff, Koskoff & Bieder represented the plaintiff. Atty. Michael Neubert of the New Haven law firm Neubert, Pepe & Monteith represented the defendants.

#### **JURY VERDICT:**

**Automobile accident;  
16-year-old female;  
myofacial pain syndrome;  
5% ppd of neck and back;  
VERDICT OF \$210,566.30**

In the case of *Theresa Asarito v. Theodore Linstrum*, Docket No. CV96-0325825S, filed in the Superior Court for the Judicial District of Danbury, the jury awarded the plaintiff \$210,566.30 on July 5, 2001. The defendant's insurance carrier, Allstate Insurance Company, offered only \$4,400.00 before trial.

On October 21, 1994, the 16-year-old plaintiff was involved in a two vehicle col-

lision on White Street in Danbury. 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 exited the parking lot, intending to turn left 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.

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 in the next six weeks, 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. 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." Dr. Lentini's bill was \$3,905.00.

In May, 1996, the plaintiff began treating with Dr. Ronald Manoni, another chiropractic physician. The plaintiff said 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. 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 Daniel Fish, M.D., an orthopedic surgeon and Randy Trowbridge, M.D., a physiatrist. 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. In August, 1996, the plaintiff was treating with Dr. Manoni for back and neck discomfort; however, she testified that she "was having a good day" in early August and decided to go roller blading with her friends. She fell onto her right knee, tearing her anterior cruciate ligament (ACL). 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 prior to that visit 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 treated the plaintiff regularly. In addition to prescribing medications, he 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 myofascial pain syndrome and prescribed physical therapy and trigger point injections.

Neither Dr. Fish nor Dr. Trowbridge assigned a rating to the plaintiff, but both were disclosed as to the fact that the plaintiff had suffered a permanent injury in this collision and that she would likely require future treatment as a result of these injuries. Both Dr. Fish and Dr. Trowbridge testified that the plaintiff suffered soft tissue injuries in this collision leading to myofascial pain syndrome; this condition is caused by injury to myofascia or covering of the muscles and ligaments of the spine. Dr. Trowbridge testified that he was able to objectively diagnose this condition by manually palpating the plaintiff's muscles and ligaments and by temporarily relieving the plaintiff's pain with trigger point injections. Dr. Trow-

bridge'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.

The plaintiff argued that the defendant had the right to an independent medical examination but did not do so. 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's life expectancy as a 23 year old white woman was 57.4 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., of Silver, Golub & Teitell, LLP, counsel for the plaintiff.

## **JURY VERDICT:**

**Medical malpractice; attempted vaginal birth after cesarean; birth of child with cerebral palsy; VERDICT OF \$2,500,000.00; Verdict date: September 5, 2000.**

In the case of *Tammy Bosco ppa Jessica Bosco v. Sally J. Irons, M.D., et al*, Docket No. CV96 0557611 S, filed in the Superior Court for the Judicial District of Hartford at Hartford, the jury returned a verdict in favor of the plaintiff in the amount of \$2,500,000.00.

The plaintiff, a 26-year-old mother, became the patient of the defendant doctor for purposes of an attempted VBAC (Vaginal Birth After Cesarean) for her second pregnancy. The plaintiff's first pregnancy required a cesarean because of pre-eclampsia. The second pregnancy proceeded without incident to the approximate due date at which time mother was admitted to the hospital because of headaches. Induction was begun with prostaglandin gel. Her water broke before noon on February 4, 1994. At 6:00 p.m., the plaintiff started to receive Pitocin to augment the labor. At 6:20, pursuant to a standing order, the plaintiff received Stadol, which lasted about an hour. At 7:30, the nurse called the doctor because of a change in the fetal heart monitors to now show "persistent variables." At 8:05, the nurse again called the doctor because of complaints of pain. The doctor immediately came over and conducted an examination, which showed the patient 5 centimeters dilated with tenderness over her whole abdomen. The defendant doctor stayed in the room and monitored the situation until 8:35 when the order went out for an emergency C-section. The baby was delivered at 8:58. An issue existed as to whether or not the mother requested a cesarean when the doctor showed up after 8:05.

Delivery was hampered because the baby had kicked its way out of the uterine scar and into the abdomen. The child was subsequently diagnosed with mild cerebral palsy, including fine and gross motor deficiencies, ocular dysmetria, and a problem with drooling.

A medical economist testified that the

*continued on page 101*

## How to Create A Winning Documentary Record

*continued from page 69*

and includes data compilations such as computer files and e-mail. *See* D. Conn. L. Civ. R. 39. However, the Practice Book does not contain any definition of the term “document” that applies to discovery requests in actions pending in state court. Therefore, any document request that you serve in a state court action should contain a definition of the term “document” that, like the definition of that term in the Federal Rules, is broad enough to call for the production of any e-mails, computer files or similar data compilations.

When you serve document requests, you should calendar the date established by federal or state court rule for responses. If responses are not timely provided, promptly contact opposing counsel to seek compliance. If you do not obtain documents as requested, and no timely objections have been filed, file a motion to compel disclosure or for other appropriate relief. *See* Practice Book §13-14(b), Fed. R. Civ. P. 37 and Local Rule 9(d). Before filing a Rule 37 motion, comply with the requirement of a good faith conference to secure the disclosure without court action. In state court, consider initiating such a conference, even though not required. If objections have been filed, attempt to resolve the objections with opposing counsel. If you cannot reach an agreement concerning the objections, file a motion to overrule the objections and compel disclosure. *See* Practice Book §13-10(c), Fed. R. Civ. P. 37 and Local Rule 9(d).

### **From Third Parties**

Your opponent knows what documents your opponent has provided to you. But your opponent does not know what documents third parties have voluntarily provided to you (unless, of course, your opponent serves a request for production of such documents—a request which may or not be subject to a work product objection, depending on the circumstances of the particular case). Therefore, identify and contact third parties who are likely sources of documents relevant to your case, and ask them to voluntarily produce documents.

If third parties will not voluntarily produce requested documents, or if you are at all in doubt as to whether or not third parties have fully complied with your request for documents, serve a subpoena to compel the production of documents. Note, however, that if you obtain documents from third parties pursuant to subpoena, the Federal Rules mandate that prior notice of any such commanded

production of documents must be served on each party. *See* Fed. R. Civ. P. 45 (b)(1). Although no Practice Book provision specifically requires such prior notice of the commanded production of documents by subpoena, the better practice is to serve a copy of the subpoena upon opposing parties. *See* Practice Book §13-27(a) (“A party who desires to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. ... If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.”); and Practice Book §10-12 (“It is the responsibility of counsel ... filing the same to serve on each party who has appeared one copy of ... every paper relating to discovery, request, ... or similar paper.”).

Remember that third parties include governmental entities, and that you can obtain governmental records through freedom of information acts. *See, e.g.,* Conn. Gen. Stat. §1-19 and 5 U.S.C. §552. Of course, for many public records, such as documents recorded on the land records and records of municipal and state agencies, you may not need to comply with the formalities of the applicable freedom of information act.

If you obtain certified copies, you can take advantage of the authentication provisions of the Connecticut Code of Evidence (“CCE”) and the Federal Rules of Evidence (“FRE”). *See* CCE §§ 9-3 and 10-4, and FRE 902 and 1005. Conn. Gen. Stat. §1-14 provides that certified copies of public records may be admitted in evidence with the same effect as the original, and Conn. Gen. Stat. §1-17, provides that certified copies of public records shall be considered the same as originals for all purposes. Note also the hearsay exception for public documents in CCE §8-3(7) and FRE 803(8), and the procedure to prove the absence of a public record in FRE 803(10).

### **Supplemental Requests**

Under both the Practice Book and the Federal Rules of Civil Procedure, there is no specific limit on the number of document requests you can serve. As you take depositions and conduct other discovery, you may learn about additional documents that are relevant to your case. Follow up in writing with regard to requests made orally at depositions, and serve supplemental document requests as appropriate. Be aware that if you simply ask for documents informally rather than by proper request or motion, you have no remedy if opposing counsel does not produce the requested documents.

## Organize The Documents You Obtain

Once you obtain documents from your client, from the opposing party, or from third parties, it is important to organize them. Doing so early on will save time in the long run by allowing you to readily access the important documents relevant to your case.

At the very least, keep the documents you have obtained in appropriately labeled sub-files so that the sources of the documents are readily apparent later on to you and to anyone else working on the case. If the documents involved are voluminous, use a numbering system (such as Bates-stamping, or numbered stickers) to identify and, if appropriate, index the documents. It is virtually impossible to effectively use and keep track of a large number of documents without such a system. In addition, in a discovery dispute about whether a particular document was or was not produced, the use of such a system will help to prove what documents you produced or received.

### **Comply with Disclosure Requirements**

#### **In Federal Court Cases, Comply with The Automatic Disclosure Requirements**

In Federal Court in Connecticut, the automatic disclosure requirements of Fed. R. Civ. P. 26(a)(1) now apply. With regard to documents, the initial disclosure must include a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody or control of a party and that the disclosing party may use to support its claims or defenses. Be sure that you timely comply with this requirement. Compliance with Fed. R. Civ. P. 26(a)(1) is required at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the Rule 26(f) conference that initial disclosures are not appropriate.

### **Respond to Document Requests**

When you receive document requests from an opposing party, calendar the date for filing your objections and responses. Review the requests to determine which are objectionable on privilege or other grounds, and make sure that you file timely objections. *See* Practice Book §13-10 and Fed. R. Civ. P. 34(b).

Forward copies of the document requests to your client, and ask if the client is aware of any documents responsive to the requests other than those previously provided to you in connection with the matter. After you have gathered all documents responsive to the requests, determine which responsive documents are within the attorney-client, work product,

or other applicable privilege. Segregate all such privileged documents from the documents being produced, and keep them in separate and clearly marked sub-files so that they will not be inadvertently commingled with other documents and mistakenly produced. In Federal Court actions, prepare a privilege log as required by Local Rule 9(d)1. In State Court cases, provide a similar privilege log if requested.

Once you have assembled the documents to be produced in response to the requests, mark or specifically identify them in some fashion (by Bates numbers, numbered stickers, or otherwise), and keep them in a separate sub-file. This will help to avoid any dispute later on about whether or not a particular document was produced as required.

### ***Comply with The Continuing Duty to Disclose***

You have a continuing duty to disclose additional documents, as provided in Practice Book §13-15 and Fed. R. Civ. P. 26(e). Be sure you comply with these requirements. If you fail to do so and then seek to introduce into evidence at trial a document you have not disclosed, opposing counsel may have grounds to exclude that document from the trial record.

### ***Determine What Documents You Require for The Trial Record***

In a typical case, the documents you have obtained from the steps outlined above will be more voluminous than the documents you need for your trial record. Therefore, review the documents you have obtained to determine which documents you need to get into the record at trial. In determining which documents you need to get into the record, review the pleadings, focusing on each element of each cause of action and each defense. Double-check your discovery responses to make sure that you have disclosed all the documents you want to use, to the extent they are the subject of document requests.

Do not wait until shortly before trial to do this analysis. Before the discovery period ends, check to make sure that you have obtained all of the documents you require. Otherwise, you may realize on the eve of trial that you have a documentary hole in your case.

### ***Consider Requests to Admit to Avoid Evidentiary Issues***

You can avoid evidentiary issues at trial, and streamline the trial, by filing requests to admit not only as to facts, but also as to documents. See Practice Book § 13-22 *et seq.* and Fed. R. Civ. P. 36. For example, you can establish the existence, genuineness, and due execution of docu-

ments, and the requisite elements for the business records exception to the hearsay rule, through requests to admit (see FRE 803(6), CCE §8-4 and Conn. Gen. Stat. §52-180). If the opposing party does not make a requested admission and you prove at trial what the opposing party has refused to admit, you can also seek an award of the expenses incurred in making your proof, including reasonable attorney's fees. See Fed. R. Civ. P. 37(c)(2) and Practice Book § 13-25.

### ***Prepare Summaries of Voluminous Documents***

The contents of voluminous writings, recordings, or photographs, otherwise admissible, that cannot be conveniently be examined in court, may be admitted in the form of a chart, summary, or calculation, if the originals or copies are available for examination or copying, or both, by other parties at a reasonable time and place. See CCE §10-5 and FRE 1006. If you have voluminous documents, such as bank records, which can be more effectively presented at trial by a summary document, comply with these rules. Note that you must make the underlying documents, or copies of them, available to opposing counsel at a reasonable time and place before you can put the summary into evidence.

### ***Determine How You Will Get Each Document into Evidence.***

For each document you have decided to make a trial exhibit, determine the witness through whom you will introduce the exhibit, and anticipate any evidentiary issues related to that document. Research those issues, and be prepared to present appropriate authority to the court supporting the admission of the document, such as CCE and FRE references or applicable caselaw. Be mindful that the official commentary to the CCE includes references to relevant Connecticut cases you can cite to the court. At trial, provide copies of key cases to the court and, of course, to opposing counsel.

Likewise, anticipate evidentiary issues as to documents opposing counsel may want to put into the record at trial, and be prepared to present authority to the court concerning your objections, including the filing of a motion in limine, as appropriate.

### ***Make Your Documentary Record at Trial***

Prepare a list of all exhibits you intend to offer as evidence at trial, even if the court does not require that you do so. Then, determine with opposing counsel before trial which documents can be marked as full exhibits by agreement. Both the court and the jury will appreci-

ate the efforts of counsel to streamline the introduction of documents, which can be tedious if not handled properly.

At the appropriate time during trial, introduce into the record those documents which do not require witnesses for their introduction, such as certified copies of public records (see CCE §§8-3(7), 9-3, and 10-4, Conn. Gen. Stat. §§1-14 and 1-17, and FRE 803(8), 902, and 1005); responses to requests to admit and responses to interrogatories (see CCE §8-3(1) and FRE 801(d)(2)); and deposition transcript excerpts and other written statements by the opposing party (see CCE §8-3(1) and FRE 801(d)(2)).

Keep in mind the rule of completeness in Practice Book §13-31(a)(5), CCE §1-5, and FRE 106. CCE §1-5 provides that when a statement is introduced by a party, the court may, and upon request shall, require the proponent at that time to introduce any other part of the statement, whether or not otherwise admissible, that the court determines ought in fairness to be considered contemporaneously with it. It further provides that when a statement is introduced by a party, another party may introduce any other part of the statement, whether or not otherwise admissible, that the court determines ought in fairness to be considered with it. Practice Book §13-31(a)(5) has an analogous provision for deposition transcripts. FRE 106 provides that when a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought, in fairness, be considered contemporaneously with it.

If opposing counsel raises an objection based on the "best evidence" rule in CCE §10-1, remember that CCE §10-2 provides that copies are admissible unless a genuine question is raised as to the authenticity of the original or the accuracy of the copy, or it would be unfair under the circumstances to admit the copy. See also CCE §10-3, which describes the circumstances in which the original of a writing, recording, or photograph is not required. For the analogous Federal rules, see FRE 1002 to 1004. See also CCE §8-4(c) for admissibility of copies (rather than originals) of business records, and the exception to the best evidence rule for admissions of a party as provided in CCE §10-6 and FRE 1007.

Determine before trial through which witness you will introduce each exhibit for which you need a witness. If it is your own witness, be sure he or she is familiar with the document and knows what you will ask about it. If you intend to get a document into evidence through a hostile witness whose deposition was taken, in-

clude in your trial notebook for that witness the applicable transcript references supporting admission of the document so that they are immediately at hand in the event of a dispute.

As exhibits are put into the record as full exhibits, so indicate on your exhibit list. If you have marked exhibits only for identification, note that on your exhibit list. Before you finish with each witness, and before you rest your case or defense, make sure you have put into the record all of the documents you intended to put in the record. Also, make sure that the clerk's record of exhibits is the same as yours.

### **Some Practical Tips for Preparing and Using Documents at Trial**

- As you assemble the documents you intend to put into the record, check to make sure that you have redacted extraneous markings on the documents that were not on the documents as they were produced or received, such as your handwritten notes and fax transmittal information by which documents were conveyed to you. Also, make sure you do not inadvertently include any privileged documents with the documents you intend to put in the record.

- Make enough copies of all documents you intend to put into the record for the judge, opposing counsel, and your own file.

- Prepare a 3-ring notebook containing all of your proposed exhibits, with a list of your proposed exhibits in the front. Arrange the exhibits in chronological order, or in the order in which you intend to introduce them. Insert a numbered tab in the notebook before each proposed exhibit. Unless you intend to introduce documents you have not disclosed (and were not required to disclose), consider making copies of this 3-ring notebook available to the trial judge, the judge's clerk, and opposing counsel, before trial begins. At trial, such a 3-ring notebook is effective in helping you and, more importantly, the judge, to keep track of and read documents as witnesses testify about them.

- If a pretrial order requires you to submit a list of proposed exhibits before trial, keep in mind that you may be precluded from introducing documents not on that list. Consider adding to your list a category for documents subpoenaed for trial and a category for impeachment and rebuttal documents (without identification of specific documents).

- Include a section in your trial notebook that contains your opponent's responses to your discovery requests. If, at trial, your opponent seeks to put into the record a document which your opponent should have disclosed but did not, object to its admission on that ground.

- If a particular document is vital to your case, consider making an enlargement of it on poster-board, and displaying it on an easel during the trial.

Once you get a document into evidence, *use it*. If you have a jury trial, publish the document to the jury and make extra copies for the jurors to review, as appropriate, with the court's permission. Documents can only be compelling and persuasive evidence if they are obtained, organized, and then properly used at trial. ■

## **President's Notebook**

*continued from page 69*

by a columnist for *The San Diego Union-Tribune* and published of all places, in the *New Haven Register* on May 23, 2001.

Not to be outdone, our Connecticut writers are getting into the act. On May 16th, Michele Jacklin of the *Hartford Courant*, in an article about this year's legislative session stated:

"We begrudge (healthcare workers) a 67-cent-an-hour raise, but we don't begrudge ambulance-chasing lawyers charging \$350 an hour so that they can bollix up our court system with frivolous lawsuits."

As recently as last night, a lobbyist for the HMO industry stated on ABC that the McCain-Kennedy Bill which would allow patients wrongfully denied treatment to sue HMO's was nothing more than a trial lawyers protection bill.

These are not isolated comments. The public is continuously bombarded by this type of insidious propaganda and unless we take the strongest steps to counteract it, we will continue to lose the battle in the arena of public opinion.

When he spoke to us at last year's annual meeting Joe Mengacci stressed our obligation as lawyers to not only respond to these distorted and misleading articles swiftly, but also to undertake a grass roots effort to inform the public in general and our clients in particular, of the real facts—that trial lawyers protect us from corporate tyranny; that trial lawyers challenge the erosion of our individual rights and attempts to limit access to the courts; that trial lawyers obtain fair and reasonable compensation for our injuries; not government, not industry, but trial lawyers!

So what do we, as an organization pro-

pose to do about this situation?

We will move forward with the initiative begun last year during Joe's tenure to encourage grass roots information efforts from individual and firms such as a firm newsletter. CTLA will be glad to assist any one of you to find resources to help you compile publications from your firm to your clients which help get our message across.

We'll intensify our efforts to place judges and CTLA members on radio and television to get our message across and engender respect and appreciation for the civil justice system.

We will work with authors of pro civil justice books, such as the soon-to-be-printed *In Defense of Tort Law* by Suffolk Law School Professor Michael Rustad, to publicize their works on TV and radio and in the newspapers.

We will sponsor an inaugural civil justice education event targeted to newspaper and broadcast reporters and editors.

Prior to the 2002 legislative sessions, we will publicize our legislative agenda, to leverage radio and television appearances and newspaper opinion pieces regarding consumer rights legislation.

We will work with the American Trial Lawyers Public Affairs Office to determine the best strategies and tactics to get our message across to the public.

We will be asking you members to tell us about your most egregious cases as the basis for eliciting feature stories about the way the civil system brings justice to victims. Because that is the way you get the media's attention—relating issues to individuals with whom the public can identify.

We will continue to support and broaden those outreach programs which place trial lawyers in the communities. The People's Law School, the Bicycle Helmet Program, the Student Trial Program and the Speaker's Program.

We will use modestly priced paid advertising to call public attention to CTLA's website. We will regularly update that website with consumer safety information, especially related to current topics like Ford and Firestone.

I know Judge Robert Holzberg has put judicial independence among his top priorities as President of the Connecticut Judges Association. We will be working with the Connecticut Judges Association to develop print materials and other means to foster an appreciation for independent judiciary and oppose those forces who would seek to erode judicial independence. So, Judge Holzberg, we are with you there 100 percent.

We will intensify our efforts to broaden our membership. Just last year the Board of Directors established a young law-

*continued on page 111*

# Making The Most of The CTLA ListServ

By Douglas W. Hammond

In this issue, the summary of online message is devoted exclusively to lien reimbursement issues. It was prepared from selected messages posted to the CTLA e-mail discussion group between the fall of 2000 and mid-June 2001. More messages have surely been added since. To stay on top of these ongoing discussions, you may wish to join. Contact Diana Roe at [droe@ct-tla.org](mailto:droe@ct-tla.org) or visit <http://lyris.depoconnect.com/scripts/lyris.pl?join=cttlamembers>

We start with two very similar inquiries:

*Q. I have received a letter from Primax Recoveries, on behalf of PHS, arguing that ERISA preempts the Collateral Source statute whether the plan is self-funded OR insured. This is a new approach. The essential argument is that ERISA's savings clause allowing states to regulate insurance does not apply to 52-225c because that statute does not specifically regulate insurance. Have you had any experience with this issue?*

—John A. Collins III,  
[jjcollins@sswbagg.com](mailto:jjcollins@sswbagg.com)

*Q. Auto accident. My client's medical bills were paid by PHS, his group health ins. provided by his employer. ... PHS is serviced by Primax who claims that although PHS is not self funded, that it is an insured plan subject to ERISA. Primax claims that it has a valid lien based upon recent US Supreme Court cases. ... Any advice?*

—Jane Holler, [janeholler@aol.com](mailto:janeholler@aol.com)

A. PHS has tried this nonsense with me as well. I have written back citing 52-225c and told them I would not honor their "alleged" lien as it violates public policy. I have seen their non-ERISA "plan language" and it is garden variety subrogation language. At one point I KeyCited the statute and found some superior court cases rejecting this type of subrogation claim based on the statute. According to the Appellate Court, 52-225c is strong public policy to protect Connecticut residents. *Pajor v. Town of Wallingford*, 704 A.2d 247, 249+, 47 Conn.App. 365, 366+ (Conn. App. 1997) I have told PHS that they would have to sue and if they did, I would counterclaim a CUTPA violation of statutory public policy.

—Joseph P. Secola,  
[JPSECOLALAW@aol.com](mailto:JPSECOLALAW@aol.com)

A. I filed a class action complaint against PHS for this nonsense last November. The caption is attached hereto. Their position flies in the face of insurance directives from the commissioner prohibiting reimbursement in non-ERISA situations. Let me know if any plaintiff has repaid the lien based on this Primax letter and I'll add them to the case ...

—Mike Stratton, [mstratton@koskoff.com](mailto:mstratton@koskoff.com) [attachment omitted here, see *Toms v. Physicians Health Services*, pending in the Judicial District of Fairfield at Bridgeport]

A. To those of you dealing with a request for reimbursement where the ERISA plan is not self funded, I attach a form response that I drafted. It debunks their analysis of ERISA legislative intent and history. Good luck out there.

—Mike Stratton,  
[mstratton@koskoff.com](mailto:mstratton@koskoff.com)

[Mr. Stratton's attached letter follows]  
Dear Primax, PHS, etc.:

In your last letter you admit that the plan you administer is not self funded, but rather is a plan of "insurance". Despite that admission, you claim that you are entitled to reimbursement out of the proceeds of my client's third party tort settlement for benefits paid under your insurance plan. Your position is completely untenable and clearly made in bad faith given 1) the controlling precedent of the U.S. Supreme Court, and 2) operative directives of the State of Connecticut Insurance Commissioner.

First, as to Supreme Court precedent, you claim that two U.S. Supreme Court decisions support your position that ERISA preempts state anti-subrogation statutes even where the plan is not self funded. Neither of these cases, however, has anything to do with anti-subrogation statutes, and both predate the controlling precedent of *FMC v. Holliday*, 498 U.S. 52 (1990).<sup>1</sup> In *FMC*, the U.S. Supreme Court ruled that anti-subrogation statutes such as C.G.S. section 52-225c directly regulate insurance and are not preempted by ERISA: "[a state anti-subrogation statute] directly controls the terms of insurance contracts by invalidating any subrogation provisions they contain.... This returns the matter of subrogation to

state law. Unless the statute is excluded from the reach of the savings clause by virtue of the deemer clause, therefore, it is not pre-empted". 498 U.S. at 61.

In *FMC*, the court held that only self funded ERISA plans could avoid state anti-subrogation laws. The Court reasoned that self funded plans were not insurance plans, and the savings clause only saved those state laws which regulated insurance plans: "State laws that directly regulate insurance are "saved" but do not reach self funded employee benefit plans because these plans may not be deemed to be insurance companies.". 498 U.S. at 61. In the present instance, you readily admit that your ERISA plan is not self funded and is an insurance plan. As such the rule of *FMC* applies and C.G.S. Section 52-225c is fully operative. In other words without running afoul of clear precedent from the highest court of the land, YOU MAY NOT REQUEST REIMBURSEMENT.

Finally, as you are aware, the Insurance Commissioner of the State of Connecticut has issued two directives, HC-40 and HC-40a, both of which expressly prohibit requests for reimbursement. The directives expressly state that C.G.S. Section 52-225c regulates the content of insurance policies, and that it is improper for an HMO or other health insurer to request reimbursement out of personal injury recoveries.

At present you are wrongfully and illegally putting my client's recovery under a cloud by making claims against it. Please send a response indicating that you are no longer pursuing a claim against my client's personal injury recovery. If not, we will hold you responsible for any further damage done to my client and your insured as a result of your misrepresentations of the law and bad faith.

[end of attachment to Mr. Stratton's message]

\* \* \* \* \*

*Q. Can anyone advise me whether I can deduct my attorney's fees before paying the Department of Administrative Services its statutory lien for welfare payments when I settle a case? My client signed an assignment to the state of the proceeds of her PI suit recovery. I just settled the case and the state is claiming 1/2 of the gross settlement, including my fee! The relevant statute, 17b-94, says in pertinent part: "state can get fifty per cent of the proceeds re-*

ceived by such beneficiary . . . after payment of all expenses connected with the cause of action, whichever is less, for repayment . . . , and shall have priority over all other claims except attorney's fees for said causes, expenses of suit, costs of hospitalization connected with the cause of action by whomever paid. . . ." The statute doesn't explicitly say what those expenses are, unless the 'priority' language means expenses also. It seems unfair of the state to take 50% of the gross settlement when the client would never have gotten my 1/3 fee if there were no lien. I spoke to [a Reimbursement Analyst for the Department] [name of state employee deleted] on an earlier case. She said the state is entitled to its 50% (or more) based on the total recovery, no deductions for costs. If I have to be a debt collector for the state, I'd at least like to maximize my client's bottom line. Can anyone enlighten me?

—Harold Brienes,  
[brielaw@snet.net](mailto:brielaw@snet.net)

A. Whoever you spoke to is wrong. You take your fee and the expenses off the top and then the state receives 50% of the net proceeds or the entire lien, whichever is less.

—Donald Walsh, Jr.,  
[DWalsh1988@aol.com](mailto:DWalsh1988@aol.com)

A. My understanding of the State lien is that the state gets reimbursed for medical expenses after attorney's fees and costs or unpaid medicals, then is also entitled to get up to 1/2 of the net to the client when there is a substantial lien.

Usually the state will reduce its repayment by a percentage equal to a fee reduction. also when a large medical portion is claimed, the caseworker needs to itemize the medicals related to the case. You need to review the claimed meds and check that unrelated meds are not inflating the reimbursement claim. In some cases you may want to provide a list of specials and/or list of payments from medpay showing the state did not pay medical bills related to the claim.

The reimbursement is further complicated by the fact that not all caseworkers apply the law correctly. Some will let the medical reimbursement slide and only take 50% of the net. Some caseworkers are easier to work with and compromise the amount due to the state.

—Eric A. Polinsky,  
[epolinsky@mindspring.com](mailto:epolinsky@mindspring.com)

\* \* \* \* \*

Q. Our client is a former wife of a Navy of-

ficer. . . She has received Navy health coverage benefits (via TriCare). Now the Navy wants to know if I will agree to represent the U.S. Government in its collection claim against the tortfeasor "for the reasonable value of the medical care [provided?] for or furnished by the U.S. Government" under the Medical Care Recovery Act, 42 U.S.C. Sec. 2651-2653 and 10 U.S.C. Sec. 1095 and implementing regulations. The government does not pay a fee, prorata or otherwise, for such service. It only offers cooperation regarding records and government doctors (none of significance in my case).

I request advice from those of you with experience, to whom many thanks. I offer a heads up for the rest of you who may take clients with such benefits.

—Leeland J. Cole-Chu,  
[lcc@c-cc.com](mailto:lcc@c-cc.com)

A. The Medical Care Recovery Act is one of those super liens which you will have to pay back. The good/bad news is the reasonable value of services estimated by the navy is usually low. Signing the form (since you have to pay it back anyway) usually is advantageous since you'll get a LT. jg [Lieutenant, Junior Grade?] to assist you in obtaining the records.

—John A. Collins III,  
[jcollins@sswbagg.com](mailto:jcollins@sswbagg.com)

A. I have done this for the government. In addition to cooperating in getting you records and bills, they usually are willing to compromise the claim. However, I have objected to any language in their lien letter that suggests that the Navy's interest takes priority to the client's interest.

—Ralph J. Monaco,  
[rmonaco.c-l@snet.net](mailto:rmonaco.c-l@snet.net)

A. I have proceeded both ways here. I have shunned the Navy and not protected their interest if the client could obtain the records independent of going through the bureaucratic morass associated with government records, let them hang in the wind so to speak. . . . , I have also agreed to protect their fee when I really needed Navy Commentary on reports. I can tell you it was quite a feat getting a Navy doctor to forward a narrative with "opinion" commentary about prognosis, etc. Ten out of ten times I recommend client seeing a civilian doctor for both purposes of evaluation and treatment, whether or not there is continuing care thereafter (permits opinion testimony by doctor, exception to hearsay rule). But back to the issue at hand, if you don't need them, don't

agree to protect their payments. I have found Navy legal most difficult. If they want to protect lien, the government can join action with appearance by an Assistant U.S. Attorney, although that is highly unlikely . . . . I'll bet she can or already has copied her full chart. . .

—John J. Nazzaro, [nazzjn@aol.com](mailto:nazzjn@aol.com)

\* \* \* \* \*

Q. Does anyone have experience with claims for reimbursement by either of these two providers alleging they are exempt under ERISA from our collateral source statutes? 1) United Healthcare—claims a contractual right to recovery due to its being an employee benefit plan; 2) HUMANA/Employers Health of Green Bay, WI, also claiming subrogation rights against a third party recovery.

—David P. Mester,  
[mester@larose.org](mailto:mester@larose.org)

A. I suggest that you demand a copy of the Plan and the Summary Plan Description for the period in question. Do not accept an excerpt from either. If there is a conflict between the Plan and the Summary Plan Description you can claim the benefit of that which is more favorable to your client. You will need these items at the post trial hearing on the collateral source deductions anyway.

—Jeff Martin,  
[martin@ofalaw.com](mailto:martin@ofalaw.com)

\* \* \* \* \*

Q. Could anyone provide me with the cite for the 7th Circuit case in which the judge ordered the ERISA lien reduced? Thanks.

—Karen Linder,  
[KLinder@RBCE.com](mailto:KLinder@RBCE.com)

A. Even better than a reduction, the Ninth Circuit has repeatedly held that there is no such thing as an ERISA lien. There being no binding precedent in the Second Circuit (despite a Judge Covello decision finding such a lien) I would argue that no lien attaches to settlement proceeds under ERISA. *Reynolds Metals Co. v. Ellis*, 202 F.3d 1246 (9th Cir. 2000). The U.S. Supreme Court granted certiorari in the case but the parties settled prior to argument. [A further reply by Mr. Faxon noted that Judge Covello's decision is *Connecticut Steel Corp v. Cordova*, No. 3:96cv2728 (AVC) (D.Conn., October 30, 1996)].

—Joel Faxon,  
[jfaxon@koskoff.com](mailto:jfaxon@koskoff.com)

A. [Review of earlier messages, including a post by Jeremy Vishno, suggests that

the Seventh Circuit case that Ms. Linder was originally seeking may have been *Wal-Mart Stores, Inc. v. Wells*, No. 99-2018. May 17, 2000]

\* \* \* \* \*

Q. *Can I disburse settlement proceeds to my client without payback of the ERISA lien as my client is requesting? Or does duty to repay attach to plaintiff's attorney at time of settlement?*

—Kevin M. O'Brien,  
[kmobrien@snet.net](mailto:kmobrien@snet.net)

A. Kevin, it is my understanding that the ERISA lien is a superlien and if you disburse to your client without reimbursing them you could be personally liable.

—Paul A. Morello Jr.  
[pam@donmorlaw.com](mailto:pam@donmorlaw.com)

A. Kevin, be very careful with ERISA liens. You must pay them back or YOU may be personally liable. If your client demands payment to him, I suggest you hold the funds in escrow and invite client to find another attorney.

—Paul N. Shapera,  
[PNSWS@aol.com](mailto:PNSWS@aol.com)

A. You become a fiduciary under ERISA. They can sue your client and you, and get attorneys' fees in addition to the sums owed. Check to make sure that the lien is from a truly ERISA qualified provider. If it is an insurance company, they may talk ERISA, but they don't have lien rights. If it is a self funded plan, a MEWA or other federal plan, they do. Also, if it is a union plan they have similar lien rights under Taft-Hartley, and you become a fiduciary under that law also. Finally, see Rule 1.15(b) of the Rules of Professional Conduct. Lawyers have been successfully grieved for not honoring liens.

—Mark Dubois,  
[reardonlaw@aol.com](mailto:reardonlaw@aol.com)

\* \* \* \* \*

Q. *I would very much appreciate knowing the cites of the federal cases that hold only two thirds of the ERISA lien needs to be paid back. Thanks very much*

—Phil Zuckerman,  
[flipsue@aol.com](mailto:flipsue@aol.com)

A. I believe he was referring to Medicare, which does have a superlien. However, read, *FMC Medical Plan*, 122 F2d 1258 (9th Cir. 1997) and *Health Cost Controls of Illinois*, 187 F3d 703 (7th Cir. 1999). Another issue you can look into is the Common Fund Theory. Read *Wal-Mart Stores, Inc.*, 2000 WL 631028 (7th Cir 2000) and *Harris*, 208 F3d 274 (1st Cir.2000)

—Guy L. DePaul,  
[gdepaul@danburyattorneys.com](mailto:gdepaul@danburyattorneys.com)

\* \* \* \* \*

[I saw no immediate replies to the following inquiries, but thought they were worth posting here]

Q. *I received a Reimbursement Agreement which Teamsters Local No. 559 Health Services and Insurance Plan claims my client must sign before he will be entitle to health benefits for treatment of injuries from an auto accident. The agreement states "I agree...to reimburse the Plan out of any proceeds, however described or allocated, without any reduction for attorneys' fees that I, my spouse, or covered dependent receives from a third party." The Plan is requiring that I sign an Agreement By Attorney, stating that I represent their insured and that I agree the Plan will be re-paid before any attorney fee is deducted from the recovery. Does anyone know if this is supported by ERISA? If so, where?*

—Elizabeth J. Robbin,  
[erobbin@roginlaw.com](mailto:erobbin@roginlaw.com)

Q. *Here we go with PHS again! I got the standard letter claiming that even though it's not a self-funded plan, it is still entitled to reimbursement because ERISA supersedes our state anti-subrogation statute. But, there's a twist. My client lives in NJ, it is a NJ plan and a NJ employer. New Jersey doesn't have an anti-subrogation statute. Do you think they have a valid lien or would CT law apply, since it was a CT motor vehicle accident, the case is pending in CT and settlement (hopefully!) would be accomplished in CT?*

—Betty Ann Rogers,  
[BettyAnn@urymoskow.com](mailto:BettyAnn@urymoskow.com)

Q. *I have an opportunity to settle a motor vehicle case BEFORE the ERISA funded plan pays the med. bills. If the liability policy pays first and then the plan pays the bills can they still claim a lien against the settlement?*

—Kenneth Shluger  
[shluger@aol.com](mailto:shluger@aol.com)

Q. *Does this situation [believed by your compiler to be a reference to the position advanced by Michael Stratton in his complaint against PHS] apply when PHS is the provider for a Medicare Recipient? The Insurance Commissioner says no, because Medicare has its own reimbursement rights. If you know differently, let me know.*

—George W. Boath Jr.,  
[Attyboath@CS.com](mailto:Attyboath@CS.com)

I'll end this month's list serv summary with a couple of quick tips.

1. Remember not to needlessly add information which could enable a defendant to readily identify your client and case, and your specific concerns in it. Any e-mail message could possibly be distributed beyond your intended audience, whether maliciously, or otherwise. Draft your messages in a manner that would not be too damaging if they fell into the hands of defense counsel.
2. Make sure your subject line is correct. If you are replying to a message, but changing the topic, change the subject line, too.
3. Send "me too" requests privately to the individual e-mail address of the person who has the information you want, not to the list itself.
4. Try to include a (just a) few lines of the message to which you are replying. That simple step makes it easier to understand your message in the context in which you intended it.

*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. ■*

#### Footnote

<sup>1</sup>Instead of citing *FMC* which is directly on point, you refer to *Pilot Life Ins. Co. v. Dedeaux*, 107 S.Ct. 1549, 1554 (1987) which relates to contract bad faith law in Mississippi. In that case, the Court held that contract bad faith law only indirectly relates to insurance and therefore ERISA plans were preempted from its scope. The next case that you cite, *Metropolitan Life Ins. Co. v. Massachusetts*, 105 S.Ct. 2380, 2391 (1985), actually rebuts your position and holds that ERISA does not preempt state laws in Massachusetts regulating the terms of the insurance contract.



# 2001 CTLA Annual Meeting

## June 21, 2001

### Gerald F. Stevens Memorial Awards

*The Gerald F. Stevens Award is given in memory of one of our most beloved presidents who died unexpectedly at the height of his career, which included not only the practice of law but also the Majority Leader and the Minority Leader in the Connecticut General Assembly, where he served with distinction in both positions. His two major interests, and the prime focus of his legal practice were environmental law and workers' compensation law. This award is given each year to exceptional graduating law students.*

The awards were presented by CTLA Board Member Christopher Carveth, a partner of the late Mr. Stevens.



The 2001 Awards were presented to:

#### **Excellence in Environmental Law**

Aimee L. Hoben,  
University of Connecticut School of Law

#### **Excellence in Workers' Compensation Law**

Cristiana Maggiora,  
Quinnipiac College School of Law



### T. Paul Tremont Advocacy Award

Given to an individual who exemplifies the fearlessness, tenacity and compassion that Paul so well demonstrated throughout his career as a trial lawyer. Matthew Shafner, O'Brien, Shafner, Stuart, Kelly & Morris, PC

*A resident of Groton, Matt Shafner is a long time member and former Treasurer of the Connecticut Trial Lawyers Association. Currently, he serves on CTLA's Board of Governors and the Executive, Nominating, Legislative and Workers' Compensation Committees. Matt is also on the Forum Editorial Board. He received his bachelor's degree in Political Science from the University of Connecticut in 1958 and his JD from the University of Connecticut School of Law in 1959. He has been with his present firm of O'Brien, Shafner, Stuart, Kelly & Morris, PC since 1966, and has served as the City of Groton Attorney from 1990-1995 and 1999 to present. In addition to the Connecticut Trial Lawyers Association, he is active in several professional organizations including the New London County Bar Association, Association of Trial Lawyers of America and the Connecticut Workers' Compensation Commission's Legal Advisory Panel. Matt also is the author of several articles, including "Workers' Compensation—An Idea Whose Time has Come and Gone?" for the CTLA Forum, Vol. 12, No. 4, 1994 and "Workers' Compensation—Handling Occupational Disease Cases" for the CTLA Forum, Vol.*

*13, No. 5, 1995. He has lectured extensively, especially in the areas of occupational disease and workers' compensation.*

*The Tremont Award was presented by Bill Davis of RisCassi & Davis of Hartford. Mr. Davis' remarks follow:*

Paul Tremont, as a young lawyer out of law school, joined a young organization of trial lawyers at the urging of Ted Koskoff. This organization, at that time in the early 1960s, probably had about 30 members and adapted the name Connecticut Trial Lawyers Association. From that time up until his death in 1999, Paul Tremont was an integral part of this organization, which now consists of some 2000 lawyers. He served as President and was a most active member of the Board of Governors up until the time of his death. This was an organization devoted to the cause of the victims of wrongs, and its mission was education of its members and legislative activity to further the cause of the civil jury system.

Paul Tremont was an outstanding trial lawyer who devoted himself to the cause of his clients. He was respected by all; and because of his outstanding career and his life-long devotion to the

Connecticut Trial Lawyers, your Board of Governors determined that an award should be given at the Annual Meeting in his honor, hence, the creation of the T. Paul Tremont Advocacy Award. Your committee, consisting of Bob Sheldon, Jason Tremont, Bill Gallagher, Andy Groher, and yours truly designated Matthew Shafner of New London as the first recipient of this award.

If he were alive, Paul Tremont would share in our belief that nobody within the organization is more deserving of recognition than Matt Shafner. Matt throughout his exemplary legal career, has been actively involved in both the Connecticut Trial Lawyers Association and the American Trial Lawyers Association serving as our delegate to the latter organization for many years. Matt has probably attended every annual meeting of the American Trial Lawyers Association from the time he first became a member up to the present. His purpose was to further his knowledge through seminars and interacting with lawyers throughout the United States so as to better serve his client. Throughout his long career, he has devoted himself to the cause of his clients and the betterment of this organization. He represents clients zealously, but with dignity and respect. He is very concerned about people, and that concern rings out loud and clear in his representation of his clients. He commands the respect of everyone that he comes in contact with, clients, opponents, and the court. He is respectful of others and is always prepared, and his word is his bond.

Long before it was accepted that asbestos caused serious injury and death to workmen, Matt Shafner became involved in the representation of asbestos victims. He devoted many years to this cause and was a passionate advocate for asbestos victims. As has been the case with tobacco defendants, for years many manufacturers denied that asbestos was a cause of lung cancer; and it was only through the tireless and dedicated effort of Matt Shafner and other lawyers that this myth was exposed, and it was determined that not only was asbestos the cause of cancer but also that these manufacturers had been aware of that fact for many, many years. Matt spent many a week in the Federal Court in Hartford before Judge Joseph Blumenfeld advocating the cause of asbestos clients.

Matt has been a tireless champion for enhancing the right of injured workers, both under our State Worker's Compensation Act and under the Federal Longshoreman's Act. For years, he served as Chair or Co-Chair of CTLA's Workers' Compensation Committee. In that capacity, he read every piece of potential legislation that was offered in the general

assembly; and on countless occasions, he testified before various legislative committees in favor of bills that would enhance the rights of those who were victimized by work-related accidents. He made numerous phone calls and personal visits to the legislators and other influential persons in an effort to promote workers' rights. In all of these endeavors, Matt was the consummate advocate. He was persuasive and indefatigable in promoting his cause. He was always a total gentleman, courteous, polite, thoughtful, and humorous.

He has also had a very successful career as a trial lawyer and enjoys a reputation for excellence with both bench and bar. An example of his preparation and dedication as a trial lawyer revolves around several cases where his clients had lost a limb in an accident. Again, to properly prepare himself to present these cases, he researched the injuries and the adverse effects on the individual, as well as court results in Connecticut and other jurisdictions. However, he was not satisfied that he truly understood what it was like to lose a limb; and being the creative, intellectually curious, and stalwart advocate that he is, Matt joined a local support group for individuals and their families who had suffered such an injury so that he could better understand what such a person deals with on a daily basis and the effort that is required of such a victim to deal with everyday living.

On Monday, June 18th, in the Hartford Courant, an article entitled "Tragic Tale of Tainted Tap Water Speeds Bill" reported on the story of the death of Brian Avery, a 4 year old who lived with his parents in Voluntown, Connecticut, due to contaminated drinking water. When Brian died, the doctors reported that his liver was "like a ball of copper" and this resulted from the fact that the drinking water in Voluntown had contained up to eight times the amount of copper and more than one and a half times the amount of lead allowed by federal regulators. Matt Shafner represented the Avery family in successful litigation against the water supplier and spearheaded legislation which passed during this session of the Legislature which will force companies to notify consumers of excess copper in drinking water and will force companies to notify consumers when the state seeks to impose a civil penalty for non-compliance with health standards. Matt's dedication and efforts extended not only to the Avery family but to all consumers by virtue of his tireless effort in seeing that this bill became law.

This gives you some idea of the man that we honor here tonight. Matt Shafner epitomizes professionalism and civility in the practice of law. As an organization we

are both privileged and proud to honor Matt as the first recipient of the T. Paul Tremont Advocacy Award.

The inscription on the back of the clock reads as follows:

**CTLA**  
**T. Paul Tremont Advocacy Award**  
**Matthew Shafner**



**June 21, 2001**

*Mr. Shafner's remarks in accepting the award follow:*

When Bill Davis called me, I assumed it was to serve on another committee or to support some political candidate.

I was truly shocked to learn I was to get an award—especially the first Paul Tremont award. I assumed the criterion must be longevity.

When I saw Jason Tremont at the next Board of Governors meeting, I asked him if the criteria was simply hanging around long enough. Jason assured me the criteria for the award was more substantial than mere longevity.

When we used to meet in the little room in the back of the kitchen at Leon's Restaurant, it was Paul who selected the appetizers and ordered the wine with no input from me, but it was I who objected to the cigars following dinner. It is perhaps ironic that I receive the Tremont Award, as Paul so enjoyed fine food, fine wine and a good cigar after dinner.

I figure I have gone to about 45 annual and winter ATLA meetings in the past 30 years. Only 2 lawyers have ever made me cry. Listening to the art of the closing statement, the great Moe Levine brought me to tears. The other was Bill Davis in a case about the death of a small boy in which he read a corny little poem about what a little boy means.

I watched Bill Davis and Leon Ris-Cassi voir dire a jury in New London in the 60s. It was an epiphany for me for I had never appreciated the full use that could be made of voir dire, to flush out bias and prejudice, a subject never taught at UCONN in the 1950s.

I have had the good fortune to watch

the great legal artists of our country for over 40 years, from Moe Levine, Izzy Halperin and Harry Gair in the 60s to Gerry Spence, Ted Koskoff, Bill Davis and Paul Tremont in the 90's. I eventually learned that Paul had a secret weapon. He had developed the focus group long before it had the label. He found some guy by the name of Joe Fogiarole who by himself could express the sentiment and attitudes of a typical Bridgeport jury. Paul would merely consult Joe Fogiarole on any case and he would tell Paul how the jury would receive a case. No wonder Paul was so successful, and cost effective too.

Nothing gives me greater joy than to watch a fine trial lawyer at work. I feel like Salieri, watching the Mozarts of our time composing a masterpiece.

Many have told me I should take more time to smell the roses. For me, taking time to appreciate the work of a great trial lawyer is the sweetest nectar. Being a trial lawyer is not just *what I do*—I believe it is really *what I am*.

There is an old story of an orthodox synagogue. One Yom Kippur, the holiest day of the year, when God enters into his Book of Judgment who shall live and who shall die, it is observed by a strict 24 hours of absolute fast. One Yom Kippur, while the entire congregation fervently offered up its solemn prayers, suddenly the Rabbi walked from facing the front of the congregation to turn around face the altar, kneeled down, raised his hands and proclaimed, "*Oh Lord, before you, I am nothing.*"

The President of the synagogue who sits next to the Rabbi then walked down center aisle, kneeled next to the Rabbi and threw up his hands and said, "*Oh Lord, before you, I too am nothing.*"

The synagogue has a "Shamus", who in status is slightly above the custodian—he hands out prayer books and shawls and stands in the back of the synagogue. He then walks up the center aisle, kneels along side of the President and puts up his hands and says, "*Oh God, before you I am nothing.*"

The President looks at the Shamus, then turns to the Rabbi and whispers, "Look who thinks he's nothing".

Which brings me to the Ugly Seminar. Otherwise known as "What I have learned from the cases I have lost."

This was one of the few times I felt I was really in my element with Paul Tremont, Bill Davis, Mike Koskoff, Bob Adelman. We talked about our great losses, not about victories. I felt I belonged on that panel as I have had more learning opportunities than most due to defendants' verdicts ranging from a rear-end collision I lost to Dale Faulkner, to a passenger in a school bus I lost to Andy

O'Keefe, or an accidental gun shooting I lost to Dr. Henry Lee, ably assisted by national counsel for Sturm-Ruger gun manufacturer.

Helen Sobolewski kept pestering me for over a year in 1973 to take her case. Her husband had died of lung cancer after being diagnosed with asbestosis, but his doctor said it could be due to cigarette smoking. What could I do if his own doctor could not establish causal relationship. When I learned asbestos was still being used in submarines, and it may have been disabling people, or possibly killing people, I decided to take the case believing I would lose. I considered it a pro bono case, but maybe Electric Boat would change its working conditions.

For many trial lawyers, there is a defining case that can shape a career.

For me that case was the first of hundreds of asbestos cases that arose out of Electric Boat beginning in 1973.

The third party suits we began in 1975 took me around the country for two years, taking depositions of major Fortune 500 companies, the heart of the asbestos industry. It gave a small town lawyer from a small firm the chance to gain an insight into the heart and soul of corporate America. It was not a pretty picture. For this, I thank my partners and great staff for their patience and support.

After seeing so many clients die of cancer, including friends I had gone to school with, I learned that "*when a worker is injured by corporate neglect everyone loses. When the workplace is made safe, everyone wins.*"

I worked with Paul's partner, Bob Sheldon, over many years obtaining very modest gains for workers in the legislature. But in 1993, we were witnesses to the worst setback for injured workers' rights in decades. And for some reason we have yet to recover for injured workers what was lost. It was so bad that I wrote an article in the *Forum* suggesting we do away with the workers' comp system entirely. When the cost of workers' comp is too easily built into overhead it does not promote safety but becomes a corporate incentive for neglect—a legally sanctioned method for businesses to injure and even to kill people. Let the trial lawyer sue the employer for neglect, apply his art in the civil courts with juries, and the workplace will become a much safer place.

It is no accident that no corporate executive of any asbestos company ever went to jail or was even prosecuted, although they are hit with punitive damages frequently for having concealed the toxic dangers of asbestos since 1935. Consider that if you have one drink too many tonight and accidentally kill someone going home, you are going to be crim-

inally prosecuted for negligent homicide. But if you sit in a corporate Boardroom, stone sober, and coldly compute the number of persons who will burn in a Pinto inferno in exchange for a \$13 shield for the fuel tank, or calculate how to go on selling asbestos that is killing your own workers, you are safe from prosecution.

The asbestos cases affected an entire industry. I am proud to have contributed my small measure to the downfall of the asbestos industry, an evil empire if ever there was one. But sometimes an entire universe can be discovered in a solitary grain of sand or mustard seed as they say. Let me tell you about a single case.

Brian Avery was almost 4 years old when it was discovered he had Wilson's disease, an uncommon condition that prevents the liver from metabolizing copper. His liver suddenly failed in 1997 so they rushed him to Mt. Sinai Hospital in New York for a liver transplant from his father—the youngest recipient ever attempted. It failed and he died within weeks. Six months later his parents learned for the first time that their water company had been ordered to reduce the excessive copper levels in their water *three years earlier*. They remembered the pathologist had said Brian's liver was like a ball of copper. We settled the case for high six figures, but ten times that amount would not have settled the case if I had not agreed on two things—(1) Absolutely No Confidentiality Agreement; and I had to (2) try to get the legislature to enact changes so that other water companies must inform their customers of excessive copper levels before it was too late.

You may have seen the story in Monday's Hartford Courant. Last year we got a copper information clause added into the statute similar to lead. This year after public testimony by Brian's parents, the local Health Director was added as a party to any proceedings involving excessive copper. And, next year we hope to obtain regulations to require water systems to move more quickly to implement changes with immediate notice to the consumers in the interim, not wait for three years.

I would like to acknowledge the *pro bono* help of Bob Shea of Gaffney & Bennett. Without him, we could not have gotten this far in the legislature. This kind of humanitarian effort by Bob Shea probably does not show up in a Lobbying Report. On behalf of the Avery family, I want to publicly acknowledge and thank this little known hero. He deserves a big hand.

The most satisfying cases to me are not those which obtain the highest settlements or verdicts. They are the ones which represent *change*, so the work

place is made safe for all workers; so that the water is made safe for everyone to drink; so that HMOs are made more responsive to the medical needs of their patients.

When I was in college, I wanted to be a lawyer as an entree into politics where I could influence grand social change.

After becoming a lawyer, I have had the great fortune of affecting many lives, one family at a time, one person at a time, and on occasion affecting some favorable social change. This has been tremendously fulfilling. As fulfilling have been the number of young lawyers I have been able to influence to perform their trial lawyer skills on behalf of individuals against corporate power, against government power, against insurance company power. They perform much better than I ever could. They, too, are the roses in my life.

The great Professor Tom Lambert, the erudite editor of ATLA's Trial magazine used to say "bearing in mind that the brain can absorb no more than the tail can endure" which was followed by "As Lady Godiva said when finishing her famous ride—I think I am nearing my close/clothes."

I would like to recognize my family who are here tonight, Diane, who is married to Attorney John Zaccaro; my granddaughter, Jennifer, who just graduated high school; my son, Daniel, who is married to Attorney Missy Klott and, my son, Attorney Nathan Shafner who is married to Lori. I was hoping we might get a plumber in this family somewhere along the way.

And to my lovely wife, Denise, who is on a long ago planned trip to visit family in Norway, I want to thank you in absentia for allowing me the freedom to pursue my dream and become what I am. And I promise, I will take more time to smell the flowers—in the not too distant future. I have just returned from a week in Italy smelling flowers,—and wondering if having a bouquet delivered each week to the office would be sufficient.

You have no idea how much this award means to me. Nothing could be of greater significance or flattering to me than this recognition, from my most esteemed colleagues and friends of CTLA, the only professional association to whom I have devoted all my efforts and resources for over 40 years now and especially in the name of the great Paul Tremont. I hope I do you honor Paul. From the bottom of my heart, tanto grazie, mille grazie, Thank you so much.

## 2001 CTLA JUDICIAL AWARD

**The Hon. Jonathan E. Silbert  
Administrative Judge for  
The New Haven Judicial  
District Superior Court**



*A Superior Court Judge, Jonathan E. Silbert was managing partner at Garrison Silbert & Arterton before his appointment to the bench in 1991. Judge Silbert is currently the Administrative Judge and Presiding Civil Judge for the Judicial District of New Haven. He received an AB, cum laude, from Dartmouth College in 1965 and his JD from Harvard Law School in 1968. Judge Silbert has been an instructor in criminal justice at both Yale Law School and the University of New Haven. In addition, he has served as a consultant to a variety of organizations, including the National Institute of Corrections. He is also a member of the Connecticut Bar Association, Connecticut Judges Association, Connecticut Bar Foundation, James Cooper Fellow and the New Haven County Bar Association. He has authored several articles including "The Crisis in Corrections: A Role for the Practitioner" for Connecticut Lawyer in May 1991 and has lectured extensively in continuing judicial education including "Judicial Ethics: Ex Parte Communications and Disqualification" at the Connecticut Judicial Institute in June 2000 and "Loyalty, Friendship, Temptation and Legal Ethics" at Seoul National University College of Law in Seoul, Korea in February 2001.*

*The Award was presented by Ira Grudberg, of Jacobs, Grudberg, Belt & Dow of New Haven. Mr. Grudberg's remarks follow:*

All of a sudden you realize you are getting old. Here I am with the great honor of saying nice things about, and giving an award to, a man who much to my shock, is not very far from sixty. When I first met him I already seemed like a hoary veteran, and he virtually a little kid. Now, many years down the line, it is my great pleasure, on behalf of the Connecticut Trial Lawyers' Association to honor Judge Jonathan F. Silbert with our Judiciary

Award for 2001.

Actually, Judge Silbert is something of an anomaly among our most successful Connecticut Judges. First, he is not from Waterbury or its immediate environs. Like our junior senator, although a few years later, Jon was born in Stamford. Second, Judge Silbert is an Ivy Leaguer through and through. He has had to work diligently to break down the innate distrust most ordinary human beings have of Ivy Leaguers. Jon graduated Phi Beta Kappa in 1965 from Dartmouth College, and got his law degree three years later at Harvard. More than just an Ivy Leaguer, Judge Silbert is a real intellectual. During his years as an undergraduate and in law school, he managed also to end up traveling to places like the London School of Economics and Political Science for a term while in college, and at Warsaw University—not Warsaw Park in Ansonia—for the summer of 1966. He published extensively, during the 1970s and 1980s. Most involved topics arising out of his "other life" defending those accused of crime. His publications include "The Crisis in Corrections: a Role for the Practitioner" in the May, 1991 *Connecticut Lawyer*; "Alternative Dispute Resolution Mechanisms for Prisoner Grievances" (with two others) published through the United States Department of Justice, National Institute of Corrections; "Commentary: Research on Sentencing" in the *Justice System Journal* in 1982; "Mediation of Prisoner Disputes" (with two others) in the May, 1982 *Judicature*; "Diversion: An Alternative Form of Prosecution" as part of *The Public Defender Source Book* put out by the Practicing Law Institute in 1976.

Judge Silbert is more than just an egghead. He is also a trivia buff. His resume bears the "miscellaneous" information that he was "Jeopardy!" champion on an October 1998 broadcast. I understand, although I didn't see the show, that in his next appearance as defending champ he lost, primarily because he missed a question where the correct response was "Who is Sandra Day O'Connor?" How was he supposed to know that? Who is Sandra Day O'Connor anyhow?

After graduating from Harvard, Judge Silbert began his professional career as an attorney at New Haven Legal Assistance Association, Inc. He is one of a number of first-class Superior Court Judges who came out of that background—as well as a number of top-flight lawyers in the private sector. His career in private practice was all with the New Haven firm entitled, at the time of his elevation, Garrison, Silbert & Arterton, P.C. Jon was managing partner there between 1974 and 1991 when he went on the bench. Clearly even then he was used to running

things.

In addition to his practice, Judge Silbert was more than busy with a bunch of other prestigious endeavors worthwhile to the society he lived and worked in. He was on the Guilford Board of Education for seven years, vice chairman his last two years. He taught criminal justice at the University of New Haven between 1968 and 1979. He was a member of the national study commission on defender services, a consultant with the South Central Criminal Justice Supervisory Board, National Institute of Corrections, he was a member of the Connecticut Criminal Sanctions Task Force in the late 80s and consulted with a number of charitable foundations in the criminal justice area.

As a Superior Court Judge for a decade, he made numerous presentations to the Connecticut Judicial Institute, covering many different subjects, civil, criminal and ethical. His lecturing was not limited to Connecticut. He spoke at the Mississippi Judicial College in 1995 and the National Judicial College in Reno, Nevada three years earlier. He gave three different presentations in Russia and the Republic of Georgia in 1999, and two separate presentations in Korea in February of this year—one before the Korean Criminology Association and one at the Seoul National University College of Law. His presentations in Russia were in Russian. I understand he is not only fluent but speaks like a native. The last time I was in his chambers I noted a Russian language newspaper with a group of people including Judges Silbert and Schaller. I was afraid to ask him what they said about him, but they let him leave the country so it cannot have been all bad.

Clearly Jon is a man of all seasons. Personally and professionally he is one of the more extraordinary people I know. He and his wife are parents of twin girls adopted from Korea, who are entering college this fall. I am told that when awaiting approval and clearance for the adoption, in a phone conversation the other party out of the blue mentioned “babies.” “Babies?” While my partner Willie Dow was blessed with his three Korean children over a period of many years, Jon and his wife received theirs “all at once.” I am told by all that one cannot find a more devoted and delightful father.

I spoke with Judge Arterton about her former partner.

She told me of Jon’s immense enthusiasm about a wide range of interests, including (with photography, canoeing, kayaking, squash, and scuba diving) entomology. It is apparently a rare experience to watch and listen to Judge Silbert enthuse over the wonders of some bug he brought to the office for “show and tell”.

She also told me how Jon first got an inkling he would be named to the bench. He had passed through the Judicial Selection Committee some years before and apparently all his mighty politicking skills had gone for naught. He thought his chances of appointment ranged between dormant and non-existent. Ethan Levin-Epstein came to interview with the Garrison firm in 1991. Before coming he spoke with his friend Stan Twardy, at that time one of Governor Weicker’s top aides. When telling Ethan about the firm, Stan suggested he ask Jon about his “future plans.” It was Janet who interviewed and spoke with Ethan, who dutifully asked about Jon’s plans. She drew a blank. She spoke with Jon. He drew a blank. It was apparently the very next day when the call came—out of the blue from the Governor’s office. As the cliché goes, the rest is history.

I already noted how Jon’s interests involve quite a few athletic things. You simply can’t believe how competitive he is—in terms of winning and losing. The last two years the Judges’ volleyball team at the New Haven County Bar outing lost in the finals of the tournament to a team loosely known as “Jacobs, Grudberg, Belt & Dow and Friends,” sort of like fellow travelers in the McCarthy era. I ask the younger members of the bar to forgive me my private joke. This year Judge Silbert thought they had gone over the top by signing up Brian Fisher, a terrific ball player and athlete. There was a rumor that Judge Silbert had actively lobbied with the governor’s office to get some help for his volley ball team (he is the captain of course), but I discounted such talk.

There was one other thing he needed to do to tie down the coveted championship. As many of you know, he is more than willing to work all kinds of hours to help lawyers and litigants. A week ago Tuesday he agreed to meet after 5 o’clock with myself and defense counsel on a legal/medical malpractice case scheduled for trial in early July. The only day my expert doctor was available to give a video deposition was last Thursday, June 14—the day of the County Bar outing. Judge Silbert clearly had a very strong stake in settling the case, because (1) he wanted me to attend the outing and (2) as a reward to him to have me play on our volleyball team to lock it up for the Judges’ squad. Too bad. Try as he did, the case did not settle. Jacobs, Grudberg, Belt & Dow—and friends—prevailed yet another year. I have not credited the rumors that after the competition he was kicking in the lockers at the Owenego Club.

Let me get to why we are here, Jonathan Silbert as a judge. He has been our presiding judge for civil in New Haven since 1996. For the last three years he

has been administrative judge for the Judicial District. I have seen him do all kinds of things over the years, very different roles. He excels at everything. He was presiding in Meriden when we dedicated the portrait to my dear departed friend Bob Reilly. He spoke and introduced Brother Dolan. As always, he struck a perfect note. He repeats it at all functions involving the court, most notably at the Service of Remembrance each November.

In all the years he has been on the bench, I have never heard a lawyer say anything negative about Judge Silbert. I have never heard anyone say anything other than strongly positive or superlative about him. He generates that sort of response. I would be stunned if any of you have heard anything negative about Jon.

He works tremendously hard. He presides on some of the more difficult bench trials involving lawyer presentments. He always demonstrates not only the ability “to decide,” but also to have understanding for the weaknesses and failings of people/lawyers. He is unfailingly courteous and considerate to lawyers and litigants. He appears at all times to have a cohesive group of judges who work together, help each other and generally “pitch in”. Although he was pretty much the new kid on the block in New Haven when originally appointed Presiding Judge, Civil, in 1996 everyone at the courthouse was not only happy for him, but delighted with the way the court ran and continues to run.

Judge Silbert is essentially without ego or arrogance. More than most any Judge I have ever known, he goes out of his way to solicit opinions from lawyers as to how things can be done better, suggestions as to improvements in assignments or court procedures. He truly listens. He is marvelous at getting people together and settling cases. Yet, he does not in anyway terrorize those. Mostly insurance companies of course, who unreasonably insist on clogging up the court system with trials in modest cases. Although he prides himself on moving business, and keeps his available court rooms full, he never punishes lawyers who come up with unforeseen problems fairly close to trial.

Judge Silbert cares about his craft; it clearly shows in his work. He cares about the people, lawyers and litigants, who come before him; that clearly shows in his treatment of everyone. While his job of presiding often puts great stress on the “numbers,” he has never lost sight of the fact that our courts are here to dispense justice. He does that perhaps better than anyone I know, or have known over the many years I have been kicking around. On behalf of the Connecticut Trial Lawyers Association, it is my great pleasure

and honor to present this year's Judiciary Award to that "virtual little kid" that I met more than thirty years ago, the Honorable Jonathan E. Silbert.

\* \* \* \* \*

*Judge Silbert's remarks in accepting the Award follow:*

Does anyone here remember James Stockdale? I do. I've been looking at the names of those who have received this honor in years past, and I can't help thinking about Admiral Stockdale, Ross Perot's running mate in 1992, who began the Vice-presidential debate that year by wondering aloud, "Who am I? Why am I here?"

I know how he must have felt. It is an odd sensation indeed to be listed in the company of such legends-in-the-making as my friends Joe Pellegrino, our Chief Court Administrator, Bob Holzberg, President of the Connecticut Judges Association and Justice Christine Vertefeuille of our Supreme Court. As Ira was just kind enough to remind you, the only thing that threatens to make me a legend in my own time is that I once blew a question about Justice Sandra Day O'Connor on national television.

It is stranger still to find myself among so many already established legends from whom I have learned so much over the years, genuine giants of the judiciary like Judges Flanagan, Burns, Santaniello, Zampano, Dupont, and Dorsey, to name just a few. And as I look out at this room, I see several of my colleagues who I know deserve this kind of recognition far more than I do, so I can't help but think that there has been some horrible mistake. But mistake or not, I am very grateful and deeply honored, and I am delighted to accept this award.

I'm also delighted that you chose Ira Grudberg to make this presentation, or, at least, I was delighted until he called me at home last night in a panic and asked me to fax over a resume as soon as possible.

Ira probably doesn't realize how much I have learned from him over the years. For one example, Ira was the attorney for a criminal defendant in the first jury trial I ever saw, back in 1967 when I was a summer intern in the U.S. Attorney's office. It involved the theft of some major works of art and was a memorable event for a number of reasons, but what stands out most was Ira's cross examination of the government's key witness, Special Agent McFarland of the FBI. Ira asked McFarland a question. McFarland responded with a question of his own. "No, no, no, Special Agent McFarland," said Ira. "Only a Jewish person can answer a question with another question, and you are not a Jewish person, are you?"

McFarland had to admit the awful truth, the jury had been suitably distracted, and I had learned the wonderful lesson, one I had not been taught in law school, that it is possible to be effective in this profession and to have fun at the same time.

Thinking about that episode reminded me of the letter Ira had sent me the day after my appointment was announced by the Governor's Office in 1991, and I have concluded that the advice he gave me then is the best explanation of why you chose me for this award. Because, as my wife and children will attest, I am quite the pack rat, I was able to rummage through my stuff recently and actually found the letter. It begins: "Dear Jon, Congratulations", etc. etc. etc. and concludes: "Please don't forget what it is like to be a lawyer."

It seemed to me then, and seems to me now, that this statement is like a judicial corollary to the Golden Rule. I can't think of a better piece of advice for any judge, new or not so new.

I've received other good advice and encouragement over the years, too, though, and this seems to be a good occasion to acknowledge some of it publicly. My Dad, who passed away four years ago, and my Mom, who at age 88 is just not quite strong enough to be here tonight, are the ones who instilled in me the values which have directed me along my career path. By honoring me, you also honor them, and I am deeply grateful for that. My wife, Bonnie McHale, is here, along with one of our daughters, Jessica, who will be starting her sophomore year at Wesleyan in September. Her twin sister, Corey, couldn't be here, as she is taking summer courses at Simmons so she can get some of her science requirements out of harm's way and eventually take a semester abroad. They are my three favorite people, and while they thought I was a bit nuts to leave a successful and congenial law practice with the likes of Joe Garrison and Janet Arterton, they were supportive of that decision and have, as the surgeons say, tolerated the procedure well. And speaking of Joe and Janet, they have always epitomized what being a trial lawyer is all about, and my long association with them has influenced the way I look at the law today.

Finally, as a presiding judge for five years in a busy urban judicial district, I recognize that I may have had more regular contact with more of your members than have most of the trial judges with whom I work, perhaps making me a more visible candidate for this award than they, even though they are the ones who do the heavy lifting. Clearly, however, the fact that you have chosen to recognize me reflects the quality of the colleagues with whom I have had the good fortune to

work over the past several years. I thank them for putting up with me, for educating me and for the fact that so many of them are here to share this evening with me.

Some experiences over the past month encourage me to reaffirm the importance of the role played by trial lawyers in our system of justice. Thanks to the interest of former Chief Justice Frank McDonald in a program known as the Russian-American Rule of Law Consortium, and thanks to a grant by the Connecticut Bar Foundation, I had the opportunity to travel to Russia last month with Judge Schaller of the Appellate Court. Since the fall of Communism, Russia has been moving in fits and starts toward significant judicial reform. Among the issues on the table are jury trials, which have been implemented in serious criminal cases in about 10% of the regions, or "subjects", as they are called, of the Russian Federation, and are scheduled to be implemented in the remaining 90% by 2003, along with significant transfers of power from the prosecution to the judiciary. Not surprisingly, there is resistance, and there is no way to be certain where all this is going. President Putin, at least, seems to be solidly behind the reform effort, and among the judges and lawyers with whom we spoke, there is a palpable air of excitement. Along with that, there is a desire to understand better how lawyers, whose role was stifled under the old regime, might become more effective advocates, not only in criminal cases, but in the increasing volume of civil litigation as well.

Judge Schaller and I are now in the process of seeking to develop a sister state relationship with the Pskov Oblast', a fascinating region located southwest of St. Petersburg. Its capital, the city of Pskov, is a delightful place with a 13th century Kremlin and many churches, monasteries and other buildings that date back hundreds of years. We are being helped by our judicial colleagues in Vermont, who have had a sister state relationship with Karelia, a region north of St. Petersburg, for the past 10 years or more, one of six such relationships either in existence or in the works.

None of us are kidding ourselves . . . small groups of judges and lawyers traveling back and forth now and again are not alone going to undo decades of corruption and failure. But from what I have seen of the progress being made by Vermont in Karelia, there is ample reason to make the effort. And, frankly, it is yet another opportunity to be effective within our profession while having fun at the same time.

We are hopeful that, if funding comes through, a group of Pskov judges and lawyers could travel to Connecticut as

early as this autumn, and another group of American judges and lawyers could be back in Pskov to conduct seminars next spring. If all this comes to pass, I certainly hope that we will be able to involve some of you trial lawyers in the effort to demonstrate how vigorous advocacy helps to promote the rule of law in our country, and how it can also do so in Russia. A working knowledge of Russian is useful, but by no means required.

In the meantime, however, there are cases to settle right here in scenic and historic New Haven. When I return to court next week, I will keep this wonderful award with me, in part because I truly appreciate the honor, in part because it is a particularly handsome piece of metal-work, and primarily because I believe it will continue to remind me not to forget what it is like to be a lawyer.

Thank you.

\* \* \* \* \*

**SPECIAL PRESENTATION TO  
BETH BANIA**  
*For Her Efforts in the  
Enactment of P.A. 01-152, An  
Act Concerning Peremptory  
Challenges in a Civil Action*



*This award was presented by James Bartolini of RisCassi & Davis in Hartford. Jim represented Ms. Bania in a civil case in which there were several defendants, all of whom were afforded a separate set of peremptory challenges because of the Appellate Court's interpretation of the unity of interest portion of §§51-241 and 51-243 of the General Statutes in Rivera v. St. Francis Hospital, 55 Conn. App. 460 (1999).*

*Mr. Bartolini's remarks follow:*

Approximately two years ago I was involved in selecting a jury where there were three named defendants. My client was present during that voir dire process. She observed how all three defense counsel would huddle together and confer

after the questioning of each prospective juror; how defense counsel would exercise challenges is a way to box plaintiff's counsel in at every opportunity. My client became angry. From her perspective (and from mine), defense counsel, were not acting as separate entities. They were acting as a unity and yet each attorney was entitled to four peremptory challenges on behalf of their client whereas I, representing the plaintiff was only entitled to a total of four challenges. The scales were clearly weighed against us in a three to one ratio.

I explained to my client how the system worked and how the courts interpret our law with respect to jury challenges. I then showed her the case of *Rivera vs. Saint Francis Hospital* where one lawyer represented a hospital and three hospital doctor employees. How the trial judge, the Honorable Douglas Levine, concluded that they should be treated as a unity for jury selection purposes and consequently he award a total of four challenges. Following a plaintiff's verdict, defense counsel appealed and the verdict was reversed on the grounds that defense counsel in that situation should have been entitled to sixteen challenges not four *i.e.* one for each named defendant. This caused my client to become incensed. She became determined to fix the problem.

Beth Bania is no stranger to the legislative process. She successfully lobbied a bill which provides for better scoliosis screening for school children. Beth asked me what needed to be done. From my perspective, I felt that the solution was permitting equal challenges between all plaintiffs and all defendants. In other words, no matter how many plaintiffs there might be and no matter how many defendants there might be, the court should award challenges such that the total number of challenges for plaintiffs would equal the total number of challenges for defendants.

Beth found a legislator to sponsor a bill which would constitute a change to Connecticut General Statutes 51-241.

The legislative process can perhaps be described like making sausage: the finished product looks entirely different than the sum of the ingredients.

Beth bird-dogged the bill. When, upon financial analysis, it was felt that the bill would increase the total number of jurors that would need to be summoned for jury duty (presumably because you would likely have a greater number of total challenges) the bill was sidetracked. Legislators did not want to increase any cost to the state.

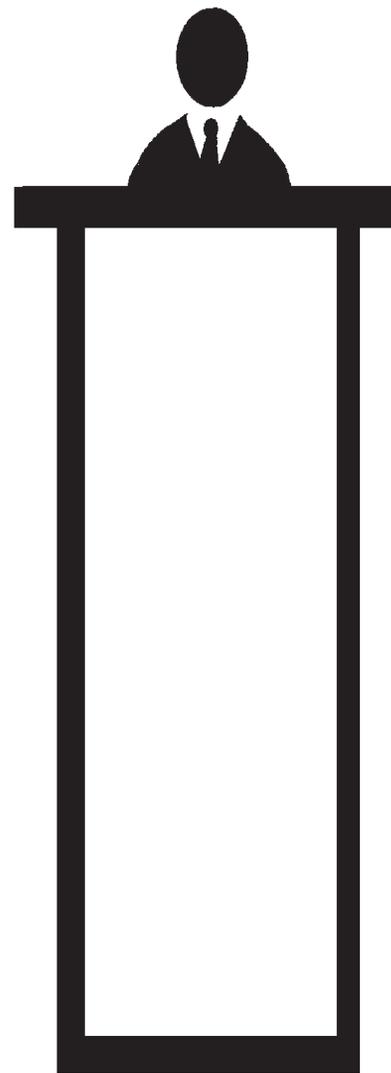
The bill went through multiple permutations before arriving in its final form. What the change in the law accomplished is the following:

1. Elimination of the situation that existed in *Rivera vs. Saint Francis Hospital*. Under the new law, defense counsel or any counsel who represented multiple parties in this manner would only receive a total of four peremptory challenges.
2. In the absence of apportionment or cross claims, there would be a presumption of unity of interest.
3. Under no circumstances could there be more than a two to one ratio of challenges between all plaintiffs and all defendants.

Never again would there be a situation identical to that which Beth Bania faced, namely, where the ratio of challenges between plaintiff and defendant was three to one.

This legislative change is a major step in the direction of a fair jury selection. The Connecticut Trial Lawyers and their clients have one person to thank for that effort. That person is Beth Bania.

It gives me great pleasure to present this award to Beth Bania for her efforts in bringing fairness and justice to our system.





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# How to Tell A Story

By David Ball

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*David Ball, a well-known trial consultant, specializes in focus groups, jury selection, case analysis and strategy, and juror decision-making with respect to damages. He teaches trial skills to attorneys across the country and to law students at Duke, UNC, Wake Forest, and Campbell. His new video, Do Your Own Focus Group, has been released by the National Institute for Trial Advocacy and will soon be joined by his book on the same topic. This article appeared in the February 2000 issue of Trial Briefs, the publication of the North Carolina Academy of Trial Lawyers. ©North Carolina Academy of Trial Lawyers, Inc., 2000. Reprinted with permission.*

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Telling your story to a jury does not require you to be a gifted storyteller. Just use the following techniques:

## **Simplicity**

Good storytelling is done simply: a simple narrative of the events that happened. One fact is given per sentence. Thus, instead of "During a stormy night there was no one at home," that's two facts. Instead, say, "It was a stormy night. No one was home." Simplicity lends directness.

## **Present Tense**

Use the present tense. Past tense distances the listener from the events. Present tense provides a more immediate experience. Thus, instead of "It was a stormy night," say "It *is* a stormy night."

## **Events**

A story is a sequence of events, not facts or explanations. An event is an action verb: something someone does or something that happens to someone. Each sentence in your story should take us to the next event. Instead of "It is a stormy night. No one is home," say, "The storm starts at 8 p.m. At 8:30 p.m. Mr. Miller drives off. He leaves the house empty." ("Starts" and "drives off" and "leaves" are events.) People listen to events.

## **Each Point is Important**

Do not hurry through one event to get to the next. Give each event some time and importance. That does not mean everything is of equal importance, but any event important enough to include is im-

portant enough not to rush through. Listen to this next story as if every separate point has some importance: "Come back with me to seven o'clock this morning. My alarm rings. I wake up. I roll out of bed. I open the curtains. I look out. It's snowing. I take a hot shower. I go downstairs. I drink some coffee. I read the *Times*. I put on my coat. I go outside, I scrape the windshield."

This looks stilted on the page, but spoken aloud in such a way as to give each event some importance, it will be carefully listened to. Note the use of present tense. Note the simplicity. Note that every sentence contains a new event.

Remember, any sentence that does not take us from one event to the next does not belong in your opening story. Information is not an event, because information does not advance the action.

If you say, "I take a shower. The water is hot," the second sentence provides information; there is no event so the second sentence does not advance the story. If the water being hot is important, then say, "I turn on the hot water. I step into the shower." The event of stepping transforms actionless information ("the water is hot") into a new event. "Is" is not an action verb. "Step" is. Jurors listen to forward-moving action—event to event to event. They tend not to listen to actionless information, no matter how important you think it is.

Thus, be careful not to complicate your opening story with information jurors do not need in order to understand the progress of the events. Do not worry about explaining the significance of the events. Do that later. Your first task is solely to narrate the flow of the events: the plot. "John does something. Then something happens. And he does something else . . . etc."

Few tellers can effectively convey both the story (events) and the explanatory details (information) at once. Listeners tend to layer in only one new level at a time: first the events, and later the explanatory details. If you tell both at the same time, jurors track neither of them very well. Thus, your story should focus on the events. The explanatory details should follow.

In other words, only when jurors know the story can they readily absorb the rest of the information.

Practice this method of storytelling. If you have children they will appreciate it.

If you have no children, get a friend to listen.

## **Selectivity and Starting Point**

Every story can be told a hundred ways. The best way is to emphasize the events the jury needs in order to understand what happened, in the way you want them to understand it. Do not hide information, but begin your story—and spend 90 percent of your time—with events that help you. Include the events that hurt you but subordinate them and place them later in your narrative. (Do not conceal them.) This sounds obvious, but events that seem helpful can often hurt by making jurors think their own thoughts about what your client did. This is most likely to happen when you tell jurors what your client did before they know about the wrongdoing of the other side.

If, say, there is a contributory negligence issue working against you, start your story with events involving the defendant. If you start with your client, some jurors will consider not only the events you're talking about, but will also think about your client in general—including what she might have done to bring the harm upon herself. (This is often due to "defensive attribution," discussed below.) If jurors come to that belief in early opening, they will tend to believe it for the rest of trial.

So, if the doctor failed to diagnose your client's cancer, don't start by telling us what your client did. ("Jane calls the doctor for an appointment . . . Goes to see him on January 8 . . . etc.") That makes jurors think about why Jane chose that doctor, why Jane didn't ask for a second opinion, etc. Start by telling us about the events that encompass the doctor's wrongdoing. "Dr. Smith runs the test. He sends it to the lab. He studies the result. He calls Jane . . ." That way jurors begin by thinking about what the doctor, not Jane, might have done wrong.

Further, never start by talking about events that highlight your case's weaknesses. Bury those bad events in the middle and mention them only briefly. (Do not conceal them.) For example, take a premises liability case: an assault in a motel room. Three bad guys beat an elderly couple in the elderly couple's room. Plaintiff counsel should NOT start the story this way:

"It's 3:00 a.m. January 12, 1998. Three

Central Prison inmates shoot a prison guard through the head. Prisoners Hughie Duckworth, Dewey Drake, and Louie Mallard escape over the prison wall. They run. They get to a stoplight at an intersection. They surround a gray Buick. They pull the elderly driver out. She struggles against them. They shoot her in the chest. They drive off in her Buick. They lose their pursuers. They park in the dark behind the C'mon Inn motel. Duckworth, Drake, and Mallard shove open the door to Room 123. John and Jane, my clients, wake in terror. Duckworth, Drake, and Mallard demand money. Duckworth beats John while. . ."

That's good story telling. The jury will listen. Jurors will get the full horror of what the bad guys did to John and Jane. Jurors will get the point: these bad guys were really bad.

This would be fine, except that your case is not about three bad guys. It's about a motel owner who installed flimsy doors and never told guests of the previous break-ins.

Starting the story with the bad guys hands the case to the defense by encouraging jurors to blame the bad guys instead of the owner. Juror shock and anger will be directed at Hughie, Dewey, and Louie. By the time you finally get to the story of your case—what the motel owner did—the jurors will be irrevocably blaming the bad guys. You've created your own competition.

Here's a better beginning for the plaintiff:

"It's November 14, 1998. The owner of the C'mon Inn Motel needs to replace a broken guest-room lock. He goes to the hardware store. He buys a four-dollar lock. He goes back to the motel. He installs the four-dollar lock. Two months later, at nine in the evening, John and Jane, my clients, drive by. They see the sign: 'C'mon Inn: clean, safe rooms.' They check in. John asks the owner, 'Is it safe here?' 'Sure,' says the owner. That night John and Mary are beaten and robbed in their room."

This is the same case, with a different story. By shining your narrative light on the actions of the motel owner, especially at the beginning of your story, jurors will more likely blame him instead of the bad guys. The bad guys are hardly on their minds.

If you're defense counsel, the reverse, of course, is true: focus on the bad guys to get the jury's attention off what your client did. And if you're on defense in a case with issues of contributory or comparative negligence, start your story with events centering on the plaintiff to get the jury thinking about what the plaintiff could have or should have done differently—even if you're not specifically

going to mention anything like that. The jury will still think it.

In criminal defense, you're usually going to have to begin by talking about your client. But the same general principle applies: select your beginning so that your initial focus helps you. Don't begin by talking about the fire that someone mysteriously started, or jurors will automatically think about your client on the scene. Instead, talk about what your client was doing elsewhere when the fire was started. Or talk about the activities of the person you contend was the real arsonist. Your story should create—right from the start—separation between the crime and your client. Tell jurors the story of the crime *without* your client in it, or tell them the story of what your client was doing without the crime in it. Otherwise, as jurors hear the story of the crime, they will automatically insert the defendant into it.

Civil or criminal, it is useful to self-test the beginning of your story by asking yourself what that beginning would encourage jurors to think if it were all they were going to hear. Where are you helping them focus? Such self-testing is necessary because you already know the whole story, so you already know what your focus is. But your focus isn't automatically your jurors' focus. You have to make sure your story creates the focus you want.

Don't underestimate the importance of choosing the right events with which to start your story. The first thing a listener hears is what the listener tends to think you mean the story to be about. This usually makes the listener hear everything that follows in that same framework. Thus, wrong focus at the start can skew the rest of the case.

This is especially true for plaintiffs, due to a phenomenon called "defensive attribution." When people hear that something bad happened to someone, they instinctively want to believe that the bad thing would never have happened to them. In this way, defensive attribution makes jurors seek out ways to separate themselves from the plaintiff who was harmed.

For example, in the motel case, defensive attribution makes jurors say to themselves "Oh, that would not have happened to me because I would never have chosen to stay in a motel room that faced the back lot."

In a medical negligence case, defensive attribution makes jurors say, "Oh, that would not have happened to me because I would have gone for a second opinion." (Jurors commonly say this even though they have never in their lives sought a second opinion!)

In a products liability case: "Oh, that

would not have happened to me because I never would have bought that kind of car."

And in deliberations, they will tell other jurors, "The plaintiffs never should have stayed in that kind of room!" or "She should have gotten a second opinion!" or "It's his own fault for buying that kind of car!" And because defensive attribution is common and unavoidable human nature—everyone does it—these remarks will take their toll on the other jurors.

Due to the psychological mechanism of defensive attribution, jurors commonly rely on even the flimsiest of reasons to persuade themselves that this kind of harm would never have happened to them. And they are far more likely to do that if you start your story with something that helps them do it. That's why plaintiff counsel normally should start with the defendant's actions. ("The motel owner chooses a four dollar lock") so that by the time defensive attribution sets in, jurors will already have been focused on the defendant's wrongdoing.

In brief: the first events you tell your jurors must go to the heart of what you are trying to prove, and avoid helping the other side. Be careful where you start and be careful what you emphasize as you go on.

### Conclusion

You need not be a gifted storyteller to tell persuasive stories. You merely need to:

- Use present tense.
- Be simple.
- Have each sentence convey a new event.
- Treat each event as if it is important in itself,
- Carefully select where to begin and what to emphasize.

With practice, these techniques are easily mastered. They'll help you tell a story jurors will listen to. There is no better way to begin any case, and no better way to begin your personal relationship with any jury. ■



# 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 issue of the Forum. Reprinted here is Chapter 2. Chapter 3 will appear in the next issue of the Forum.

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.

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## Chapter 2

### The Rules of The Road

#### I. THE OVERVIEW: THE IMPORTANCE OF BASIC PRINCIPLES

#### II. YOUR HIGH SCHOOL ENGLISH TEACHER KNEW BEST: EMPLOYING THE FIRST NINE KEY RULES OF LEGAL COMPOSITION

1. Use strong verbs.
2. Eliminate legal jargon.
3. Write as clearly and simply as possible.
4. Try not to hedge. If you must hedge, explain why.
5. Keep your sentences to twenty-five words or less.
6. Try to move subordinate clauses to the beginnings or ends of sentences.
7. Write for your readers, not for yourself.

8. Use specific imagery, not vague generalities.
9. Remember that understated prose is the best form of expression.

### III. THE TENTH RULE: USE SIMPLE LANGUAGE

#### I. THE OVERVIEW: THE IMPORTANCE OF BASIC PRINCIPLES

Getting organized is the first step in writing. Yet even lawyers who structure their material well often find that their prose suffers from a common set of problems. Their sentences begin to resemble the Code of Federal Regulations. They keep throwing around phrases such as *res ipsa loquitur*, which few readers can understand and even fewer can relate to.

We all know there are basic principles in learning to write anything well. Authors have devoted entire books to the subject William Zinsser's *On Writing Well* and Joseph Williams's *Style* are my favorites, and their tracks are all over this chapter. Legal writers should also make Bryan Garner's *A Dictionary of Modern Legal Usage* one of their primary reference books; his work is the source of some of the examples of bad legal writing (which Garner culled from other sources) used throughout this book.

We will spend only a few pages on ten important principles of composition as they apply specifically to lawyers' writing. Some you'll recall as you compose your initial draft. Since you are going to want to concentrate on the substance of your message as you write, however, many are probably better applied in the editing process, discussed in the next chapter.

#### II. YOUR HIGH SCHOOL ENGLISH TEACHER KNEW BEST: EMPLOYING THE FIRST NINE KEY RULES OF LEGAL COMPOSITION

Pedantic as they may appear to be, here are the first nine principles of writing that lawyers need to remember. You may have learned them in high school English class years ago, but reading endless opinions as a lawyer tends to obliterate even the finest classical education. While nine rules may seem like a lot, they have special—and easy—application to legal writing.

#### 1. Use strong verbs.

Try to use active verbs rather than passive verbs. Take the sentence "Jane threw the ball." "Threw" is a verb in the active voice. Contrast that with the sentence "The ball was thrown by Jane." "Was thrown" is in the passive voice. A good writer uses the passive voice around 25 percent of the time. Lawyers, however, tend to use it around 75 percent of the time, with law professors often coming in at close to a 90 percent clip.

One example from a typical legal memo should suffice (citations are omitted):

Restitution on grounds of mistake is most commonly allowed when both parties are mistaken as to some fact material to the transaction. Traditionally, a unilateral mistake is grounds for recovery only if enforcement of the contract would be unconscionable, or if the other party had reason to know of the mistake. . . . All these black-letter rules are founded on the equitable principle of unjust enrichment.

Though much of the legal jargon could be eliminated as well, simply changing the verbs does this:

Courts allow restitution on grounds of mistake only when both parties err as to some fact material to the transaction. A party can recover for a unilateral mistake only in an unconscionable contract, or if the mistake was apparent. . . . The underlying equitable principle of unjust enrichment defines these black-letter rules.

Why are lawyers so wedded to the passive voice? It's often a way of removing the writer from the action, thus appearing to be more official and impartial. Yet the overuse of the passive voice weakens writing for a number of reasons. "All fine prose is based on the verbs carrying the sentence," wrote F. Scott Fitzgerald. If your verbs are weak, so is your prose.

Writers implicitly recognize this weakness, so if they use the passive voice often, they tend to add a number of adjectives and adverbs to compensate. That just makes matters worse, cluttering the page. A writer clinging to the passive also tends to leave out some of the main information in sentences. "This action was filed in the Southern District of New York," writes the litigator, never bothering to tell us who filed it. True, the information may be obvious from what's gone

before, but you're still asking readers to put the pieces together. A few similar passive sentences and those readers give up: You're asking them to do too much work. The passive voice "sanitizes and institutionalizes [lawyers'] writing and often anesthetizes the reader," Judge Patricia Wald once complained. "All views are attributable to an unknowable 'it.'"

In legal writing, you should avoid the passive voice in most cases for two additional reasons. First, think about how you give directions. When someone asks how to find a certain landmark, you tell her, "Take I-95. Get off at Exit 28. Go to the third light and make a right. Proceed two miles." Without even thinking about it, you give the directions in the active voice—"take," "get off," "go," "make," and "proceed." In fact, if you gave the directions in the passive voice (and you never would)—"I-95 should be taken. Exit 28 should be traversed"—no one would find the landmark.

Legal writing is often a form of giving directions. You're telling clients what they should do or telling courts what reasoning you'd like them to apply. As with directions, if you write in the passive voice, your readers can't even begin to figure out what you're saying.

Finally, the language of rhetoric and advertising is quite similar to that of legal writing. In each, the writer is often exhorting readers, attempting to persuade them. Yet speechwriters and writers of ad copy rarely if ever, use the passive voice. It's "Tastes Great—Less Filling," not "It should be tasted because it is less filling." "Just Do It," commands Nike. If the slogan were "It should just be done!" it's hard to imagine that anyone would buy Nike's products.

This is true of rhetoric as well. "Ask not what your country can do for you, ask what you can do for your country," said President Kennedy in his famous inaugural address, in 1961. I can't even begin to put that sentence in the passive voice. "I have a dream," said Dr. Martin Luther King, Jr., in 1963, in perhaps the most famous American speech of the twentieth century. If King had gone to law school, he might have proclaimed, "A dream has been had by me." It's just not the same.

Obviously, the passive voice has its uses. If you want the reader to focus on the object of an action, the passive voice enables you to encourage this. ("The pedestrian was struck." This works if we don't really care who was driving the car.) And if you're a lawyer representing the "who" who did the "what" to the "whom," the passive voice is your friend. "Smith fired the gun," the prosecutor should write. "The gun was fired," aptly counters the defense attorney, implying that causation is lacking. The problem is that

many of the prosecution or plaintiffs' briefs I read use the passive voice too. By doing so, these lawyers undercut their case.

Politicians speak in the passive voice all the time, in just such a defensive posture. "Mistakes were made," they'll announce, leaving the impression that someone else made them. "[T]he Chinese Embassy was inadvertently damaged," said Bill Clinton after NATO bombed the embassy during the Balkan conflict in 1999. William Schneider, a political analyst for CNN, has called this usage "the past exonerative." John Leo, a columnist for *U.S. News & World Report*, once wrote that the passive voice is "a terrific screen to conceal choices, responsibility, and moral conflicts." If that's your goal—and it rarely should be—by all means use the passive.

Remember two other points as corollaries to this rule. First, try to avoid weak verbs. Verbs like "seems," "suggests," "appears," and "is" do not convey as much action as others. Occasionally we need to use these weaker verbs: "She *is* a woman is better than "She *equals* a woman." Many times, though, lawyers adopt constructions in which the weak verbs can be eliminated. "It was Justice Scalia who said" can be changed to "Justice Scalia said." "He will be a participant" can be revised to "He will participate."

Second, avoid the use of the generic passive. "It is widely known," writes the lawyer, never bothering to tell us who widely knows it. Try to identify your subjects for your readers. Otherwise, there's too much room for ambiguity.

## 2. Eliminate legal jargon.

Lawyers use a lot of odd words and phrases that no one else uses and few understand. Your writing should pass what I call "the McDonald's test." If you were to read the document you're drafting aloud in McDonald's, would people understand what you're saying? If not, your prose is too removed from ordinary language. Pretend that you are writing for a nonlegal audience that will not understand terms such as "caveat" and "ex parte." If you do, you'll end that your prose is clearer and that you are often using jargon as an excuse for failing to explain yourself. Your style and choice of words should be as conversational and contemporary as possible.

For example, lawyers like to use a lot of ancient verbiage, such as "heretofore," "hereunder," and "said document." That sounds great for those living in London circa 1590, but such prose, even in formal documents, creates a barrier between writer and reader. You would never go up to the counter in McDonald's and say, "Said milkshake—I will quaff it!" So don't

write that way either, as one litigator did: "It all fully appears from the affidavit of the publisher thereof heretofore herein filed."

Lawyers also use a lot of Latin. Some of it is a convenient form of shorthand, as in the use of *habeas corpus* or *res judicata*. A lot of it is unnecessary, however. When I see *infra* and *supra*, I still end up turning the wrong way. (With computers, you can find the page and tell the reader exactly where to turn.) Similarly, in McDonald's, you'd never announce, "Assuming, *arguendo*, I don't get the burger but the fish filet." A bilingual debate is going on in this country, but it isn't about Latin and English any longer, a fact a judge on the Illinois Appeals Court must have forgotten when he earned a *Scribes Journal of Legal Writing* "Legal-degook Award" by writing, "*Parens patriae* cannot be *ad fundaban jurisdictionem*. The zoning question is *res inter alios acta*. (See *Mississippi Bluff Hotel v. County of Rock Island*, 420 N.E.2d 748, 751 [Ill. App. Ct. 1981]).

Finally, lawyers use a lot of odd words that they would never think of using in ordinary speech. "In the *instant* case," they write, meaning, one supposes, that if you mix Nestlé's Quik with milk, you get a case. Or they write, "This case is on all fours with another case." (Whenever I see such a phrase, my instinct is to help the case get on its feet.) If you were talking with a friend over coffee, you'd say, "This case is consistent with that case" or "It's a lot like this other case." You should write the same way.

Eliminating jargon is a particular problem for law students and paralegals, who become fascinated with the new words and concept they are being taught when they enter the profession. Everything these students read, including the work of their professorial role models, encourages them to compose in this pretentious style. Take, for example, this typical passage from an article in the *Harvard Law Review*:

The hermeneutic tradition suggests that historical discontinuities are so substantial that interpretation must make incoherent claims because it can achieve the necessary determinacy of past intentions only at the cost of an implausible claim about consistency of meaning across time.

I know someone else who is making incoherent claims.

An editor can't even begin to rewrite this sentence so people can understand it. Yet a lot of legal literature—both inside academia and beyond—is composed of texts, opinions, treatises, and articles written in this befuddled prose. Not only does the profession write in this incoher-

ent style, it elevates the style to the pages of its leading law reviews.

### **3. Write as clearly and simply as possible.**

Like all writers, lawyers should convey the maximum amount of information in the fewest number of words. Unfortunately, legal writing tends to be full of clutter, no matter how eminent the writer. I once heard a story about a law graduate who went to clerk for the great Judge Jerome Frank, of the U.S. Court of Appeals for the Second Circuit. On his first day, Judge Frank gave him a fifteen-page opinion to review and edit. The clerk pored over the draft, anxious to do a good job, and found it extremely wordy and repetitive. After a week, he returned the draft to the judge, the fifteen rambling pages cut to three tight ones.

For a week he heard nothing. Finally Judge Frank stuck his head inside the clerk's office. "I really like the three pages you wrote," he said to the clerk. "Just add them to the beginning of my opinion."

In *On Writing Well*, a wonderful book all writers should read, William Zinsser pointed out:

Consider all the prepositions that are routinely draped onto verbs that don't need any help. Head up. Free up. Face up to. We no longer head committees. We head them up. We don't face problems anymore. We face up to them when we can free up a few minutes. A small detail, you may say—not worth bothering about. It *is* worth bothering about. The game is won or lost on hundreds of small details.

Coming up with broad categories that encompass these small details isn't easy. Here are six.

#### **a. Eliminate redundancies.**

Lawyers tend to be repetitious, presenting the same idea continually in the hope that readers will remember. This constant repetition is one reason that legal prose is as boring as it is.

In sentence construction too, lawyers often add a lot of superfluities. "The accident occurred at 12 noon," writes the young associate. Can it be noon at any other hour? You don't need the "12." "She testified about her past memories," writes the litigator. Last I looked, memories were always about the past. "The armed gunman entered the bank," the prosecutor's brief announces. Someone should tell that prosecutor: All gunmen are armed—it's part of the job description. Legal writing has hundreds of similar redundancies. Eliminate them.

#### **b. Substitute a word for a phrase.**

Whenever lawyers have to use a con-

junction or a preposition, they often start sounding like C-3PO in *Star Wars*, stringing along phrases. In these situations, one short word will almost always suffice. As others, such as the legal scholar Robert Smith, have pointed out, substitute "because" for "due to the fact that"; "can" for "is able to"; "under" for "pursuant to"; "if" for "in the event that"; "after" for "subsequent to"; "before" for "prior to"; "previously" for "at an earlier date"; "about" for "approximately," and "too many" for "an excessive number of."

#### **c. Avoid euphemisms.**

Using professional double-speak almost always adds extra words. An Interior Department press release once referred to a nest as an "owl site center." In 1984, the State Department stopped using the word "killing" in its human rights reports, replacing it with "unlawful or arbitrary deprivation of life."

Lawyers and government bureaucrats are not alone in this. As Zinsser has written, airline personnel are notorious for their use of euphemisms. "Please extinguish all smoking materials," they used to announce, leading some in the waiting area to check whether their pants were on fire.

Using this kind of double-speak can also be a form of lying, as George Orwell warned in his famous essay "Politics and the English Language." The statute dealing with suits for nuclear accidents refers to such accidents as "incidents." Politicians may think that calling a tax increase "revenue enhancement" or old people "senior citizens" is a way to appeal to modern sensibilities. The more you try to cushion the truth with weasel words, though, the harder it is to deal directly with what you're trying to address.

I once heard a story that when an exterminator was sued for spreading a chemical negligently, the term "exterminator" was evidently too direct for the attorney. Instead, the defendant was called a "rodent operative." I doubt the change in language helped one bit.

#### **d. Eliminate unnecessary adjectives and adverbs.**

If a writer's verbs are strong, he or she doesn't need as many adjectives and adverbs. So it goes for lawyers, even though they seem wedded to the notion that the more such words they use, the better. Too many adjectives and adverbs weaken writing, albeit for different reasons. "The adjective is the enemy of the noun the adverb is the enemy of the verb," Judge John Minor Wisdom, a wonderful writer on the U.S. Court of Appeals for the Fifth Circuit, used to warn his clerks.

Take adjectives. The problem with them is that they're often ambiguous.

"When the accident happened, it was a cold day," writes the typical legal writer. The problem with "cold" is that it means different things to different people: What's cold in Boston isn't what's cold in Palm Springs. If she had written instead "When the accident happened it was twenty-three degrees outside," or "Everyone was wearing down coats," you'd know the precise conditions. With adjectives, you don't.

Why are lawyers so fond of adjectives? Probably because legal standards and judges use them so much, talking about the "reasonable person" test in torts or the "substantial evidence" threshold in administrative law. Though it may sound cynical, judges use these terms precisely because they're trying to be vague. A "reasonable person" would do almost anything, which is a way of telling juries that they have wide latitude to decide these matters. As to that standard in administrative law, how much evidence is substantial? Four documents? Twenty-five? The reviewing courts invoking the standard don't know, and even if they did, they would never tell you. By using an adjective to define "evidence," they keep the standard vague enough so they can employ it as they choose. So if you're trying to be vague, use more adjectives. Usually, however, precision is the goal.

Lawyers should avoid using too many adverbs for a different reason. While adverbs obviously have their place—excuse me: while adverbs have their place—in the hands of lawyers they can become unnecessary tools of exaggeration and hyperbole. "The appellant's argument is totally without foundation," lawyers write, even though "without foundation" is sufficient. A recent brief to the U.S. Court of Appeals for the Seventh Circuit stated, "The Court boldly and enthusiastically stated that the concept of active/passive liability (indemnification) is not applicable to a trust relationship." As in all such matters, one has to question whether the judges were that bold and enthusiastic about this concept.

#### **e. Eliminate many transition words.**

In their attempts to be and seem logical, lawyers add words such as "therefore," "thus," and "furthermore" to many sentences. If your writing is logical, you don't need as many transition words. Whenever possible, cut them.

#### **f. Keep things short.**

The major complaint I hear from judges, clients, and other lawyers about legal documents is that they're too long. "Many judges look first to see how long a document is before they read the first word," one confided in me. "They made

me read twenty-five pages when they could have cut it to six,” another complained, in an all-too-typical comment. Elmore Leonard, the mystery writer, once said that he has a rule he applies whenever he writes a novel. “I try to leave out the parts that people skip,” he said.

That’s a good rule for everyone. Unfortunately, lawyers love to throw in the parts other people skip—often right at the beginning of a document, so the reader can’t avoid it. For example, readers come to the second page and have to confront a four-paragraph block quote. *The New York Times* columnist and language cop William Safire characterizes quotes like this as a MEGO—My Eyes Glaze Over. Once readers fall into that stupor, they don’t snap out of it easily. Your job as a writer is to grab readers by the lapels and make them read for as long as you can.

Many judges have told me that when they confront documents, the question is not *whether* they’ll read them but *how* they’ll read them. If a brief or letter hasn’t gotten to the main point in a paragraph or two, the mind begins to wander.

Of course, lawyers don’t want to leave out information that could aid their cause, and sometimes it’s better to err on the side of caution by being over inclusive. If that’s the case, at least prioritize your points and put the questionable material toward the back. It’s better to make pages 15 through 30 superfluous than to mix the superfluity throughout, because then the reader has to go through all the extraneous information to get to the heart of the matter.

“There is but one art: to omit,” the novelist Robert Louis Stevenson once wrote. Though in my view he could have omitted a good deal of the text in *Treasure Island*, his advice was sound.

#### **4. Try not to hedge. If you must hedge, explain why.**

Lawyers tend to be paranoid writers, using words such as “seems,” “appears,” and “maybe” throughout their writing. In a profession that demands exactitude, such words have their place and are essential. Lawyers, however, overuse them. The more you qualify what you say, the less you say. “Don’t be kind of bold,” Zinsser once wrote. “Be bold.” Or as E.B. White put it, “Be obscure clearly.”

Legislative and contractual drafters and judges have good reasons to be paranoid writers. Other lawyers read what these individuals draft with an eye toward getting out of it. The job of construction for these writers is a painstaking process of plugging holes to assure that nothing can be misconstrued.

In other types of legal writing, however, judges, clients, and lawyers read our

prose with no such jaundiced eye. While some assertions have to be qualified—in an opinion letter, for example—most don’t. “No weasel words,” Judge Wisdom cautioned in the primer he gave to clerks.”

Still, lawyers hedge almost reflexively. “Apparently, it seems we can win this case,” says the memo from the associate. Well, can we prevail or can’t we?

If you do have to hedge an assertion, always follow the qualifier with a sentence that explains why. That’s because a hedge always introduces an ambiguity that must be clarified. “Apparently, we can win this case,” could mean either “I’m not sure we can win this case,” or “No one is sure that we can win this case.” Is the ambiguity in the mind of the writer or in the general state of affairs? To settle things, you might write, “My doubt is raised by a Connecticut case that went the other way.” That follow-up sentence clarifies the uncertainty. Doing this will also compel you to hedge less, since few writers will follow by saying, “My doubt is raised by my terrible insecurity, which causes me to qualify everything!” Forcing yourself to explain your hedges will break the reflexive habit of legal paranoia.

#### **5. Keep your sentences to twenty-five words or less.**

The basic rule is this: The more complicated your information is, the shorter your sentences should be. Legal data are frequently complex, so the least you can do for readers is to shorten your sentences and make the information easier to absorb.

Legal writers are famous for their lengthy sentences. None is longer, perhaps, than this one, quoted in the *Wall Street Journal*, from a 1998 stock purchasing offer mailed by Lyondell Acquisition Corp. to holders of Arco Chemical Co.:

The Merger Agreement further provides that, without limiting the generality of the foregoing, from the date thereof until such time as Purchaser’s designees shall constitute a majority of the Board of Directors of the Company, except as expressly contemplated or permitted by the Merger Agreement or the Disclosure Letter delivered by the Company to Lyondell and Purchaser concurrently with the execution and delivery of the Merger Agreement, or to the extent that Lyondell shall otherwise consent in writing, the Company will (a) use its commercially reasonable efforts to operate and maintain its business in all material respects only in the usual, regular and ordinary manner consistent with past practice (including undertaking

scheduled or necessary “turnarounds” or other maintenance work and including offsite storage, treatment and disposal of chemical substances generated prior to such time as Purchaser’s designees shall constitute a majority of the Board of Directors of the Company) and, to the extent consistent with such operation and maintenance, use commercially reasonable efforts to preserve the present business organization of its business intact, keep available the services of, and good relations with, the present employees and preserve present relationships with all persons having business dealings with its business, except in each case for such matters that, individually and in the aggregate, do not and are not reasonably likely to have a material adverse effect on the Company and its subsidiaries taken as a whole and (b) except to the extent required by clause (a) above, the Company will not, and will not permit any of its subsidiaries to: . . . (iii) amend its Certificate of Incorporation or By-Laws or other comparable organizational documents; (xi) waive any material rights or claims relating to the Company’s business; (xii) accelerate vesting or conversion or approve the acceleration or conversion of any shares of restricted stock, except as provided in the Merger Agreement, or grant or approve the grant of any additional shares of restricted stock, phantom stock units, or stock options under any existing plan, except as provided in the Merger Agreement, or modify the term of any performance period or the performance objective to be attained for that performance period under any existing plan; or (xiii) authorize any of or commit or agree to any of, the foregoing actions.

Even in its abridged form here, the sentence is 376 words long and counting.

No one wants to sound like Joe Friday on *Dragnet* or Edward James Olmos’s Castillo on *Miami Vice*, for whom twenty-five words was a season’s worth of dialogue. But that kind of brevity isn’t going to happen in the legal enterprise. While an occasional long, well-constructed sentence does have its place, shorter is better.

#### **6. Try to move subordinate clauses to the beginnings or ends of sentences.**

Take a basic sentence: “Jane filed the complaint.” If you were to add a clause to that sentence, you should write, “*Before leaving for the weekend*, Jane filed the

complaint,” or “Jane filed the complaint *before leaving for the weekend.*” What lawyers should not write, but often do, is “Jane, *before leaving for the weekend,* filed the complaint.” Or, worse, “Jane filed, *before leaving for the weekend,* the complaint.”

The subject, verb, and object present the main information in most sentences. The clause is additional. Putting that clause in the middle makes it harder to read the sentence. So don’t do it, unless you have a clause that has to go there because, say, it defines Jane. “Jane, who likes to walk to the courthouse, filed the complaint.” In this case, the clause can’t go at the end because it won’t make sense there.

### 7. Write for your readers, not for yourself.

We write for others. “Anything that is merely written to please the author is worthless,” wrote Blaise Pascal. A story I once heard illustrates this principle. A professor was teaching a photography class and asked her students to bring her their best pictures each week so she could critique them. One student brought in a picture the teacher didn’t particularly like. “It’s interesting,” she began, “but it’s taken from such a distance you don’t have a focus.”

The next week the student returned with the same picture. “I like most of your work,” the professor said, “but I saw this picture last week, and on second glance, the color in it isn’t very good either.”

The following week the student returned with the same picture. “I don’t understand this,” the professor said. “Every week you keep returning with the same picture, even though it’s not very good.”

“But you don’t understand,” the student finally blurted out. “I had to climb a mountain for three days to snap this!”

That’s all well and good. But the amount of time you spend on something doesn’t translate into whether it’s meaningful for your readers to hear about it. That’s a mistake lawyers frequently make.

This has two clear ramifications for your writing. First, don’t feel the need to introduce yourself in sentences. “I think that this is wrong,” writes the lawyer. You usually don’t need to say, “I think.” Of course you think it—you wrote it. “This is wrong” is enough. Similarly, avoid the temptation to begin sentences with “It is clearly the case that,” or “It is interesting to note that,” or “My sense is that.” It’s natural to want to go into a big windup like a baseball pitcher before delivering the message, but it’s unnecessary.

A graphic example of what not to do came in a brief filed in the U.S. Court of Appeals for the D.C. Circuit (citations

omitted):

When we launched the instant assault upon the indictment we did not do so with the intent of winning the battle but losing the war. From our angle of vision based on two decades of experience on both sides of the appellate sufficiency question, we pursued this appeal fully convinced by the facts and the law.

With all due respect, why inject yourself? Just give us the argument. Your mental processes may be fascinating to you, but they bore a reader, unless your name is James Joyce or Hunter S. Thompson.

Lawyers should also avoid writing in a stream-of-consciousness style, taking the reader on an excursion through their planning. Both judges and lawyers do this all the time, though in the case of judges it’s more justified. Take judicial writing: The best way to organize an opinion is to begin with the conclusion and then go on to describe the arguments that support the result. Yet that isn’t the way judges write at all. Often they do begin with the conclusion, but they then go on to describe all the losing arguments and how they arrived at their findings, taking the reader on a journey through the centers of their minds. You want to ask, if these are losing arguments, why do we have to hear about them? Clearly, however, there are jurisprudential reasons—such as assuaging the losers and avoiding appellate reversal—that force many judges to organize opinions in this fashion.

Lawyers often take readers on similar, albeit less justified, intellectual excursions in their letters and memos to clients. “You asked me whether you can be sued for that leak in your back yard,” lawyers begin, and then they go on to describe all the research they did in excruciating detail. Yet a recounting of research is of little use to clients, especially up front. It’s as if you went to a doctor and told him that you’re worried about your cholesterol. “We’ll run a blood test,” says the doctor. “Come back next week and I’ll tell you what you should do about it.” You return the following week. “What should I do?” you ask the doctor. “Let me tell you how we did the test,” he replies, “thinking like a lawyer” and beginning a ten-minute recitation of lab procedures. You don’t care how the test was done at all; you want to know the results and what to do about your cholesterol. The same goes for clients reading your legal recommendations.

Lawyers and law students love to explain their research because they know it’s the one skill that really does separate them from the general public. Avoid the temptation.

### 8. Use specific imagery, not vague generalities.

Because the law is a conceptual discipline, it has a number of big, difficult-to-grasp words. Occasionally, as Joseph Williams of the University of Chicago has written, substituting a word that evokes vivid pictures in the reader’s eye can enliven legal writing. You could write, “Law students should spend less time studying and more time having fun.” A more memorable sentence, though, is “Law students should spend less time with Justice Thomas and more time with Tom Hanks.” By substituting specific examples for general concepts, the sentence comes alive.

This is what the ad copywriter David Ogilvy did when he was writing a tag line for a celebrated print advertisement for Rolls-Royce. Rather than saying the car was quiet, he wrote, “At sixty miles an hour, the loudest noise in this new Rolls-Royce comes from the electric clock.”

Good legal writers use this technique all the time. Justice Oliver Wendell Holmes could have gone into a long dissertation about the value of First Amendment rights and how those occasionally must be compromised if exercising them will cause harm. Instead he wrote, “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing panic.” It’s the image that makes the sentence memorable.

The key here is to use the technique sparingly—something judges frequently forget. Justice John Paul Stevens is a wonderful jurist, but he was having a bad day when he wrote in a concurring opinion in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981), “And even though the foliage of the First Amendment may cast protective shadows over some forms of nude dancing, its roots were germinated . . .” You also want to use appropriate metaphors. Don’t write, as an Ohio lawyer did, “Pour the allegations contained in the Plaintiffs’ Complaint through a legal strainer and you would be left with one sole question . . .”

### 9. Remember that understated prose is the best form of expression.

In a sense, all writing is a one-to-one conversation, readers read alone. You should pretend you’re talking to a person across a table in a quiet room. Queen Victoria apparently preferred conversing with Benjamin Disraeli to conversing with William Gladstone. Gladstone, she said, addressed her as if he were talking to a crowd in a stadium, Disraeli talked to her one-to-one. Too many lawyers sound like Gladstone, lecturing their audiences in a pompous style.

The best briefs are models of simple clarity and restraint, even when the cir-

cumstances seem to demand otherwise. In contrast, many litigators—especially, let's face it, many *male* litigators—are graduates of what I call the Bobby Knight-Stone Cold Steve Austin School of Written Advocacy. These writers think that the more they overstate their points, attacking the personality of the other side, adding adverbs, and otherwise engaging in hyperbole, the more effective they are as advocates. Unfortunately, the only conclusion most readers draw from such prose is that these writers are as egomaniacal as they seem. To take but one example (citations omitted):

The Attorney General repeats lamentations echoed earlier and often about the Attorney General's inability to prepare and to litigate the case. The Attorney General calls his asserted inabilities a lack of due process. As a consequence, the Attorney General asks the Department to enter a decision denying the . . . recovery in its entirety and on the merits.

We submit that this apologia for the Attorney General's failure to have proved his case should be rejected. The proposed remedy, *e.g.*, a denial of recovery on the merits without regard to the contents of the record, is so blatantly unlawful, and so blatantly contrary to plain statutory and constitutional requirements, that to hear such an act advocated by the chief law enforcement officer of the Commonwealth is truly grounds for pause.

The tribunal is probably still pausing. In other instances, lawyers ask rhetorical questions. "Can anyone doubt that this is wrong?" writes the attorney, inadvertently implying that if the judge does doubt it, the case is over already. It reminds me of a professor I once had at Yale Law School, who was said to be able to construct a straw-man argument and still manage to lose to the straw man.

Orwell once wrote that "the inflated style is a kind of euphemism. A mass of Latin words falls upon the facts like soft snow, blurring the outlines and covering up all the details. The great enemy of clear language is insincerity." If this condition afflicts your prose, buy a Nautilus machine and work out your aggressions elsewhere. The more you turn up the heat rhetorically, the more you weaken your arguments.

### III. THE TENTH RULE: USE SIMPLE LANGUAGE

The nine rules already outlined are important to creating good writing. There is also a tenth rule, which goes beyond them: *Use simple language*. Your choice of words will make or break your composi-

tion.

Like the language of most conceptual disciplines, the law is top-heavy with big words. Several years ago, the *Scribes Journal of Legal Writing* quoted this paragraph from a brief:

It would be hebetudinous and obtuse to fail to be cognizant of the adverse consequences of a ruling in this case. However a decision by a court should not be infected with pusillanimity and timidity. The karma of this case must not be allegory or adventitious, but a pellucid and transpicuous analysis of the law and facts.

Most attorneys don't write this badly, but all lawyers should strive to use simpler speech. "Clearness is secured by using the words that are current and ordinary," wrote Aristotle. To be sure, a careful writer always strives for precision above all else. That's why legal writers should always keep a dictionary and a thesaurus handy. "You ought never to use an unfamiliar word unless you've had to search for it to express a delicate shade," F. Scott Fitzgerald wrote.

Simple words, many of which came into the English language from Anglo-Saxon, tend to convey meaning more strongly than words that came into the language later from French. Words derived from Latin tend to be conceptual words, you're courting trouble.

Look at any memorable line from a speech or an advertisement (forms of rhetoric similar to legal writing) and you'll notice that almost all the words are simple and direct:

Give me liberty or give me death.

I have a dream.

These are the times that try men's souls.

I feel your pain.

Read my lips—no new taxes.

Similarly, when you're skating and fall through the ice, you don't yell, "Assist!" or "Aid!" You call "Help!" There's a lesson in that. "Assist" and "aid" come from French-Latin roots; "help" is derived from Old English.

Most lawyers think there is no way they can discern the origin of most words in the language. Yet we tend to know these things intuitively. Take the famous phrase from Winston Churchill's speech to the British people in 1940, urging them to fight on against the Nazis. As Robert MacNeil, Robert McCrum, and William Cran point out in their book, *The Story of English*, Churchill, like most effective speakers, relied on words of Old English origin, with one exception. I'll bet you can spot the anomaly:

We shall fight on the beaches;  
we shall fight on the landing  
grounds, we shall fight in the fields

and in the streets, we shall fight in the hills; we shall never surrender.

The odd word is "surrender," which sounds and looks different from the others. Churchill probably chose it rather than the more consistent "give up" because the French *had* surrendered, and he was trying to draw a subtle distinction for his listeners as to how the British might act differently. The point for our purposes, however, is simply that it's easier to spot words of Norman origin than you might think.

The language of the law tends to be overloaded with French words because in the formative periods of key disciplines such as procedure, criminal law, and property, much of the legal discourse took place in French. Even today, lawyers use so many French-sounding words—"plaintiff," "defendant," "robbery," "burglary," "jury," "indictment"—that they frequently sound like they were born in Paris. A lot of Latin also became embedded in legal language during this period because Latin was the official language of scholarship and academia. Many of these old legal terms of French and Latin origin cannot be replaced, which makes it all the more important that you counteract them by striving for simplicity with the words you can change.

In *Knauff v. Shaughnessy*, 338 U.S. 537 (1949), Justice Robert Jackson showed how to mix the large words with the smaller ones in one of the more eloquent dissents ever written:

Now this American citizen is told he cannot bring his wife to the United States but he will not be told why. He must abandon his bride to live in his own country or forsake his country to live with his bride.

So he went to court and sought a writ of *habeas corpus*, which we never tire of citing to Europe as the unanswerable evidence that our free country permits no arbitrary official detention. And the government tells the Court that not even a court can find out why the girl is excluded. But it says we must find that Congress authorized this treatment of war brides and, even if we cannot get any reasons for it, we must say it is legal; security requires it.

Security is like liberty in that many are the crimes committed in its name.

A few other historical developments have also contributed to the complexity of legal writing. With the rise of commercial activity and the litigation that arose as a result, the eighteenth and nineteenth centuries were formative periods for legal prose.

During this period, many lawyers and clerks were paid by the word. It was in their interest to make the writing as cluttered as possible. What's more, then, as now, the workers and scribes who assisted lawyers in their drafting often found them arrogant and out of touch. As Charles Dickens captured in *Bleak House*, legal assistants frequently drafted documents with an eye toward satirizing their bosses. Phrases such as "Oyez, oyez, oyez" and "Now comes the plaintiff" might have been delivered with a wink and a nudge. Finally, these assistants who assisted lawyers were certainly not illiterate, but they weren't highly educated either.

As attorneys continue to perpetuate these styles, they're often imitating the language of semiliterate scribes who were being paid by the word and subtly sending up the law. It's not a role model I would follow.

Besides, the importance of writing in the legal profession is new. For much of our history, lawyers didn't even file briefs in the Supreme Court. Even though there were fewer justices, it was too much trouble to write out all those briefs by hand. What lawyers did instead was to file a short table of cases that made up the basis of the argument and then argue orally in the court, sometimes for hours. (This is still the practice in English courts and throughout Europe.) By modern standards, lawyers did little writing, and what little they did, they dictated to their scribes.

The rise of the importance of writing in the legal profession came only with im-

provements in office automation. It's no coincidence that the Federal Rules of Civil Procedure were revised in the late 1930s to encourage more written discovery, because the price of typewriters had dropped precipitously during the deflation of the Depression. It's only in the last generation or two that lawyers have made writing the principal means of their essential communication.

Legal education, however, is always slow to keep up with the real world. Even today, almost all law courses use the case method, studying judicial opinions rather than briefs or other writings by practicing lawyers. A century ago, reading opinions made sense, since little else was written down for law students to read and study. You would think that in the subsequent century, some professors might have come up with the idea that their students could learn more by examining the documents they would soon have to write—briefs, memos, contracts, and letters—while growing to appreciate the role lawyers have in the decision-making process. No such luck, however.

The oral nature of much early legal discourse also explains a lot of the problems lawyers have with their writing now. Being wordy, using run-on sentences, and asking rhetorical questions are far less egregious faults for speakers than for writers. That after all, is why they're called *rhetorical* questions. As lawyers have carried these habits of oral communication into writing, however, they've made their writing worse. Reading is very different from listening. Understanding the roots of legal prose can help lawyers

learn where their problems lie.

Many lawyers fear that if they adopt the ten rules outlined in this chapter, their prose will become so simple that they won't sound like themselves, or they will look foolish. Yet a complex personal style hides more of an author than it reveals. "Style results more from what a person is than what he knows," wrote F.B. White. As to fears of oversimplification, they seldom prove true for lawyers, who forget that the greatest written prose is seldom complex. Aldous Huxley, who began his literary career as an ad writer, once concluded that

any trace of literariness in an advertisement is fatal to its success. Advertisement writers may not be lyrical, or obscure, or in any way esoteric. They must be universally intelligible. A good advertisement has this in common with drama and oratory, that it must be immediately comprehensible and directly moving.

Just listen to Justice Holmes, as he began his explanation of the common law:

The object of this book is to present a general view of the Common Law. To accomplish this task, other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic, it has been experience.

If such a simple, eloquent style worked for him more than a hundred years ago, it will work for you too. ■

## Law Reporter

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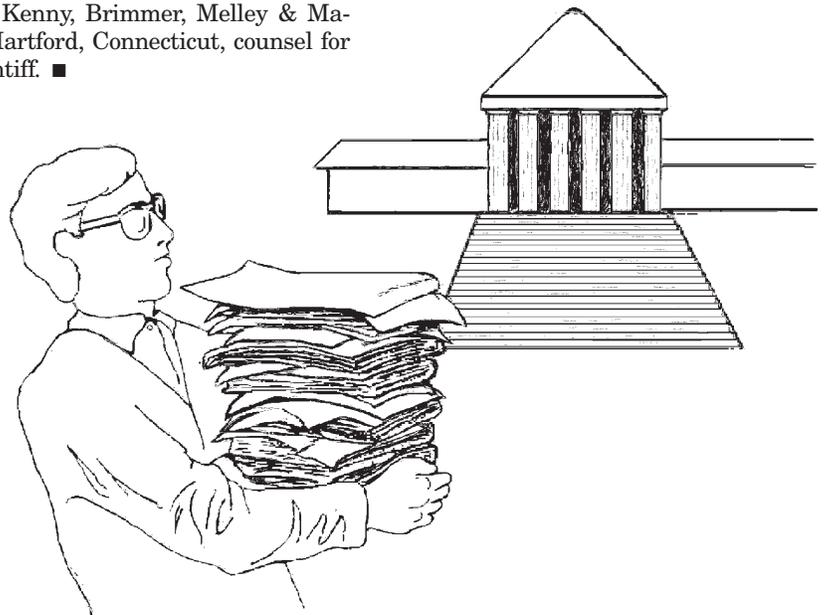
child was impaired from the work force. The child has been involved with regular physical therapy, which will be required into adulthood, along with occupational therapy and periodic checkups. The child is otherwise mainstreamed into the school system, self ambulatory, and very bright. The child looks and speaks normally.

The issue in the case was whether the doctor should have come after the 7:30 phone call to monitor the situation more closely, should have conducted an emergency C-section at 8:05 in response to the tender abdomen and the recognition of the possibility of a uterine rupture and whether the doctor should have proceeded to an emergency C-section at 8:20 in light of non-reassuring tracings.

The jury returned a verdict for the plaintiff in the amount of \$1,050,000.00 and \$1,450,000.00 non-economic dam-

ages. Medical bills submitted to date of the trial were \$46,000.00.

Submitted by William J. Melley III, Esq., of Kenny, Brimmer, Melley & Mahoney, Hartford, Connecticut, counsel for the plaintiff. ■



## Award for Excellence in Mediation Community Mediation Reception Graduate Club, New Haven, May 10, 2001

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*Judge Arterton was recipient of the Zampano Award for Excellence in Mediation given by Community Mediation of New Haven at a reception at the Graduate Club on May 10, 2001. Her remarks follow:*

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Most of history records the resolution of conflicts in terms of victories and losses. In war, might often makes right, but sometimes quirks of nature—such as befell the Spanish Armada—or sheer grit such as motivated the American revolutionaries—can turn the tide. The victorious leaders are traditionally characterized in terms of their courage, bravery, strength, cunning or treachery. And sometimes there is simply no alternative dispute resolution process available—remember, negotiation with Hitler turned out to be “appeasement” which led to war.

Less frequently, history notes the end of the beginning of conflict, but it is hard to record or reflect on a war that never happened. But history does take note of the peacemakers. Before 622 AD, a wise and respected man in Mecca named Mohammed founded his life mission this way. The sacred place where each of the tribes kept their gods and holy relics had fallen into disrepair, and the most sacred common relic, the black stone that had fallen from the sky, was no longer in its proper place. Each of the four tribal leaders demanded to be the one to reposition the sacred black stone, and of course thereby to emerge as the most eminent or predominant power. Since power rivalries among tribes were ultimately resolved in the bloodiest of ways with no role for losers, disputes had the potential for fatally high costs. Mohammed lay a carpet on the ground, had the stone placed on it, and had each tribal chief take a corner, and together they repositioned the stone in the Kaaba. Mohammed became known as Al-Amin, the Trusted One.

Indeed, mediation success requires as an essential, trust by all parties in the mediator. This trust enables parties to be willing to jointly search for a workable peace to what divides them, because they are assured that they will not be disadvantaged by engaging. Often, it is the realization that the alternative is too costly that drives the parties to try mediation.

Currently, courts, impelled in part by a similar concept, are going through something of an expansion of purpose. The judiciary is traditionally used to define public values as a product of applying legal principles. As these legal principles are shaped by social, economic, scientific, political and moral evolution, “the law” too evolves.

*Dred Scott* was the law and Mr. Scott, living in free territory was returned to slavery; *Plessy v. Ferguson* was the law and Mr. Plessy could legally be thrown out of the white section of the train; *Bradwell v. Illinois* was the law and Myra Bradwell was lawfully refused admission to the Illinois Bar. But, *Brown v. Board of Education* put an end to the myth of separate but equal; *United States v. Virginia*, ended the exclusion of women from VMI and all other public male academic bastions. That’s judicial evolution and thus it has been that parties use the courts to vindicate their positions through an orderly procedure, concluding with a judicial determination which is then subject to appellate review.

So introducing Alternative Dispute Resolution to the institution of the judiciary rightfully raises concerns about whether it will undermine the development of these articulations of public values or the benefits of a public forum for scrutiny of the activities of the parties and of the judges themselves.

The Alternative Dispute Resolution Act of 1998 which for the first time required that ADR be “an integral part of the national policy of judicial administration” recognized that there is a huge range of types of disputes finding their way to the federal courts, and that as to their resolution, one size does not fit all. While the much-mouthed rationale of reduction of delay, cost and court congestion has yet to find actual empirical support, the importance of institutionalizing Alternative Dispute Resolution in the courts was aptly stated in the testimony of Peter Steenland from the Department of Justice in congressional hearings:

[T]he principle [sic] benefit of using dispute resolution techniques is that these processes enable the parties to resolve their disputes themselves, often in a way that neither the courts nor other adjudica-

tors could provide. When parties are encouraged to work with each other to identify what they really need to settle a dispute, they can often achieve a resolution far superior to one that is imposed upon them, whether that comes from a judicial decree or an arbitral award. If we are to be concerned about our citizens’ satisfaction with our justice system, we must build into that system not only opportunities for efficiency, but also measures that encourage and aid litigants in resolving their disputes in a consensual manner. In many [of these] cases, the prevailing party does not win in litigation. The costs, the delays, and the disruptions to an ongoing relationship are terribly corrosive and harm all parties. All too often, the costs far outweigh the benefits of a victory decreed by someone else; ultimately, no one wins in these circumstances.<sup>1</sup>

Thus it is that the U.S. District Court for the District of Connecticut is embarked on the process of devising and implementing its own ADR Plan, drawing on its existing settlement resources from its gifted magistrate judges and its dedicated bar, to meet the mandate of encouraging and promoting the use of ADR. We will address the many concerns that exist, recognizing that by institutionalizing ADR, and not just leaving it in its current *ad hoc* form, we risk making rules and requirements that begin to look too much like what this was supposed to be “alternative” to. A balance between judicial oversight and party autonomy must be struck and however we end out structuring it, we will have the benefit of the very thoughtful input and recommendations from the District Court ADR Advisory Committee, whose membership reflects representation from all major types of federal litigants as well as distinguished mediators and academics.

As I have traveled the path from skeptic to believer in considering whether ADR should properly be a part of the judicial process, I have become convinced that integrating ADR into the judicial processing, however accomplished, serves to introduce more and more parties to the

*continued on page 104*

# Personal Injury Awards Are Being Attacked by Medicare and Health Plans, Plaintiffs' Lawyers May Be Personally Liable

By Sylvia Hsieh

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*The Forum frequently gets inquiries about subrogation issues, especially Medicare. This is also reflected on the CTLA ListServ, as Doug Hammond's column in this issue illustrates. This article answers many of the questions and suggests measures plaintiff lawyers can take to protect their clients, and themselves.*

*This article appeared in Lawyers Weekly USA in the April 30, 2001 edition. ©2001 Lawyers Weekly, Inc. Reprinted with permission.*

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Both Medicare and private ERISA plans are becoming much more aggressive about the subrogation of medical expenses out of personal injury awards, experts tell *Lawyers Weekly USA*.

Medicare liens are especially treacherous because there is no notice requirement and no statute of limitations. Medicare can come after the money years later and if the plaintiff has spent it, the lawyer can be personally on the hook.

As a result, lawyers should always consider whether Medicare paid for any of a client's bills, lawyers say.

"Until the last five years, nobody thought much about Medicare liens. Now I deal with it in every case," says Jules Olsman, a plaintiffs' attorney in Farmington Hills, Mich., and president of the state trial lawyers association.

"It's a large unhealed canker sore on all cases. You can't ignore them," says Paul Godlewski, a Minneapolis plaintiffs' attorney.

"It's a daily occurrence," agrees Troy Giatras, a personal injury attorney in Charleston, W.Va.

Many plaintiffs' lawyers either don't address the issue early enough, or avoid it altogether, and are risking personal liability, experts say.

"Medicare says they can come after everyone in the food chain. Anybody who put their hands on a check is exposed," says Olsman.

Some personal injury lawyers say that private ERISA plans also pose a big problem for them.

"Subrogation in the small case as well as the large catastrophic case has a direct impact on the bottom line. In many cases, you fight more with the subrogated carrier than with the tortfeasor," says Douglas Roberts, a Columbus, Ohio, attorney who gives seminars to lawyers on

this subject.

For lawyers who represent ERISA plans, the new emphasis on subrogation means that such clauses may need to be rewritten.

Under the Medicare Act, the federal government has a lien for the repayment of bills paid by Medicare on money recovered from a patient from a third party.

The issue typically comes up in personal injury, workers' comp, and elder law cases.

Large verdicts against nursing homes in the past several years have attracted lawyers who aren't familiar with these liens and ignore them if they don't hear from the government.

"What happens as a practical matter is plaintiffs' lawyers say, 'We haven't heard a big stink about Medicare. Let's not think about it. Let's move on. Wink-wink.' That's what lawyers shouldn't be doing," says Mark Cameli, a Milwaukee attorney.

This is a huge mistake, experts say, because if the money is disbursed the lawyer is personally liable for repaying Medicare. The Act also doesn't have a statute of limitations, so a lawyer could potentially be on the hook even years after a case settles.

"They can collect any time they find out about it," says Olsman.

"You don't want to find out your client spent all the money and now you're the only source of funds because you received money from that settlement. You're putting yourself at risk by not finding out the amount of the lien and seeing if the government is willing to negotiate it down," says John Parisi, an attorney in Overland Park, Kan., who handles nursing home cases.

Personal injury lawyers should warn their clients up front that an award will be reduced by the amount of any lien.

"I tell my clients if there is a lien, it will come from their share," says Ruben Krisztal, a plaintiffs' attorney who also practices in Overland Park, Kan. He notes that Medicare doesn't provide for a reduction in the lien to cover attorney fees.

The lien can be an especially big problem in states with caps on non-economic damages.

"You don't want your clients to be surprised. If [they] have to pay it all back, they could come out of it without any re-

covery. You need to negotiate with the government what will be paid back before settlement," says Parisi.

It's also up to the lawyer to contact Medicare, not the other way around.

Usually, this means that lawyers have to look closely at the medical bills to see whether the government paid for them.

Another reason to inspect the bills is to make sure the lien covers only bills for injuries related to the lawsuit.

"The difficulty arises when you start arguing [about] what is related and unrelated. It happens quite often. You have to look at the paperwork quite carefully," says Krisztal.

Olsman says the problem is that Medicare asserts liens based on billing codes that capture all bills paid after a certain date of injury, even if they aren't related.

He is currently suing Medicare in a case where his client settled with a nursing home for a hip fracture, and the government claimed a lien for bills for a leg fracture that he says is unrelated to the settlement.

"Medicare says it's all one big pie. I say it's not related—one injury you have a lien on, the other you don't," he says.

Once a case is settled, plaintiffs' lawyers should obtain a release from the government saying it's been paid, advises Cameli.

## ERISA Plans

ERISA plans are also focusing on collecting subrogated claims. Many now hire companies to do this for them.

"ERISA carriers have become much more aggressive in the last five to 10 years simply because they realized subrogation work can be very lucrative," says Roberts.

Most plans require full reimbursement for medical expenses paid by the plan, but many leave some wiggle room for plaintiffs.

As a result, there has been a flurry of litigation over the issue. Courts are all over the map on whether a plan is entitled to subrogation if the plaintiff hasn't been "made whole," as well as on the issue of whether the plan is responsible for a portion of the plaintiffs' attorney fees.

Plan lawyers say these problems can be avoided by making the subrogation language airtight.

Draft the plan “so nobody can see ambiguity,” says David Gordon of Los Angeles, who represents employers and several large union plans. This means the documents should explicitly say that the plan takes the first dollar of any recovery and doesn’t recognize the “make whole” doctrine.

The plan should also specify that it won’t reduce its right to subrogation for attorney fees, says Thomas Lawrence, a Memphis, Tenn., attorney who represents employers in handling subrogation claims.

This avoids the “common fund rule” that some courts apply, which says the plan should help the plaintiff pay for the cost of recovering money from a third party by pitching in for attorney fees.

Eliminating the make whole doctrine and the common fund rule in the plan language gives it more room to negotiate.

“I recommend [plans] have all the bells and whistles to allow full reimbursement because it gives [them] the option of saying, ‘Look, I don’t have to have 100 cents on the dollar, but I’m not going to give you one-third,’” says Lawrence.

Another mistake that drafters are making is not specifying that the plan has a right of subrogation against any money received in a settlement, regardless of how the money is allocated.

“From the employer’s point of view, if we say we’ll get compensated after the other expenses are paid, every settlement agreement will allocate to other expenses. Unless the plan claims the first dollar, every settlement will be denominated [for] pain and suffering,” says Gordon.

### What Plaintiffs’ Lawyers Can Do

Experts say there are some steps that plaintiffs’ lawyers can take to maximize their clients’ recovery, defeat subrogated claims and get attorney fees.

Roberts advises lawyers to put in their fee agreement that they have a security interest in any settlement money.

“There isn’t any attorney in the world who does personal injury work who should not have a grant of a security interest. It’s a powerful tool,” he says. This is because the lawyer’s secured interest will trump a plan’s unsecured claim.

Plaintiffs’ lawyers should also draft their fee agreements to make it as clear as possible that attorney fees are paid first.

“The plan can’t get what the participant never had. If the fee agreement says everybody agrees that the first 30 percent goes to the attorney, which is the attorney’s interest and which the participant has no right to, then there is no right of reimbursement,” says Gordon.

In most cases, plans will negotiate some contribution to attorney fees, al-

though usually not the full amount, plaintiffs’ lawyers say.

“If you turn to the subrogated carrier and say ‘Screw you’ that’s going to buy you three years of litigation. If I can get a subrogated carrier to 50 cents on the dollar, I’d do it in a heartbeat,” says Roberts.

### Ethical Issues

Many lawyers tend to ignore reimbursement issues, but this can raise ethical problems. “There’s big exposure for lawyers. There are big ethical issues,” says Olsman, who notes that many plaintiffs’ lawyers don’t tell their clients about the problem early enough because they want to appear positive about the case.

In addition to the Medicare lien itself, there are also civil and criminal fraud penalties if a lawyer knows that Medicare paid for the medical bills but doesn’t notify the government.

“Under the federal False Claims Act, the standard is reckless disregard, so if you stick your head in the sand and repeatedly fail to pay the government, you could end up with some liability,” says Parisi.

In some cases, plaintiffs’ lawyers have notified their malpractice carriers where they failed to tell a client about a Medicare lien and the money was disbursed, notes Olsman.

While a lawyer won’t be personally liable to an ERISA plan for a subrogated claim, some courts have said that an attorney can be sued for inducing the plaintiff to breach a contract with the plan, says Lawrence.

In a recent case, he successfully argued that a plaintiff’s attorney can be held liable for disbursing funds while having knowledge of an employer’s subrogation claim. (*Greenwood Mills Inc. v. Burris*, No. 2:99-0005, (M.D. Tenn. Jan. 10, 2001).)

He also notes that under the new *Restatement of the Law Governing Lawyers* and many state ethics rules, a lawyer who knows about a third party claim must put the money in question into a trust account. ■

Questions or comments can be directed to the writer at:

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## Remarks of Hon. Janet Arterton

*continued from page 102*

experience of self-structured resolutions, that so many have found so helpful. After all, even the Tobacco litigation was settled. But, importantly, requiring parties to take some responsibility for finding a solution to their problem is every bit as important a public value as presentation of their problem for judicial determination. That ADR will not be applicable in every case is beside the point—because the two values of judicial adjudication and consensual resolution can, and in my view, should coexist within the institutional framework of the federal courts.

This is, of course, the precept of Community Mediation which offers alternatives to externally imposed resolution, and thereby strengthens the people and communities it serves by teaching and training people how to make peace. It is apparent that often finding this peace is more difficult than just continuing to duke it out. Recognizing this we have new heroes of the George Mitchell variety and we are desperate for the hero or heroine to emerge in the Middle East.

It is indeed Al-Amin, the Trusted Ones, the mediators who by their skills, savvy and grit lead the parties out of their seemingly intractable conflict by sheer force of their own commitment to the mediation process, to a less bruising course than the one they are on. It is to those tough men and women who engage in this hard, frustrating but all important endeavor we call mediation who we really are honoring tonight, with the hope that as there are more of you, we will nudge our disputatious culture to adapt, both here and abroad, and we can avoid the too costly alternative.

Thank you. ■

### Footnote:

<sup>1</sup>Testimony of Peter R. Steenland, Jr., Senior Counsel for Alternative Dispute Resolution, Department of Justice, before the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, October 9, 1997. 1997 WL 621881 (F.D.C.H.).



# 2001 Legislative Report

Gaffney, Bennett & Associates

The following is a summary of several important bills that were approved by the General Assembly.

## **BILLS PASSED BY THE GENERAL ASSEMBLY**

### **PUBLIC ACT 01-152, HB5850—AN ACT CONCERNING PEREMPTORY CHALLENGES IN A CIVIL ACTION.**

**Effective Date: October 1, 2001.**

Throughout the 2001 legislative session, the Insurance Industry, the Business Community and the Medical Community voiced strong opposition to HB 5850, arguing that the 1993 unity of interest law is a good law that has been working fairly for all parties. Ultimately, the majority of lawmakers believed in fact that the 1993 law has not been fair for many plaintiffs, especially in light of the three Appellate Court decisions on the issue: *Rivera v. Saint Francis Hospital*, *Glass v. Peter Mitchell Construction* and *Beach v. Regional School District No. 13*. Based upon these Appellate Court precedents, the lawmakers agreed that some further criteria must be provided on the unity of interest issue. Therefore, the new law states that the court shall find a unity of interest among parties who are represented by the same attorney or law firm; and there shall be a presumption that a unity of interest exists among defendants who have not filed cross-claims or apportionment complaints against one another. In addition, in order to prevent the situation that often occurs now where the plaintiff has four peremptory challenges and the defendants have sixteen or twenty, the new law also provides that one side cannot ever have more than twice the total number of challenges as the other side.

### **PUBLIC ACT 01-167, HB 6895—AN ACT CONCERNING DECISIONS OF THE CLAIMS COMMISSIONER.**

**Effective Date: October 1, 2001.** The overall purpose of this new law is to encourage the Office of the Claims Commissioner to hold hearings and to make decisions on claims against the state that are filed with Claims Commissioner, so that citizens will not have to wait several years for a decision by the Claims Commissioner. The new law establishes a mechanism whereby any claim that has been pending for more than three years (year 2002) or for more than two years

(years 2003 and thereafter) is reported to the General Assembly at the commencement of each legislative session. The General Assembly then may decide to: (1) grant the Claims Commissioner an extension for a period specified by the General Assembly to dispose of such claim, (2) grant the claimant permission to sue the state, (3) grant an award to the claimant, or (4) deny the claim. Notice is also provided to the claimant that the General Assembly will be reviewing his/her claim. The new law also provides that the following claims shall be privileged with respect to assignment for hearing: (1) claims by persons who are sixty-five years or older or who reach such age during the pendency of the claim, (2) claims by persons who are terminally ill, as defined in section 52-191c, and (3) claims by executors and administrators of estates.

- It is also important to note that members of the Legislature's Judiciary Committee are agreeable to a future proposal that would make the Connecticut claims commissioner process more similar to the Federal Tort Claims Act. The CTLA will be working on this proposal during the next couple of months.

### **PUBLIC ACT 01-32, SB1357—AN ACT CONCERNING WITNESS FEES.**

**Effective Date: October 1, 2001.** This new law amends section 52-260 to allow the court to determine the reasonable fees of certain medical professionals and real estate appraisers—including trial testimony by way of deposition—to be included as taxable costs. This new law also amends section 52-257 to allow parties to obtain the reasonable expenses incurred for the recording, videotaping, transcribing and the presentation of the deposition of certain medical professionals and real estate appraisers in lieu of live testimony at trial.

### **PUBLIC ACT 01-\_\_\_, HB 6586—AN ACT CONCERNING JUDGE TRIAL REFEREES.**

**Effective Date: October 1, 2001.** This new law allows the Superior Court to refer trials de novo in arbitration cases to designated judge trial referees. The law requires the Chief Justice to designate judge trial referees who can hear these cases and publish a list of the referees by October 1 of each year. It is important to note that the law specifies that for trials after arbitration, the judge trial ref-

eree can issue a judgment that exceeds \$50,000. This new law also alters the date when the 20-day period to demand a trial de novo after an arbitrator's decision begins—the period starts on the date that the arbitrator's decision is postmarked by the United States mail rather than on the date that the court files the decision.

### **PUBLIC ACT 01-71, SB 1108—AN ACT CONCERNING OFFERS OF JUDGMENT.**

**Effective Date: October 1, 2001.** The original legislation that was filed with the Judiciary Committee this year would have completely repealed the Connecticut Offers of Judgment statutes. The CTLA strongly opposed this initial legislation, and instead participated in compromise legislation, which eventually became Public Act 01-71. This new law provides defendants with an extra thirty days (for a total of sixty days) to respond to plaintiffs' offers of judgments. The new law also requires that all offers of judgment must be filed with the court not later than thirty days before trial (this new provision now prohibits the frequent occurrence where defense counsel would file offers of judgment just as the trial was about to begin, and the plaintiff would have no reasonable opportunity to review or respond to the offer).

### **PUBLIC ACT 01-15, HB 6538—AN ACT CONCERNING ADMISSIBIL- ITY OF RECORDS AND REPORTS OF CERTAIN EXPERT WITNESSES AS BUSINESS ENTRIES.**

**Effective Date: October 1, 2001, and applying to all civil actions pending on October 1, 2001 or brought thereafter.** This new law amends section 52-174 to allow in all civil actions that signed reports and bills of certain medical professionals may be admitted into evidence as business entries (the prior law only applied to personal injury actions).

### **PUBLIC ACT 01-85, SB 1008—AN ACT REQUIRING DIRECT PAY- MENT OF PRESCRIPTION MEDI- CATION FOR WORKERS' COMPEN- SATION.**

**Effective Date: January 1, 2002.** This new law amends section 31-294d to require employers/insurers to pay the costs of an injured employee's prescription drugs directly to the medical provider.

**PUBLIC ACT 01-22, SB 1112—AN ACT CONCERNING THE WORKERS' COMPENSATION REVIEW BOARD. Effective Date: October 1, 2001.** This new law extends the section 31-301 appeal period from ten days to twenty days.

**PUBLIC ACT 01-33, HB 5861—AN ACT INCREASING THE MILEAGE REIMBURSEMENT RATE FOR WORKERS' COMPENSATION CLAIMANTS. Effective Date: October 1, 2001.** This new law amends section 31-312 to change the mileage reimbursement rate for injured workers from a flat fifteen cents per mile to a rate equal to the federal mileage reimbursement rate used for a privately owned automobile as set forth in 41 CFR Part 301-10.303, as from time to time amended.

**PUBLIC ACT 01-\_\_\_, SB 1129—AN ACT CONCERNING RIGHTS OF WATER COMPANY CONSUMERS. Effective Date: October 1, 2001, except for the provision requiring regulations to be adopted by the DPH, which is effective upon passage.** This new law requires the Connecticut Department of Public Health (DPH) to notify local health directors when it seeks to impose civil penalties on water utilities for violating water quality laws and regulations. The law requires the water utility to notify the health director when the utility appeals penalty; and the health directors are entitled to participate in all administrative proceedings and judicial appeals regarding these violations. The new law also requires the DPH to: (1) amend its current regulations to require a public education program for any system that violates DPH's standards for the copper content of water, and (2) develop regulations incorporating federal regulations incorporating the federal standards regarding public notice of serious drinking water contamination problems.

**PUBLIC ACT 01-\_\_\_, SB 1058—AN ACT CONCERNING COURT OPERATIONS. Effective Date: October 1, 2001.** This new law makes several changes to the laws governing Superior Court Operations. Most notably, the new law authorizes the court, when deciding child custody or visitation issues, to order either of the parents and the child to participate in counseling and drug or alcohol screening if it is in the child's best interest. The new law also authorizes the judgment creditor in a small claims case, instead of the court clerk, to send interrogatories to the appropriate people or institutions. The legislation that was initially filed with the Judiciary Committee this year contained a provision that au-

thorized the Superior Court to establish a new fund to assist attorneys who have mental health, substance abuse or gambling problems. This new program was to be funded by a \$10 charge on attorneys. As the session moved forward, this proposed program became more controversial, and the provision establishing this new program was deleted by way of a House Floor Amendment.

**PUBLIC ACT 01-145, HB 6941—AN ACT CONCERNING PLANS FOR THE REMEDIATION OF MEDICAL AND SURGICAL ERRORS. Effective Date: October 1, 2001.** This new law requires Connecticut Hospitals to provide the Connecticut Department of Public Health with plans for the remediation of medical and surgical errors that is required by the Joint Commission on the Accreditation of Healthcare Organizations.

**PUBLIC ACT 01-82, HB 6983—AN ACT CONCERNING THE LIABILITY OF LANDOWNERS WHO PERMIT THE HARVESTING OF FRUITS AND VEGETABLES. Effective Date: October 1, 2001.** The original legislation that was filed with the Judiciary Committee this year provided immunity to all farm owners when such farm owners allowed volunteers for non-profits (e.g., FOODSHARE) to harvest fruits and vegetables from the farm owners' properties. At the request of CTLA, the bill was amended to state that farms which are considered "pick-your-own" farms or any other farms which otherwise invite the public and charge for the harvesting of produce do not get the protection of this law.

**PUBLIC ACT 01-41, HB 6535—AN ACT CONCERNING INDEMNIFICATION OF COURT APPOINTED HEALTH CARE GUARDIANS. Effective Date: October 1, 2001.** The legislation that was initially filed with the Judiciary Committee this year provided total immunity to health care guardians. The CTLA opposed this immunity legislation, and instead proposed compromise legislation which would require the State of Connecticut to indemnify the court appointed guardians. The new law also provides that a claim against such health care guardian need not be filed with the Claims Commissioner under chapter 53 of the general statutes.

**PUBLIC ACT 01-95, HB 6583—AN ACT CONCERNING RECONSIDERATION REQUESTS AND THE REOPENING OF MATTERS BY THE COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES. Effective**

**Date: July 1, 2001.** This bill authorizes the executive director of the CHRO to permit people whose discrimination complaints have been dismissed without a full investigation, and who ask permission, to go directly to court, even if their request to reconsider the dismissal has been granted, denied or is pending. The new law also establishes standards for reopening a closed CHRO matter.

#### **BILLS/PROVISIONS NOT ENACTED BY THE GENERAL ASSEMBLY**

**SB1110—AN ACT CONCERNING EQUAL ACCESS TO EVIDENCE IN PERSONAL INJURY LAWSUITS** (this bill required plaintiffs to execute medical/employment/tax authorizations in all cases).

**SB1111—AN ACT CONCERNING FAIRNESS IN MEDICAL EXAMINATIONS** (this bill provided extensive control to insurance companies in the selection of IME physicians).

**SB1259—AN ACT CONCERNING STANDARDS OF CONDUCT AND LIABILITY FOR CORPORATE DIRECTORS AND OFFICERS** (this bill provided liability protection for corporate officers and directors).

**SB 149—AN ACT CONCERNING POLICE POWERS OF ARREST** (liability protection for municipalities).

**HB 5048—AN ACT CONCERNING RECREATIONAL IMMUNITY FOR MUNICIPALITIES.**

**HB 5311—AN ACT CONCERNING NOTICE OF INJURIES CAUSED BY DEFECTIVE MUNICIPAL ROADS AND BRIDGES** (this bill makes notice requirements more burdensome).

**HB 5642—AN ACT CONCERNING APPLICATION OF THE GOOD SAMARITAN LAW TO POLICE OFFICERS USING AUTOMATIC EXTERNAL DEFIBRILLATORS.**

**SB 576—AN ACT CONCERNING RECREATIONAL IMMUNITY FOR MUNICIPALITIES.**

**SB 604—AN ACT CONCERNING KNOWN OR SUSPECTED CASES OF ANIMAL ABUSE** (Immunity provision).

**HB 5838—AN ACT CONCERNING GOOD SAMARITAN IMMUNITY FOR EMERGENCY SERVICE PROVIDERS.**

**HB 5845—AN ACT CONCERNING MUNICIPAL IMMUNITY FOR RECREATIONAL USE OF MUNICIPAL LAND FOR SKATEBOARD PARKS.**

**HB 5851—AN ACT CONCERNING IMMUNITY FROM LIABILITY FOR POLICE OFFICER TRAINED IN USE OF DEFIBRILLATOR.**

**SB 990—AN ACT CONCERNING MUNICIPAL LIABILITY FOR INJURIES AT SKATEBOARD PARKS.**

**HB 6884—AN ACT ESTABLISHING**

A STATUTE OF LIMITATIONS ON MAKING A CLAIM AGAINST THE SECOND INJURY FUND FOR REIMBURSEMENT.

SB 1196—AN ACT CONCERNING PENALTIES FOR LATE WORKERS' COMPENSATION PAYMENTS (this bill loosened the late payment penalties on people who fail to make timely workers' compensation benefit payments to injured workers).

HB 6771—AN ACT CONCERNING THE UNIFORM ARBITRATION ACT (this bill had three objectionable provisions relating to arbitrator immunity, fee-shifting/loser pays and mandatory discovery requirements).

HB6654—AN ACT CONCERNING PLEADING STATUTORY RECKLESSNESS (this insurance industry proposal required more stringent pleading requirements for section 14-295 claims).

HB6833—AN ACT ESTABLISHING AN INTERNAL AUDIT PRIVILEGE FOR INSURERS (this insurance industry proposal created a statutory privilege for all documents and communications relating to insurance company internal audits).

HB6838—AN ACT CONCERNING THE RESPONSIBILITY OF GENERAL HOSPITALS AND OTHER HEALTH CARE PROVIDERS AND PERSONS WITH RESPECT TO HIV-RELATED TESTING (the original, total immunity provision was amended).

SB577—AN ACT CONCERNING STATEMENTS OF APOLOGY MADE AFTER AN ACCIDENT (this bill required a defendant's statement of apology to be admissible at trial).

SB1292—AN ACT CONCERNING FLEXIBILITY IN AUTOMOBILE INSURANCE RATE FILING REQUIREMENTS (this insurance industry proposal essentially repeals the law requiring the Insurance Department to review and approve new auto insurance rates before these rates can be used by the companies).

HB6888—AN ACT CONCERNING SCHOOLS AND CRIMINAL CONVICTION RECORDS AND EDUCATIONAL TECHNOLOGY (immunity provision).

HB 6979—AN ACT CONCERNING ELECTRONIC NOTARIZATION (very stringent and unworkable requirements).

SB 1341—AN ACT CONCERNING PATIENT AND RESIDENT ABUSE IN HEALTH CARE FACILITIES (the bill redefined compensable psychological injuries to require serious physical injuries).

SB 1387—AN ACT CONCERNING THE AWARD OF FEES AND EXPENSES IN APPEALS OF STATE TAX ASSESSMENTS (Loser Pays Provision).

HB 6988—AN ACT CONCERNING

THE IDENTIFICATION OF OFF-SITE CONDITIONS THAT AFFECT THE VALUE OF RESIDENTIAL REAL PROPERTY (immunity provision).

SB1059—AN ACT CONCERNING CONFIDENTIAL RECORDS OF THE INSURANCE DEPARTMENT (this bill created several new statutory privileges for insurance company documents and communications).

SB1096—AN ACT CONCERNING THE LICENSING OF INSURANCE PRODUCERS (the extensive insurance company immunity provision was deleted from this bill).

SB1248—AN ACT ADOPTING THE UNIFORM ATHLETE AGENTS ACT (immunity provision).

SB500—AN ACT CONCERNING THE POWER OF THE POLICE OFFICER STANDARDS AND TRAINING COUNCIL TO SET RETENTION STANDARDS FOR POLICE OFFICERS (immunity provision).

HB6675—AN ACT CONCERNING BROWNFIELD REDEVELOPMENT (immunity provision).

HB6771—AN ACT CONCERNING THE UNIFORM ARBITRATION ACT (sections 14 and 17).

HB6914—AN ACT CONCERNING THIRD PARTY LIABILITY AND REVISIONS TO THE TRANSFER ACT (immunity provision).

SB1377—AN ACT CONCERNING TECHNICAL CHANGES TO DEPARTMENT OF PUBLIC SAFETY STATUTES (immunity provision).

HB6969—AN ACT CONCERNING LIABILITY FOR INJURIES SUFFERED BY EMERGENCY PERSONNEL WHILE ON PRIVATE PROPERTY IN THE PERFORMANCE OF THEIR DUTIES.

HB6970—AN ACT CONCERNING MUNICIPAL IMMUNITY FOR DEFECTIVE SIDEWALKS.

HB6983—AN ACT CONCERNING THE LIABILITY OF LANDOWNERS WHO PERMIT THE HARVESTING OF FRUIT AND VEGETABLES (amended to provide very limited protection to non-profit vegetable farmers).

HB6982—AN ACT CONCERNING THE GOOD SAMARITAN LAW (this bill would have provided more immunity to users of Automatic External Defibrillators).

SB1420—AN ACT CONCERNING THE DISPOSITION OF REMAINS OF DECEASED PERSONS (immunity provision was amended out of the bill).

SB1251—AN ACT CONCERNING CREMATION AUTHORIZATION (immunity provision).

HB 6850—AN ACT CONCERNING THE POWER OF A MUNICIPALITY TO APPOINT RECEIVER OF RENTS (im-

munity provision).

HB 5653—AN ACT CONCERNING LIMITATION OF LIABILITY OF PRODUCT SELLERS (this bill provided total immunity to product manufacturers (e.g., gun manufacturers and auto manufacturers) when their products are used during the commission of a felony).

SB 433—AN ACT CONCERNING THE NURSE INTERVENTION PROGRAM (this bill provided total discovery and liability protection to certain nurses involved in the program to provide rehabilitation and counseling to impaired/addicted nurses).

SB 1226—AN ACT ADOPTING REVISED ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE CONCERNING SECURED TRANSACTIONS (this bill was amended to delete the insurance industry proposal to make it more difficult for our clients to sell their structured settlement contracts).

SB 1201—AN ACT CONCERNING EDUCATORS (immunity provision).

SB 1115—AN ACT CONCERNING INVESTIGATIVE SUBPOENAS (this bill had a provision allowing for subpoenas of medical and psychiatric records).

HB 5309—AN ACT PROHIBITING THE PAYMENT OF JURORS BY A PARTY OR SUCH PARTY'S REPRESENTATIVE.

HB 7026—AN ACT CONCERNING STATUTORY OATHS.

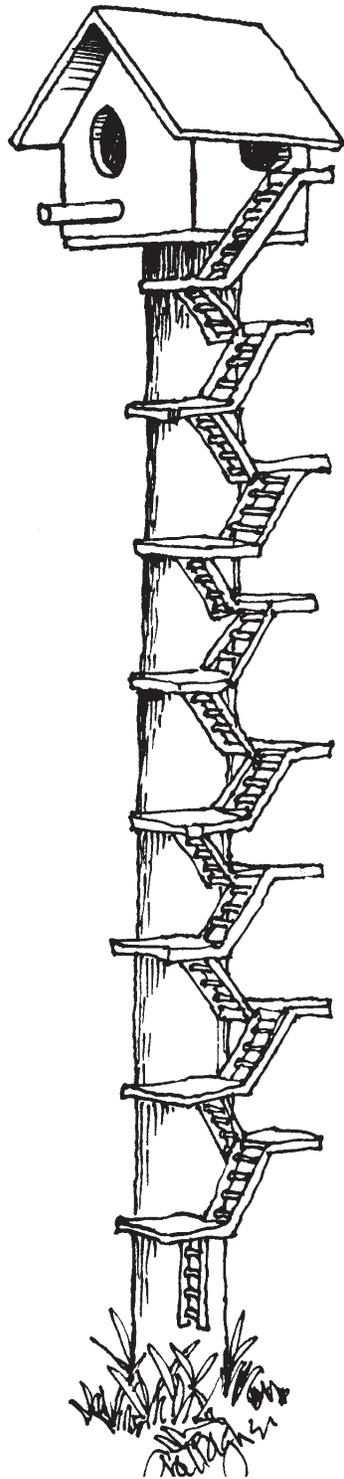
SB 300—AN ACT CONCERNING LIABILITY PROTECTION FOR SKATEBOARD PARKS.

HB 6987—AN ACT CONCERNING HEALTH INSURANCE CLAIMS AND PAYMENT RECOVERY (this bill had claims payment provisions that are inconsistent with the current anti-subrogation statute, section 52-225c).

HB6725—AN ACT CONCERNING CERTIFICATION AND BACKGROUND CHECKS FOR HOME HEALTH AIDES AND BACKGROUND CHECKS FOR EMERGENCY MEDICAL TECHNICIANS, FOR CERTAIN CAREGIVERS AND FOR NURSING HOME EMPLOYMENT (immunity provisions).

SB1108—AN ACT CONCERNING OFFERS OF JUDGMENT (the original bill repealed the offer of judgment statutes altogether). ■





## When Microsoft Cries "Frog!," Does The Second Circuit Jump? Has The Morality of The Marketplace Infected The Court of Appeals?

By Peter A. Kelly

*The editor yields his usual column to Peter A. Kelly, who practices in New Haven. The decisions Attorney Kelly refers to are Bristol Technology v. Microsoft Corporation, 114 F. Supp. 2d 59 (D. Conn. 2000), the decision awarding punitive damages; U.S. Bancorp Mortgage Co. v. Bonner Mall, 513 U.S. 18 (1994); Microsoft Corporation v. Bristol Technology, \_\_\_ F.3d \_\_\_ (2d Cir. 2001) (docket #00-9508, published 5/17/01); and Housing Works, Inc. v. City of New York, 203 F.3d 176 (2d Cir. 2000).*

Overshadowed by Microsoft's recent momentous victory in the D.C. Circuit court of appeals was a decision by the Second Circuit involving a Connecticut case—also in Microsoft's favor—which was published in May.

That decision, in a proceeding called *Microsoft Corporation v. Bristol Technology*, reflects discredit upon the Second Circuit, and is an affront to the Connecticut district court in particular and the federal trial courts generally. It is the responsibility of the Second Circuit to eradicate that decision.

What happened was a district court jury in Bridgeport—after a six week trial in 1999—found that Microsoft had violated CUTPA, Connecticut's unfair trade practices act, by having engaged in deceptive acts or practices. The dispute arose from Bristol Technology's charge that Microsoft had cheated on a licensing agreement with Bristol, which had developed a computer program—referred to as a "bridge"—to permit UNIX-based computer operating systems to run programs written for Microsoft's Windows operating systems. The agreement provided that Microsoft would furnish the vital source codes needed by Bristol to make its bridge programs work. But while publicly lauding this arrangement, Microsoft decided—when the first agreement expired—to cut back on its scope. The new agreement they proposed limited Microsoft's disclosure of newly developed program source codes. Bristol claimed this damaged their business since customers would not want to buy programs which could not assure them access to all of Microsoft's new programs. (As Microsoft head Bill Gates had put it in 1997, independent software vendors who wrote programs to the newer Microsoft programs without realizing that Bristol's bridge program couldn't accommodate them, would be "just f—ed.")

But although the jury had found Microsoft guilty of violating CUTPA, it awarded only nominal damages of \$1. Under the district judge's instructions, this probably meant the Bristol had not presented clear enough evidence of its damages resulting from Microsoft's actions to enable them to calculate damages without guessing.

After the verdict, the trial proceeded with Bristol's claims for counsel fees and punitive damages. Under CUTPA these determinations are made by the trial judge after the jury has been discharged. The district court judge, Janet C. Hall, had presided over the trial and—in connection with Bristol's punitive damages motion—had reviewed trial transcript and

exhibits. In August 2000, Hall released her decision finding that Microsoft had engaged in "egregiously deceptive behavior," specifically including lying by Gates. Her task in assessing a proper measure of damages to deter repetition of such conduct was complicated since this was an exceptional CUTPA case. Unlike most others, where the defendant's misconduct only affected the plaintiff, Judge Hall concluded that Microsoft's actions were intended to cause large numbers of programmers to change their behavior (i.e., forsake the bridge programs of Bristol and others), and that hundreds of millions, if not billions of dollars were at stake.

Her decision was extremely detailed, featuring a review of all pertinent evidence, a comprehensive survey and analysis of the law concerning CUTPA punitive damages, and detailed fact findings and legal conclusions. She decided upon an award of \$1 million, recognizing that—to Microsoft—this sum alone was probably not much of a deterrent, but no doubt aware of the sensitivity of businesses to incidents of judicial censure. The importance of this decision derives from its role as a guidepost in the exceptional CUTPA case where the malefactor's conduct cuts a wide swath, as well as the unusually high quality of clear-minded legal analysis it represents. Moreover, Hall's methodology and analysis is a valuable resource on a national level, since all 50 states and the District of Columbia have enacted so-called "little FTC acts," which, like CUTPA, prohibit unfair or deceptive trade practices.

Notwithstanding these considerations, the Second Circuit, in a decision released May 17, obliterated Hall's ruling. And they did it based upon a request from Microsoft alone—with no opposition, and without benefit of adversarial briefing. But what makes it wrong and unjust is that their decision effectively disregards controlling Supreme Court and relevant Second Circuit law.

Here's what happened. Although the *Bristol Technology* case was at most a legal brushfire relative to its federal antitrust case in Washington, Microsoft didn't want to have Hall's punitive damages decision as a permanent part of American jurisprudence. Microsoft appealed to the Second Circuit. After filing the appeal Microsoft settled the case with Bristol. This is not unusual, and typically results in the appeal being dismissed as moot (i.e., "dead"). However, federal law permits courts to "vacate" judgments where such action is "just under the circumstances." An order vacating a judgment means that the decision is inoperative. It cannot be cited as precedent. For all practical purposes, it's as if the decision had never been rendered.

Motions to vacate have been considered important by commercial or governmental litigants who received a bad result in court, and worried about that precedent being used against them in future litigation. To avoid this, the typical solution was to settle the suit while an appeal was pending, then ask either the trial court or court of appeals to vacate the troublesome ruling.

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# Sign Up Here

By Anne M. Valentine

*Anne M. Valentine is president of the Ohio Academy of Trial Lawyers. This article appeared in the Winter 2001 Ohio Trial, the quarterly publication of OATL. © OATL Education Foundation, 2001. Reprinted with permission. Ms. Valentine's eloquent message is that pro bono work is incumbent on all trial lawyers.*

I enter the fifty-year-old concrete-block warehouse through a corrugated garage door partially raised for my anticipated visit. Before the door closes, sunlight makes visible the particles in the air. Ten years ago, I might have said desperation has a smell, but now what my nose perceives is simply dust, cigarette smoke, and the scent of the ninety men who, on any given day, claim the crowded shelter as home.

I exchange warm hellos with Tyrone, who has been on staff at the men's-only shelter for the decade that I have been visiting on various Wednesdays. We catch up on our respective lives since we were last together before he shouts above the din of conversations: "Hey, listen up. The lawyer's here." He points to a sheet of legal paper taped to the worn wooden table. "Sign up if you need to talk to the lawyer." The hubbub resumes as men come forward.

I look at the sign-up sheet: over the next three hours I will talk with fifteen men, including Ray-Ray who is, as always, among the first to sign, writing his name on the last line of the long yellow sheet. This is progress. I've convinced Ray-Ray that he needn't fabricate a new legal ordeal to justify a conversation with me. If he lets the others with more pressing problems go first, I won't leave before we have the chance to visit.

First up is Jake, who tells me he has worked the past five days cleaning out a building on the north end for a man who enlisted a group from the shelter for a stint of hard labor. Jake did the work but the employer disappeared on pay day, his temporary office vacated. I'm grateful to start the evening with a tangible task: I can make calls, write a letter, and leave Jake with some expectation that the lawyer can help this time.

The next three men, anxious to find work, want to have their criminal records expunged. Not one meets the strict statutory requirements for "a clean slate." One of them has had me help him on several occasions with job applications, checking his spelling, explaining the questions. But every background check brings him another rejection.

For Ken, I answer questions about legally dissolving a marriage that has been long dissolved by drugs, distance, and poverty.

The evening brings men with questions about social security benefits, affordable housing, eviction, and petty criminal charges. While much of this is out of my "area of expertise," and while I can't solve most of these problems, often I can clarify their issues, and channel the men toward the right individuals or agencies. I can make appointments and follow-up phone calls. I can enlist the staff of the shelter to help.

And then there are men for whom I have nothing professional to offer: men with substance abuse problems, mental

illnesses, and physical impairments. They sign the list. And so, instead of offering answers, analysis, and contacts—the technical advice for which trial lawyers are trained—I offer something that's hardly unique to our profession: I shake a hand. I listen. Sometimes I listen to convoluted, disjointed stories that have no end and for which there is no resolution. I look someone in the eye and he thanks me for looking at him because the rest of the time he feels invisible "on account of how people ignore me like I'm not even here."

Imagine the relief when the next man in line, Randy, tells me, "I lost all my personal papers." Finally, something I can solve. After dozens of similar scenarios at the shelter, I've cobbled together a plan—a network of helpful people and resources—for such dilemmas. (No social security card: no driver's license. No driver's license: no benefit check, no job. And on and on).

As I finish the night's paperwork and walk out to my car with Tyrone, he says to me, as he has every other Wednesday evening for the past decade: "Remember, you and me, Anne, we're only a six-pack away from these guys." I can sense that his reassurance, a way of saying "but for the grace of God go I," is offered as much for himself as for me. Ills, too, is a hard-earned place.

Once in ten years I've found a resident of the shelter who needed a "trial lawyer." Few others have possessed a problem even close to our specialty. But, as a trial lawyer, our determination, our unique capacity to identify with the less powerful in the community, and the networks we have cultivated over the years, are all that is necessary.

I am hardly in a position to underscore the moral responsibilities we all have as citizens and as human beings. But I believe, as trial lawyers, we have an additional obligation: because of our singular and powerful position in society, we hold a key to access to justice. As the legal scholar Learned Hand wrote, "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice." It must follow, then, that we need to use our unique powers to benefit the powerless. We can neither expect other well-meaning and committed citizens to stand-in for us, nor can we expunge our sense of duty with other burdens and commitments. *Pro bono* work is incumbent upon all of us.

I know we all struggle with whether to accept a minor, soft-tissue case given the frustrating ordeal we often endure trying to obtain a good result. We all take on a fair share of these cases knowing that such people require our professional guidance in order to access the legal system and receive fair treatment.

But I'd like to urge you to widen that "fair share" and expand your talents into *pro bono* service that at first glance seems out of your field. Trial lawyers represent the highest ideals of our profession. And, unlike our fellow attorneys in other areas of practice, we even represent the archetypal image of law in the minds of the public. Thankfully, we often can deliver justice for our clients and our actions make us worthy of the respect we're afforded. But, given our commit-

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## Editorial

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But the Supreme Court, in 1994 in *U.S. Bancorp Mortgage Co. v. Bonner Mall*, cracked down on the practice. The decision in the *U.S. Bancorp* case was unanimous. The Court, in an opinion by Justice Antonin Scalia, said:

- Vacatur cannot be justified simply on the ground that the case has been settled.
- While it remains possible that exceptional circumstances could conceivably justify vacatur in a settled case, the fact that the settlement agreement provides that there will be no objection to the motion does not provide an exceptional circumstance.

The Court noted the important public interest in the presumptive correctness of judicial decisions and the value of precedent to the legal community, observing that judicial decisions are not “merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.”

But remarkably, what should have posed an insurmountable obstacle to Microsoft was given short shrift by the Second Circuit. With an obligatory nod to the *U.S. Bancorp* ruling, the appellate court found four “exceptional circumstances” which enabled it to do Microsoft’s bidding:

1. It was “unclear” whether Hall had jurisdiction over the punitive damages issue;
2. Since CUTPA is a state law, federal decisions about it aren’t all that important;
3. Maybe a waiver was needed by Microsoft to permit Hall to rule on punitives; and
4. Her ruling might prove embarrassing or unflattering to some Microsoft people (or, in the lifeless prose of the court, such individuals are “the subject of moral appraisals integral to the findings on punitive damages”).

None of these constitutes an exceptional circumstance under *U.S. Bancorp*. Let’s deal with the two most glaringly specious ones first, numbers 2 and 4. As to 2, it is arrant nonsense. Worse, it trivializes the important and necessary work done by the district courts whenever they are faced with interpreting state law.

The fourth “exceptional circumstance” is similarly absurd. While not a criminal sanction, the purpose of punitive damages—as the name implies—is to punish with the hope of deterring specific future misconduct. The Second Circuit’s professed concern for the sensibilities of

Microsoft is incomprehensible.

Numbers 1 and 3 both question whether Hall’s decision was legally correct. If you’re now asking “Isn’t that what appeals are for?,” you are doing better than the Second Circuit on this point. Doubtless Microsoft’s lawyers knew, when they decided to settle the appeal, that the Supreme Court in *U.S. Bancorp* said that when an appeal is rendered moot by settlement, “the losing party has forfeited his legal remedy . . . of appeal, thereby surrendering his claim to the equitable remedy of vacatur.” The Court also emphasized its concern over “the inappropriateness of disposing of cases, whose merits are beyond judicial power to consider, on the basis of judicial estimates regarding their merits.”

Finally, in any decision to grant vacatur, affecting as it does the integrity of judicial precedent, a court must consider the public interest implications of its decision. If there was any service to the public interest in granting Microsoft’s motion, the Second Circuit couldn’t find it—their decision is silent on this issue.

Why, then, did the court of appeals prove so willing to comply with Microsoft’s request? We may never know. Some judicial decisions are just wrongheaded. Here, in an interesting twist, the obvious error of the ruling is further illuminated by irony. Last year the Second Circuit heard a case where a settling party also moved to vacate the district court ruling. In denying that petition, the court observed, “Our task, the appeal being moot, is to avoid the expression of any view on the merits.” That decision—as was the Microsoft decision—was issued “per curiam.” However, the senior member of the Microsoft panel was also a member of the panel which issued the earlier decision. In that case he took the unusual step—in a per curiam ruling—of writing a separate concurring opinion to point out, “with utmost respect for the district judge, that in the fullness of caution he may wish to consider on remand the vacatur of his own opinion. . . .” This was a perfectly appropriate observation. One can only wonder why it did not instantly spring to mind in this case. Also why—instead of getting a judicial “slap upside the head” and being told to go home and get over it—Microsoft became a special object of the Second Circuit’s grace.

Why does any of this matter? It matters because any case which calls into question the integrity of the judicial system is important. In a court system where less than 10% of cases filed proceed to final judgment, faith in the reliability of the courts and correctness of judicial decisions is the very glue that holds the judicial system together. Unfortunately, the Microsoft decision

gives the appearance of the proverbial “old boys’ club” where the forms of justice are observed, but—with a wink, nod, and clap on the back, the requested result is granted to the privileged member.

Fortunately, it is wholly within the power of the Second Circuit to remedy this all too human lapse. What they should—and I think, must—do is revisit this decision on their own initiative and vacate it, with a remand to Judge Hall to hear any further request from Microsoft for vacatur. We will then see if Microsoft has the guts—in a Connecticut court where such watchdogs of the profession as the Connecticut Bar Association and the Connecticut Trial Lawyers Association may be permitted to file friend of the court briefs—to press its claim of “extraordinary circumstances.” ■

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## Guest Editorial

*continued from page 110*

ment not to ration this justice, we must all find further opportunities in our own communities to share our particular abilities. Inquire about volunteering through local bar associations, shelters, churches, or private agencies; many programs offer training and mentoring to assist you with issues outside “your expertise.”

Consider this page a different sort of sign-up sheet. Consider these words a voice rising above the noisy conversations of a crowded room. Come and sign your name to the list. You needn’t wait as Ray-Ray does for everyone else to go first. ■

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## President’s Notebook

*continued from page 81*

yers section of CTLA. The leadership of this section is developing programs to attract younger members of the bar.

We will establish a Social Affairs Committee and we will aggressively seek more female and minority members.

I intend to make existing and potential members more aware of the resources that CTLA provides to the rank and file members, one glowing example is our Website. Just by way of example, we have over 600 depositions and excerpts from trial testimony of experts available on line to our members. If you haven’t visited and utilized the CTLA website, you have no idea what you’re missing.

In closing, let me say that I am deeply honored to be elected as the President of this great organization. I look forward to a challenging and exciting year working together with all of you to achieve our goals.

That’s it for our program this evening. Thank you very much for coming. I hope you enjoyed yourself and please drive home safely. ■

## THE AMERICAN JURY

A jury reflects the attitudes and mores of the community from which it is drawn. It lives only for the day and does justice according to its lights. The group of twelve, who are drawn to hear a case, makes the decision and melts away. It is not present that next day to be criticized. It is the one governmental agency that has no ambition. It is as human as the people who make it up. It is sometimes the victim of passion. But it also takes the sharp edges off the law and uses conscience to ameliorate a hardship. Since it is of and from the community, it gives the law an acceptance which verdicts of judges could never do.

*Justice William O. Douglas  
The Anatomy of Liberty  
(1954)*

# CTLA Supreme and Appellate Court Review June 2000 to May 2001

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This Review covers cases in the Connecticut Law Journal and the Connecticut Law Reporter from June 6, 2000 to May 29, 2001, and other miscellaneous cases and matters brought to our attention in that period of time.

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### 1. LEADING CASES

#### 101. Number of preemptory challenges changed.

Sections 51-241 and 51-243 have been amended by Public Act 01-152 to add the following language:

"A unity of interest shall be found to exist among parties who are represented by the same attorney or law firm. In addition, there shall be a presumption that a unity of interest exists among parties where no cross claims or apportionment complaints have been filed against one another. In all civil actions, the total number of preemptory challenges allowed to the plaintiff or plaintiffs shall not exceed twice the number of preemptory challenges allowed to the defendant or defendants, and the total number of preemptory challenges allowed to the defendant or defendants shall not exceed twice the number of preemptory challenges allowed to the plaintiff or plaintiffs."

The legislation is a result of the restrictive interpretation the Appellate Court has made of "unity of interest" reflected in the three cases decided since the unity of interest legislation was enacted in 1993. *Beach v. Regional School*

*District No. 13*, 42 Conn. App. 542 (1996), cert. denied 239 Conn. 939 (1997); *Glass v. Peter Mitchell Construction*, 50 Conn. App. 539, cert. granted 247 Conn. 938 (1998) (appeal withdrawn); and *Rivera v. St. Francis Hospital*, 55 Conn. App. 460 (1999).

Unity of interest should now be found to exist among various defendants who are represented by the same attorney or law firm. The language of this part of the statute is that a unity of interest "shall be found." A presumption is created that unity of interest exists among parties who have not filed cross claims against each other, or apportionment complaints against one another.

In addition, in all civil actions the total number of challenges from one side of the case cannot exceed twice the number of challenges on the other side. For example, if one plaintiff sues a hospital and four separate doctors on various theories of malpractice, and there are no cross claims or apportionment claims, and all defendants are represented by separate counsel, under the former practice the plaintiff would have 4 challenges and the defendants 20 challenges. Now, if the defendants are afforded 20 challenges, the plaintiff must be afforded 10 challenges.

A detailed summary of the unity of interest legislation first enacted in 1993 and the later Appellate Court decisions interpreting the unity of interest rule appears in a memorandum prepared by Gaffney, Bennett & Associates, CTLA's lobbyists, soliciting support in the Senate for the legislation. An extraordinary effort over substantial opposition was made by Gaffney Bennett, and a successful result achieved.

The legislation is procedural in nature and should be applied to all pending cases when it becomes effective on October 1, 2001. See, *Citizens Against Pollution Northwest, Inc. v. Connecticut Siting Council*, 217 Conn. 143, 151 (1991); *Mulrooney v. Wambault*, 215 Conn. 211, 216-217 (1990); *Anderson v. Schieffer*, 35 Conn. App. 31, 39-40 (1994).

#### 102. (1) Snow removal contractor liable to injured plaintiff. Injury is foreseeable, and public policy supports imposing liability.

(2) Party with duty to keep premises safe may not apportion liability with snow removal contractor because:

- (a) Under the non-delegable duty doctrine the party with the duty cannot absolve itself from liability by contracting out the performance of the duty;
- (b) There can be no apportionment because the non-delegable duty doctrine imposes a form of various liability. The party with the duty is vicariously liable for the acts of the independent contractor;
- (c) Snow removal contractor may also be directly liable to plaintiff.

(3) Liability need not be based on control. Contractor is liable to all those who may foreseeably be injured by his work or conditions on the structure not only when he fails to disclose dangerous conditions known to him, but also when the work is negligently done.

*Gazo v. Stamford*, 255 Conn. 245 (2001)

The plaintiff was injured in a fall on an icy sidewalk. He sought damages from the City of Stamford, the owner of the property abutting the sidewalk, and the tenant of that property, the defendant Chase Bank. The bank filed an apportionment complaint against the independent contractor it had hired to provide ice and snow removal services. The plaintiff filed a substitute complaint asserting negligence and contract claims against the independent contractor.

The trial court granted the independent contractor's for summary judgment on the negligent count, and its motion to strike the breach of contract count, and rendered judgment in favor of the independent contractor. Plaintiff appealed.

The Supreme Court held that the independent contractor, having assumed a contractual obligation to perform a duty owed by another, is nevertheless liable to third parties in tort for the negligent performance of that duty.

The court's analysis is as follows:

1. In concluding that the independent contractor, Pierni Construction, owed a direct duty of care to the plaintiff, it first examined the relationship between Pierni's alleged negligence and the plaintiff's injuries. It found that the relationship is direct, and well within the scope of foreseeability. Pierni contracted to remove ice and snow from the sidewalk in front of the bank in order for the area to be safe for pedestrians such as the plaintiff. Although the duty owed to the plaintiff cannot extend beyond the scope of foreseeability, the potential for harm from a fall on ice was significant and foreseeable.
2. There was a valid public policy reason for holding Pierni responsible for his conduct. Pierni's liability to the plaintiff fits within the general rule that every person has a duty to use reasonable care not to cause injury to those whom he reasonably could foresee would be injured by his negligent conduct, whether that conduct consists of acts of commission or omission. The ultimate test of the existence of the duty to use care is found in the foreseeability that harm may result if it is not exercised.

The court noted that in this connection, for policy reasons, it has limited the reach of duties so as to preclude certain foreseeable victims from being able to recover for their breach. For example, the cases have shielded professional decision making from the complaints of third parties, when third party intervention carried with it a substantial risk of interference with the primary purpose of the professional consultation. *Jacoby v. Brinckerhoff*, 250 Conn. 86, 97 (1999) (psychiatrist's treatment of troubled spouse should not be burdened by accountability to other spouse); *Zamstein v. Marvasti*, 240 Conn. 549, 561 (1997) (mental health professionals have no duty to third persons when performing sexual assault abuse evaluations of children); *Fraser v. United States*, 236 Conn. 625, 634, cert. denied, 519 U.S. 872 (1996) (duty to disclose substantial risk of imminent act of violence arises only if third person is identifiable victim or member of class of identifiable victims); *Krawczyk v. Stingle*, 208 Conn. 239, 246 (1988) (no liability to third parties for attorney's negligent delay in execution of estate planning documents).

The court saw no similar persuasive policy reasons to limit the snow removal contractor's liability.

3. Section 324A of the Restatement (Second) of Torts recognizes such a duty as a matter of policy. This section provides that one who undertakes gratuitously or for consideration the rendering of services to another which he should recognize as necessary for the protection of third persons or things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care if he has undertaken to perform a duty owed by the other person to the third person. The court adopted this section of the Restatement.

The court stated (255 Conn. at 253):

"In this case, Pierni contracted to perform ice and snow removal services for Chase Bank, which had a nondelegable duty to keep its premises safe. Ice and snow removal is a type of service that is undertaken in contemplation of protecting third persons, and injuries resulting from a slip and fall are foreseeable."

4. The court reasoned that it had already adopted an analogous duty in construction cases, citing *Coburn v. Lenox Homes, Inc.*, 173 Conn. 567 (1977); *Zapata v. Burns*, 207 Conn. 496 (1988).

In *Coburn* a contractor was held liable to a subsequent purchaser of a house in which the contractor had installed a faulty septic system. The court in that case held that privity was not a requirement to sustain the plaintiff's tort action. Moreover, that decision stated that a defectively constructed house is likely to result in damage to the owner and there is no reason why the contractor should not be liable for the effects of his negligence if they were foreseeable.

In *Zapata v. Burns*, the court determined that an architect's liability for negligence resulting in personal injury or death may be based on his supervisory activities or upon defects in the plans. In addition, the court reasoned that it is "now almost the universal rule that the contractor is liable to all those who may foreseeably be injured by the structure, not only when he fails to disclose dangerous conditions known to him, but also when the work is negligently done." 207 Conn. at 517. See, Annotation 74 ALR 5th 523 (2000), "Modern status of rules regarding tort liability of building or construction contractor for injury or damage to third person occurring after completion

and acceptance of work; 'completed and accepted' rule."

The court further reasoned that the nondelegable duty doctrine means that the party with such a duty—in this case, Chase Bank, could not absolve itself of liability by contracting out the performance of that duty. The nondelegable duty doctrine means that a party may contract out the performance of a nondelegable duty, but may not contract out his ultimate legal responsibility. 255 Conn. at 255.

The court viewed the nondelegable duty doctrine as involving a form of vicarious liability, pursuant to which the party with the duty may be vicariously liable for the conduct of its independent contractor. That vicarious liability, however, does not necessarily preclude liability on the part of the independent contractor.

The court noted that the general rule is that an employer is not liable for the negligence of its independent contractors. An exception, however, to this general rule is that the owner or occupier of premises owes invitees a nondelegable duty to exercise ordinary care for the safety of such persons. The nondelegable duty doctrine is, therefore, an exception to the rule that an employer may not be held liable for the torts of an independent contractor.

The court further noted that liability may not be apportioned, because in the case of vicarious liability of one defendant for the conduct of another apportionment does not apply.

The decision also held that the plaintiff could not as a matter of law be considered a third party beneficiary of the contract between Chase Bank and the contractor, and that contractor's liability is based on principals of tort law. The plaintiff could not convert that liability into one sounding in contract merely by invoking the contract language in his complaint.

Putting a contract tag on a tort claim does not change the essential character of the tort claim.

### **103. Apportionment cannot be based on intentional misconduct, strict liability, and liability under any non-negligence-based statutory cause of action.**

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

Public Act 99-69 §1(o) amended the apportionment principles of §52-572h to exclude apportionment with respect to liability based on intentional misconduct;

strict liability; and liability under any non-negligence-based statutory cause of action. Here, the court construed the Products Liability Act as creating strict liability, and therefore falling into the second category of excluded claims, even when the products liability claim is based on underlying conduct that constitutes simple negligence.

#### **104. Apportionment cannot be brought against an unidentified third party.**

*Eskin v. Castiglia*, 253 Conn. 516 (2000)

The court put to rest an issue as to whether apportionment can be had against a John Doe party. The specific holding is that the apportionment complaint cannot be filed against an unidentified third party.

The decision was based on statutory construction and principles of equity. With respect to the latter, the court stated (253 Conn. at 531):

[O]n the equities of this case, we believe that to follow the defendant's theory would be inequitable. The defendant's theory would put the burden on the plaintiff to bring the unidentified defendant into this case in order to preserve her opportunity to collect all of the damages that she may be awarded. Thus, this is a case in which the equities and our statutory construction point to the same conclusion.

#### **105. Expanding application of CUTPA to landlords and others liable in premises liability cases.**

*Suto v. Deerfield Realty Co.*, 27 CLR 384 (8/28/00) (Arnold, J.)

The court held that a landlord may be liable under CUTPA for failing to comply with the statutory responsibilities established by the Landlord and Tenant Act, even if the failure constitutes only negligence. Allegations that a landlord negligently failed to remove an accumulation of leaves on a walkway in violation of the requirement that common areas be kept in a clean and safe condition as required by §47a-7(a)(3), resulting in a fall and injuries to the plaintiff, are sufficient to state a claim under CUTPA. The opinion discusses the recent trend towards recognizing the application of CUTPA to conduct by landlords.

In *Brezicki v. Shop Rite Supermarkets, et al*, Superior Court Judicial District of New Haven at Meriden, #99-0266196S the plaintiff fell on property owned by

HRE properties, and leased to Shop Rite. The plaintiff claimed that the defendants were negligent in failing to remove accumulated ice, and in failing to correct known defects in the crosswalk. The plaintiff further claimed that the defendants had violated the Connecticut State Building Code, and §29-252 of the General Statutes, by failing to provide a safe means of entrance and egress to Shop Rite, and asserted that such code violations constituted deceptive or unfair practices under CUTPA.

At trial in November 2000, the plaintiff's expert testified that cracks in the crosswalk caused ice to accumulate in the area where the plaintiff fell, and that the crosswalk was not properly graded to allow for adequate drainage. The jury found that defendants had violated CUTPA by failing to comply with §29-252 and with sections 804.1 and 805.1 of the State Building Code.

The plaintiff received a verdict for compensatory damages in the amount of \$299,910.45. Case settled for \$340,000.00 by reason of the defendant's exposure to the prospect of punitive damages and attorney's fees under CUTPA.

The plaintiff's counsel in the case was CTLA member William H. Clendenen, Jr. of New Haven.

#### **106. Plaintiff's claim of an inability to work or resume normal activities does not place the plaintiff's psychological condition at issue, and therefore does not waive the privilege for communications with a psychologist.**

*Woodsworth v. Viola*, 27 CLR 466 (9/11/00) (Kocay, J.)

In a negligence action for injuries from a fall in a parking lot controlled by the defendant, the assertion of claims for an inability to work or resume normal activities does not introduce the plaintiff's psychological condition as an issue in the case within the meaning of the exception to the statute creating a privilege for communications between a psychologist and patient. The records of treatment of the plaintiff by a psychologist prior to the accident are not discoverable in a negligence action.

The opinion also holds that the allegation of "pain and discomfort" raises a claim based on physical discomfort and not a claim of pain associated with the plaintiff's mental condition. The court did allow the defendant discovery of records relating to the plaintiff's request for social security disability benefits filed be-

fore the accident, but it ordered *in camera* review of the records.

Another recent opinion limiting discovery of information concerning application for social security disability benefits is *Caldwell v. Shelby Insurance Co.*, 23 CLR 302 (1/25/95) (Flynn, J.).

For a similar decision, see *Johnson v. Trujillo*, 977 P.2d 152 (1999) holding that prior psychiatric and counseling records are not discoverable where no specific psychiatric or brain injury is claimed. *Johnson* and other similar cases were reported in the 1999 Review, 17 *Forum* 148-149 (1999).

#### **107. Colon v. New Haven: Municipal liability gone haywire.**

*Colon v. New Haven*, 60 Conn. App. 178, cert. denied 255 Conn. 908 (2000)

The plaintiffs brought suit against the Board of Education and the City for injuries sustained by Maribel Colon when she was struck by a door that was negligently opened by her teacher at her school. The trial court rendered summary judgment for the defendant on the ground of governmental immunity, and the plaintiffs appealed to the Appellate Court, which held that the trial court improperly determined that the teacher's *discretionary* act of opening the door did not fall under the exceptions to governmental immunity for acts that are likely to subject an identifiable person to imminent harm.

The court held that the statute, §52-557n, contains no language evincing a legislative intent to abandon the common law exception involving an identifiable person subject to imminent harm, and under the circumstances of the case, where the potential for harm was significant and foreseeable and the danger limited in duration, the exception applied.

The incomprehensible holding of this decision is that the opening of the door by a school teacher was a discretionary act.

The first issue decided by the Appellate Court in the appeal was that as a matter of law the opening of the door by the teacher was a discretionary act. Although the Appellate Court conceded that whether acts or omissions are ministerial or discretionary is normally a question of fact for the fact finder, 60 Conn. App. at 181, it nevertheless held, as a matter of law, that on the facts alleged the opening of the door by the teacher was a discretionary act.

The Appellate Court's reasoning is that there "is no allegation that Pollack was required to perform in a proscribed

manner and failed to do so.” 60 Conn. App. at 182. It held (60 Conn. App. at 183):

In the present case, there was no directive describing the manner in which Pollack was to open doors. Rather, it appears that it is Pollack’s poor exercise of judgment when opening the door that forms the basis of the plaintiff’s complaint. Accordingly, we conclude that Pollack’s actions were discretionary in nature.

Plaintiffs argued that the act of opening a door was not, as a matter of law, a discretionary act and, therefore, the trial court’s holding was erroneous. Whether the act is discretionary or ministerial is at least a question of fact.

The distinction between governmental acts, which carry immunity, and ministerial acts, which do not carry immunity, has been described as follows: “Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature. . . . On the other hand, ministerial acts are performed in a prescribed manner without the exercise of judgment or discretion as to the propriety of the action.” *Gordon v. Bridgeport Housing Authority*, 208 Conn. 161, 167-68 (1988).

This articulated distinction, however, does not go a long way toward avoiding the result described above; that, because every voluntary physical act involves some sort of preceding thought process, every human function may be deemed discretionary as a matter of law. See *Koloniak v. Board of Education*, 28 Conn. App. 277, 281 (1991). In order to avoid the unfairness associated with the current approach, definitive guidelines need to be set which take into account the purpose of governmental immunity.

The best discussion of the distinction between discretionary acts and ministerial acts is found in *Letowt v. Norwalk*, 41 Conn. Supp. 402 (1989). In *Letowt*, the plaintiff, Ricki Letowt, sued the defendant City of Norwalk claiming that, while standing beside her automobile, which had just been involved in an accident, she was struck by a police vehicle responding to the accident call and was pinned between her automobile and the patrol car. *Id.* at 402. The plaintiff alleged that her injuries were caused by the negligence of Laura Blakely, the responding police officer, in several respects. *Id.*

The defendant moved for summary judgment claiming that the operation of a police department was a governmental function, and that the defendant was,

therefore, immune from liability. *Id.* The issue before the court was whether negligence in the driving of a police vehicle should properly be characterized as discretionary or ministerial. *Letowt*, 41 Conn. Supp. at 403.

The court, Lewis, J., denied the defendant’s motion for summary judgment and adopted the holding articulated by the Supreme Court of Rhode Island in *Catone v. Medberry*, 555 A.2d 328 (R.I. 1989) that:

When the government or its agent engages in an activity normally undertaken by private individuals in the course of their everyday lives, a duty arises under the common law to exercise reasonable care in the performance of this task. Governmental employees, like ordinary citizens, must operate their vehicles in a reasonably safe manner and avoid creating foreseeably unreasonable risks of harm to the motoring public.

*Letowt*, 41 Conn. Supp. at 406 (quoting *Catone*, 555 A.2d at 334). In reaching this holding, Judge Lewis reviewed the three approaches used by different courts.

The Florida approach, articulated in *Commercial Carrier Corporation v. Indian River County*, 371 So.2d 1010, 1022 (Fla. 1979) distinguishes between planning level decisions, which carry immunity, and operational type decisions, which do not carry immunity. *Letowt*, 41 Conn. Supp. at 404. Planning level functions are those involving basic policy decisions, whereas operational level functions are those that implement the policy. *Id.*

The second approach is that proposed by Professors Prosser and Keeton in W. Prosser & W. Keeton, *Law of Torts* (5th Ed. 1984) §132, p.1062. This approach would involve an assessment of “the nature of the plaintiff’s injury, the availability of alternative remedies, the ability of the courts to judge fault without unduly invading the executive’s function, and the importance of protecting particular kinds of official acts.” *Letowt*, 41 Conn. Supp. at 405.

Under either one of these two approaches it is clear that the act of Geneva Pollock in opening the door is a ministerial act. Such an act is surely not a planning level decision. Further, the court is able to judge fault without invading the executive’s function and there is no official act requiring protection.

The third approach or analysis, that articulated by the Supreme Court of Rhode Island in *Catone v. Medberry*, 555 A.2d 328 (R.I. 1989) and adopted by Judge

Lewis, provides the most practical guidelines while focusing on the reasons for governmental immunity. In *Catone*, William Catone, in his capacity as administrator of the estate of his wife, sued the State of Rhode Island claiming that the State, by and through its employees, negligently caused his wife’s death. *Id.* at 330. The death occurred as a result of injuries sustained by the decedent when she collided with a state-owned dump truck. *Id.*

The defendants moved for summary judgment claiming they were immune from suit. *Id.* The trial court granted the defendant’s motion and the plaintiff appealed. *Catone*, 555 A.2d at 330. In deciding that the underlying policy considerations would not be advanced in applying governmental immunity to bar recovery under the circumstances of the case, the court reversed. *Id.* at 332, 334.

In reversing the trial court, the court undertook an analysis of the liability of the United States under the Federal Tort Claims Act. *Id.* at 332. The court noted a similarity between the Rhode Island Tort Claims Act and the Federal Tort Claims Act, 28 U.S.C.A. §2680. Section 52-557n (a)(2)(B) of the Connecticut General Statutes is sufficiently similar to warrant the same analysis. Not only does 28 U.S.C.A. §2680 (a) specifically provide immunity for discretionary acts, under *Harlow v. Fitzgerald*, 457 U.S. 800, 816-17, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), federal law recognizes a distinction between discretionary and ministerial acts. See *Gordon v. Bridgeport Housing Authority*, 208 Conn. 161, 169, n. 3 (1988).

The court in *Catone* notes that the legislative and judicial branches of the federal government have addressed the liability of the United States under the Federal Tort Claims Act for injuries arising out of the negligent operation of government vehicles. In *Dalehite v. United States*, 346 U.S. 15, 34, 73 S.Ct. 956, 967, 97 L.Ed. 1427 (1953) the majority of the court concluded, in light of the legislative history of the act, that “the draftsmen did not intend to relieve the government from liability for such common-law torts as an automobile collision caused by the negligence of an employee.” *Catone*, 555 A.2d at 332.

Although the legislative history of §52-557n of the Connecticut General Statutes is “. . . worse than murky” and “contradictory,” *Sanzone v. Board of Police Commissioners*, 219 Conn. 179, 188 (1991), logic and fairness dictate that the General Assembly could not have intended to

shield municipalities from liability for every act which requires some measure of preceding thought process. The way it stands now, however, under the current analysis utilized in Connecticut, immunity is extended to acts which have no connection whatsoever to a governmental function and which, if not granted immunity, would not act against the underlying policy and purpose of governmental immunity.

Again, the primary purpose of governmental immunity is to allow for the effective administration of governmental operations by removing the threat of potentially disabling litigation. As the court stated in *Catone*:

[T]his need to protect the government's ability to perform certain functions is particularly relevant when the activity in question involves a high degree of discretion such as governmental planning or political decision making. The state would be unable to function if liability was imposed each time an individual was deleteriously affected by such activities.

*Catone*, 555 A.2d at 333. When the actor is engaging in an activity normally undertaken by a private individual, however, "there is no need to cloak them in the protection" of governmental immunity. *Id.* The official functioning of the government will not be impeded by utilizing an analysis which denies immunity and imposes liability for acts which have no connection with governmental planning or official decision making; acts which cannot normally be undertaken by a private individual.

## 108. Governmental immunity or doctrinal inanity?

By Steven D. Ecker

*This essay articulates the problem with municipal liability cases. It's time for the Supreme Court to act. Steven D. Ecker is a long-time CTLA board member. This essay appeared as the principal editorial in the Winter 2001 issue of the Forum.*

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

The Connecticut law of governmental immunity finds itself in this situation. We have managed to take a sensible policy concern (the notion that governmental

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

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

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

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

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

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

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

## 109. Tremont & Sheldon lawyers' research on middle finger yields interesting history.

*The editor of this Review received the following report, through an intermediary, from the lawyers at the Bridgeport firm of Tremont & Sheldon.*

Before the Battle of Agincourt in 1415, the French, anticipating victory over the English, proposed to cut off the middle finger of all captured English soldiers. Without the middle finger it would be impossible to draw the renowned English longbow and therefore be incapable of

fighting in the future. This famous weapon was made of the native English Yew tree, and the act of drawing the longbow was known as "plucking the yew" (or "pluck yew"). Much to the bewilderment of the French, the English won a major upset and began mocking the French by waving their middle fingers at the defeated French, saying, "See, we can still pluck yew!" "PLUCK YEW!" Since 'pluck yew' is rather difficult to say, the difficult consonant cluster at the beginning has gradually changed to a labiodental fricative "F," and thus the words often used in conjunction with the one-finger-salute are mistakenly thought to have something to do with an intimate encounter.

It is also because of the pheasant feathers on the arrows used with the longbow that the symbolic gesture is known as "giving the bird."

## 2. STATUTES AND RULES

- *All Public Acts referred to in this section appeared in the Appendix to the Review circulated at the Annual Meeting. Copies can be obtained from the CTLA central office. The Public Acts do not appear in the Forum.*
- *The report of the Commission to Study Attorney Grievance Process was published in the Connecticut Law Journal on April 24, May 1 and May 8, 2001. The report is in the form of proposed revisions to the Rules. To date they have not been acted on by the Rules Committee. The Superior Court proposed rules were published in the May 22, 2001 Connecticut Law Journal. The rules and the complete report were included in the Appendix to the Review furnished at the Annual Meeting. They do not appear in the Forum.*

## RULES

### 201. Declining or terminating representation.

Rule 1.16 is proposed to be amended to provide if the representation of a client is terminated either by the lawyer withdrawing from representation, or by the client discharging the lawyer, the lawyer is now under an obligation to confirm the termination in writing to the client before or within a reasonable time after the termination of the representation. The commentary to this provision states that a written statement to the client confirming termination and the basis for it reduces the possibility of misunderstanding

the status of the relationship. Lawyers now must be guided accordingly, or run the risk of violating this section of the Rules of Professional Conduct.

### 202. Code of Judicial Conduct amended to permit judge to sit on case notwithstanding that a lawyer or party to the proceeding has filed a lawsuit or complaint against the judge.

Canon 3 of the Code of Judicial Conduct is proposed to be amended to permit a judge to continue to sit, rather than automatically being disqualified. The commentary indicates the proposal reflects the predominant view of jurisdictions around the country concerning the issue. Apparently the concern arises from pro se parties who grieve or sue a judge in order to disqualify the judge.

The proposal is controversial, and a former chair of the Judicial Review Council has publicly stated his opposition to it. Most judges would disqualify themselves under these circumstances.

## LEGISLATION

### 203. Over 52 immunity and provisions creating special statutory privileges for insurance companies and corporations successfully opposed by CTLA.

A great number of immunity proposals, provisions for creating statutory privileges for insurance companies and corporations, etc., were successfully opposed by CTLA. Neil Ferstand works very closely on a daily basis with our lobbyists, Gaffney, Bennett & Associates, to perform the research and develop the arguments for and against certain pieces of legislation. The CTLA's ability to access national research materials, as well as the materials from other states' trial lawyers associations, is crucial to our legislative success.

The bills successfully opposed include provisions requiring plaintiffs to execute medical, employment and tax authorizations in all cases; giving control to the insurance company in the selection of an examining physician; specialized legislation protecting municipalities and extended recreational immunity to municipalities, to mention only a few.

The number of immunity proposals abound, and in the past ten years the total number of immunity proposals successfully opposed by CTLA exceeds 500.

The only Connecticut organization that stands between the special interests of corporate America, the insurance indus-

try and the consumer is the Connecticut Trial Lawyers Association and its lobbyists, Gaffney, Bennett & Associates.

A detailed list of legislation successfully opposed in the 2001 legislative session appeared in the Appendix to the Review circulated at the Annual Meeting. It is included in this issue in the Gaffney Bennett Legislative Report.

### 204. Public Act No. 01-152: An Act Concerning Peremptory Challenges in Civil Action.

See Section 101 for a discussion of this legislation.

### 205. Public Act No. 01-167. An Act Concerning Decisions of the Claims Commissioner.

This legislation affords a privilege to claimants 65 years of age or older, claims by persons who are terminally ill, and claims by executors or administrators of estates.

The legislation also requires the Claims Commissioner to decide the claim within 90 days of hearing.

Section 1 requires the Claims Commissioner to report to the General Assembly on all claims that have been filed with his office and not disposed of within three years of the date of filing, except those cases where the parties have stipulated to an extension of time. A report is due at the beginning of the 2002 legislative session.

Thereafter, commencing with the 2003 regular session, the Commissioner is required to report on all claims that have not been disposed of within two years of the date of filing. This practice will continue at each regular session thereafter. For those claims that have not been resolved within three years, the General Assembly has the option to grant the Claims Commissioner an extension of time to dispose of the case, grant the claimant permission to sue the state, to grant an award to the claimant, or deny the claim.

### 206. An Act Concerning Judge Trial Referees.

The legislation authorizing judge trial referees to hear de novo appeals from arbitration matters has been approved. For matters valued under \$50,000 that have been referred to arbitration, if a trial de novo is claimed, the judge trial referee, without the consent of the parties, can preside over a civil jury trial. The legislation includes language that a referee can exercise the powers of the Superior Court with respect to "trial, judgment and ap-

peal in the case, including a judgment of \$50,000 or more.”

## **207. Public Act No. 01-15: An Act Concerning the Admissibility of Records and Reports of Certain Expert Witnesses as Business Entries.**

In the past, §52-174 of the General Statutes only applied to personal injury actions and proceedings in family relations matters. It authorizes the admissibility of reports of certain medical providers. The statute has been expanded to cover all civil actions pending on the effective date of the act, or brought thereafter.

## **208. Public Act No. 01-71: An Act Concerning Offers of Judgment.**

This legislation authorizes the plaintiff to file an offer of judgment “not later than 30 days” before trial. The defendant now has 60 days from being notified of the offer of judgment, and prior to the rendition of a verdict, to accept the offer of judgment.

The 30-day before trial provision also applies to the defendant, who may not accept an offer of judgment not later than 30 days before trial.

## **209. Public Act No. 01-32: An Act Concerning Witness Fees.**

This Public Act authorizes taxing costs for the cost of “recording, videotaping, transcribing and presentation” of a deposition of a practitioner of the healing arts or real estate appraiser that is used on the trial in lieu of live testimony. The legislation authorizes the taxation of the “reasonable expenses incurred.”

## **210. Public Act No. 01-85 requires direct payment of prescription medication for workers’ compensation claimants; Public Act No. 01-33 increases the mileage reimbursement rate for workers’ compensation claimants.**

## **211. Public Act No. 01-22—An Act Concerning the Workers’ Compensation Review Board.**

This legislation extends the workers’ compensation appeal time from the Commission to the Compensation Review Board from 10 days to 20 days.

### **3. REMEDIES**

#### **ABUSE OF PROCESS**

## **301. Abuse of process may be asserted as a counterclaim to a complaint for vexatious litigation.**

*Rimer v. Nichols*, 27 CLR 585 (10/9/00) (Skolnick, J.)

A counterclaim for abuse of process may be asserted to a complaint for vexatious litigation based on allegations that the current action had been commenced while the underlying action was still pending solely for the purpose of coercing the defendants into withdrawing that prior action.

## **302. Having a letter served by a sheriff does not constitute abuse of process.**

*McDonald v. Howard*, 28 CLR 373, (1/15/01) (Mintz, J.)

### **AGENCY**

## **303. Presumption of agency rebutted for a car being operated by employee of a vehicle emissions testing center during emissions test.**

*Corso v. American Medical Response of Connecticut, Inc.*, 27 CLR 106 (7/3/00) (Devlin, J.)

The statutory presumption that the operator is the agent of the owner under §52-183 of the General Statutes rebutted by evidence that vehicle was being operated for the purpose of performing an emissions test by an emissions testing company employee.

## **304. Parent’s liability for automobile provided to child.**

*Galland v. Bishop*, 28 CLR 690 (3/19/01) (Arena, J.)

This opinion discusses the distinction between situations where a vehicle is being borrowed for the borrower’s own personal benefit, for which there is vicarious liability only if the owner or parent had knowledge of and acquiesced in the use of the vehicle, and where the third-party operator was operating the vehicle while engaged in an activity for the benefit of the owner’s child, for which there is vicarious liability.

Here, the owner of a vehicle provided to a child for use in college was held liable for injuries caused by a friend to whom the vehicle had been loaned by the child, but only if the owner was aware that the child occasionally allowed others to use the vehicle.

### **AUTO CASES**

## **305. There is no correlation between the extent of property damage and the extent of personal injuries, in the absence of expert testimony.**

*Davis v. Maute*, 770 A.2d 36 (2000)

This case holds that counsel may not argue that there is a correlation between the extent of damage to automobiles in an accident, and the extent of the occupant’s personal injuries caused by the accident, in the absence of expert testimony on the issue.

Counsel had argued that the case was a “fender bender” and suggested that the plaintiff’s injuries could not have been sustained from such a collision.

The court specifically held that a party in a personal injury case may not directly argue that the seriousness of the personal injuries from a car accident correlates to the extent of the damage to the cars, unless that party can produce competent expert testimony on the issue. Absent such expert testimony, any inference by the jury that minimal damage to the plaintiff’s car translates into minimal personal injuries to the plaintiff would necessarily amount to “unguided speculation.”

### **AUTO LESSOR LIABILITY**

## **306. Provision in lease prohibiting operation without a valid operator’s license does not limit lessor’s vicarious liability under §14-154a.**

*Young v. Kelly*, 26 CLR 668 (6/5/00) (Alandar, J.)

A contractual limitation in a lease agreement prohibiting operation by the lessee without a valid operator’s license does not limit the lessor’s liability under §14-154a to a person injured by the negligence of a lessee operating with a suspended license.

## **307. Nonassignability clause in a vehicle lease agreement does not relieve the lessor of vicarious liability to a third person operating with the lessee’s permission. Fact that the operator is not the lessor is not conclusive.**

*Hughes v. Pagnozzi*, 26 CLR 695 (6/12/00) (Nadeau, J.)

General Statutes §14-154a provides that any person renting or leasing a motor vehicle to another is liable to the same extent as the operator of the vehicle. The Supreme Court has interpreted that statute as imposing liability on the lessor provided that the vehicle operator is “in lawful possession of it pursuant to the terms of the contract of rental.” *Pedevillano v. Bryon*, 231 Conn. 265, 269 (1994). As such, the lessor is not precluded by the statute from imposing reasonable restrictions on the identity of those whom it is willing to entrust its

property and for whose conduct it is willing to assume the risk.

The lessor argued that the lease signed by the lessee limited who may be an authorized driver. In support of this argument, the lessor argued that paragraph 16 of the lease, which states that “you may not assign or transfer your rights or obligations under this lease or sublet the vehicle without our prior written consent,” was enough to restrict the identity of authorized drivers.

The court held that the provision did not clearly set forth who may or may not be an authorized driver. This was especially so in light of the fact that paragraph 9 of the lease appeared to indicate that use of the vehicle was for “personal, family, or household purposes” and did not specifically restrict the lessee who signed the lease as the sole driver. The court reasoned that although the lessor could have included provisions in the lease that would have more clearly defined who was an authorized driver, it had not, and therefore cannot relieve itself of liability imposed by §14-154a.

The moral of this case is to get the lease and read it. The fact that the operator may not be the lessee is not conclusive under *Pedevillano*.

**308. A golf cart is not a “motor vehicle” within the meaning of the statute imposing vicarious liability on the lessor of a motor vehicle.**

*Kelly v. Breudan Corp.*, 27 CLR 190 (7/24/00) (Levin, J.)

A golf cart is not a “motor vehicle” within the meaning of the statute imposing vicarious liability on the lessor of a motor vehicle for negligence by the lessee, §14-154a. A person injured when thrown from a leased golf cart cannot recover from the lessor based solely on the negligence of the operator.

**309. The loan of a car by a repair garage to a customer may constitute a lease under §14-154a.**

*Klimaszewski v. Lewis*, 27 CLR 275 (8/7/00) (Levine, J.)

Any form of consideration is sufficient to create a motor vehicle lease for purposes of imposing vicarious liability on a lessor pursuant to §14-154a of the General Statutes for the negligent operation of a leased motor vehicle. Consideration in the form of a payment of money is not required. Accordingly, a loan of a vehicle to a customer by a repair garage while the customer’s car is being repaired can

constitute a lease subjecting the garage to vicarious liability as a lessor.

**AUTO EXCEPTION IN WORKERS’ COMPENSATION FOR EMPLOYEE’S SUIT AGAINST CO-EMPLOYEE**

**310. Pulling a stalled truck with a chain does not constitute “operation” of the stalled truck.**

*Suprenant v. Burlingham*, 27 CLR 108 (7/3/00) (Parker, J.)

Pulling a stalled truck with a chain in order to jump-start the truck does not constitute “operation” of the stalled truck. The exception to the exclusive remedy provision of the Workers’ Compensation Act for claims based on a co-employee’s negligent operation of a motor vehicle, pursuant to §31-293a, is therefore inapplicable to the plaintiff, who is a passenger in the towed truck, who was injured when the chain broke.

**BYSTANDER EMOTIONAL DISTRESS**

**311. Father can recover for bystander emotional distress caused by witnessing medical malpractice during childbirth.**

*DeRosa v. Master*, 27 CLR 714 (10/30/00) (Nadeau, J.)

The decision contains a useful discussion of the issue of whether any bystander can assert an emotional distress claim based on medical malpractice.

**312. Mother who claims to have witnessed continuing malpractice in prenatal and postnatal care of child does not state cause of action for bystander emotional distress.**

*Vanase v. State*, 28 CLR 665 (3/19/01) (Hurley, J.T.R.)

The court held that a claim for bystander emotional distress may be based on medical malpractice, but only if the claimant witnessed a distinct event that caused an immediate injury. Allegations that the plaintiff mother witnessed continuing malpractice in the prenatal and postnatal treatment of a child were held to be insufficient to state a claim for bystander emotional distress.

**313. No cause of action for bystander emotional distress for witnessing friend’s death.**

*Batista v. Backus*, 28 CLR 624 (3/5/01) (Rogers, J.)

Witnessing a friend’s death caused by the defendant’s negligence not actionable,

because the friend is “not closely related” to the decedent.

**CAUSATION**

**314. A mound of dirt left at a construction site next to a highway which caused a car driven by an intoxicated driver to overturn is not the proximate cause of injuries to the passenger.**

*Soares v. George A. Tomasso Construction Corp.*, 27 CLR 185 (7/17/00) (Holzberg, J.)

A mound of dirt left at a construction site near a highway which caused a vehicle driven by an intoxicated operator to overturn is not, as a matter of law, a proximate cause of injuries to the passenger in the vehicle. The court reasoned that it was not reasonably foreseeable that an operator would deviate from the normal course of travel on the highway in such a manner as to reach the mound created by the defendant. The opinion contains an excellent discussion of claims for injuries from collisions with objects just off a public highway.

**CIVIL RIGHTS ACTIONS**

**315. Administrative remedy available from claims commissioner must be exhausted before filing suit against a state employee under *Binette v. Sabo*.**

*Martin v. Brady* 27 CLR 121 (7/10/00) (Rogers, J.)

A claim against a state employee under the implied cause of action for violation of the state constitutional prohibition against unreasonable searches or seizures, created in *Binette v. Sabo* 244 Conn. 23 (1998), must be presented to claims commissioner pursuant to § 4-414 et seq. of the General Statutes before being asserted in a civil action. Failure to exhaust that administrative remedy requires dismissal of the action.

**316. An award of both punitive damages at common law and attorney’s fees on a joined civil rights claim would be duplicative.**

*Ham v. Greene*, 27 CLR 512 (9/18/00) (Levin, J.)

A plaintiff who prevails in claims against police officers on common law claims of malicious prosecution and intentional infliction of emotional distress, as well as on a claim under the Federal Civil Rights Act, should not be awarded statutory attorney’s fees under the Civil Rights Act if punitive damages are awarded on the common law claims, be-

cause under Connecticut law punitive damages are limited to compensation for litigation expenses, including attorney's fees. An additional award of fees under the Federal Civil Rights Act would permit double recovery.

The opinion also holds that the prevailing rate for the prosecution of a civil rights case by an attorney with substantial experience who specializes in the field is \$250 per hour. The opinion reduced the rate for an attorney with six years experience to \$150 per hour. The opinion also contains a summary of fee awards in other recent civil rights cases in Connecticut.

**317. There is no cause of action under the due process clause of the state constitution for a police department's failure to adequately protect a victim.**

*Peters v. Greenwich*, 28 CLR 671 (3/19/01) (D'Andrea, J.)

The court reasoned that there was no cause of action because existing statutory and common law tort remedies for negligence by municipal employees provide an adequate remedy for the plaintiff's damages, and the plaintiff in a negligence action against a municipal employee can join a claim against a municipality pursuant to the indemnification statute, §7-465.

#### COMMON CARRIER

**318. Common carrier liable for injuries to passenger from fall at train station.**

*Wint v. Bridgeport*, 28 CLR 511 (2/12/01) (Skolnick, J.)

A common carrier can be held liable for a plaintiff's injury in a fall on a railroad station platform for failing to maintain the platform in a reasonably safe condition. Rule applies only if the plaintiff was a passenger of that carrier, and that the carrier was aware of the unsafe condition.

#### CUSTODIAL INTERFERENCE

**319. Tort of interference with a custodial parent's rights to a child requires proof that the defendant physically removed the child from the plaintiff's custody.**

*Bouchard v. Sundberg*, 27 CLR 407 (8/28/00) (Shortall, J.)

The tort of interference with a custodial parent's rights to a child, §53a-98 of the General Statutes, requires proof that the defendant physically removed the child from the plaintiff's custody. Alle-

gations that the plaintiff's former spouse provided false information that induced the children of the marriage to refuse to visit the plaintiff are insufficient to state a cause of action for custodial interference.

The opinion also holds that one parent cannot sue the other parent and that parent's new spouse for alienation of affections of the children from the first marriage, because Connecticut does not recognize a cause of action alienation of the affections of a child.

#### CUTPA Architects

**320. Rule barring CUTPA claims based on professional malpractice is limited to attorneys and physicians. It does not apply to architects.**

*Hopper v. Hemphill*, 27 CLR 181 (7/17/00) (Hickey, J.)

The court reasoned that the Supreme Court's exclusion of medical and legal malpractice claims turned on considerations of public policy. While there are similarities among the three professions, there are differences as well. Whether a special relationship between a doctor/patient and an attorney-client applies to the architect/client relationship so as to implicate the public policy considerations implied in *Haynes v. Yale New Haven Hospital*, 243 Conn. 17, 34 (1997) is uncertain. Given this uncertainty, the court held that it would be inappropriate to extend CUTPA exclusion beyond the holding in *Haynes*.

#### Attorneys

**321. Failure of lawyer to reduce fee agreement to writing not actionable under CUTPA**

*Brown v. Loomis*, 27 CLR 550 (9/25/00) (Gordon, J.)

#### Breach of Contract

**322. For simple breach of contract to come within CUTPA there must be aggravating circumstances.**

*Ford v. Barnes*, 27 CLR 501 (9/18/00) (Corradino, J.)

The breach of a contract to provide a wedding reception is not sufficient to allege a CUTPA violation, even though there may be a public policy supporting marriage. However, allegations that the defendant committed the tort of malicious prosecution in connection with the breach of contract are sufficient to provide the additional "aggravating circumstance" to permit a cause of action under CUTPA.

#### Contractors

**323. Contractor's grossly sloppy construction of a residential garage and subsequent deceptive and delaying tactics to avoid responsibility constitute CUTPA violation.**

*Salter v. H&M Sachse, Inc.*, 27 CLR 41 (6/26/01) (DeMayo, J.T.R.)

A contractor's sloppy construction of a garage for a homeowner, and subsequent deceptive and delaying tactics in an attempt to avoid responsibility for correcting the inadequate construction constitute a violation of CUTPA.

#### Dentists

**324. Dentist reporting an unpaid bill to a credit bureau while the bill was being contested liable in CUTPA.**

*McMahon v. Quinlivan*, 27 CLR 19 (6/19/00) (Skolnick, J.)

Allegations that the defendant dentist performed dental services beyond those authorized by the patient do not state a claim under CUTPA because CUTPA does not apply to claims based on the sufficiency of medical or dental care provided by a medical or dental professional. However, the allegations that the defendant dentist reported an unpaid dental bill to a credit bureau while the bill was being reasonably contested, thereby interfering with the patient's ability to obtain financing for the purchase of a home, involved the entrepreneurial or commercial aspects of the professional's business and therefore are sufficient to state a cause of action under CUTPA.

#### Employment

**325. Employer can be liable under CUTPA for failure to adequately supervise employee.**

*Cole v. Federal Hill Dental*, 28 CLR 18 (11/6/00) (Kocay, J.)

#### Employment Relationship

**326. CUTPA does not apply to a claim by employees against employer, or to the employment relationship.**

*Stebbins v. Doncasters, Inc.*, 27 CLR 488 (9/18/00) (Bishop, J.)

CUTPA cannot be based on allegations that the defendant-employer intentionally caused the plaintiff-employees to be exposed to toxic substances because CUTPA does not apply to claims arising out of the employment relationship.

## Employer

### 327. Employer's failure to carry workers' compensation insurance does not constitute a violation of CUTPA.

*Ricketts v. Sheresky*, 28 CLR 680 (3/19/01) (Lewis, S.J.)

### 328. CUTPA claim cannot be based on violation of severance agreement.

*Ephraim v. Quinnipiac Medical P.C.*, 29 CLR 159 (4/30/01) (Thompson, J.)

A CUTPA claim cannot be based on the wrongful retention of deferred compensation plan contributions by a former employer in contravention of a severance agreement. Even though the conduct did not occur until after the relationship terminated, no action is permitted because it arose from the employer-employee relationship.

## Engineer

### 329. Engineer may be sued in CUTPA.

*Pollock v. Panjabi*, 27 CLR 316 (8/14/00) (Levin, J.)

The opinion holds that the rule barring CUTPA claims based on professional malpractice only applies to physicians and attorneys, and not to claims against an engineer. The decision also holds that a CUTPA claim may be based on a single transaction. It is not necessary in all cases to establish multiple acts of misconduct or a course of conduct.

### 330. CUTPA applies to entrepreneurial aspects of all regulated professions, including engineering.

*Worldwide Preservation Services, LLC v. IVth Shea, LLC*, 29 CLR 7 (4/2/01) (Tierney, J.)

## Hospitals

### 331. CUTPA claim cannot be based on hospital's failure to disclose a hospital-wide outbreak of bacterial infection.

*Bridgeport Hospital v. Cone*, 28 CLR 425 (1/29/01) (Hodgson, J.)

A CUTPA claim cannot be based on allegations that the hospital covered up a hospital-wide outbreak of staph infection for the entrepreneurial motive of attracting and retaining patients. CUTPA does not apply because the basis of the allegations is a failure to disclose medical risks which implicate the hospital's medical competence, rather than the entrepreneurial aspect of operating a hospital.

## Liability for Personal Injuries

### 332. CUTPA claim can be based solely on personal injuries.

*Cole v. Federal Hill Dental*, 28 CLR 18 (11/6/00) (Kocay, J.)

A claim under CUTPA can be based on damages consisting solely of personal injuries.

## Municipality

### 333. CUTPA applies to municipalities.

*Manchester v. United Stone America, Inc.*, 27 CLR 414 (9/4/00) (Bishop, J.)

A CUTPA claim against a municipality cannot be based on allegations of wrongdoing in the award of a public works contract, because such activity does not occur within "trade or commerce" within the meaning of CUTPA. The opinion holds that the 1990 Supreme Court holding that a municipal housing agency is not subject to CUTPA is based on the statutory exclusion for entities that are extensively regulated, not a ruling that CUTPA is inapplicable to all municipalities. See *Connelly v. Housing Authority*, 213 Conn. 354 (1990).

### 334. CUTPA does not apply to municipalities.

*Ippolitti v. Ridgefield*, 27 CLR 629 (10/16/00) (Moraghan, J.)

The court notes that municipalities are completely exempt from CUTPA. The court also notes that most trial court opinions have held that municipalities enjoy a blanket immunity from liability under CUTPA.

## Nursing Home

### 335. Allegation that nursing home failed to protect a resident relates to professional competence rather than entrepreneurial aspects of the home's business. No CUTPA violation.

*Walsh v. Abbott Terrace Health Center, Inc.*, 28 CLR 183 (12/4/00) (Wiese, J.)

## Owner of Real Estate

### 336. Fraudulent misrepresentation by owner of real estate incidental to the operation of a business not CUTPA violation.

*Viscounti v. Pepper Partners*, 27 CLR 43 (6/26/00) (Curran, J.)

CUTPA does not apply to fraudulent misrepresentations concerning the absence of environmental contamination made by an owner of real estate being sold incidental to the operation of a busi-

ness not normally involved in the purchase and sale of real estate.

## Product Seller

### 337. Exclusive remedy of the product liability act does not bar a CUTPA claim based on false and misleading practices in the marketing of a defective product.

*Kristofak v. General Motors Corp.*, 27 CLR 378 (8/28/00) (Doherty, J.)

The exclusive remedy provision of the Product Liability Act does not bar the assertion of a CUTPA claim based on allegations that the manufacturer of a defective motor vehicle engaged in false and misleading advertising concerning the safety of the product, because of the Product Liability claim addresses the design and manufacture of the product, while the CUTPA claim addresses a separate issue of unfair or deceptive practices concerning the marketing of the product.

## Single Act

### 338. CUTPA claim cannot be based on a single act of misconduct.

*Piantidosi v. MacGarvey*, 27 CLR 252 (7/31/00) (D'Andrea, J.)

A CUTPA claim cannot be based on a single act of misconduct. Allegations that the defendants falsely represented in negotiations for the purchase of a residence that an oil storage tank had been legally abandoned are not sufficient to state a cause of action under CUTPA.

## Pub Owner

### 339. A claim that defendant pub owner served a patron known to be intoxicated is insufficient to state CUTPA violation.

*Lilly v. Gillis*, 27 CLR 87 (7/3/00) (Fracasse, J.)

Allegations that the defendant pub owner sold alcoholic beverages to a patron known to be intoxicated are insufficient to state violation of CUTPA by plaintiff, who was injured in a motor vehicle collision with the patron.

## Real Estate Broker

### 340. Intentional misrepresentation by a real estate broker to a prospective buyer may constitute CUTPA violation.

*Schur v. David Ogilvy and Associates, Inc., et al*, 27 CLR 103 (7/3/00) (D'Andrea, J.)

Allegations that the defendant real estate broker intentionally mislead the plaintiff, prospective purchaser of real estate, concerning the condition of property

being purchased are sufficient to state a cause of action under CUTPA.

## DISCOVERY

### Petition for discovery

**341. Evidence that plaintiff was struck in the head in an unknown manner while shopping at the defendant's store provides sufficient probable cause to order the production of video surveillance tapes in operation at the time of the incident.**

*Likier v. Christmas Tree Shops, Inc.*, 28 CLR 495 (2/12/01) (Pittman, J.)

The plaintiff was struck in the head in an unknown manner while shopping in the defendant's store. This provided sufficient probable cause to justify an order in a petition for discovery for the production of video surveillance tapes operating at the store at the time of the event, in order to assist the plaintiff in determining whether a cause of action in negligence existed against the store. The decision noted, however, that the plaintiff must pay the cost of collecting and viewing the tapes.

**342. Petition for discovery unavailable where remedy exists under FOIA.**

*Stratton v. State*, 26 CLR 649 (6/5/00) (Gordon, J.)

The availability of a remedy under the Freedom of Information Act bars any relief against a state agency or a state employee under either a petition for discovery or a statute authorizing an order for the taking of a deposition to perpetuate testimony.

Stratton filed a bill of discovery against the State, the Department of Revenue Services, and four employees of the Department of Revenue Services alleging that they had material and necessary information relating to his employment which was necessary in order for him to establish a potential cause of action against the same defendants for constitutional and common law claims, including civil rights action, wrongful discharge and violation of public policy, etc.

The court dismissed the case on the basis that the availability of a remedy under the Freedom of Information Act, §1-18a, et seq. of the General Statutes bars any relief against a state agency or a state employee either under a petition for discovery or the statute authorizing an order for the taking of a deposition to perpetuate testimony, §52-156a.

## EMPLOYER LIABILITY

**343. Employer liable for negligent infliction of emotional distress on employee. Workers' compensation no bar.**

*Harrop v. Allied Printing Services, Inc.*, 26 CLR 703 (6/12/00) (Hennessey, J.)

The adoption in 1993 of P.A. 93-228 eliminating an employee's right to recover under the Workers' Compensation Act for emotional distress damages resulted in the elimination of the employer's statutory immunity for the common law cause of action for negligent infliction of emotional distress based on events occurring in the course of employment.

**344. Employer liable to employee on theory of negligent hiring.**

*Barnett v. Woods*, 27 CLR 596 (10/9/00) (Skolnick, J.)

A claim against an employer for negligent hiring is not limited to claims by the public. It also includes claims by employees. Here, the theory was that the employer was liable to an employee for the negligent hiring of a co-employee. The allegations were that the plaintiff was subjected to sexual harassment by the co-employee, offensive verbal comments, and touching of a sexual nature. These allegations were held sufficient to state a cause of action for invasion of privacy.

**345. Section 31-72 authorizing double damages for employers to pay wages requires proof of bad faith.**

*Klein v. William Raveis Real Estate, Inc.*, 29 CLR 355 (5/28/01) (Lewis, S.J.)

## Suarez Action

**346. Armored truck driver who was required by bank to wear a bulletproof vest, which bank refused to provide, can sue bank for gunshot injuries sustained during a robbery attempt.**

*Rovasio v. Wells Fargo Armored*, 29 CLR 159 (4/30/01) (Nadeau, J.)

Under the exception to the exclusivity provision of the Workers' Compensation Act permitting claims against employers for injuries that were substantially certain to occur, known as the *Suarez* doctrine, an armored truck driver for a bank who was required by the bank to wear a bulletproof vest, but which the bank refused to provide, can maintain a claim for injuries received when shot by a third person during a robbery.

## EXPERT WITNESS LIABILITY

**347. An expert witness is not immune from negligence claim arising out of his service as an expert.**

*Pollock v. Panjabi*, 27 CLR 316 (8/14/00) (Levin, J.)

The immunity accorded a witness for claims based on testimony provided in connection with a judicial or administrative proceeding does not bar a professional malpractice claim by a party against that party's own expert witness. The court reasoned that the purpose of the rule—to avoid creating a disincentive to testify—would not be furthered by insulating a hired witness from claims of negligent performance of a contractual obligation.

The opinion contains an extensive discussion of decisions from other jurisdictions on the issue of whether the witness immunity rule bars negligence claims against an expert witness.

## FIREFIGHTER'S RULE

**348. Firefighter's rule limited to firefighters and police officers, and not to other occupations.**

*Estafan v. Rolls*, 27 CLR 130 (7/10/00) (Moraghan, J.)

Firefighter's rule, which bars a firefighter or a police officer from recovering from a person being rescued for injuries occurred during the course of duties, is limited to firefighters and police officers and does not extend to other occupations. The rule did not bar an airport administrator's claim for injuries incurred while rescuing a pilot.

**349. Firefighter's Rule applies only to premises liability claims and not claim vs. police officer for injuries from a vehicle collision while responding to a call for assistance.**

*Feliciano v. Williams*, 27 CLR 160 (7/17/00) (Skolnick, J.)

The firefighter's rule, which limits the rights of firefighters and police officers to recover a negligence for injuries incurred in the performance of their duties, applies only to premises liability claims against property owner for injuries occurred while on the property in the line of duty. The rule does not bar recovery by a police officer for injuries incurred in a vehicle collision, which occurred while the officer was responding to a call for assistance.

**350. Firefighters rule does not apply to claims based on conduct occurring after police officer's arrival, or conduct constituting a violation of a statute intended for the protection of the officer.**

*Levandoski v. Cone*, 27 CLR 532 (9/25/00) (Corradino, J.)

The firefighters rule, which bars a firefighter or police officer from recovering for injuries incurred while responding to a call for assistance, does not bar recovery for injuries caused by negligent conduct occurring after arrival in response to a call for assistance, or to injuries incurred as a result of conduct which violates a statute specifically intended for the protection of firefighters or police officers.

A police officer in this case was injured while pursuing a suspect who fled when the officer arrived at a home in response to a call complaining of a noisy party. The officer can recover from the suspect for injuries incurred from a fall during the chase because the defendant's conduct occurred after the officer arrived and was a violation of the statute prohibiting conduct which "endangers any peace officer," §53-167(a).

**351. Firefighter's rule does not prevent recovery by a police officer from a suspect for injuries incurred while pursuing the suspect.**

*Kelly v. Tucci*, 27 CLR 649 (10/16/00) (Corradino, J.)

**352. Firefighter's rule limited to firefighters and police officers. Does not apply to animal control officer.**

*Fortin v. Adams*, 28 CLR 160 (12/4/00) (Doherty, J.)

**353. Rule is not limited to premises liability cases, but applies as well to claims against third parties who are not property owners.**

*Jainchill v. Friends of Keney Park*, 29 CLR 139 (4/23/01) (Peck, J.)

The court noted that technically the Firefighters Rule is not applicable because the rule is limited to premises liability cases in which a claim is being asserted against a property owner for negligently permitting the existence of a dangerous condition. However, the court reasoned that the rationale for the rule—that the public in general should bear the cost of injuries incurred by emergency personnel in the performance of a profession known to present a higher than nor-

mal risk—should be extended to claims involving acts of negligence not involving premises liability. In this case the police officer unsuccessfully attempted to sue the sponsor of a public event for injuries incurred while pursuing a young child who was driving a utility vehicle that had been negligently left unattended with the keys in the ignition.

### FORGED SETTLEMENT AGREEMENT

**354. Unauthorized settlement agreement with the plaintiff's signature forged is unenforceable.**

*Ball v. Teissonniere*, 29 CLR 117 (4/16/01) (Silbert, J.)

A settlement agreement with the plaintiff's signature forged by the plaintiff's attorney, who then embezzled the payment, is unenforceable. The plaintiff may pursue the original claim even though the defendant may have to pay damages already paid in good faith. The opinion balances the consequences of the attorney's fraud being imposed on the attorney's client or the defendant.

### FRAUD AND MISREPRESENTATION

**355. Cause of action for "fraudulent prevention of inquiry" allowed permitting buyer of real estate to recover for misrepresentations by seller.**

*Viscounti v. Pepper Partners*, 27 CLR 43 (6/26/00) (Curran, J.)

There is a cause of action for "fraudulent prevention of inquiry" pursuant to which a real estate purchaser can recover for a seller's deliberate attempts to lead the purchaser away from making relevant inquiries concerning a defective condition. The rule that a civil conspiracy cannot be based on conspiratorial conduct among agents of the same principal precludes a conspiracy claim against the employees of two separate but commonly owned entities, including a commonly owned corporation and partnership.

### GOVERNMENTAL LIABILITY Board of Education

**356. Section 10-235 does not authorize direct claim by injured party against Board of Education.**

*Brown v. Acorn Acres, Inc.*, 28 CLR 24 (11/6/00) (Martin, J.)

Section 10-235 requires that a Board of Education indemnify its employees for claims based on negligence in the performance of their duties. The court held that

the statute does not authorize a direct claim by an injured party against the Board of Education. Rather, the statute provides that a judgment must first be obtained against the negligent employee.

The opinion collects the superior court cases dealing with the issue, and notes an Appellate Court decision that seems to imply that a direct action can be brought.

Accord: *D'Alessio v. Ansonia*, 28 CLR 361 (1/15/01) (Nadeau, J.)

### Dog Bite

**357. Municipality not liable under dog bite statute, but plaintiff may have cause of action under identifiable victim subject to immediate harm exception.**

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

The court held that there is no exception to governmental immunity for discretionary acts by a municipal employee with respect to an injury for which strict liability is imposed by statute. The municipality was protected by governmental immunity for claims for injuries from an attack by a dalmatian dog in the control of a member of a fire department at a parade, even though strict liability would otherwise be imposed under the Dog Bite Statute, §22-357.

The opinion holds, however, that the plaintiff was an "identifiable person" within the meaning of the identifiable person/immediate harm exception to governmental immunity, while the plaintiff was present at the staging area. Whether the possibility of an attack by the dog presented a threat of immediate harm presented an issue of fact which could not be resolved on summary judgment.

**Defective Highways and Sidewalks**  
**358. Injuries caused by a tree hanging over a highway that fell onto a moving vehicle not a defect in the highway nor a nuisance.**

*Gray v. Norwalk*, 27 CLR 149 (7/17/00) (Skolnick, J.)

There is no cause of action against the municipality under either the defective highway statute or for nuisance for injuries incurred when a decaying tree limb hanging over a highway fell onto a moving vehicle. There is no claim under the Defective Highway Act because before it fell the limb was not protruding into the traveled portion of the roadway and therefore did not constitute a highway defect, and no claim in nuisance because no positive act by the municipality caused the limb to deteriorate and fall.

**359. Injuries from a highway defect actionable only if plaintiff was traveler at the time of injury.**

*Savaria v. Groton*, 27 CLR 508 (9/18/00) (Martin, J.)

Allegations that the plaintiff was injured by a falling street lamp pole while performing landscaping work on property adjoining the road on which the lamp was located are not sufficient to permit an action under the defective highway statute.

**360. Municipal ordinance requiring that sidewalks be maintained by abutting owners does not create a private cause of action for personal injuries.**

*Dreher v. Joseph*, 60 Conn. App. 257 (2000).

A municipal ordinance requiring that abutting owners maintain town sidewalks creates only an obligation owed by abutting owners to the municipality, and does not create a private cause of action permitting recovery by a pedestrian against an abutting owner for personal injuries from a fall caused by a negligently maintained sidewalk.

**361. Defective highway statute is exclusive remedy.**

*Robishaw v. New England Central Railroad*, 27 CLR 586 (10/9/00) (Bishop, J.)

The court followed the Supreme Court decision in *Sanzone v. Board of Police Commissioners*, 219 Conn. 179, 192 (1991), which held that the clause in §52-577n providing that the Defective Highway Act is the exclusive remedy for claims against municipalities based on highway defects bars not only a direct claim against a municipality under the act, but also an indirect claim by joining a municipal employee and seeking indemnification from the municipality under §7-465.

In an interesting twist, the court held that *Sanzone* applies only to claims against a municipality, and not to a direct claim against the employee, even though the employee may be unable to obtain indemnification from the municipality. The decision holds that a claim against municipal employees for injuries from a collision between a train and a vehicle based on allegations that the employees failed to install any warning signs at a railroad crossing in violation of the statutory mandate for such warnings contained in §13b-344 is based on a failure to perform ministerial act, and therefore is not barred by the employee's qualified immunity for

claims based on discretionary acts. The decision also holds that defective signals at a railroad crossing constitute a highway defect.

**362. Punitive damages not recoverable under defective highway statute.**

*Sackman v. Sullivan*, 28 CLR 501 (2/12/01) (Karazin, J.)

**363. Defective highway statute the only remedy for a passenger of bus who fell on grassy area used as drop off point.**

*Ferreira v. Pringle*, 255 Conn. 330 (2001)

The plaintiff was left off in a grassy area used by the bus company as a stop to allow passengers to disembark from the public bus. The grassy area was part of the adjacent public highway. The court held that claims for injuries to the bus passenger who tripped on the grassy area on the remnant of a severed signpost can be asserted against a municipality only under the defective highway statute, §13a-149.

Plaintiff had brought two actions. In the first action the defendants were the bus company, the driver of the bus, the state, the town, two public officials, and several other municipalities. In the second action, the defendants were the town fire department and two town officials. The actions were consolidated, and the court concluded, as a matter of law, that the claims in both actions invoked the defective highway statute, §13a-149, and that the exclusive remedy for the plaintiff's injuries was under that statute.

The court granted the defendants' motion to strike the first action, and dismissed the second action.

The Supreme Court held that the defective highway statute was the exclusive remedy for the plaintiff's case, and the plaintiff had failed to comply with the notice provisions. The plaintiff had made a claim in the case that §13a-149 was unconstitutionally vague as applied to the facts of this case, which the court rejected.

The Supreme Court opinion by Justice Katz contains an excellent summary of municipal liability, 255 Conn. 341-355.

**364. Evidence of icy road conditions in the year preceding the accident, and a prior similar collision caused by ice the day before, admissible to prove constructive notice.**

*Ormsby v. Frankel*, 255 Conn. 670 (2001)

In an action under the Defective Highway Statute based on a motor vehicle collision caused by ice on a road, evidence of icy conditions in the year preceding an accident and of a similar accident caused by ice the day prior to the plaintiff's collision are admissible for the purpose of determining whether and when the state should have known of the ice patch. The plaintiff need not prove a substantial similarity between the two accidents if the offering of the evidence is solely for the purpose of determining whether the state had constructive notice of the ice. Substantial similarity would have been necessary had the offer been intended to prove the existence of the ice which caused the accident in litigation.

Whether the state's response time for reacting to a known dangerous highway condition is reasonable is a question of fact for a jury determination.

**365. Notice may be extended if the statutory period ends on the day the filing office is closed. The notice may be filed the next day the office is open.**

*Brennan v. Fairfield*, 255 Conn. 693 (2001)

The opinion also holds that an otherwise proper notice that was received by the town clerk in timely fashion is not rendered invalid because the claimant misnamed the clerk.

**Imminent Harm to Identifiable Victim**

**366. Motorists injured in a collision at an intersection with no stop sign does not fall within foreseeable class of victims.**

*McLaurin v. West*, 28 CLR 515 (2/15/01) (West, J.)

The opinion held that governmental immunity protects the city and its director of traffic for the discretionary act of whether a stop sign needs to be replaced or installed at a particular intersection.

**367. City may be sued for police department's failure to respond to a report that a ruptured water main threatened to flood neighboring homes.**

*Stracener v. South Central Connecticut Regional Water Authority*, 26 CLR 705 (6/12/00) (Devlin, J.)

The immediate threat to identifiable victim exception to sovereign immunity permits an action against a municipality

for a police department's failure to respond to a report that a ruptured water main was threatening to flood homes located in the immediate neighborhood of the pipeline failure.

**368. City has liability to parent who fell while visiting school to pick up child.**

*Gray v. New Haven*, 26 CLR 706 (6/12/00) (Devlin, J.)

The immediate threat to identifiable victim exception to sovereign immunity allows an action against a municipality for injuries to a parent who slipped and fell while visiting the school to pick up a child.

**369. The test for "imminent harm" under the imminent harm—identifiable victim exception to governmental immunity is whether the hazard is limited in time and geographic scope.**

*Spina v. New Haven*, 27 CLR 484 (9/18/00) (Lager, J.)

In determining whether a dangerous condition satisfies the imminent harm element of a claim under the imminent harm to an identifiable victim exception to sovereign immunity, the test is whether the condition was limited in duration to a short period of time and was present in an area of limited geographical scope.

A claim against school officials for injuries to a school child who ran into a water spigot protruding from the side of a school building could satisfy the "imminent harm" element because it was reasonably foreseeable that a small child could be struck in the face by the spigot and the hazard was limited to recess time and to the playground area.

**370. Imminent harm to an identifiable victim exception does not apply to direct claims against a municipality, but only to claims against municipal employees.**

*Knoob v. North Branford*, 27 CLR 486 (9/18/00) (Devlin, J.)

The imminent harm to an identifiable victim exception to the doctrine of governmental immunity is relevant only with respect to claims against governmental employees and not to direct claims against municipalities, because a direct claim against the municipality can be brought only under the municipal liability statute, which creates statutory immunity for municipalities but does not apply to claims against municipal employees. See §52-577n.

This decision is directly contrary to *Colon v. New Haven*, 60 Conn. App. 178, cert. denied, 255 Conn. 908 (2000).

**371. Identifiable victim subject to immediate harm exception applies only with respect to activities for which participation is mandatory.**

*Fortune v. New London*, 27 CLR 637 (10/16/00) (Shapiro, J.)

The exception applies to activities which are mandatory, such as attendance at school by a student. It does not apply to a claim by a person participating in a basketball game while a municipal court was reserved for use of the YMCA because the plaintiff's participation was entirely elective.

**372. Imminent harm to an identifiable victim exception to sovereign immunity is raised by allegations that police failed to take steps to protect plaintiff's decedent after being informed that a psychiatric patient had made threats of attacking a small group of specially identified individuals at an identified time and location.**

*Peters v. Greenwich*, 28 CLR 671 (3/19/01) (D'Andrea, J.)

The imminent harm to an identifiable victim exception to sovereign immunity is sufficiently raised by allegations that the defendant police department failed to take adequate steps to protect a victim after receiving a warning from a family member of a person diagnosed as suffering from a psychiatric disorder that the person had made threats of an attack on a small group of potential victims that included a specific identification of the plaintiff's decedent, an estimate of the approximate time of the attack; and an identification of the town in which the attack would take place.

The specific identification of the plaintiff's decedent and the general location of the threatened attack was held to satisfy the "identifiable victim" element of the exception, and the specification of an approximate date satisfies the "imminent harm" element.

**Sovereign Immunity**

**373. Exception from the common law doctrine of sovereign immunity for conduct in excess of statutory authority held to exist an action against DCF.**

*Shay v. Rossi*, 253 Conn. 134 (2000)

Allegations that employees of the Department of Children and Families continued to prosecute a petition of neglect after obtaining information of an absence of neglect, solely to vindicate and legitimize the earlier improper handling of the case, are sufficient to state a claim that meets the exception from the common law doctrine of sovereign immunity for conduct in excess of statutory authority. It also meets the requirements for the exception from the statutory immunity for claims against state employees based on wanton, reckless or malicious conduct (§4-165).

**374. Sovereign immunity does not extend to claims against a private bus company operating a fleet of buses owned by the state.**

*Gordon v. H.N.S. Management Co.*, 27 CLR 495 (9/18/00) (Rittenband, J.T.R.)

**375. The statutory waiver of immunity for personal injury actions against the Commissioner of Public Health and Mental Retardation, §19a-24, constitutes not only a waiver of the Department's common law sovereign immunity but also a waiver of the statutory immunity otherwise available under §4-165 to employees of the Department.**

*Pattavina v. Mills*, 27 CLR 521 (9/25/00) (Higgins, J.)

The court, after determining that there was no impediment to the waiver of sovereign immunity, awarded a total of \$1.1 million, \$700,000 in noneconomic damages, \$250,000 in attorney's fees to the retarded plaintiff, and \$150,000 in noneconomic damages to the parents.

The specifications against the Commissioner of the Department of Mental Retardation and the employees of the Department were as follows:

- (1) The negligence of Department employees in failing to more promptly report acts of abuse by two co-employees against an adult client entrusted to the Department's care;
- (2) Failure to institute procedures to assure more closely monitoring of the care required of a client who had been identified as being at high risk of mistreatment;
- (3) Failure to conduct background check that would have revealed that the two abusive employees had falsely denied on employment

applications ever being convicted of a crime;

- (4) Failure to respond to alarming statements by the abusive employees that the client was best handled through the use of an intimidating form of supervision;
- (5) Failure to remove the patient from the facility in which the abusive conduct occurred promptly after the abuse became known;
- (6) Failure to inform the parents of the abuse before the parents learned of it through the public news reports.

### **376. Statute waiving sovereign immunity for claims for injuries from a motor vehicle accident involving a state owned vehicle inapplicable to golf carts.**

*Kelly v. Ron's Golf Cart Rental*, 27 CLR 442 (9/11/00) (Levin, J.).

§52-556, waiving sovereign immunity for claims for injuries from a motor vehicle accident involving a state owned vehicle operated by a state employee does not apply to golf carts. Nor does §14-154a apply, creating liability for the lessor of motor vehicles.

Negligence claims for injuries caused by the negligent operation of a state leased golf cart used by employees for transportation on a state university campus cannot be asserted under either statute.

Interestingly, the opinion also holds that a golf car is a "motor vehicle" within the meaning of the criminal statutes defining motor vehicle violations.

### **377. Building inspector's refusal to comply with request to enforce zoning law or fire building codes barred by sovereign immunity.**

*West Haven Academy of Karate v. Guilford*, 28 CLR 53 (11/13/00) (Alander, J.).

Claims against a municipality for a building inspector's refusal to comply with a request to enforce conditions imposed on a building permit, or to enforce the fire safety and building codes are based on discretionary acts and therefore are barred by sovereign immunity.

### **378. Municipalities duty to appoint dog warden who meets the Commissioner of Agriculture's baseline criteria is ministerial.**

*Lemp v. East Granby*, 28 CLR 324 (1/8/01) (Rubinow, J.).

Although the appointment of the dog

warden is ministerial, the town's choice between qualified candidates is discretionary.

The opinion also holds that qualified municipal immunity for tortious actions by municipal employees performing governmental duties cannot protect a dog warden from liability for failure to comply with the ministerial duty to order an aggressive dog to be destroyed rather than released.

A common law recklessness claim may be based on allegations that a town's dog warden prematurely released an aggressive dog, failed to destroy the dog in a timely manner, and failed to notify the Commissioner of Agriculture that the dog required destruction.

### **379. Statewide Grievance Committee and its officials protected by sovereign immunity and judicial immunity.**

*Dixon v. Statewide Grievance Committee*, 29 CLR 36 (4/2/01) (Silbert, J.).

## IMMUNITY

### **380. Prosecutor is immune from invasion of privacy claims by a victim of a crime based on statements made during a sentencing hearing.**

*Barese v. Clark*, 62 Conn. App. 58 (2001)

Prosecutors enjoy absolute immunity from civil liability based on conduct occurring during a judicial proceeding, including a sentencing proceeding. A prosecutor was held immune from liability for claims of invasion of privacy and infliction of emotional distress based on allegations that during a sentencing hearing he improperly disclosed that the criminal defendant had exposed the plaintiff, the victim of the defendant's assault, to the HIV virus.

### **381. Immunity for statements made during the course of judicial proceedings absolute: It applies to all causes of action.**

*Schreiber v. Federal Insurance Co.*, 28 CLR 693 (3/19/01) (Arena, J.).

The doctrine of absolute immunity for statements made during the course of judicial proceedings grew out of and is most commonly applied as a defense to defamation cases, however the doctrine also applies to other causes of action. As applied in this case, the doctrine was held to bar a claim that the defendant-insurer committed a violation of CUTPA and CUIPA by making intentionally false and

defamatory claims in a special defense to an insured's complaint seeking to enforce uninsured motorist coverage.

## INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

### **382. Intentional infliction of emotional distress by outrageous conduct does not include rude behavior by an employer against an employee believed to be experiencing emotional difficulties.**

*Appleton v. Stonington Board of Education*, 254 Conn. 205 (2000).

The Supreme Court held that following allegations were insufficient to allege cause of action for intentional infliction of emotional distress by extreme and outrageous conduct:

- (a) That school officials made condescending comments concerning the plaintiff's work performance in the presence of other employees,
- (b) School officials contacted the plaintiff's family to suggest that the plaintiff was acting erratically and should take some time off,
- (c) School officials arranged to have the plaintiff escorted off school premises by the police.

## INTEREST

### **383. Statutory prejudgment interest not allowed on commercial or economic loss.**

*Grigerik v. Sharpe*, 27 CLR 87 (7/3/00) (Silbert, J.).

Prejudgment interest under §37-3b of the General Statutes may not be awarded on commercial or economic loss. Rather, prejudgment interest is limited to damages for injury to person or property.

## INTERFERENCE WITH CONTRACTUAL RELATIONS

### **384. Tort of interference with contractual relations is established by proof that only some loss occurred. The amount of the loss need not be established.**

*Hi-Ho Tower, Inc. v. Com-Tronics, Inc.*, 255 Conn. 20 (2000)

Damages in tort law require the measurable amount of damages to be established. The tort of interference with business expectancies requires only proof that some loss was incurred. It is not necessary to establish the amount of the loss.

A jury finding of liability but a finding of zero damages is sufficient to establish the claim and to justify an award of punitive damages.

## LEGAL MALPRACTICE

**385. Successor attorney cannot be impleaded for apportionment of damages in a malpractice action against the original attorney.**

*Gauthier v. Kearns*, 27 CLR 201 (7/24/00) (Rittenband, J.)

A successor attorney representing a client cannot be impleaded for apportionment of damages in a malpractice action against the original attorney because permitting claims by the original attorney against the successor attorney would violate public policy by providing a disincentive to representation of an individual wishing to change attorneys. The opinion also holds that "property damage" as used in the apportionment statute is limited to physical property and does not include commercial loss, so that apportionment is not available in legal malpractice in any event.

**386. Claim for negligently providing legal services can be based on both breach of contract and malpractice.**

*Welty v. Crisciou*, 27 CLR 253 (7/31/00) (Blue, J.)

Claim against a lawyer for negligently providing professional services may be asserted both on a breach of contract theory and on a tort of malpractice theory. The claim for breach of contract is based on an implied obligation to exercise ordinary care, and therefore does not require an allegation of a promise to achieve a specific result. The opinion also holds that although the negligent performance of legal services constitutes a violation of Rule 1.1 of the Rules of Professional Conduct, requiring a lawyer to provide competent representation to a client, and constitutes a breach of fiduciary duty in the ethics sense, a violation of the rule does not constitute a breach of fiduciary duty in the tort sense. Therefore a count for breach of fiduciary duty against an attorney based only on negligent conduct cannot be joined in an action for legal malpractice. The claim for breach of fiduciary duty was brought in this case to recover punitive damages and attorney's fees.

**387. Expert testimony not required in case based on entry of default caused by the lawyer's failure to file an appearance.**

*Paul v. Gordon*, 58 Conn. App. 724 (2000)

**388. Attorney supervising visit from which non-custodial parent removed child and left country can be sued for malpractice for negligent supervision of visitation.**

*Mirjavadi v. Vakilzadeh*, 28 CLR 524 (2/15/01) (Lewis, J.)

## LENDER LIABILITY

**389. Mortgage creditor not liable in negligence for incorrectly reporting to various credit bureaus that debt was unpaid.**

*Schonberger v. Citicorp Mortgage, Inc.*, 26 CLR 700 (6/12/00) (Fineberg, J.)

A mortgage debtor has no cause of action in negligence for the mortgage lender's incorrect reporting to various credit bureaus that the debtor had failed to pay the mortgage note. Although there is no negligence liability, the court held that there was liability in defamation for the incorrect reporting.

## LIQUOR LIABILITY

**390. Although provider of alcohol is not liable for injuries caused by intoxicated driver, that rule does not apply to a claim based on negligent supervision of a bartender who became intoxicated from drinking on the job.**

*Seguro v. Cummiskey*, 27 CLR 720 (10/30/00) (Rittenband, J.)

The rule that a provider of alcohol cannot be held liable in negligence for injuries caused by an intoxicated person because that person's conduct in becoming intoxicated rather than the service of alcohol is the proximate cause of the injuries. This rule does not apply to a claim based on negligent supervision. A tavern owner can be liable on a theory of negligent supervision of an employee for injuries from a motor vehicle accident caused by the operator who became intoxicated while working as a bartender.

**391. Tavern owner not liable for negligent supervision of bartender serving intoxicated patron.**

*DeFosses v. Blauvelt*, 28 CLR 126 (11/27/00) (Kocay, J.)

The rule of non-liability of a tavern owner in common law negligence for injuries from a car accident caused by an intoxicated patron cannot be avoided by asserting a claim of supervisory negligence based on the allegation that the tavern owner negligently failed to prevent the bartender from serving the patron.

**392. An obviously intoxicated patron sufficient allegation to meet specificity requirement for claim of reckless and wanton serving of alcohol.**

*DeFosses v. Blauvelt*, 28 CLR 126 (11/27/00) (Kocay, J.)

## MALICIOUS PROSECUTION

**393. Malicious prosecution can be based on the knowing withholding of complete information, as well as the knowing giving of false information.**

*Ford v. Barnes*, 27 CLR 501 (9/18/00) (Corradino, J.)

A claim for malicious prosecution by causing commencement of criminal proceedings against the plaintiff can be based not only on providing false information to the police, but also on failure to provide complete information. The failure to provide complete information can be relied upon to support an additional element of malice as well.

The opinion holds that whether an arrest resulting from a call by the defendant restaurant owner to the police to resolve a conflict with an irate customer is sufficient to establish the tort of malicious prosecution presents issues of fact which cannot be resolved on summary judgment.

## MEDICAL MALPRACTICE

### Agency and Apparent Authority

**394. Hospital may be liable under a theory of apparent authority for a staff radiologist who was actually an independent contractor.**

*McClelland v. Day Kimball Hospital*, 29 CLR 166 (4/30/01) (Bishop, J.)

A hospital may be liable under a theory of apparent authority for the negligence of radiologists with privileges at the hospital, even though the radiologists were actually independent contractors of the hospital.

### Certificate of Good Faith

**395. Claim that medical testing lab failed to timely report results of an amniocentesis test alleges malpractice claim requiring a certificate of good faith.**

*Sinclair v. Quest Diagnostics*, 27 CLR 98 (7/3/00) (Potter, J.)

The lab failed to timely report results of an amniocentesis test, thereby depriving the plaintiff of an opportunity to terminate her pregnancy. The defendant claimed this constituted a claim for malpractice requiring a certificate of good

faith. The court held that the certificate is required even though the lab was not selected by the plaintiff, and the test results, when provided, were directed only to the patients primary care physician. The plaintiff unsuccessfully argued that there is no doctor-patient relationship between a patient and an independent testing lab selected by the patient's primary care physician.

**396. Certificate of good faith not required for intervening employer in medical malpractice action.**

*King v. Sultar*, 253 Conn. 429 (2000)

**397. Filing a petition to extend the statute of limitations tolls the period for all potential defendants, not just the defendants named in the petition.**

*Lucid v. Arthritis Center of Connecticut, P.C.*, 28 CLR 404 (1/22/01) (Wiese, J.)

The filing of a petition for an automatic 90-day extension of the statute of limitations for the preparation of a good faith certificate for a medical malpractice action tolls the limitation period for all potential defendants, not just the defendants named in the petition.

**398. Physical therapist negligence in deciding not to monitor patient's transfer from wheelchair states malpractice claim mandating certificate of good faith.**

*Trimel v. Lawrence & Memorial Hospital Rehabilitation Center*, 61 Conn. App. 353, cert. granted 255 Conn. 948 (2001).

**399. Good faith certificate not required an action alleging that hospital failed to prevent patient from falling out of bed.**

*DeJesus v. Veterans Memorial Medical Center*, 28 CLR 522 (2/12/01) (Kocay, J.)

The court reasoned that these allegations required no expert testimony and therefore constituted an action in ordinary negligence rather than a medical malpractice.

**301A. Good faith certificate required for complaint for injuries to 87-year-old patient from a fall while sitting unattended on a hospital bed.**

*Sullivan v. Manchester Memorial Hospital*, 28 CLR 704 (3/19/01) (Wagner, J.T.R.)

Whether it was negligent for a hospital to have left an 87-year-old patient unattended while sitting on the edge of a hospital bed requires expert testimony. Therefore a good faith certificate is necessary.

**302A. Certificate not required for claim against licensed nurse for negligently providing psychological counseling without a prior license.**

*Holt v. Levine*, 29 CLR 20 (4/2/01) (Gilardi, J.)

**303A. Certificate required for false imprisonment claim against physician based on involuntary commitment of a psychiatric patient.**

*Leister v. Thimineur*, 29 CLR 42 (4/9/01) (Nadeau, J.)

A good faith certificate is required for a false imprisonment claim against a physician for involuntarily committing a psychiatric patient without following the commitment procedures required by §17a-502. Medical expert testimony is required to determine whether accepted medical standards for an involuntary commitment had been followed.

#### Expert Testimony

**304A. Expert testimony is not required to establish that a physician has a duty to obtain consent before performing a medical procedure.**

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

Expert testimony is not required to establish that a doctor must obtain consent before performing a medical procedure on a patient. The case distinguishes an earlier holding involving multiple procedures being administered during the same surgery by multiple physicians. In that situation, expert testimony is required to establish which of the several doctors is required to obtain consent on behalf of all of the physicians. However, no expert testimony is required to establish that at least one physician must obtain consent for all the procedures.

#### LOSS OF CHANCE

**305A. Cause of action for loss of chance can be joined in a wrongful death malpractice action.**

*Cuhna v. Fisher*, 27 CLR 496 (9/18/00) (Fineberg, J.)

A count for "loss of chance of recovery" can be joined in a medical malpractice action brought under the wrongful death statute. The defendant unsuccessfully argued that a "loss of chance" claim, first recognized in 1996 in *Borkowski v. Sacheti*, 43 Conn. App. 294, cert. denied, 239 Conn. 945 (1996), can only be brought if the claimant survives.

*Borkowski* was a medical malpractice action brought by Marcella Borkowski as administratrix of the estate of her deceased husband. The operative complaint in *Borkowski* contained three counts: the first count alleged that the decedent's wrongful death was caused by the negligence of the defendant; the second count alleged a loss of chance of survival by the decedent due to the negligence of the defendant; and the third count alleged a loss of consortium. The trial court submitted the first and third counts to the jury, but refused to submit the second count. The Appellate Court reversed, and remanded the case to the trial court, holding that a cause of action in fact did exist and should have been presented to the jury along with the first and third counts.

In order to succeed on a claim for loss of chance, the plaintiff must show:

- (1) that he has in fact been deprived of a chance for successful treatment, and
- (2) that the decreased chance for successful treatment more likely than not resulted from the defendant's negligence.

The defendants had argued that Connecticut law does not recognize the existence of a cause of action for loss of chance in medical malpractice cases.

#### PARENTAL LIABILITY

**306A. Parental immunity bars any claim for contribution, apportionment or indemnification against a parent.**

*Burke v. L&L Management, LLC*, 27 CLR 420 (9/4/00) (Rittenband, J.)

This decision holds that parental immunity bars any claim for contribution, apportionment or indemnification against a parent arising out of injuries to a child, including claims asserted in opposition to a parent's direct claim to recover medical expenses paid on the child's behalf.

#### PREMISES LIABILITY

**307A. Snow removal contractor liable to third party for negligently failing to perform contractual obligation to remove snow.**

*Zercie v. Vantage Point Condominium Ass'n.*, 27 CLR 45 (6/26/00) (Levin, J.)

**308A. Property owner sued for non-delegable duty to keep the premises safe cannot apportion liability to an independent contractor.**

*Hoyt v. K-Mart Corp.*, 27 CLR 467 (9/11/00) (Kocay, J.)

**309A. Escalator Servicing Company may be liable on theory of negligent maintenance even after possession and control have been returned to the property owner.**

*Hutchinson v. Stamford*, 27 CLR 152 (7/17/00) (D'Andrea, J.)

The rule that an independent contractor is not liable under a theory of premises liability for injuries caused by a defective condition on the property after possession and control have been turned over to the property owner does not apply to a claim based on negligence in performing work on the premises which created a continuing, unsafe condition. Accordingly, an escalator maintenance service company may be liable for negligent maintenance even though the maintenance contract had been terminated eighteen months earlier. See also *Zercie v. Vantage Point Condominium Assoc.*, 27 CLR 45 (6/26/00) (Levin, J.) (Possession and control are not the only bases for a premises liability claim).

**310A. Landlord does not owe a duty to protect passerby from criminal assault by tenant.**

*Spencer v. Nesto*, 27 CLR 212 (7/24/00) (Robinson, J.)

A residential landlord does not owe a duty to protect a passerby from criminal assault by evicting a tenant with a propensity for criminal conduct. The opinion discusses several cases dealing with the issue of a property owner's duty to protect third parties.

**311A. Storeowner has duty to provide safe means to enter and may be liable to customer for injuries from fall caused by a sidewalk defect at the entrance to the store.**

*Major v. New London*, 27 CLR 217 (7/24/00) (Corradino, J.)

A store owner may be liable to a customer for injuries from a fall by a sidewalk defect at the entrance to the store

even though the municipality rather than the owner is responsible for the repair of the defect. The court reasoned that a store owner has a duty to provide a safe means for business invitees to enter and leave the premises.

**312A. Landlord may be liable in common law negligence for injuries from an attack by tenant's dog in common area, but not for attack inside leased premises.**

*Rose v. Tomaso*, 27 CLR 265 (8/7/00) (Devlin, J.)

This case holds that although a landlord may be liable in common law negligence for injuries from a dog attack occurring in the common area, based on negligence in entering into a lease with a tenant that harbors a dog with known vicious tendencies, the landlord is not liable for an attack that occurs inside the leased premises.

**313A. Mortgagee may be liable to third-parties: foreclosing mortgagee's ability to withhold consent for maintenance expenditures may impose liability for injuries from defective conditions.**

*Doty v. Shawmut Bank*, 58 Conn. App. 427 (2000).

The fact that the receiver of rents has been appointed at the request of the lender in a mortgage foreclosure action and that the lender's permission is required for the receiver to make repairs exceeding a certain cost creates an issue of fact as to whether the lender had sufficient control over the premises to be liable for injuries to a visitor from a fall allegedly caused by a defective condition on the mortgaged property.

**314A. Independent contractor may be liable to subsequent owners for negligently inspecting an underground oil storage tank at the request of homeowner.**

*Piantidosi v. Dragone*, 27 CLR 425 (9/4/00) (D'Andrea, J.)

Homeowner, before selling the property, had underground storage tank inspected by defendant. Homeowner then sold the property to the plaintiff's predecessor in title. The court indicated that the independent contractor may be liable.

## PRIVITY

**315A. Lack of privity does not bar a claim for negligence by a contractor against owner's architect.**

*Carolina Casualty v. 60 Gregory Boulevard*, 26 CLR 685 (6/5/00) (Hickey, J.)

Privity of contract is not a bar to a claim for negligence even with respect to claims between parties in a purely business relationship, and even where the plaintiff has suffered only economic loss, with no injury to person or to property. Allegations that the plaintiff, a prime contractor on a construction project, incurred extra costs due to the negligence of the architect retained by the property owner are sufficient to state a cause of action for negligence against the architect.

## PRODUCT LIABILITY

**316A. Learned intermediary doctrine viability in Connecticut argued before Supreme Court.**

*Vitanza v. Upjohn Co.*, (S.C. No. 16343), D.N. 99-7539 (2nd Cir. 5/5/00) (Feinberg, C.J.)

In May 2000 the Second Circuit certified to the Connecticut Supreme Court the issue of whether the "learned intermediary" defense to a claim against a pharmaceutical manufacturer is an issue of fact which must be submitted to the jury, or is an issue of law which can be resolved by the trial court on motion for summary judgment. The Supreme Court accepted the referral, and heard argument on April 17, 2001. The plaintiff is represented by CTLA past-president Richard Silver. CTLA filed an amicus brief.

**317A. Sidewalk not a product within Products Liability Act.**

*Truglio v. Hayes Construction Co.*, 26 CLR 695 (6/12/00) (Nadeau, J.)

The installation of a sidewalk constitutes a service, rather than the sale of a product subject to the Products Liability Act. A defectively installed sidewalk accordingly is not subject to the Products Liability Act.

**318A. CUTPA claim is functionally equivalent to a product liability claim and is barred by the Product Liability Act.**

*Morin v. Iron Age Corp.*, 28 CLR 356 (1/15/01) (Beach, J.)

The product liability act provides that it is the exclusive remedy. The court considered the CUTPA claim in this case the

functional equivalent of a products liability claim.

## RAILROAD LIABILITY

### 319A. Defective Highway Act does not apply to claims against Metro-North.

*Finkelstein v. Department of Transportation*, 26 CLR 651 (6/5/00) (Lewis, J.)

The Defective Highway Act does not apply to claims against Metro-North Commuter Railroad Company for injuries caused by a defective sidewalk on railroad property. A claim for negligence may be brought against the railroad without first filing a notice of suit under the Defective Highway Act.

## RES IPSA LOQUITUR

### 320A. Res ipsa loquitur cannot be asserted if direct evidence of the defendant's negligence has been offered at trial.

*Gilbert v. Middlesex Hospital*, 58 Conn. App. 731 (2000)

A jury instruction on res ipsa loquitur is appropriate only if the plaintiff is relying on circumstantial evidence. The doctrine cannot be asserted if direct evidence of the defendant's negligence has been offered at trial. Plaintiff's intent to assert reliance on the doctrine must be apparent from the allegations of the complaint.

### 321A. Doctrine of res ipsa loquitur does not apply if specific acts of negligence have been alleged.

*McGuire v. Lavietes*, 28 CLR 134 (11/27/00) (Zoarski, J.)

## RESCUE DOCTRINE

### 322A. Rescuer can recover from a person whose own negligence caused the situation-requiring rescue.

*Estafan v. Rolls*, 27 CLR 130 (7/10/00) (Moraghan, J.)

The rescue doctrine, which permits a rescuer to recover for damages from the person whose negligence caused the rescuee to be in danger, is not limited to recovery against a third party tortfeasor. A cause of action can be stated for recovery from the rescuee whose own negligence created the situation requiring the rescue.

A person injured while saving a pilot from a plane which crashed due to the pilot's own negligence can recover from the pilot for injuries incurred during the rescue.

## ULTRAHAZARDOUS LIABILITY

### 323A. Illegal use of fireworks constitutes an ultrahazardous activity for which strict liability is imposed.

*Lipka v. DiLungo*, 26 CLR 654 (6/5/00) (Blue, J.)

Illegal use of fireworks constitutes an ultrahazardous activity imposing strict liability to a bystander who may be injured from the setting off of the fireworks.

### 324A. Delivery of home heating oil is not an ultrahazardous activity.

*Nelson v. Thomaston Oil, Inc.*, 27 CLR 454 (9/11/00) (DiPentima, J.)

### 325A. Operation of a residential treatment facility for sexually deviant children is not an ultrahazardous activity.

*King v. Stetson School, Inc.*, 28 CLR 658 (3/12/01) (Hale, J.T.R.)

## VEXATIOUS LITIGATION

### 326A. Sanctions for bringing vexatious action includes award of attorney's fees.

*Maris v. McGrath*, 58 Conn. App. 183, cert. granted 254 Conn. 919 (2000)

The court awarded \$15,000 in attorney's fees against the plaintiff for suing a party with whom the plaintiff had cohabited for several years for a return of monies placed in a joint banking account. The court referred to the action as "purely recreational litigation."

## VOLUNTEER

### 327A. A volunteer with special expertise must meet the standard of care expected of an expert.

*Monterose v. Cross*, 60 Conn. App. 655 (2000)

A person with special expertise who voluntarily provides assistance to another has the duty to provide that assistance with the degree of care expected of an expert, even though the assistance is provided in a non-professional setting.

Here, in a personal injury action brought by the plaintiff against a friend who was a professional rigger of heavy equipment, for compensation for injuries incurred while loading a heavy object being borrowed from the defendant by the plaintiff into a truck, it was error for the trial court to refuse to give an instruction as to the standard of care expected of professional riggers.

## 4. UNINSURED AND UNDERINSURED MOTORISTS INSURANCE

[UM=Uninsured Motorist; UIM=Underinsured Motorist]

## ADDITIONAL INSURED AND ADDITIONAL DRIVERS

### 401. Individuals named as additional drivers but not as additional named insureds are not covered by UIM coverage.

*Kitmirides v. Middlesex Assurance Co.*, 27 CLR 673 (10/23/00) (D'Andrea, J.)

## CONSENT TO SETTLE

### 402. Settlement at the limits of the tortfeasor's liability policy does not require the consent of the UIM carrier. Failure to obtain consent does not bar recovery under the UIM policy.

*Magda v. Hartford Underwriters Insurance Co.*, 27 CLR 462 (9/11/00) (Arnold, J.)

Following the adoption of the 1997 public pact eliminating an uninsured motorist carrier's right to subrogation to recover UIM benefits from a tortfeasor, P.A. 97-58, §4, an underinsurer can no longer enforce a "consent to settle" clause against an insured who has settled for the full amount of the tortfeasor's liability coverage, even though the tortfeasor may have had assets to respond to a judgment in excess of the liability limits.

## DRIVE-BY SHOOTING

### 403. Uninsured motorist coverage is available to an operator injured in a drive-by shooting.

*Mills v. Colonial Penn Insurance Co.*, 28 CLR 471 (2/5/01) (Blue, J.)

The event constitutes an "accident" from the claimant's point of view, and the "use of the uninsured motor vehicle" as those terms are used in the UM policy.

### 404. UM covers only ordinary and intended use of vehicle. Drive-by shooting not covered.

*Espinosa v. Atlantic Casualty Co.*, 27 CLR 309 (8/14/00) (Rittenband, J.T.R.)

Uninsured motorist coverage for injuries that arise out of the use of an uninsured motor vehicle applies only to ordinary, intended uses of a vehicle, not to all events which occur. Accordingly, injuries to a passenger in one vehicle caused by a stray bullet shot from another vehicle during a drive-by shooting

are not covered by the uninsured motorist coverage of the vehicle occupied by the injured passenger.

## EXHAUSTION

### 405. Liability coverage available under all policies applicable to a particular vehicle must be exhausted before triggering UIM benefits.

*Wilson v. Rodriguez*, 28 CLR 81 (11/20/00) (Wiese, J.)

All liability policies applicable to a particular vehicle must be exhausted before a plaintiff is eligible for underinsured motorist claimant is entitled to benefits after exhausting the liability coverage of only one tortfeasor is limited to instances in which the liability coverage is available under multiple policies insuring multiple vehicles. The rule does not apply to instances in which a claim is being made against multiple tortfeasors insured under the same policy covering the same vehicle. Therefore, a plaintiff with a claim against both operator and owner of a vehicle must exhaust any liability coverage applicable to the vehicle available to both the operator and the owner before being entitled to UIM coverage.

## LIMITS: MAY BE COVERAGE UNDER LIABILITY AND UIM

### 406. Exclusion of UIM coverage for claims by the named insured does not exclude UIM coverage by passenger after liability limits exhausted.

*Pudlo v. Allstate Insurance Co.*, 28 CLR 27 (11/6/00) (Martin, J.)

The policy contained an exclusion for named insured, but did not exclude UIM coverage for the passenger after exhausting the liability limits of the operator's policy. Because the passenger was not the "named insured," the passenger was able to assert a liability claim and a UIM claim when the liability coverage was exhausted.

The case highlights the need for careful reading of the policy. The drafting of the exclusion in this case was done so as to apply to the party claiming coverage, rather than to apply to the vehicle. Although a UIM claim would be excluded if asserted by the policyholder, the exclusion was inadequate to exclude coverage by the passenger/non-policyholder.

## PAYMENTS THAT REDUCE AMOUNT RECOVERABLE IN UIM CLAIM

### 407. Insurer has the right to reduce UIM coverage by damages recovered from responsible party, which includes payments regardless of the amount of insurance carried by that party.

*Hanz v. Dragone Enterprises*, 27 CLR 547 (9/25/00) (Melville, J.)

An insurance company's right to reduce the limits of underinsured coverage by any damages recovered by the claimant from "any person responsible for the injury" is not limited in the case of a claim involving multiple tortfeasors, to the recovery for the negligence attributable to the uninsured tortfeasors, but includes any amount paid to the insured by any responsible party regardless of the amount of insurance carried by the party.

## PRIVATE PASSENGER MOTOR VEHICLE

### 408. Municipal fire emergency vehicle is not private passenger motor vehicle and therefore it does not have to be covered by UM insurance.

*Willoughby v. New Haven*, 254 Conn. 404 (2000)

A self-insured municipality is not required to provide UM benefits to an employee injured while operating a fire emergency vehicle.

## PUNITIVE DAMAGES

### 409. Punitive damages cannot be recovered under a UM policy.

*Laudette v. Peerless Insurance Co.*, 27 CLR 456 (9/11/00) (Dyer, J.)

Neither common law nor statutory punitive damages can be recovered under an uninsured motorist policy, because UM coverage is available only to the extent that the plaintiff would have been able to recover from the tortfeasor's carrier if the tortfeasor had carried comparable coverage, and permitting insurance coverage for punitive damages would be against public policy.

## STACKING

### 410. Stacking is prohibited even if authorized by terms of policy.

*Delcegno v. Hartford Casualty Insurance Co.*, 26 CLR 652 (6/5/00) (Moran, J.)

The 1993 statute abolishing stacking of UM coverage prohibits stacking even with the agreement of the parties. Therefore, stacking is not permitted under a

policy regardless of whether an ambiguous provision relating to stacking is interpreted in favor of the insured or the insurer.

## STATUTE OF LIMITATIONS

### 411. Six-year statute of limitations for making a demand for arbitration on a UIM claim commences upon receipt of check from tortfeasor's insurer, not clearance of check.

*Scalise v. American Employers*, 27 CLR 324 (8/14/00) (Nadeau, J.)

A payment of an obligation by check suspends the obligation until the check is cleared. Therefore, for purposes of determining when the limitations period for serving a demand for arbitration on an uninsured motorist carrier commences—six years from "payment" of any claim against the tortfeasor's liability insurer—payment occurs when the settlement check is received, not the later date when the check is cleared and the settlement funds have been received.

### 412. Contractual limitation of three-years and provision requiring exhaustion of the tortfeasor's policy for UIM claim does not render contract ambiguous.

*Tracy v. Allstate, Inc.*, 28 CLR 503 (2/12/01) (Adams, J.)

The inclusion in an UIM policy of both a provision requiring that any suit for benefits be commenced within three years of an accident, and the inconsistent provision prohibiting recovery until the tortfeasor's liability coverage has been exhausted, does not render the policy ambiguous and therefore does not invalidate the three year contractual limitation period. The policy requires the commencement of the suit within three years, even though proceeding on the complaint must be deferred until the liability policy has been exhausted.

### 413. Contractual limitation periods of less than three years are void, leaving claims under these policies subject to the six-year period for contracts.

*Gohel v. Allstate Insurance Co.*, 61 Conn. App. 806 (2001)

### 414. Limitation period for uninsured claim begins when the insured should have been aware that the tortfeasor was uninsured, which is not necessarily the date of accident.

*Polizos v. Nationwide Mutual Insurance Co.*, 255 Conn. 601 (2001)

The six-year statute of limitations for uninsured motorist claims, §52-276, commences on the date the insured should have become aware that the tortfeasor was uninsured, not necessarily on the date of accident. For an insured initially told that a tortfeasor was insured, the limitation period begins on the date the plaintiff receives responses to interrogatories indicating that no insurance was available.

## 5. INSURANCE LAW

### ASSIGNMENT

**501. Contractual anti-assignment clause restricts the right but not the power to assign contractual rights, unless the clause contains explicit language removing the power as well as the right to assign.**

*Rumbin v. Utica Mutual Insurance Co.*, 254 Conn. 259 (2000)

An anti-assignment clause in a contract restricts the right but not the power to assign, unless the contract explicitly limits the power to assign through the use of such language as any assignment shall be “void” or “invalid” or “will not be recognized.” Rather, a plain anti-assignment clause will merely entitle the non-assigning party to recovery of damages that may result from an assignment.

The Supreme Court held that an anti-assignment clause in a structured settlement agreement did not prevent the sale of the right to receive a future stream of payments in exchange for a present cash payment. Rather, it only entitled the non-assigning party to recover damages for any adverse tax consequences that might be incurred as a result of the assignment. The opinion also holds that the statute requiring court approval for any assignment of rights under a structured settlement agreement does not prohibit the inclusion of an anti-assignment clause in a structured settlement agreement.

### BAD FAITH HANDLING OF WORKERS' COMPENSATION CLAIM

**502. Exclusive remedy provisions of the Workers' Compensation Act does not bar an action by an employee against an insurance carrier for bad faith handling of claim.**

*Vivianti v. Powell*, 28 CLR 651 (3/12/01) (Owens, J.)

**503. Exclusivity clause of workers' compensation statute does not bar injured employee's action against insurer for bad faith mishandling of workers' compensation claim.**

*Silano v. Hartford Underwriters Insurance Co.*, 28 CLR 217 (12/11/00) (Rush, J.)

The exclusivity provision of the Workers' Compensation Act does not bar an employee from suing the employer's workers' compensation insurer for bad faith mishandling of an employee's claim because the alleged injury stems from an independent action of the insurer rather than from the course of employment.

### CONTRACTUAL LIMITATION

**504. Insurer's wrongful refusal to honor claim not a repudiation of the contract barring reliance on contractual limitation period.**

*Rock v. Eagle American Insurance*, 26 CLR 699 (6/12/00) (Wagner, J.)

An insurance company's wrongful refusal to honor a claim for benefits does not constitute repudiation of the contract barring reliance on a contractual one-year limitation period for bringing an action to enforce coverage.

The opinion also holds that the contractual limitation period is inapplicable to a claim for breach of the implied duty of good faith and fair dealing based on the insurer's failure to honor the claim for benefits.

### COVENANT OF GOOD FAITH AND FAIR DEALING

**505. Allegations that a property insurer improperly conditioned benefits on the execution of a general release and engaged in tactics to minimize benefits are sufficient to state a claim for breach of the covenant of good faith.**

*Turner v. Allstate Insurance Co.*, 28 CLR 485 (2/5/01) (Mintz, J.)

The requirement that a claim for breach of covenant of faith and fair dealing include allegations of a sinister motive or dishonest purpose is satisfied by allegations that the defendant insurer conditioned the payment of benefits upon the execution of a general release, and then engaged in various improper tactics solely to minimize the benefits paid.

**506. Condo owner can sue association's insurer for breach of implied obligation of good faith and fair dealing.**

*Lawrence v. Commodore Commons Condominium Association*, 28 CLR 56 (11/13/00) (Curran, J.)

Section 47-255(d) requires liability coverage for the common areas of a condominium association to provide protection for individual unit owners as well as the condominium association. This statute creates a sufficient contractual relationship between an insurer and a unit owner to permit a claim for breach of the covenant of good faith and fair dealing based on an alleged unreasonable refusal to defend a claim asserted against an individual unit owner, even though the policy sued under was issued by the insurer to the condominium association and not directly to unit owners.

### CUIPA

**507. Self-insured employer not subject to CUIPA.**

*Braca v. Cigna Insurance Co.*, 27 CLR 711 (10/30/00) (Melville, J.)

An employer who self-insures with respect to workers' compensation benefits is not an insurer and therefore is not subject to liability under the Unfair Insurance Practices Act.

**508. CUIPA: General business practice is satisfied by alleging two additional incidents.**

*Travelers Property & Casualty Insurance Co. v. Troyer*, 28 CLR 68 (11/13/00) (Fineberg, J.)

**509. Third party claimant has no cause of action against insurance company for violation of CUIPA or CUTPA.**

*Chapell v. LaRosa*, 28 CLR 683 (3/19/01) (Corradino, J.)

A party with a claim against an insured defendant cannot recover against the defendant's insurer for unfair settlement practices either under a theory of breach of covenant of good faith and fair dealing, a violation of CUIPA, or a violation of CUTPA. The breach of the covenant of good faith and fair dealing does not apply because a third-party claimant is not a third-party beneficiary of the insurance contract. A violation of CUIPA is limited to conduct by an insurer in dealing with its insured, not dealings with third-party claimants. A violation of CUTPA does not exist because a CUTPA claim can be based on conduct in the han-

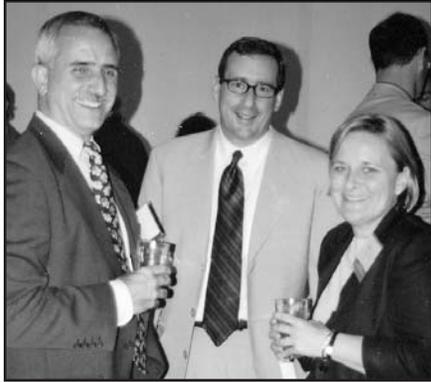
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ding of claims by an insurer only if the conduct also constitutes a violation of CUIPA, and CUIPA does not deal with insurer misconduct directed to third-party claimants.

**510. Allegation that unfair practice was committed with such frequency as to indicate a general business practice too conclusory to state cause of action under CUIPA.**

*Travelers v. Troyer*, 26 CLR 696 (6/12/00) (Wagner, J.T.R.)

A conclusory allegation that the defendant insurer committed an unfair settlement practice "with such frequency as to indicate a general business practice," without a factual basis reciting specific examples, is insufficient to state a cause of action under CUIPA.

**511. CUIPA claims for false advertising and failure to properly pay claims do not require proof of general business practice.**

*Turner v. Allstate Insurance Co.*, 28 CLR 485 (2/5/01) (Mintz, J.)

CUIPA claims for false advertising and failure to properly pay claims under §38a-816(1) and §38a-816(15) do not require a general business practice, unlike claims for unfair settlement practices under §38a-816(6).

**EXCLUSION FOR "ABUSE AND MOLESTATION"**

**512. The exclusion in a liability policy for claims arising out of abuse or molestation excludes coverage of claims against a preschool program based on the fondling of one female student by a male classmate.**

*Community Action for Greater Middlesex County, Inc. v. American Alliance Insurance Co.*, 254 Conn. 387 (2000).

The insured unsuccessfully argued that the phrase "abuse or molestation" was ambiguous and applied only to acts motivated by sexual gratification which the children were too young to experience.

**LIQUOR LIABILITY EXCLUSION**

**513. Liquor liability exclusion does not bar claim based on liquor seller's failure to protect a customer from intoxicated employee.**

*DeCrescenzo v. Jakucenis*, 26 CLR 709 (6/12/00) (Grogins, J.)

A liquor liability exclusion clause in a

liability policy covering a bar prohibits a claim based on the consumption of alcohol by a bar employee, but it does not prohibit a claim against the pub's failure to protect a customer from an assault by an intoxicated employee.

**NOTICE OF CLAIM**

**514. Failure to provide any notice whatsoever of claim to the insurance company prior to judgment constitutes prejudice as a matter of law. No recovery permitted.**

*Hartford Insurance Co. v. Colonia Insurance Co.*, 58 Conn. App. 39, cert. denied 254 Conn. 907 (2000)

Prejudice to an insurer by an insured's failure to provide notice of a claim is established as a matter of law by the insured's complete failure to provide any notice whatsoever before judgment was entered against the insured. The lack of notice would deprive the insurance company of an opportunity to settle the claim. The claimant with a judgment against an insured party cannot recover in a subrogation action directly against the insurer if no notice of the claim was ever given until after the judgment was entered.

**OCCURRENCE**

**515. Multiple claims for injuries from exposure to asbestos caused by the defendant-insurer's failure to warn are "occurrences" for purposes of determining whether a per-occurrence limit has been reached.**

*Metropolitan Life Insurance Co. v. Aetna Casualty & Surety Co.*, 255 Conn. 295 (2001)

Whether multiple similar claims under an insurance policy are individual "occurrences," so that each claim is subject to the policy's per-occurrence limit, or whether all of the claims together constitute a single "occurrence," so that the claims may be aggregated to determine whether the policy's per-occurrence limit has been reached, turns on whether the "cause" closest in time to the creation of each claim was common to all claims.

As applied to the claims against the insurer for injuries from exposure to asbestos caused by the insurer's failure to have warned of the dangers of asbestos exposure after obtaining evidence of those dangers, the relevant "occurrence" is the exposure of each claimant to asbestos, not the earlier single event of the insurer's failure to warn. Although both causes were contributing causes, the

more recent cause of each claimant's injury was the exposure to asbestos. The insurer, therefore, may not aggregate the multiple claims for purposes of determining whether its per-occurrence limit has been reached.

**516. Each of employee's multiple check forgeries constitutes "occurrence" within meaning of per occurrence limit in an employee theft policy.**

*Shemitz Lighting Inc. v. Hartford Fire Insurance Co.*, 28 CLR 533 (2/19/01) (Sequino, J.)

The court held that an employee's act of embezzlement by forging signatures on several checks falsely made payable to the employee constitutes a separate occurrence rather than one continuing occurrence. The insured may recover, therefore, the total amount of the embezzled money, rather than a one time recovery of the policy limit.

**SUBROGATION OF NO-FAULT**

**517. Repeal of no-fault statute precludes subrogation of no-fault benefits after effective date of repeal, but not before.**

*Middlesex Mutual Assurance Co. v. Spragg*, 27 CLR 233 (7/31/00) (Gordon, J.)

An insurer's contractual right to claim reimbursement for no-fault benefits paid to an insured, authorized until January 1, 1994 by §38a-369, becomes vested when the payment is made by the insurer. The repeal of 38a-369 by P.A. 93-297 effective January 1, 1994 as applied to a claimant in which payments were made to the insured both before and after the effective date of the repeal, results in the insurer being entitled to reimbursement for benefits paid before but not after the effective date.

**6. WORKERS' COMPENSATION  
Legislative**

**601. Legislature makes minor changes in workers' compensation.**

As of press time, the legislature in the 2001 session had (1) lengthened to twenty days the period for appeals from decisions of the trial commissioner (P.A. 01-22); (2) required direct payment to pharmacies by respondents, rather than mere reimbursement of the claimant (P.A. 01-85); and (3) increased the mileage reimbursement to the federal rate, now 34.5 cents per mile (P.A. 01-33). So the lid stays on, as the reign of the business lobbyists continues.

## 602. Workers' compensation premiums continue to decline.

Workers' compensation premiums have fallen 47.2% since 1993, according to state Insurance Commissioner Susan Cogswell. Ms. Cogswell was recently quoted in the Workers' Compensation Commission newsletter "Issues" as saying that "The good news is that this is the eighth straight year of no overall increase for the voluntary market . . . The compensation system continues to benefit from reforms enacted by the Legislature in the early nineties. . . ." This decline over the last eight years does not even take inflation into account. The sharply reduced benefits may be good news for some.

### Supreme Court

## 603. Respondent collaterally estopped from relitigating cause of cancer.

Where the parties fully litigated the issue of causation of the claimant's decedent's cancer in a case brought under the Longshore and Harbor Workers' Compensation Act, the respondent could not relitigate the issue of causation in proceedings brought for supplemental benefits under the Connecticut Workers' Compensation Act. Collateral estoppel was applied, over the respondent's protest that a different standard of causation was used in the federal proceeding, based on a repealed former LHWCA rule that if the evidence was equally balanced, the claimant wins (now no longer the law). The Court found that the federal administrative law judge had not found the evidence evenly balanced, but had found that the weight of the evidence clearly favored the claimant. *Lafayette v. General Dynamics Corp.*, 255 Conn. 762 (April 24, 2001).

## 604. Australian claimant need not return to Connecticut for testimony and examination.

The trial commissioner erred in dismissing an asbestosis claim by an Australian for failure of the claimant to travel to Connecticut to testify and be examined by a Connecticut physician. *Pietrarola v. Northeast Utilities*, 254 Conn. 60 (Aug. 8, 2000). The claimant's treating physician stated the claimant's respiratory condition prohibited his traveling to the United States. The Court held that, although the commissioner had the power to dismiss a claim for unjustifiable failure to appear, it was unreasonable to dismiss the claim on the particular facts of this case, since a deposition and examination could be done

in Australia.

### Appellate Court

## 605. Preexisting permanent partial disability payable in motor vehicle claim not compensable.

The claimant's prior motor vehicle accident claim was settled, based on an assessment of 15% permanent partial disability of the knee. The claimant suffered a subsequent work-related injury to the same knee, in which permanency was compromised at 26%. The respondent was required to pay only the 11% difference under Sec. 31-349(a). *Chappell v. Manafort Brothers, Inc.*, 63 Conn. App. 630 (June 5, 2001). Sometimes generous prior ratings come back to haunt claimants. Where the amount of the first settlement is significantly discounted because of questionable liability or an unfavorable IME, the result may be unjust. If settlement documents reflected that the prior claim was settled for less than full value, e.g. 60%, because of questionable liability, or because of insufficient policy limits or a competing IME assessment, might the result be different under Sec. 31-249 when a second injury increases the permanency?

## 606. Out-of-state claimants may be treated in their home state.

Squashing an embarrassingly mean-spirited argument, the Appellate Court held that it would be "patently unreasonable" to require a claimant to travel from Texas to Connecticut to receive medical treatment, which is what the respondent had insisted is required by our law. *Melendez v. The Home Depot, Inc.*, 61 Conn. App. 653 (Feb. 6, 2001). The Court pointed out that in *Cummings v. Twin Tool Mfg. Co.*, 40 Conn. App. 36 (1996), it remanded for a hearing on the appropriateness of out-of-state treatment only because Mr. Cummings was a resident of Connecticut. It doesn't seem like a stretch to say that people should be treated where they live.

## 607. Medical evidence of causation required in matters not within the common knowledge.

Where the trial commissioner had held that the "instability" of the claimant's compensable back condition had caused her to fall and fracture bones in her right leg, the CRB was affirmed in its reversal of the award for lack of medical evidence of causation. Medical evidence is required where the issue of causation "is not a matter within the common knowl-

edge of the commissioner, the board or this court." *Dengler v. Special Attention Health Services, Inc.*, 62 Conn. App. 440, 449 (March 27, 2001). Not too exact a standard, but we get the idea. Presumably, if a claimant with a bad knee fell and hurt her back, the chain of causation would make more common sense and thus not require medical evidence of causation? As the Court pointed out, *Garafola v. Yale & Towne Mfg. Co.*, 131 Conn. 572 (1945), is still good law; in *Garafola*, the Court held that medical evidence was not necessary to establish causation of a back sprain where the claimant was a molder, presumably because it is common knowledge that molders do back-breaking work. These days, getting a doctor's opinion is prudent, even on the simplest factual issue.

## 608. Transportation to hospital and payment of medical bills are sufficient notice of hypertension claim.

Where the municipal employer provided ambulance service and payment for medical tests at the time of a 1989 episode of hypertension, the claim was timely under the medical treatment provision of Section 31-294c, even though written notice of claim was not filed until 1992. *Pernacchio v. City of New Haven*, 63 Conn. App. 570 (May 29, 2001).

## 609. No continued health insurance for injured municipal employees who receive medical treatment but no indemnity benefits.

Receipt of medical benefits under the workers' compensation act doesn't qualify an injured municipal employee to receive continued group health insurance or life insurance benefits under Section 31-284b. *Kelly v. Bridgeport*, 61 Conn. App. 9 (Dec. 5, 2000). Reversing the CRB, the Court held that payments for medical treatment were not "compensation payments" so as to trigger continued 284b benefits.

## 610. Court strikes Suarez action by shot policeman.

The Appellate Court, through Justice Peters, sharply emphasized the narrowness of the *Suarez* exception to exclusivity, in affirming the striking of all counts of a complaint by a policeman accidentally shot by fellow SWAT team member. The plaintiff had sued the municipality as well as supervisory personnel, alleging gross mismanagement of the tactical response team amounting to intentional in-

jury. The Court held that the claims against the fellow employees did not arise to the level of intentionality, stating that the employer must not only intend the harmful acts but must also believe that injury is substantially certain to follow the malfeasance. The Court also held that attribution of intentionality to the employer cannot be done merely on the basis of the acts of supervisory personnel. Only where the malefactor is an alter ego of the employer, by the tests governing disregard of the corporate entity, can an employer be held liable under the *Suarez* doctrine. *Melanson v. West Hartford*, 61 Conn. App. 683 (Feb. 13, 2001). Query how a governmental entity could ever be held liable under such an alter ego standard: Boss Tweed? Uncle Sam? Even corporate presidents are rarely alter egos under the alter ego doctrine; this panel of the Court was plainly hostile to *Suarez*. A more appropriate test for employer responsibility is whether a person with authority to act for the corporation sanctioned or required the intentional act or omission. The law of fraudulent transfer or alter ego liability, imported by the Court from the area of debtors' rights without careful analysis, has no logical relevance to the law of exclusivity, it seems to me.

Similarly, the Court barred a *Suarez* wrongful death claim by the estate of a Branford firefighter against the fire chief and town for intentional misconduct causing the death of the fireman. The plaintiff's allegations included failure to implement safety programs and training, including violations of the relevant national standards for fire departments, and failure to perform required fire inspections. The plaintiff offered expert testimony that, because of this misconduct, injury was substantially certain to occur. The Court, citing *Melanson*, found the conduct alleged did not rise to the level of intentional harm. *Ramos v. Branford*, 63 Conn. App. 671 (June 12, 2000).

#### **611. COLA calculations the same under Sec. 31-306 and 31-307a.**

The mathematical calculation of cost of living allowances is the same for survivors' benefits under Sec. 31-306 as for temporary total disability under Sec. 31-307a. The plaintiff had argued for a higher rate under Sec. 31-306 between 1995 and 1998. *Rutledge v. State of Connecticut*, 63 Conn. App. 370 (May 15, 2001).

#### **612. Stress from delay in workers' compensation claims not compensable.**

Where a psychologically injured person with a compensable claim developed additional depression because of delay in the processing of his contested workers' compensation claims, the debilitating condition was not compensable. *Funaioli v. New London*, 61 Conn. App. 131 (Dec. 19, 2000). The Court affirmed the denial of psychological disability benefits based on the premise that the psychological consequences of a workers' compensation claim, as opposed to the psychological consequences of the injury, are not compensable. That doctrine, while it may make sense in cases of previously disturbed claimants, is hard to swallow in cases where the claimant is understandably depressed when he loses his house, his job, his car and his wife because of the litigation of his claim.

#### **613. No preclusion for failure to send disclaimer to dependent claimants.**

Where the respondent sent notice of contest to the decedent employee's last address, rather than to the widow and child who were making the claim, the claimants' motion to preclude under Sec. 31-297(b), based on imperfect disclaimer, was properly denied. *Walter v. State of Connecticut*, 63 Conn. App. 1 (April 24, 2001). In fact, the Court had already held that Sec. 297(b) limits preclusion to cases where the respondent fails to send the disclaimer to the commissioner, not where the respondent fails to send the disclaimer to the claimants. *Vachon v. General Dynamics Corp.*, 29 Conn. App. 654, 659 (1992), cert. denied 224 Conn. 927 (1993). Interestingly, however, the Court held that adequate notice to the claimants was required, despite the lack of a statutory mandate; but that notice to the decedent's last known address was adequate notice to the survivors here.

#### **614. Principal employer immune where it pays workers' compensation benefits.**

Where the principal employer paid the claimant's workers' compensation benefits through Liberty Mutual under an "owner-controlled insurance program," the claimant, a plant guard employed by Burns International Security Services, could not sue the principal employer civilly in a slip-and-fall accident. The record was foggy as to the relationship between the defendant, Connecticut Yankee

Atomic Power Co. and the Northeast Utilities Service Company, which paid for the "insurance program." It seemed clear, however, that the employer, Burns, had not paid the benefits, and immunity was extended upstream pursuant to Sec. 31-291. *Bishel v. Connecticut Yankee Atomic Power Co.*, 62 Conn. App. 537 (April 3, 2001).

#### **615. Court enforces attorney fee guidelines.**

In an opinion with troubling implications, the Appellate Court affirmed the reduction in attorneys' fees to \$20,000.00 by the CRB, in a contested matter where the trial commissioner had awarded \$30,000.00, based on the work involved. *Day v. Middletown*, 59 Conn. App. 816 (Sept. 12, 2000). The case settled for \$100,000.00 plus payment of more than \$33,000.00 in medical bills. The trial commissioner reviewed the case and awarded \$30,000.00 in attorney's fees. The CRB reduced the fee to \$20,000.00 based on the fee guidelines and the 20% fee contract. The holding itself is plausible. But the Appellate Court took an unnecessarily rigid approach, suggesting that the guidelines have the force of law, and that the trial commissioner has little authority to vary the guidelines. That apparent inflexibility is disturbing, since it means that claimants with significant cases where the primary problem is compensability and medical coverage, rather than indemnity benefits, simply won't be able to get representation. The commissioners should continue to have the authority and confidence to vary the fee guidelines to do justice. The Court also stated that the fee guidelines couldn't be varied because this case involved a settlement and hence was not a "contested case." That reasoning is of course utter nonsense. Contested cases are settled at least as frequently as accepted cases, and, from the numbers, that appears to have been the case here, since if the case hadn't been contested, the medical bills would have been paid voluntarily.

#### **616. "Disability" means physical injury, when counting weeks for Second Injury Fund transfer.**

In winding up transfers to the Second Injury Fund, the courts continue to be what one might call extremely solicitous to the Fund. The Appellate Court recently barred a transfer on grounds of untimely notice by finding that 104 weeks for purposes of notice meant weeks from the date of injury, not weeks of disability

benefits paid, despite rulings below, and decades of precedent, to the contrary. *Karutz v. Feinstein and Herman, P.C.*, 59 Conn. App. 565, cert. denied 254 Conn. 949 (Aug. 29, 2000). The reasoning of the court was that if the person got hurt, she must have been disabled. Funny that no commissioner or court had ever made such an interpretation throughout the decades of existence of the Fund. By contrast, the CRB has been a more level playing field on these transfer cases. See, e.g., *Mulroy v. Becton Dickinson & Co.*, Case No. 04083 CRB-05-99-07 (Sept. 29, 2000), where the CRB in a sensible opinion upheld the trial commissioner's finding of a significant preexisting disability and of the lack of a controversy sufficient to send the case to the medical panel on transfer; *Weber v. Electric Boat*, Case No. 04086 CRB-02-99-07 (Nov. 13, 2000), where the CRB found that the panel had overstepped its bounds by giving its opinion on causation; and *Fish v. Caldor, Inc.*, 3840 CRB-7-98-6 (May 11, 1999), where the CRB limited the scope of the medical panel to medical issues.

#### **617. Release of intervenor's claim against tortfeasor does not bar moratorium on future benefits.**

The carrier accepted one third of a \$40,000.00 settlement of a third party claim; the lien amount was about \$67,000.00. In the settlement document, the employer and carrier released "any rights which they may have to recover Workers' Compensation benefits paid to" the plaintiff with respect to the work-related injury. The claimant argued that this release waived any moratorium in benefits based on the plaintiff's net recovery in the civil action, here about \$12,000.00. The Court held no: there was no intention to waive the moratorium. *Short v. Connecticut Bank & Trust Co.*, 60 Conn. App. 362 (Oct. 10, 2000). Any such waiver of credit has to be specific and clearly intended, to stand up.

#### **Superior Court**

#### **618. Successful jury trial for intentional injury against corporate employer.**

An employee who was badly injured in a blasting accident was successful in a *Suarez* claim against his corporate employer, resulting in a verdict of \$3,766,380.94, with prejudgment interest to be added. *Petrozzi v. The Ensign-Bickford Co.*, No. CV 97-0574903-S (memorandum filed Aug. 21, 2000), 28 Conn. L. Rptr. No. 1, 30 (Nov. 6, 2000). The plain-

tiff was badly burned, significantly disabled, and had 13 surgeries, including removal of live blasting caps imbedded in his skull and torso. The court gave the jury essentially the instruction requested by the defendant, that the jury must find that the defendant engaged in serious or willful misconduct such that the employer knew that the plaintiff's injury was substantially certain to follow. The court found that the evidence was sufficient to support the award and the verdict, and remittitur was denied. Besides the very fact of success, the case is important for several legal rulings: (a) The court held that the employer could intervene and be credited with the amount of workers' compensation paid (here almost \$300,000.00) and have an offset against future compensation. (b) The court allowed the plaintiff to obtain security for payment, so that the security would be in place pending the appeal. (c) The court denied punitive damages, holding that the verdict is adequate to deter future behavior. The parties had agreed that the punitive damage issue would be decided by the judge rather than the jury. (d) The court held that the misconduct must be "serious or willful" and that the jury instruction need not be "serious and willful." The court did not address the "ascription" evidence, that is, evidence showing that the misconduct was by employees sufficiently important to impute the misconduct to the corporation itself.

#### **619. Failure to provide bulletproof vest gives rise to Suarez claim.**

A civil action for intentional injury, based on the fact that the employer required its armored-car driver to wear a bulletproof vest but refused to provide one, survived a motion to for summary judgment on the grounds of exclusivity. The plaintiff, without a vest, had been shot by a robber. *Rovasio v. Wells Fargo Armored*, Dkt. No. CV98-062143, Ansonia/Milford J.D. (Jan. 29, 2001), 47 Conn. Sup. 30 (March 27, 2001). The Court stated that the "prospect of armed robbery is the foreseeable constant," but left the defendant an opportunity to prove that the same harm would have occurred even if the plaintiff had been wearing a vest.

#### **620. Suarez defendant may not intervene for reimbursement.**

A defendant employer sued for willful misconduct may not intervene to recover workers' compensation benefits under Sec. 31-293(a), on the ground that the

statute allows recovery only against a third party defendant. *Vitale v. Ravizza Bros., Inc.*, 28 Conn. L. Rptr. No. 18, 651 (March 12, 2001). The Court suggested, however, that set-off would be available to the employer, should the injured employee succeed in the civil suit. Practically, of course, the reimbursement would ordinarily go to the workers' compensation insurer, the real party in interest, with the intervening employer only a nominal plaintiff; so under this decision, the loss remains with the worker's compensation carrier. But the insured did pay the premium.

#### **621. Bad faith actions may proceed.**

Two more Superior Court decisions join the majority in holding that the exclusivity doctrine does not bar bad faith claims against insurers for mishandling workers' compensation claims. *Vivivani v. Powell*, Dkt. No. CV96-0384941 New Haven J.D. at New Haven (Dec. 27, 2000), 7 Conn. Ops. 91 (Jan. 29, 2001); and *Silano v. Hartford Underwriters Ins. Co.*, Dkt. No. CV96-329388 (Sept. 18, 2000), 28 Conn. L. Rptr. No. 6, 217 (Dec. 11, 2000).

In the *Silano* opinion Judge Rush noted that the Supreme Court "recognizes an independent cause of action in tort arising from an insurer's common law duty of good faith . . . separate and distinct from the plaintiff's statutory claims . . ." citing *Buckman v. People Express, Inc.*, 205 Conn. 166, 170, 530 A.2d 596 (1987).

#### **622. Claimant's settlement of third party claim does not bar action by employer.**

The claimant/plaintiff settled his motor vehicle claim with the tortfeasor's liability carrier for the \$20,000.00 policy limit and reimbursed the employer for about \$10,000.00 of the \$28,000.00 paid in workers' compensation benefits. The employer was not barred from filing a civil action against the third party tortfeasor for the remaining compensation reimbursement and, presumably, for the value of likely future benefits. *J.P. Noonan Transportation Inc. v. Ferrara*, 7 Conn. Ops. 253 (March 5, 2001). Whoops!

#### **623. Reduction of pension for receipt of heart and hypertension benefits held governed by collective bargaining agreement, not ordinance.**

Where the municipality had reduced a regular, non-disability pension by the amount of the claimant's heart and hy-

pertension benefits, the court held that the collective bargaining agreement, which allowed reduction only of disability pensions, would govern the issue, rather than a town ordinance which allowed the reduction of all pensions by the amount received in workers' compensation benefits. *Racaniello v. Darien*, CV 99 0169570 (memorandum filed July 17, 2000), 27 Conn. L. Rptr. No. 14, 509 (Sept. 18, 2000). The court therefore didn't reach the issue of whether Sec. 7-433c benefits were workers' compensation benefits within the meaning of the ordinance, and in fact denied summary judgment because of an inadequate record as to the effect of Sec. 7-433b(b), which caps pension plus heart and hypertension benefits at the current earnings of the claimant's peers. Beware: these municipal pension issues related to workers' compensation are often full of bizarre twists.

#### United States District Court

#### **624. Sexual harassment action for negligent supervision survives dismissal.**

Where a plaintiff alleged he was subjected to unwanted sexual harassment by his supervisor, involving grabbing and touching, the Court declined to dismiss the action against the employer for negligent supervision, on the ground that the plaintiff's emotional injuries were not clearly caused by the physical touches. The Court did, however, dismiss a claim against the employer for negligent assault and battery, as barred by exclusivity; and dismissed a claim for vicarious liability, since the aggressor was acting outside the scope of employment. *Abate v. Circuit-Wise, Inc.*, Dkt. No. 3:00CV01452 (Jan. 25, 2001), 7 Conn. Ops. 192 (Feb. 19, 2001). It will take a while to resolve the law with respect to when emotional reaction to physical insult is and is not covered by workers' compensation; it is far from clear at this point.

#### Compensation Review Board

#### **625. Employer-carrier coverage disputes may be decided by commissioner.**

Commissioners may decide coverage disputes as between employer and carrier, but not coverage disputes between carriers. *Bell v. Lombardo and Holt*, Case No. 04152 CRB-299-11 (Nov. 27, 2000). This is a good decision in a murky area. Because the claimant's right to receive as-yet-unpaid benefits was at issue, the CRB held that the employer may introduce evidence to establish coverage by the car-

rier, and the commissioner may decide the coverage issue.

#### **626. Mistaken date in notice of claim not fatal.**

Correcting a surprising holding by the trial commissioner, the CRB held that a one-week mistake in the date of injury in a timely notice of claim did not bar the claim; but the respondent would have the opportunity to show prejudice, if it suffered any harm because of the mistaken date. The trial commissioner had held that the claim was time-barred because no timely notice of claim had been filed for the correct date of injury. *Surowiecki v. UTC*, Case No. 4233 CRB-8-00-5 (May 24, 2001). Good work by the CRB.

#### **627. CRB awards attorneys' fees for frivolous appeal.**

In a restrained decision, the CRB tagged the respondent for attorneys' fees for its frivolous appeal, by which the respondent delayed proceedings apparently through sheer arrogance. The respondent appealed from a decision of the trial commissioner to limit the respondent's medical examiner to two serial examinations instead of the four the respondent had insisted on; but the appeal was frivolous from the start, since there was no evidentiary record for the CRB to review. Further, after appealing the recordless case, the respondent failed for eight months to respond to the claimant's motion to dismiss the appeal, and then failed to file its brief. Greater sanctions might seem appropriate. *Rowe v. Yale University*, Case No. 04124 CRB-03-99-09 (Nov. 27, 2000). For a keystone Connecticut establishment, Yale University could certainly show a better face to the public in workers' compensation matters.

#### **628. Where no deductions for Social Security or Medicare, the compensation rate tables don't apply.**

Where the claimant policeman had no Social Security or Medicare deductions withheld, because of a police retirement system different from Social Security, his actual net income should be used to compute his workers' compensation rate, rather than the Commission-issued rate tables. *Donahue v. Southington*, Case No. 04136 CRB-06-99-10 (Nov. 30, 2000). The respondent, even though it is a creature of the state and without standing to complain about state law, argued a denial of equal protection, which the CRB declined to consider.

#### **629. Subsequent clarifying medical report should be considered.**

Where a confused treating physician in 1997 clarified an earlier report from 1996, which he believed to have been erroneous, it was error for the trial commissioner not to consider the later clarifying report. The trial commissioner had failed to do so because the CRB, in a previous remand, had specifically limited the scope of the hearing on remand to consideration of the (erroneous) 1996 report, which the claimant had presented to the CRB on a motion to submit additional evidence in an earlier appeal, and which itself contradicted a previous 1994 opinion of the trier, Dr. Selden. *Bryan v. Sheraton-Hartford Hotel*, 62 Conn. App. 733 (April 17, 2001). Silly me, said Dr. Selden; the commissioner might as well have stayed in bed.

#### **630. Injustice of hearing loss assessments again acknowledged by CRB.**

The severe injustice of using the AMA Guides to the Evaluation of Permanent Impairment in cases of high frequency hearing loss was again acknowledged by the CRB, even though it upheld the pitiful award by the trial commissioner, based on the defective AMA system. *Morin v. Miller Co.*, Case No. 04164 CRB-08-99-12 (Dec. 19, 2000). The CRB stated that "we have never stated that it would be unreasonable for a trial commissioner to adopt a different test," and pointed out that other jurisdictions have rejected the unreasonable AMA guidelines. Otorhynolaryngologists, however, are generally about as bold as lizards when it comes to sticking their necks out for justice in hearing loss cases. The trial commissioners need to recognize the problem and deal with it. Good for the CRB.

#### **631. Hearing loss claim barred as untimely, though allegedly undiagnosed.**

The CRB affirmed the denial of a hearing loss claim as untimely, even though it was allegedly not diagnosed as work-related until a few months before the claimant filed a notice of claim. The rationale was that the hearing loss was not found to be an occupational disease. *Stephen Maginnis v. U.S. Airways*, Case No. 4116 CRB-1-99-8 (Feb. 21, 2001). This line of decisions, which bars claims as untimely, even before the claims arise, appears unjust.

### **632. Late payment penalty applies to attorneys' fees.**

The 20% penalty provision of Sec. 31-303 also applies to attorneys' fees which have been awarded but unpaid. *Schiano v. Bliss Exterminating Co.*, Case No. 4104 CRB-4-99-8 (Feb. 21, 2001).

### **633. Connecticut lacks jurisdiction over Connecticut over-the-road trucker hired in Pennsylvania.**

The CRB used the tripartite jurisdictional analysis from *Cleveland v. U.S. Printing Ink, Inc.*, 218 Conn. 181 (1991), i.e., place of employment contract, place of injury, or place of most significant relationship to the employment, to deny jurisdiction over a vascular injury to a Connecticut-based trucker who garaged his truck in Connecticut. The place of hire, the CRB affirmed, was Pennsylvania; the trucker spent 10-15% of his time in Connecticut (we don't learn if he spent more time in another state); and Pennsylvania had the most significant relationship to the employment. Since there was no evidence where the injury occurred, the CRB found there was no jurisdiction based on the place of injury. *Kelley v. Venezia Transport Services*, Case No. 4184 CRB-2-00-2 (March 8, 2001).

### **634. Work searches unnecessary for award of 308a benefits.**

The CRB reiterated that work searches are not essential for an award of wage loss benefits under Sec. 31-308a, where the commissioner concludes that the claimant's earning capacity is diminished based on other evidence. The CRB noted, however, that P.A. 93-228 amended Sec. 308a to limit these benefits to claimants "who are willing and able to perform work in this state;" the CRB seemed to hint that it might infer a work search requirement. *Smith v. BIC Corp.*, Case No. 4169 CRB-3-00-1 (April 30, 2001). This would be an overly rigid interpretation, which could lead to inequitable results in cases where the claimant's treating physician advises the claimant that he should not work because of his work-related condition. The commissioner's discretion should be maintained.

### **635. Palliative acupuncture and massage treatments are compensable.**

In a good decision, the CRB affirmed a commissioner's order that the respondents pay for acupuncture and massage therapy treatments, even though the treating physician had stated the treat-

ments were palliative and not curative. In fact, the treatments alleviated the claimant's pain during her reconditioning process and thus aided in the rehabilitation process. *Zalutko v. Danbury Hospital* Case No. 4229 CRB-7-00-4 (May 23, 2001). The doctrine that treatment should be denied because merely palliative is a doctrine gone haywire; it should be discarded. This doctrine would deny morphine to a terminal cancer patient on the ground that the drug will not help get the claimant back to work. The issue should be addressed simply as a question of whether the treatment is reasonable under the medical circumstances. Analysis under this realistic framework would leave ample room for denial of frivolous or excessively prolonged treatment.

### **636. Estoppel applied in accepted hypertension claim.**

Where the state had accepted the compensability of a hypertension condition and paid benefits for several years, it was estopped from later raising a statute-of-non-claim defense and seeking reimbursement of benefits paid. *Gary v. State of Connecticut*, Case No. 04208 CRB-08-00-03 (Jan. 4, 2001). Since a weird mystique has arisen around the talismanic word "jurisdiction," the State figured it could get away with raising the "jurisdictional" defense. The CRB quite rightly held that under the circumstances the State was estopped from revoking its acceptance of the claim or seeking reimbursement, where the trial commissioner found that the respondent conducted no investigation, the claimant withheld no information, and the claimant relied on the respondent's acceptance of the claim.

### **637. Sec. 5-145a presumption is rebuttable by credible evidence.**

The presumption of compensability of heart and hypertension created by Sec. 5-145a for state employees in stressful occupations is rebuttable by "sufficiently credible" evidence, but not by "insubstantial or suspect" evidence. *Horn v. State*, Case No. 4177 CRB-3-00-1 (Feb. 22, 2001). Practically speaking, the presumption is thus meaningless if the State puts on any evidence at all: the commissioner decides as he or she pleases, without regard to the statutory "presumption."

### **638. Unnecessary defensive maneuver by prison guard does not count as "attending or restraining an inmate."**

A prison inmate, exiting from a shower, stumbled and grabbed a guard, and the surprised guard, to gain control, seized the inmate and restrained him. The CRB held that in these circumstances the guard's injuries did not qualify for the enhanced benefits provided by Sec. 5-152(a) for guards who are injured while "attending or restraining an inmate," since the injury was not a "direct result of the special hazards inherent in such duties." *Johnson v. State of Connecticut*, Case No. 04162 CRB-01-99-12 (January 25, 2001). The guard at the time of the restraint did not know whether the inmate was attacking him; in retrospect it was clear that the inmate was not. A slippery distinction.

### **639. Trial commissioner may decide recusal and transfer issues.**

The trial commissioner, rather than the commission chairman, has the authority to decide issues of recusal and transfer to another district, where recusal and transfer is sought on the ground that one of the commissioners sitting in the district had acted on a Form 36 concerning termination of benefits, and the other sitting commissioner had presided over two preformal hearings. *Rogers v. C.N. Flagg Power*, Case No. 03809 CRB-06-96-05 (June 23, 2000). Chairman Mastrogiro, writing for the CRB, stated that the commission general policy to avoid the same commissioner's sitting at the preformal and the formal hearings is not mandatory, but merely one factor which the trial commissioner should consider. Thus the case was remanded to the Third District for the trial commissioner to decide the recusal and transfer issues, in a case where the former chairman had ordered transfer to another district. Good work.

### **640. Binaural treatment necessary for right-sided hearing loss.**

In an interesting decision, the CRB upheld a commissioner's authorization of medical treatment for both hearing-impaired ears, even though only the hearing loss in the right ear was compensable. *Telesca v. UTC/Pratt & Whitney*, Case No. 04056 CRB-06-99-06 (July 11, 2000). The facts are not detailed, but the principle is a good one: that whatever treatment may benefit the use of the affected body part or organ is within the commissioner's discretion, even if the treatment is to another afflicted body part.

## **641. Preclusion may follow widow's notice of claim.**

Where the widow of a man who suffered a compensable head injury filed a notice of claim for widow's benefits, and the employer failed to file a timely disclaimer, the claimant's motion to preclude defenses was appropriately granted. *Tardy v. Abington Constructors*, Case No. 04105 CRB-02-99-08 (Oct. 30, 2000). What goes around, comes around: the CRB several years ago created out of whole cloth, and in my opinion quite erroneously, a rule that a widow must file a separate notice of claim, even where the underlying claim is compensable; the only effect of the rule is to deny claims without considering the merits, since the employers and carriers already have perfect notice of the facts of the case. The issue has still not been decided by the Supreme Court, and venerable case law supports the notion that no separate notice for surviving dependents has ever been properly required. In this case, the shoe was on the other foot: the employer argued that since there is no requirement that a widow file a separate notice of claim, the claimant could not base preclusion on a gratuitously filed notice; but the CRB felt otherwise.

## **642. Contract as "independent contractor" does not bar finding of employee relationship.**

The CRB confirmed that an employment contract which states that the worker is an independent contractor does not prevent a finding by the commissioner that the worker is an employee under the Act, where the facts support findings of control and the employment relationship. *Merritt v. Nacom*, Case No. 04098 CRB-03-99-08 (Oct. 16, 2000). Right. My impression is that the practice of labelling a worker as an independent contractor, in an effort to avoid paying workers' compensation or unemployment premiums or making payroll deductions, has been much more widespread in the last several years.

## **643. Asthma compensable whether or not occupational disease.**

Where the respondent's independent medical examiner confirmed that a serious asthmatic condition was caused by the claimant's exposure to pine material at work, the respondent Walmart had the temerity to argue that the condition was not compensable because it was not an occupational disease. The CRB affirmed the commissioner's finding of compensability, with a promising analysis, that condi-

tions may be occupational diseases as well as conditions caused by repetitive trauma and, presumably, accidental injuries as well. Here, the trial commissioner found causation based on the exposure of a single day. *Burke v. Walmart Stores, Inc.*, Case No. 04037 CRB-02-99-04 (July 11, 2000), 6 Conn. Ops. 816 (7/24/00). One hopes that the arguments constantly made for an overly restrictive definition of occupational disease will be treated appropriately by the CRB and thus give guidance to the courts. The aim of the Act is to cover work-related conditions, as the Supreme Court made abundantly clear in earlier decades, rather than to find ways of excluding such conditions from coverage by doubletalk. One would also point out that civil actions may lie against employers who contest compensability on the ground that the particular condition, though it may be work-related, is not covered under the Act.

## **644. Commissioner may not determine pension reduction because of receipt of heart and hypertension benefits.**

The jurisdiction of the Commission does not extend to determination of the reduction of a municipal pension because of the simultaneous receipt of heart and hypertension benefits pursuant to Sec. 7-433c. *Obier v. North Haven*, Case No. 04020 CRB-03-99-4 (Aug. 4, 2000). The trial commissioner had in fact reduced the Sec. 7-433c benefits because of the charter provision for reduction of the pension; the CRB pointed out that the heart and hypertension benefits are primary and must be paid in full, and that the commissioner may not decide the impact of the pension rules.

## **645. Cross appeal to CRB must be filed within ten days of decision.**

All appeals from a commissioner's rulings must be filed within ten days of the commissioner's decision; there is no extra ten-day period for the filing of cross appeals, according to the CRB. *Iannarone v. State of Connecticut*, Case No. 04138 CRB-07-99-10 (Aug. 4, 2000, motion for reconsideration denied Sept. 14, 2000). The respondent argued that Practice Book Sec. 61-8 specifically allows cross-appeals within ten days from the filing of the appeal; but the CRB said that application of the ten-day rule of Sec. 31-301(a) was a matter of "jurisdiction," so the Practice Book didn't apply. Maybe.

## **646. Commissioner may hold formal hearing with no prior informal or preformal hearings.**

It is within the discretion of the commissioner to skip scheduling an informal or preformal hearing, and proceed directly to hold the formal hearing, here on the issue of temporary total disability. *Lois Brown v. State of Connecticut*, Case No. 04053 CRB-02-99-05 (July 27, 2000). Informal hearings are creatures of habit, not statute.

## **647. Wrong date on notice of claim causes dismissal.**

In a grim decision, the CRB held that even though the claimant police captain reported his knee injury when it happened, his claim was barred on the ground that when he filed his otherwise timely notice of claim, he listed the wrong date of injury: the date of a prior accepted injury to the same knee. *Devito v. Stamford*, Case No. 04062 CRB-07-99-06 (July 27, 2000). It's hard even for doctors and lawyers to figure whether an incident is a new injury or recurrence, and this self-represented claimant likely didn't know the significance of the distinction, or the lawyer-speak. The decision, at least on the legal side, seems unnecessarily rough: one infers that the claimant figured his "new injury" was merely a continuation of the old accepted knee condition, and acting on his own, filed a notice of claim months later because his knee still bothered him.

The frequently quoted platitudes about the liberal purpose of the Act in extending benefits to injured workers often seem, in cases depending on the technicalities of filing, merely a cloak for injustice. Here the claimant was a police captain with many years of service, and he had an accepted knee injury. To me there seems no reason to treat injured people so harshly: the respondent after all had contemporaneous written notice of the incident, in a report filed by the claimant; and the statute specifically allows the proportionate reduction of benefits where the respondent has been prejudiced by a delay in notice. Phooey. The statute should be amended reasonably to accommodate claimants with ambiguous dates of injury.

## **648. No separate appeal from denial of motion to correct is required.**

A party need not file a separate appeal from the denial of a motion to correct, but may simply amend the reasons of appeal to include the additional ground of error.

*Costa v. Torrington Co.*, Case No. 04097 CRB-05-99-08 (July 28, 2000). The claimant had sought to dismiss part of the respondents' appeal. On the merits, the respondents had vigorously contested the compensability of the claimant's cirrhosis of the liver which resulted from solvent exposure; the condition was treated as an occupational disease, as it should have been, without quibble, even though industrial solvents are ubiquitous and certainly not peculiar to any particular occupation, and the finding and award was upheld.

#### **649. Volleyball not hazardous duty for state employee.**

An injury while playing volleyball with inmates didn't qualify a claimant for the full-pay benefits of Sec. 5-142(a), since the activity was not "attending or restraining an inmate," the hazardous pay standard. *Bouchard v. State of Connecticut*, Case No. 04120 CRB-08-99-09 (July 28, 2000). The claim lacked punch.

#### **7. STATUTES OF LIMITATION [For UM and UIM cases, see §4] CONDEMNATIONS**

#### **701. The six-month appeal period for condemnations commences with notice to the property owner, not upon filing of the statement of compensation.**

*Commissioner of Transportation v. Capone*, 28 CLR 274 (1/1/01) (Silbert, J.)

The six-month period for filing an appeal from a condemnation assessment provided under §13a-76 commences with the property owner's receipt of an assessment notice rather than when the notice was filing with the Court.

#### **CONTRACTS**

#### **702. Three-year statute for executory contracts; six-year statute for executed contracts.**

*Najda v. Yudkin*, 28 CLR 577 (2/26/01) (Nadeau, J.)

Section 52-581 establishes a three-year limitation for oral contracts. Section 52-576 establishes a six-year limitation. The distinction is that 52-581 applies to executory, and 52-576 applies to executed contracts. Therefore, a claim for breach of contract against an attorney with respect to services which have been fully performed is subject to the six-year statute, not the three-year statute.

#### **COUNTERCLAIMS**

#### **703. Statute permitting negligence counterclaims to be brought outside the limitation period at any time before the pleadings are closed, §52-584, applies only to counterclaims to negligence actions, and not to contract actions.**

*Kenyon Oil Co. v. Milo's Service Station of Harwinton, Inc.*, 28 CLR 321 (1/8/01) (McWeeny, J.)

A tenant's claim alleging damages caused by drinking contaminated water on leased premises cannot be asserted as a counterclaim to the landlord's action for back rent beyond the statute of limitations.

#### **EXTENSIONS OF STATUTE OF LIMITATIONS**

#### **704. Section 52-593a extends statute even though complaint not served by same sheriff to whom it was originally delivered.**

*Hornyak v. St. Pierre*, 27 CLR 716 (10/30/00) (Wiese, J.)

Section 52-593a extends the statute of limitations for 15 days if the complaint is delivered to the serving sheriff within the original limitation period. Even though the process is delivered to one sheriff and served by another sheriff, the statute applies. The defendant unsuccessfully argued that the statute's requirement that the "officer making service" shall endorse on the return "the date of delivery of the process to him," could not be satisfied because the serving sheriff could not claim to have received the delivery of the process.

#### **705. Fifteen day tolling period under §52-593a applies to apportionment complaints. Amended return permitted.**

*Gillette v. Knaus Development Co., LLC*, 28 CLR 277 (1/1/01) (Wiese, J.)

The savings statute tolling the statute of limitations for 15 days if the writ is delivered to a sheriff for service within the statute of limitations, §52-593a, applies to apportionment complaints.

The opinion also holds that the savings statute is not rendered inapplicable by the sheriff's failure to endorse under oath on the return that process was delivered within the limitation period, provided an amended return containing the proper information is subsequently filed.

#### **706. Section 52-593 does not apply to the 120-day limit for filing an apportionment complaint.**

*Tricon International, Ltd. v. United Construction*, 28 CLR 724 (3/26/01) (McWeeny, J.)

#### **707. Fifteen-day extension of statute applies to service in a foreign country under Hague Convention. Delivery by FedEx okay. Amended return permitted.**

*Brown v. Brookville Transport Ltd.*, 28 CLR 662 (3/12/01) (Blue, J.)

Section 52-593a, extending the statute of limitations if process is timely delivered to an appropriate officer for service, applies to service in a foreign country made pursuant to the Hague Convention, and is satisfied by process delivered by Federal Express. The opinion also holds that the requirement under the statute that the serving officer endorse the date of receipt on the process is directory rather than mandatory, so that a sheriff's failure to endorse the receipt date can be cured by amendment.

#### **708. Section 52-593a does not provide for an extension of a statute of limitations. Rather, it authorizes a 15-day period for service even if that period would extend beyond the statute of limitations period.**

*Jastroch v. Haynes*, 28 CLR 716 (3/26/01) (Stodolink, J.T.R.)

Based on this reasoning, the statute was held inapplicable to a claim asserted in a complaint delivered to a sheriff for service 22 days before the statute of limitations lapsed, and served 5 days after the statute had lapsed.

#### **709. Verbal request to sheriff to revise date sufficient to allow reliance on 15-day extension.**

*Stellato v. Cuccaro*, 26 CLR 664 (6/5/00) (Nadeau, J.)

A verbal request to a sheriff to revise the date stated in a summons following a delay in service is sufficient to permit reliance on the statute extending the limitations period up to 15 days from issuance of a summons delivered to a sheriff.

#### **HOUSING AUTHORITIES**

#### **710. Statutory requirement for written notice within six-months of a claim against a housing authority is mandatory, not directory.**

*Fooks v. Norwich Housing Authority*, 28 CLR 371 (1/15/01) (Martin, J.)

Section 8-67 of the General Statutes

requires notice to the housing authority. Plaintiff's claim that she fell from a nail protruding from the floor causing injuries was barred by her failure to give notice.

Accord: *Fields v. Housing Authority of the City of Stamford*, 63 Conn. App. 617 (2001).

## LACHES

**711. A court sitting in equity is not required to apply the statutory limitations for an analogous legal claim.**

*Vissa v. Pagano*, 27 CLR 150 (7/17/00) (Karazin, J.)

Although a court sitting in equity may look to the statute of limitations for an analogous legal claim for determining whether the plaintiff's claim should be barred by laches, the court is not required to apply the same statutory period. Accordingly, claim for unjust enrichment brought in a shareholder derivative suit based on allegations that the defendant shareholder misappropriated corporate assets is not barred as a matter of law solely because the action was commenced beyond the three year statute of limitations for torts.

## PETITION FOR NEW TRIAL

**712. Statute of limitations for petition for new trial is three years, and is not extended by an appeal.**

*Labow v. Labow*, 27 CLR 542 (9/25/00) (Moran, J.)

The court held that the limitation is jurisdictional. The statute of limitations is set out in §52-582. The authorization for a petition for new trial is pursuant to §52-270 of the General Statutes.

Because the statute of limitations specifically refers to the cause of action created by §52-270, the separate statute of §52-582 was deemed jurisdictional and could be raised at any time without being asserted as a special defense.

## PRODUCTS LIABILITY

**713. Statute of repose in non-work-related products liability case is useful safe life, which usually cannot be resolved on summary judgment.**

*Buffing v. K-Mart Corp.*, 27 CLR 248 (7/31/00) (Arnold, J.)

Products liability claims not subject to the Workers' Compensation Act, §52-577a(c) requires a determination as to a products useful safe life, which normally cannot be resolved on a motion for summary judgment. Ten-year repose period applies to work related product liability

actions.

**714. One-year time limit for impleading third party in products liability action applies even though the statute of limitations for indemnification claim does not commence until judgment has entered against the defendant.**

*Demelis v. Lyon & Billard Co.*, 28 CLR 5 (11/6/00) (Levin, J.)

## SEXUAL MOLESTATION CLAIMS

**715. The limitation period for sexual molestation claims applies to non-perpetrators who failed to protect the plaintiff.**

*Lawson v. Lawson*, 29 CLR 264 (5/14/01) (DiPentima, J.)

The sexual molestation of a minor may be brought within seventeen years after the plaintiff's eighteenth birthday. It is not limited to claims against perpetrators, but extends also to claims against non-perpetrators who failed to protect the plaintiff.

## STATE

**716. Statutes of limitations and the doctrine of laches do not apply to claims against the state.**

*Department of Environmental Protection v. Kapadwala*, 29 CLR 210 (5/7/01) (Rittenband, J.T.R.)

## TOLLING

**717. Service of prejudgment remedy does not toll statute of limitations.**

*Raynor v. Hickock Realty Corp.*, 61 Conn. App. 234 (2000)

Service of an application for prejudgment remedy pursuant to §52-278 is not service of process required by §52-45a to commence an action and stay the statute of limitations. A claim asserted in a complaint filed after the statute of limitations had lapsed is barred, even though a prejudgment application containing an unsigned copy of the same complaint had been served and heard at a hearing attended by both parties before the period had lapsed.

## VEXATIOUS LITIGATION

**718. Limitation period for vexatious suit claim accrues when the underlying action terminates, not when it commences.**

*Shea v. Chase Manhattan Bank*, 27 CLR 579 (10/2/00) (Tierney, J.)

## 8. TRIAL PRACTICE AND PROCEDURE

### ACCIDENTAL FAILURE OF SUIT

**801. The egregious misconduct exception to the application of the accidental failure of suit statute: Plaintiff's dilatory conduct precludes reliance on accidental failure of suit statute.**

*Freeman v. King*, 27 CLR 3 (6/19/00) (Hurley, J.)—and—

*Gillum v. Yale University*, 62 Conn.

App. 775 (2001), cert. denied \_\_\_ Conn. \_\_\_ (6/14/01)

The *Freeman* decision contains a summary of several recent superior court decisions refusing to apply the accidental failure of suit statute because of dilatory conduct in the prosecution of the first action. The decision represents the judiciary's closing the door to utilization by a plaintiff of the accidental failure of suit statute. This decision precluded use of the accidental failure of suit statute and granted summary judgment for the defendant.

The most recent Appellate Court decision on this subject is *Gillum v. Yale University*. *Gillum* was a medical malpractice case in which the plaintiffs had difficulty responding to discovery. The plaintiffs, however, took the necessary depositions and disclosed their experts. The plaintiffs were ready for trial. Neither defendant did any depositions, and neither disclosed experts. They were not ready for trial.

The trial court and the Appellate Court focused only on the negative history of the case regarding the discovery, and ignored the fact that neither defendant was anywhere near ready for trial and had done absolutely no preparation for the trial.

**802. Accidental failure of suit statute inapplicable to case where plaintiff's counsel engaged in pattern of dilatory conduct.**

*Ruggeiro v. Zepperi*, 27 CLR 162 (7/17/00) (Corradino, J.)

An action which has been dismissed for failure to prosecute, should not be saved under the accidental failure of suit statute if plaintiffs counsel had engaged in a pattern of dilatory conduct. Reviving the action would be inconsistent with the policy sought to be furthered by the statute of limitations and would be unfair to the defendant.

The court declined to apply the statute to save a medical malpractice claim. The opinion also suggests that the application

of the Accidental Failure of Suit Statute issue should be transferred to the trial judge who dismissed the original complaint because of that judge's closer understanding of plaintiff's conduct in the underlying case.

The court reviewed the applicable authorities, including *Ruddock v. Burrowes*, 243 Conn. 569 (1998), and Judge Blue's decision in *Gillum v. Yale New Haven Hospital*, 5 Conn. Ops. 40 (Blue, J. 1999).

The court noted that the dissent in *Ruddock* (by Justices Berdon and Katz) sharply disagreed with the majority decision. It noted that the whole purpose of §52-592, the Accidental Failure of Suit Statute, was to permit matters to be tried on their merits and by definition a matter of form has nothing to do with the resolution of a case on the merits. Also, the dissent reasoned that there are no standards capable of defining what is "egregious" misconduct. One judge may decide that this statute cannot be relied on, while on the same or similar set of facts another judge might view the statute as saving the litigation. The dissent asserted that the belief that the majority's decision punishes the client for the transgressions of the lawyer, and although the client hires the lawyer, the law should not deny the client justice because of the misconduct of the lawyer.

Judge Corradino in *Ruggeiro* reasoned that there are many situations where a lawyer's mistakes or transgressions prejudice a client, and this is the unfortunate cost of the adversary system.

**803. Statute does not apply if there was a finding in the first case that the failure of the action was due to counsel's misconduct.**

*Talit v. Northwest Airlines, Inc.*, 28 CLR 705 (3/19/01) (Hale, J.T.R.)

If a motion to reopen a nonsuit was denied in the earlier suit on a factual finding that the lawyer's action had not been the result of mistake, accident, or other reasonable cause, this precludes a finding that the new action failed merely as a "matter of form."

**804. Suit commenced by service but not returned to court can be saved under the accidental failure of suit statute.**

*Serrano v. Swanch*, 27 CLR 333 (8/14/00) (Doherty, J.)

A suit is commenced on service of process, and therefore can be saved under the accidental failure of suit statute, even if it was not returned to court.

**805. Accidental failure of suit statute saves probate appeal dismissed for failure to timely return writ.**

*Amore v. Decker*, 28 CLR 419 (1/29/01) (White, J.)

The statute applies to save a probate appeal that was timely taken, timely served, but was dismissed due to the appellant's attorney's accidental failure to return the writ within the return period.

**AMENDING PROCESS**

**806. THIS SECTION MOVED TO SECTION 888A.**

**APPEAL FROM PROBATE**

**807. Designation of improper return date by the court when granting an application for permission to appeal does not invalidate the appeal.**

*In Re Michaela Lee R.*, 253 Conn. 570 (2000)

In a probate appeal it is the duty of the probate court to designate a return date that complies with §52-46 and 52-46a when granting an application for permission to take an appeal from probate. It is not the applicant's duty. An improper designation by a probate court does not invalidate the appeal, because the right to take an appeal from probate is an absolute right which cannot be deprived by an omission of the probate court.

**808. When conducting a de novo review of probate court decision, superior court cannot rule on legal issues not considered by the probate court.**

*Randolph Foundation v. Westport Appeal from Probate*, 27 CLR 356 (8/21/00) (Tierney, J.)

Court held that the Superior Court cannot rule on legal issues that had not been presented to the probate court, because the Superior Court's jurisdiction is limited to the jurisdiction exercised by the probate court. However, the Superior Court can consider factual evidence related to events which occurred after the probate proceeding that relate to the issues ruled on by the probate court, even though the evidence was not available to the probate court.

This is an extraordinary decision. De novo review means just that. The Superior Court does not sit as an Appellate Court where review is de novo, but as a trial court conducting a de novo hearing. Raising legal issues in the probate court should not be a conditioned precedent to raising them in the Superior Court.

**APPORTIONMENT**

**809. Time limit for filing apportionment complaint mandatory.**

*Keith v. Anand*, 26 CLR 694 (6/12/00) (Nadeau, J.)

The time limit for filing an apportionment complaint—120 days from the return date of the original complaint—is mandatory. This is so even with respect to a defendant served by substituted service who did not become aware of the complaint until after the 120-day period had elapsed. The court noted that failure of the defendant-apportionment plaintiff to get timely notice of the plaintiff's action against him was due, in part, to his failure to timely notify the Department of Motor Vehicles of a change in his own address.

**810. 120-day time limit for filing apportionment complaint applies even if statute of limitations for direct claim by plaintiff has not yet lapsed.**

*Tine v. Baker*, 27 CLR 57 (6/26/00) (Hurley, J.T.R.)

A defendant may not file an apportionment complaint beyond the 120-day time limit established by §52-102b(a), even if the negligence statute of limitations period for direct claim by the plaintiff against the apportionment defendant has not yet lapsed.

**811. Defendant can apportion against plaintiff.**

*Farmer v. Christianson*, 27 CLR 196 (7/24/00) (Sullivan, L., J.)

A motor vehicle case brought by the operator and passengers of one vehicle against the operator of a second vehicle, the defendant operator of the second vehicle can prosecute an apportionment complaint against the operator-plaintiff, even though that operator is already a party in the action.

**812. Apportionment claim can be asserted against one already a party to the action.**

*Torres v. Begic*, 27 CLR 403 (8/28/00) (Levin, J.)

This decision holds that the statute authorizing apportionment imposes no restriction on the right to assert such claims between existing parties in the action. The decision also holds that the 120-day limit for filing an apportionment complaint does not apply to an apportionment claim against an existing party. The decision also holds that a plaintiff has standing to challenge an apportionment

complaint.

**813. There can be no apportionment by counterclaim.**

*Morrill v. Rutledge*, 27 CLR 576 (10/2/00) (Alander, J.)

A counterclaim can only be used to assert a claim on which the defendant could have obtained affirmative relief had he sued the plaintiff in a separate action. It is not authorized under the apportionment statute. In addition, apportionment is prohibited against a party.

**814. Apportionment complaint may be filed against a person already a party to the action.**

*Sharif v. Peck*, 29 CLR 311 (5/21/01) (Blue, J.)

The court reasoned that the phrase “party” as used in that portion of the statute limiting apportionment complaints to persons “not a party to the action” is used in a limited sense to mean a party to the particular claim being asserted by one plaintiff against the common defendant, not the more general sense of any “party” to the action.

For a contrary holding, see *Rubbak v. Thompson*, 29 CLR 316 (5/21/01) (Lewis, S.J.).

**815. Apportionment not permissible in legal malpractice case.**

*Gauthier v. Kearns*, 27 CLR 201 (7/24/00) (Rittenband, J.)

The court held that “property damage” as used in the apportionment statute is limited to injury to physical property, and does not include commercial loss. Accordingly, apportionment is not available in a legal malpractice action.

**816. Apportionment statute held retroactive.**

*Estate of Eastwood v. State*, 27 CLR 236 (7/31/00) (Solomon, J.)

Public Act 95-111, codified in §52-102b, authorizing a third-party complaint to bring a joint tortfeasor into an action for apportionment of damages, and authorizing the filing of a direct claim by the plaintiff against the apportionment defendant within 60 days of the return date applies retroactively to claims asserted in any action commenced after July 1, 1995, even with respect to claims for which the statute of limitations otherwise would have expired.

Here, there was a 10-year delay by the Claims Commissioner in granting permission to sue. The state impleaded a third-party tortfeasor and the plaintiff

filed a direct claim against the third-party defendant, even though the statute of limitations had expired for a separate action by the plaintiff against the third party.

**817. Plaintiff has standing to attack apportionment complaint.**

*Eskin v. Castiglia*, 253 Conn. 516 (2000)

Although the opinion did not discuss this issue specifically, it permitted a challenge by the plaintiff against an apportionment complaint against an unidentified third party without discussion of the issue of whether a plaintiff has standing to challenge the legal sufficiency of a third-party apportionment complaint. The opinion affirms the trial court decision at 23 CLR 677 (4/5/99) which did include a specific holding that a plaintiff has standing to challenge an apportionment complaint.

**818. Plaintiff has standing to challenge the sufficiency of service of apportionment complaint on a third-party defendant.**

*Lemp v. East Granby*, 27 CLR 388 (8/28/00) (Rubinow, J.)

The plaintiff has standing to challenge the sufficiency of service of process of an apportionment complaint on a third-party defendant because the effectiveness of service will impact on the plaintiff’s ability to execute on a judgment against the third-party defendant if a claim is asserted.

Also, the failure to provide a plaintiff with a copy of the apportionment complaint does not invalidate complaint, but tolls the 60-day period for the plaintiff to fail a direct claim against the apportionment defendant.

**819. Plaintiff has standing to challenge defendant’s apportionment complaint.**

*Bowen v. Stonegate Condominium Association*, 28 CLR 578 (2/26/01) (Jones, J.)

A plaintiff has standing to challenge the defendant’s right to bring an apportionment complaint. The proper procedure is a motion to strike.

**820. If apportionment complaint is untimely, plaintiff’s claim asserted against the apportionment defendant must also be dismissed.**

*Nemecek v. Ashford*, 27 CLR 312 (8/14/00) (Bishop, J.)

The dismissal of an apportionment complaint because it was filed beyond 120 days of the return date of the original complaint requires dismissal of the claim filed by the plaintiff directly against the apportionment defendant while the apportionment complaint was pending. Jurisdiction for the claim of the plaintiff is derivative of jurisdiction over the apportionment claim.

**821. Apportionment defendant’s time limit for filing second apportionment complaint runs from return date of original complaint, not from return date of first apportionment complaint or the amended complaint asserting a direct claim.**

*Bednaz v. Svindland*, 27 CLR 438 (9/4/00) (Alander, J.)

A 120-day time limit for filing a second apportionment complaint by a third-party defendant brought into the action by a first apportionment complaint runs from the return date of the plaintiff’s original complaint, not the return date of the first apportionment complaint, or the return date of the amended complaint asserting a direct claim by the plaintiff against the third-party apportionment defendant, even though the first apportionment defendant had no reason to seek apportionment until after the plaintiff’s direct claim had been asserted.

**822. Apportionment complaint cannot be filed in products liability action.**

*Travelers Property Casualty v. Chirico*, 27 CLR 665 (10/23/00) (DiPentima, J.)

A third-party apportionment complaint cannot be filed in a products liability action because only claims for contribution and indemnification are authorized for actions subject to the Products Liability Act.

**823. New apportionment complaint can be filed within 15 days of the granting of a motion to strike, even though the 120-day time limit has lapsed.**

*Andretta v. Rudig*, 27 CLR 667 (10/23/00) (Nadeau, J.)

A new apportionment complaint may be filed after the granting of a motion to strike an earlier apportionment complaint, so long as it is filed within the 15-day period allowed by §10-44 for filing a new pleading after the granting of a motion to strike. This is authorized even

though the 120-day time limit has passed.

**824. 120-day time limit for filing apportionment complaint directory, not mandatory.**

*Vaillant v. Norwalk*, 27 CLR 668 (10/23/00) (Karazin, J.)

**825. Property owner sued for breach of non-delegable duty to maintain safe premises cannot implead third party for apportionment of damages.**

*Smith v. Hartford Direct Marketing & Mailing Services, Inc.*, 28 CLR 55 (11/13/00) (Rittenband, J.T.R.)

**826. Dismissal of an apportionment complaint requires a dismissal of the plaintiff's claim against the third-party defendant, as the latter claim would be time-barred except for the 60-day grace period for direct claims against an apportionment defendant.**

*Currier v. Fieldstone Village Condominium Association, Inc.*, 28 CLR 90 (11/20/00) (Sferrazza, J.)

**827. Property owner sued for breach of non-delegable duty to maintain premises in safe condition cannot seek apportionment from independent contractor who allegedly caused the condition.**

*Figueroa v. Aml-Trap Falls, LLC*, 28 CLR 196 (12/11/00) (Moran, J.)

The property owner sued for breach of the duty to maintain premises in a safe condition cannot seek apportionment from an elevator maintenance contractor that allegedly caused the condition resulting in the plaintiff's injury. The court reasoned that in addition to the owner's primary liability for breach of a non-delegable duty, the contractor is an agent of the owner so that the owner is vicariously liable for the contractor's acts.

**828. Property owner sued for breach of nondelegable duty may not seek apportionment from independent contractor.**

*Shira v. Rubin*, 28 CLR 376 (1/15/01) (Wiese, J.)

**829. Parental immunity prohibits apportionment claim against parent based on failure to properly secure child's car seat.**

*Tine v. Baker*, 28 CLR 420 (1/29/01) (Corradino, J.)

The failure to secure the car seat does not constitute "operation" within the meaning of the statutory abrogation of parental immunity for actions of negligence in the operation of a motor vehicle, §52-572c.

The opinion contains a discussion of the law regarding abrogation of the doctrine of parental immunity for cases involving the negligent operation of a motor vehicle.

The decision also holds that an apportionment complaint is barred based on a violation of the statutory obligation to properly restrain children in a car seat or safety belt because, by statute, the evidence of such failure cannot be used in a civil action or considered as contributory negligence. See §14-100(c) (1).

**830. Notice of apportionment, rather than apportionment complaint, is proper procedure for apportionment of liability to third party who has already settled the plaintiff.**

*Trainor v. Jackson, Inc.*, 28 CLR 445 (1/29/01) (Rubinow, J.)

**831. Defendant in personal injury action for assault cannot seek apportionment for another encouraging the assault.**

*Calore v. Stratford*, 28 CLR 653 (3/12/01) (Melville, J.)

Apportionment is not permitted based on intentional conduct, but only negligent conduct.

**832. Condo management company may seek apportionment from independent snow removal contractor.**

*Grehl v. Crossroads Condominium Association, Inc.*, 28 CLR 661 (3/12/01) (White, J.)

A condominium management company sued for injuries from a fall on condominium property may seek apportionment from an independent snow removal contractor regardless of the resolution of the issue of whether liability for failure to perform a non-delegable duty is subject to the apportionment statute. The court reasoned that a condominium management company as a non-owner does not have a non-delegable duty. Rather, the court reasoned, the case involves an independent contractor suing another independent contractor for apportionment for negligence. This is permitted.

The decision obviously will turn on whether a condo management company

is alleged to be in control of the premises. If in control, the duty to keep the premises safe is non-delegable.

**833. No apportionment under defective highway statute.**

*Ladson v. Kenney*, 28 CLR 724 (3/26/01) (Hurley, J.T.R.)

The apportionment statute does not apply to cases based on statutory cause of action.

**834. Statutory prohibition of apportionment complaints against immune parties refers to immunity between apportionment defendant and first party plaintiff, not immunity between defendant and apportionment defendant.**

*Allen v. Hutchinson*, 29 CLR 317 (5/21/01) (Blue, J.)

The immunity is the immunity that exists from liability to the original plaintiff. Here, the defendant unsuccessfully claimed that he could bring in the plaintiff's employer as a apportionment defendant as there was no immunity between his status as defendant and the apportionment defendant. The court held that the immunity as used in the statute is between the plaintiff and any defendant or apportionment defendant.

## ARBITRATION

**835. Court rather than arbitrator should decide initial issue of whether statute of limitations defense is subject to arbitration.**

*Ficca v. Basile*, 27 CLR 7 (6/19/00) (Frazzini, J.)

The court rather than the arbitrator should decide the threshold procedural issue of whether a statute of limitations defense is subject to arbitration. The opinion also holds that the merits of the statute of limitations defense, if the defense is subject to arbitration, has to be determined by the arbitrator.

**836. Prosecution of a civil action for a year does not waive right to arbitration.**

*McGee v. The Hartford* 27 CLR 117 (7/10/00) (Skolnick, J.)

Prosecution of a civil action for nearly a year does not waive the plaintiff's contractual right to have the matter submitted to arbitration.

**837. Requirement that arbitration agreement be in writing can be satisfied by correspondence ex-**

## **changed between the parties and arbitrator.**

*Bisconti v. McEachin*, 27 CLR 401 (8/28/00) (West, J.)

Combining several pieces of correspondence between the parties and the arbitrator relating the arbitration can satisfy the requirement that the agreement be in writing. Here, the correspondence between the parties and the arbitrator concerning the scheduling of the arbitration hearing, and evidentiary matters, were sufficient to satisfy the requirement for an agreement in writing.

## **Statutory Arbitration Pursuant to §52-549z**

### **838. Trial de novo denied where plaintiff failed to present any evidence at arbitration hearing.**

*Caputo v. Blackie*, 28 CLR 476 (8/5/01) (Silbert, J.)

To be entitled to a trial de novo following a court mandated arbitration pursuant to §52-549z, the plaintiff must attend and present a prima facie case at the arbitration proceeding. A trial de novo was denied in this case because the plaintiff, appearing only through counsel, failed to present any evidence at the arbitration hearing.

## **BANKRUPTCY**

### **839. Debtor discharged in bankruptcy may be joined as a defendant in an action against the debtor's insurer for the purpose of obtaining a judgment to be executed against the insurer only.**

*Lightowler v. Continental Insurance Co.*, 255 Conn. 639 (2001)

Joining a discharged bankruptcy debtor as a defendant in an action against the debtor's malpractice insurer, solely for the purpose of obtaining a judgment to be executed against the insurer, does not violate the "fresh start" rule of the Bankruptcy Code even though the insurance policy provides for a \$5,000 deductible. The insurance company's right to recover the deductible from the debtor on any claim pending on the date of bankruptcy would be discharged by the bankruptcy.

## **BIFURCATION**

### **840. Trial on civil rights claim against a police department and individual officers should be bifurcated.**

*Eddy v. Bridgeport*, D.N. 3:97CV-1629(SRU) (U.S.D.C. 5/1/00) (Underhill, J.), 26 CLR iii (6/5/00)

The district court has held that the trial of a civil rights claim against a police department for failing to establish proper procedures for responding to requests for domestic violence assistance, and claims against police officers for allegedly inadequately responding to the plaintiff's calls, should be bifurcated, with the trial against the individual officers first. The reason is that many of the issues relevant to the claims against the municipality are not relevant to claims against the officers, and a judgment in favor of the officers would resolve the claim against the city.

## **CLASS ACTIONS**

### **841. A claim by employees against employer for intentional exposure to toxic substances may not be prosecuted as a class action.**

*Stebbins v. Doncasters, Inc.*, 27 CLR 488 (9/18/00) (Bishop, J.)

A claim that the employer intentionally caused the employees to be exposed to toxic substances on the job may not be prosecuted as a class action because the common issues—exposure to the toxic substance and whether the exposure was intentional—do not predominate over the individual issues of proximate cause and the amount of damages.

## **COLLATERAL ESTOPPEL AND RES JUDICATA**

### **842. Doctrines of collateral estoppel and res judicata should not be applied to a small claims action to recover property damage from a motor vehicle accident.**

*Isaac v. Truck Service, Inc.*, 253 Conn. 416 (2000)

The theories underlying the doctrines of collateral estoppel and res judicata clearly apply to a small claims judgment. However, for policy reasons these doctrines should not be applied to a small claims judgment for property damage from a motor vehicle accident. Accordingly, a plaintiff who successfully prosecutes a small claims action to recover property damage from a motor vehicle collision is not barred by res judicata from prosecuting a later personal injury action based on the same accident, and may not rely on collateral estoppel to preclude the defendant from contesting liability in the later action.

## **COMPETENCY**

### **843. Competency of party is presumed. If rebutted, case must be dismissed.**

*Sunbridge Healthcare Corp. v. Haj-*

*dasz*, 27 CLR 340 (8/21/00) (Berger, J.)

There is a presumption that a defendant is mentally competent. If the presumption can be rebutted by proof of incompetency, the action must be dismissed until a conservator has been appointed. In this case an action for fees by a nursing home against one of its patients was dismissed because the patient was mentally incompetent.

## **COSTS**

### **844. Expert witness fees permitted only for testimony of physician, dentist, nurse or real estate appraiser where legal claim is asserted. If claim is equitable, witness fees may be awarded for any type of expert.**

*Pestey v. Cushman*, 27 CLR 159 (7/17/00) (Bishop, J.)

Expert witness fees awarded to a party prevailing on a legal, as opposed to equitable, claim can exceed the nominal fee under §52-260(a) for witnesses in general only with respect to categories of witnesses listed and §52-260(f). These are physicians, dentists, nurses, or real estate appraisers. Therefore a party prevailing on a legal claim may not recover the actual costs of expert testimony from an agricultural engineer or an odor expert.

Pursuant to §52-257(e), however, the court does have discretion to award reasonable expert witness fees to a party prevailing on an equitable claim.

### **845. Several costs rulings: "Trial fee;" expert gets time in court only; neuropsychologist; records used in evidence; service of subpoenas.**

*Mills v. Rogers*, 27 CLR 647 (2000) (Aurigemma, J.)

Judge Aurigemma made the following rulings on costs in an action in which the plaintiff prevailed:

1. Recovery of trial fees in excess of the normally authorized \$75 for "difficult or extraordinary cases" is not limited to cases made difficult or extraordinary by the presence of complex legal issues. Rather, it also applies to cases which are unusually difficult to present because of the nature of the evidence.
2. The recovery of a "reasonable fee" for the costs of presenting expert testimony from a practitioner of the healing arts is limited to compensation for actual time at trial. A flat fee charged by a physician is

recoverable only to the extent justified by the amount of actual time the witness spent in court.

3. A neuropsychologist is not a "practitioner of the healing arts" within the meaning of the statute.
4. The recovery of costs of records used in evidence applies to records actually introduced into evidence, and not to materials used in closing argument.
5. The authorization for the recovery of fees incurred for service of process includes service of witness subpoenas.

#### **846. Expert witness preparation time not permitted.**

*Liberman v. Deming*, 28 CLR 145 (11/27/00) (Fineberg, J.)

Fees for providing live testimony permitted. Fees for medical expert's preparation time not permitted.

#### **847. Medical expert can be paid for preparation time if testimony actually given in court.**

*Tharp v. Lato*, 29 CLR 312 (5/21/01) (Adams, J.)

The authorization for witness fees for expert testimony by a physician, dentist, nurse or real estate appraiser, §52-260(f), includes authorization for the recovery of an expert's preparation time, but only for expert witnesses who are actually called to provide trial testimony.

#### **848. Costs cannot be taxed against the State.**

*Ladstatter v. Crouch*, 28 CLR 517 (2/12/01) (Corradino, J.)

Costs may not be taxed against the State by a party prevailing in an action against a state for negligent operation of a motor vehicle pursuant to §52-556.

### **DECLARATORY JUDGMENTS**

#### **849. Defendant's failure to move to strike declaratory judgment action containing no certificate of notice waives the defect.**

*37 Huntington Street v. Hartford*, 62 Conn. App. 586, cert. denied 256 Conn. 914 (2001)

An opponent's failure to move to strike a declaratory judgment complaint in which the plaintiff failed to certify that all interested parties had been joined or given notice as required by §17-56(b) of the Practice Book constitutes a waiver of that defect.

### **DEATH OF JUDGE**

#### **850. Successor judge should be appointed to decide post-verdict motions after the death of the trial judge.**

*Marsala v. Groomell*, 28 CLR 528 (2/19/01) (Robinson, J.) (also reported at 46 Conn. Supp. 650 (2001))

### **DEFAULTS**

#### **851. Default in equity does not relieve plaintiff of the obligation to present evidence on liability.**

*Palmieri v. Lee*, 27 CLR 96 (7/3/00) (Levin, J.)

Entry of default relieves the plaintiff of an obligation to present evidence as to liability at a hearing in damages with respect to legal claims. However, the principles of equity require that the plaintiff still present evidence to prove the allegations of the complaint with respect to equitable claims. The court denied all equitable relief following a hearing in damages in which the plaintiff failed to present any proof as to liability on either the legal or equitable claims, and inadequate proof as to damages on the legal claims.

#### **852. Judgment cannot be entered where motion to open default is pending.**

*CAS Construction Co. v. Dainty Rubbish Service, Inc.*, 60 Conn. App. 294 (2000), cert. denied, 255 Conn. 928 (2001)

### **DISCOVERY**

#### **853. Request for discovery of parent's medical records to explore whether genetic factors caused the injury claimed by minor plaintiff must be supported by expert testimony.**

*Pierce v. Whitney Street Associates*, 27 CLR 339 (8/21/00) (Lager, J.)

A defense request for permission to obtain discovery of a parent's medical records on the theory that genetic factors may be the cause of injuries of minor plaintiff in a lead paint case must be supported by expert testimony to establish the relevancy of the requested information.

#### **854. Town's practice of leaving an expert's report in the possession of the expert to avoid disclosure under FOIA does not relieve the town from obligation to produce the report in response to a discovery request.**

*Manchester v. United Stone America, Inc.*, 27 CLR 672 (10/23/00) (Bishop, J.)

#### **855. Nonstandard interrogatories may be filed in motor vehicle case with respect to non-automobile-related claims joined with the auto case.**

*Restuccia v. Allstate Insurance Co.*, 29 CLR 309 (5/21/01) (Brennan, J.T.R.)

This was an action for the negligent operation of a motor vehicle which was joined with non-automobile claims. The court held that the rule prohibiting the use of nonstandard interrogatories without prior court approval, §13-6(b), applies only to the auto-related claims. Uniquely drafted interrogatories directed to the non-automobile-related claims must be answered in the normal course. Here, the action was against the insurer for underinsured motorist benefits. The plaintiff included a CUTPA and CUIPA claim.

### **DISCOVERY ABUSE**

#### **856. Name dumping is discovery abuse warranting sanctions.**

*Usowski v. Jacobson*, 27 CLR 291 (8/7/00) (Tierney, J.)

Discovery sanctions were imposed on a plaintiff for responding to an interrogatory asking for the names of any persons having knowledge of a particular issue. The plaintiff listed 122 names, only a few of whom actually had relevant knowledge. This practice is referred to as "name dumping." The court construed the response as an effort to force the defendant to incur substantial costs in conducting depositions that would provide little useful information. It directed the defendant to randomly select and depose four of the named witnesses and, after determining that none of the four had relevant knowledge, the court ordered that the plaintiff pay all costs for the remaining 118 depositions, including attorney's fees.

#### **857. Witness who refuses to answer deposition question based on privilege may not later provide the undisclosed testimony at trial.**

*DeLeon v. Fonda*, 27 CLR 300 (8/7/00) (Hodgson, J.)

A witness who declines to answer questions during a deposition in reliance on a privilege should not be permitted to later provide the previously undisclosed testimony at trial based on a waiver of the privilege. In this case an attorney

who declined to answer questions during a deposition on the grounds that to do so would reveal confidential client communications may not provide the same testimony at trial after obtaining the client's waiver. The testifying attorney, a party in the case, unsuccessfully argued that the testimony should be precluded at trial only if the party taking the deposition had exhausted all efforts to obtain a court order compelling the testimony at the time of the deposition.

#### FEES

#### 858. Failure to pay filing fee subject matter jurisdictional defect.

*Hefi v. CHRO*, 61 Conn. App. 270 (2001)

Filing of an administrative appeal without paying the required filing fee within the 45 day appeal period cannot confer jurisdiction over the appeal on the court, even if the failure to pay was due to incorrect advice received from the court clerk.

#### FORUM NON CONVENIENS

#### 859. Motion to dismiss based on forum non conveniens must be supported by specific proof to support claims of inconvenience.

*Anderson v. Marriott Hotel Services, Inc.*, 27 CLR 69 (6/26/00) (Alander, J.)

A motion to dismiss under the doctrine of forum non conveniens must be supported by specific proof to establish the movant's claims that obtaining jurisdiction over witnesses and potential apportionment defendants would be more convenient in the foreign forum. Here, the court denied a motion to dismiss a personal injury case brought in Connecticut for injuries incurred by the plaintiff while vacationing at the defendant's resort in Hawaii.

#### IMPLEAD

#### 860. Twenty-day time limit for the assertion by a plaintiff of claims against third-party defendant not mandatory. Permission to file claims beyond that period should be liberally granted.

*Tarzia v. Great Atlantic & Pacific Tea Co.*, 254 Conn. 786 (2000)

The Supreme Court dismissed an appeal after determining that certification had been improvidently granted, letting stand an Appellate Court holding that the 20-day time limit for assertion by a plaintiff of any claims against a third-party defendant impleaded pursuant to §52-102a should not be strictly enforced.

Rather, permission to file claims beyond the period should be liberally granted.

#### INDEMNIFICATION

#### 861. No indemnification permitted in multi-car motor vehicle collision.

*Keller v. Irizarry*, 27 CLR 242 (7/31/00) (Arnold, J.)

In a personal injury action involving a several vehicle collision, one operator cannot recover in common law indemnification from the other operator, because none of the individual operators could be in exclusive control of the situation.

#### INTEREST

#### 862. Post judgment interest in a negligence case is discretionary for cases arising before May 27, 1997, and mandatory thereafter.

*Mack v. LaValley*, 27 CLR 448 (9/11/00) (Sullivan, L., J.)

In 1997 the statute authorizing post-judgment interest in negligence actions was changed from "may" to "shall." Interest at the rate of 10% "shall" be recovered in a negligence action. This was not a clarifying amendment. Accordingly an award of interest remains discretionary with respect to cases arising before the date specified in the Public Act, May 27, 1997.

The opinion contains a discussion of the legislative history of the two statutes authorizing interest, §37-3a, which applies to civil actions in general, and §37-3b, which applies to negligence actions in particular.

The opinion holds that to avoid imposing restriction on a defendant's right to appeal, discretionary post-judgment interest should be awarded to compensate for delay caused by an appeal only if the appeal was taken in bad faith, was frivolous or was taken solely for the purposes of delay. The decision seems to ignore appellate authority that the interest is for lack of use of the money, and the continued use of the money by the defendant.

#### INTERVENTION

#### 863. Employer in heart and hypertension claim can intervene an employee's third party action.

*King v. Sultar*, 253 Conn. 429 (2000).

Compensation to a firefighter or police officer under the heart and hypertension act are in effect payments under the workers' compensation act. Therefore, an employer's right under the compensation act to intervene to recover compensation benefits in an employee's personal injury

action against a third-party tortfeasor can be utilized by a municipal employer to intervene to recover benefits paid to a firefighter or police officer under the heart and hypertension act.

#### 864. Third party may intervene as of right even if an interlocutory ruling will affect that party's interests, though the final judgment in the matter will not affect the third party.

*Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 60 Conn. App. 134 (2000)

The Appellate Court essentially rewrote Practice Book §9-18 and §52-107 of the General Statutes. The Practice Book and the statute both indicate that the judgment must affect the intervenor's rights. The court, following the federal rule, held that the right of intervention also extends to actions in which an interlocutory order will affect the intervenor's rights, although the judgment in the case will not affect the intervenor at all.

Here, the court held that an employee has a right to intervene in an action against an employer to contest whether the intervening employee's personnel records are subject to discovery, even though the underlying dispute did not involve the intervenor's and the final judgment in the action will not affect them.

The decision also holds that the employee's rights to intervene as a matter of right were not satisfied by permitting the filing of a motion seeking the same relief and permitting participation at a full hearing on that motion, because the benefits available through participation at the discretion of the court are not the equivalent to the benefits available to a third party formally designated as an intervenor.

Although the Connecticut rule is antiquated, the court basically ignored the Connecticut statute and rule, and adopted the federal rule, Federal Rules of Civil Procedure, Rule 24.

#### 865. An employer permitted to intervene in employee's medical malpractice action to recover workers' compensation benefits, but not in legal malpractice action.

*Babich v. Bonadies*, 29 CLR 319 (5/28/01) (Booth, J.)

The court reasoned that the employer's liability to an employee extends to additional injuries caused by medical malpractice by a physician during the treatment of a work-related injury. As a

result, the employer is entitled to intervene in an employee's action against a third-party tortfeasor to recover paid benefits, and this applies to the employee's malpractice claim against a medical provider.

The opinion is careful to note, however, that the court was not ruling on the issue of what portion of any recovery in the malpractice action would be subject to the employer's claim for reimbursement.

Accord: *Griffiths v. Hartford Hospital*, 23 CLR 305 (1998) (Fracasse, J).

In *Pinney v. May*, 20 CLR 163 (1994) (DiPentima, J.) the court held that the employer could not intervene in a legal malpractice action to obtain reimbursement of its workers' compensation payments because "the injury that is the subject of the legal malpractice is not the personal injury suffered by plaintiff's decedent; rather it is the loss of the right of action against the third party tortfeasor."

## JUDICIAL ESTOPPEL

**866. Providing information concerning ownership in a business under oath in one proceeding judicially estops the party from asserting an inconsistent claim in a later suit.**

*Usowski v. Jacobson*, 27 CLR 291 (8/7/00) (Tierney, J.)

A plaintiff who disclaimed any ownership interest in any business ventures in a financial affidavit and sworn testimony in a divorce case is judicially estopped from asserting any inconsistent claim of having an ownership interest at the same time period in a later suit against a former employer and business associate.

## MEDICAL EXAMS

**867. Plaintiff has unconditional right to refuse to consent to examination by defendant's physician. Plaintiff may be precluded from presenting his own medical testimony if the refusal is unreasonable.**

*Morton v. Kaminski*, 28 CLR 61 (11/13/00) (Rittenband, J.)

Section 52-178a gives the plaintiff a right to refuse to consent to an examination by any physician designated by the defendant, regardless of the reasonableness of the refusal. However, if the reasons are unreasonable, the defendant may cross-examine the plaintiff as to the refusal, request an adverse inference to be drawn from that refusal, and plaintiff may be precluded from presenting his own medical testimony.

## MOTION TO DISMISS

**868. Motion to Dismiss to contest personal jurisdiction must be filed within thirty days of appearance. Memorandum in Support of the motion need not be filed within same thirty-day period.**

*Stewart v. Air Jamaica Holdings Limited*, 27 CLR 144 (7/10/00) (Rubinow, J.)

§10-30 of the Practice Book provides that a motion to dismiss objecting to personal jurisdiction must be filed within thirty days after an appearance, and that a memorandum of law be submitted to support the motion. Although the provision requiring the motion to be filed within the thirty-day period is mandatory, the requirement that the memorandum be filed within the same thirty-day period is not mandatory and may be waived.

**869. Collateral estoppel and res judicata must be asserted as special defenses and raised by motion for summary judgment, not motion to dismiss or motion to strike.**

*Cadle Company v. Gabel*, 28 CLR 269 (12/18/00) (Arena, J.)

## Motion to Strike

**870. Statutory immunity may be raised by motion to strike, if clear on the face of the complaint.**

*Greco v. Anderson*, 28 CLR 605 (3/5/01) (Shortall, J.)

**871. Pro se status may be challenged in motion to strike.**

*Schwartz v. AAAA Legal Services, P.C.*, 28 CLR 608 (3/5/01) (Rubinow, J.)

## NONSUIT

**872. Order granting nonsuit or default conditioned on compliance with a discovery obligation: procedure for avoiding automatic entries of erroneous nonsuits and defaults.**

*Boteler v. Toro*, 26 CLR 678 (6/5/00) (Silbert, J.)

Difficulties are encountered occasionally from the entry of a conditional nonsuit or default on a motion filed to compel compliance with a pleading obligation, or failure to comply with discovery requests where compliance may not be apparent on the face of the docket because no

pleading need be filed to verify compliance with a discovery request. Frequently provisional orders that a nonsuit or default will automatically enter if the pleading is not filed by a fixed date.

Here, a motion for nonsuit was granted conditioned on the filing of supplemental answers to interrogatories within 21 days. The supplemental answers were delivered to the opposing party before that period expired, but judgment was automatically entered by the clerk at the end of the 21 day period as nothing had been filed in court. The nonsuited party did not learn of the judgment of nonsuit until well beyond the four month limitation for opening judgments. This opinion describes the procedure implemented in the New Haven judicial district in an attempt to avoid the problem of judgments being incorrectly entered on conditional nonsuits and default. In New Haven initial orders provide that if there is no compliance by a specified date, the party seeking compliance must file an additional motion attesting that no compliance has occurred. The burden then shifts to the party from whom compliance is being sought to file an objection to the motion for nonsuit or default, with proof of compliance, before the additional motion is reached on the next short calendar.

## OFFERS OF JUDGMENT

**873. Offer of judgment interest should be awarded in an action for uninsured motorist coverage, even though the resulting award will exceed the policy limit.**

*Gomez v. Infinity Insurance Co.*, 27 CLR 285 (8/7/00) (Melville, J.)

In an action against an insurer for uninsured motorist coverage, offer of judgment interest should be allowed, even though the addition of the interest to the plaintiff's damages will result in a recovery that exceeds the insurer's policy limit. The opinion also holds that the filing of an amended complaint does not invalidate a previously filed offer of judgment.

**874. Accepted offer of judgment cannot be withdrawn based on unilateral mistake.**

*Cadle Co. v. Christophersen*, 27 CLR 345 (8/21/00) (Lewis, J.)

An accepted offer of judgment in a collection action on a promissory note may not be withdrawn on the grounds that the plaintiff-offeror mistakenly omitted attor-

ney's fees and costs in its calculations for the offer. The error was a unilateral mistake, not a mutual mistake. It therefore cannot be withdrawn.

**875. Interest is not available under the offer of judgment statute in arbitration proceedings.**

*Nunno v. Wixner*, 27 CLR 484 (9/18/00) (Rush, J.)

The court reasoned that the offer of judgment statute is only available to a party prevailing at "trial" and therefore not to a party prevailing at a mandatory arbitration proceeding.

**876. 30-day time limit to accept offer of judgment not mandatory and may be extended.**

*McManus-Pesce v. Miller*, 29 CLR 304 (5/21/01) (Peck, J.)

In this case the court granted an extension to permit a defendant sufficient time to obtain responses to discovery requests before replying to an offer of judgment.

## PAYMENTS OF DEBTS FROM ANTICIPATED JUDGMENT

**877. Agreement that a debt will be paid from proceeds of anticipated judgment is enforceable against settlement fund received after judgment was reversed and case later settled.**

*Suffield Development Association Ltd. Partnership v. National Loan Investors, L.P.*, 60 Conn. App. 842 (2000)

In this case no judgment existed from which to pay the debt. Rather, the judgment was reversed but the court held the debt may be satisfied from the proceeds of the settlement that came about after reversal.

## POST TRIAL MOTIONS

**878. Motion for extension of ten day limit for filing post verdict motions must be filed before the time limit has lapsed.**

*Lalime v. Pediatric Associates of Norwalk*, 26 CLR 683 (6/5/00) (D'Andrea, J.)

The time for filing post-verdict motions pursuant to §16-35 of the Practice Book must be filed before the time limit has lapsed.

## PRIOR PENDING ACTION

**879. Prior pending action doctrine does not require dismissal of an action brought as a precaution**

**to prevent the running of the statute of limitations while a motion to amend the complaint in the original action is pending.**

*Mola v. Home Depot U.S.A., Inc.*, 27 CLR 60 (6/26/00) (Karazin, J.)

## RELEASES

**880. Release of personal injury claim against lessee of motor vehicle also releases the lessor from claims based on vicarious liability.**

*Cunha v. Colon*, 28 CLR 447 (2/5/01) (Levine, J.)

The court followed *Alvarez v. New Haven Register, Inc.*, 249 Conn. 709 (1999) which held that the release of a personal injury claim against an employee also releases the employee's employer from liability based on respondeat superior. The court extended this holding to a claim against a vehicle lessor based on vicarious liability for the negligence of the lessee under §14-154a. A release of the lessee also releases the lessor.

**881. Release can be limited to one of several tortfeasors, even if the released tortfeasor is vicariously liable for the act of negligence of the other tortfeasors.**

*Torres v. Alfano*, 28 CLR 465 (2/5/01) (Corradino, J.)

A release expressly limited to one of multiple tortfeasors is effective as a release of only the tortfeasor specified. The court held that this holding applied to situations in which the released tortfeasor was vicariously liable for the acts of negligence of the remaining tortfeasors, as well as to situations in which both tortfeasors were actively negligent.

The opinion contains a discussion of the overlooked risks of granting a release to one of several tortfeasors, even where an express reservation is made, and suggests that those risks can be avoided by utilizing a covenant not to sue rather than a release.

## SEQUESTRATION

**882. Witness sequestration order bars any discussion of evidence in the presence of a non-party witness, in or out of the courtroom.**

*State v. Nguyen*, 253 Conn. 639 (2000)

The decision holds, inter alia, that a witness sequestration order bars any discussion of any witness's testimony in the presence of another non-party witness,

regardless of where the discussion occurs, even though the Practice Book rule expressly requires only that a sequestered witness not be present in the courtroom during testimony by another witness.

## SERVICE OF PROCESS

**883. Service of process under Hague Convention authorizing service of documents by mail does not apply to the original service of process needed to commence an action.**

*Johnson v. Pfizer, Inc.*, 26 CLR 690 (6/12/00) (Hurley, J.)

The court held that the provision of the Hague Convention authorizing service of documents on the defendant in a foreign country by mail applies only to documents delivered after the action has been commenced, and does not authorize service of the original process required to commence the action. Service to commence the lawsuit must be by forwarding process to the "Central Authority" designated by the foreign jurisdiction. In addition, a translation into the language of the foreign jurisdiction must accompany the original process forwarded to the Central Authority for service.

**884. Service on non-resident defendant may be mailed to any address likely to be received by defendant.**

*Estafan v. Rolls*, 27 CLR 129 (7/10/00) (Moraghan, J.)

The requirement that service on a non-resident be completed by sending a copy of the process served on the Secretary of State to the defendants "last known address" pursuant to §52-59b of the General Statutes is satisfied by mailing to any address at which the process is reasonably likely to be received by the defendant. The mailing of the process to the out-of-state defendant's parent's home is sufficient to obtain personal jurisdiction even though the defendant had not resided with his parents for the preceding three years.

**885. Process can be served on out-of-state resident either under longarm statute (substituted service on the secretary of state) or by §52-57a (actual service authorized by the law of the foreign jurisdiction).**

*CHRO v. Mills*, 27 CLR 382 (8/28/00) (Fineberg, J.)

**886. Personal jurisdiction cannot be obtained by serving a party's attorney. This applies in probate appeal even if court orders service on attorney.**

*Department of Social Services v. Butler*, 27 CLR 670 (10/23/00) (Skolnick, J.)

**887. Service of process in personal injury action against Board of Education must be made on the town clerk or mayor.**

*Padgett v. New Haven*, 28 CLR 568 (2/26/01) (Devlin, J.)

Claims of negligent supervision against the Board of Education constitutes a claim against the Board in its capacity as agent of the municipality, not in the Board's capacity as an agent of the State. Therefore, service of a complaint asserting such a claim against a local Board must comply with the statute establishing the officials who may be served in civil actions against a municipality: the municipal clerk, the assistant clerk, the mayor or town manager. Personal jurisdiction cannot be obtained by serving the chairman of the Board of Education.

#### Amendment of Process

**888A. Process may be amended so that it can be returned six days before the return date, but the return date must be within two months of the date of process.**

*Stop & Shop Supermarkets v. Cromwell*, 27 CLR 140 (7/10/00) (Gordon, J.)

The failure to return process at least six days before the return date as required by §52-46a can be cured by amending the complaint to state a later return date. The requirement that the stated return date be within two months of the date of the process, under §52-48(b) is mandatory. Accordingly, process that is returned both beyond the six days from the stated return date, and beyond two months following the date of process cannot be cured by amendment.

*Coppola v. Coppola*, 243 Conn. 657, 661-62 (1998) held that a defect in returning the action to court six days before the return date was curable. In *Concept Associates Ltd v. Board of Tax Review*, 229 Conn. 618 (1994) the court permitted a plaintiff to amend its return date pursuant to §52-72. The court distinguished these cases, holding that the requirement that process must be made returnable not later than two months after the date of process.

**888. Statute authorizing an amendment to cure defective return date can be relied upon to cure complaint that contains a stated return beyond the statutory time period.**

*Olympia Mortgage Corp. v. Klein*, 61 Conn. App. 305 (2001)

The statute authorizing the amendment of process to cure a defective return date can be relied upon to cure a complaint that contains a stated return date completely beyond the statutorily authorized time period of two months from date of process so long as the process was actually returned within the two month period.

Section 52-72(a) authorizes the amendment of civil process. §52-48(b) requires that service of process be within two months of the date of the complaint.

The plaintiff sought to recover damages for the defendant's negligence, fraud and legal malpractice. The trial court granted the motion of the defendant to dismiss the action. This was reversed by the Appellate Court on the basis that the plaintiff's motion, made pursuant to §52-72(a) for permission to amend its civil process to cure the defective return date should have been granted. Moreover, §52-48 is remedial and should be liberally construed.

**889. Failure to include a return date in a writ of summons can be cured by amendment.**

*Schuld v. Carey*, 27 CLR 511 (9/18/00) (Shay, J.)

**890. Failure to return process within six days of return date can be cured by amendment.**

*Zalumis v. Assenza Builders*, 28 CLR 53 (11/13/00) (Doherty, J.)

**891. Circumstantial defects statute, §52-123, applies to wide range of proceedings, including special proceedings and probate appeals.**

*Dostie v. Doak*, 28 CLR 646 (3/12/01) (Rittenband, J.T.R.)

This statute is not limited to curing defects in process, but applies to special proceedings required to commence actions, such as appeals from probate. The defendant had argued that the documents that commence an appeal from probate, a copy of the notice of appeal and the probate order allowing the appeal, do not constitute "writs" and therefore do not come with the statute.

The opinion also holds that improperly naming an estate instead of the administrator as the defendant to an appeal from probate can be cured by amendment pursuant to the statute.

#### Longarm Jurisdiction

**892. Longarm jurisdiction based on repeated solicitation of business in this State cannot be based on internet advertisements on the World Wide Web.**

*Liberty Aircraft v. Atlanta Jet, Inc.*, 28 CLR 398 (1/22/01) (Munro, J.)

For purposes of conferring jurisdiction over foreign corporations under the Longarm Statute, internet advertisement on the world wide web or advertisements in magazines with worldwide circulation do not constitute repeatedly soliciting business in Connecticut.

Connecticut's Longarm Statute is 33-929(f).

#### SPECIAL DEFENSES

**893. Special defense must contain factual allegations.**

*Cluney v. Regional School District No. 13*, 27 CLR 415 (9/4/00) (Gordon, J.)

A special defense cannot merely contain the legal conclusion that the complaint fails to state a claim upon which relief may be granted. It must contain factual assertions to support the claim.

**894. Exclusive remedy provision of the workers' compensation act must be raised by special defense, not motion to dismiss.**

*Hubbard v. Powell*, 27 CLR 453 (9/11/00) (Dyer, J.)

**895. Summary judgment cannot be granted on a particular special defense.**

*Condor Capital Corp. v. Michaud*, 27 CLR 697 (10/23/00) (Peck, J.)

**896. Defense of governmental immunity must be pleaded as special defense.**

*Brown v. Acorn Acres, Inc.*, 28 CLR 24 (11/6/00) (Martin, J.)

**897. Sudden emergency may be asserted as special defense to a negligence complaint.**

*Kiewlen v. Mallison*, 28 CLR 565 (2/26/01) (Levine, J.)

Even though a general denial is sufficient to permit the submission of evidence that the defendant's conduct was a non-negligent response to a sudden emer-

gency, the court permitted the defendant to plead the doctrine of sudden emergency as a special defense.

**898. Res judicata must be raised as special defense.**

*Dixon v. Coughlin*, 28 CLR 608 (3/5/01) (Silbert, J.)

**899. Duty to mitigate damages may be raised as special defense to breach of contract action.**

*Profitec, Inc. v. FKI Industries, Inc.*, 28 CLR 619 (3/5/01) (Devlin, J.)

**801A. Foreign corporate plaintiff's lack of required certificate to transact business must be raised as special defense.**

*Furman Lumber, Inc. v. American Modular Corp., LLC*, 29 CLR 317 (5/21/01) (Kremski, J.T.R.)

A defense that an out-of-state corporate plaintiff lacked the required certificate of authority from the Secretary of State to transact business in Connecticut in violation of §33-121(a) cannot be asserted at trial unless previously raised as a special defense.

## STANDING TO SUE

**802A. Trade name is not a legal entity and therefore has no standing to sue.**

*GMA Yacht Sales v. Skagit Marine Dist. Inc.*, 28 CLR 227 (12/11/00) (Skolnick, J.)

A trade name is not a legal entity. It therefore has no standing to sue. Rather, the suit must be brought in the name of the owner of the trade name, d/b/a the trade name.

**803A. Action on behalf of limited liability company must be brought in the name of the company, not in the name of individual members.**

*Crozier v. Gattoni*, 28 CLR 320 (1/8/01) (Doherty, J.)

**804A. Capacity to sue must be raised by special defense rather than motion to dismiss.**

*Advanced Technology Enterprises v. Surecomp Services*, 28 CLR 549 (2/19/01) (Karazin, J.)

A challenge to the capacity of a corporation to maintain an action based on its failure to obtain a certificate of authority to transact business must be raised by special defense, rather than motion to dismiss.

## SUMMARY JUDGMENT

**805A. Requirement that a memorandum be filed to support a motion for summary judgment is mandatory.**

*Fenyves v. Trumbull Probate Court*, 27 CLR 17 (6/19/00) (Moran, J.)

The requirement that a memo of law be filed to support a motion for summary judgment is mandatory, not directory, because without a memorandum the opposing party does not have an opportunity to rebut the legal claims being relied upon by the movant. The court denied the motion for summary judgment based solely on the movant's failure to file a supporting memorandum.

**806A. Rear-ending plaintiff's vehicle while brushing off spider warrants summary judgment.**

*Colby v. Parrillo*, 27 CLR 29 (6/19/00) (Devlin, J.)

This was a motor vehicle case in which the defendant acknowledged striking the rear of the plaintiff's vehicle while attempting to brush off a spider. The court held that the only conclusion any jury could reach was that averting one's attention to brush a spider off one's lap while operating a vehicle in traffic constituted negligence.

**807A. Rebuttal of statutory presumption of agency can be raised on summary judgment motion.**

*Curran v. Duncan*, 28 CLR 640 (3/12/01) (Adams, J.)

The statutory presumption that an agency relationship exists between the operator and owner of a motor vehicle, §52-183, can be rebutted by motion for summary judgment.

**808A. Uncertified deposition transcript can support summary judgment in absence of contradictory evidence.**

*Harper v. Fitness & Nutrition, Inc.*, 29 CLR 15 (4/2/01)

## WAIVER OF LIABILITY

**809A. Waiver of liability signed by adult customer of roller skating rink held enforceable.**

*Salvatore v. 5 D's, Inc.*, 28 CLR 714 (3/26/01) (Doherty, J.)

## WRONG DEFENDANT OR PLAINTIFF STATUTE

**810A. Wrong plaintiff statute permits consideration of a motion**

**to substitute parties even though motion to dismiss pending.**

*Nygren v. Steier*, 28 CLR 699 (3/19/01) (Doherty, J.)

The Practice Book provision and the statute authorizing the substitution of a new plaintiff in an action brought in the name of a wrong party, §9-20 of the Practice Book and §52-109 of the General Statutes, includes an implied grant of jurisdiction for the limited purpose of considering a motion for substitution. A motion for substitution can therefore be ruled on while a motion to dismiss for lack of jurisdiction is pending, notwithstanding the rule that a court can take no further action in the matter until the jurisdictional challenge has been resolved.

The mistake in commencement of a tort action for injuries to an individual who has filed bankruptcy can be cured by substituting the trustee in the bankruptcy proceeding.

**811A. Wrong Defendant Statute does not save a claim filed while the prior action was still pending.**

*Billerback v. Cerminara*, 29 CLR 267 (5/14/01) (White, J.)

The Wrong Defendant Statute authorizes claims to be filed within one year of an action dismissed for failure to name the correct defendant. The court held it does not apply if the prior action has not yet been dismissed at the time the second action is filed, or if the prior action was dismissed for dormancy rather than for a failure to properly name the defendant. Even if the earlier action was allowed to become dormant because the plaintiff realized that the defendant was not properly named, and the second action was filed as soon as discovery was made, the action had to be dismissed.

Plaintiff seeking to utilize the wrong defendant statute must obtain a judicial determination that summary judgment has been entered, or the case dismissed or stricken, because the wrong defendant has been sued.

**812A. Wrong Defendant Statute does not save case originally brought against wrong person due to legal rather than factual error.**

*Isidro v. State*, 62 Conn. App. 545 (2001)

Section 52-593, the Wrong Defendant Statute, authorizes the bringing of a new action within one year of a judgment of

an action which failed because the wrong person was named as defendant. The court held that the statute does not apply to an action dismissed because the plaintiff named the wrong defendant due to a legal error, rather than a factual mistake. The original action against the state employee who was operating a state-owned vehicle which collided with the plaintiff was dismissed based on the state employee's sovereign immunity. The second action was brought against the state under the statutory waiver of immunity.

## WITHDRAWAL OF ACTION

**813A. Plaintiff has absolute right to withdraw a complaint at any time prior to the commencement of a hearing on the merits.**

*AMBA Realty Corp. v. Kochiss*, 28 CLR 77 (11/20/00) (Stodolink, J.)

Section 52-80 permits a withdrawal just before the commencement of a hearing on the merits. Plaintiff is entitled to do this, even if the court believes that the withdrawal would be contrary to the interest of judicial economy.

A contrary decision is *Byrd v. Leszczynski*, 28 CLR 88 (11/20/00) (Berger, J.). Judge Berger reasoned that the court should reinstate the action after the plaintiff withdrew and refiled the complaint. The plaintiff did so to avoid a ruling prohibiting the submission of expert testimony because of a late disclosure. The opinion appears to be contrary to Appellate Court opinions.

**814A. Plaintiff cannot avoid an adverse ruling by withdrawing a complaint and commencing a new action.**

*Zamkov v. Sawyer*, 28 CLR 484 (2/5/01) (Booth, J.)

## 8.5. JURY ISSUES

### JURY QUESTIONNAIRE

**8501. Criminal defendant's request to have a questionnaire completed by all potential jurors to facilitate an anticipated claim of racial bias denied.**

*State v. Colon*, 27 CLR 288 (8/7/00) (D'Addabbo, J.)

The defendant sought to have a supplemental questionnaire filled out by all potential jurors as a means of facilitating an anticipated claim of unequal racial representation. The motion was denied, but the approach would appear to apply to civil cases, especially complex litigation

involving controversial issues.

The court reasoned that the request of the defendant was beyond the scope of information that is provided for and allowed by §51-232(c) requiring mandatory production of information. In addition, the court felt procedures are available to the defense, other than by mandating production of this information, to address any claims that may be raised along these lines.

The ruling would appear to be completely discretionary, and the idea of supplemental jury questionnaires has application to civil cases.

### NO RIGHT TO JURY TRIAL

**8502. No right to jury trial under Connecticut Franchise Act.**

*Hartford Electric Supply Co. v. Allen-Bradley Co.*, 28 CLR 447 (2/5/01) (Satter, J.T.R.)

### OBJECTION TO JURY CLAIM

**8503. Proper procedure to challenge a jury claim is objection to jury claim, not a motion to strike.**

*First Union National Bank v. Moore*, 27 CLR 312 (8/14/00) (Silbert, J.)

This case holds that since the 1996 repeal of the Practice Book provision authorizing use of a motion to strike to remove a case from the jury list, an objection to jury trial claim is the proper procedure to challenge a jury claim. However, an opponent's failure to object to the use of a motion to strike waives the issue.

See §8507 in "Time Limit for Jury Claim" section below for a case suggesting the use of common law motion to erase case from docket.

### POLLING THE JURY

**8504. Rule granting the parties a right to have each juror polled individually before jury is discharged is mandatory, not subject to harmless error analysis.**

*State v. Pare*, 253 Conn. 611 (2000)

A jury is "discharged" within the meaning of the criminal procedural rule granting a right to have each juror polled individually upon request made before the jury has been "discharged," §42-31, only after the jury has disbursed or been subjected to contact with persons other than jurors, thereby creating the possibility of outside influences.

The court held in this case that it was error for the trial court to refuse to recall

the jury to comply with the defendant's request for individual polling after the jury had been excused from the courtroom but asked to remain convened in the jury room until the judge could join them for an exchange of comments.

The opinion discusses only the criminal rule relating to juror polling, but appears to apply to civil cases because the civil rule, §16-32, has the same language. A party is entitled to poll the jury before the jury is discharged.

The decision also holds that a request for polling can be made at any time before the jury is discharged, and a request made before the verdict is returned is not premature and need not be renewed.

### POST-VERDICT CONTACT WITH JURORS

**8505. Attorney may contact jurors post-verdict without permission or supervision of court, but supervision strongly recommended to avoid ethics violations.**

*Struski v. Big Y Foods, Inc.*, 28 CLR 172 (12/4/00) (Stevens, J.)

The court held that an attorney may conduct post-verdict communications with jurors without court permission or supervision to determine whether the jury had been influenced by improper or extraneous factors. However, no questions may be asked concerning the jury's mental impressions or deliberative process.

The opinion strongly urges that court permission be obtained before contacting jurors, and that any inquiry be conducted pursuant to court supervision in order to avoid committing ethical violations by asking questions that may be deemed to be harassing or embarrassing.

The opinion contains an excellent discussion of the law related to post-verdict jury contact, and sets out in an appendix a list of disclosures which should be made before questioning a juror.

### QUALIFICATIONS FOR JURY SERVICE

**8506. Statute disqualifying from jury service any person unable to speak and understand English not unconstitutional.**

*State v. Colon*, 27 CLR 287 (8/7/00) (D'Addabbo, J.)

Section 51-217(3), requiring a juror to be able speak and understand English, is not unconstitutional as applied to a Hispanic criminal defendant.

## TIME LIMIT FOR JURY CLAIM

### 8507. New jury claim not required when new issues are added by amended pleading.

*Fletcher v. Mead School for Human Development, Inc.*, 28 CLR 667 (3/19/01) (Tierney, J.)

This case holds that a new jury claim is not required when new issues are added by amended pleading. The court noted that the proper procedure to challenge whether a party is entitled to a jury trial is a common law motion to erase the case from the jury docket, since the Practice Book provision authorizing use of a motion to strike to have the case removed from the jury docket was repealed in 1996.

For a different procedural suggestion, see §8503 in "Objection to Jury Claim" section above.

## WAIVER OF JURY TRIAL

### 8508. Jury waiver clause in commercial mortgage note held enforceable.

*First Union National Bank v. Moore*, 27 CLR 312 (8/14/00) (Silbert, J.)

Jury waiver clause in a mortgage note is enforceable even though the obligors were unrepresented at the loan closing, where unaware of the significance of the waiver, had no opportunity to negotiate the waiver, and were advised by the lender that no attorney was needed for the transaction.

## VERDICT

### 8509. Court construes verdict forms returned for both the plaintiff and the defendant as an award for the plaintiff on the issue of liability, and for the defendant on the issue of damages.

*Lapost v. Mayo*, 29 CLR 233 (5/7/01) (Hickey, J.)

## 9. APPELLATE PRACTICE AND PROCEDURE

### ALTERNATE GROUND TO AFFIRM

#### 901. Appellate or Supreme Court can affirm ruling on motion to strike granted on the wrong ground so long as there is a basis for granting the motion.

*Gazo v. Stamford*, 255 Conn. 245 (2001)

The court relied on an alternate ground to affirm an appeal from the granting of a motion to strike. The court held that it can affirm the granting of a

motion on any ground raised in the motion, even if the motion was improperly granted by the trial court on grounds not raised.

## AMICUS CURIAE

### 902. Amicus curiae appearances and the filing of briefs not permitted in trial court.

*Finley Associates, Inc. v. Crossroads Investment Co.*, 29 CLR 138 (4/23/01) (Aurigemina, J.)

There is no provision in the Practice Book permitting an amicus curiae appearance and the filing of an amicus brief in the superior court. Normally there is no need for such an involvement because the proceedings at the trial level, having no precedential value, affect only the parties to the action.

The case involved the Ethics Commission seeking amicus status, which the court did not permit.

## APPEALABILITY

### 903. Attorney cannot directly appeal sanctions imposed for improperly filing amicus brief.

*Leydon v. Greenwich*, 57 Conn. App. 727 (2000)

An attorney cannot file a direct appeal from sanctions imposed for having improperly filed an amicus brief without first obtaining court permission. The right to appeal a trial court decision pursuant to §52-263 is limited to parties to the action.

Peter Thalheim attempted to appeal from the trial court's order to show cause and the court's imposition of sanctions against him in the underlying case, *Leydon v. Greenwich*, 57 Conn. App. 712, cert. granted 254 Conn. 904 and 905 (2000). Because he was not a party to the underlying action, the Appellate Court held it lacked jurisdiction and dismissed the appeal.

The court heard the underlying case on March 26, 1998. On March 23, 1998 the court received by hand delivery a 23 page amicus memorandum of law in opposition to the relief claimed by the plaintiff, signed by Attorney Thalheim. Although Thalheim is an attorney admitted to practice in this state, the brief did not identify him as purporting to represent any party in the action, nor did it represent that he had filed an appearance in the case or had been granted permission to file an amicus curiae brief.

Shortly after the court rendered its decision on July 8, 1998 it ordered Thalheim to appear and show cause why he should

not be sanctioned for filing an amicus brief without following the Rules of Practice. The court held that an amicus curiae brief could not be filed without first obtaining permission from the court. Thalheim disagreed with this order, and the Appellate Court did not decide it, in view of its disposition dismissing the appeal.

The Appellate Court's decision is based on *State v. Salmon*, 250 Conn. 147, 167 (1999) in which the court held that only an actual party to an underlying action may file an appeal.

Thalheim's remedy was by writ of error, rather than direct appeal.

### 904. Denial of a motion to dismiss based on sovereign immunity can be immediately appealed.

*Shay v. Rossi*, 253 Conn. 134 (2000)

The denial of a motion to dismiss based on sovereign immunity is a "final judgment" which can be immediately appealed. The court reasoned that sovereign immunity provides protection from suit as well as from liability.

### 905. Denial of a motion to intervene is a final judgment which can be appealed.

*King v. Sultar*, 253 Conn. 429 (2000).

The denial of a motion to intervene is a final judgment within the meaning of the statute authorizing appeals, §52-263, and therefore can be immediately appealed.

Although an appeal can only be brought by a "party" an unsuccessful movant for permission to intervene has sufficient party status to appeal the denial of a motion to intervene.

The opinion also holds that an appellate court that reverses a trial court ruling may go on to consider additional issues presented but not ruled on by the trial court.

### 906. Denial of a motion for summary judgment cannot be raised on appeal following a trial on the merits.

*Gilbert v. Middlesex Hospital*, 58 Conn. App. 731 (2000)

### 907. Denial of motion to dismiss post-judgment alimony motion not appealable.

*Rosenfield v. Rosenfield*, 61 Conn. App. 112 (2000)

Motion for post-judgment alimony modification pursuant to §46b-82 in the absence of a change of circumstances presents a question of statutory authority to hear the motion, rather than subject

matter jurisdictional issue.

**908. Denial of collateral estoppel claim is immediately appealable.**

*Lafayette v. General Dynamics Corp./Electric Boat Division*, 255 Conn. 762 (2001)

The plaintiff claimed that the defendant was collaterally estopped by a determination in a prior matter from contesting allegations in the plaintiff's complaint. This issue is immediately appealable, even though the ruling does not result in a final judgment, but rather permits the matter to proceed to trial.

The decision holds that a determination by an administrative judge awarding benefits under the federal Longshore and Harbor Worker's Compensation Act to a claimant whose spouse died from a work-related illness collaterally estops the employer from litigating in a subsequent proceeding seeking widow's benefits under the Workers' Compensation Act the causal relationship between the decedent's death and the employment.

The employer had argued that the estoppel should not apply because the plaintiff had a more relaxed burden of proof in the federal proceeding than under the Workers' Compensation Act. However, the court held that the presumption in the federal proceeding that once a plaintiff makes out a prima facie case for benefits the claim is presumed to be covered, was successfully rebutted by substantial evidence provided by the employer, so that the determination was ultimately decided under the traditional "preponderance of the evidence" standard.

### Discovery Orders

**909. Discovery sanction orders are not "final judgments" and therefore are not appealable.**

*Rosa Brothers, Inc. v. Mansi*, 61 Conn. App. 412 (2001)

A discovery sanction order against a party is not a "final judgment" and therefore cannot be the subject of an interlocutory appeal. The trial court order limited the defendant's testimony as a sanction for having refused to answer deposition questions in reliance on the fifth amendment privilege against self-incrimination.

### ARTICULATION

**910. Articulation not essential for appeal from a decision accompanied only by a brief citation to legal authority if the ruling is based solely on an issue of law.**

*Community Action for Greater Middlesex County, Inc. v. American Alliance Insurance Co.*, 254 Conn. 387 (2000).

A trial court's brief reference to a legal authority as an explanation for an endorsement ruling granting a motion for summary judgment provides a sufficient record for appeal, provided the ruling is based solely on legal grounds. The opinion reverses the Appellate Court's refusal to consider the appeal because the appellant had failed to request an articulation of the trial courts cursory endorsement ruling.

**911. Motion for review essential to preserve claim made in motion for articulation.**

*Wendover Financial Services Corp. v. Connelly*, 61 Conn. App. 244 (2000)

The trial court denied the motion for articulation. The plaintiff failed to file a motion for review from that ruling. The Appellate Court held the review pursuant to §66-7 of the practice book gives the Appellate Court the authority to direct any action deemed proper including the power to direct the trial court to articulate. Failure to file a motion for review does not preserve the issue raised in the motion for articulation.

### DECISIONS NOT OFFICIALLY REPORTED

**912. Citation in a brief to a superior court decision published only in a private publication must be supported by a copy attached as an exhibit to a brief.**

*Murphy v. Commissioner of Motor Vehicles*, 60 Conn. App. 526 (2000)

Section 67-9 requires providing the court with a copy of the opinion in the appendix to the brief if the citation is by reference solely to a private publication. This appears to be commonly overlooked, as the court, although it considered the opinion in spite of the party's failure to strictly comply with the Practice Book Rule, admonished counsel to follow the rule.

### PLAIN ERROR

**913. Failure to charge on burden of proof on mitigation of damages is plain error.**

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

If a jury instruction on mitigation of damages is given, an instruction on the burden of proof with respect to mitigation must also be given. Failure to do so is plain error.

### REMAND

**914. New trial utilizing evidence from first trial improper. Completely new trial must be held on remand.**

*Schiappa v. Ferrero*, 61 Conn. App. 876 (2001)

Attorney trial referee's report was rejected because it was not filed within 120 days as required by §19-4. On remand for "a new trial" as authorized by §19-17 of the Practice Book, a completely new trial must be conducted. It was error for the trial court to remand with instructions that evidence from the original trial should be incorporated into the record of the second trial in order to avoid duplication.

### STANDING

**915. Committee appointed in partition sale not a party to defend court's judgment on appeal.**

*Mitchell v. Silverstein*, 28 CLR 430 (1/29/01) (Sferrazza, J.)

A committee appointed by the court to partition property and conduct a judicial sale is not a party to the partition action with legal interests, and therefore may not intercede to defend the trial court's judgment on appeal.

**916. Municipality has no standing to challenge an administrative regulation.**

*Canterbury v. Commissioner of Environmental Protection*, 62 Conn. App. 816 (2001)

A municipality does not have standing to challenge an administrative agency regulation enacted pursuant to an authorizing statute.

### STAYS

**917. Order for weekly payments in satisfaction of a judgment automatically stayed on appeal.**

*Bergen v. Belfonti*, 29 CLR 130 (4/23/01) (West, J.)

### WAIVER

**918. Upon the granting of a motion to strike, a litigant may waive his right to claim error in the ruling on appeal if no action is taken.**

*Tuthill Finance v. Greenlaw*, 61 Conn. App. 1, 8-9 (2000)

The trial court granted a motion to strike on October 28, 1991. The plaintiff neither moved for judgment on the stricken count, nor attempted to reserve its appeal pursuant to the rules then in effect requiring the filing of a notice of ap-

peal. Because the plaintiff did nothing to pursue its unpreserved appeal on the granting of the motion to strike, the court held that it waived the right to claim on appeal that the granting of the motion was improper.

The court's ruling is most extraordinary, as the rule in effect at the time (4002(a)) applied only to judgments. In effect the decision says that if the plaintiff doesn't move for judgment striking a count in his own complaint, he may waive his right to appeal.

## 10. DAMAGES

### CHILD'S MEDICAL EXPENSES

#### 1001. Both parent and child can sue for recovery of the child's medical expenses.

*Mercede v. Kessler*, 29 CLR 246 (5/14/01) (Karazin, J.)

Section 52-204, the statute barring recovery by a parent for the costs of providing medical care to an injured child if the recovery is also obtained by the child, bars double recovery, but does not bar the simultaneous prosecution of the claims. Parents may therefore seek recovery for medical expenses in a court brought on behalf of the child, and may seek alternative recovery in a separate count brought on their own behalf.

### COLLATERAL SOURCE

#### 1002. Credit to plaintiff for the cost of medical insurance coverage is the full annual premium paid for the entire policy year in which the injury was incurred.

*Girardi v. York*, 28 CLR 10 (11/6/00) (Sferrazza, J.)

Accord: *Jones v. Riley*, J.D. of Hartford, #CV-00-0595076 (Berger, J.) (5/16/01).

#### 1003. No deduction permitted for collateral source payments from a court award of damages that expressly excluded recovery of insurance provided medical expenses.

*Ottiano v. Shetucket Plumbing Supply Co.*, 61 Conn. App. 648 (2001)

This is a personal injury action tried to the court. No deduction for collateral source payments was held to be permitted under §52-225a under the circumstances, as the award of damages expressly excluded any recovery of medical expenses.

#### 1004. Defendant entitled to deduction for all collateral source payments, even though the economic damages awarded by the jury are less than the plaintiff's claimed medical expenses.

*Jones v. Kramer*, 29 CLR 213 (5/7/01) (Stodolink, J.T.R.)

The court held that the defendant is entitled to the full amount of collateral source benefits received by the plaintiff, even if the award of damages was less than the plaintiff's claimed medical expenses. There was no special interrogatory in this case used to clarify which of the claimed expenses had been disallowed by the jury.

The plaintiff argued that the defendant has the burden of establishing that each collateral source payment was allocable to the damages included in the jury's award. The court rejected this.

### LOSS OF CONSORTIUM

#### 1005. Fiancée cannot recover for a loss of consortium.

*Dognin v. Black*, 27 CLR 144 (7/10/00) (Arnold, J.)

A person who was the plaintiff's fiancée at the time of an accident cannot recover for a loss of marital consortium, even if the couple married after the accident and before suit was commenced.

### MITIGATION OF DAMAGES

#### 1006. Instruction on mitigation of damage must be accompanied by an instruction on the burden of proof on the mitigation issue.

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

If jury instruction on mitigation of damages is given, an instruction on who has the burden of proof with respect to mitigation must also be given. The trial court's failure to give an accompanying burden of proof instruction constitutes plain error, and therefore can be raised on appeal without objecting at trial.

Remand was to damages only.

### MULTIPLE DAMAGES—§14-295

#### 1007. Vehicle owner is not vicariously liable for statutory multiple damages.

*Little v. Bonesse*, 27 CLR 458 (9/11/00) (Levin, J.)

Section 14-295, imposing multiple damages based on reckless conduct in the operation of a vehicle by another is not imposed on the owner of a motor vehicle, who is vicariously liable under §52-183.

The opinion, contrary to the majority of cases, also holds that a claim for multiple damages must be supported by specific factual allegations to support the conclusion that the defendant's conduct constituted reckless or wanton misconduct.

#### 1008. Employer liable for multiple damages under §14-295.

*Johnson v. Campo*, 27 CLR 598 (10/9/00) (Hurley, J.)

An employer is vicariously liable for multiple damages under §14-295 for injuries caused by an employee's reckless violation of certain motor vehicle statutes. The multiple damage statute imposes liability on "any party" rather than on "any operator," and §52-183 specifically refers to vicarious liability for reckless as well and negligent operation of a motor vehicle.

#### 1009. Statutory cause of action for multiple damages under §14-295 can co-exist with common law action for punitive damages for reckless and wanton operation of a motor vehicle.

*Landers v. Schwartz*, 28 CLR 147 (11/27/00) (Rubinow, J.)

The decision also holds that the employer of the operator can be vicariously liable for multiple damages under §14-295, and that punitive damages and statutory multiple damages can be recovered under a claim for loss of consortium.

#### 1010. Multiple damages under §14-295 may be recovered by a party claiming bystander emotional distress caused by witnessing injuries to close relative in motor vehicle accident.

*Eng v. Sheehy*, 28 CLR 719 (3/26/01) (Melville, J.)

#### 1011. Employer vicariously liable for multiple damages based on reckless operation of motor vehicle by employee.

*Jennings v. Vega*, 29 CLR 87 (4/16/01) (D'Andrea, J.)

Section 14-295 damages are collectible against the employer, who may be vicariously liable for the injuries inflicted by his employee's reckless operation of an employer-owned motor vehicle while the employee is in the course of his employment.

## 11. EVIDENCE ADMISSIONS

### 1101. Statements in stricken pleadings admissible as evidentiary admissions, even statements in a stricken apportionment complaint.

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

Statements made in a stricken pleading are admissible as evidentiary admissions by the party who made the statements, including statements in a stricken apportionment complaint. An allegation in a third-party apportionment complaint by the manufacturer of a product that the plaintiff's injuries were caused by a defect which arose after the product had left the manufacturer's control are admissible at trial between the plaintiff and the manufacturer to establish the existence of the defect, even though the apportionment complaint was later stricken and even though the allegations were meant to be hypothetical.

The court noted that whether the statements were hypothetical is relevant to weight, not admissibility. The opinion is also useful for its description of evidentiary admissions and its explanation that any statement by a party is admissible regardless of whether the statement is made in a judicial proceeding, and regardless of whether the statement is against the declarant's interest.

## CREDIBILITY

### 1102. Reputation for being a prostitute is not relevant to the credibility of a witness.

*State v. Lambert*, 58 Conn. App. 349, cert. denied 254 Conn. 915 (2000)

A reputation for being a prostitute is not relevant to the credibility or veracity of a prosecution witness. It was therefore not error for the trial court to refuse to permit questioning intended to reveal that a prosecution witness was a prostitute.

### 1103. Chiropractor's lack of disciplinary history inadmissible in malpractice action.

*McCaffrey v. Puckett*, 784 So.2d 197 (Miss. 2001), 2001 WL 463336

Malpractice action vs. chiropractor claiming manipulation caused herniated disc. Court held that admission of character evidence relating to lack of disciplinary history was reversible error. The court reasoned that it would have been clearly wrong under the rule relating to character evidence to offer evidence that

the chiropractor had been disciplined. The converse is just as improper. Erroneous admission of evidence bolstering the defendant's character was reversible error.

## DEAD MAN STATUTE

### 1104. Testimony admissible under the Dead Man Statute, §52-172, provided one of the parties to the action is acting in a capacity as a representative of the decedent's interest.

*Pender v. Matranga*, 58 Conn. App. 19 (2000)

Testimony is admissible as an exception to the hearsay rule under Connecticut's Dead Man Statute, §52-172, only if the action is by or against the party acting in a capacity as a representative of the deceased's interest. In an action between adjoining property owners to establish the existence of an easement, statements by the deceased grantor to a family member not a party to the action concerning the grantor's intent with respect to a conveyance of one of the parcels is not admissible under the statute.

## EFFECT OF DRUGS OR ALCOHOL

### 1105. Jury may be instructed to disregard witness's admission to smoking marijuana while observing a crime if no testimony is elicited as to effect of the marijuana on the witness.

*State v. Green*, 62 Conn. App. 217 (2001)

The decision would apply on the civil side. Besides evidence that the witness or party had been drinking or doing drugs, there must be additional testimony that it had an effect on the witness. In this case the court held that a jury may be instructed not to consider the effects of marijuana on the reliability of the testimony of a witness who admitted to smoking marijuana before observing the events in question because he was not questioned as to the effect of the marijuana on his ability to observe.

## EXPERT TESTIMONY

### 1106. Cases in which the expert has testified in the preceding four years must be disclosed. Furnishing of work product material to the expert renders its subject to discovery.

*Vargas v. Yale New Haven Hospital*, 27 CLR 135 (7/10/00) (Owens, J.)

A party may obtain through interroga-

tories information concerning all instances in which the opponent's expert witness has testified in other proceedings during the past four year period, including copies of transcripts of the testimony, even though the Practice Book rules on their face appear to limit the opponent's obligation to providing such information at a deposition of the witness. The opinion also holds that a document otherwise protected by the work product privilege is subject to discovery by the opposing party if provided to an expert for use in formulating the expert's opinion.

### 1107. Expert testimony needed to establish negligence of professional ski instructor.

*Civitello v. Ski Sundown, Inc.*, 27 CLR 301 (8/14/00) (Holzberg, J.)

Expert testimony is required to establish that it was negligent for a professional ski instructor to permit new students to take lessons without using poles and to fail to provide instructions concerning the proper methods for stopping and falling while skiing.

### 1108. Expert testimony unnecessary to support jury award as to specific amount of future expenses.

*Szymczak v. Canessa*, 27 CLR 608 (10/9/00) (Mottlesse, J.)

A jury award for future medical expenses may be based on expert testimony that a need for future treatment was likely, and testimony as to the actual expenses incurred to date. Specific expert testimony as to the amount of future expenses likely to be incurred is not required.

### 1109. Ex parte communication between court-appointed expert witness and counsel does not require exclusion of the testimony. Cross-examination to impeach is the objecting party's only remedy.

*In re David W.*, 254 Conn. 676 (2000)

Although it is improper for a court-appointed expert witness to have ex parte contact with counsel for any of the parties without court approval, or to act as an expert witness for one of the parties on a separate but related issue in the same case, neither the ex parte contact nor serving dual roles requires a per se exclusion of the expert's testimony. Rather, the only remedy available to the objecting party is to raise the improprieties in

cross-examination to impeach the expert witness's testimony.

In a parental termination matter in which the court-appointed psychiatrist had ex parte contact with counsel for the Department of Social Services, and also served as an expert for the Department in the same case, the opportunity to cross-examine the witness concerning those improprieties was the parent's only remedy. The opinion reverses the Appellate Court holding that the psychiatrist's testimony must automatically be excluded.

**1110. Disclosure of expert witness should provide sufficient notice of witness's proposed testimony.**

*Norrie v. Bristol Hospital*, 28 CLR 323 (1/8/01) (Sheldon, J.)

Disclosure of a witness's proposed testimony as required by §13-4(4) may result in preclusion if disclosure is inadequate.

**1111. Medical malpractice plaintiff can elicit expert opinion testimony during deposition of defendant's physician-employee.**

*Kekelik v. Hall-Brooke Hospital*, 29 CLR 136 (4/23/01) (Tierney, J.)

A medical malpractice plaintiff deposing a defendant's physician-employee can elicit testimony concerning the standard of care provided to the plaintiff, even if the employee has not been disclosed as an expert by either party.

**1112. Horizontal gaze nystagmus test (HGN) constitutes scientific evidence and therefore requires a foundation for admissibility under *State v. Porter*.**

*State v. Russo*, 62 Conn. App. 129 (2001)

At trial the state called the police officer to testify concerning his observations of the defendant's demeanor and performance on sobriety tests, including the HGN test. The defendant objected to the introduction of the officer's testimony regarding the HGN test and its results because the state did not establish the proper foundation for the admission of scientific evidence. The trial court permitted the testimony without a foundation, stating 62 Conn. App. at 133:

HGN testing was not scientific evidence and stating: "I'm going to allow the officer to testify [about the HGN testing because] I feel that it's . . . not really, in my book, a really classic scientific test."

The Appellate Court held that this was an abuse of discretion. The HGN test constitutes scientific evidence, was not overruled in *State v. Porter*, 241 Conn. 57 (1997). However, the jury heard other evidence from which it reasonably could have found that the defendant was intoxicated, so that the admission of the improper evidence was held harmless.

**ILLEGALLY OBTAINED EVIDENCE**

**1113. The Supreme Court decision that illegally obtained evidence is admissible in administrative proceeding held retroactive.**

*Bjunes v. DMV*, 27 CLR 226 (7/31/00) (Cohn, J.)

The Supreme Court decision in *Fishbein v. Kozlowski*, 252 Conn. 38 (1999) holding that illegally obtained evidence is admissible in a license suspension hearing is retroactive to an arrest made before the *Fishbein* decision was released. Accordingly, evidence obtained at a police checkpoint at which the police were stopping all vehicles is admissible at a DWI suspension hearing, regardless of whether the checkpoint was constitutional, and regardless of when the stop occurred.

**LIMITED PURPOSE ADMISSION**

**1114. Trial court may not admit a document for a limited purpose, and then reverse itself post-trial to permit use of the document for additional purposes.**

*Urich v. Fish*, 58 Conn. App. 176 (2000)

It was error for the trial court to admit into evidence for a limited purpose a document objected to on grounds of hearsay, and then make a post-trial ruling reversing that limitation to permit the use of the document for additional purposes. The procedure denied the opposing party the opportunity to address at trial the use of the document for the additional purposes.

**PRIVILEGES**

**[Attorney-Client Privilege appears in §12]**

**1115. Statutory exceptions to the privilege for communications with a psychiatrist are the exclusive exceptions. No others are allowed.**

*Falco v. Institute of Living*, 254 Conn. 321 (2000)

The exceptions specifically listed in the psychiatrist's privileged communica-

tions statute, §52-146d, are the only exceptions to the prohibition of disclosure. There can be no judicially created exception permitting disclosure if a court believes that the merits of discovery outweigh the statutory policy in favor of nondisclosure. A psychiatric hospital, therefore, may not be required to divulge in an action on a bill of discovery the name and address of a patient needed for the prosecution of a claim for assault and battery. The decision reverses the Appellate Court opinion reported at 50 Conn. App. 654.

The opinion also holds that statutory privileges limiting discovery do not constitute a violation of the parties right to petition the courts, as guaranteed by Article First, Section 10 of the Connecticut Constitution.

**TELEPHONE CONVERSATIONS**

**1116. Statements made in a phone call must be authenticated by providing information imparted during the phone call that verifies the identity of the speaker.**

*State v. Valentine*, 255 Conn. 61 (2000)

Evidence of a prior inconsistent statement made during a phone conversation must be authenticated by evidence verifying the identity of the speaker. The Court held that it was not error for the trial court to refuse to admit as prior inconsistent statements, comments made by a prosecution witness in a call to a defense investigator because the investigator had failed to elicit information that would assure that the call was from the person purporting to make the call.

**12. ATTORNEYS**

**APPARENT AUTHORITY**

**1201. An attorney does not have apparent authority to settle a client's case.**

*Windsor Housing Authority v. Fonthworth*, 27 CLR 386 (8/28/00) (Tanzer, J.)

An attorney's status as a representative of a client does not create apparent authority to authorize a settlement on behalf of the client. Accordingly a settlement agreed to by an attorney is not binding unless either authorized in advance, or later ratified by the client.

## ATTORNEY AS WITNESS

### 1202. Attorney can be subpoenaed to testify concerning the existence of an oral settlement agreement.

*Sandberg v. Sandberg*, 28 CLR 519 (2/12/01) (Gruendel, J.)

A party may subpoena an opponent's counsel to testify concerning the existence of an alleged settlement agreement between the two parties. The testimony should be limited to establishing the existence of a clear and unambiguous agreement in which the terms were not in dispute at the time the agreement was made. Moreover, the evidence must be presented to a judge different from the trial judge, so that improper evidence concerning settlement discussions is not heard by the trier of fact.

## ATTORNEY FEE AGREEMENTS

### 1203. Attorney fee agreement that fails to comply with requirement of Rules of Professional Conduct that fee agreement with new client be communicated within reasonable time of commencement of representation renders agreement unenforceable.

*Whitman Breed Abbott & Morgan LLP v. Heithaus*, 28 CLR 43 (11/13/00) (D'Andrea, J.)

A fee agreement that fails to comply with Rule 1.5(b) of the Rules of Professional Conduct, which requires that the basis for an attorney's fee be communicated to a client that the attorney does not regularly deal with within a reasonable time of commencing the representation, is unenforceable. The law firm unsuccessfully argued in this case that only fee agreements that failed to comply with a rule that has been incorporated into a statute, such as the prohibition of oral contingent fee agreements, are unenforceable as a matter of law.

### 1204. Original counsel can recover share of contingent fee earned by successor counsel even though the original contingent fee agreement was not reduced to writing.

*Gagne v. Vaccaro*, 255 Conn. 390 (2001)

The Supreme Court was persuaded by Judge Lavery's dissenting opinion in *Alan E. Silver, P.C. v. Jacobs*, 43 Conn. App. 184, cert. denied, 239 Conn. 938 (1996). It reversed the *Silver v. Jacobs* decision, as well as the *Perkins & Mario v. Annun-*

*ziata*, 45 Conn. App. 237, 241-242 (1997); and *Brunswick v. Safeco Ins. Co.*, 48 Conn. App. 699, 705, cert. denied, 247 Conn. 923 (1998).

At 255 Conn. 408 the Supreme Court held:

In this case . . . the party seeking to hide behind the violation of §52-251c, Vaccaro, is a third party who holds the fruits of the product of the oral contract between Aldrich [client] and Gagne [original attorney]. In our view, it would be a violation of our equity jurisprudence to allow Vaccaro to retain those fruits.

## ATTORNEY'S FEES

### 1205. Request for exorbitant fees may constitute a violation of Rules of Professional Conduct.

*Ham v. Greene*, 27 CLR 512 (9/18/00) (Levin, J.)

It is a violation of Rule 1.5 of the Rules of Professional Conduct, requiring a lawyer's fee to be reasonable, and Rule 3.3(a) (1), providing that a lawyer shall not make a false statement to a tribunal, for an attorney representing a prevailing party in a civil rights case to submit an application that requests exorbitant attorney's fees. The opinion strongly criticizes the plaintiff's attorney in this case for overstating his time as well as his experience in civil rights cases.

### 1206. Maximum permitted attorney's fee in workers' compensation is 20 percent. The sum from which 20 percent is computed must not include medical bills paid by either the employer or the employee.

*Day v. Middletown*, 59 Conn. App. 816, cert. denied 254 Conn. 945 (2000)

Workers' Compensation Commission fee guidelines require that medical bills paid by the claimant be subtracted from a settlement amount before determining the maximum attorney's fee of 20 percent. This requires a reduction for the medical bills paid by the employer on behalf of the employee, as well as the bills paid directly by the employee.

### 1207. Client's consent to a division of fees between current and former lawyers cannot be retracted after case terminates.

*Pinney, Payne, Van Lenten, Burrell, Wolfe & Dillman, P.C. v. Heering*, 28 CLR 204 (12/11/00) (Adams, J.)

## CHARGING LIENS

### 1208. Attorneys charging lien takes priority over all creditors, even secured creditors.

*Kubeck v. Cossette*, 28 CLR 35 (11/6/00) (Shortall, J.)

An attorney's common law charging lien against a recovery obtained on behalf of a client under a contingent fee agreement takes priority over other creditors of the client, even though no formal assignment was made by the client to the attorney, and even if the other creditor claims are secured.

Accord: *McGannon v. Kramer*, 28 CLR 268 (12/18/00) (Adams, J.)

## COMMUNICATIONS WITH REPRESENTED PARTIES

### 1209. Rule 4.2 of the Rules of Professional Conduct does not apply to communications with former employees of a represented party.

*Shoreline Computers, Inc. v. Warnaco, Inc.*, 27 CLR 30 (6/19/00) (Alander, J.)

Rule 4.2 restricts direct communication between opposing counsel and a represented party. The rule applies to communications with an employee of a represented party who is in a position to take action that may be binding on the employer. The rule does not apply to communications with former employees, because former employees can no longer act on behalf of the employer and therefore can no longer bind the employer.

The opinion also holds, however, that communications with a former employee may still be prohibited by the privilege for communications with a trial consultant retained to assist counsel. The only prohibited communications would be those concerning trial strategy. Occasional discussions with counsel are not sufficient to elevate the former employee to the status of a trial consultant, even if some discussion of litigation strategy had occurred.

## CONFLICT OF INTEREST

### 1210. Attorney's preparation of wills for a married couple does not disqualify attorney from subsequently representing one spouse in post-dissolution motion concerning distribution of marital property.

*Matisoff v. Matisoff*, 28 CLR 273 (1/1/01) (Cremins, J.)

**1211. Representation in a criminal case does not disqualify attorney from representing opposing party in a civil action ten years later.**

*Harriman v. Smith*, 27 CLR 61 (6/26/00) (Arnold, J.)

Representation of a criminal defendant in a matter which resulted in a felony conviction does not disqualify an attorney from representing an opposing party in a civil action ten years later. The defendant tried to disqualify the plaintiff's attorney in a personal injury action in 1999 as a result of handling a felony case ten years before.

#### FIDUCIARY DUTY

**1212. Attorney breached fiduciary duty by assisting client to avoid paying an insurance adjuster by arranging for the omission of the adjuster as a payee on the settlement check.**

*Biller Associates v. Peterken*, 58 Conn. App. 8, cert. granted in part 254 Conn. 914 (2000)

This case holds that it was a breach of a fiduciary duty to a third party for an attorney to assist a client in avoiding payment of a fee owed to a public adjuster by arranging for the omission of the adjuster as a named payee on a settlement draft from an insurance company, thereby making it possible to cash the check without the adjuster's signature. The court relied on the determination that failing to withhold funds to pay the adjuster's fee constituted a violation of Rule 1.15(b) of the Rules of Professional Conduct requiring that an attorney provide notification of and promptly pay over funds owed to a third party.

#### NONDISCLOSURE AS VIOLATION OF RULES OF PROFESSIONAL CONDUCT

**1213. Fraudulent nondisclosure is prohibited by Rules of Professional Conduct.**

*Statewide Grievance Committee v. Egbarin*, 61 Conn. App. 445, cert. denied 255 Conn. 949 (2001)

Rule 8.4 of the Rules of Professional Conduct proscribes attorneys from engaging in dishonesty, fraud, deceit, or misrepresentation. The Rule prohibits fraudulent nondisclosure as well as intentional misrepresentation.

#### PRIVILEGE

##### Attorney-Client

**1214. Attorney may be compelled to reveal communications concerning a deceased client's transfer of property to an intervivos trust.**

*Morgan v. Pendleton*, 27 CLR 39 (6/26/00) (D'Andrea, J.)

The rule that an attorney-client privilege does not bar testimony by an attorney concerning a deceased client's execution of a will also applies to testimony concerning an intervivos transfer of assets into a trust. The attorney can be compelled to testify whether the client intended to preclude a devisee by transferring real estate to a trust eight years before death.

**1215. An otherwise privileged communication should be disclosed if the attorney-client privilege is being used to shelter criminal or fraudulent conduct.**

*Sheetz v. Sheetz*, 27 CLR 156 (7/17/00) (Hiller, J.)

If there is evidence from which it can reasonably be found that a client was using the attorney-client privilege to shield fraudulent or criminal conduct a court should conduct a balancing test and order disclosure of otherwise privileged communications if the benefit in obtaining a more accurate resolution of the dispute outweighs the resulting injury to the attorney-client relationship. This was a divorce in which the court ordered disclosure of communications between one spouse and that spouse's estate planning attorney because of evidence of an understatement of assets in a financial affidavit.

**1216. Crime-Fraud exception to attorney-client privilege applies to communications involving commission of a civil fraud as well as a crime.**

*Olson v. Accessory Controls & Equipment Corp.*, 254 Conn. 145 (2000)

The attorney-client privilege is not limited to fraud that would constitute a crime. It also applies to otherwise privileged communications assisting in the commission of a civil fraud. The court held, however, that under the facts of this case there was insufficient evidence of intent to commit a civil fraud to cause loss of the privilege.

The opinion also establishes a stan-

dard for determining whether the attorney-client privilege has been lost because the communications were in furtherance of the civil fraud:

Whether there is probable cause to believe that the communications with an attorney were made with an intent to perpetrate a civil fraud.

This standard does not require evidence of an actual intent to commit fraud. Rather, proof only of probable cause to believe that such an intent existed is enough.

The court rejected a burden shifting approach to determine whether the privilege has been waived. This would involve burdening the trial courts with the need to conduct a time consuming hearing to determine the merits of a claim of waiver under the civil fraud exception. Merely establishing probable cause would require at least an in camera review of a possibly privileged communication.

An environmental assessment report prepared by a consultant hired by the attorney on behalf of the client to assist in the preparation of a response to a remediation order from the DEP is privileged, even though the expert's report contains only factual information and will also be used for purposes not involving attorney-client communications. The information was essential for the preparation of legal advice, the expert was hired through the attorney rather than directly by the client, and the consultant's role as an advisor to the attorney was made clear in the agreement, and the agreement emphasized that all communications were to be confidential.

**1217. Special defense by insurance company of untimely notice waives attorney-client privilege with respect to investigation assigned to counsel.**

*Reichhold Chemicals, Inc. v. Hartford Accident & Indemnity Co.*, 27 CLR 722 (10/30/00) (Hodgson, J.)

An insurance company, by asserting an insured's failure to provide timely notice as a special defense to a complaint seeking to enforce coverage under the policy, waives the attorney-client privilege with respect to investigative tasks assigned to the attorney. The insurer cannot use the work-product privilege or attorney-client privilege as a shield by assigning investigative tasks that would normally be assigned to a non-attorney insurance adjuster to the attorney retained to defend the case. Information obtained by an attorney while acting in an

investigative capacity for an insurer must be disclosed.

## SANCTIONS

**1218. No sanction may be imposed by the Statewide Grievance Committee in the absence of a finding that there has been a violation of the Rules of Professional Conduct.**

*Statewide Grievance Committee v. Daniels*, 28 CLR 106 (11/20/00) (Silbert, J.)

There must be a finding that the grieved attorney has committed a violation of the Rules of Professional Conduct for the Statewide Grievance Committee or a reviewing subcommittee to impose a sanction.

A reviewing committee's order that a grieved attorney return the unused portion of a contested retainer, while also entering a finding that the attorney's handling of the retainer did not constitute a violation of the rules, could not stand. A presentment based on the attorney's refusal to comply or otherwise respond to the order was dismissed.

## STATEMENTS BY ATTORNEY CONSIDERED UNDER OATH

**1219. Representations by an attorney to the court are considered as made under oath.**

*State v. Nguyen*, 253 Conn. 639 (2000)

The trial court may rely on factual representations by counsel without taking testimony under oath, because declarations as an officer of the court are virtually made under oath.

## STATEWIDE GRIEVANCE COMMITTEE

**1220. Action taken by reviewing committee of the Statewide Grievance Committee with no lay person member is void.**

*Block v. Statewide Grievance Committee*, 29 CLR 54 (4/9/01) (Satter, J.T.R.)

**1221. Statewide Grievance Committee has jurisdiction even if underlying allegations arose solely from representation of a client in federal court.**

*Statewide Grievance Committee v. Gifford*, 29 CLR 13 (4/2/01) (Berger, J.)

**1222. Disqualification of member of local grievance committee requires proof of actual bias, or actual conflict of interest. Appearance of impropriety not enough.**

*Laviano v. Statewide Grievance Committee*, 27 CLR 552 (9/25/00) (Satter, J.T.R.)

Language in the decision supports the proposition that the more lenient standard for recusal applies to administrative proceedings—the existence of actual bias or actual conflict of interest—rather than the more stringent standard for judicial proceedings, which involve the mere appearance of impropriety.

## SUSPENSION

**1223. Attorney convicted of a felony should not be permitted to resume practice until criminal sentence has been fully served.**

*Statewide Grievance Committee v. Mercer-Falkoff*, 26 CLR 669 (6/5/00) (Silbert, J.)

An attorney convicted of a felony should not be permitted to resume practice of law until the criminal sentence has been fully served, even if the sentence was primarily limited to a supervised release and even if all other factors supported an immediate return to practice.

The attorney entered a plea of guilty to a one-count information charging false statements to a federally insured bank in violation of 18 U.S.C. §1014. The charge arose out of an admittedly false financial statement filed by the attorney to help procure loans on behalf of a client in 1989. Losses to the banks involved amounted to just over \$100,000. The lawyer was not prosecuted until 1997. He entered a plea of guilty, and the sentence imposed was 24 hours incarceration and three years of supervised release, with several conditions, including community service and restitution. The sentence was imposed September 3, 1997. The attorney was suspended in federal court for 36 months, a period equivalent to his current term of supervised release.

The trial court followed Judge Berger's decision in *Statewide Grievance Committee v. Hochberg*, 25 CLR 214 (7/12/99) which held that a suspension for a period of parole or probation is an appropriate sanction.

**1224. Attorney convicted of felony should not resume practice until criminal sentence has been fully served.**

*Statewide Grievance Committee v. Rothenberg*, 27 CLR 559 (10/2/00) (Berger, J.)

Even if the sentence was limited to probation, the attorney should not be reinstated until the probation period has expired.

## 13. GENERAL PRACTICE CONDEMNATION

**1301. Statutory requirements for commencement of a civil action do not apply to condemnation appeals.**

*Department of Transportation v. Crestwood II*, 27 CLR 332 (8/14/00) (Thompson, J.)

The statutes require a civil action be commenced by service of process consisting of a writ of summons and an accompanying complaint, and that process be returned to court no later than 12 days before the return date specified in the writ of summons. These statutes do not apply to appeals from an assessment of damages in an eminent domain proceeding. The opinion holds that an eminent domain appeal may be filed in the same docket file opened to accommodate the deposit filed with the court by the taking agency. It is not necessary to commence a new action and activate a new court docket file for the prosecution of the appeal.

**1302. Appeal from a condemnation award can be initiated merely by filing an application in the original docket file opened for the state's notice of assessment of damages. Notice to the Department of Transportation of the application for appeal need not comply with the requirements for the commencement of a new civil action.**

*Commissioner of Transportation v. Wong*, 27 CLR 669 (10/23/00) (Moraghan, J.)

Accord: *State v. Tuck-It-Away*, 27 CLR 674 (10/23/00) (Melville, J.)

**1303. Condemnation of property under sales agreement: seller entitled to compensation in the amount of selling price and buyer entitled to anticipated profit.**

*Newington v. Young*, 28 CLR 341 (1/15/01) (Bieluch, J.T.R.)

If property is taken in a condemnation proceeding that is subject to a purchase and sale agreement, the seller is entitled

to compensation in the amount of the purchase price and the buyer is entitled to compensation in the amount of the anticipated profit from the transaction. A prospective seller of undeveloped property suitable for residential development is entitled to the contract price under a pending purchase and sale agreement, and the buyer is entitled to the difference between the likely developed value of the lots and the purchase price under the agreement, less development costs.

The opinion also holds:

- (1) Valuations of real estate made by a municipality for the purpose of assessing property taxes not admissible as evidence of market value in condemnation proceeding.
- (2) Property owners burden of proof for establishing the highest and best use for property is whether it is reasonably likely that the property is suitable for the proposed use, not proof by a preponderance of the evidence that the property could be so used. An owner claiming that the highest and best use for undeveloped parcel is for single family residences need only establish that it is reasonably likely that appropriate zoning approvals could be obtained.

#### **1304. Reverse condemnation collaterally estopped by zoning finding.**

*Cumberland Farms, Inc. v. Groton*, 29 CLR 144 (4/23/01) (Martin, J.)

A finding by a Zoning Board of Appeals to support the denial of a variance application that the current use of the property is reasonable and permitted under the existing zoning laws, and therefore that the element of hardship has not been established, must be given collateral estoppel effect in a subsequent action for an unconstitutional taking of the property. The constitutional taking case involved a claim that the plaintiff had been denied all reasonable use of the property, which was totally inconsistent with the Zoning Board's finding.

#### **COVENANT NOT TO COMPETE**

#### **1305. Covenant-not-to-compete in agreement for purchase of business unenforceable if buyer has breached an employment agreement with the seller.**

*DeSalle v. Appelberg*, 60 Conn. App. 386, cert. denied 255 Conn. 908 (2000)

A covenant-not-to-compete contained

in an agreement for the purchase and sale of a business cannot be enforced by a buyer who is in breach of an employment contract with the seller entered into as part of the same transaction.

#### **1306. Non-competition agreement signed by current employee as condition of continued employment is unenforceable for lack of consideration.**

*Fairfax Corp. v. Nickelson*, 28 CLR 162 (12/4/00) (Gormley, J.)

This result was reached even though continued employment was contingent upon signing the agreement. The opinion also holds that non-competition agreements between an employment agency and a salesperson restricting the employee's right to work for a competitor for two years is unenforceable with respect to an employee who accepted a non-sales position with a competitor. The decision also holds the liquidated damage provision unenforceable if there are no actual damages.

#### **EXHAUSTION OF ADMINISTRATIVE REMEDIES**

#### **1307. The futile and inadequate remedy exception to the exhaustion doctrine applies only if the agency is without authority to grant the relief requested. It does not apply if there is "little likelihood" that the agency will grant relief.**

*Fish Unlimited v. Northeast Utilities Service Co.*, 254 Conn. 1 (2000)

This decision holds that the exception to the exhaustion of administrative remedies doctrine for instances in which the recourse to the administrative agency would be "futile and inadequate" applies only if the agency is without authority to grant the relief requested. The exception does not apply if there is very little likelihood that the agency will grant the relief.

An environmental organization cannot bring a civil action allegedly being conducted in violation of the Environmental Protection Act without first exhausting administrative remedies by intervening in the DEP permit proceeding.

#### **EX POST FACTO LAW**

#### **1308. Application of the 1995 amendment to the parole eligibility statute, §54-125a [increasing from 50 percent to 85 percent the amount of each sentence a person convicted of certain crimes must serve before be-**

**coming eligible for parole], to inmates sentences after the statute's effective date of July 1, 1996, for crimes committed before that date violates the constitutional prohibition against ex post facto laws.**

*Johnson v. Warden*, 28 CLR 279 (1/1/01) (Dyer, J.)

#### **MORTGAGE FORECLOSURE**

#### **1309. Court may decline to foreclose a mortgage in a case based on a default for failure to keep taxes current.**

*Fleet National Bank v. Crystal, LLC*, 27 CLR 18 (6/19/00) (Mintz, J.)

In a foreclosure based on an acceleration clause activated by a default for failing to keep taxes current, the court may deny relief if the default is cured, was not willful, and did not endanger the plaintiff's security.

#### **PARTITION**

#### **1310. Relief in partition action is a partition in kind or by sale. The court may not order transfer from a party holding a minimal interest in exchange for consideration from the other party.**

*Fernandes v. Rodriguez*, 255 Conn. 47 (2000)

In an action seeking partition under §52-459 et seq. of the General Statutes, the court may grant relief only in the form of either a partition in kind or a partition by sale. One party cannot be ordered to convey an interest to the other party in exchange for consideration established by the trial court, even if the receiving party has only a minimal interest in the property.

#### **PUBLIC TRUST DOCTRINE APPLIES TO MUNICIPAL PARKS AND BEACHES**

#### **1311. All park and beach property owned by a municipality is held in trust for the use of all state residents, not just residents of the municipality.**

*Leydon v. Greenwich*, 57 Conn. App. 712, cert. granted, 254 Conn. 904 and 905 (2000)

An ordinance limiting access to a municipal park or beach to area residents of Greenwich is void and unenforceable against persons who are residents of Connecticut, but not of Greenwich. The

*continued on page 171*

*Newsworthy items of general interest*

## The Importance of A Horse's Ass

*This item of railroad history was called to our attention by several CTLA members, who gleaned it from the Internet.*

Does the expression, "We've always done it that way" ring any bells?

The US standard railroad gauge (distance between the rails) is 4 feet, 8.5 inches. That's an exceedingly odd number. Why was that gauge used?

Because that's the way they built them in England, and English expatriates built the US railroads. Why did the English build them like that?

Because the first rail lines were built by the same people who built the pre-railroad tramways, and that's the gauge they used. Why did "they" use that gauge then?

Because the people who built the tramways used the same jigs and tools that they used for building wagons, which used that wheel spacing.

Okay! Why did the wagons have that particular odd wheel spacing?

Well, if they tried to use any other spacing, the wagon wheels would break on some of the old, long distance roads in England, because that's the spacing of the wheel ruts.

So who built those old rutted roads?

Imperial Rome built the first long distance roads in Europe (and England) for their legions. The roads have been used ever since.

And the ruts in the roads?

Roman war chariots formed the initial ruts, which everyone else had to match for fear of destroying their wagon wheels. Since the chariots were made for Imperial Rome, they were all alike in the matter of wheel spacing.

The United States standard railroad gauge of 4 feet, 8.5 inches is derived from the original specifications for an Imperial Roman war chariot.

And bureaucracies live forever.

So the next time you are handed a specification and wonder what horse's ass came up with it, you may be exactly right, because the Imperial Roman war chariots were made just wide enough to accommodate the back ends of two war horses.

Now the twist to the story . . .

There's an interesting extension to the story about railroad gauges and horses' behinds.

When we see a Space Shuttle sitting on its launch pad, there are two big booster rockets attached to the sides of the main fuel tank. These are solid rocket boosters, or SRBs. The SRBs are made by Thiokol at their factory at Utah. The engineers who designed the SRBs might have preferred to make them a bit fatter, but the SRBs had to be shipped by train from the factory to the launch site.

The railroad line from the factory happens to run through a tunnel in the mountains. The SRBs had to fit through that tunnel. The tunnel is slightly wider than the railroad track, and the railroad track is about as wide as two horses' behinds.

So, a major Space Shuttle design feature of what is arguably the world's most advanced transportation system was determined over two thousand years ago by the width of a horse's ass.

.. and you thought being a HORSE'S ASS wasn't important!

*Larry C. Wyckoff*

*Associate Wildlife Biologist*

*Napa-Sonoma Marshes Wildlife Area*

\* \* \* \* \*

## Victims' Lawyers Aren't Villains

**Who else, besides their lawyers, did the asbestos victims of Libby have on their side?**

*This editorial appeared in the Montana Missoulian on 4/9/01.*

It's altogether fashionable these days to revile lawyers. Still, two of Montana's top elected officials struck a discordant note last week when they used the bankruptcy filing by W.R. Grace as an opportunity to tee off on lawyers.

Grace is the owner of the defunct vermiculite mine linked to hundreds of cases of asbestos-related disease in Libby. Grace's bankruptcy filing means people in Libby will have to stand in line with Grace's other creditors for any compensation they hope to receive.

Gov. Judy Martz responded with this: "While I can certainly understand and support W.R. Grace's efforts to remain solvent beneath the weight of claims

against them by asbestos victims across the country, I want to make sure that Libby residents are not left holding the bag so that trial lawyers and others may benefit at their expense."

Sen. Conrad Burns chimed in, "The folks in Libby who need and deserve the help are going to get the short end of the stick on this. We unfortunately have some greedy folks out there that don't live in Libby that are jumping on the bandwagon to try and get some cash out of W.R. Grace, not to mention the trial lawyers that will end up taking at least half of any settlement."

It's not our mission to defend trial lawyers. But we do feel some duty to defend the truth. And the truth is that people in Libby and others tragically affected by asbestos exposure didn't have anyone but the lawyers on their side.

Not the politicians, certainly. Not local government or community institutions. Not state regulatory agencies. Not public health agencies. Not the U.S. Environmental Protection Agency or Occupational Safety and Health Administration. Not organized labor or churches or environmental groups. And, until very late in the day, not even the press. And, at the risk of stating the obvious, Grace itself wasn't exactly doing what it could for these folks. It's hard to find people who'll lawyer-up when they feel they're being treated fairly.

The lawyers didn't make anyone sick. They haven't victimized anyone. They have no special powers over Grace or any other company. All they can do is help people press their claims and assert their rights in a court of law. Judges and juries decide whether the plaintiffs are entitled to damages. It wasn't frivolous lawsuits that sent Grace fleeing into the shelter of U.S. Bankruptcy Court. It was the very real potential of huge damages awarded by juries on the merits of the cases that made Grace fear insolvency.

Their great sin, these plaintiffs' lawyers, is to be motivated at least in part by the profit motive. For that, the governor and senator would have us hold them in lower esteem than a company that uses the legal system to cleave away its responsibilities. It's OK for the rest of us to profit doing what we do, but it's evil for lawyers to make a buck helping some mineworker's widow who can't draw a full breath?

Standing next to any bad guy in court is a lawyer. There are lots of cases and clients out there we sure wouldn't take if we were lawyers. But representing the interests of asbestos victims hardly qualifies as dishonorable work. The worst they have done is expose the fact that the people who should have stood alongside sick and dying people failed for so long to do so.

\* \* \* \* \*

## Behind The Court's Civil Rights Ruling

*This article appeared in the New York Times Sunday, April 29, 2001, Section 4, p. 4. David Dante Troutt is a professor at Rutgers Law School in Newark, New Jersey.*

The wars among Supreme Court justices over federal discrimination laws—typically resolved in 5-4 decisions—have become a rite of spring, threatening to dull the blooms and bore the American public into apathy. That would be a mistake, regardless of where you stand, because last week's decision involving Title VI of the Civil Rights Act of 1964 signals not only a constriction of that statute's wide reach, but another milestone in a conservative march away from the courts as the arena for determining rights, bringing them back into the political process where they are subject to the will of the majority.

The differences among the justices are far more than legalistic bouts over statutory construction. First, they reflect philosophical disagreements over how discrimination occurs and how the law should address it. They also represent the conservative majority's abiding protection of states' rights against claims that state practices are discriminatory.

But the battle comes down to two different means of proving discrimination: whether by the intent or by the result of the action. Given the subtle and even unconscious nature of much discrimination, plaintiffs forced to prove the intent behind discriminatory acts do not last long in the courthouse.

In the grand but imperfect architecture of American civil rights law, there used to be many rooms. The Civil Rights Act of 1964 was built on a broad anti-discrimination foundation, and its titles, or, if you will, rooms, each addressed specific issues—employment, education, housing and so on. Many allowed plaintiffs to prove only discriminatory results, not intent.

In the mid-70's, civil rights lawyers

discovered that Title VI's broad focus on the receipt of federal funds offered entry to state agency contracting offices and corporate board rooms whose decisions could be challenged for any discriminatory effects. Title VI soon became a wide corridor to confront institutional decision making that denied access or benefits to groups protected by the statute. Its follow-the-money framework offered a far-reaching civil rights tool.

Over the years, however, conservative justices interpreted civil rights laws narrowly, demanding discriminatory intent, not results, in nearly every room of the structure. Now, with last week's ruling, the open door to Title VI is closing. What for civil rights plaintiffs was once a fortress against injustice has become a box with no doors.

"This seems to be still another line of attack in a multifaceted campaign by the court's conservatives to deny Americans a judicial remedy for violations of their rights," said Herman Schwartz, a constitutional scholar at American University Law School.

The question before the court was whether private as opposed to government plaintiffs could sue under a section of the law that allowed a judgment to be made on the basis of discriminatory results, rather than intention.

"Some types of discrimination, especially by federally funded institutions making policies that affect entire communities, can only be shown by the disparities they inflict," said Derrick A. Bell, a visiting law professor at New York University Law School.

The facts before the Supreme Court in *Alexander v. Sandoval* were straightforward. The State of Alabama had passed an English-only law, and became the first state to deny driver license exams in any language other than English. Like most states, Alabama receives federal highway and law enforcement funds. A class of private plaintiffs sued the state for discrimination by national origin under Title VI's results standard, and won in two lower courts. Alabama appealed to the Supreme Court, and, in a majority opinion by Justice Antonin Scalia, the court reversed the lower-court rulings.

According to the majority, without express Congressional authority in the statute, private plaintiffs must prove an intent to discriminate.

The dissenting justices pointed out that federal appeals courts had allowed private plaintiffs to sue using the results standard of proof for three decades; it was

an issue many considered settled.

Title VI has supported discrimination claims as diverse as bank redlining of poor neighborhoods, education requirements and health care programs, because its results standard is better suited to policies whose discriminatory intent is untraceable but whose discriminatory effects are clear.

For example, environmental advocates in Camden, N.J., recently won a landmark Title VI victory when a federal court ruled that placement of a cement additive plant near the homes of poor, mostly black and Latino residents amounted to discrimination by the controlling state agency that received federal funds. The area was already the site of waste treatment and power plants, and residents had suffered high rates of asthma and other respiratory ailments. Though it is doubtful that state decision makers desired to see more children's health imperiled, the results of their decision would have greatly increased such risks.

But that legal victory will now be appealed and, after this Supreme Court ruling, probably reversed. That will leave enforcement to the federal Environmental Protection Agency—which has pursued fewer than 1 percent of such complaints since 1994.

Racial profiling presents another example of discrimination that by definition, relies on statistical proof of practices by police, rather than the smoking gun of subjective intent. Without a results standard, few individual plaintiffs could hope to prevail against specific traffic stops under Title VI as the court now construes it.

All this suggests a greater burden on the political process to implement the country's anti-discrimination policies. Citizen suits had been used to energize the law, for federal agencies are rarely able to protect rights. Yet the court's slim but conservative majority appears anxious to relinquish that role to an executive and legislative branch dominated now by Republicans traditionally hostile to the federal role in civil rights enforcement. Indeed, President Bush's campaign pledge to nominate more strict constructionists to fill Supreme Court vacancies barely registered with voters.

Meanwhile, more and more public functions, like prisons and social services, are being contracted to private companies whose discriminatory acts may now be beyond the reach of other federal civil rights laws.

## Twirlers Suit Is Frivolous North Haven school grievance has no business in federal court.

*This editorial appeared in the New Haven Register on May 22, 2001. The editorial notes that there are "powerful interests that like nothing better than to hedge people's rights to sue and to limit the awards people who have suffered serious damages can win from juries." It makes the point that "cases like this" make fodder for the propaganda machine of those who limit the consumer's right to sue.*

Every indication suggests that this is a case to be settled in the office of the athletic director, the principal or, if all else fails, the Board of Education. Why it is going to be settled in U.S. District Court is more than we can fathom.

The case involves two high school sophomores who were members of the majorette squad at North Haven High School this year. Unfortunately, the two have been dropped from the squad for next year because they did not pass tryouts.

The girls' parents are suing the majorettes' coach, the athletic director, principal and school board, claiming that in the past girls who once made the squad did not have to audition again. The suit claims the girls have been denied their right to participate in after-school activities in violation of their constitutional rights.

Maybe we're missing something, but for the life of us we just don't see any constitutional issues in someone being dropped from a baton twirling squad because a coach changes policy and insists on an annual tryout.

If there are personality conflicts involved, as has been suggested, it would seem that the situation offers an excellent opportunity for parents to teach their daughters some important lessons—in acceptance of a minor setback and getting on with life, in conflict resolution at the grass-roots level, in determination to spend a year practicing so as to pass the tryout with flying colors next year.

Absent any evidence of deeply ingrained racial, ethnic or gender bias in the incident, there seems no reason to waste the time of a federal court considering this issue at public expense.

In addition to setting a poor example for the young people involved, litigation of this nature plays into the hands of those who seek to curtail the legitimate rights of citizens to have their day in court. There are powerful interests that like

nothing better than to hedge people's rights to sue and to limit the awards people who have suffered serious damages can win from juries.

Cases like this make wonderful fodder for their propaganda machine and their design to maintain the court system as a preserve where only the rich and powerful can have their rights protected.

\* \* \* \* \*

## Sequestered, A Jury Understands Its Duty

By D. Graham Burnett

*This article appeared in the New York Times Op-Ed page on 6/16/01.*

There are brighter faces in New York State criminal courts these days—in the jury boxes, at least. With the abolition last month of the mandatory sequestering of all juries deliberating criminal cases, there will be less shuttling to hotels and fewer restless nights under the eye of watchful guards. This may be good. But when I passed through the metal detectors at 100 Centre Street for jury duty in Manhattan last year, I had no idea of the role sequestration could play in a verdict.

We were a diverse lot: a pair of professors, a computer-game developer, a restaurant manager, a vacuum-cleaner repairman; black, white, Hispanic. In the end, 12 of us would spend four days totally sequestered—sleeping at outlying hotels, able to pass only short notes to the outside world via our guards—as we struggled to agree on what happened in a tiny West Village apartment on an August night in 1998. There, a young man stabbed another man 25 times, leaving him bleeding to death on the floor. Was it murder?

For 23 hours we wrangled over this question in a tiny, bare room. We pored over crime-scene photos. We tried to reenact the crime. Half a day would pass in respectful discussion; then came fights, tears, curses, silence. But no consensus. Two men had gone into a room; one had come out, and he claimed self-defense. How could we say what had happened?

But we had something else to think about. In addition to all the emotion and the evidence—the DNA, the phone records, the blood on the wall—there was the simple matter of our charge: to apply the law. And the law says that when someone claims to have acted in self-defense, the state must show beyond a reasonable doubt that the defendant did not do so. There lay our very limited task.

We did not agree. I was foreman, and I

secretly believed the case insoluble. I hoped we could hold out for a hung jury. But the judge gave no sign of relenting. As days wore on, the crushing weight of our seclusion and confinement reduced us to tearful unanimity. But not before one of us was rushed to the hospital, collapsing under the strain and another made a somewhat half-hearted attempt to escape and had to be herded back by the sergeant-at-arms. A third, nearly hysterical, tried to reach her lawyer to find out if she could press for her own release. Marched before the merciless eye of the judge, she was given a frightening dressing-down.

On what would be the last full day of the ordeal, someone took the courage to mumble, as we were marched by the bench on our way back to the jury room, "We are the prisoners now!"

How true it seemed. And that may have helped us finally reach a verdict. For days, we had fought over the burden of proof. It was absurdly high, some said. How could the state ever win? Ultimately, though, we acquitted the defendant of all charges. We were not sure he was innocent, but we were not sure he was guilty, either, and having tasted the state's power during our confinement, we understood in a new way why the burden of proof was so heavy. Sequestration was, for us, a powerful civics lesson.

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## Most Lawyers Don't Receive High Salaries

By Thomas A. Cloutier

*This letter to the editor appeared in the Hartford Courant 6/17/01. Thomas A. Cloutier is President of CTLA.*

Right out of left field comes Michele Jacklin's irrelevant comment, "but we don't begrudge ambulance-chasing lawyers charging \$350 an hour so that they can bollix up our court system with frivolous lawsuits" [Other Opinion, May 16, "The 'Gimme More' Legislative Session"].

For one thing, we do and should begrudge any ambulance-chasing lawyers who charge \$350 so they can bollix up the court system with frivolous lawsuits. Such conduct is clearly improper and unethical. However, I have practiced law for almost 30 years, and I do not know one single ambulance-chasing lawyer who charges \$350 an hour so he or she can bollix up the court system with frivolous lawsuits. The gratuitous comment which is totally unrelated to the issues raised lathe column, is totally perplexing as to

its purpose.

A *Courant* article [Connecticut page, May 17, "Educators: Top Pay Won't Avert Teacher Crisis"] noted that Connecticut's average teaching salary is \$52,410. It also noted that The American Federation of Teachers' annual survey lists the average salary for an attorney at \$71,150 and an engineer at \$72,427. Contrary to the public perception that the Jacklin column caters to, the vast majority of lawyers earn a decent, but not extravagant, wage after years of education and training.

As an individual who is very proud of his profession and who views the overwhelming majority of lawyers as caring members of society, I feel there is no way that I can allow Ms. Jacklin's comments to go unaddressed.

\* \* \* \* \*

## A Judge Overturned by An Appearance of Bias

By John Schwartz

*This article appeared in the New York Times on 6/29/01.*

Judge Thomas Penfield Jackson talked himself out of a victory, a federal court of appeals ruled yesterday.

The court found that by speaking repeatedly and candidly to the media about the case, Judge Jackson violated three longstanding ethical precepts for judges that prohibit commenting on cases in progress. The seven judges of the United States Court of Appeals for the District of Columbia Circuit cited the public statements in their decision to reverse Judge Jackson on the legal remedy he had devised: breaking Microsoft into separate and competing companies.

"The violations were deliberate, repeated, egregious and flagrant," the judge wrote. Even though the appeals judges did not find actual bias on the part of Judge Jackson, they said the appearance of impropriety was enough to poison the judgment.

"Public confidence in the integrity and impartiality of the judiciary," they added, "is seriously jeopardized when judges secretly share their thoughts about the merits of pending cases with the press."

Experts in legal ethics say they had been dumbfounded by Judge Jackson's actions outside the courtroom while part of the judgment was still pending.

"It's really incomprehensible—he just lost it," said Stephen Gillers, vice dean and professor of legal and judicial ethics at New York University School of Law. "Judge Jackson crossed the line with a

vengeance."

"It is unusual," Mr. Gillers said, "to see a lower court decision on trial overturned on the basis of the appearance of bias."

What Judge Jackson did to earn the sharp rebuke of the appeals court was to talk to reporters and others outside of the court after he delivered his judgment on June 7, 2000, but before he had announced his sentence in the case. Some of the judge's interviews with reporters, in fact, occurred as early as September 1999, after the two sides had presented their evidence but before the verdict.

Among others, he spoke with Joel Brinkley and Steve Lohr of *The New York Times*, and Ken Auletta of *The New Yorker* magazine, after insisting that his comments would remain secret until the final judgment. He also shared his views with other reporters and in lectures after the judgment.

His language could be startlingly direct. He told reporters that William H. Gates's "testimony is inherently without credibility," and said that Mr. Gates "has a Napoleonic concept of himself and his company, an arrogance that derives from power and unalloyed success, with no leavening hard experiences, no reverses."

And, in a statement that would later bring a furious response from Microsoft's lawyers, he compared the company's executives to drug traffickers who "never figure out that they shouldn't be saying certain things on the phone," and said that the company's unyielding protestations of innocence reminded him of gang members in Washington's infamous Newton Street Crew, who claimed even on the day of their sentencings for murder that "the whole case was a conspiracy by the white power structure to destroy them."

The judicial rules in question prescribe the ethical norms that federal judges must follow. Canon 3A (6) of the Code of Conduct for United States Judges says, "A judge should avoid public comment on the merits of pending or impending action."

A second rule requires judges to "avoid impropriety and the appearance of impropriety in all activities," and Section 455(a) of the judicial code tells judges to recuse themselves whenever "their impartiality might reasonably be questioned."

The fact that Judge Jackson insisted on for temporary secrecy for the interviews "made matters worse," the appeals court reasoned, because it "suggests knowledge of their impropriety."

The appeals court also faulted Judge

Jackson for denying Microsoft's request for a hearing on disputed facts before the breakup order.

Norman W. Hawker, a professor of law at Western Michigan University, noted that the appeals court affirmed much of Judge Jackson's analysis in the case: "He wrote an incredible opinion, and they upheld it on facts and law. He himself pulled the carpet out from underneath his remedy decision."

Microsoft argued in its appeal of the ruling that Judge Jackson's comments showed such intense bias that the court should throw out his entire decision, including the findings of fact, which concluded that Microsoft engaged in monopolistic behavior.

In brief filed in January, the Justice Department and the 19 states joining the antitrust suit argued that Judge Jackson's remarks provided "no grounds for inferring bias or partiality" and recommended that the appeals court do nothing. By retaining Judge Jackson's findings of fact and throwing out his remedy, the appeals court, in effect, struck a compromise.

Within the four walls of the courtroom, judges live in a bubble of power and privilege: they set the rules absolutely. For example, as associate county judge in Wheaton, Ill., Edmund Bart, decided last year that people were not paying enough attention to the posted signs prohibiting cell phones in the courtroom. Judge Bart had three people jailed overnight after their cell phones rang in the courtroom.

But after the gavel comes down for the day, that aura of invincibility falls away, and some judges have trouble adjusting, legal experts said.

"Judge Jackson made the mistake of thinking that he is more important than he really is," Mr. Gillers of New York University said. "He's important as a judge who sits there in his robes upon the bench, but not as an activist, or a participant in the public debate—no matter how fierce that debate might be."

It is not the first time that public comments by Judge Jackson, a Republican who was appointed by President Ronald Reagan in 1981, got him into trouble with higher judicial authorities.

After the drug trial of former Mayor Marion Barry of Washington, Judge Jackson gave a speech at Harvard before the sentencing in which he suggested that the jurors had been too soft on Mr. Barry. An appeals court panel later ruled that Judge Jackson had violated judicial ethics in the speech, but declined to re-

move him from the case.

But one appellate judge on that panel wanted to do more than simply deliver a slap on the wrist. "In my view, a judge is never permitted to discuss the merits of a pending case in a nonjudicial forum," wrote the dissenting judge, Harry T. Edwards. "Whenever such an occurrence arises, a judge should recuse himself to protect the sanctity of the judicial process."

Judge Edwards is now the chief judge on the appeals court in Washington and oversaw the appeal in the Microsoft case.

\* \* \* \* \*

## Judges: Conferring A Lifetime of Ideology

BY Jack N. Rakove

*This article appeared in the New York Times on 5/13/01.*

As President Bush submits his first judicial nominees to the Senate, all signs indicate another round in the struggle over the composition of the federal bench is about to start. Republicans seem poised to renew their campaign to remake the federal judiciary in a conservative image. Senate Democrats still resent the long procedural delays that Republicans imposed on President Clinton's nominees, and threaten to follow suit if the Bush appointments prove too conservative.

Outside Congress, advocacy groups are mobilizing. Liberals tar the Federalist Society, the conservative legal group advising the White House, as the Black Hand of judicial politics, much as conservatives have portrayed the American Civil Liberties Union or NOW.

No one can be surprised by the intensity of this struggle, or that it extends beyond appointments to the Supreme Court. Since the 1960's, some of the hottest hot-button issues of American politics have become primarily matters of judicial resolution: school integration, abortion, affirmative action, environmental regulation. Even after the Supreme Court lays down controlling doctrines in these areas, district and appellate courts retain substantial discretion to resolve the ordinary disputes that come before them.

Nor does it matter that presidents themselves may feel little real concern about the tenor of constitutional law. Both parties have energized constituencies that care passionately about judicial appointments. Republicans have been railing against activist judges for a generation, while many Democrats are waiting

to see whether their senators have the same spine that Republicans displayed when obstructing Clinton nominees.

But amid these disputes, a more troubling question has been ignored. The idea of judicial independence, embodied in the life tenure that federal judges enjoy under Article III of the Constitution, is a core concept of American law. It is a foundation of America's distinctive theory of judicial review, which makes judges the final arbiters of the meaning of the Constitution. But what happens to that concept when the appointments process becomes an extension of ideological politics by judicial means? Can life tenure be a sufficient measure of independence, when other criteria than a distinguished legal career or judicial temperament dictate the character of appointments?

By coincidence, this is an appropriate time to consider the question, because it marks the tri- and bicentennials of two key moments in the development of the American notion of an independent judiciary.

In 1701 that the British Parliament passed the Act of Settlement, allowing royal judges to serve during good behavior—meaning as long as they behave responsibly—rather than at the pleasure of the crown. The independence judges then acquired had, by current norms, a limited meaning. But the Act of 1701 had a broader purpose: to arrange the peaceful transfer of the British crown from Queen Anne, the last of the Stuart dynasty, to the House of Hanover.

A century later, the Judiciary Act passed by Congress marked a different change of dynasties: from the Federalist administrations of George Washington and John Adams to the four decades of Democratic-Republican hegemony that began with Thomas Jefferson.

The American understanding of judicial independence had evolved radically in the intervening century. One key shift came with the publication of Montesquieu's "The Spirit of the Laws" in 1748. Montesquieu was the first to classify the powers of government into the modern trinity of legislative, executive and judicial. His identification of the judiciary as a third independent department deeply influenced the American revolutionaries of 1776.

Over the next quarter-century, four significant developments gave the American concept of judicial independence its essential form. First, Americans came to regard their constitutions as supreme law, and as such, enforceable by courts.

Second, the most advanced American thinkers—including the authors of "The Federalist," James Madison, Alexander Hamilton and John Jay—identified the legislature as the most dangerous branch of government, and sought to insulate judges from legislative control, the better to enable them to check its excesses. Third, the framers of the Constitution concluded that the judiciary was the department best situated to resolve disputes that would inevitably arise from its messy division of power between the Union and the states.

To secure these ends, granting judges tenure during good behavior was "the best expedient which can be devised," Hamilton observed. By allowing the president to nominate judges, the framers hoped that judicial appointees would have due respect for the authority of the national government. But confirmation by the Senate, originally elected by the state legislatures, would provide a corresponding degree of respect for the states. Once insulated from improper political influence, judges would, at least in principle, decide each case "impartially," Madison predicted, their independent judgment secured by the "most effectual precautions."

It was a nice thought, but Madison privately doubted whether federal judges would have the nerve and will to carry out these tasks. The events of the 1790's offered further reason to wonder about the impartiality of federal judges and the uses of life tenure. Here lie the sources of our fourth development: the adoption of the Judiciary Act of 1801.

George Washington had nominated the first federal judges on the basis of their loyalty to the Constitution. But that loyalty increasingly meant support for the controversial policies followed by his administration and those of his Federalist successor, John Adams—even when it meant enforcing a constitutionally dubious measure like the Sedition Act of 1798. When the Federalists lost control of Congress and the presidency in 1800, they used the lame-duck Congressional session of 1801 to adopt a Judiciary Act creating a new raft of judgeships to which loyal partisans were hastily appointed and confirmed. John Marshall's appointment as chief justice was designed, in part, to prevent Jefferson from making that nomination. The goal was to entrench Federalist partisans in the one department they could still control, as a means of preserving their ideology.

Though the incoming party repealed

the Judiciary Act of 1801 only two years later, its adoption reveals as much about the real meaning of the Constitution as the concept of an independent judiciary describes its ideal aspiration. At times when the Constitution is not a subject of controversy, or the two parties view each other in benign terms, judicial appointments may work as the framers hoped. Considerations of professional reputation, a record of public service and senatorial privilege will operate to produce a reasonably balanced and moderate corps of judges.

But for the past three decades, the politics of judicial appointments has been more impassioned. Constitutional interpretation has become a matter of sharp political conflict and sometimes bitter controversy, as measured in several confirmation battles over the Supreme Court. And with an electorate as closely divided as America's now is, and an era when control of the political branches is so precarious, the opportunity to entrench one's ideology through the advantages of life tenure in the judiciary is a powerful temptation. Under these conditions, judicial appointments become a continuation of politics by other means, made compelling by the entrenched advantages life tenure bestows.

Whether this meets Madison's ideal of an impartial, independent judiciary, though, is another matter.

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## Tompaine.Com A Journal of Opinion "Tort Reform" Targets Juries

*What follows is the text of an ad which appeared on the op-ed page of the New York Times on 5/9/01.*

Anyone charmed by George W. Bush's approach to economics (them that has gets, the rest can form a line) or the environment (smoke gets in your eyes, arsenic in your water) will be thrilled by his take on legal "reform"—never trust a jury.

Bush advocates "tort reform"—the ongoing effort by corporations to immunize themselves from legal responsibility for causing injuries or death.

Corporations have already weakened the counterbalance to their power provided by legislators, regulators and judges. But juries don't take campaign contributions. They can't be lobbied or feted. They're inclined to hold lawbreakers accountable.

"The jury is the last line of defense against corporate misconduct," says Craig

McDonald of the nonprofit Texans for Public Justice. "The corporations are most afraid of twelve people they can't control."

That's where "tort reform" comes in. Capping punitive damages. Restricting the definition of "negligence." Raising standards of proof. These and other "tort reforms" undermine the discretion of juries and the power of their decisions—verdicts meant to deliver justice and discourage future wrongdoing. Here's one example of how it worked in Texas after Governor Bush signed "tort reform" into law:

In 1998, a San Antonio jury awarded \$42.5 million to the widow of a worker killed in a Diamond Shamrock refinery explosion. The jury believed the company knew its equipment was unsafe. "We felt the verdict appropriately punished this company," juror Wilda Hosch told the Dallas Morning News.

But Diamond Shamrock won't get the message: Texas "tort reform" capped damages at \$200,000. Jurors complained the caps make a mockery of justice. "\$200,000 is nothing to these guys," Hosch said.

The kind of sweeping "tort reform" passed in Texas has never passed in Congress, but here it comes again. With George Bush in the White House, its chances are better than ever.

This Week at TomPaine.com—  
"Tort Reform Targets Juries"

Featuring a Special Report by Michael King . . . "How Punitive Damages Change Corporate Behavior" by Public Citizen . . . and "Hypocrites of Tort Reform" by the Center for Justice and Democracy. [[www.centerjd.org](http://www.centerjd.org)]

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## Europe's View of The Death Penalty

*This editorial appeared in the New York Times on 5/13/01.*

The legal drama and publicity surrounding Timothy McVeigh point up a fact of cultural geography. America and Europe are land masses separated by both the Atlantic Ocean and enthusiasm for the death penalty. Americans who travel in Europe, whether as tourists or ambassadors, marvel at the frequency with which they are called on to defend the American legal system's reliance on capital punishment. At least among European elites, the death penalty has become an even stronger metaphor for America since the nation is led by a man

who presided over 40 executions in 2000 alone and the government was preparing, until Friday, to carry out on May 16 its first federal execution in 38 years.

The McVeigh saga and the media's response are "the latest twisted piece of Americana," according to The Sunday Herald of Glasgow, expressing a typical view. Such commentary underscores the fact that the United States, in its belief that execution is an appropriate punishment, stands nearly alone in the community of democracies.

Felix Rohatyn, ambassador to France during the Clinton administration, says that every time he gave a speech, French audiences asked him to defend America's use of the death penalty—and it was usually the first question asked. European politicians and intellectuals, who view the death penalty as a human rights issue, are incredulous that Americans support a punishment that fails to deter crime, targets mainly those who cannot afford a decent lawyer, is used on the mentally retarded and has often gotten the wrong man. America's high execution rate stands in striking contrast to its history of respect for individual rights and its role as an international champion of human rights.

The death penalty is becoming a diplomatic impediment for Washington. Some European countries will not extradite suspected murderers to America. Capital punishment may be one reason that Washington's European allies voted against American membership in the United Nations Human Rights Commission. Today, the European Union will admit no country with a death penalty. It was abolished in Germany, Austria and Italy right after World War II. Later, other European nations gradually abolished it and signed international treaties that make it unlikely that the death penalty will be revived there in the foreseeable future.

Surprisingly, public opinion polls show that the death penalty is still popular in many of the countries where it is illegal. Support ranges from very low in Scandinavia to 65 percent in Britain. But supporters do not hold their views strongly. The death penalty is not a subject of ongoing political debate, in part because European nations do not elect judges or prosecutors. So most officials who administer the legal system are not subject to campaign pressures or fears of being depicted in television ads as soft on crime.

These attitudinal differences have cultural and historic roots. America was shaped by a frontier culture and an emphasis on individual accountability. We endorse longer sentences than European

nations, which stress rehabilitation, not punishment. A recent Gallup poll showed that American supporters of the death penalty do not believe it deters crime. Almost half of those polled believe in the justice of "an eye for an eye" and endorse execution as social vengeance. That view is anathema among Europe's parliaments

The size of the American popular majority supporting the death penalty changes with the intensity of the public's fear of crime. The more violent the state, the more likely it is to employ the death penalty. Shamefully, it is also a shorthand for attitudes about race relations, an issue that Europe is only now beginning to confront. The death penalty is most used in the American South, and is disproportionately applied to those who kill whites.

Certainly, many of the Europeans most scornful of our use of the death penalty are motivated by resentment of America, not concern for human rights. Nevertheless, they are seeing a reality to which Americans seem blinded. In our reliance on capital punishment, America stands apart from the other progressive democracies. ■

## Supreme and Appellate Court Review

*continued from page 164*

opinion holds that the public trust doctrine, which provides that all park and beachfront property owned by a municipality are held in trust for all residents of the state, is part of the common law of Connecticut. The opinion notes that this case does not involve the concept that land within the high and low watermarks are property of the state held in trust for all residents, a concept which the court noted is separate from the "public trust" doctrine. This case involved the concept that parklands and dry, or non-tidal, beaches owned by a municipality are held in trust for the benefit of all state residents and therefore must be open for use by all state residents. It has been argued in the Supreme Court.

### REAL ESTATE BROKERS

**1312. The substantial compliance amendment to the real estate listing statute does not apply to the requirement that listing agreements be in writing and signed by the seller.**

*Taylor v. Carbee, 27 CLR 433 (9/4/00) (Corradino, J.)*

The 1994 amendment permitting enforcement of real estate agreements that failed to comply with specified minimum requirements if there is substantial com-

pliance with certain of the requirements, §20-325a, applies only to five of the seven statutory requirements. The statute applies to broker's commission agreements, and the substantial compliance amendment does not apply to the requirements that listing agreements be in writing, and be signed by the person for whom services are to be rendered (subsections 1 and 7 respectively). Rather, the statute applies only to the requirements for names and addresses of parties, the date of the agreement, the conditions, the broker's signature, and the warning of the broker's right to a lien.

### RESTRAINTS ON ALIENATION

**1313. A variance cannot include a restriction that a residential**

**property not be used as rental property.**

*Gangemi v. Fairfield ZBA, 255 Conn. 143 (2001)*

A condition imposed with a variance limiting the use of the property to the residence of the owner, even though the other properties in the same zone may be rented out, is void as a violation of the strong public policy disfavoring restraints on alienation.

### TAX FORECLOSURE

**1314. Deficiency judgment cannot be obtained in a tax foreclosure action.**

*Winchester v. Northwest Associates, 255 Conn. 379 (2001) ■*

Pick Up Tinari Ad  
from page 30 last issue

# ATLA What Others Say

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

## Powerful BB Guns Can Leave Users Seriously Injured

*ATLA President Fred Baron and participating state Trial Lawyer Association presidents write weekly "Keeping Our Families Safe: Consumer News for Families" newspaper columns that are distributed to and published by hundreds of weekly and small daily newspapers throughout the country. This is from one of the April issues.*

Remember when your parents told you that a BB gun was not a toy—and that it should never be pointed at anyone because it could blind someone if the BB struck one of their eyes?

They were correct then—but mis-aiming is only one of these guns' safety threats. Some BB guns have design problems that could lead to serious harm.

Little Rock attorney Bob Cearley has been handling BB gun injury cases for plaintiffs for more than 10 years. He says that one of the dangers of modern BB guns is the ability to expel BB projectiles with extreme air pressure.

Some models of these are designed so that they can be pumped repeatedly, allowing enough pressure to build up to fire a BB at a rate of up to 1,100 feet per second—enough to pierce through the skull, heart or other vital organ of anyone standing nearby. And it seems that many purchasers and users don't know this.

An additional danger seems to be linked to Daisy Manufacturing Co.'s "Power Line" BB guns. Those guns may have been designed in such a way that users can be fooled into believing that the gun has run out of BBs and is not loaded.

Cearley says that a BB could become lodged in a narrow passage near the barrel cartridge, leading the user to believe all the projectiles had been shot. However, a residual BB could eventually fall into place and accidentally discharge while users were playing and "shooting air" at one another.

That is apparently what happened in a recent case reportedly settled for nearly

\$18 million in Pennsylvania. In that case, reports the March 16, 2001 edition of the *Legal Intelligencer*, a teenager was severely brain-damaged when his friend, believing that his Daisy Power Line BB gun was out of ammunition, accidentally shot him.

Bob Cearley has had several clients suffer the same kinds of fates because of BB guns. His first case involved a 10-year-old boy in Little Rock who was shot in the heart and became a paraplegic due to oxygen loss to his brain. In 1996, Cearley represented a Marquette, Michigan, youth who became partially paralyzed after being shot through the skull with an air rifle.

Both Cearley and the attorneys for the Pennsylvania plaintiff have alerted the U.S. Consumer Product Safety Commission (CPSC) to the dangers of these guns.

The CPSC has no regulatory authority over guns and rifles which use gunpowder to project bullets. But it does have authority over air-powered guns and rifles, and its three Commissioners and staff are concerned about "the new high-powered rifles which can be lethal," says spokesman Ken Giles. CPSC defines "high-velocity" as a BB discharged at a speed greater than 350 feet per second, he added.

The CPSC recently "sat down with the industry leaders and persuaded them that they needed to put warning labels on the packaging which alerts consumers that these are not toys and definitely should not be used by any one under the age of 16 years," Giles reports.

For more information on the CPSC's recommendations regarding BB guns, go to the CPSC web site at <http://www.cpsc.gov>.

For more health and safety information and tips, please visit ATLA's "Keep Our Families Safe" Web site at <http://family.safety.atla.org>.

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## Facts About Punitive Damages Awards: Punitive Damages Are Rarely Awarded

In 1996—the latest year studied—civil juries awarded punitive damages in only 2.5 percent of tort trials. Judges awarded punitive damage more frequently than

juries, in 7.9 percent of tort cases. "Tort Trials and Verdicts in Large Counties, 1996," U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, NCJ-179769 (August 2000), p.7.

In **medical malpractice cases**, only 1.2 percent of injured patients are awarded punitive damages. In cases specifically involving **defective products**, punitive damages were awarded in 1.4 percent of cases. "Tort Trials and Verdicts in Large Counties, 1996," U.S. Department of Justice, Bureau of Justice Statistics, NCJ 179769 (August 2000), p. 3, 7.

*Most punitive damages are awarded in cases involving businesses suing other businesses and cases involving intentional torts, like assault.* In their study of juries published in 1995, the American Bar Foundation's Stephen Daniels and Joanne Martin found that of the total number of punitive damages awards, 47 percent were in business cases, 36 percent were in intentional tort cases, 5 percent in products liability cases and 12 percent in other tort cases. "Financial harm is not only involved in the largest number of punitive awards, but these awards occur at a higher rate in cases claiming financial harm than in cases involving other types of harm." Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 Maryland L.Rev. 1093, 1128 (1996), citing Stephen Daniels and Joanne Martin, *Civil Juries and the Politics of Reform* (1995).

**Median Punitive Damages Awards Are Actually Very Low.** In 1996, the median punitive damages award by juries in state tort cases was only \$27,000. By contrast, the median tort punitive damage award made by a judge was \$75,000, \$48,000 higher. The combined judge/jury median punitive damages award was \$38,000. "Tort Trials and Verdicts in Large Counties, 1996," U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, NCJ-179769 (August 2000), p.7. **Punitive damages decreasing.** Between 1992 and 1996, the median punitive damages jury award declined by 25 percent, from \$36,000 in 1992 to \$27,000 in 1996. "Tort Trials and Verdicts in Large Counties, 1996," U.S. Department of Justice, Office of Justice Programs, Bureau of Justice

Statistics, NCJ-179769 (August 2000), p.7; "Civil Jury Cases and Verdicts in Large Counties," U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, NCJ-154346 (July 1995), p. 8.

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## Inept Physicians Are Rarely Listed As Law Requires Study Finds Lack of Reporting by Hospitals and HMOs

By Robert Pear

*This article appeared in the New York Times on 5/29/01.*

A federal program to protect patients from incompetent doctors is failing because health maintenance organizations and hospitals rarely report those doctors to the government as they are required to do, federal investigators say.

Under federal law, H.M.O.'s and hospitals are supposed to inform the government of any disciplinary actions taken against doctors for incompetence or misconduct.

But in the last decade, 84 percent of H.M.O.'s and 60 percent of hospitals never reported a single "adverse action" to the government, a report by the inspector general of the Department of Health and Human Services said.

This low level of reporting occurred even though a government study found that tens of thousands of Americans die each year because of medical errors.

Information on incompetent doctors is included in a computer system known as the National Practitioner Data Bank, created by Congress to protect patients against doctors who move from state to state without disclosing that they have been censured or disciplined in some way for providing poor care.

But, the report, based on an 18-month study, said that from 1990 to 1999, while managed care became the dominant form of health care in the United States, covering more than 100 million Americans, H.M.O.'s "reported only 715 adverse actions."

Officials offered these examples of incompetence and misconduct: performing surgery on the wrong side of a patient's body; providing a fatal overdose of drugs; performing unnecessary surgery; engaging in sexual relations with patients; prescribing narcotics for the doctors' own use; repeatedly billing Medicaid for services never provided.

The inspector general's explanation was stark. In a market more concerned about price than quality, the report said, H.M.O.'s have evolved into "bill-paying organizations," and managed care plans "often have little incentive to devote many resources to quality assessment and improvement."

Carmella Bocchino, vice president of the American Association of Health Plans, said many H.M.O.'s apparently did not realize they were required to tell the government when doctors were disciplined for incompetence or misconduct.

But Margaret E. O'Kane, president of the National Committee for Quality Assurance, which evaluates and accredits health plans, said, "Health plans are very nervous about reporting to the databank because they are afraid of being sued by doctors."

Sometimes, some H.M.O. executives said, they work out quiet deals with inept doctors. Under such arrangements, a doctor resigns from a health plan, and in return the health plan promises not to file a report with the federal databank.

Senator Ron Wyden, Democrat of Oregon, the author of the 1986 law that created the National Practitioner Data Bank, said the low level of reporting was unacceptable.

"The inspector general's study sounds an alarm bell," Mr. Wyden said in an interview. "The databank is only as good as the information that goes into it. Health plans ought to do more than just pay lip service to the goal of quality in health care."

The databank is for the use of hospital and other health care providers and federal law prohibits it from disclosing information on a specific doctor to the general public. Federal investigators said H.M.O.'s and hospitals frequently consulted the national databank to check on doctors' qualifications, but rarely contributed any information of their own. In the last 10 years, managed care organizations submitted more than eight million inquiries, accounting for about half of all queries.

Discussion of the databank is part of a larger debate over medical errors and the quality of care. In November 1999, the National Academy of Sciences estimated that 44,000 to 98,000 Americans died each year as a result of medical errors, and it called for "a nationwide mandatory reporting system" to help health care providers learn from their mistakes.

Many H.M.O.'s have adopted clinical guidelines to ensure that doctors follow the best practices for diagnosing or treat-

ing specific conditions. And Karen M. Ignagni, president of the American Association of Health Plans, said that if the government did more to make H.M.O.'s aware of their obligations, those organizations would take "whatever steps are needed to comply with federal law and regulations."

But the inspector general found that most H.M.O.'s did relatively little to monitor and assess the quality of care, or to protect patients from "poorly performing practitioners."

H.M.O.'s assume that hospitals and physician groups will evaluate the quality of care and report incompetent doctors, but that assumption is often unjustified, the report said.

"Hospitals find it difficult to hold individual practitioners responsible for poor care," and they often perform only a cursory review of doctors' qualifications when deciding whether to grant clinical privileges, the study said.

From 1990 to 1999, physician groups reported 60 "adverse actions" to the national databank.

H.M.O.'s and hospitals cannot be sued for errors they investigate and properly report. But if they fail to report discipline involving those errors, the government may remove the legal protections, a penalty that is rarely invoked.

Doctors evaluate colleagues in a peer review process. But the report said that because of concerns about liability, hospitals, physician groups and H.M.O.'s "are reluctant to share information about the performance of individual practitioners."

Senator Wyden said consumers ought to have access to information in the databank about flagrant misconduct by doctors. But doctors and hospitals say such disclosures would make it impossible to discuss errors and misconduct candidly in the rigorous peer review process because of the fears of lawsuits.

State medical boards license and discipline doctors, but they differ in how aggressively they investigate questionable doctors and in how much information they make available to the public or the databank.

The Federation of State Medical Boards collects information on disciplinary actions across the country. The service, available on the Internet at [www.docinfo.org](http://www.docinfo.org), costs \$9.95 for each physician search.

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## So, The Tumor Is on The Left, Right?

### Seeking Ways to Reduce Operating Room Errors

By Jennifer Steinhauer

*This article appeared in the New York Times, Metro Section, on 4/1/01.*

In the last year alone, two doctors in New York State were accused of operating on the wrong side of a patient's brain. A third was found guilty of performing surgery on the wrong section of a spinal cord; another lost his license for, among other things, removing the left kidney of a 79-year-old man who had a cancerous mass in his right kidney, and still another performed surgery on a healthy knee, rather than an injured one—the second such blunder for that doctor in five years.

And those were just the incidents that became public.

Hundreds of cases of wrong-site surgery occur in the United States each year. There were 28 cases in New York State alone last year, up from 20 cases in 1999, according to the state's Department of Health.

In many cases, the surgeon is punished, either by losing his license or the right to practice in the hospital where the error occurred.

But wrong-site surgery is rarely the fault of a single person. By the time the wrong body part is actually removed, several factors have almost certainly come into play, ranging from a series of small but crucial mistakes by several people who dealt with the patient, to flaws in a hospital's operating procedures, to the very culture of American medicine.

"The problem is usually not an individual person making a mistake," said Dr. Elise Becher, an assistant professor of pediatrics and health policy at Mount Sinai School of Medicine, who has extensively researched medical errors. "It is individuals making several mistakes, and systems not preventing those mistakes from doing harm."

Human and systems errors tend to collide in onerous ways. For example, someone places the wrong side of an X-ray against the light box in an operating room, resulting in a tumor appearing to be on the left side instead of the right. But the hospital itself has no formal protocol, like marking each X-ray with a large "L" and "R," to prevent this from happening. Or in what doctors call the "ultimate wrong-site procedure," an orderly brings the wrong patient to the operating room, but three people who saw

the patient before she was placed on the gurney were not required to check that both her first and last names matched those on the surgery roster.

Dr. Becher further divides the conditions that lead to wrong-site surgery into two categories, "environmental" and "latent."

Latent conditions, she explains, are holes in presurgical procedures and problems with the way staff members communicate during an operation. For instance, a set number of people should be required to verify that the correct limb, and yes, the correct patient, have been prepared for surgery.

"Things should be reviewed by an entire team," Dr. Becher said. "Doctors and nurses should also be reviewing materials and check the arm band to the chart to see that we have the right person and right body part. Has everyone seen the X-ray? There should be constant checking and discussion."

Environmental factors, like staff shortages and subspecialization, are less easily remedied. Nursing shortages, which have plagued hospitals across the country for the last several years, can result in nurses rushing through a patient's surgical preparation. And the trend among doctors to choose a narrow subspecialty often results in a patient's being seen by several doctors—say a cardiologist, a neurologist and a surgeon—who tend to focus on a particular body part or system, rather than on the entire patient. In a preoperative exam, a cardiologist is more concerned with whether a patient's heart can withstand surgery than with what kind of surgery she is to have. Of course, such narrow focus does not always lead to wrong-site surgery, but it does "decrease the likelihood that patient will be surrounded by caregivers who know the patient," Dr. Becher said.

In a study of 15 wrong-site surgery cases, the Joint Commission on Accreditation of Healthcare Organizations, a national group, found several common factors, including the involvement of more than one surgeon, the performance of several different procedures during one surgery and pressure from hospital administrators on surgical teams to speed things up.

And as it turns out, surgery is rarely an area where teamwork and second-guessing by subordinates are welcome. In a study published last year in *The British Medical Journal*, researchers compared attitudes about stress, error, hierarchy and teamwork among airline pilots

worldwide with those among operating room and intensive care staffs of hospitals in the United States and four European countries—an interesting comparison since medicine now finds itself in the same unwelcome spotlight as the airline industry was not so long ago. In 1999, the Institute of Medicine of the National Academy of Sciences found that medical mistakes kill 44,000 to 98,000 hospitalized Americans a year.

The *British Medical Journal* study found stark attitudinal differences between surgeons and pilots, whose training was vastly overhauled several years ago to encourage teamwork. For instance, while 94 percent of cockpit crews disagreed with the statement that junior team members should not question decisions made by senior members, only 55 percent of surgeons disagreed with the same statement. And while 64 percent of surgeons surveyed felt that high levels of teamwork occurred in their operating room, their view was shared by only 28 percent of surgical nurses and 39 percent of anesthesiologists, underscoring a strong disconnect between the different members whose functions are critical to successful surgery.

Besides reforming the culture of medicine, what can be done to make sure that the proper arm, designated knee or correct brain lobe is operated on? There is universal agreement that a patient can do her part by trying to have conversations about what she is about to undergo with every health care worker who touches her before the procedure.

The American Academy of Orthopedic Surgeons recently urged members to sign their initials directly on the site to be operated on.

At the Adirondack Medical Center in Saranac Lake, N.Y., where a few weeks ago a doctor was dismissed for operating on the wrong hip of a patient, a red hockey sock will now be placed over the limb that is not slated for surgery.

It is a change that came about because in the past, simply marking "yes" on the proper place did not eliminate wrong-site procedures.

"Let's say you want to prevent the wrong knee from being operated on," said Dr. Donald M. Berwick, a clinical professor of health care policy at Harvard Medical School and the president of the Institute for Healthcare Improvement.

"You could write 'yes' on the proper knee," Dr. Berwick said. "That is helpful. But notice that the incorrect knee has no signal. If upstream when they grab the

drape and place it the wrong way, only the left knee is showing, the surgeon sees nothing. So the intervention you engaged in didn't work. In a different system you write 'no' on the wrong knee. So if drapes go on wrong, you'll see the wrong knee."

Medical error experts also agree that the stigma of reporting mistakes has to be removed. "Wrong-site is an extremely serious problem whose rate of occurrence should be zero," Dr. Berwick said. "But many errors in health care are a derivative of normal human properties such as failing to notice the mistakes of everyday life, like adding salt instead of sugar in your coffee.

"But the remedy is not to say, 'Who did it, and how could they be so stupid?'" he added, "but rather, 'How has our system led to such dire consequences, and how can we make the system so robust that we can account for predictable human frailty?'"

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## A Battle for The Courts

*This editorial appeared in the New York Times May 11, 2001.*

President Bush's initial batch of nominations for the nation's Circuit Courts of Appeal has turned out to be more eclectic and conciliatory than most people expected. It contains fewer hard-right legal activists than expected and also includes a number of mainstream conservatives who will be acceptable to Senate Democrats. Even so, Mr. Bush is unlikely to get his wish for "civility" in the confirmation process, if by that he means a free pass to carry out his plan to fill the 100 federal court vacancies with judges who will reshape the federal judiciary into a conservative force.

Mr. Bush's package of 11 nominees was cleverly put together. Two of them are sitting federal judges, both African-American, who were first nominated by President Clinton. One of these, Roger Gregory, a recess appointee to the Fourth Circuit Court of Appeals last year, would have had to step down next spring had Mr. Bush not renominated him. Altogether the group includes six minority members and women.

But neither conservative legal activists nor the Senate's Democratic leadership think this mixture reflects a real change in the administration's goal of accomplishing a major rightward shift in the composition of the federal judiciary. That shift, in turn, is intended to produce more restrictive rulings on social issues such as abortion, gay rights and federal

authority to protect civil rights and the environment. Democrats and many legal authorities are particularly troubled by two nominees for the influential United States Court of Appeals for the District of Columbia. Either of the two, Miguel Estrada and John Roberts, if confirmed, would bring a constricted view of constitutional rights to a court that hears many civil rights cases. Another troubling nominee is Michael McConnell, a University of Utah professor whom Mr. Bush has tapped for a seat on the 10th Circuit Court of Appeals, based in Denver. A bitter opponent of abortion rights, Mr. McConnell also has little use for church-state separation. In addition, Democrats are ready to fight over the nomination of Terrence Boyle, a protégé of Senator Jesse Helms.

Democrats must not be timid in using the powerful leverage they have in a Senate and Judiciary Committee evenly divided between the two parties. If they stay united they can train the White House to send up mainstream conservative nominees or enter negotiations in which ideologically conservative nominees would have to be balanced by some liberal jurists chosen by the Democrats. A key is for the Democrats to stand firm on enforcing the prerogative under the so-called blue-slip policy that allows any senator to block a nominee from his home state. The Judiciary chairman, Orrin Hatch, liked the blue-slip rule when the G.O.P. used it to block President Clinton's judicial appointments, but now he wants to loosen it up.

Senator Tom Daschle, the Democratic leader, and the two top Democrats on the Judiciary Committee, Patrick Leahy of Vermont and Charles Schumer of New York, have refrained from criticizing specific nominees on Mr. Bush's initial list pending further research. They have indicated a general willingness to accept mainstream nominees and negotiate on special cases. But no senator is obliged to regard the president as having an uninhibited right to reshape federal courts by imposing a political uniformity based on his own philosophy. It would plainly be best if bruising partisan battles over judges could be kept to a minimum. But what Mr. Bush calls civility is less important than preserving the impartiality and independence of the judiciary, and the Senate's proper role in the advise and consent process.

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## Big Business Is in Good Hands

By Molly Ivins

*This article appeared in the Miami Herald on 6/27/01.*

Tort reform means: 'You can't sue corporations that injure or kill your family.'

Look at it this way: The good news is that there's at least one thing about which George W. Bush is consistent. He believes in doing nothing that would hurt Big Business.

He especially believes in letting no one sue business. He is opposed to a patient's bill of rights for that reason; he tried to keep the lawyers who won a \$17 billion case for Texas from getting their fees for that reason; and tort reform, which means "you can't sue corporations that injure or kill you or your family," is a burning passion with him.

So it should come as no surprise that the federal government has decided to settle its case against the tobacco companies. According to anti-smoking groups, in the 2000 elections the tobacco companies gave \$8 million in campaign contributions, 80 percent of it to Republicans. Bush certainly knew that John Ashcroft, whom he named attorney general, in 1998 was one of the leading senators in stopping anti-smoking legislation that would have toughened regulations and increased prices.

Administration officials say that they don't think they can win the case, even though several states, including Florida, have won. The tobacco companies thus go into settlement negotiations with little reason to pony up. The government was claiming \$20 billion in damages for money it has spent on health care for its employees, veterans and those on Medicare with illnesses caused by smoking.

Knowingly making and marketing a poisonous, addictive product could be considered of dubious legality. I fail to see the difference between that and Murder Inc. (As one who has quit smoking many, many times, I speak with some feeling on the issue.) The idea that smokers have a "choice" about the habit seems to me a legitimate argument: I can't imagine suing a tobacco company because I was stupid enough to start smoking. But an addiction is not a problem that can be solved by just saying "No".

The government was suing to recover the cost to everybody else of treating smoking illnesses and would have used much of the money to educate young peo-

ple about why they shouldn't smoke.

Given the amount that the tobacco companies spend on marketing their poison, it makes some sense to have a counter-force out there, unless we all want to continue paying these staggering health costs, while the tobacco companies make billions.

Nothing in the world is easier to make fun of than an overreaching lawyer, but this is not a case of trial lawyers versus Big Business; it's a case of our right to get recompense when we have been hurt by corporate behavior. I'm not defending lawyers—though I know some righteous ones.

Just the other day, a few Texas lawyers were found to have been keeping quiet about unsafe Firestone tires for a couple of years to guard their clients' interests, possibly costing additional lives. But the patient's bill of rights and tort reform in general are not about the rights of lawyers; they're about our rights.

The media love to focus on outrageous verdicts, of which we have seen many over the years. What is almost never reported is the nutty verdicts are almost invariably overturned on appeal.

The system of civil litigation actually works quite well—for example, in the famous case of the 81-year-old woman who suffered third-degree burns after spilling a cup of McDonald's coffee on her lap.

The jury first awarded her \$2.9 million, after learning that McDonald's had ignored 700 such complaints over the years. But the judgment was reduced to \$480,000 on appeal and was later settled out of court for an undisclosed sum (she had initially sued for \$200,000). And McDonald's no longer heats its coffee to a point that produces third-degree burns, thus improving public safety.

For hilarious straight talk, I hope you did not miss Bush last week explaining that the Federal Energy Regulatory Commission did not impose price caps in the West. The official line is that this is a "market-based mitigation plan."

Herewith Bush's version: "They're not talking about firm price controls. They are talking about mechanism to—as I understand it, a mechanism to mitigate any severe price spikes that may occur, which is completely different from price controls."

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## Foil Bush's Maneuvers for Packing The Court

By Bruce Ackerman

*Bruce Ackerman is a Professor of Law and Political Science at Yale. This op-ed piece appeared in the Los Angeles Times April 26, 2001 © Los Angeles Times 2001.*

We are on the brink of a court-packing crisis. President Bush, relying on the conservative Federalist Society as his principal advisor, soon will be sending a stream of right-wing ideologues to the Senate for confirmation to the nation's federal courts. This will pave the way for hard-right nominations to the U.S. Supreme Court as the high court's justices depart.

So long as the president is left unchecked, he will be sorely tempted to ram high court appointments through the evenly divided Senate on a vote of 51 to 50, relying on Vice President Dick Cheney for the tie-breaking vote.

If this gambit succeeds, the result will be nothing less than a constitutional revolution. The present court has three youthful conservatives—Justices Clarence Thomas, 52, Anthony M. Kennedy, 64, and Antonin Scalia, 65. With a bit of reinforcement, a hard-right majority on the nine-member court will rule the nation long after George W. Bush has left the White House.

The current judicial majority has already put the nation on notice of its revolutionary agenda, striking down the Violence Against Women Act and seriously weakening the Americans With Disabilities Act.

Once rejuvenated, the majority can be expected to thwart efforts to secure genuine equality for all Americans, create new constitutional limits on environmental protection and impose the religious right's fundamentalist morality on just about everyone.

Are most Americans really prepared for this brave new world? How will they respond when told that they must wait 10 or 15 years to reassert control over their personal and political destiny?

There have been other runaway courts in our history. The most famous was the reactionary court of the 1930s that made war on Franklin D. Roosevelt's hugely popular New Deal. In time, however, Roosevelt made appointments to the court, which were confirmed by the Senate, that brought the court more into line with public thinking.

But President Bush is no Roosevelt. In precipitating a sweeping constitutional revolution, he cannot claim a broad popu-

lar mandate for change. To the contrary, he has been placed in the White House by the same judicial bloc whose grasp on power he would be extending.

This is the first time in American history that the majority of the Supreme Court has the potential to arrange for its own succession. By intervening in the last presidential election, the conservative majority removed the American people's check on a runaway court. It is one thing for the justices, who are not elected, to exercise the sovereign power of judicial review. It is quite another for them to insulate themselves yet further from popular control by putting their man in the White House.

This unprecedented situation requires the Senate to ask new questions and draw new lines. The first step should be a moratorium on Supreme Court appointments until the American people return to the polls in 2004. Under present rules, it only takes 40 senators to block any appointment to the court. Senators should use this power to force President Bush to demonstrate that he can win reelection in 2004 without the Court's assistance.

While the present case has no exact historical parallel, another episode does provide a precedent for a moratorium. When President Lincoln was assassinated, he was replaced by Vice President Andrew Johnson who threatened to pack the court with conservatives. Congress responded with a statute disabling him from replacing retiring justices. It explained that it was John Wilkes Booth, not the American people, who had transformed Johnson into the president. Clearly, Congress would not have deprived Lincoln of his choices for the court.

By the time Johnson left the White House in 1868, the court was reduced to seven members. After the election, Congress returned the court's size to nine, giving Ulysses S. Grant the power to fill vacancies.

A similar logic applies today. The right-wing bloc on the court should not be permitted to extend its control for a decade or more simply because it made rulings that cleared the way for Bush to take the White House.

The Supreme Court has often functioned perfectly well without its full complement. During the 1990s, the justices cut their workload dramatically and now deliver only 80 opinions each year. They can easily maintain this pace with two or three fewer justices.

A strict moratorium is not appropriate in the case of nominations to the lower

courts. Some new appointments are required for the effective administration of justice. But this is no reason to populate the courts with judicial ideologues intent on a revolutionary agenda.

The Bush administration's peremptory ejection of the American Bar Assn. from its traditional role in vetting nominations makes senatorial scrutiny especially imperative. Despite Bush's wishes, the Senate should continue to require that the ABA thoroughly investigate a nominee's background. Only then can the Senate be in a position to consider soberly whether a nominee is a mainstream jurist with solid professional credentials.

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## Blocking Judicial Ideologues

*This editorial appeared in The New York Times April 27, 2001.*

With President Bush expected to unveil his first batch of judicial nominees in early May, the jostling is intensifying over the Senate's confirmation process. Senate Republicans who spent the better part of the past eight years stalling confirmation proceedings to block approval of President Clinton's centrist judicial choices are now maneuvering to fill as many of the existing 94 judicial vacancies as possible while their party still controls the evenly divided chamber. Their apparent goal is a speedy hard-right makeover of the nation's federal courts.

To clear the way, Mr. Bush last month ended the American Bar Association's formal role in reviewing the credentials of prospective judicial nominees that was initiated by President Eisenhower in the 1950's. His own screening committee, as Nina Totenberg of National Public Radio recently noted, largely comprises former law clerks to the two most conservative Supreme Court justices, Antonin Scalia and Clarence Thomas, and alumni of Kenneth Starr's various independent counsel investigations of President Clinton. Neil Lewis of *The Times* reported this week that roughly 20 of the 70 judicial candidates interviewed so far had been recommended directly by the Federalist Society, a staunchly conservative legal group that has risen to prominence in the Bush administration.

The main focal point of the present skirmishing in the Senate is an arcane parliamentary custom known as "the blue slip policy" that allows a senator to block or delay a judicial nominee from his home state. Senator Orrin Hatch, chair-

man of the Judiciary Committee, relied on this policy to prevent hearings on many of President Clinton's nominees, but now that a Republican president is in power Mr. Hatch has proposed changing the blue slip system so that a statement of support from a Republican senator would overcome a statement of opposition from a Democratic senator.

This page deplored the way Republicans abused the blue slip system during the Clinton years to prevent timely hearings and floor votes on mainstream judicial nominees with no strong ideological agenda. Their tactics deprived the bench of numerous worthy jurists, left courts shorthanded to deal with cases, and needlessly politicized justice in this country.

But that past abuse does not mean the Democrats should now abandon the blue slip policy completely and give the Republicans carte blanche to ram through ideologically driven nominees who could reshape the federal judiciary for a generation to come. By virtue of his office, Mr. Bush has the undisputed power to nominate judges, but moderates and liberals do not have to move aside passively for confirmation of ideological jurists whose agendas call for diminishing women's reproductive freedom and eviscerating the powers of the federal government and the courts in protecting civil rights and the environment.

It is critical that Democrats and Republican moderates use every weapon at their disposal to force Mr. Bush and his Senate allies to a position of moderation on judicial appointments. Those weapons can include insistence on judicious use of the blue slip policy to secure a balanced array of nominees that includes centrists along with conservatives and a willingness to use the filibuster, if necessary, to block extreme appointments. As a general rule, the president's choices for judgeships deserve significant deference. But senators have a right to make sure that he does not use the appointive power to distort the balance of the federal judiciary for decades to come.

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## Suing HMOs Can Bring Results

By Richard Blumenthal

*This article appeared in the Hartford Courant on 4/11/01.*

Our landmark lawsuit against four major HMOs put Connecticut soundly on record—and on the map—in support of health insurance reform.

It was the first such court action by any state to seek comprehensive, fundamental change in the industry and stop HMO abuses. It promptly ignited controversy—defensive denunciations by the industry and political attacks on me, but active acclaim from patients and doctors.

It has now been joined by the doctors themselves, who have brought a lawsuit seeking similar remedies and reforms through the Connecticut Medical Society, a second historic court action.

Their stand took tremendous courage and conviction, for the HMOs are immensely powerful and self-protective, with sweeping sway in the lives and livelihoods of the doctors and other health care providers.

Why do we take this stand?

The answer, simply and starkly, is that the HMOs are failing to act fairly and legally.

They apply arbitrary undisclosed coverage guidelines.

They deceptively use lists of pharmaceutical drugs, so-called formularies, to prevent patients from receiving medicine that their own doctors prescribe.

They refuse to be responsive when patients or physicians call or write to complain or inquire, putting them on hold or giving them the runaround.

They deny timely payment to doctors and other providers, discouraging safe and effective treatment.

They use an abusive system of rewards and punishments to coerce their own employees to deny coverage for valid claims.

They impose daunting disincentives to discourage candid communication between doctor and patient.

Indeed, one of the common themes of many or all of these complaints is interference with the doctor/patient relationship, which is at the core of effective medical treatment. The central objective of reform is to compel the HMOs to respect that relationship and avoid second-guessing what doctors decide and prescribe as treatment. No one wants an absolute blank check or carte blanche, but deference should be shown to the experience and judgment of treating physicians.

These complaints and others have been repeated to me and members of my office by literally thousands of people who have called or written over the past several years. We have championed their cause—case by case—usually with success, so that consumers initially denied coverage or treatment eventually got both.

This dramatic record—the huge number of complaints, and our high rate of individual success—led to a common sense conclusion: The problem is bigger than any individual patient or doctor. It is the system, and the systemic practices of HMOs.

Our lawsuit seeks to change the system. It does not seek money—not a dime for either the state or any doctor or patient. It asks the court for an order that would compel the HMOs to comply with their duty of care, their duty to disclose their policies fully and accurately, and to obey their legal obligations under specific statutes.

A few of the more enlightened HMOs already are voluntarily adopting modest reforms. They recognize that there need not be a conflict between patients and profits. In fact, improved practices may save money—eliminating expensive and unnecessary bureaucracy that second-guesses physicians—and benefit their bottom lines. If there is no need to sue them, we won't.

Our legal initiative should provide an impetus to legislative action—an incentive to avoid judicial intervention by supporting congressional remedies.

Much of our lawsuit, in fact maybe all of it, will be unnecessary if the industry reforms itself, or if our Congress and president adopt a real patient's bill of rights and other reforms through federal law.

Health care reform may someday come—maybe someday soon—at the federal level. But in the meantime, we must continue the fight in our state and federal courts to vindicate and protect the profoundly important rights of patients, now violated by the HMO industry with such long-lasting, devastating consequences.

\* \* \* \* \*

## Brownfields Bills Would Kill The Patient

By Mark A. Dubois and Jan Schlichtman

*This editorial appeared in the Hartford Courant on 4/6/01.*

Many people were riveted by the movie "A Civil Action" in 1998. It told about several heroic families in Woburn, Mass., and their long legal battle with corporate giant W. R. Grace. The families charged Grace with decades of dumping chemical waste onto land around the corporation's factories. When water drained from this land and contaminated the public water supply, whole families began to get sick, especially children. When her child died, one angry mother spearheaded

a search and a lawsuit that exposed the horrible facts surrounding the pattern of sickness and death.

The Woburn story shows, as we've seen so many times, how corporate indifference and negligence can cause wide-reaching pain. It shows, again, courageous mothers and fathers defending the well-being of their families. But most important, it shows that in America's courts there's no difference between a corporate Goliath and the little guy.

Now brownfields bills would make sure that Connecticut families injured like those in Woburn never see the inside of a courtroom. These bills are proposed with good intentions. But if these bills pass, Connecticut families who are sickened or homeowners whose property values have been virtually destroyed by pollution would have no way to recover damages.

Why do some people want these bills? They want to help communities solve a big problem. Nearly 300 old, abandoned, heavily polluted industrial sites are all over Connecticut. They're slowly leaching decades of accumulated poison into the ground and, in many cases, into wells and public water supplies like Woburn's. They're ugly eyesores that have gradually destroyed nearby property values. Because the companies that owned them are long out of business, nobody pays taxes on them. They're obviously a dangerous blight.

In a good-faith effort to help communities, well-meaning lawmakers have come up with measures to help. One would provide special tax breaks and grants to developers willing to build on these properties. Another would provide incentives to developers to work with the Department of Environmental Protection to make these properties productive again.

But the measures as proposed will exact a huge cost on those least able to bear it. These bills bar from the courts all those who have been made sick by site pollution and those who have been robbed of their property values because their homes are close to polluted areas. These bills abolish the rights of victims to get help.

Bill sponsors say that this immunity for polluters is needed—that without it, developers will be scared away from investing in derelict property sites. But such immunity is both wrong and unfair. Instead of being part of a broad rehabilitation program, the true victims of these brownfields will be shut out of the solution and victimized even further. The proposed laws terminate victims' rights,

effectively and permanently.

A just solution would consider the victims first. Legislators can include some simple and cost-effective mechanisms to provide relief to those who have suffered the most from polluted sites. Legislation should feature a plan to identify people whose person or property has been injured. Legislation should establish a program or fund to cover the losses of those who can show that they suffered due to pollution from these sites.

We know the whole community benefits when any part of it improves. But we also know that no community really wants to cure these problems at the expense of its own citizens. These are real problems for real people—retirees whose medical problems require them to move, but whose home-equity nest egg is gone because no one wants to buy their home; the neighborhood with a well that suddenly turns up polluted; the family with a child sickened with environmental asthma.

In a blind rush to address this serious problem, legislators risk doing more harm than good.

We all want cities and towns to do whatever they can to rehabilitate properties and erase blight. But the little guy should still have the opportunity to confront Goliath, at least at the bargaining table if not in court. The bills legislators are now proposing don't do that. They bar the door and erase victims' rights. They force the victims to shoulder the biggest losses.

As written, in all fairness, this legislation should not pass.

\* \* \* \* \*

## Beware: Toxic Mold

*There have been several reported awards concerning toxic mold cases. These involve the \$32 million verdict in Texas, the shutting down of a high school due to fungus in Maryland, and an \$11.5 million verdict in Florida. The following reports on these and other cases involving toxic mold.*

Like some sort of biblical plague, toxic mold has been creeping through homes, schools and other buildings across the U.S. Although press reports have focused on stachybotrys, strains of aspergillus, chaetomium and penicillium have also triggered their share of grief. At least two families have burned their homes to rid themselves of the contamination. Thousands more, including antipollution crusader Erin Brockovich, are suing home

builders, landlords and insurers for damages to their property and their health. Last month, the California state senate approved the country's first mold bill, which would set standards for acceptable levels indoors and require home sellers to disclose mold problems. Amid the frenzy, a cottage industry of fungus busters, mold lawyers and support groups is growing. On June 4, a jury found that Farmers Insurance should pay Melinda Ballard of Dripping Springs, Texas, \$32 million for mold damage to her 22-room, hilltop mansion and for her ensuing mental anguish. In May, the Delaware Supreme Court upheld a \$1 million jury award to Elizabeth Stroot of Wilmington, Delaware, who claimed that moldy water leaking into the bathroom of her apartment aggravated her asthma and caused cognitive disorders. Faced with a rising number of claims, insurers and home builders are looking for ways to minimize their liability. Farmers Insurance, which estimates that, in Texas alone it will have to shell out \$85 million in mold claims, has simply eliminated coverage in some 30 states. Says Janet Bachman, vice president of the American Insurance Association: "We are not the guarantors of public health." The California building industry tried and failed to push through a "home warranty" bill, under which homeowners could be required to enter binding arbitration instead of suing for defects. How much of the crisis is based on hard science and how much stems from plain old hysteria is a hotly contested issue. Doctors know that certain strains can trigger allergic reactions, asthma and other respiratory ailments. They have discovered that toxins produced by aspergillus molds can cause cancer. But proving that a mold in this particular house caused this person's nosebleeds or mental confusion is a notoriously difficult task.

## Fungus Shuts Down High School

A Bedford County high school will be closed for the rest of the school year because of a fungus that may have caused respiratory problems among students and faculty. "In the interest of student and staff health and safety, we have decided not to reopen," Jefferson Forest High School, school Superintendent Jim Blevins announced. Students will finish an abbreviated school year at a nearby middle school. The fungus *Stachybotrys*

was identified by the U.S. Occupational Safety and Health Administration after complaints of breathing problems at the high school this month. *Stachybotrys* is a greenish-black mold that can grow on wet wallboard and other building materials. The mold was traced to water damage from a roof leak at the school. Reported in the Washington Post on 4/30/01.

## Sexy It's Not, But Mold is Real Hot

Driven by media coverage of mold-contaminated buildings and by high-profile victims, toxic tort Web sites are flooded with inquiries from people who think they maybe mold victims, too. Many plaintiffs' lawyers say they are hearing from potential plaintiffs in unprecedented numbers. Even as scientists scramble to understand the effects of dozens of different mold species on humans, toxic mold law-

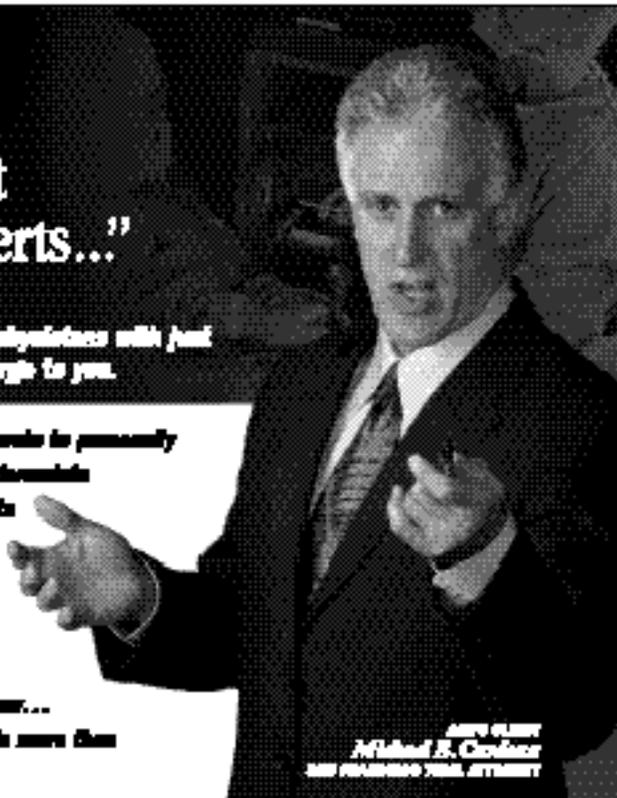
suits are going to trial across the country. "Mold is where asbestos was 30 years ago," says Alexander Robertson IV, who represents Erin Brockovich, along with hundreds of other mold plaintiffs. In one of the first big mold cases, a Florida county sued the architect and builders of its \$13 million courthouse, claiming that construction defects led to a problem that sickened 15 workers. After a trial in 1996, a state court jury awarded the county \$11.5 million, which, adding in attorneys' fees and settlements with some of the defendants, exceeded the building's cost. *Centex-Rooney Construction Co. v. Martin County*, 706 So.2d 20 (Fla. 4th Dist. Ct. App. 1997). Since then, plaintiffs have sued over claims involving other moldy courthouses, offices, schools, homes and apartment complexes. Reported in the *National Law Journal* on 6/4/01 in an article by Bob Van Voris. ■

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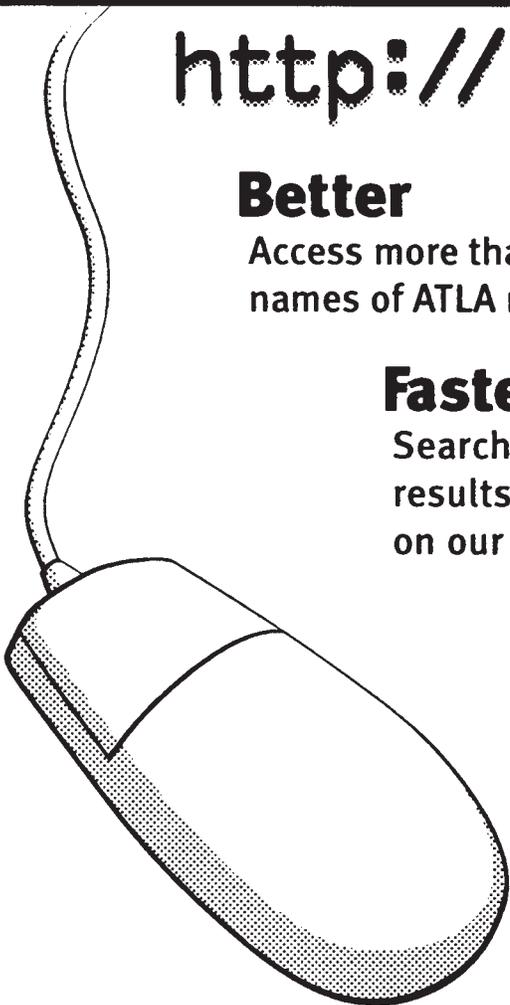
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# THOUSANDS OF HEROES.



Photograph by Yoni Brook / ybpic.com

## THE REST OF US CAN ONLY HELP.

Out of the tragedy has come unprecedented compassion and kindness. America is pulling together.

Thousands of highly qualified trial lawyers now pledge to contribute their legal expertise, experience and time—free of charge—to help victims and their families under the September 11th Victim Compensation Fund established by Congress.

America's trial lawyers, who called for a moratorium on civil lawsuits arising out of that horrific day, will provide legal services to those injured and to the families of those who were lost.

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If ever there were a time when lawyers could help people grievously wounded through no fault of their own—what trial lawyers do every day—this is it.

## OUR HEARTS GO OUT TO ALL WHO MOURN.

---

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If you are an experienced trial lawyer and would like to volunteer your legal services to 9-11 victims through the TLC program, use the form on the TLC Web site, [www.911LawHelp.org](http://www.911LawHelp.org), send an e-mail to [volunteers@911LawHelp.org](mailto:volunteers@911LawHelp.org), or send a fax to 845-678-2435.

Trial Lawyers Care, Inc., P.O. Box 1000, Peck Slip Station, New York, NY 10272-1000.

# 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 “inviolable” 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](http://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. ■

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# 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: \_\_\_\_\_ Bad faith claim made:  Yes  No  
Ins. Co.: \_\_\_\_\_ Suit filed v. insurer?  Yes  No  
Affiliated ins. group: \_\_\_\_\_ Court and location: \_\_\_\_\_  
Adjuster involved in conduct: \_\_\_\_\_ Docket #: \_\_\_\_\_  
Reported in Ins. Commissioner?  Yes  No Reporting Atty: \_\_\_\_\_  
Date reported: \_\_\_\_\_ Phone: (\_\_\_\_) \_\_\_\_\_  
Commissioner action: \_\_\_\_\_ Fax: (\_\_\_\_) \_\_\_\_\_

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Hartford, CT 06103-2920 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:

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## MEMORANDUM

**To:** All CTLA Members  
**From:** Thomas A. Cloutier, President  
**Date:** April 2001  
**Re:** “Cases that Make a Difference”

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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:

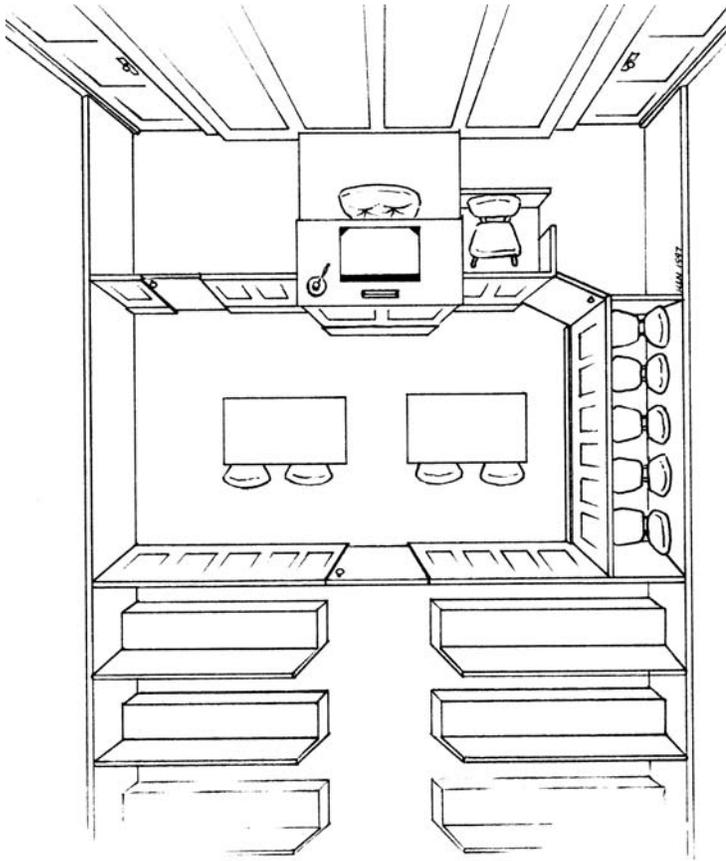
- FACT: Trial Lawyers are under attack in Congress and by many local politicians!
- FACT: Public opinion of trial lawyers is at an all-time low!
- FACT: Big business and their lobbyists are leading the attack on us, and are twisting the information to convince the public and our legislators that we do 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.



Pick Up Tasa Ad  
from page 27 last issue

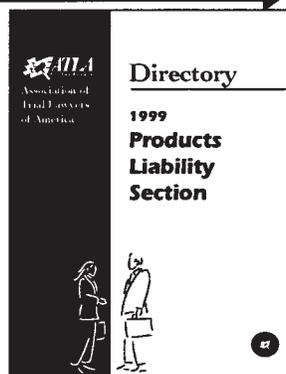
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# Product Liability Cases Create Positive Change

*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.

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## **'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).

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## **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.

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## **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).

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### **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.

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### **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).

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### **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 Oralflex 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 Oralflex. 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).

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### **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).

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### **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). ■



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Business Tel.	Business Tel.	Business Tel.	Business Tel.
_____	_____	_____	_____
Type of Case	Type of Case	Type of Case	Type of Case
_____	_____	_____	_____

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