

From The President's Notebook By Kathleen L. Nastri

Since the last issue of the FORUM reached readers, CTLA has strategized around and labored through challenges unlike any seen in recent years. So far, we have been successful. Unfortunately, these challenges continue to threaten the basic tenets of accountability within the law on which we depend in representing our clients.

When the medical malpractice "Crisis" arrived in Connecticut last year we were prepared. CTLA had amassed an arsenal of eminently credible information refuting doctors' claims and supporting the rights of victims. Chris Bernard and I met with legislators early and often to explain the merits of our position. Members' clients were asked to participate, and were ready to tell legislators how unfair an impact the tort "reform caps" would have on their individual situations. CTLA lobbyists and



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CTLA Update on Evidence

2001 — 2003 Update on Evidence (And Sundry Cases of Interest to the Trial Bar)

By Bob Adelman and Neil W. Sutton
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We include in this issue Bob Adelman and Neil Sutton's College of Evidence reviews for 2001, 2002 and 2003. The three years have been consolidated and presented in accordance with the ten sections of the Evidence Code. In addition, the authors have included sections on discovery, expert disclosure, rebuttal testimony, adverse inferences (medical reports), sufficiency of evidence, notice pleading and verdict forms. This should provide our Forum subscribers with some interesting reading well into the new year.

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INTRODUCTION

The Update on Evidence covers civil cases and (insofar as the rules therein are useful in civil cases) criminal cases published from September 12, 2000 through August 26, 2003.

The Table of Contents and section headings appear out of sequence because they follow the format of the *Connecticut Code of Evidence* ("C.C.E."). The C.C.E. became effective on January 1, 2000. Some of the Appellate decisions reviewed in this Update were tried before that date and therefore did not rely on the Code in deciding the issues. However, in order to help the practitioner familiarize himself or herself with the Code, reference is made to the applicable sections.

The Code does not cover every evidentiary issue. As stated in the commentary, C.C.E. §1-2(b): "Although the Code will address most evidentiary matters, it cannot possibly address every evidentiary issue that might arise during trial." Therefore, in addition to the articles in the Code, the Update contains additional headings.

I. General Provisions

§1-2 (b) PROCURING ABSENCE OF WITNESS WAIVES HEARSAY OBJECTION TO THE STATEMENT OF THAT WITNESS — *State v. Henry*, 76 Conn. App. 515 (May 26, 2003); West, J.; Trial Judge — Thompson, J.

RULE: The Code is not all encompassing. C.C.E. §1-2(b). Therefore, even though there is no similar hearsay exception in the Code, the Appellate Court follows the exception in Fed. R. Evid. 804(b)(6): "*Forfeiture by Wrongdoing*. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

FACTS: The defendant was accused of sexual assault. The victim gave a recorded statement to the police regarding the assault. Before trial, the victim was murdered. The state claimed that the defendant murdered the victim to prevent her from testifying in the sexual assault case.

The court held an evidentiary hearing, and concluded that the defendant had murdered the victim to make her unavailable to testify against him. In accordance with the Federal Rule, the trial court allowed the victim's tape-recorded statement in evidence, despite the fact that it was hearsay. The Appellate Court affirmed.

REASONING: Defendant pointed out that there is no provision in the C.C.E. comparable to Federal Rule of Evidence 804(b)(6). He argued "that the Connecticut Code of Evidence is an exclusive, all encompassing compilation of our evidentiary law, and, therefore, because it contains no provision that a hearsay statement that is offered against a party

who has procured the unavailability of a witness may be entered into evidence, the court improperly admitted the victim's recorded statement into evidence." *Id.* at 537.

The Appellate Court quoted extensively from an article by Justice Borden in the Connecticut Bar Journal in holding the Code was never designed to be all encompassing or to preclude the continued common law development of Connecticut rules of evidence. A new rule was adopted that procuring the absence of the declarant waives any hearsay objection.

§1-5(a) FAILURE TO PRODUCE MANUAL REFERENCED AND INCORPORATED IN CONTRACT DOES NOT PRECLUDE ADMISSION OF CONTRACT — *Advanced Financial Services, Inc. v. Associated Appraisal Services, Inc., et al.*, 79 Conn. App. 22 (August 26, 2003); Lavery C. J.; Trial Judge — Stengel, J.

RULE: C.C.E. §1-5 (a), which 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, considering the context of the first part of the statement, ought in fairness to be consid-

ered contemporaneously with it", does not preclude admission of part of a contract when another part of the contract cannot be produced.

FACTS: Action for damages resulting from defendant's negligent appraisal, which misrepresented the state of completion of construction on property. Plaintiff offered in evidence a loan purchase agreement referenced a "loan purchase program seller's manual" containing additional terms, conditions, and procedures. The plaintiff did not have a copy of the 1995 manual and could not obtain it. Defendant objected to the admission of the contract without the manual, citing C.C.E. §1-5(a). The trial court allowed the contract into evidence. The Appellate Court affirmed.

REASONING: "Even if we assume, without deciding, that this evidentiary section applies to written contracts and does not implicate the parol evidence rule, the fatal flaw in the defendant's argument is that the manual that was in place in 1995 no longer existed. Neither the plaintiff nor Countrywide had that manual. The court did order the plaintiff to produce a portion of the 2001 manual relevant to the completion certificate, which the plaintiff did." *Id.* at 29.

§1-5(b) **RIGHT TO INTRODUCE REMAINDER OF STATEMENT IS LIMITED BY RELEVANCY** — *State v. Jackson*, 257 Conn. 198 (July 31, 2001); Norcott, J.; Trial Judge — Thim, J.

RULE: "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, considering the context of the first part of the statement, ought in fairness to be considered with it." C.C.E. § 1.5(b).

FACTS: The defendant, the victim, and other men were playing cards at a house in Bridgeport. There was an altercation between the defendant and the victim, and the defendant was accused of shooting and killing the victim. When questioned by the police, the defendant gave a written statement that he had not been at the house at the time of the murder, but in fact had been elsewhere selling drugs. In the statement, the defendant related additional information, such as the fact that the victim was his sister's boyfriend, that he harbored no ill will toward the victim, and that he did not shoot him.

At trial, the defendant testified that in fact he had been at the house when the shooting occurred, but had seen an individual known as "Kato" shoot the victim.

The state offered the part of the defendant's statement in which he had said he was not at the house at the time of the shooting, to show the defendant was attempting to establish a false alibi. The defendant offered the remainder of the statement, pursuant to the rule set forth above. The trial judge did not allow the remainder of the statement to go to the jury. The Supreme Court affirmed.

REASONING: "It is an elementary rule of evidence that where part of a conversation has been put in evidence by one party to a litigation or prosecution, the other party is entitled to have the whole conversation, so far as relevant to the question, given in evidence, including the portion which is favorable to him." . . . In the present case, the selected portion of the statement rejected by the trial court was not relevant to the content and purpose of the state's introduction into evidence of the redacted portion of the defendant's written statement." *Id.* at 214-215.

§1-5(b) **OPENING THE DOOR ON A CONVERSATION LEADS TO ADMISSION OF REMAINDER** — *State v. Colon*, 71 Conn. App. 217, (July 23, 2002); Mihalakos, J.; Trial Judge — Comerford, J.

RULE: "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, considering the context of the first part of the statement, ought in fairness to be considered with it." C.C.E. §1-5(b) (emphasis added).

FACTS: Defendant was being prosecuted for shooting his girlfriend with a shotgun. On the witness stand was Sgt. Lynn Holly of the Bridgeport Police Department. As part of her investigation, Sgt. Holly had interviewed Sara Perez, the victim's mother.

During cross-examination, defense counsel asked Holly to recount part of her interview with Perez. Defense counsel was trying to establish that Perez had said the victim's children had not witnessed the shooting. This double hearsay was admitted.

On redirect, the state elicited the remainder of the interview with Perez. More particularly, that Perez had said

that the defendant claimed that the victim accidentally shot herself while cleaning the shotgun.

The defendant objected to the redirect examination on the basis of hearsay. The trial court allowed the testimony. The Appellate Court affirmed.

REASONING: On appeal, the state argued "the defendant opened the door by eliciting a prior hearsay response during its cross-examination of Holly.... The defendant recognizes the basis for the state's argument in its brief but argues that the doctrine on opening the door is not a recognized hearsay exception. We agree with the state." *Id.* at 234.

If the remainder of a statement is necessary to put the portion originally elicited in proper context, the remainder will not be excluded on hearsay grounds. "Statement," as used in this subsection, includes written, recorded and oral statements." C.C.E. §1-5(a) Commentary (emphasis added).

II. Judicial Notice

§2-2(b) **NOTICE NOT REQUIRED BEFORE COURT TAKES JUDICIAL NOTICE OF PROFESSIONAL ETHICAL RULES** — *Azia v. DiLascia*, 64 Conn.App. 540 (July 31, 2001); Spear, J.; Trial Judge — Munro, J.

RULE: "The court may take judicial notice without a request of a party to do so. Parties are entitled to receive notice and have an opportunity to be heard for matters susceptible of explanation or contradiction, but not for matters of established fact, the accuracy of which cannot be questioned." C.C.E. § 2-2(b).

FACTS: The main issue in this divorce appeal was the award of custody of parties' child to the plaintiff husband. During the divorce proceedings, pursuant to the court's Early Intervention Program, a Special Master psychologist had evaluated the child. A month after her service as Special Master in the litigation (during which she obtained confidential background information from the plaintiff husband), the Special Master was hired by the defendant mother as the child's treating psychologist. The defendant then called the psychologist as a witness during the divorce proceedings, to support her bid for custody.

After the trial concluded, the judge consulted the Ethical Rules of the American Psychological Association in concluding that the psychologist had vio-

lated those rules, to which the judge referred in his Memorandum of Decision. The Ethical Rules had never been introduced as evidence.

The defendant claimed that the reliance on the Ethical Rules without notice to her and an opportunity to be heard was error. The Appellate Court found the court's action proper.

REASONING: When judicial notice is taken at the request of a party, notice to the opposing party and an opportunity to be heard are required. *C.C.E.* §2-2(a). However, when the court takes judicial notice of a fact on its own initiative, if the matter is an "established fact, the accuracy of which cannot be questioned," notice and an opportunity to be heard are not required.

The Appellate Court held: "The ethical rules applicable to the profession of a witness are permissible for judicial notice because a professional, who is a member of an association, is held accountable to know those ethical rules. See, e.g., *Gagne v. Vaccaro*, 255 Conn. 390, 403, 766, A.2d 416 (2001)" *Azia v. DiLascia*, at 559. The *Gagne* case, cited by the court, refers to the ethical rules of the legal profession.

COMMENT: Given the complexity of the ethical rules, the fact that they constantly change, and the question of the applicability of the ethical rules of a voluntary association (e.g. the ABA), the classification of these rules as matters not "susceptible to explanation or contradiction" seems questionable.

III. Presumptions

§3-1 SOCIAL SECURITY ADMINISTRATION'S FINDING NOT BINDING AS TO DISABILITY — *Tevolini v. Tevolini*, 66 Conn. App. 16, (October 2, 2001); Healy, J.; Trial Judge — Harrigan, J.

RULE: A finding by the Social Security Administration that a party is disabled does not lead to a presumption that the party is disabled in an independent legal action.

FACTS: Divorce action in which the defendant wife claimed that her illness and disability were the cause of the breakdown in the marriage and made alimony claims based on her alleged inability to work.

The plaintiff husband sought a physical examination and the opportunity to present evidence to refute the claim of illness and disability.

The trial court found that the Social Security Administration's conclusion that

the defendant wife was disabled constituted a conclusive presumption to that effect in the divorce action.

The Appellate Court reversed, holding that the plaintiff husband had a right to present evidence on the issue, and that the trial court abused its discretion in permitting the administrative finding to create a conclusive presumption.

REASONING: "[B]ecause the defendant placed her health at issue in her claim for alimony, the plaintiff then had a right... to be heard and to offer evidence to refute that claim." *Id.* at 24.

IV. Relevancy

§4-1 EVIDENCE OF WHAT PLAINTIFF WOULD HAVE DONE IF GIVEN CORRECT INFORMATION IS NOT SPECULATIVE — *Dilieto v. County Obstetrics and Gynecology Group, P.C., et al.*, 265 Conn. 79 (July 29, 2003); Vertefeuille, J.; Trial Judge — Sheldon, J.

RULE: Plaintiff's testimony as to what course of treatment she would have followed if given correct information is admissible, despite defendant's claim that the testimony would be speculative.

FACTS: Plaintiff, suffering from intense and prolonged bleeding menstruation, consulted with Dr. Casper, an OB/GYN. Casper performed a dilation and curettage. The uterine tissue was submitted to Dr. Anderson, a pathologist. Anderson reported the tissue as consistent with an endometrial stroma sarcoma, which is malignant. The tissue was submitted for a second opinion to Yale New Haven Hospital where two pathologists examined it and agreed that the tissue was consistent with endometrial stroma sarcoma. The Yale Tumor Board also reviewed the case, and added another possibility to the differential diagnosis: myometrium, which is benign. This last piece of information was not communicated to the plaintiff.

Based upon the pathology, Casper recommended, and plaintiff agreed to, the removal of her uterus, fallopian tubes, and ovaries. The pathology after the surgery did not reveal any malignancy.

To establish causation, plaintiff sought to testify that if she had been told that her condition might be benign, she would have chosen a different course of treatment. Defendant objected to this testimony on the grounds that the plaintiff's testimony as to what she "would

have done" was speculative. The trial court barred the testimony. The Supreme Court found error and reversed.

REASONING: This issue was squarely addressed in *Burns v. Hanson*, 249 Conn. 809 (1999). In that wrongful birth case, plaintiff sought to testify as to whether or not she would have had an abortion if properly informed. The trial court barred the testimony on the grounds that it was speculative. The Supreme Court reversed, holding that the testimony was important on causation and that the argument that it is speculative goes to its weight, not admissibility.

In *DiLieto*, the defendant sought to distinguish *Burns* on the grounds that in *Burns* the plaintiff had had personal experience terminating a pregnancy many years before. Defendant argued that *Burns* should be confined to those cases where the plaintiff had prior experience with the surgery in question. According to the defendant, since Michelle DiLieto had not had a prior total hysterectomy, she did not have sufficient life experience to enable her to testify as to what she would have done had she been told that her condition was possibly benign. The Supreme Court ruled that the trial court's reading of *Burns* was too narrow, and the testimony should have been allowed.

§4-1 TESTIMONY OF EXPERT WITNESS PHYSICIAN AS TO HOW HE TREATED HIS WIFE FOR SIMILAR INJURY, CONTRARY TO OPINION ON STANDARD OF CARE, ADMISSIBLE ON CREDIBILITY — *Raybeck v. Danbury Orthopedic Associates, P.C., et al.*, 72 Conn. App. 359 (September 17, 2002); Flynn, J.; Trial Judge — Radcliffe, J.

RULE: Expert witness' action in similar situation, contrary to his opinion regarding what the standard of care mandated, is admissible to impeach the expert's credibility.

FACTS: Plaintiff sustained a Colles' fracture of her wrist. Dr. Malloy, treating the plaintiff in the ER, manually realigned the bones and applied a cast. The fracture did not heal properly, developing a tilt that made one of the bones in the wrist protrude outward and cause pain. Plaintiff sought a second opinion from Dr. Wolfe, who performed surgery,

pinning the wrist. Plaintiff brought suit alleging that Dr. Malloy should have pinned the wrist in the first instance.

Plaintiff's expert, Dr. Sedlin, testified that the standard of care mandated pinning. However, he revealed at deposition that while on a skiing trip his wife had sustained a fracture similar to the one sustained by the plaintiff, and that he had treated the fracture with a cast instead of pins. He claimed that he treated his wife this way — inconsistent with his stated opinion on the standard of care — only because he and his wife were planning a trip to Tahiti (after their ski trip) and if he had used pins, she would have been unable to swim.

He indicated that in the event that they hadn't been going to Tahiti, he would have referred his wife to his partner, Dr. Houseman, for pinning. Plaintiff objected to this testimony on the grounds that how Dr. Sedlin treated his wife was irrelevant and would distract the jury from the main issues in the case. The trial court allowed the testimony. The Appellate Court affirmed.

REASONING: "The fact that Dr. Sedlin treated his wife in a manner that was contrary to what he has asserted was mandated by the duty of care would serve to aid the jury in its determination of his credibility and it was therefore relevant." *Id.* at 379.

§4-1 TESTIMONY OF EXPERT WITNESS PHYSICIAN AS TO WHAT HE WOULD HAVE DONE, WHILE NOT SUFFICIENT TO ESTABLISH STANDARD OF CARE, IS RELEVANT ON STANDARD OF CARE AND CREDIBILITY — *Wallbank, et al. v. Rothenberg*, 74 P.3d 413 (Colo.App. 2003), Certiorari Granted, 2003 Colo. Lexis 579 (July 21, 2003), Naves, J.; Trial Judge — Taubman, J.

RULE: Expert witness' testimony as to what he would have done if presented with the plaintiffs' case is admissible to establish the standard of care, despite expert's testimony that the standard of care does not require that the case be handled in that way.

FACTS: This case arose when Dr. Rothenberg was performing surgery on six-week old Emily Wallbank to remove a growth called a cystic hygroma on her

neck. During surgery, Emily's facial nerve was injured, causing partial paralysis of the right side of her face. Plaintiffs claimed that Rothenberg was negligent in not obtaining a CT scan or MRI before surgery to determine the extent of the growth and its relationship to the facial nerves.

Rothenberg's expert testified that the standard of care did not require that a CT scan or MRI be obtained before surgery. However, he testified that he personally would have obtained those tests before surgery.

Defendant moved in limine to prohibit the testimony as to what Rothenberg's expert would have done, claiming the personal preference of a particular expert is irrelevant to the standard of care because a practice different from that personally followed by an expert witness may also fall within the applicable standard of care. *Id.* at 416.

The trial court allowed the testimony, ruling that "such testimony of the expert's personal practices was admissible and relevant as some evidence of the standard of care, as long as additional evidence was presented that Rothenberg's conduct fell below the standard of care." *Id.* The Colorado Court of Appeals affirmed. The Colorado Supreme Court has granted certiorari.

REASONING:

"We conclude, as did the trial court, that testimony concerning the experts' personal practices was of some relevance because each expert also testified concerning the applicable standard of care. We reach this conclusion for the following reasons.

"First, as the [*State Bd. Of Med. Exam'rs v. McCroskey* 880 P.2d 1188 (Colo. 1994)] court noted, 'the actual practice in a community' is the starting point in determining a reasonable standard of care. Thus, once the expert testified concerning the standard of care, then testimony of that expert's personal practices may help the jurors understand why that standard of care is followed by that expert or other experts.

"Second, testimony regarding an expert's personal practices may either bolster or impeach the credibility of that expert's testimony concerning the standard of care. See, C. Frederick Overby, *Trial Practice and Procedure*, 51 Mercer L. Rev. 487, 501-02 (1999) ("The relevance and importance of a medical expert's personal choice of a course of treatment is highly probative of the credibility of the

expert's opinion concerning the standard of care. A jury is free to disregard the expert's opinion entirely and find that the standard of care is reflected by the course of treatment the expert would have chosen, a highly probable scenario if other evidence admitted in the case supports this proposition.')

"Third, because each expert addressed the applicable standard of care, testimony regarding their personal practices was proper direct and cross-examination. Thus, the jury could give whatever weight it determined was appropriate to the testimony of those experts, including ignoring it completely. Similarly, during closing argument counsel for each party was able to argue the significance of the experts' testimony as to their personal practices. Also, the jury was properly instructed concerning the applicable standard of care."

Id. at 416-17.

One old Connecticut case seemed to imply that what the expert would have done might have been sufficient to *establish* the standard of care, but modern case law does not support that proposition. See, *Nielson v. D'Angelo*, 1 Conn. App. 239, 246 (1984).

§4-1 TESTIMONY THAT A DIFFERENT SURGICAL APPROACH WOULD HAVE AVOIDED AN INJURY INADMISSIBLE UNLESS CHOICE OF SURGICAL APPROACH WAS A BREACH OF THE STANDARD OF CARE — *Harrison v. Hamzi, et al.*, 77 Conn. App. 510 (June 17, 2003); Dupont, J.; Trial Judge — West, J.

RULE: Testimony that the defendant could have avoided an injury by using a different surgical approach is inadmissible on causation, unless the expert testifies that it was a breach of the standard of care to use the defendant's surgical approach.

FACTS: Plaintiff had a goiter removed by the defendant. During the surgery plaintiff suffered an injury to her laryngeal nerve, causing vocal cord paralysis.

Plaintiff's expert testified that the defendant breached the standard of care by doing the operation too fast. He testified that the surgeon must be meticulous and careful in identifying and protecting the nerve while dissecting out the goiter. The operative note reflected that it took the defendant 55 minutes to perform the

operation. Plaintiff's expert indicated a careful and meticulous dissection of this goiter could not have been performed in that time frame.

Plaintiff's expert also testified that which surgical approach was used for this operation was the "surgeon's preference," and that the defendant did not breach the standard of care by choosing the surgical approach he used.

Plaintiff then sought to offer testimony that use of an alternative surgical approach would have avoided the injury. The trial court excluded the testimony but on the grounds that it was irrelevant. The Appellate Court affirmed.

REASONING: In the absence of testimony from the expert that the standard of care required the defendant to use an alternative surgical approach, the testimony was not relevant on the issue of whether the breach caused the injury.

§4-1 EVIDENCE OF PRIOR SANDY CONDITION IN "GENERAL AREA" ON ROADWAY INADMISSIBLE — *White v. Westport*, 72 Conn. App. 169 (September 20, 2002); Hennessy, J.; Trial Judge — Ryan, J.

RULE: Evidence of defective condition in "general area" where accident occurred is inadmissible to prove constructive notice of defective road.

FACTS: Plaintiff claimed he lost control of his motorcycle as a result of sand on Beachside Avenue. The jury found that the sand constituted a defect and that the defendant town had notice of that specific defect, but that the plaintiff had not proved that the defendant had sufficient opportunity to remove the sand. There was a defendant's verdict.

Plaintiff offered evidence from a neighbor who had written a letter to the town four years before the accident, complaining about the sand on Beachside Avenue. The neighbor was prepared to testify that the problem principally arose during the spring and summer (the accident occurred in June) because the defendant Town did not adequately remove sand after the winter months. However, the neighbor could not say whether or not there had been sand at the precise location of the accident. The trial court barred the testimony.

Plaintiff also sought to offer the testimony of the town's Director of Public Works, that when street sweepers were

used to clean the roads, they did not remove sand from the adjacent elevated sidewalks. The implication was that, even if the town used street sweepers after the winter and before the accident, sand on the sidewalks would blow into the roadway. The trial court also barred this testimony.

The Appellate Court affirmed.

REASONING: In *Ormsby vs. Frankel*, 255 Conn. 670 (2001), the Supreme Court relaxed the standard for evidence of a prior icing condition when offered to prove constructive notice. However, the prior icing condition at issue in *Ormsby* was in the same location as the icing condition that caused the plaintiff's accident. Plaintiff in *White v. Westport* was unable to forge that link.

As to the evidence regarding the street sweepers not getting sand off the sidewalks, plaintiff was unable to demonstrate that the sand in the roadway on the date of the accident came from sidewalks. In face of the fact that there were beaches near the accident location, plaintiff was unable to prove that the sand in question had been applied by the town during the winter months and not cleaned up.

COMMENT: The Appellate Court's view of relevancy here appears a bit too restrictive, especially given that, to quote from the commentary from §4-1 of the Code, "it is not necessary that the evidence, by itself, conclusively establish the fact for which it is offered or render the fact more probable than not." It only has to have a "tendency to support a fact relevant to the issues."

§4-1 STANDARD OF ADMISSIBILITY FOR EVIDENCE OF PRIOR ICING CONDITION AND PRIOR ACCIDENTS IS MORE RELAXED WHEN EVIDENCE IS OFFERED TO PROVE NOTICE RATHER THAN EXISTENCE OF DEFECT — *Ormsby v. Frankel*, 255 Conn. 670 (April 17, 2001); Borden, J.; Trial Judge — Lavine, J.

RULE: "[I]n an action brought under §13a-144, when a party offers evidence of a prior accident in order to prove constructive notice of the particular defect in question, and not the defect itself, a more attenuated standard is appropriate. Under this standard, [a] plaintiff

attempting to introduce evidence of prior accidents must show that the circumstances of the other accidents were substantially similar to those under which the plaintiff was injured.... The requirement of a substantially similar condition is lessened when the evidence is offered to show notice of a dangerous condition. In such a case, the prior accidents need only be such as [would] call [the] defendant's attention to the dangerous situation that resulted in the litigated accident." *Id.* at 688-89.

FACTS: Plaintiff's car skidded on a 250-foot ice patch on the roadway. Plaintiff presented (1) testimony from police department employees that in the year before the plaintiff's accident, ice was common on the stretch of road in question, and the department had received more complaints of ice there than in other areas, and (2) evidence of an accident at the same location, one day before the plaintiff's accident.

As to the evidence that the area was prone to icing, the defendant objected, relying on a long line of cases which hold that "[t]he notice, actual or implied, of a highway defect causing injuries which a municipality must receive as a condition precedent [to] liability for those injuries, is notice of the defect itself which occasioned the injury, and not merely of conditions naturally productive of that defect and subsequently in fact producing it. Notice of another defect, or of the existence of a cause likely to produce the defect, is not sufficient...." *Id.* at 678-79.

The plaintiff, however, had offered this evidence to show how vigilant the defendant should have been in monitoring icing on this particular stretch of roadway. "The evidence of prior icing conditions was relevant to establish a more truncated time period than would otherwise be permitted during which the defendant should have discovered the particular icy condition on that day. For example, absent actual notice of the specific icy condition on that day, if the icy condition had existed for a certain number of hours before the accident, evidence of prior similar conditions at that general area would be relevant to the jury's determination regarding whether that number of hours was long enough to charge the defendant with constructive notice of that condition. In the present case, the plaintiff's evidence was that the particular ice that caused the accident had existed for two and one-half hours before the accident occurred. Evidence of prior icing

conditions was relevant to the jury's determination that this was a sufficient amount of time for the department to uncover and remedy the particular icy condition that caused the plaintiff's accident." *Id.* at 680.

The defendant claimed that the evidence of the accident the day before the plaintiff's should not have been admissible unless the plaintiff proved that the same patch of ice caused both accidents. In fact, the patch of ice from the day before had been sanded, and thousands of cars had passed over the road between the two accidents. The melting of snow each day and the freezing of the runoff each night caused the icy condition in question. According to the defendant, because the two ice patches were not the same, or substantially similar, the evidence was inadmissible. The trial court admitted the testimony on the issue of notice.

Following *Martins v. Connecticut Light & Power*, 35, *Conn.App.* 212, cert. denied, 231 Conn. 915 (1994), the trial court held that, because the prior accident was being offered as proof of an event which called the defendant's attention to a dangerous condition and increased the duty to inspect and remedy it, the plaintiff was not required to offer evidence of similarity to the same degree as when proving defectiveness. The Supreme Court affirmed.

REASONING: "This claim presents us with the necessity of resolving an issue that we previously have noted, but have not found necessary to decide, namely, in an action brought under §13a-144, what is the standard by which a trial court should gauge the admissibility of evidence of a prior accident offered to prove constructive notice of the particular defect in question? More precisely, the question is whether the circumstances of the prior accident must be essentially the same as the accident in question, or whether a more relaxed standard is appropriate. We conclude that the standard to be employed is the more relaxed standard previously articulated in *Claveloux v. Downtown Racquet Club Associates*, supra, 44 *Conn.App.* 696, and *Martins v. Connecticut Light & Power Co.*, supra, 35 *Conn.App.* 218." *Ormsby v. Frankel*, at 683.

In addition to adopting the more relaxed standard of admissibility regarding prior accidents when offered to prove constructive notice, Justice Borden, one of the leading Connecticut authorities on

evidence, cited with approval important language from *Martins v. Connecticut Light & Power Co.*: "We also agree with the Appellate Court that '[a] party should not be denied the right to prove every essential fact material to its cause of action by the most convincing evidence available....' *Martins v. Connecticut Light & Power Co.*, supra, 35 *Conn.App.* 220. A prior accident at the same location, under the same weather and road conditions, is certainly relevant to how much time was reasonable for the defendant to have responded to road conditions on February 20, 1993." *Ormsby v. Frankel*, at 689-90 (emphasis added).

§4-1 **IN A PRODUCTS CASE, WHERE NOTICE IS NOT AN ISSUE, PRIOR ACCIDENTS MUST BE SUBSTANTIALLY SIMILAR** — *Pickel v. Automated Waste Disposal, Inc.*, 65 *Conn.App.* 176 (August 21, 2001); Foti, J.; Trial Judge: Radcliffe, J.

RULE: Evidence of other similar accidents is admissible to prove the existence of a particular physical condition, situation or defect. However, a party attempting to offer evidence of prior accidents or evidence of the experience of others has the burden of proving that the circumstances were substantially the same as those under which the plaintiff was injured. *Id.* at 185.

FACTS: The plaintiff, a Post Office employee, was emptying trash at work when the dumpster lid struck her and knocked her unconscious.

The plaintiff sought to call as witnesses a number of other postal employees who had had incidents with the dumpster. The trial court ruled that the plaintiff had failed to prove that the prior incidents were sufficiently similar to allow their admissibility into evidence. The Appellate Court affirmed.

REASONING: The first witness had been injured six days before the delivery of the dumpster in question to the Post Office. He was unable to testify that it was the same dumpster, or even the same color. In addition, no foundation had been laid that the circumstances in the two incidents were the same. (The plaintiff had not yet testified as to how her accident occurred when this witness was offered.)

§4-1 **LIMITING INSTRUCTION HELD SUFFICIENT TO NEGATE IMPROPER ADMISSION OF IRRELE-**

VANT AND PREJUDICIAL EVIDENCE — *State v. Coughlin*, 61 *Conn.App.* 90 (December 12, 2000); Mihalakos, J.; Trial Judge: Parker, J.

RULE: You can unring the bell.

FACTS: Defendant crossed the centerline and collided head-on with a pickup truck coming in the opposite direction, seriously injuring the other driver. Defendant was taken to the hospital, where blood and urine samples were taken. His blood alcohol level was 0.17%. The urine screen was positive for cocaine.

Months later, the defendant unsuccessfully attempted to steal the lab report from his hospital file.

At trial, the state offered the entire hospital file to show how the defendant had ripped the lab report from its folder, and thereby show consciousness of guilt and state of mind. The defendant moved that the reference to cocaine in the lab report be redacted, because he was charged with driving under the influence of alcohol, not driving under the influence of drugs.

The trial court refused to redact the reference to cocaine, but did instruct the jury as follows: "There is absolutely no evidence about cocaine in this case. You must totally remove from your minds anything about drugs when considering this case." *Id.* at 95.

The defendant appealed, claiming that the admission of evidence regarding cocaine was unfairly prejudicial. The Appellate Court affirmed the trial court.

REASONING: A jury is presumed to follow the court's instructions.

§4-1 **INCOME TAX RETURNS OFFERED BY PLAINTIFF IMPROPERLY PRECLUDED BECAUSE THEY SHOW INCREASE IN EARNINGS** — *Daigle v. Metropolitan Property and Casualty Insurance Company*, 60 *Conn.App.* 465 (October 17, 2000); Hennessy, J.; Trial Judge — Mihalakos, J.; *Daigle v. Metropolitan Property and Casualty Insurance Company*, 257 *Conn.* 359 (August 7, 2001); Sullivan, J.

RULE: The fact that the plaintiff's income tax returns show an increase in net income does not necessarily mean that the plaintiff has not sustained a loss of earning capacity.

FACTS: Automobile collision case in which the plaintiff offered his income tax returns as evidence on his claim for lost wages and lost earning capacity. His claim was that as a self-employed general contractor he had to hire people to do work he previously had done himself.

The tax returns showed an increase in net income. The trial judge refused to allow the tax returns in evidence because, in his view, they could not provide the basis for a reasonable estimate by the jury of lost wages or earning capacity. The Appellate Court affirmed.

The plaintiff appealed to the Supreme Court. Although the Supreme Court affirmed the Appellate Court's decision (because the plaintiff had failed to mark his tax returns for identification, and this precluding appellate review), the court specifically disavowed the Appellate Court's reasoning that the tax returns were not admissible because they showed an increase in net income.

REASONING: "We do not rely on the Appellate Court's reasoning that 'because the plaintiff's tax returns showed an increase in net income after the accidents, they could not provide a basis for a reasonable estimate by the jury of an alleged loss in wages or earning capacity due to his injuries.' *Daigle v. Metropolitan Property & Casualty Ins. Co.*, supra, 60 Conn.App. 470. Although this statement is correct if it is assumed that the only evidence offered, namely, the plaintiff's income tax returns, established an increase in net income, it requires clarification. The mere fact that a party's income tax returns show an increase in net income after an accident does not necessarily mean that that party has not sustained a loss of earning capacity. For example, a person who had been unemployed or underemployed prior to an accident and who then is partially disabled as a result of that accident would not be precluded from asserting a claim for loss of future earning capacity merely because he or she is employed with increased, post accident net income." *Daigle v. Metropolitan*, at 363-64, n.5.

COMMENT/CAVEAT: Beware if defense counsel cites the Appellate Court opinion, which upheld the trial court's holding, and which the Supreme Court in turn affirmed. The Supreme Court affirmed because the plaintiff had not marked the tax returns for identification, so the court concluded it could not review his claim.

The Supreme Court clearly went out of its way, however, to disavow the rea-

soning of the trial and Appellate Courts. Unfortunately, this language is contained only in a footnote in the Supreme Court opinion, so if you are unaware of the footnote, you may be misled by a citation to the Appellate Court opinion.

§4-1 EVIDENCE OF GENERAL CONDITION OF PARKING LOT INADMISSIBLE TO PROVE SPECIFIC DEFECT — *Boretti v. Panacea*, 67 Conn. App. 223, (December 4, 2001); Dranginis, J.; Trial Judge — Moraghan, J.

RULE: Where the alleged defect is a particular patch of ice, evidence of the "general condition" of the parking lot is irrelevant.

FACTS: Plaintiff and her daughter drove to defendant's office building and parked in the lot. While getting out of her car, the plaintiff slipped and fell. The alleged defect was ice surrounding the car.

The daughter testified regarding the fall and the specific condition of the parking lot around the car. When plaintiff's counsel sought to elicit further testimony regarding the general condition of the parking lot beyond the immediate vicinity of the car, the defendants objected on the ground of relevance. The objection was sustained. The Appellate Court affirmed.

REASONING: "After a review of the record and transcripts in this case, we conclude that the trial court did not abuse its discretion in its rulings with regard to the scope of the plaintiff's direct examination of her daughter. In this premises defect case, for the plaintiff to recover for breach of a duty owed to her as a business invitee, the plaintiff had to allege and prove that the defendants had either actual or constructive knowledge of the 'specific defective condition which caused the injury and not merely of conditions naturally productive of that defect.... On the question of notice the trier's consideration must be confined to the defendant's knowledge and realization of the specific condition causing the injury, and such knowledge cannot be found to exist from a knowledge of the general or overall conditions obtaining on the premises.' (Citations omitted.) *Kirby v. Zlotnick*, 160 Conn. 341, 344-45, 278 A.2d 822 (1971); see *Monahan v. Montgomery*, 153 Conn. 386, 390, 216 A.2d 824 (1966); *Fuller v. First National Supermarkets, Inc.*, 38 Conn. App. 299,

301, 661 A.2d 110 (1995); *LaFaive v. DiLoreto*, 2 Conn. App. 58, 60, 476 A.2d 626, cert. denied, 194 Conn. 801, 477 A.2d 1021 (1984).

"Given that the plaintiff, as a business invitee, was required to prove that the defendants had notice of the specific condition of the parking lot that caused her to fall, testimony regarding the general condition of the parking lot was irrelevant in this case." *Boretti* at 228.

COMMENT: It would be reasonable in this situation to argue that, as to the duty to inspect the premises, the defendant could be found by the trier of fact more likely to have failed if there was ice all over the parking lot, which would be far more apparent than a smaller patch of ice surrounding the car.

§4-1 OWNER'S MANUAL NOT ADMISSIBLE AS EVIDENCE OF NEGLIGENCE — *Chasse v. Mitchell*, 2002 Ct. Sup. 9828, 32 CLR 624 (August 1, 2002); Corradino, J.

RULE: Pronouncements in the owner's manual do not establish a standard of care.

FACTS: This case arose out of a collision on I-395 caused at least in part by slippery conditions. The defendant testified that he downshifted when he began to slide.

The owner's manual for the vehicle (which the defendant did not own) stated: "Warning: To avoid skidding and losing control on slippery roads, do not downshift into low when you are moving faster than 20 mph (30 km/h)." Plaintiff argued that the defendant downshifted between 35 and 45 mph. The trial court refused to admit the owner's manual or its warning in evidence. The jury returned a defendant's verdict.

REASONING: Defendant testified he never read the manual. There is no legal duty to read the manual. Therefore, failure to read the manual or follow its warning cannot constitute negligence or be evidence of negligence.

The plaintiff also argued that the warning was relevant to establish a "standard of care". The court excluded the evidence, finding that even if the manufacturer's recommendation had not been followed, "there was no testimony presented, expert or otherwise, that the downshifting had anything to do with causing the defendant to lose control of the vehicle..." *Id.* at 7. In other words, there was no evidence of causation.

COMMENT: An owner's manual might, under the right circumstances, be analogized to a learned treatise, and admissible through an expert witness.

§4-1 RELEVANT EVIDENCE NEED ONLY HAVE A TENDENCY TO PROVE A FACT — *Bovat v. Waterbury*, 258 Conn. 574 (November 20, 2001); Katz, J.; Trial Judge — Leheny, J.

RULE: It is not necessary that a piece of evidence conclusively establish the fact for which it is offered or render it more probable than not. Evidence is relevant if it has a "tendency" to support a conclusion, "if only in a slight degree." C.C.E. §4-1, Commentary.

FACTS: Plaintiff was a passenger in a car driven by his friend, Steven Sylvester, when Sylvester was blinded by the lights of an oncoming car and skidded into a utility pole owned by CL&P. The light pole was only 3 feet, 4 inches from the edge of the road. The plaintiff collected the \$25,000 policy limit from Sylvester and brought suit against CL&P and the City of Waterbury, claiming a wrongly situated light pole and a defective road.

Before trial the plaintiff settled with CL&P for \$10,000.

Plaintiff filed a Motion in Limine to preclude the defendant City from eliciting evidence regarding the settlements with Sylvester and CL&P.

The trial court ruled that the pleadings asserting CL&P's culpability were evidentiary admissions and would be admitted. The gist of the ruling was that the fact that the plaintiff had made a claim against CL&P was admissible because it contradicted his position that the City was solely responsible.

However, the trial court precluded the defendant from eliciting testimony regarding the settlement or release between the plaintiff and CL&P. *Conn. Gen. Stat.*, §52-216 provides: "An agreement with any tortfeasor not to bring legal action or a release of a tortfeasor in any cause of action shall not be read to a jury or in any other way introduced in evidence by either party at any time during the trial of the cause of action against any other joint tortfeasors, nor shall any other agreement not to sue or release of claim among any plaintiffs or defendants in the action be read or in any other way introduced to a jury."

As to Sylvester, against whom suit was never filed, the trial court asked whether the defendant had evidence that the plaintiff had asserted a claim. Defendant responded that while he did not have direct evidence, he had documents reflecting a settlement, and asserted that the jury should be allowed to infer from the settlement that the plaintiff had made a claim.

The trial court ruled that although the defendant could question the plaintiff about whether he asserted a claim against Sylvester, it could not introduce evidence of the settlement and release. When the defendant asked the plaintiff on the witness stand whether or not he had asserted a claim against Sylvester, he said he had not.

The defendant subpoenaed a claims adjuster from Liberty Mutual, Sylvester's carrier, and offered the following documents to impeach the plaintiff's testimony that he had not asserted a claim against Sylvester: (1) a letter to Sylvester from Liberty Mutual, notifying him of its intention to pay the \$25,000 policy limit in return for a release; (2) a release signed by the plaintiff; and (3) a computer-generated record indicating that Liberty Mutual had issued a \$25,000 check to the plaintiff for a loss on the date of the collision.

The trial court refused to admit the documents, on the basis that they did not conclusively establish that the plaintiff had made a claim. The Supreme Court found error, although harmless.

REASONING: Although it was theoretically possible that Liberty Mutual initiated contact with the plaintiff, and offered to pay the policy limit without his asserting a claim, this seems unlikely.

In addition, the claims manager testified that Liberty Mutual "would not have entered into a settlement and issued a check in exchange for a release of claims without a party having initiated a claim.... Therefore, the evidence was probative of the fact that a claim may have been made. See *Conn. Code Evid.* §4-1. Consequently, the jury should have been given the opportunity to consider the evidence in assessing the plaintiff's credibility." *Id.* at 596-97.

COMMENT: Although the evidence is clearly relevant, the opinion does not go the next step and deal with the conflict with *Conn. Gen. Stat.*, §52-216a, quoted above.

§4-3 COLLATERAL EVIDENCE INTENDED TO CORROBORATE WITNESS NOT ALLOWED — *State v. Hunter*, 62 Conn.App. 767 (April 17, 2001); Zarella, J.; Trial Judge — Gill, J.

RULE: Relevant evidence may be excluded where the proof and answering evidence it provokes may create a side issue that will unduly distract the jury from the main issues. C.C.E. §4-3.

FACTS: Murder case in which the principal evidence against the defendant was a written statement by Jesus Alvarez. In the statement, Alvarez admitted to participating in the events leading up to the murder and identified the defendant as the shooter. After giving the statement, Alvarez pleaded guilty to conspiracy to commit murder and was sentenced to ten years imprisonment.

At trial, Alvarez disavowed the statement, claiming that he had never read it, had been under the influence of drugs when he signed it, and that the police had coerced him into signing it. He further testified that he had not been involved in the murder and had not seen the defendant on the day of the murder. Alvarez' written statement was admitted for substantive purposes under *State v. Whelan*, 200 Conn. 743 (1986). C.C.E. §8-5(1).

On cross-examination, the defendant testified that on the night of the murder he and a number of friends had gone to a convenience store at or about the time of the murder. He further testified that a video surveillance tape from the convenience store showed that he had been in the convenience store at that time and could not have witnessed the murder.

Defendant's counsel sought to call four "alibi" witnesses to corroborate Alvarez's testimony and to introduce the convenience store video. The trial court refused to allow the defendant to call the witnesses or put the convenience store video into evidence. The court explained: "[I]t's not relevant to the case.... [W]e have to conclude cases when we start them. I don't think we can keep going off and branching off and get everybody else to come in and say yes they saw her with another witness.... [Alvarez] has testified, the jury can believe [him] or not believe [him]." *State v. Hunter*, at 774.

REASONING: "The court did not abuse its discretion by not allowing this evidence because it was not legally relevant. The admission of this evidence

would have created a side issue that would have unduly distracted the jury from the main issue. By allowing the admission of this evidence and the examination of the alibi witnesses proposed by the defendant, the court would have opened the door to several trials within a trial." *Id.* at 775.

§4-3 PROBATIVE VALUE VS. PREJUDICIAL EFFECT: FAILURE TO REDACT PREJUDICIAL MATERIAL — *Ancheff v. Hartford Hospital*, 260 Conn. 785, (July 9, 2002); Borden, J.; Trial Judge — McWeeny, J.

RULE: An offer to redact prejudicial material from an exhibit may be "too little and too late" when the offer to redact is not made until the exhibit has been offered several times.

FACTS: In January 1993 the plaintiff underwent back surgery, after which he developed an infection. An infectious disease specialist, Dr. Jonathan Tress, treated him. Tress ordered a once a day dose of Gentamicin, 480mg. Gentamicin has a known side effect of poisoning the inner ear.

Pursuant to an inpatient dosing program previously enacted by the hospital, the hospital pharmacy increased the daily dosage to 615mg. Thereafter, Tress examined the plaintiff's condition, and determined that the increased dosage was appropriate. Plaintiff developed vestibular toxicity, which resulted in the loss of the function of his inner ear, including his sense of balance.

The plaintiff claimed that the hospital's inpatient dosing program which resulted in a single large daily dose of Gentamicin in lieu of the conventional three doses per day, constituted "medical research", and that the hospital had failed to get his informed consent before including him in the program. The hospital claimed that the inpatient dosing program was not "medical research", but a program of medical therapy for the improvement of patient care. This was a key factual issue for the jury.

The hospital had signed an agreement with the federal government that, in return for federal funding, all "medical research" would be conducted in accordance with the ethical principles set forth in the Belmont Report.

The Belmont Report contained a definition of "medical research", of significant probative value in resolving a criti-

cal issue before the jury. However, the Report also contained passages the trial judge found unduly prejudicial, regarding experimentation on concentration camp victims and the infamous Tuskegee syphilis study, which used disadvantaged rural black men to study the untreated course of syphilis.

Plaintiff's counsel offered the Report on at least five different occasions during the trial. The trial judge ruled that the probative value of the report was outweighed by its prejudicial effect, and refused to admit it. The Supreme Court affirmed.

REASONING: "On the probative side of the scale, the Belmont Report did contain a definition of research, and an explanation of the line between practice and research, which the hospital, by signing the July 30, 1992 agreement, which in turn incorporated the report by reference, could be considered to have adopted. Nonetheless, the trial court, in deciding whether the report was more prejudicial than probative, was confronted by the plaintiff's consistent offer of the report as a whole, rather than with a clear choice of admitting only the probative part and excluding the rest, which constituted much the greater portion of the report. We ordinarily leave that balancing function to the broad discretion of the trial court, and see no basis for concluding that the court abused that discretion in this case.

"This brings us to the second exception noted previously, namely, the plaintiff's final offer of redaction. That offer can best be characterized as too little and too late. It was too little because it left to the trial court the task of deciding precisely what portions of the ten single-spaced page report were to be redacted. 'It [was] not the trial court's responsibility to attempt to separate the admissible and inadmissible portions of the [Belmont Report.]' *Calcano v. Calcano*, 257 Conn. 230, 243, 777 A.2d 633 (2001). It was too late because it came, not during any of the plaintiff's offers of the report, but after the court had ruled three times on the report as offered in an essentially unredacted form, and after the court had completed delivering its articulation of the basis of its ruling. We therefore decline to give any determinative weight to the plaintiff's final offer of redaction." *Ancheff* at 807.

COMMENT: This rule, which puts the burden of identifying and redacting

unfairly prejudicial parts of a document on the offering party, seems to contradict earlier case law placing the burden on the objecting party to specify which parts of an otherwise admissible document ought to be redacted. For example, when a business record is offered, some parts may be subject to redaction. However, as Professor Tait notes, "the burden is on the objecting party to point out the inadmissible parts and to specify his or her objections." *Tait's Handbook of Evidence* §8.28.7, 3d ed. 2001.

In addition, the rule in *Ancheff* presents practical problems. How does the offering party know which sections the court considers unfairly prejudicial? Perhaps the best solution is to sit down with opposing counsel and identify which sections are objected to as unfairly prejudicial, try to reach agreement on most of them, and bring the final disputed sections to the trial court for a ruling.

§4-8 OFFER OF COMPROMISE INADMISSIBLE — WHEN REDACTION REQUIRED — *Marquardt and Roche/Meditz and Hackett, Inc. v. Riverbend Executive Center, Inc.*, 74 Conn. App. 412 (January 7, 2003); Flynn, J.; Trial Judge — Cocco, J.

RULE: When offering a document containing admissible material and an offer of compromise, the burden is on the party offering the document in evidence to redact the inadmissible portion.

FACTS: This litigation evolved over a fight about three parking spaces. Defendant offered a letter from defendant's attorney, which it claimed contained a statement of fact separate from any offer of compromise. The trial court refused to allow the letter in evidence. The Appellate Court affirmed.

REASONING: "Although there were statements within that letter that the defendant wanted introduced into evidence, the defendant never sought an introduction of only those portions it claims were admissible; it sought, rather, to introduce the entire letter. Because the inadmissible statements of an offer of compromise were contained in the letter offered in its entirety, the court properly refused to admit that letter into evidence." *Id.* at 428.

VI. Witnesses

§6-6(b) MISCONDUCT EVIDENCE — INQUIRY ALLOWED REGARDING SHOPLIFTING INCIDENT IN PERSONAL INJURY CASE — *Schimmelpfennig v. Cutler*, 65 Conn.App. 388 (August 28, 2001); Foti, J.; Trial Judge — Sferrazza, J.

RULE: “A witness may be asked, in good faith, about specific instances of conduct of the witness, if probative of the witness’ character for untruthfulness.” C.C.E. §6-6(B)(1).

FACTS: Plaintiff, a passenger in a car driven by Tobey Falco, was involved in an automobile collision. Jeffrey Stachura, originally a defendant in the case, had lent the car to Falco. Stachura stated in his deposition that he believed that, on the day of the collision, the plaintiff and Falco had been shoplifting, because merchandise in the trunk after the collision was not in bags and still had the store tags attached.

Defendant’s counsel filed a motion requesting permission to cross-examine the plaintiff on whether or not she had been shoplifting on the date of the collision, which the plaintiff vehemently denied. The court permitted the inquiry, but ruled that extrinsic evidence would not be permitted on this point. C.C.E. §6-6(b)(2). The Appellate Court upheld the trial court.

REASONING: Whether to permit this type of inquiry as to the plaintiff’s credibility is within the discretion of the trial court.

§6-11(b) PRIOR CONSISTENT STATEMENT MUST PRECEDE UNDUE INFLUENCE — *State v. Vines*, 71 Conn. App. 359 (July 30, 2002); Flynn, J.; Trial Judge — Freedman, J.

RULE: Where claim is that witness lost his memory as the result of a threat, prior consistent testimony demonstrating the same failure of memory is not admissible to “rehabilitate” the witness unless the prior consistent statement was made before the threat.

FACTS: On May 11, 1998 the victim was beaten and robbed. That day he gave a detailed statement to the police, identifying the defendant as one of the assailants.

About three months later, the father of one of the assailants threatened the victim.

The victim later testified three times: at a preliminary hearing in January 1999; at the first trial in May 1999, which resulted in a hung jury; and at the second trial in April 2000. On all three occasions the victim could not identify his assailant.

During the second trial, the state offered the victim witness’ May 11, 1998 statement as a prior inconsistent statement for substantive purposes, pursuant to *State v. Whelan*. C.C.E. §8-5(1).

The defendant then sought to introduce the victim’s testimony from the first trial as a prior consistent statement. The trial court would not allow the prior consistent statement into evidence. The Appellate Court affirmed.

REASONING: C.C.E. §6-11(a) provides: “(a) General Rule: Except as provided in this section, the credibility of a witness may not be supported by evidence of a prior consistent statement made by the witness.” §6-11(b), which provides the exceptions to the General Rule, does not specifically deal with a claim of undue influence or a threat. However, the court held that the same analysis used under §6-11(b)(2) should apply. Therefore, there must be “a suggestion of bias, interest or improper motive that was not present at the time the witness made the prior consistent statement.” C.C.E. §6-11(b)(2). Since the threat that the State claimed caused the witness’ failure of memory took place before the prior consistent statement, it was not admissible.

VII. Opinions and Expert Testimony

§7-1 OPINION TESTIMONY BY LAY WITNESSES — OPINION TESTIMONY BY CO-WORKERS AS TO RACIAL MOTIVATION BEHIND TREATMENT OF EMPLOYEE INADMISSIBLE — *Hester v. Bic Corp.*, 225 F.3d 178 (2d Cir. 2000); Newman, J., Jacobs, J., Cardamone, J.; Trial Judge — Squatrito, J.

RULE: In a Title VII action, a lay witness cannot give an opinion about the reason for an employer’s action, absent personal knowledge of facts that formed the basis of the employer’s action. *Fed. R. Evid.* at 701.

FACTS: Employment discrimination case in which the plaintiff called co-employees who testified that in their opinion race was a factor in the plaintiff’s treatment. None of the witnesses had personal knowledge of the employer’s decision-making process. The Court of Appeals held this testimony inadmissible and reversed.

REASONING: “In an employment discrimination action, [Federal] Rule 701(b) bars lay opinion testimony that amounts to a naked speculation concerning the motivation for a defendant’s adverse employment decision. Witnesses are free to testify fully as to their own observations of the defendant’s interactions with the plaintiff or with other employees, but ‘the witness’s opinion as to the defendant’s [ultimate motivations] will often not be helpful within the meaning of Rule 701 because the jury will be in as good a position as the witness to draw the inference as to whether or not the defendant’ was motivated by an impermissible animus.... The four witnesses here testified that they observed Beck treat Hester with (variously) condescension, coldness, hostility or disregard, as compared with the three or so other Group Leaders, who were white. A jury can draw its own conclusions ‘from observed events or communications that can be adequately described’ to it, such as the observed differential treatment described by Hester’s witnesses.... But their speculative lay opinion that this differential is attributable to race rather than anything else, is not helpful in this case because it ‘merely tell[s] the jury what result to reach.’” *Hester v. Bic Corp.*, 225 F.3d. at 185.

§7-1 HOMEOWNER CAN OPINE AS TO CAUSE OF DIMINUTION OF VALUE OF HOME — *Pestey v. Cushman*, 259, Conn. 345 (February 5, 2002); Vertefeuille, J.; Trial Judge — Bishop, J.

RULE: A homeowner can testify not only as to the value of his property, but also as to the cause of its diminution in value. C.C.E. §7-1 Commentary.

FACTS: Plaintiffs and defendants lived one-third of a mile apart in North Franklin. Plaintiffs’ property was a residence. Defendants had a dairy farming operation.

In 1990, defendants constructed a 42,000 sq. ft. barn, and a pit in which to store manure generated by their dairy herd. Plaintiff first noticed "objectionable odors" in early 1991. The odors were not the typical "stercoraceous" (excremental) odors generated by livestock, but more pungent and sharp. In 1997, the defendants installed an anaerobic digestion system on their farm to process manure. Afterwards, the odors wafting over plaintiffs' property became even worse, smelling like sulphur and sewage. It was so bad that the plaintiffs had to close the windows of their home.

Plaintiffs brought suit, claiming that the defendants' actions diminished the value of their home.

At trial the plaintiff testified that in his opinion the value of his property had declined from \$585,000 in 1990 to \$330,000 in 1999, because of the odors from the defendants' farm.

Defendants conceded that the homeowner could give his opinion as to the value of his property at two points in time, but claimed he could not opine that it was the odors that caused the diminution in value. The trial court allowed the testimony. The Supreme Court affirmed.

REASONING: The Supreme Court held that where an owner of real property testifies as to value before and after an event, the causation element is already implicitly contained in the opinions. Therefore, it was proper for the trial court to allow the plaintiff to give his opinion on causation in a manner in which it could be subjected to cross-examination.

§7-1 **PERSONAL PROPERTY OWNER CAN OPINE ONLY ON VALUE OF HIS OWN PROPERTY** — *Urlich v. Fish*, 261 Conn. 575, (August 27, 2002); Sullivan, J.; Trial Judge — DeMayo, J.

RULE: Lay witness cannot testify as to the value of personal property he does not own. C.C.E. §7-1.

FACTS: Defendant bought a boat from the plaintiff. When he picked up the boat, items previous on board, which he thought were included in the sale¹, were missing. He refused to pay the full purchase price, and the seller sued.

In defending the case, the buyer offered a list of the missing items with prices attached. The plaintiff seller objected on the ground that the defen-

dant buyer had not provided a proper foundation for the value of the items. The court sustained the objection, ruling that the list was admissible as a list of allegedly missing items but not as evidence of their value. However, since it was a non-jury trial, the list was admitted in its entirety subject to that limitation.

The items on the list fell into three categories: (1) items that defendant had actually replaced, with the cost of replacement; (2) items for which the defendant had obtained estimates of replacement cost; and (3) items which had no foundation on value other than the defendant's opinion.

It was apparent from the trial court's Memorandum of Decision that the court had accepted all of the values listed by the defendant. The Supreme Court reversed.

REASONING: "This court previously has recognized that the competence of a witness to testify to the value of property may be established by demonstrating that the witness owns the property in question. *State v. Baker*, 182 Conn. 52, 60, 437 A.2d 843 (1980). In this case, however, the defendant never became the owner of the items in question and, in fact, had only viewed them briefly while considering purchasing the boat. The defendant, therefore, was not competent to testify as to the value of the items." *Urlich* at 581.

"The defendant then proceeded to testify as to what he had paid to replace some of the missing items, thereby laying a foundation for some, but not all, of the prices listed on the disputed exhibit." *Id.* at 582.

"We conclude that the trial court improperly admitted the cost estimates as nonhearsay verbal acts. The estimates were offered to prove the truth of the facts contained therein — namely the replacement values of the radio and the furniture. Therefore, the estimates were inadmissible hearsay. By admitting the estimates, the trial court deprived the plaintiff of all opportunity to cross-examine the suppliers who provided the estimates." *Id.* at 585.

COMMENT: In a personal injury case the cost of repair is admissible to prove the extent of the damage to an automobile, if the repair was actually made and the bill incurred. However, an estimated cost of repair is not admissible. It represents the opinion of the cost to repair of whoever supplied the estimate, and is hearsay.

MORAL: Never sell a boat to a fish.

§7-2 **EXPERT TESTIMONY NOT ALLOWED ON LAW AND ETHICS IN LAW FIRM'S ACTION AGAINST FORMER PARTNER** — *Pepe & Hazard v. Jones, et al.*, 2002 Ct. Sup. 11779

RULE: Expert testimony mixing ethics and substantive law intrudes on the function of the trial court in charging the jury.

FACTS: Partners at Pepe & Hazard left and formed the Hartford office of Dechert, Price & Rhoads. Pepe & Hazard brought suit against the former partners and Dechert to recover damages for breach of fiduciary duty, breach of contract, fraud, conversion, misappropriation of trade secrets, and tortious interference with contractual rights and business expectations.

Pepe & Hazard sought to call Ralph Elliot as an expert witness to testify about the nature of the relationship between attorneys and their firm and their clients. More specifically, Elliot would testify that the defendants committed numerous violations of the Rules of Professional Conduct and breached their fiduciary duties to the law firm and its partners in the way they effectuated their departure.

The defendants filed a motion in limine to preclude this expert testimony. The motion was granted.

REASONING: "In the end, the jury must be presented with a clear, correct and comprehensive statement of controlling law in the judge's binding instructions. Such instructions must be followed to the exclusion of inconsistent notions of the law which jurors might harbor or the lawyers might suggest in their arguments. Surely, they should not be contradicted or second-guessed by the jury based on quasi-evidentiary input from an expert witness who may express different views.

"Finally, insofar as the opinions of Attorney Elliot would apply the legal principles he is prepared to analyze and discuss to particular facts as they may be proved at trial, such offerings are expressions of opinion on ultimate issues in the case, which have not been shown to be necessary for the jury's understanding of any factual issue it must resolve". *Id.* at 11788.

§7-2 EXPERT TESTIMONY REQUIRED IN CASE AGAINST DAY CARE PROVIDER — *Lepage v. Horne*, 262 Conn. 116 (December 3, 2002); Katz, J.; Trial Judge — Sferrazza, J.

RULE: The standard of care that a day care provider should follow in attending to a sleeping infant is beyond the ken of an ordinary juror and must be proved by expert testimony.

FACTS: The plaintiff's 75-day-old infant was under the care of the defendant day care provider. The defendant put the infant down for her nap on her side. 15 or 20 minutes later, the infant was seen sleeping on her stomach, with her head to the side. The defendant decided not to disturb the infant's nap by shifting her onto her side or back. Approximately one hour later, the defendant checked on the infant, and found she had died. The autopsy determined that she died from sudden infant death syndrome (SIDS). Plaintiff brought suit, claiming that the defendant was negligent because she allowed the infant to sleep in the prone position.

At trial plaintiff introduced the expert testimony from the director of a sleep disorders laboratory, who testified that the highest risk factor for SIDS is sleeping in the prone position and that because of this increased risk, the American Academy of Pediatrics had issued a recommendation in 1992 suggesting that infants be placed on their side or back for sleep. The expert testified that it was highly probable that the infant's sleep position caused her death.

At the close of the plaintiff's case, the defendant moved for a directed verdict on the grounds that the plaintiff had failed to introduce expert testimony on the standard of care applicable to the defendant day care provider.

The trial judge denied the motion on the grounds that the experience of caring for a child is part of an ordinary juror's experience and expert testimony was not required. There was a plaintiff's verdict.

Defendant appealed and the Supreme Court reversed.

REASONING: The Supreme Court held that the issue was not general knowledge of how to care for a child. "The question is whether the ordinary juror has sufficient knowledge to determine the required standard of care — in this case, knowledge that the risk of SIDS

associated with leaving an infant sleeping in the prone position is sufficiently great so as to make it reasonably foreseeable that SIDS may occur, thereby requiring the caretaker to take appropriate preventative measures. We conclude that this question goes beyond the field of ordinary knowledge and experience of jurors and, therefore, that expert testimony was required". *Id.* at 126.

§7-2 EXPERT TESTIMONY NOT REQUIRED TO ESTABLISH SINGLE PHYSICIAN'S DUTY TO INFORM — *Raybeck v. Danbury Orthopedic Associates, P.C., et al.*, 72 Conn. App. 359 (September 17, 2002); Flynn, J.; Trial Judge — Radcliffe, J.

RULE: The duty to inform a patient of the risks and benefits of medical treatment is one imposed by law. Therefore, expert testimony is not required to establish that duty.

FACTS: See, §4-1 above. Dr. Malloy did not inform the plaintiff that pinning her wrist was an alternative. In his charge to the jury, the trial court charged the jury that the "plaintiff must first establish a duty to inform. This must be shown by expert testimony..." *Id.* at 373. The Appellate Court held this to be error.

REASONING: The fact that expert testimony is not required to establish a duty to inform was decided in *Godwin v. Danbury Eye Physicians & Surgeons, P.C.*, 254 Conn. 131 (2000). However, *Godwin* only applies where it is clear which physician has that duty. See, *Mason v. Walsh*, 26 Conn. App. 225 (1991), *cert. denied*, 221 Conn. 909 (1992). In this case, although two physicians were defendants, it was clear that the informed consent claim applied only to Dr. Malloy. *Raybeck* at 372-73 n.5.

COMMENT: This principle in this case is generally outweighed by practicality. While it is true that the plaintiff does not need an expert witness to establish the duty to inform, it is hard to imagine a successful prosecution of an informed consent case without an expert on this issue. In a case with multiple defendants, plaintiff needs expert testimony to establish which physician has the duty. In addition, once the duty is established, plaintiff needs an expert witness to establish what the risks, benefits, and alternatives are and how they should be explained to the patient.

§7-2 QUALIFICATIONS OF EXPERTS IN PRODUCTS LIABILITY CASES: PROFESSIONAL ENGINEER CAN TESTIFY REGARDING UNREASONABLY DANGEROUS DESIGN OF A PRODUCT DESPITE LACK OF PECULIAR OR SPECIAL KNOWLEDGE OF THAT PRODUCT — *Moran v. Eastern Equipment*, 76 Conn. App. 137 (April 8, 2003); Bishop, J.; Trial Judge — Levine, J.

RULE: An engineer has knowledge, skill, experience, training and education which will assist the trier of fact in understanding a claim of defective design, even if the engineer does not have experience designing the particular product in question.

FACTS: Plaintiff was filling his wheel loader with fuel. The fuel fill was inside the engine compartment and necessitated removal of the engine cover. Plaintiff slipped, and his right hand went into the unguarded fan blade. His right index finger had to be amputated.

The plaintiff's expert, Zamparo, testified that the product was defectively designed because the unguarded fan blade was only seven inches from the fuel fill. Defendant objected to Zamparo being allowed to testify, claiming that he was not qualified because he had no experience in designing wheel loaders. The trial court allowed the testimony. The Appellate Court affirmed.

REASONING: The court found no abuse of discretion on the part of the court in allowing Zamparo's testimony. As a professional and licensed engineer with experience in the automotive area, a master's degree in automotive engineering, 48 years of experience including product safety and machine design, and "other numerous credentials", the court found that Zamparo could fairly be said to have a "special skill or knowledge directly applicable to a matter in issue"; *State v. Henry*, 72 Conn. App. [640,] 654 [cert. denied, 262 Conn. 917 (2002)]; that his "skill or knowledge is not common to the average person"; *id.*; and that his "testimony [was] helpful to the court or jury in considering the issues." *Moran* at 151.

COMMENT: Connecticut's state courts are, in general, friendlier towards expert testimony than are the federal courts.

State court judges have realized that we don't want to make a "federal case" out of every case involving expert testimony. Keep that in mind when you are choosing your forum.

§7-2 QUALIFICATIONS OF EXPERTS IN MEDICAL MALPRACTICE CASES: C.G.S. §52-184c DOES NOT REQUIRE EXPERT TO BE LICENSED IN CONNECTICUT — *Dilieto v. County Obstetrics and Gynecology Group*, 265 CONN. 79 (July 29, 2003); Vertefeuille, J.; Trial Judge — Sheldon, J.

RULE: The reference in C.G.S. §52-184c(a) to §52-184b does not mean that an expert must be licensed in Connecticut.

FACTS: See, Section 4-1. Plaintiff called as an expert witness John Shepherd, a physician from England. Shepherd's proposed testimony was that the defendants had breached the standard of care in failing to run additional diagnostic tests before recommending a course of treatment. Defendants objected to this testimony on the basis that §52-184c(a)² incorporates §52-184b in defining a health care provider. §52-184b(a) defines a health care provider as one "licensed by this state...." Since Dr. Shepherd was not licensed by Connecticut, the trial court precluded his testimony. The Supreme Court reversed.

REASONING: The reference in §52-184c(a) that defines health care providers as those licensed in this state is to medical malpractice defendants, not experts. This is made obvious by the statement in subsection b that a "similar health care provider" is one who "is licensed by the appropriate regulatory agency of this state or another state...."

"The interpretation of §52-184c urged by the defendants, which we reject, would effect a radical change in the trial of medical malpractice cases in this state because it would preclude expert testimony by any medical expert who is not licensed in Connecticut. Nothing in the legislative history of §52-184c suggests that the legislature intended such a substantial modification in Connecticut law". *Id.* at 93-94.

§7-2 QUALIFICATIONS OF EXPERTS IN MEDICAL MALPRACTICE CASES: §52-184c DOES NOT

REQUIRE THAT EXPERT HAVE BEEN BOARD-CERTIFIED AT TIME OF MALPRACTICE —

Grondin v. Curi, 262 Conn. 637 (March 18, 2003); Norcott, J.; Trial Judge — Agati, J.

RULE: In contrast to subsections (b) and (d), subsection (c) of §52-184c is silent as to any element of time. The common law does not require that the expert physician have been certified at the time of the malpractice.

FACTS: The defendant, a board-certified pediatrician, was the decedent's primary treating physician from 1984 until her death in 1997. During her life, decedent had significant respiratory problems and illnesses, which were treated by the defendant. In November 1995, a CT scan revealed a large tumor in the decedent's lungs that ultimately proved fatal.

Plaintiff alleged that the defendant had breached the prevailing standard of care by failing to diagnose the decedent's lung cancer earlier.

Plaintiff's expert was Dr. Grella. Although Grella was a board-certified pediatrician at the time of trial in September 2001, he was not board-certified at the time of the alleged malpractice, before November 1995. Defendant objected to Grella's testimony on the basis that he had not been board-certified at the time of the malpractice. The trial court precluded the testimony. Plaintiff was non-suited. The Supreme Court reversed.

REASONING: The Supreme Court observed that the statute clearly does not impose such a time restriction. Since the statute "was not intended to alter dramatically the scope of what constitutes the standard of care in a medical malpractice case or who qualifies to testify about that standard," *id.* at 652, the court turned to common law analysis.

Other states have uniformly held that an expert need not have been board-certified at the time of the malpractice to be qualified. Experience is not the only vehicle to obtain the necessary knowledge as to what the standard of care was at a particular point in time. That knowledge can also be gained through study. However, the *Grondin* court went to great lengths to point out that §52-184c sets only minimum standards for admissibility.

COMMENTS: An attorney calling a physician who was not board-certified at

the time of the malpractice to testify against a physician who was board-certified at that time must be extremely careful to lay a solid foundation as to the sources of the expert's knowledge as to what the prevailing standard of care was among board-certified physicians at the time of the malpractice.

In a situation like this, where the judge is facing a tough evidentiary issue of first impression, the best way to proceed would be for the judge to allow the expert to testify — even if the judge believes the testimony inadmissible. If the jury returns a defendant's verdict, the case is over — no appeal. If there is a plaintiff's verdict, the judge can set the verdict aside, and if the plaintiff appeals and succeeds, the verdict can be reinstated without a retrial. See *Boehm v. Kish*, 201 Conn. 385 (1986).

§7-2 QUALIFICATIONS OF EXPERTS IN MEDICAL MALPRACTICE CASES: AN EXPERT ON STANDARD OF CARE MAY NOT BE QUALIFIED TO GIVE OPINION ON CAUSATION — *Sherman, etl al v. Bristol Hospital, Inc.*, 79 Conn. App. 79 (August 26, 2003); Dranginis, J.; Trial Judge — Shortall, J.

RULE: Whether or not an expert is qualified to testify on the issue of causation is a determination independent of whether or not that witness is qualified to testify on the standard of care.

FACTS: Plaintiff underwent wrist fusion surgery. After the operation, he was admitted to the hospital for pain management. He was prescribed morphine, which was self-administered by a patient-controlled analgesia machine.

Nurse Silva was assigned to the plaintiff's care the night after the surgery. That night, the plaintiff had a heart attack.

The plaintiff's claim on the breach of the standard of care was that he had been inadequately monitored during the night by Silva. On causation, the plaintiff alleged that the morphine depressed his cardiac system, and because the administration of morphine was left unchecked, he suffered the heart attack.

Defendant filed a motion in limine to preclude plaintiff's expert, an advanced practiced registered nurse, from testifying. An evidentiary hearing was held, at the conclusion of which the issued concluded that the plaintiff's expert was

qualified to testify on the standard of care, but not on causation. The defendant then filed a motion for summary judgment, which was granted. The Appellate Court affirmed.

REASONING: Neither the trial court nor the Appellate Court ruled that a nurse could never testify on the issue of causation. However, the court found that in this particular case, this particular nurse was not qualified to render opinions on the effect of the breach of the standard of care in causing the heart attack.

COMMENT: It does not appear that C.G.S. §52-184c applies, by its terms, to the issue of causation.

§7-2 QUALIFICATIONS OF EXPERTS IN MEDICAL MALPRACTICE CASES: LIBERAL INTERPRETATION ARISES OUT OF INTERACTION BETWEEN §7-2 and §52-184c —

Marshall v. Hartford Hospital, 65 Conn. App. 738, (September 25, 2001); Dupont, J.; Trial Judge — Graham, J.

RULE: C.G.S. §52-184c(d), which provides that a witness who does not qualify as a “similar healthcare provider” may testify as to the standard of care if he possesses sufficient training, experience and knowledge in a related field of medicine, should be liberally construed.

FACTS: The plaintiff, Kaila Marshall, was born prematurely. In the neonatal intensive care unit, the attending physician was a neonatologist. Six days after birth, Kaila developed complications from the insertion of an intravenous catheter, and as a result lost the fingers on her hand. The plaintiff alleged that the defendant hospital and attending neonatologist were negligent in failing to diagnose and treat the complication in time.

The plaintiff objected to the qualifications of three experts called on behalf of the hospital, none of whom was a neonatologist³, to testify that there was no breach in the standard of care by the staff of the neonatal unit. The plaintiff claimed that only a neonatologist could qualify under the statute as an expert on the standard of care in this context.

The trial court allowed these experts to testify as to the appropriate care and treatment to be given to the plaintiff in the neonatal unit as the complication developed, and to express opinions that

none of the staff of the defendant hospital had breached the standard of care. There was a defendant’s verdict. The Appellate Court affirmed.

REASONING: The issue was how properly to treat a catheter complication that cut off circulation to the plaintiff’s hand. “Grossman was a surgeon with a specialty in pediatric surgery, with an emphasis on surgery of the hand, upper extremity and peripheral nerves. He had operated on neonates for problems related to vascular occlusion.

“Ruby, the second challenged expert, is board certified in general surgery with subspecialty training and certification in vascular surgery. He testified that he had had substantial experience in treating vascular occlusions, that vascular surgery for a child and an adult involves the same principles and that he knew of no vascular surgeon in Connecticut who specialized in peripheral vascular surgery for neonates.” *Id.* at 756.

“The plaintiff also argues that the defendant hospital’s third expert, Hellenbrand, was not qualified because he was not board certified in neonatology. Hellenbrand was a pediatric cardiologist, a specialty Poland [plaintiff’s expert] agreed would have expertise in the management of catheters. Hellenbrand treated newborns frequently in the setting of neonatal intensive care units and had experience in the management of catheter complications.

“General Statutes §52-184c(d) provides: ‘Any health care provider may testify as an expert in any action if he: (1) Is a ‘similar health care provider’ pursuant to subsection (b) or (c) of this section; or (2) is not a similar health care provider pursuant to subsection (b) or (c) of this section but, to the satisfaction of the court, possess sufficient training, experience and knowledge as a result of practice or teaching in a related field of medicine, so as to be able to provide such expert testimony as to the prevailing professional standard of care in a given field of medicine. Such training, experience or knowledge shall be as a result of the active involvement in the practice or teaching of medicine within the five-year period before the incident giving rise to the claim.’

“We agree with the trial court that the defendant hospital’s experts were qualified to testify. Section 52-184c

allows a health care provider trained and experienced in a medical specialty similar to that specialty in question to testify as an expert. The defendant hospital’s experts had such a specialty. Furthermore, §§7-2 and 7-4(a) of the Connecticut Code of Evidence also provide a basis for the court’s acceptance of the testimony of the defendant hospital’s experts.

“There are many Connecticut cases that adhere to the liberalization of evidentiary rules allowing expert medical testimony in a medical malpractice action when there is a similarity of practice. See, e.g. *Pool v. Bell*, 209 Conn. 536, 542-43, 551 A.2d 1254 (1989); *Katsetos v. Nolan*, 170 Conn. 637, 646-47, 368 A.2d 172 (1976); *Fitzmaurice v. Flynn*, 167 Conn. 609, 618, 356 A.2d 887 (1975); *Marshall v. Yale Podiatry Group*, 5 Conn. App. 5, 7-12, 496 A.2d 529 (1985). Medical specialties overlap, and it is within a court’s discretion to deem the witness qualified to testify. It is not the artificial classification of a witness by title that governs the admissibility of the testimony, but the scope of the witness’s knowledge of the particular condition.”

Id. at 757-58.

§7-2 QUALIFICATIONS OF EXPERTS IN MEDICAL MALPRACTICE CASES: FAILURE TO COMMUNICATE BETWEEN SPECIALISTS — *Kroha v. LaMonica*, No. (X02) CV98-0160366-S, (July 29, 2002); Sheldon, J.

RULE: An obstetrician-gynecologist who regularly interacts with internists can testify that an internist breached the standard of care in failing to personally and immediately communicate information to an obstetrician-gynecologist.

FACTS: In this medical malpractice case, the plaintiff sued her obstetrician-gynecologist and internist (Dr. Dezielle), claiming that their failure to diagnose her preeclampsia led to the death in utero of her child.

Plaintiff’s expert was Dr. Jacques Moritz, a board certified obstetrician-gynecologist. He sought to testify that the internist had breached the standard of care in two ways: first, in failing to diagnose the preeclampsia; and second, in failing to personally and immediately

communicate the results of her examination to the obstetrician-gynecologist.

As to the first opinion of breach against the internist plaintiff claimed admissibility on two grounds: first, that Moritz practiced "in a related field of medicine," and therefore satisfied the requirements of *C.G.S.* §52-184c(d)(2); and second, that the defendant internist was "providing treatment or diagnosis for a condition which is not within his specialty," so the expert's testimony was admissible pursuant to §52-184c(c). The court rejected these claims and precluded the opinion.

As to the opinion that the internist breached by failing to personally and immediately communicate the results of her examination to the obstetrician-gynecologist, the plaintiff claimed that Moritz "the requirement of making complete and timely communications as to the results of tests, procedures and examinations of patients referred for consultation is the universal practice in all fields of medical practice." The court denied the motion to preclude this opinion.

REASONING: "Though Dr. Moritz is not a Board-certified internist, or a person intimately familiar with the practice of internal medicine, he has made referrals to internists ever since he started his medical practice and received referrals from them... Dr. Moritz claims, moreover, that the basic standards governing referrals and consultations between physicians of different specialties were not specialty-specific between 1991 and 1996... On the basis of this experience in the practice and teaching of obstetrics and gynecology in the five-year period preceding the incident here in question, the Court finds that Dr. Moritz is competent to testify that Dr. Dezielle breached the standard of care for Board-certified internists by failing personally to communicate, and/or to ensure the immediate communication of, the full results of her consultation to the Ob-Gyns who referred the plaintiff for consultation." *Kroha* at 13.

§7-2 FOUNDATION FOR ADMISSION OF EXPERT TESTIMONY ON STANDARD OF CARE MUST INCLUDE SPECIFIC TESTIMONY THAT THE STANDARD APPLIES TO THE DEFENDANT — *Friedman v. Meriden Orthopaedic Group, P.C.*, 77 Conn. App. 307 (June

10, 2003), cert. granted, 265 Conn. 905 (September 4, 2003); Flynn, J.; Trial Judge — Munro, J.

RULE: When an expert witness physician, board-certified in a different specialty than the defendant, seeks to testify as to the standard of care applicable to the defendant, the foundation for that testimony must include a specific statement that the standard of care being testified to applies to the defendant.

FACTS: During herniated disc surgery, the defendant used electrocautery to stop bleeding. The defendant hit one of the plaintiff's nerve roots, causing cauda equina syndrome. This resulted in permanent bowel, bladder, and sexual dysfunction.

During surgery, defendant discovered that the plaintiff had spina bifida occulta (SBO). SBO is a common congenital anomaly. In plaintiff's case, his condition resulted in a six-inch gap in the bony protective covering of the spinal column.

Before surgery, Dr. Zimmering had taken plain x-rays, which according to his reading did not show the SBO. Those x-rays were missing at the time of the trial.

Plaintiff presented expert testimony from Dr. Bernstein, an orthopedic surgeon, who testified that an orthopedic surgeon needed to be aware of SBO before surgery in order to protect exposed nerve roots.

Plaintiff also offered the testimony of Dr. Pressman, a board-certified neuroradiologist (board-certified in radiology and in the subspecialty of neuroradiology.) Part of Pressman's testimony related to how one reads flat x-ray films for the presence of SBO. Because of scheduling difficulties, Pressman's testimony had been videotaped. In his testimony he discussed how "we" read flat x-ray films for the presence of SBO. It was not clear whether "we" referred radiologists, orthopedists, or both. The defendant objected to this testimony on the basis that it had not been established that Pressman was referring to how an orthopedist should read the films.

Since the claim in question involved an orthopedist reading x-rays, the trial court analyzed it under §52-184c(b), the subsection that applies to non-specialists.

In the trial court's view "because Dr. Zimmering is a board-certified orthopedic surgeon and in all of his other work, for instance the surgery, he is held to the standard of a board-certified orthopedic

surgeon, but in his work reading as a radiologist, the court finds under subsection (b) that he is held to a lesser standard, that basically of a similar health care provider, which in this instance would be, for lack of a better way to put it, plain old radiologist to distinguish from a board-certified diagnostic radiologist and there is no foundation laid that the opinion offered by Dr. Pressman regarding to the reading of those plain X rays, the AP X rays, was the standard of care for a 'plain old radiologist' to be distinguished from what he was testifying as and that he is a board-certified diagnostic radiologist." *Id.* at 311-12. The trial court did not allow the testimony. The Appellate Court affirmed.

REASONING: The Appellate Court first rejected the trial court's conclusion that the analysis should be done under §52-184c(b) because although board-certified in orthopedic surgery, the defendant was not board-certified in radiology. The Appellate Court held that because Zimmering is board-certified in orthopedic surgery, subsection (b) is not applicable.

The Appellate Court then said subsection (c) could not apply because Pressman was not board-certified in the same specialty as Zimmering.

The analysis was therefore under subsection (d), which provides that an expert can testify if he "possesses sufficient training, experience, and knowledge as a result of practice or teaching in a related field of medicine..." The Appellate Court upheld the trial court's ruling "because there was an inadequate foundation as to whether Pressman knew what the standard of care was for orthopedic surgeons when reading plain X rays and whether he was holding Zimmering to that standard and not some different one applicable to his distinct specialty." *Id.* at 318. "Pressman's testimony was excluded properly because it is unclear from the record whether he was testifying as to a standard of care expected of a board-certified neuroradiologist, his own field, or an orthopedic surgeon reading plain X rays, the defendant's specialty." *Id.* at 318-19.

COMMENT: This case demonstrates one of the dangers of using videotaped testimony. It is difficult to anticipate every objection and to cure gaps in establishing qualifications or foundation, which turn out to concern the trial court. In this case, plaintiff's counsel requested leave to conduct a brief telephone deposition of Pressman to fill the gap in the

foundation. With closing arguments scheduled for the next day, permission was denied.

§7-2 PORTER/DAUBERT DOES NOT APPLY TO BLOOD ALCOHOL TEST — *State v. Kirsch*, 263 Conn. 390 (May 6, 2003); Katz, J.; Trial Judge — Espinosa, J.

RULE: The reliability of blood alcohol testing is so well established that no *Porter* hearing is necessary.

FACTS: Defendant collided head-on into another vehicle, killing its occupant.

During defendant's trial, the blood alcohol tests performed at the hospital, showing his blood alcohol level at 0.21, were offered in evidence. Defendant objected and requested *Porter* a hearing. The trial court overruled the objection, did not hold a *Porter* hearing, and held that the blood alcohol records were admissible as business records pursuant to C.G.S. §52-180. The Supreme Court affirmed.

REASONING: Contrary to the trial court, the Supreme Court first noted that the fact that a document qualifies as a business record does not necessarily mean that there is no need for a *Porter* hearing. The business record exception only satisfies the hearsay objection; it does not address the reliability of the statements, opinions, test results or other information contained within the business record.

The Supreme Court held that because a *Porter* hearing is required only when the evidence in question involves "innovative scientific techniques", no hearing was required for the admission of blood alcohol testing, because "the methodology underlying the hospital blood test at issue is not the type of novel, experimental or innovative scientific technique which triggers the need for a *Porter* hearing." *Id.* at 405. The court went on to observe, in footnote 15, that "even if a *Porter* hearing had been required, the evidence proffered by the State demonstrated, as a matter of law, that the *Porter* standard had been satisfied." *Id.* at 409.

COMMENT: Here is the two-part rule on *Porter/Daubert* in Connecticut state courts: The first question is whether or not the evidence at issue is based on "innovative scientific techniques." If it is not, *Porter/Daubert* does not apply.

Second, if *Porter/Daubert* does apply, the analysis is applied to the methodology, not the conclusion.

§7-2 PORTER/DAUBERT DOES NOT APPLY TO ACCOUNTANT'S TESTIMONY ON LOST PROFITS — *Pepe & Hazard v. Jones, et al.*, (September 11, 2002) Ct. Sup. 11655.

RULE: An accountant's testimony is not "scientific evidence" for which a *Porter* hearing is required.

FACTS: See, Section 7-2 above. In order to establish the amount of its lost profits, *Pepe & Hazard* offered expert testimony from a certified public accountant, David Yaffe, a business valuation specialist. Yaffe was offered to testify as to the profits the departing practice group would have generated if they had not left. The defendants moved in limine to exclude this testimony under *Porter* on the grounds that Yaffe's methodology was not reliable. The trial court refused to block the testimony.

REASONING: The trial court observed that Yaffe did not hold himself out as a "scientist", which might cloak him in an aura of infallibility; and that the evidence itself "is not scientific evidence within the meaning of *Porter*, because the witness can say nothing which risks causing the jury to decide an issue in the case without exercising their own independent judgment." *Id.* at 14.

§7-2 PORTER/DAUBERT DOES NOT APPLY TO EXPERT MEDICAL TESTIMONY BASED ON GENERALLY ACCEPTED MEDICAL PRINCIPLES RATHER THAN ON INNOVATIVE SCIENTIFIC TECHNIQUES. IF APPLIED, IT SHOULD BE APPLIED TO EXPERT'S METHODOLOGY, NOT CONCLUSION — *Hayes v. Decker*, 263 Conn. 677 (June 3, 2003); Sullivan, C., J.; Trial Judge — Fineberg, J.

RULE: *Porter* does not apply to medical testimony that consists of a logical deduction from generally accepted medical premises. When *Porter* is applied, in assessing the validity of "scientific" testimony, the focus must be solely on the underlying principles and methodology, not the conclusion.

FACTS: In May and June of 1995 plaintiff's internist recommended plaintiff discontinue taking his blood pressure medication, which had been prescribed by his urologist for kidney dysfunction. Plaintiff followed this recommendation, and one month later suffered a massive heart attack.

Plaintiff could not produce expert testimony that the discontinuance of the blood pressure medication caused the heart attack, which was caused by severely occluded arteries, a condition that develops over a long period. However, plaintiff did offer expert testimony from a cardiologist, Friedlander, that taking the plaintiff off the medication would have increased his blood pressure and caused the heart attack to be more severe, killing more heart tissue.

This opinion was based on deduction from basic scientific principals. (1) Removing the medication would increase the plaintiff's blood pressure. (2) When blood pressure increases, the heart must work harder to circulate the blood. (3) When the heart is working harder, it requires more oxygen. (4) If the heart's oxygen requirements are higher during a heart attack, when oxygen has been cut off or reduced, the extent of damage to heart tissue will be greater. However, the expert could point to no study that concluded that withdrawal of high blood pressure medication increases the severity of a heart attack, nor could he quantify how much greater the damage would be.

The trial court precluded the testimony based on *Porter/Daubert*. The Appellate Court reversed. The Supreme Court affirmed the reversal.

REASONING: The Appellate Court had reversed the trial court, concluding that the trial court incorrectly applied *Porter*; or in the alternative, that the testimony should have been admitted simply on a showing of relevance, without a *Porter* analysis.

In affirming the Appellate Court, the Supreme Court agreed that *Porter* does not apply to this type of medical testimony. The court reaffirmed that the *Porter* test for admissibility should not apply to all expert testimony, but only to that which involves "innovative scientific techniques", *id.* at 687, and went on to hold that the expert's opinions in this case "were not the type of evidence contemplated by *Porter*." *Id.* at 688.

"[T]hese are generally accepted principles of cardiology, which are supported by numerous studies. This is not the type of 'junk science' that *Porter* is intended to

guard against. Nor are these principles 'obscure scientific theories... that had the potential to mislead jurors awed by an aura of mystic infallibility surrounding scientific techniques, experts and the fancy devices employed.' Rather, these are well-established principles of the scientific community to which *Porter* simply does not apply. Accordingly, Friedlander's testimony based on these principles should have been admitted upon a showing of relevance." *Id.* at 689 (internal citation omitted).

The holding that *Porter* does not apply to this type of evidence was reinforced in Justice Vertefeuille's concurring opinion, wherein she stated:

In my view, the threshold inquiry in the present case is whether *Porter* applies. I think it is important to establish first, and unequivocally, that *Porter* does not apply to expert medical testimony like Friedlander's which was based on generally accepted medical principles, and not on innovative scientific techniques. Friedlander's opinion was a logical deduction from two generally accepted medical premises. As such, his testimony was admissible without undergoing a *Porter* analysis or being subjected to a *Porter* hearing.

Id. at 691-92 (emphasis added).

The second part of the majority opinion discusses how to apply *Porter* to medical testimony that does involve innovative scientific techniques. The trial court had applied *Porter* to the expert's conclusion as opposed to the principles upon which the conclusion was based.

The Supreme Court ruled that this was incorrect: "[T]he *Porter* analysis is meant to determine whether the methodologies or premises underlying an expert witness' conclusions are valid, not to assess the credibility of the expert's ultimate conclusion." *Id.* at 685-86. The court emphasized that "[u]nder *Porter*, a trial court does not have the discretion to exclude expert testimony because it believes there are better grounds for an alternative conclusion." *Id.* at 686.

§7-2 *PORTER/DAUBERT APPLIES ONLY TO EXPERT TESTIMONY ON COMPETENCY OF JUVENILE TO WAIVE MIRANDA RIGHTS — State v. Griffin*, 77 Conn. App. 424 (June 17, 2003); Foti, J.; Trial Judge — Hadden, William L. Jr., J.)

RULE: When an expert's methodology is based upon novel scientific principles, a *Porter* analysis is correctly applied. Here the expert's testimony on whether or not a juvenile's waiver of his *Miranda* rights was knowing and voluntary was found unreliable and inadmissible.

FACTS: The defendant, age 14, robbed and later shot the victim. He was arrested and confessed to shooting her. He filed a motion to suppress the confession on the grounds that he had not voluntarily, knowingly, and intelligently waived his privilege against self-incrimination.

An evidentiary hearing was held. The defendant offered expert testimony from a clinical psychologist on the issue of whether the 14-year-old defendant was competent to understand the issues involved in waiving his *Miranda* rights. The state moved in limine to preclude the testimony under *Porter/Daubert*. The trial court held that *Porter/Daubert* applied and that the expert testimony did not pass the test. The Appellate Court affirmed.

REASONING: The first question was whether or not the expert testimony was based on an "innovative scientific technique." The Appellate Court concluded that it was, finding that "the methodology underlying the test rested on novel scientific principles, theory or experiment in the field of psychology. That being the case, the court properly subjected the challenged testimony to a *Daubert* analysis." *Id.* at 439.

The Appellate Court then went on to perform the *Porter* analysis and found that the testing used by the witness as the foundation for her opinion had not been subjected to reliability testing to prove its scientific validity, nor had it been subject to adequate peer review and publication. The court also observed that the testing was not generally accepted as valid in the relevant scientific community.

Reviewed under an abuse of discretion standard, the Appellate Court found that the trial court did not abuse its discretion in reaching this conclusion.

§7-2 *PORTER/DAUBERT APPLIES ONLY TO "SCIENTIFIC" EVIDENCE — APPELLATE COURT REFUSES TO EXTEND RULE TO TESTIMONY OF PEDIATRICIANS — KUMHO REJECTED — State v. Vumbach*, 68 Conn. App. 313, (February 10, 2002);

Foti, J.; Trial Judge — Hadden, J.

RULE: A pediatrician's testimony about how victims of sexual abuse react is not "scientific evidence" to which the trial court should apply a *Porter/Daubert* analysis.

FACTS: Defendant was accused of sexually assaulting his girlfriend's minor daughter. The state called to the witness stand Dr. John Leventhal, a professor of pediatrics at the Yale Medical School. Leventhal's testimony explained why minor victims of sexual abuse often lack precision in their descriptions of the events and why they often delay reporting sexual abuse. The trial court held that the testimony satisfied the threshold inquiry of scientific validity pursuant to *Porter* and *Daubert* and allowed the testimony. The defendant appealed. The Appellate Court affirmed, but on the ground that no *Porter/Daubert* analysis was required.

REASONING: First, in footnote 8, the Appellate Court specifically declines to follow *Kumho Tire*, and thereby extend *Porter* and *Daubert* beyond "scientific" evidence. The inquiry then becomes whether this testimony qualifies as scientific evidence.

"Courts apply the *Daubert* standard only when such testimony involves 'innovative scientific techniques...' To determine if such a technique exists, we look to see whether the trier of fact is 'in a position to weigh the probative value of the testimony without abandoning common sense and sacrificing independent judgment to the expert's assertions based on his special skill or knowledge.'" Furthermore, we determine if the testimony is based on obscure scientific theories that have the "potential to mislead [the trier of fact] awed by an aura of mystic infallibility surrounding scientific techniques, experts and the fancy devices employed." If an expert's testimony concerns a method, 'the understanding of which is accessible to the [trier of fact] . . . and the value of the expertise lay in its assistance to the [trier of fact] in viewing and evaluating the evidence,' the testimony is not scientific even though an expert's skill and training are based on science."

Id. at 329-30 (Citations omitted; internal quotation marks omitted.)

§7-2 *HORIZONTAL GAZE NYSTAGMUS TEST IS SCIENTIFIC EVIDENCE*

THAT MUST MEET PORTER / DAUBERT CRITERIA — *State v. Russo*, 62 Conn.App. 129 (March 6, 2001); Foti J.; Trial Judge — Byrne, J.

RULE: Testimony regarding horizontal gaze nystagmus (HGN) testing is the type of scientific evidence that must comply with the requirements in Connecticut for the admission of scientific evidence. *C.C.E.* §7-2.

FACTS: Drunken driving prosecution in which the court allowed HGN testimony without *State v. Porter* analysis.

REASONING: HGN testing is scientific evidence that requires the court to go through the analysis. The Appellate Court found the error to be harmless in this case.

§7-2 **TESTIMONY BY EXPERTS: EXPERT TESTIMONY IS ADMISSIBLE ONLY IF IT CASTS LIGHT ON A FACT IN ISSUE** — *Amsden v. Fischer*, 62 Conn.App. 323 (March 20, 2001); Schaller, J., Trial Judge — Kaplan, J.

RULE: Evidence that subsequent operation by non-party physician contributed to the plaintiff's injury not admissible unless it will assist the trier of fact to determine a fact in issue. *C.C.E.* §7-2.

FACTS: On March 2, 1993 defendant performed carpal tunnel surgery on the plaintiff. Postoperatively, the plaintiff noticed median nerve damage in his right hand resulting in reduced sensation in his fingers and thumb. Another physician, Dr. Ashmead, performed reconstructive microsurgery in an attempt to repair the damage. Even with the reconstructive surgery, the plaintiff was left with a 44% permanent disability.

Defendant did not implead Dr. Ashmead for apportionment. However, when defendant's expert witness testified, the expert sought to offer an opinion that the plaintiff's injuries were caused by Ashmead. The plaintiff moved to block this testimony and his Motion in Limine was granted. The Appellate Court affirmed.

REASONING: The defendant argued that the expert testimony was admissible to establish facts inconsistent with the plaintiff's claim that the defendant proximately caused his injuries — in other words, to negate the plaintiff's proof on causation.

The Appellate Court held that, since a negligent actor is responsible for the foreseeable consequences of his negligence, "in the absence of impleading a third party based on a claim of negligence, the defendant cannot attempt to prove that another non-negligent party is responsible... [I]f the defendant believed that a non-party was responsible for some or all of the plaintiff's injuries it was his responsibility to implead that non-party.... [S]ince the defendant makes no claim that negligence on the part of Ashmead was the cause of the plaintiff's condition, the defendant cannot attempt to reduce his own responsibility for the foreseeable consequences of his own negligence. The trial court, accordingly did not abuse its discretion in granting the Motion in Limine, thereby excluding evidence relating to a subsequent physician's treatment." *Id.* at 327.

The defendant also made an argument that he was entitled to a charge on intervening superseding cause. The Appellate Court rejected that claim. The rationale was that if the attempted reconstructive surgery was within the scope of the risk created by the original negligence, as a matter of law it could not be an intervening superseding cause.

§7-2 **EXPERT OPINION NOT NECESSARY TO EVALUATE EFFECT OF MARIJUANA ON WITNESS** — *State v. Clark*, 260 Conn. 813, (July 16, 2002); Katz, J.; Trial Judge — Fracasse, J.

RULE: Expert testimony is not required as to the effect of smoking marijuana on a witness' ability to observe, recall or narrate events.

FACTS: Prosecution involving a gang fight which resulted in the death of a gang member. The state's primary witness was Townsend, who had been standing near the site of the shooting smoking marijuana. Townsend testified that shortly before the shooting he had smoked five joints, with perhaps a 10 or 15 minute "interlude" between each one.

Although the defendant elicited these facts during cross-examination, he did not ask Townsend whether or not smoking five joints affected his ability to perceive or recall the events of that night, nor did the defendant provide expert testimony that this would be the case.

The trial court instructed the jury at the end of the case that in the absence of such evidence they could not "speculate

that he was or was not affected by it or how he was affected by it." The Supreme Court found this instruction to be error, but harmless.

REASONING: "We recognize that, because it is an illegal substance, it may be that many jurors may have no firsthand knowledge regarding the effects of marijuana on one's ability to perceive and to relate events. At the same time, we cannot blink at the reality that, despite its illegality, because of its widespread use, many people know of the potential effects of marijuana, either through personal experience or through the experience of family members or friends. The ability to draw inferences about the impairing effects of marijuana, like alcohol, however, is based upon common knowledge, experience and common sense, not necessarily on personal experience.... The unfortunate prevalence of marijuana use, coupled with the substantial effort to educate all segments of the public regarding its dangers, underscores the reality that the likely effects of smoking five marijuana cigarettes in a short period of time before the incident are within the ken of the average juror." *Id.* at 824-25.

§7-2 **INTERNIST CAN USE AMA GUIDE TO OPINE ON PERMANENCY** — *Bossie v. Webster Financial Corp.*, No. CV00-0500297S (May 20, 2002); Trial Judge — Quinn, J.

RULE: Internist can testify as to partial orthopedic disability in accordance with the AMA Guide even though he rarely provides such ratings and lacks specific training in the use of the AMA Guidelines.

FACTS: Motor vehicle accident in which the plaintiff's internist testified as to the plaintiff's permanent partial disability in accordance with the AMA Guidelines. Defendants claim that the internist was not adequately trained or experienced in the use of the orthopedic guidelines, and filed a Motion in Limine to preclude his opinion. The trial court denied the Motion in Limine.

REASONING: Use of the AMA Guidelines is not confined to particular specialties. Chiropractors have been held qualified to use the guidelines. Clearly the internist had training and experience that qualified him to assist the trier of fact. *C.C.E.* §7-2. The limits of his training and experience go to weight, not admissibility.

§7-3(a) NARROW VIEW OF EXPERT TESTIMONY ON CAUSATION IN MEDICAL MALPRACTICE CASE — *Harlan v. Norwalk Anesthesiology, P.C.*, 75 Conn. App. 600 (March 18, 2003); Peters, J.; Trial Judge — Tierney, J.

RULE: An Appellate Court not fully informed of the strength of one's case can go off on a tangent.

FACTS: At 6:28 p.m. on March 7, 1995, Leslie Harlan gave birth to a healthy baby. At 7:30 p.m. she suffered a severe stroke when her middle cerebral artery burst.

Plaintiff claimed that the defendant's improper management of her blood pressure during and after the birth of her baby was a substantial factor in causing the stroke. Defendant claimed that the stroke was solely caused by a congenital abnormality of plaintiff's middle cerebral artery. There was a defendant's verdict.

On appeal, the plaintiff claimed error in the trial court's instructions to the jury on the use of hearsay statements of a party opponent (*see*, Section 8-3(1) below) and its instruction regarding the use by the jury of a learned treatise (*see*, Section 8-3(8) below). The plaintiff also claimed error in restrictions placed on final argument (*see*, Final Argument below).

There was no appeal on whether or not the plaintiff had produced sufficient expert testimony on causation. Furthermore, since the jury had determined that there was no breach of the standard of care, the jury had never reached that question. Nevertheless, in the first paragraph of the opinion, the Appellate Court stated: "The underlying issue is whether a jury reasonably could have found that her stroke resulted from a preexisting brain defect rather than from the malpractice of her anesthesiologist."

After disposing of the issues actually appealed, the opinion gratuitously states: "The defendants were entitled to a judgment on their behalf because the plaintiff failed to present an expert witness to address the relationship between her injury and her brain defect. In her appellate briefs, she has not contested the existence of this brain defect. Indeed, she had not addressed the brain defect in any fashion." *Id.* at p. 612.

REASONING: As plaintiff pointed out in her motion for reconsideration, her brief did not address causation because it

was not an issue in the appeal. In fact, the plaintiff had produced expert testimony that the plaintiff's congenital anomaly was an uncommon but not rare phenomenon and that based upon a reasonable degree of medical probability, the plaintiff's stroke was caused by "hypertensive hemorrhage." That is, by enormous and acute changes in blood pressure caused by the defendant's malpractice.

The court's reasoning indicates a disturbing lack of understanding of causation in a medical malpractice case. The opinion speaks of the cause of the stroke being either the "brain defect" or malpractice. It does not even admit of the possibility that both could be substantial factors in causing the stroke.

The motion for reconsideration was denied, and the Supreme Court denied certiorari.

COMMENT: The way in which the Appellate Court fastened onto the "issue" of causation — an issue that the jury never reached and that was not on appeal — is disturbing. The issue was not briefed because it was not on appeal. The court, in the absence of briefing, made a serious error regarding the state of the evidence in the case regarding causation.

These leads the reader to question whether, having decided that the plaintiff had not made out a case on causation, the court paid careful enough attention to the evidentiary issues on appeal.

§7-3(a) INSUFFICIENT EXPERT TESTIMONY ON CAUSATION IN LEGAL MALPRACTICE CASE — *Vona v. Lerner*, 72 Conn. App. 179 (September 10, 2002); Dranginis, J.; Trial Judge — Tierney, J.

RULE: An expert opinion on causation that is conditional or qualified is not sufficient.

FACTS: Defendant lawyer represented both sides in a sale and purchase of a piece of property. Plaintiff buyer alleged that defendant was negligent in failing adequately to disclose conflicts of interest inherent in representing both sides, and in failing to protect his interests.

Plaintiff offered as an expert witness the testimony of Barry Hawkins. When asked about what damages flowed from the breaches he described, his answers were unresponsive, qualified, and conditional. *Id.* at 190-91 n.10. The defendant moved for a nonsuit. The trial court, finding no responses that unambiguously

connected a breach of the standard of care with damages, granted the nonsuit. The Appellate Court affirmed.

REASONING: The necessity for expert testimony in a legal malpractice case to establish causation is well established.

§7-3(a) OPINION ON ULTIMATE ISSUE — TESTIMONY BY EXPERT WITNESS THAT DEFENDANT ACTED ARBITRARILY AND CAPRICIOUSLY NOT PERMITTED — *Daley v. Wesleyan University*, 63 Conn.App. 119 (May 1, 2001); Landau, J.; Trial Judge — Mullarkey, J.

RULE: An expert can give an opinion on the ultimate issue only in a case in which the trier needs expert assistance on that precise question. *C.C.E.* §7-3(a).

FACTS: Professor brought suit against Wesleyan University, alleging breach of employment contract in denying him tenure and ending his employment. In reviewing the plaintiff's application for tenure, the defendant solicited written appraisals of the plaintiff's scholarship from nine professors outside Wesleyan. After the decision denying the plaintiff tenure, the chairperson of the tenure committee wrote a letter to the vice president for academic affairs detailing the decision. The letter discussed the written appraisals.

At trial, the plaintiff sought to call five of the outside professors as expert witnesses. Although the trial court allowed in evidence the written appraisals they had written (since the appraisals had been considered by the defendant during the tenure process), the court did not allow the professors to testify as experts. The plaintiff offered several arguments in support their testimony.

First, to explain the content of the written appraisals. Since the defendant's decision makers did not have the benefit of these explanations, the court held this testimony irrelevant.

Second, to elicit opinions that the standard employed by the defendant in evaluating the plaintiff's scholarship was "inappropriately narrow." The court held that the standard for tenure in this case was defined by the "Blue Book" used at Wesleyan, which stated the basis of the employment contract. The standards of other academic institutions were irrelevant, and these professors had no special

knowledge regarding Wesleyan's standard for tenure.

Third, to have these professors testify that their written appraisals had been misrepresented when summarized in the letter from the chairperson of the tenure committee. However, since both the appraisals and the letter were in evidence, the jury could read and compare them and discern for themselves whether or not there was misrepresentation.

Fourth and finally, to have the professors testify on the ultimate issue in the case — that the defendant's decision to deny the plaintiff tenure was arbitrary and capricious. The court refused to allow the testimony on the ground that the jury did not need expert testimony to decide the ultimate issue.

REASONING: The Appellate Court viewed of the proffered testimony of these witnesses as an attempt to shape the facts already before the jury, not as expert opinion from witnesses with "specialized knowledge" that would "assist the trier-of-fact in understanding the evidence." *C.C.E.* §7-2.

§7-3(a) **WITNESS SHOULD NOT COMMENT ON CREDIBILITY OF ANOTHER WITNESS — *State v. Thompson*, 69 Conn. App. 299, (April 23, 2002); Flynn, J.; Trial Judge — Sferrazza, J.**

RULE: Determining the credibility of a witness is solely the function of the jury and should not be commented upon by another witness.

FACTS: Defendant was accused of murder as a result of a shooting that took place outside a party. The key state's witness was Robert Latour, who testified that he saw the defendant get out of a car at the scene carrying a rifle.

The following examination took place when Sgt. John Turner of the Connecticut State Police took the witness stand:

"[Prosecutor]: Sergeant, how would you describe Robert Latour as a witness?"

[Defense counsel]: Excuse me?

The Court: Do you have an objection?

[Defense counsel]: He didn't see him testify. How can he describe him as a witness?

[Prosecutor]: I'm talking about the investigation.... As far as your investigation of this incident goes, would you — how would you characterize Robert Latour?

[Witness]: I would characterize him as reliable and consistent.

[Defense counsel]: I move to strike that, Your Honor. That — the — that's a conclusory opinion, 'reliable and consistent.' It has nothing to do with his observations of the witness. It's his analysis of what he feels the witness' statements are.

The Court: Well, it's responsive to the question that was asked. I didn't hear an objection. I was sort of expecting one and I didn't get one, and so I think it's too late at this point. But it was responsive to the way the question was asked to him.

[Defense counsel]: I would move to strike it then, Your Honor. As it's not a proper opinion for this witness to give.

The Court: Well, it's too late."

Id. at 315-16.

The trial court refused to strike the testimony. The Appellate Court reversed.

REASONING: "It is well settled that "[t]he determination of the credibility of a witness is solely the function of the jury.... It is the trier of fact which determines the credibility of witnesses and the weight to be accorded their testimony... [W]itnesses cannot be permitted to invade the province of the jury by testifying as to the credibility of a particular witness or the truthfulness of a particular witness' claims." *Id.* at 317.

§7-3(a) **EVEN AN EXPERT CANNOT COMMENT ON THE CREDIBILITY OF ANOTHER WITNESS — *State v. Grenier*, 257 Conn. 797, (September 4, 2002); Palmer, J.; Trial Judge — Parker, J.**

RULE: An expert's comment on the credibility of a crucial witness cannot be cured with a jury instruction.

FACTS: Defendant was accused of sexually assaulting the minor daughter of his half-sister.

During the trial the state called two witnesses who commented on the credibility of the minor victim. First, Kimberly Herwerth, a certified child counselor testified over objection that the victim's statements "were very credible." Second, Deborah McGeehan, a clinical psychologist testified that she was treating the victim for traumatic sexual abuse, thus indirectly expressing the opinion that the abuse had in fact occurred.

The trial court overruled objections to this testimony but during the charge told the jury that they could not consider the opinions of these witnesses in deciding whether or not the victim was being truthful. The court further charged that this testimony had only been admitted in order to explain to them how experts in the field evaluate sexual abuse allegations made by children. The Appellate Court had recognized that the admission of the opinions was error, but found it harmless considering this jury instruction.

The Supreme Court reversed.

REASONING: "In view of Herwerth's and McGeehan's professional experience and expertise, and their numerous interviews with the victim, it is reasonable to presume that the jurors likely would conclude that, if two such highly trained experts believed the victim, so should they." *Id.* at 808-09.

§7-3(a) **IMPROPER TO ASK ONE WITNESS TO COMMENT ON ANOTHER WITNESS' VERACITY — *State v. Singh*, 259 Conn. 693, (March 26, 2002); Katz, J.; Trial Judge — O'Keefe, J.**

RULE: It is improper to ask a witness whether another witness was "wrong" or "lying."

FACTS: This case arose out of a fire at the Prince Restaurant on Chapel Street in New Haven. The defendant, Balbir Singh, ran the restaurant. The state's theory was that Mr. Singh started the fire because he was in financial difficulty and attempting to get out of his lease.

The prosecution called two witnesses, Ronald Moore, the New Haven Fire Marshal and Gary Digus, the property manager for the damaged premises, who both testified that the defendant had told them that his business was bad. The defendant said that he only said his business was so-so. The state's attorney then asked:

"Q. So their recollection is incorrect or they are making it up, right, because that is not their testimony. They didn't say it was so and so, they said you told them it was bad, correct?"

A. Right."

The state presented evidence from Joel Young that the defendant was late on his rent, and later questioned the defendant about this:

"Q. Do you recall [Young] testifying that you had missed the May '95 rent?"

Do you remember hearing him testifying in court that you had not paid your May, 1995 rent?

A. May, maybe, I don't remember May....

Q. And do you have any reason to question his memory in that issue?

A. I'm sorry, I don't understand the question.

Q. Do you claim that he's wrong about that?

A. I'm not."

The state presented the testimony of Naresh Komal, that he had loaned the defendant \$10,000 and that the defendant had only repaid \$6,000. When the defendant later testified that he had repaid the entire loan, the state's attorney asked:

"Q. So is it your claim that Mr. Komal came into court and lied when he said that you still owed him over \$4,000 of that \$10,000?

A. Yes."

Finally, the state's attorney presented the testimony of Frank Dellamura, a fire investigator in the office of the New Haven Fire Marshal and Joseph Pettola, a member of the Fire Investigation Unit of the New Haven Police Department. These two witnesses testified as to how the defendant reacted when a dog sniffed gasoline on his shoes. On cross-examination, the state's attorney questioned the defendant:

"Q. It is your testimony here, is it not, that you were not present when the dog alerted to your shoes, right?

A. I was in the apartment.

Q. But you didn't see it happen?

A. No.

Q. And you recall that's different than what the people who were handling the dog said and [w]hat the detective said, right? Do you recall that's different than what they testified to?

A. Yes.

Q. And are they lying about that? You shrugged your shoulders. Does that mean I don't know?

A. I don't know.

Q. In fact, when you saw the dog alert to them and they said the dog has said there is some kind of flammable [liquid] on those shoes you immediately

said 'I wore those shoes to the restaurant after I talked to you last night,' didn't you? Yes or no? Did you understand the question?

A. No.

Q. The police told you they believed there was some kind of flammable liquid on your shoe[s]?

A. They don't tell me nothing....

Q. Did they tell you when they wanted to seize your shoes?

A. Because I gave them the shirt, my pants and they said the dog — they told me the dog pointed [to these] shoes, we have to take it. I said no problem, take it.

Q. So when they testified that in fact they informed you that they believed there was gasoline on the shoes, they were wrong or lying, correct?

A. They told me that want to take shoes. I say okay."

During final argument the state's attorney pulled all this together by arguing that either all these witnesses or the defendant were lying. The Supreme Court held that this questioning and argument were improper and reversed.

REASONING: "We previously have not had the opportunity to address the well established evidentiary rule that it is improper to ask a witness to comment on another witness' veracity.... A few of these courts have drawn a distinction between using the words 'wrong' or 'mistaken' rather than 'lying' in questions and closing arguments, concluding that the former terms are not improper because they merely [highlight] the objective conflict without requiring the witness to condemn the prior witness as a purveyor of deliberate falsehood, i.e., a 'liar.'" *Id.* at 706-07.

"The state recognizes these rules but asks this court to adopt the minority position, which the Appellate Court applied. That position provides an exception to the prohibition of questions and comments on witnesses' veracity when the defendant's testimony 'is the opposite of or contradicts the testimony of other witnesses,' thereby presenting a 'basic issue of credibility . . . [that cannot] be attributed to defects or mistakes in a prior witness' perception or inaccuracy of memory, rather than to lying.' (Emphasis added.) *State v. Singh*, 59 Conn. App. [638,] 645 [(2000)]; accord *State v. Morales*, 198 Ariz. 372, 375, 10 P.2d 632 (App. 2000);

State v. Pilot, 595 N.W.2d [511,] 518 [Minn. 1999]; *State v. Hart*, 303 Mont. 71, 80-81, 15 P.3d 917 (2000); *People v. Overlee*, 236 App.Div.2d 133, 139, 666 N.Y.S.2d 572 (1997)" *State v. Singh*, 259 Conn. 693, 710-11.

"[W]e reject the state's invitation to carve out an exception to the rule that a witness may not be asked to characterize another witness' testimony as a lie, mistaken or wrong." *Id.* at 712.

§7-3(a) IMPROPER TO ASK ONE WITNESS TO COMMENT ON ANOTHER WITNESS' VERACITY — *State v. Santiago*, 73 Conn. App. 205 (October 29, 2002); Healey, J.; Trial Judge — Dewey, J.

RULE: It is improper to ask a witness whether another witness is being untruthful.

FACTS: Murder prosecution in which at least four State's witnesses testified they saw the defendant shoot the victim in the back. The prosecutor posed the following questions to the defendant:

"[Prosecutor]: Okay. You heard all the testimony?

"[Defendant]: Yes.

"[Prosecutor]: They said you approached?

"[Defendant]: Yes.

"[Prosecutor]: Okay. They were all lying?

"[Defendant]: Yes."

Id. at 216.

The defendant did not object to this testimony. Nevertheless, the Appellate Court reversed the conviction based on prosecutorial misconduct.

REASONING: The Appellate Court was following the mandate of the Supreme Court in *State v. Singh*, 259 Conn. 693 (2002). This type of questioning is absolutely prohibited.

§7-3(a) EXPERT OPINION ON INTOXICATION ADMISSIBLE — *State v. Pjura*, 68 Conn. App. 119, (January 12, 2002); Schaller, J.; Trial Judge — Rodriguez, J

RULE: Despite the fact that it embraces the ultimate issue, a police officer's expert testimony on intoxication is admissible because the trier of fact needs expert assistance.

FACTS: Defendant was accused of drunken driving. The police officer, Huntsman, testified that based upon his general observations of the defendant and field tests, that the defendant was intoxicated. The defendant objected to this testimony on the basis that this was the ultimate issue in the case for the jury and that the jury was capable of understanding the issue without expert testimony. The trial court allowed the testimony. The Appellate Court affirmed.

REASONING: Although the jury is capable of interpreting and understanding the police officer's general observations of the defendant's behavior, such as erratic driving and the odor of alcohol, it needed the officer's assistance in understanding the significance of the tests administered, specifically, the HGN test, walking heel to toe and the one-leg stand test.

"Because we have determined that Huntsman applied the skill and knowledge from his training to both his observations of the defendant and the field sobriety test results, his testimony properly was admitted as that of an expert. His testimony meets the three prongs of the test reiterated in [*State v.*] *Lamme* [19 Conn. App. 594, 603 (1989), *aff'd*, 216 Conn. 172 (1990)] for the admission of expert opinion because he possessed a special skill and knowledge from his training, it was beyond the jury's knowledge and it allowed Huntsman to provide testimony that was helpful to the jury in deciding the issue at hand. The court did not abuse its discretion in allowing Huntsman to testify as an expert." *State v. Pjura* at 130.

§7-4(a) **EXPERT MAY CONSIDER INADMISSIBLE HEARSAY IN REACHING OPINION** — *Poulin v. Yasner*, 64 Conn.App. 730 (August 7, 2001); Landau, J.; Trial Judge — Tierney, J.

RULE: Expert in medical malpractice case may consider deposition testimony that has not been admitted in evidence in reaching opinion on causation. *C.C.E.* §7-4(a).

FACTS: Plaintiff sued his internist for failing to diagnose and treat his alcoholism. Because of his alcoholism, he developed acute pancreatitis. At trial, his expert testified that the defendant had breached the standard of care in failing to diagnose and treat the alcoholism.

The plaintiff then sought to elicit an expert opinion on whether or not the

breach in the standard of care resulted in a lost opportunity for the plaintiff to cease his alcohol consumption and therefore avoid the acute pancreatitis. The expert's opinion rested his examination of the plaintiff, his review of the plaintiff's files, the defendant's chart on the plaintiff, records from Norwalk Hospital (where he was admitted for the acute pancreatitis) and the depositions of the defendant and the plaintiff. The trial court indicated that the depositions could not be considered in deciding whether there was sufficient foundation for the expert's opinion because they were not in evidence. *Poulin v. Yasner*, at 741, n.16.

The trial court therefore sustained the defendant's objection on the ground that there was insufficient foundation for this opinion. Because in a medical malpractice case expert opinion on causation is required, the judge then directed a verdict for the defendant. The Appellate Court reversed.

REASONING: Connecticut law allows an expert to consider inadmissible hearsay in reaching an opinion. *C.C.E.* § 7-4(b).

§7-4(b) **HEARSAY RELIED ON BY EXPERT SHOULD NOT BE ADMITTED FOR TRUTH OF ITS CONTENT** — *Pickel v. Automated Waste Disposal, Inc.*, 65 Conn.App. 176 (August 21, 2001); Foti, J.; Trial Judge: Radcliffe, J.

RULE: Facts relied on by expert need not be admissible in evidence. Should they be relayed to the jury?

FACTS: In this case, also discussed above, the defendant offered the testimony of Dr. James Donaldson regarding the plaintiff's head injury. Donaldson had reviewed, among other things, the deposition of one of the plaintiff's superiors. In response to a question by defense counsel as to whether there was an indication in the file that plaintiff's work had been restricted before the incident with the dumpster lid, Donaldson responded that there was such an indication in the superior's deposition.

Defense counsel then posed the following question: "Without reading the deposition transcript, what indications are there that [the plaintiff] had limitations or pain and restrictions in her work at any time [after] she went back to work and before the subject incident?" Plaintiff's counsel objected on the ground, that defense counsel was

attempting to get this evidence in "through the back door." The court overruled the plaintiff's objection.

Plaintiff also argued that since this part of Donaldson's testimony was not being admitted for the truth of its content, but only to show the basis of his opinion, plaintiff was entitled to a limiting instruction. The court refused to give the limiting instruction. The Appellate Court affirmed.

REASONING: The Appellate Court correctly analyzed the question of whether or not Donaldson was entitled to rely on the superior's deposition in reaching his opinion. Unquestionably, he was entitled to rely on the inadmissible hearsay.

COMMENT: The plaintiff was not challenging the admission of Donaldson's opinion, but the inadmissible hearsay on which it was based. The defense claimed that the testimony was admissible to allow the jury to understand the basis of Donaldson's opinion. Assuming that to be true, the trial court nonetheless should have weighed the probative value against the danger of unfair prejudice. *C.C.E.* §4-3.

Furthermore, even if the trial judge had decided that the probative value outweighed the danger of unfair prejudice, the plaintiff was clearly entitled to a limiting instruction that the hearsay could be considered only as the basis for Donaldson's opinion, and not the truth of its content. If the defendant wanted to prove that the plaintiff had "limitations or pain and restrictions in her work" before the dumpster lid incident, it should have been required to produce independently admissible evidence to that effect.

§7-4(b) **EXPERT MAY BASE OPINION ON GENERAL READING** — *Carusillo v. Associated Women's Health Specialists*, 72 Conn. App. 75, (September 3, 2002); Dranginis, J.; Trial Judge — West, J.

RULE: An expert may rely upon hearsay, including his review of the literature and even though specific articles are not identified.

FACTS: Medical malpractice action in which the plaintiff suffered complications after a difficult delivery. Plaintiff claimed that the defendant improperly used a vacuum, which caused shoulder dystocia which then required a fourth degree episiotomy. The plaintiff's expert testified

that there was a statistical link between the use of the vacuum and shoulder dys-tocia. He testified this was reflected in the literature but did not identify specific articles. The defendant objected on the basis that the doctor was relying on unidentified hearsay. The trial court allowed the testimony. There was a plaintiff's verdict.

The defendant filed a Motion to Set Aside the Verdict that the trial court granted because the expert relied "upon unidentified medical literature to base his opinion as to causation was a reference to unreliable hearsay." *Id.* at 81.

The Appellate Court reversed and reinstated the verdict.

REASONING: "[A]n expert's opinion is not rendered inadmissible merely because the opinion is based on inadmissible hearsay, so long as the opinion is based on trustworthy information and the expert had sufficient experience to evaluate that information so as to come to a conclusion which the trial court might well hold worthy of consideration by the jury." (Internal quotation marks omitted.) *George v. Ericson*, 250 Conn., 312, 321, 736 A.2d 889 (1999). 'An expert may base his opinion on facts or data not in evidence, provided they are of a type reasonably relied on by experts in the particular field.... This is so because of the sanction given by the witness' experience and expertise.... [W]hen the expert witness has consulted numerous sources, and uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise.... The better reasoned authorities favor the admissibility of expert opinion that is partly derived from written sources.' (Citations omitted; internal quotation marks omitted.) *In re Barbara J.*, 215 Conn. 31, 43, 574 A.2d 203 (1990); see also Conn. Code Evid. §7-4." *Carusillo* at 85-86.

§7-4(b) **HEARSAY ADMITTED TO TEST EXPERT'S OPINION CANNOT BE USED FOR SUBSTANTIVE PURPOSES** — *Sowinski v. Sowinski*, 72 Conn. App. 25, (August 27, 2002); Foti, J.; Trial Judge — Cremins, J.

RULE: The fact that an expert reviewed hearsay information in reaching his opinion does not allow the use of that hearsay for substantive purposes.

FACTS: In this divorce action, one of the issues was the value of the Copake property. The defendant valued the Copake property on his financial affidavit at \$28,000. At trial, the defendant elicited an opinion from an expert appraiser that the value of this particular property was \$28,000.

The plaintiff did not produce expert testimony on this issue. However, during the cross-examination of defendant's expert, plaintiff's counsel established that the town does its own appraisal of the property for tax purposes. Plaintiff's counsel also established that in this particular case the defendant's expert appraiser obtained the town's appraisal.

Plaintiff's counsel offered the town's appraisal in evidence. Defendant's counsel objected on the basis of hearsay. The court admitted the document. The Appellate Court reversed.

REASONING: On appeal, the plaintiff argued that she had not offered the document to prove the truth of its content, but rather to impeach the testimony of the defendant's expert witness. Contrary to the statement made in the Appellate Court opinion, this would be a legitimate use of this document. However, the fact that the town had appraised the property at \$59,900 and the trial court found the value of the property to be \$59,900 was fatal to the claim that it wasn't used for substantive purposes.

§7-4(b) **EXPERT'S RELIANCE ON HEARSAY DOESN'T GUARANTEE ADMISSIBILITY** — *State v. Dehaney*, 261 Conn. 336, (August 13, 2002); Norcott, J.; Trial Judge — Spada, J.

RULE: An expert may rely upon hearsay in reaching his opinion; although such hearsay is not admissible through the expert in order to prove the truth of its content, it is admissible to show the basis or foundation of the opinion. However, before admitting hearsay evidence to demonstrate the basis or foundation of the expert's opinion the court must conclude that its probative value outweighs its prejudicial effect.

FACTS: The defendant shot and killed his wife and two children. His defense was mental disease or defect and extreme emotional disturbance. A forensic psychiatrist, Dr. Zonana, evaluated the defendant. Zonana spent approximately 16 hours interviewing the defendant and videotaped these sessions.

Zonana testified that in his opinion the defendant was not suffering from a mental disease or defect when he shot his wife, but due to that event was suffering from extreme emotional disturbance when he shot his children a short time later.

The videotaped sessions were offered in evidence to show the basis of Zonana's opinion. The trial court refused to allow them for the following reasons: they were too lengthy, they contained too many self-serving statements and they would allow the defendant to testify without being cross-examined. The trial court did allow Zonana to recount as much of their content of the videotapes as he deemed necessary to explain his opinions. The Supreme Court affirmed.

REASONING: The trial court properly ruled that to admit the videotape would allow the defendant to testify without being cross-examined.

COMMENT: This illustrates the more general problem involved when hearsay evidence, properly relied upon by an expert, is allowed to go to the jury. A clear statement by the Supreme Court that, when deciding whether or not to allow such hearsay evidence in front of the jury, not for the truth of its content but to explain the expert opinion, the court should specifically apply the balancing test in C.C.E. §4-34, would be helpful.

§7-4(b) **STANDARD OF CARE EVIDENCE ADMITTED TO EXPLAIN CAUSATION OPINION** — *Marchell v. Whelchel*, 66 Conn. App. 574, (October 30, 2001); Schaller, J.; Trial Judge — Sheedy, J.

RULE: One must be extremely careful about allowing in evidence to "explain" an expert's opinion that in fairness ought not to be presented to the jury.

FACTS: On December 12, 1995 the plaintiff consulted a podiatrist regarding the removal of a bunion on his foot. The podiatrist ascertained that the plaintiff had a weak pulse in his foot, which might indicate a lack of circulation in that area and impair his ability to heal. The podiatrist referred the plaintiff to the defendant, a vascular surgeon, to determine whether there was adequate circulation to allow the operation to be done safely. On December 15, 1995 the defendant examined the plaintiff. His examination included a Doppler study and a segmental blood pressure test. The defendant

cleared the plaintiff for surgery. The bunionectomy was performed on December 29, 1995. Severe complications resulting from a lack of circulation followed. Tissue became necrotic and gangrenous and his great toe had to be amputated.

At trial, the plaintiff demonstrated that despite the defendant's claim that the Doppler performed by him had shown adequate circulation, a Doppler conducted a month later showed significant vascular compromise. All the experts agreed that plaintiff's vascular condition would not have changed significantly during that month. In addition, the plaintiff demonstrated that although the test the defendant reported he had performed was an ankle brachial index test (taking readings at the arm and ankle) he actually performed a thigh brachial index test.

The defendant's only expert on the standard of care was himself. However, he did disclose and called to the stand an independent expert on the issue of causation. He then elicited from the independent expert how he performs a vascular consultation, which was consistent with what the defendant did in this case.

The plaintiff objected to this testimony on the basis that it crossed the line into the standard of care issue. The trial court allowed the testimony. The Appellate Court affirmed.

REASONING: The ostensible purpose of this testimony was it was relevant background information for the jury to understand the causation expert's opinion. The court was apparently of the opinion that in the absence of an express statement by the expert that the defendant's vascular consultation was not a breach of the standard of care, the jury would not make the leap itself by comparing the conduct of the defendant and the defendant's expert and noting that they were consistent.

COMMENT: How can the plaintiff minimize the risk that an opposing expert's undisclosed opinion will be allowed in as "explanation" of a disclosed opinion? There may be some steps worth taking before trial. At deposition, plaintiff might ask the expert how they go about conducting the procedure at issue, and whether the defendant's conduct was consistent with the standard of care. This at least will allow the plaintiff to be prepared to cross-examine on the issue.

If defense counsel instructs the expert not to answer these questions because they are beyond the scope of the expert disclosure, it seems unlikely that such testimony will be allowed at trial. If the subject is covered at deposition, plaintiff's counsel will be prepared to properly follow up on the issue for a Motion in Limine.

VIII. Hearsay

§8-1(2) TRANSLATOR IS A "LANGUAGE CONDUIT," NOT AN INDEPENDENT DECLARANT — *STATE V. MORALES*, 78 Conn. App. 25 (2003) (July 15, 2003); Flynn, J.; Trial Judge — Gold, J.

RULE: A translator is not a "declarant" under the hearsay rule, but a "language conduit." Therefore, a statement is not hearsay because it is in the words of the translator.

FACTS: Defendant, who was illiterate and spoke only Spanish, was interviewed by two detectives, Hawkins and Gonzales. Gonzales spoke Spanish.

The defendant made a verbal statement in Spanish to the detectives on November 6, 1998. His verbal statement was made in Spanish to Gonzales, who translated it into English for Hawkins, who had a very limited understanding of Spanish. Hawkins typed the "statement" in English. The two detectives returned to the defendant's apartment on November 10. Gonzalez translated the written English statement to the defendant in Spanish, and made any changes suggested by the defendant. The defendant signed the statement.

During the visit on November 10, the defendant gave the detectives additional information, again in Spanish. The same procedure was followed. The defendant signed the second statement on November 12.

At trial, Hawkins testified, and the defendant's statements were admitted. Gonzalez did not testify. The Appellate Court found no error.

REASONING: There were three layers of out of court statements: the defendant's verbal statement in Spanish, Gonzalez's verbal translation to Hawkins, and the written statement itself. Taking these statements in chronological order, the verbal statement of the defendant in Spanish is admissible as a statement of a party opponent. C.C.E. §8-3(1).

Whether Gonzalez's translation of what the defendant said constitutes hearsay depends on whether or not Hawkins is himself considered a "declarant." See, C.C.E. §8-1(2).

The Appellate Court adopts a rule, applied by several federal circuit courts, called the "language conduit theory." Each case must be individually examined to determine whether or not the interpreter is merely a "language conduit" or is instead an independent declarant. If the interpreter is a "language conduit," his translation is not hearsay. If the interpreter is an independent declarant, his translation is hearsay.

Some of the factors to be considered are: (1) which party supplied the interpreter, (2) whether the interpreter had any motive to mislead or distort, (3) the interpreter's qualifications and language skill, and (4) whether actions taken subsequent to the conversation were consistent with the statements as translated. *Id.* at 41. Applying those factors in this case, the Appellate Court found that Gonzalez was merely a language conduit.

The analysis in *Morales* does not apply directly to the civil trial context, because the defendant in *Morales* did not object to the admissibility of his two written statements at trial. Therefore, the framework of the court's analysis is the confrontation clause. Nevertheless, the confrontation clause analysis utilizes the evidentiary rules concerning hearsay, so that would be the starting point for an evidentiary problem involving translation.

§8-1(3) STATEMENT OF EMERGENCY ROOM PHYSICIAN AND NURSE NOT OFFERED FOR TRUTH OF CONTENTS NOT HEARSAY — *Raybeck v. Danbury Orthopedic Associates, P.C., et al.*, 72 Conn. App. 359 (September 17, 2002); Flynn, J.; Trial Judge — Radcliffe, J.

RULE: A statement offered to show its effect on the listener, not to prove the truth of its contents, is not hearsay. C.C.E. §8-1(3).

FACTS: See, Sections 4-1 and 7-2 above. Plaintiff sought to testify that when she came into the emergency room, one of the physicians and several attending nurses told her that her wrist was "a real mess" and that she would have to stay in the hospital to have the wrist

pinned. She apparently accepted this advice without complaint.

Defendant objected to this testimony on the ground that it was offered to prove that her wrist needed to be pinned. Plaintiff argued that she was offering the statement (and presumably her response) to support her claim on causation: that if she had been offered pinning, she would have chosen that alternative. The trial court barred the testimony. The Appellate Court found this to be error.

REASONING: Since, on the informed consent claim, the plaintiff has the burden of proving she would have chosen a different procedure if it had been offered, the statements of the emergency room physician and nurses and her contemporaneous response are strong evidence of what she would have done. These statements do not suffer from the inherent weakness of testimony of what she “would have done” in hindsight.

COMMENT: If this exchange could be proved through the mouth of someone other than the plaintiff, it would be much more effective.

§8-3(1) STATEMENT OF PARTY OPPONENT — USE IMPROPERLY RESTRICTED TO CREDIBILITY — *Harlan v. Norwalk Anesthesiology, P.C.*, 75 Conn. App. 600 (March 18, 2003), *cert. denied*, 264 Conn. 911 (June 17, 2003); Peters, J.; Trial Judge — Tierney, J.

RULE: The distinction between judicial admissions and evidentiary admissions continues to be elusive.

FACTS: See Section 7-3(a) above. The defendants had made statements in depositions and interrogatory answers about the timing of medications administered to the plaintiff to attempt to stabilize her blood pressure. At trial, these statements were admitted unconditionally as statements of party opponents. C.C.E. §8-3(1).

During its charge however, the court instructed the jury that insofar as these statements were inconsistent with the trial testimony, they could only be used to evaluate credibility, and not for substantive purposes. The Appellate Court affirmed.

REASONING: The opinion states that the plaintiff did not provide a foundation for her claim of full admissibility and that the claim lacked both a legal and factual basis, and points out that the plaintiff did not specify which statements

of the defendants were “admissions.”

However, the word “admissions” has no significance in this context. All statements of a party opponent are evidentiary admissions that may be used for substantive purposes. The opinion states that it is up to the trial court to determine the factual question of whether “a party statement is a judicial admission....” *Id.* at 609. While this is true, the plaintiff did not claim that any of these statements were judicial admissions, and no such finding is required before the statements can be used for substantive purposes.

§8-3(1) STATEMENT OF PARTY OPPONENT — NO RELAXED STANDARD OF RELEVANCE FOR ADMISSION — *State v. Reese*, 77 Conn., App. 152 (June 3, 2003); Hauser, J.; Trial Judge — Bishop, J.

RULE: A statement of a party opponent is subject to the normal rules of relevancy.

FACTS: Defendant Reginald Reese was prosecuted as the shooter in a murder. The state first prosecuted defendant’s cousin, Jermaine Reese, as the sole shooter. Jermaine was acquitted of all charges following a jury trial. The state then changed its theory, prosecuted Reginald Reese as the sole shooter, and obtained a conviction.

At trial, Reginald Reese sought to introduce into evidence the long form information filed by the state against Jermaine Reese case as a statement of a party opponent. The trial court refused to allow the document in evidence. The Appellate Court affirmed.

REASONING: The Appellate Court declined the defendant’s invitation to follow the federal courts (including the Second Circuit), where relaxed rules of relevancy are applied in ruling on the admission of the statement of a party opponent. The federal courts observe that this relaxation “derived vestigially from an older, rough and ready view of the adversary process which leaves each party to bear the consequences of its own acts.” *Id.* at 161.

Applying the normal rules of relevancy, the Appellate Court found that the long form information was inadmissible, for it “had no logical tendency to aid the trier in the determination of whether the state had met its burden of proving the defendant’s criminal culpability.” *Id.* at 162-63.

§8-3(1) STATEMENT BY A PARTY OPPONENT — PLAINTIFF’S STATEMENTS IN MEDICAL RECORDS REGARDING CIRCUMSTANCES OF COLLISION ADMISSIBLE — *Puchalsky v. Rappahahn*, 63 Conn.App. 72 (April 24, 2001); Foti, J.; Trial Judge — O’Neill, J.

RULE: Any statement of a party opponent is admissible.

FACTS: The plaintiff, while walking a picket line, was knocked to the ground when a car attempted to pass through. The hospital records contained notations that the car was “trying to make (or inch) its way through” and was “moving slowly through picket line”, and that the plaintiff was brushed up against car, causing him to spin once or twice to the ground.

The trial court allowed the notations into evidence on two grounds: (1) the statements were germane to the diagnosis and treatment of plaintiff, C.C.E. §8-3(5); (2) the jury could infer that they were statements of a party opponent, C.C.E. §8-3(1). The Appellate Court affirmed.

COMMENT: The opinion is somewhat confusing. The Appellate Court first averred that the jury “could have inferred that the plaintiff had made the statements.” *Id.* at 78. If the statements are attributable to the plaintiff, no further inquiry is required; it is not necessary that the information be germane to the diagnosis and treatment of his injuries. These are separate, freestanding exceptions to the hearsay rule.

§8-3(1) FACTUAL ALLEGATION IN PLEADING NOT WITHIN PARTY’S ACTUAL KNOWLEDGE HELD TO BE EVIDENTIARY, NOT JUDICIAL, ADMISSION — *Mamudovski v. BIC Corporation, et al.*, 78 Conn. App. 715 (August 19, 2003); Bishop, J.; Trial Judge — Melville, J.

RULE: Under appropriate circumstances, a trial judge has the discretion to determine that an allegation in the plaintiff’s complaint is not a judicial admission, but only an evidentiary admission.

FACTS: Plaintiff began work with the defendant in 1979. In 1988, she suffered a work-related herniated disc. She returned to light-duty work in 1991. In 1993, the defendant hired a private investigator to follow and videotape the

plaintiff. On February 9, 1994, the defendant discharged the plaintiff claiming that her claimed disability restricting her to light duty did not in fact exist.

On the day of her discharge plaintiff became upset, was crying and fainted. She was nonetheless escorted to her car and told to leave. After leaving the parking lot, she fainted again and collided with a telephone pole.

Plaintiff brought suit against her former employer, claiming negligence in allowing her to drive away (first count), retaliatory discharge (second count), and wrongful discharge (third count).

In the second count, she alleged that on February 9, 1994, "the plaintiff was injured during the course of her employment with the defendant." *Id.* at 720.

The defendant claimed that this allegation was a judicial admission that her injuries occurred in the course of employment, and that therefore workers' compensation was her exclusive remedy, barring her from prosecuting the first count (negligence). The trial court agreed, and granted an oral motion for summary judgment on the first count. The Appellate Court reversed.

REASONING: The Appellate Court reversed on the basis that, without a waiver by the plaintiff of the procedural requirements for a motion for summary judgment, an oral motion was improper.

The court went on to consider whether or not the statement in the second count of the plaintiff's complaint was a judicial admission, and concluded it was not. It found merit to the plaintiff's claim that the allegation, though factual, was "more in the nature of an untutored opinion or conclusion than the recitation of a fact within her knowledge." *Id.* at 723.

"For a factual allegation to be held to be a judicial admission, the fact admitted should be one within the speaker's particular knowledge and one about which the speaker is not likely to be mistaken. 'A party's testimony should be deemed a judicial admission only as to those facts that are 'peculiarly within his own knowledge and as to which he could not be [mistaken....]' *Pedersen v. Vahidy*, 209 Conn. 510, 520, 552 A.2d 419 (1989).' C. Tait, Connecticut Evidence (3d Ed. 2001) § 8.16.3 (b), p. 589. 'A conclusive judicial admission, to be binding, must be one of fact and not a conclusion or an expression of opinion. Courts require the statement relied upon as a binding admission to be clear, deliber-

ate and unequivocal.' 4 *Jones* on Evidence (7th Ed. 2000) § 27:33, p. 526 n.45. That view was put succinctly by the Illinois Appellate Court in *Elliot v. Industrial Commission*, 303 Ill. App. 3d 185, 187, 707 N.E.2d 228 (1999): 'Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge.'

Id. at 723.

Applying these principles, the Appellate Court observed that, although the plaintiff asserted in the second count that her injury occurred in the course of her employment, she alleged in the first count that her injuries on the same date occurred after her employment had been terminated, thus indicating her lack of knowledge of the true facts of her employment status. "Accordingly, we believe that the court incorrectly deemed the plaintiff's allegation in count two to be a judicial admission. Rather, we believe that the pleading was more in the form of a conclusory allegation by the plaintiff, and, as such, should be viewed more as an evidentiary admission that she claimed that she had seen injured in the course of her employment. As an evidentiary admission, the plaintiff's allegation should be available to counsel for cross-examination as an inconsistency, but it should not be conclusive on the fact finder, as in the case with judicial admissions." *Id.* at 728-29.

§8-3(1) **EVEN A PLEADING BETWEEN THE SAME PARTIES IS ONLY AN EVIDENTIARY ADMISSION IF FILED IN A SEPARATE LAWSUIT** — *Continental Insurance Co. v. Simkins Industries, Inc.*, 31 Conn. L. Rptr. No. 7, 249 (February 25, 2002); Trial Judge — Hodgson, J.

RULE: A pleading that is a judicial admission in one lawsuit does not constitute a judicial admission in another lawsuit between the same parties.

FACTS: In lawsuit one, *Simkins Industries v. Marsh*, Simkins Industries was the plaintiff. In lawsuit two, *Continental Insurance Co. v. Simkins Industries*, in which Simkins was the defendant, the plaintiffs sought to use allegations from *Simkins'* complaint in lawsuit one as conclusive judicial admissions. The trial court refused.

REASONING: The trial court quoted

Professor Tait that "prior judicial admissions are merely evidentiary admissions, to be used as evidence to prove a matter in dispute in the subsequent trial." *Id.* at 250.

§8-3(1) **TESTIMONY OF PARTY MISLABELED JUDICIAL ADMISSION** — *LaSalle v. Freshfield Meadows, LLC*, 69 Conn. App. 824, (May 21, 2002); Daly, J.; Trial Judge — Mottolese, J.

RULE: Testimony in a judicial proceeding held to be a judicial admission conclusive on the trier of fact.

FACTS: This was a suit on a note. During a motion for the appointment of a receiver of rents the owner of the named defendant testified as to certain facts. In a subsequent Motion for Summary Judgment, a transcript of that testimony was provided to the judge, who relied upon that testimony in reaching his decision. The Appellate Court held that this was proper.

REASONING: The trial court correctly did not characterize this testimony as a judicial admission. In fact, this evidence is nothing more than a statement by a party opponent: an evidentiary admission. The weight of the evidence was enhanced by the fact that it was taken in a judicial proceeding, with all the solemnity that attaches thereto. In addition, this particular testimony was taken before the same judge deciding the Motion for Summary Judgment, who therefore had the opportunity to observe the witness and assess his credibility.

Nonetheless, this is not properly characterized as a judicial admission, since the trier of fact still has the freedom to reject the testimony. Nor is it necessary to characterize this testimony as a judicial admission. Correctly characterized, it is an evidentiary admission, which the trier of fact found to be more probably than not true.

§8-3(2) **SPONTANEOUS UTTERANCE** — **20 TO 30 MINUTE DELAY ALLOWED** — *State v. Arluk*, 75 Conn. App. 181 (February 18, 2003); Dranginis, J.; Trial Judge — Taylor, J.

RULE: A 20 to 30 minute delay between the event and the statement is not excessive if the statement was made under circumstances indicating no opportunity for contrivance and misrepresentation.

FACTS: Defendant was accused of assaulting his wife. On April 23, 1999, the wife was driving their van, with the defendant in the front-passenger seat and their two children in the middle bench seat immediately behind. The defendant accused his wife of having an affair, and hit her in the side of the head. She drove to the Meriden police station and sounded the horn.

The defendant left the vehicle, and the wife left the police parking lot before any member of the police department came out. She drove to her parents' home, where she learned that the defendant had called and yelled at her father. Her father had called the police, who arrived shortly thereafter.

While the officer was taking a statement about the defendant's threatening call, the couple's four-year-old child (who had been in the van) blurted out that his "daddy hit his mommy." Defendant objected to this hearsay statement being admitted into evidence. The trial court admitted it as a spontaneous utterance. The Appellate Court affirmed.

REASONING: The defendant's principal argument on appeal was that an excessive amount of time, 20 to 30 minutes, had elapsed between the assault and the statement. While the amount of time involved is an important consideration, it is not decisive. In view of the fact that the Supreme Court had recently ruled that a statement made 90 minutes after the startling event qualified as a spontaneous utterance, the defendant's argument that 20 to 30 minutes was too long was rejected. *See, State v. Wargo*, 255 Conn. 113 (2000).

§8-3(2) SPONTANEOUS UTTERANCE — SPONTANEOUS UTTERANCES OF VICTIM AND DEFENDANT CONTRASTED — *State v. Kelly*, 256 Conn. 23 (May 8, 2001); McDonald, J.; Trial Judge — Tierney, J.

RULE: Self-serving declarations of defendants will seldom qualify as spontaneous utterances.

FACTS: This is the infamous *State v. Kelly* rape case. Defendant was accused of raping the victim and telling her that if she told anyone what happened, he would kill her.

When the victim arrived home shortly after midnight, visibly upset, she told her father that she was upset because she had argued with a friend. She then went to her room. The victim's older sister

came into her room and found her sobbing. During the next 10-15 minutes, the victim disclosed to her sister the details of the sexual assault. The state offered the sister's testimony as to what the victim said under the spontaneous utterance rule, and the trial court allowed the testimony.

REASONING: On appeal, the defendant claimed that the fact that the victim's initial statement to her father (that she was upset because she had argued with a friend) was untrue indicated that she had had time for reasoned reflection and even fabrication. Therefore, her later statement to her sister could not qualify as a spontaneous utterance. The rationale for the reliability of spontaneous utterances is that these declarations are "unreflective." *C.C.E.* §8-3(2), commentary. The Supreme Court found this claim to be without merit.

ADDITIONAL FACTS: At approximately 1:30 a.m., the victim's father called the defendant's father and told the defendant's father that his son had raped his daughter. The defendant's father went into the defendant's bedroom and shook him awake. He told his son about the victim's accusation, and the defendant son said: "Dad, I didn't rape his daughter... we had sex." *Id.* at 60. The defendant offered this statement through the father as a spontaneous utterance. The trial court refused to allow it in evidence, and the Supreme Court affirmed.

REASONING: 90 minutes had passed since the rape. "The defendant has not met his burden of proving that he did not have an opportunity to think about and fabricate a story that night after the assault." *Id.* at 61. "In light of the totality of the circumstances the trial court properly determined that in the present case, the defendant's self-serving exculpatory statement was not an excited utterance and therefore the trial court properly excluded the defendant's father's testimony regarding that statement." *Id.* at 62.

COMMENT: At the heart of this holding is a recognition that the reaction of most people accused of a crime is to deny it, gutting the reliability of the spontaneous utterance exception in this situation.

§8-3(2) SPONTANEOUS UTTERANCE — TEMPORAL LINK BETWEEN STARTLING EVENT AND DECLARATION ANALYZED — *State v. Wargo*, 255 Conn. 113

(December 19, 2000);
McDonald, J.; Trial Judge
— Mulcahy, J.

RULE: Proof of a close temporal link between the startling event and the declaration need not be certain. *C.C.E.* §8-3(2).

FACTS: Murder prosecution in which the defendant was accused of killing his wife and burning down the house to hide the crime. The defendant's two children escaped from the second floor by climbing through a window onto the roof of the front porch and then down a ladder placed there by the defendant. The defendant was heard to say at the scene that he was not sure if his wife had come home or if she was in the house.

The children's escape from the house occurred at approximately 3:20 a.m. The children were taken to a neighbor's house, where they stayed from 3:30 a.m. until 7:30 a.m.

At the neighbor's house, the children made the statements offered under the spontaneous utterance exception to the hearsay rule. Specifically, Brent (age 6) was heard to say that his mother was still in the house, and that his parents had been fighting that night. Rachel (age 4) was heard to say, "My daddy stepped on mommy getting us out of the house." The trial court admitted the statements, and the Appellate Court affirmed. After granting certification, the Supreme Court also affirmed.

In the Supreme Court, the defendant made three arguments: (1) that the state failed to establish that the children personally observed the events they recounted; (2) that their statements were influenced by conversations they overheard that morning; and (3) that Brent's statement regarding his parents' fighting was not sufficiently proved to be about their fighting that night. The Supreme Court rejected the arguments.

REASONING: (1) The circumstantial evidence indicated the statements were based on personal observation.

(2) Any influence caused by other conversation in the neighbor's house that morning did not so undermine the reliability of the children's statements as to make them inadmissible.

(3) The defendant's claim that Brent's statement that his parents had been fighting did not have a close enough temporal link was based on the fact that the witness who related the statement was not certain, although she believed it to be true, that Brent had stated that the fight

had occurred that night. The court noted the state was not required to establish the temporal link beyond a reasonable doubt. The statement was admissible as long as a reasonable inference could be drawn that the fight occurred on the night of the fire. The witness' later statement that she could not be sure went to the weight of the evidence, not its admissibility.

§8-3(8) STATEMENT IN LEARNED TREATISE — INCOMPLETE FOUNDATION LEADS TO LIMITED USE — *Harlan v. Norwalk Anesthesiology, P.C.*, 75 Conn. App. 600 (March 18, 2003); Peters, J.; Trial Judge — Tierney, J.

RULE: The trial court has discretion to limit the use of a learned treatise admitted into evidence to credibility.

FACTS: See, Section 7-3(a) and 8-3(1) above. During the cross-examination of defendant's expert, the plaintiff offered Exhibit 71, an excerpt from a textbook entitled *Clinical Anesthesiology*.

In accordance with C.C.E. §8-3(8), the question was whether or not the treatise was "recognized as a standard authority in the field by the witness, other expert witness or judicial notice." The trial court observed that one defense expert witness, Dr. Severino, indicated she used the text for teaching her residents, owns the text, and consults it. The witness through whom the text was offered, Dr. Puri, also testified that he owns the text, consults it, and that he knows that students use it on a regular basis. The trial court found that this was sufficient authority to find the text authoritative, even though the experts did not use the magic phrase, "I recognize it authoritative." In allowing the exhibit, the trial court embraced the broader view of the learned treatise exception as set forth in the C.C.E., §8-3(8).

In ruling, the trial court observed that although would allow the exhibit in evidence, thus allowing the plaintiff to use it in cross-examination despite the experts' refusal to acknowledge it as authoritative, he would not allow the test in evidence, to "create" the standard of care.

The Appellate Court affirmed.

REASONING: The Appellate Court relied on the experts' refusal to acknowledge the treatise as authoritative to find that the foundation had not been properly laid for the admission of the treatise under the Code.

COMMENT: The holding is not correct. The Code was specifically written to allow the admission of a treatise if the judge finds the treatise to be "a standard authority in the field," even if the expert will not acknowledge the treatise as "authoritative."

The opinion includes the bizarre statement that, even though the opening words of C.C.E. §8-3 are, "the following are *not excluded* by the hearsay rule..." this does not mean that evidence which fits an exception to the hearsay rule must be admitted. This language was chosen simply to make clear that other objections to evidence that satisfies a hearsay exception, may still be valid. For example, the evidence may not be relevant. This language does not mean that the trial court has unfettered discretion to bar relevant and material evidence that fits a hearsay exception.

§8-3(8) STATEMENT IN LEARNED TREATISE — RECOGNITION OF JOURNAL LEADS TO ADMISSION OF ARTICLE WITHIN JOURNAL — *Musorofitti v. Vlcek*, 65 Conn.App. 365 (August 28, 2001); Foti, J.; Trial Judge — Mihalakos, J.

RULE: An article's publication by an "esteemed periodical that subjects its contents to close scrutiny and peer review" justifies a presumption that the article is authoritative and admissible.

FACTS: Personal injury case in which one of the claimed injuries was an injury to the temporomandibular joint (TMJ). Plaintiff's expert testified that the TMJ injury was caused by whiplash during the collision.

On cross-examination, defendant established that the expert was a member of the American Dental Association and was familiar with that association's Journal, and that the Journal was widely read, recognized and accepted in the dental profession as authoritative. Defendant then offered a Journal article entitled "Whiplash and Temporomandibular Disorders: A Critical Review." It does not appear that defense counsel asked the expert whether the witness considered the particular article authoritative. The trial court admitted the article in evidence, and the Appellate Court affirmed.

REASONING: The Appellate Court conceded that not "all articles in a periodical may be qualified as learned through the mere demonstration that the

periodical itself is highly regarded." *Id.* at 384. The Appellate Court then quoted from a Second Circuit decision: "We do not, however, read *Meschino* to say that the reputation of the periodical containing the proffered article is irrelevant to the authoritativeness inquiry. Publication practices vary widely, and an article's publication by an esteemed periodical which subjects its contents to close scrutiny and peer review, obviously reflects well on the authority of the article itself. Indeed, because the authoritativeness inquiry is governed by a 'liberal' standard, good sense would seem to compel recognizing some periodicals — provided there is a basis for doing so — as sufficiently esteemed to justify a presumption in favor of admitting the articles accepted for publication therein." *Costantino v. Herzog*, 203 F.3d 164, 172 (2d Cir. 2000)."

§8-3(8) RECOGNITION BY EXPERT OF HANDBOOK AS A "STANDARD REFERENCE" SUFFICIENT FOR ADMISSION — *Pestey v. Cushman*, 259 Conn. 345, (February 5, 2002); Vertefeuille, J.; Trial Judge — Bishop, J.

RULE: Recognition by opposing party's expert on cross-examination that people refer to a particular treatise for general recommendations on the subject at issue is sufficient for its admission as a learned treatise.

FACTS: The facts of this case are described above in Section 7-1. The defendant called to the witness stand Richard Vetter, the designer of the anaerobic digestion system used on defendant's farm to process manure. The following examination took place:

"[Q], Doctor, this [handbook] is also recognized as a standard and referred to by people in your profession and accepted with respect to animal waste characteristics, isn't that correct?"

[A], This is general references, general recommendations, yes.

[Q], Okay. And it's recommended also for people who want to find information with respect to gas control and control of odors and gasses leaving the livestock area; isn't that true?"

[A], Again, general recommendations."

One section of the handbook, "Control of Odors and Gases Leaving the Livestock Area," recommended that a

farm operation be located at least one-half mile from neighboring houses. The defendant objected to its admission on the ground that Vetter's testimony did not arise to recognizing the handbook "as a standard authority" as required by C.C.E. §8-3(8). The trial court allowed this section to be read into evidence. The Supreme Court affirmed.

REASONING: "We conclude that Vetter's testimony, although not an unequivocal endorsement of the Midwest handbook as a leading authority in the field, was nonetheless sufficient to establish the necessary foundation to qualify it as a learned treatise. In response to questions posed by the plaintiffs' counsel, Vetter acknowledged that the Midwest handbook was a standard reference in his profession in which one could find general references and recommendations with respect to animal waste characteristics and controlling the spread of odors and gases from livestock areas. Accordingly, we conclude that the trial court did not abuse its discretion in allowing the introduction of the section of the Midwest Handbook at issue." *Id.* at 369.

§8-4 BUSINESS RECORDS — INSURANCE COMPANY'S INVESTIGATIVE REPORT HELD ADMISSIBLE WHEN OFFERED BY OPPONENT — *Sana v. Hawaiian Cruises*, 181 F.3d 1041 (4th Cir. 1999)

RULE: If, in the ordinary course of business, an entity is required to investigate an accident, its insurer's investigative report may qualify as a business record when offered by the opposing side. *Fed. R. Evid.* 803(6).

FACTS: The plaintiff, Sana, an employee on a whale-watching boat, worked on March 9 and 10, 1995. On March 11, he became ill, and on March 13, was diagnosed with encephalitis, an inflammation of the brain. On March 16, plaintiff slipped into a coma, in which he remains to this day.

Plaintiff sought traditional maritime remedies of maintenance and cure, which are available to "a seaman who falls ill while in the service of his vessel." Therefore, the critical issue was whether the plaintiff exhibited any symptoms of encephalitis on March 9 and 10, 1995.

Defendant's insurer investigated the case. The investigative report contained transcripts of interviews with two of Sana's co-workers and his supervisor, which the insurer's investigator,

Rutherford, conducted days after the plaintiff's diagnosis. The co-workers stated that the plaintiff had told them he bumped his head (which, all experts agreed, could not cause encephalitis) at work on March 10. In addition, one co-worker said the plaintiff was behaving abnormally on March 10. The supervisor stated that Sana had told him on March 8 that he felt sick. The co-workers were not available for trial. The plaintiff offered the insurance company's report containing the transcripts as a business record. The trial court refused to admit the report, and denied the claim. The Appellate Court reversed.

REASONING: The insurance company report contained two levels of hearsay. First, the statements of the co-workers and the supervisor are hearsay. Plaintiff offered them as admissions by a party opponent pursuant to *Fed. R. Evid.* 801(d)(2)(D), which provides: "[a] statement is not hearsay if [it] is offered against a party and is... a statement by the party's agent or servant concerning a matter within the scope of the agency or employment." Compare, *C.C.E.* §8-3(1)(C). Noting that the co-employees were required to cooperate with their employer to investigate the case, the court held that they were acting within the scope of their employment when giving the statements. Thus, the statements qualified as a statement of a party opponent.

The second level of hearsay was the report itself. The defendant argued that the report was an accident report, prepared in anticipation of litigation. Plaintiff argued that the report qualified as a business record, because the insurance company prepared it in the regular course of its business. The 9th Circuit concluded that the report did qualify as a business record: "Although Rutherford may have interviewed Sana's co-workers in anticipation of a potential claim, the rationale for excluding such reports is not present here. Courts are rightfully wary when parties create self-serving documents and seek to offer them as business records.... Sana, however, sought to introduce a document created by Hawaiian Cruises' insurer, which had no incentive to gather evidence of Sana's illness." *Sana v. Hawaiian Cruises* at 1046.

COMMENT: It seems clear that the court would have reached a different result if Hawaiian Cruises had offered the report.

§8-4 TRANSCRIPTION OF DOCTOR'S ILLEGIBLE NOTES DOES NOT REQUIRE INDEPENDENT BUSINESS RECORDS FOUNDATION — *Calcano v. Calcano*, 257 Conn. 230 (July 31, 2001); Sullivan, J.; Trial Judge — Rush, J.

RULE: A transcription of a business record is not a completely independent document that is required, in and of itself, to satisfy the business records statute.

FACTS: Action for injuries sustained in a February 1993 automobile collision. At trial, the issue of whether the plaintiff had pre-existing injuries was sharply contested. The plaintiff testified that, before the collision that was the subject of the case, she had been involved in only one car accident "about 20 years ago." She also testified she had no recollection of falling down stairs in November 1992.

Less than two weeks after the collision, the plaintiff had gone to her chiropractor, who died before trial. His notes could be interpreted to indicate a car accident much closer in time than 20 years, and noted, "She did good until 11/92 fell down a flight of stairs." *Id.* at 238.

Although the chiropractor's handwritten notes were illegible, at the defense lawyer's request, he had typed a transcription of those notes. Defendant offered the notes and the transcription as business records. The trial court admitted the documents in evidence. The Supreme Court affirmed.

REASONING: "The transcription was not a completely independent document that was required, in and of itself, to satisfy the business records statute. Where, as here, the original document was admissible into evidence, and there was sufficient indication that the transcription contained substantially the same information, the transcript was also admissible." *Id.* at 243.

§8-4 OPINION IN BUSINESS RECORD NOT ALLOWED — *Pickel v. Automated Waste Disposal, Inc.*, 65 Conn.App. 176 (August 21, 2001); Foti, J.; Trial Judge: Radcliffe, J.

RULE: An opinion included within an otherwise admissible business record is admissible only if the entrant would be qualified to give that opinion in oral testimony.

FACTS: In this case, discussed on two earlier occasions in this article, plaintiff's fellow Post Office employee prepared a report regarding the accident, in which the author stated, "It appears that the wind caused the lid to fall." The author had not witnessed the accident. The trial court refused to allow the report into evidence, and the Appellate Court affirmed.

REASONING: An entry in a business record is admissible only if the declarant could testify to the matter if called to the witness stand. In this case, the author had not been qualified as an expert witness, and therefore would not be permitted to testify as to why the dumpster lid fell. Since the witness could not give this opinion on the witness stand, the opinion is not admissible simply because it is contained in a business record.

§8-4 **COMPUTER-GENERATED MAP QUALIFIES AS A BUSINESS RECORD —**
State v. Polanco, 69 Conn. App. 169, (April 16, 2002); Bishop, J.; Trial Judge — Bryant, J.

RULE: A computer-generated map created from the existing computerized municipal mapping system may be admitted in evidence as a business record, subject to enhanced foundational requirements.

FACTS: Defendant was accused of possession of cocaine with intent to sell within 1500 feet of a school. The state needed to establish that the defendant's apartment was within 1500 feet of the school.

The state called Steven Santovasi, employed by the City of Waterbury Bureau of Engineering as a Geographic Information Systems Technician. About a month before trial, at the request of the state's attorney, he prepared a map which showed the school and a radius of 1500 feet, within which was located the defendant's apartment. Waterbury's computerized map consisted of 799 small grids stored in a digital library. These grids can be assembled to provide any requested level of detail or area. The court allowed the exhibit. The Appellate Court affirmed.

REASONING: As to the first business record requirement, that the map "was made in the regular course of business," Santovasi testified that it was the regular course of his business as an employee of the City of Waterbury to generate various maps.

As to the second requirement, "that it was the regular course of such business to make such a record," although in this particular instance the map was generated for use at a trial, the system was maintained and used for other non-litigation purposes such as utility information, zone information and soil information.

As to the final requirement set forth in the business record exception, "that it was made at the time of the act described in the report, or within a reasonable time thereafter," the court held "that a 'question as to the timeliness of the creating of [a computer] record is answered by observing that the time requirement refers to when the entry into the data bank was originally made, not the time the printout was produced.' 2 c. McCormick, Evidence (5th Ed. 1999) §294, p. 269." *State v. Polanco* at 182.

Finally, the Appellate Court imposed two additional requirements before a computer-generated exhibit may be admitted into evidence as a business record: "Computer generated exhibits present 'structural questions of reliability that transcend the reliability of the underlying information that is entered into the computer.' To accommodate that heightened concern, a court is not permitted to admit a computer generated exhibit into evidence unless the proffering party also (1) presents a witness whose knowledge of computers is sufficient to enable a direct and cross-examination concerning the process used to generate the exhibit and (2) lays a foundation, through that witness, sufficient to support a finding that the process and equipment involved in generating the exhibit were adequate for that purpose." *Id.* at 184.

§8-4 **AFFIDAVIT INSUFFICIENT TO ESTABLISH FOUNDATION FOR A BUSINESS RECORD —**
State v. Downey, 69 Conn. App. 213, (April 16, 2002); Daly, J.; Trial Judge — Fuger, J.

RULE: An affidavit offered to establish the necessary foundational requirements for a business record is not itself a business record, because it is prepared for the purpose of litigation. Without the affidavit in evidence, there is no foundation for the business records themselves.

FACTS: Defendant was accused of assault of a peace officer. He offered in evidence three medical reports from his treating orthopedist in order to show that

he was physically incapable of assaulting anyone. Rather than call a witness from the doctor's office to the witness stand, the defendant offered an affidavit from the doctor's record keeper, which set forth the necessary elements of the business record rule. The trial court refused to admit the medical reports. The Appellate Court affirmed.

REASONING: Although the affidavit would establish the necessary elements to make the reports admissible, the affidavit itself is hearsay and, absent a court rule or statute, not admissible in evidence. Compare *Fed. R. Evid.* §902(11), which provides for the admission of business records with an affidavit.

COMMENT: Isn't it time that Connecticut adopted such a rule?

§8-5(1) **TESTIMONY BY DECLARANT THAT SHE COULD NOT READ ENGLISH DOES NOT PRECLUDE ADMISSION OF PRIOR INCONSISTENT STATEMENT PURSUANT TO WHELAN —**
State v. Anderson, 74 Conn. App. 633 (January 28, 2003); West, J.; Trial Judge — Schimelman, J.

RULE: One seeking to block the admission of a statement that meets the *Whelan* test has the burden of persuading the trial judge "that the statement is so untrustworthy that its admission into evidence would subvert the fairness of the fact finding process."

FACTS: Defendant was accused of assaulting his girlfriend. The morning after the assault, a detective visited the girlfriend in her hospital room. He took notes, but did not take a statement from her that day. After her discharge, the detective visited her at her home and spent two to three hours with her, drafting a statement on a laptop computer. As the detective drafted each paragraph, he read it to her and asked if any changes were required. He then read the entire statement to her and asked if it was accurate. He did not print out the statement, and it was not signed that day.

The detective returned to the girlfriend's house the next day, gave the statement to her to review, and read it to her. She expressed no disagreement with the contents of the statement, and signed it.

At trial, she disavowed the statement, claiming her injuries were self-inflicted. When presented with the written state-

ment, she said she did not recognize it, although she acknowledged her signature. She testified that she could not read any English and thought she was signing a document to have the charges against the defendant dropped.

The state sought to admit the statement for substantive purposes pursuant to *State v. Whelan*, 200 Conn. 743, cert. denied, 479 U.S. 994 (1986). The defendant objected, arguing that because the girlfriend had testified she could not read English and did not realize what she was signing, her signature alone could not properly authenticate the document. The trial court allowed the statement to be “published” to the jury. The Appellate Court affirmed.

REASONING: The Appellate Court places on the objecting party the burden of proving that a statement that passes the Whelan test is unreliable. Of particular importance to the court was the fact that the girlfriend was clearly a “reluctant witness.” It is clear from the opinion that neither the trial court nor the Appellate Court found the girlfriend’s claim that she thought she was signing a document to have the charges dropped credible.

§8-5(1) TESTIMONY BY DECLARANT THAT SHE WAS UNDER THE INFLUENCE DOES NOT PRECLUDE ADMISSION OF PRIOR INCONSISTENT STATEMENT PURSUANT TO *WHELAN* — *State v. Hersey*, 78 Conn. App. 141 (July 22, 2003); Foti, J.; Trial Judge — Swords, J.

RULE: Declarant’s testimony that she was drinking heavily and on assorted medications does not require the trial court, in its gatekeeper function, to exclude the statement as unreliable.

FACTS: Defendant was accused of assaulting his girlfriend. The girlfriend gave two written statements to a police officer, one on the day of the assault and one the next day. At trial, the girlfriend was shown the statements. As to the first, she testified that although it contained her signature, she did not have her glasses on when she signed it, and had not read it.

As to the second statement, she testified that she did not remember giving it and had been drinking heavily that day. She also testified that her injuries were caused when she fell down.

The defendant objected to the admission of the statements. The trial court admitted them. The Appellate Court affirmed.

REASONING: The Appellate Court noted, “that there are rare cases in which a prior inconsistent statement that satisfies the *Whelan* requirements may have been made under circumstances that undermine its reliability.” *Id.* at 149 (emphasis added). The circumstances described above do not qualify. Nor did the fact that, hours after having made the second statement, the girlfriend was admitted to a psychiatric hospital for five days. Again, neither the trial court nor the Appellate Court found the girlfriend’s testimony regarding the making of the statements credible.

§8-5(1) INABILITY TO RECALL MATERIAL FACTS SATISFIES INCONSISTENCY ELEMENT OF *WHELAN* — *State v. Francis D.*, 75 Conn. App. 1 (February 11, 2003); Ford, J.; Trial Judge — Schaller, J.

RULE: A statement’s inconsistency is not limited to cases of diametrically opposed assertions. Inconsistencies may be found in an inability to recall.

FACTS: Defendant was accused of sexually assaulting his 12-year-old niece. The victim reported the incident to her mother the next day, and gave a written statement to the police two days after that. Trial took place 16 months after the assault.

The state offered the victim’s statement after direct and cross-examination, during a redirect. At that point, there were approximately 20 instances where the victim was unable to recall material facts. The defendant argued that a *Whelan* statement was admissible only where the victim was unable to recall material facts on direct examination. The trial court allowed the statement. The Appellate Court affirmed.

REASONING: “The victim’s inability to recall material facts, then, clearly satisfies the inconsistency element.” *Id.* at 18. The Appellate Court declined to adopt a rule limiting the use of *Whelan* statements to direct, as opposed to redirect, examination.

§8-5(1) DECLARANT’S CLAIM OF LACK OF PERSONAL KNOWLEDGE INSUFFICIENT TO DEFEAT ADMISSION PURSUANT

TO *WHELAN* — *State v. Watkins*, 72 Conn. App. 804 (October 8, 2002); West, J.; Trial Judge — Miano, J.

RULE: The third prong of *Whelan* — that the declarant possesses personal knowledge of the facts — can be established through the statement itself, and despite contrary testimony.

FACTS: Defendant was accused of being one of three perpetrators of three robberies on the nights of October 27 and 28, 1999. One of the robbers, Nealey, who drove the getaway car, gave two statements to the police describing the robberies and indicating that his involvement was only to drive the car. At trial, Nealey recanted the statements, testifying that he was not present during the robberies and could not remember what he said in the statements. He did concede that the statements were his and that he had signed them. He claimed that the information in the statements, which was corroborated by other evidence, was “fed” to him by a detective.

State offered the two statements pursuant to *Whelan*. The defendant objected on the basis that since the declarant had testified he was not present during the robberies, the information in the statements could not be based on personal knowledge. Trial court allowed the statements. The Appellate Court affirmed.

REASONING: The defendant’s argument is based upon the assumption that the trial court, in deciding whether to admit the *Whelan* statement, must accept the truth of the declarant’s in-court testimony that he was not present during the robberies. Such a requirement would destroy the *Whelan* rule, since in most cases where it is used, the witness has disavowed the prior statement.

The Appellate Court held that, as to the personal knowledge requirement, the statement was self-authenticating: “if the statement itself indicates that the basis of the information contained in that statement is the declarant’s personal knowledge, that is sufficient to satisfy the criteria of personal knowledge established by *Whelan*.” *Id.* at 812.

§8-5(1) TRANSCRIPT OF RECORDED *WHELAN* STATEMENT SENT TO JURY — *State v. Figueroa*, 74 Conn. App. 165 (December 17, 2002); Dranginis, J.; Trial Judge — Hartmere, J.

RULE: The *Whelan* rule permits the court, in its discretion, to send the prior inconsistent statement into the jury room.

FACTS: Murder prosecution in which defendant was accused of shooting the victim six times. Two witnesses testified at trial that they had seen the defendant shoot the victim. A third witness, Takheema Williams, was present and saw parts of the confrontation but not the actual shooting.

Williams had given a tape-recorded statement, which was transcribed. It does not appear from the opinion that the transcript was signed. Williams testified at trial that she could not recall any of the events on the day of the shooting or what she had told the police when her tape-recorded statement was taken. The tape recording and the transcript were admitted into evidence as full exhibits, apparently without objection.

During the fifth day of deliberations, the jury sent out a question asking whether or not Williams was ever asked whether she saw the defendant at the scene. After reviewing the trial transcript and the transcript of the tape-recorded statement, it became apparent that that specific question was never asked. However, on pages 18 and 20 of the transcript, there were questions and answers that implied that she had seen the defendant at the scene.

Q. Okay, when was the last time you seen [the defendant]?

A. Two days before.

Q. The shooting?

A. Yes.

Q. And you saw him the day when he took off in the car, too?

A. Mm. Hm.

Q. You stated to me that Ebonie [Moore] told you something after everything was done. What did she tell you again, can you tell...?

A. You seen that, you seen that, you know who did it.

Q. And she meant saying that if you saw the same thing she did?

A. Yeah.

Q. And you told her no at the time, is that correct?

A. No, I didn't.

Q. What did you tell her?

A. I told her, yeah.

Q. Okay, you told her you saw the same thing she saw?

A. Mm. Hm

Id. at 175-76 nn. 7, 8.

Over the defendant's objection, the trial court answered the jury's question by stating that Williams was never asked in open court whether she had seen the defendant at the scene. The court then reminded the jury that the tape-recorded statement and transcript were in evidence and referred them specifically to the pages of the transcript quoted above.

The defendant appealed, claiming that the court had lacked authority to direct the jury to the *Whelan* statement and that directing the jury to specific pages constituted an improper marshalling of the evidence in favor of the state. The Appellate Court affirmed.

REASONING: The Appellate Court held that it was clearly in the discretion of the court in answering a jury's question to direct the jury's attention to evidence admitted in the case. Similarly, it is within the court's discretion to decide what portion of an exhibit is responsive to a jury's question.

COMMENT: The advantage to the state of having a *Whelan* statement in the jury room, especially during a long trial where the witness' in-court testimony may have taken place weeks before, does not appear to have been carefully considered.

§8-5(1) PRIOR INCONSISTENT STATEMENT ADMITTED PURSUANT TO *WHELAN* DESPITE SIGNATURE BY PARENT INSTEAD OF SIX-YEAR-OLD WITNESS — *State v. Corbin*, 260 Conn. 730, (July 9, 2002); Sullivan, J.; Trial Judge — Barry, J.

RULE: The requirements first set forth in *State v. Whelan* and codified in the Code of Evidence for the admission of a prior inconsistent statement for substantive purposes should not be rigidly applied. In this case, the absence of the declarant's signature was held not to preclude admission.

FACTS: Defendant was accused of sexually assaulting a six-year-old girl. After being sexually assaulted the victim was interviewed by the police. The police officer reduced the victim's statement to

writing and then read the statement back to the victim. Because the victim could not read or write, the victim's mother signed the statement on her behalf.

At trial, the victim could not recall a particular part of the statement. The trial court admitted that portion of the statement as a prior inconsistent statement pursuant to *State v. Whelan*. The Appellate Court reversed because the victim had not signed the statement. The Supreme Court reversed the Appellate Court.

REASONING: "On the basis of these considerations, we conclude that the trial court properly concluded that the mother's signature provided 'significant assurance of an accurate rendition'; and therefore, properly admitted the victim's prior inconsistent statement for substantive purposes, thus allowing the jury to determine for itself whether to credit the victim's testimony at trial, her prior inconsistent statement, or neither.

"We emphasize, however, that our decision in this case should not be construed to permit a guardian's signature as a substitute for a declarant's statement as a general matter. The purpose of a declarant's signature is to 'assur[e]... an accurate rendition' of the statement. The determination of whether the signature of a guardian fulfills this purpose to meet the *Whelan* signature requirement is to be made on a case-by-case basis." *Id.* at 739-40 (internal citations omitted).

§8-5(1) REDACTED VERSION OF PRIOR INCONSISTENT STATEMENT NOT ADMITTED — *State v. Vasquez*, 68 Conn. App. 194, (February 12, 2002); Foti, J.; Trial Judge — Mulcahy, J.

RULE: Where the prior statement is inconsistent because of an omission, as opposed to a contradiction, enough of the prior statement must be offered to allow a fair evaluation of the claimed inconsistency.

FACTS: Defendant was accused of a shooting on Zion Street in Hartford. A key witness was Gloryann Lopez. During cross-examination, Lopez testified she had reported to the police that she had seen the defendant in a van on Park Street prior to the shooting.

She was then handed a copy of her police statement, reviewed it and testified that it did not reflect this observa-

tion. Defense counsel then offered as an exhibit a redacted version of Lopez's statement. The redacted version omitted major parts of Lopez's testimony: her description of the shooting and her identification of the defendant as the shooter. The trial court agreed that the written statement qualified as a prior inconsistent statement pursuant to *Whelan* because it omitted any reference to seeing the defendant in the van before the shooting. However, the trial court refused to allow the redacted version because it might confuse the jury into thinking that she had omitted other critical information when she gave her statement, when in fact she had not. The Appellate Court affirmed.

REASONING: "For purposes of our analysis, we note the distinction between those prior statements that contain contradictory representations and those prior statements that are inconsistent because of a declarant's omission of certain facts. Concerning statements in the latter category, the rule is that '[i]f a former statement fails to mention a material fact presently testified to, which it should have been natural to mention in the prior statement, the prior statement is sufficiently inconsistent.' (Internal quotation marks omitted.)....

"When a prior statement is inconsistent with a witness' present testimony because it *contradicts* the witness' present testimony, the introduction of only as much of the prior statement that is contradictory is usually sufficient to afford the jury a basis on which to evaluate the claimed inconsistency. When a party wants to impeach a witness with a prior inconsistent statement on *the basis of an omission* in that statement, however, the courts must determine how much of that prior statement is relevant to afford the jury a basis on which to evaluate the claimed inconsistency." *State v. Vasquez* at 201 (emphasis in original).

§8-8 IMPEACHMENT OF HEARSAY DECLARANT — CONFRONTATION NOT REQUIRED — *State v. Pare*, 75 Conn. App. 474 (March 11, 2003); Foti, J.; Trial Judge — Devlin, J.

RULE: "Section 8-8 permits the credibility of a declarant, whose hearsay statement has been admitted in evidence, to be attacked or supported as if the declarant had taken the stand and testified." C.C.E. §8-8, commentary.

FACTS: Defendant was accused of strangling his girlfriend with a bathrobe belt. The defendant had a history of psychiatric problems and drug addiction. His girlfriend was an alcoholic. Defendant did not contest that he had had a fight with his girlfriend and started choking her, but claimed that he did not intend her death.

The defendant turned himself into the police a few hours after the fight, and told the police that he had "never hit a woman before."

Defendant had been convicted of murdering his girlfriend in 1997, but that conviction was reversed and remanded for a new trial. At his first trial, defendant had claimed that he "had never put his hands on a female in his life, never." *Id.* at 477.

Defendant did not testify during his second trial. During the state's case-in-chief, a police officer testified as to the defendant's statement the night of the murder that he had "never hit a woman before." In addition, the defendant's testimony at his first trial was read to the jury, including the statement he had "never put his hands on a female." The State then sought to impeach the defendant's claims that he had never assaulted a woman before with a prior inconsistent statement.

The statement in question was contained in the defendant's medical record from the Connecticut Mental Health Center. In that record, the defendant had stated he "went to his niece looking for money she was holding him and assaulted her when she would not give him the money." *Id.* at 477.

Defendant objected to this testimony, and pointed to C.C.E. §6-10(b), which provides: "in examining a witness concerning a prior inconsistent statement, whether written or not, made by the witness, the statement should be shown to or the contents of the statement disclosed to the witness at that time." Since the defendant did not take the witness stand in the second trial, he was never confronted with the prior statement in the medical records. (It had not been discovered before the first trial.)

The trial court overruled the objection and admitted the medical record, instructing the jury that it was being admitted for impeachment only. The Appellate Court affirmed.

REASONING: This situation is dealt with squarely in C.C.E. §8-8, which allows one to impeach a hearsay declar-

ant by any method that could have been used if the declarant had been on the witness stand. The section specifically relieves the examiner from complying with the confrontation requirement in the situation where the declarant does not take the stand.

§8-9 RESIDUAL EXCEPTION TO HEARSAY RULE APPLIED TO LAWYER'S LETTER — *Steinberg v. OB-GYN Infertility Group, P.C., et al.*, U. S. District Court, D. Conn. 3:01 CV 02050(GLG) (March 27, 2003)

RULE: The federal residual exception to the hearsay rule, Fed. R. Evid. 807, while similar to Connecticut's residual exception, C.C.E. §8-9, contains additional requirements.

FACTS: Plaintiff is an OB/GYN who sued her former partners, claiming that when she left the group after 17 years, she did not receive her full share of the partnership distribution. The group's plan was an ERISA plan.

Defendant filed a motion for summary judgment, claiming that plaintiff failed to exhaust her administrative remedies as required by the plan. Plaintiff opposed the motion for summary judgment claiming, *inter alia*, that it would have been futile to exhaust her administrative remedies and that therefore she was not required to do so.

In her papers opposing the motion for summary judgment, the plaintiff offered a letter from her lawyer at the time she was pursuing the administrative remedies, to her future and present attorney. The gist of the letter was that it would be futile to continue the administrative route.

The defendant moved to strike the letter on the ground that it was hearsay. The trial court refused to strike the letter, admitting it under the residual exception of the hearsay rule.

REASONING: Plaintiff's first attorney was killed in the attack on the World Trade Center. After careful examination of the five requirements of the federal residual exception rule, trustworthiness, materiality, probative importance, the interest of justice, and notice, the court refused to strike the letter.

§8-9 RESIDUAL EXCEPTION USED TO ADMIT STATEMENT OF FOUR MINOR SEXUAL ASSAULT VICTIMS WHO COULD

NOT RECALL THE EVENTS AT THE TIME OF TRIAL — *Doe v.*

Thames Valley Council for Community Action, Inc., 69 Conn. App. 850, (May 21, 2002); Peters, J.; Trial Judge — Koletsky, J.

RULE: A hearsay statement may be admitted pursuant to the residual exception to the hearsay rule if it is necessary and the trial judge determines that the statement is reliable.

FACTS: Plaintiffs were four girls who alleged that a school bus driver sexually assaulted them in September and October of 1990. None was older than four years old at the time of the alleged assaults.

Two of the girls gave statements to Christine Diebel-Hempsted, who had a master's degree in clinical psychology, in the context of therapy sessions over an approximately two-year period immediately following the alleged assaults.

One girl made her statement to a police officer who served as a youth officer and investigated reports of abuse to minor children. The final girl made her statement to a social worker. The trial court admitted the statements. The Appellate Court affirmed.

REASONING: There was no question that the first prong of the residual exception was met that "there is a reasonable necessity for the admission of the statement," as none of the girls could remember the events at the time of trial.

The issue was whether or not the statements were "supported by equivalent guaranties of trustworthiness and reliability that are essential to other evidence admitted under traditional exceptions to the hearsay rule." C.C.E. §8-9. Despite cautioning that "the residual exception is one of these exceptions, but it is one that should be used very rarely and only in exceptional circumstances," the Appellate Court, after closely analyzing each statement, affirmed the trial court in allowing their admission.

AUTHENTICATION — PUBLIC RECORDS EXCEPTION — FACSIMILE COPY OF COMPUTER STORED INFORMATION — *State v. Bothwell*, 78 Conn. App. 64 (July 15, 2003); West, J.; Trial Judge — Resha, J.

RULE: A witness testifying that a facsimile copy contains the same information as that appearing on a computer screen is sufficient authentication.

FACTS: Drunken driving prosecution. In Part B of the information, the defendant was accused of being a third-time offender. The defendant had been convicted on December 23, 1992, in Norwalk and January 9, 1997, in Stamford. In order to prove these convictions, the state called the clerks from the respective courthouses. The clerks testified that once a case reaches final judgment, the result is noted on a piece of paper in the court file. The information is then transferred from that paper into the judicial department's computer. The clerk is responsible to insure that the proper information is transferred from the paper into the computer. The paper record is then sent to the Superior Court Records Center in Enfield.

When requested to obtain a certified copy of the judgment, the clerks in Norwalk and Stamford contacted the Superior Court Records Center, which faxed copies of the judgments to the clerks. They compared the information on the faxed copy with the information shown on the computer screen before appearing in Court to testify that the facsimile copy was correct.

The defendant objected, claiming that the witnesses did not compare the facsimile copies being offered with the original paper final judgment and therefore could not testify that the facsimile copies accurately reproduced the original paper final judgment. The trial court admitted the facsimile copies. The Appellate Court affirmed.

REASONING: "The state of current technology is such that certain records may be quickly and easily copied without the fear of mistaken transcription or scrivener's errors that might accompany the hand copying of such records. The witnesses testified that they compared the information contained in the facsimile copies with the information stored on the computer for each of the dispositions. The witnesses testified that the information matched. Our rules of evidence should not be construed in such a manner so as to vitiate the advantages that technology offers.

"There was sufficient testimony as to the reliability of the facsimile copies of the judicial records to warrant their admission. As the court properly noted,

the defendant's concern related to the weight of the evidence rather than to its admissibility. We conclude that the facsimile copies were sufficiently authenticated by the clerks of the respective courts to be admitted pursuant to the public records exception to the hearsay rule."

Id. at 75.

The same analysis has been applied to business records. *Federal Deposit Ins. Corp. v. Carabetta*, 55 Conn. App. 384, cert. denied, 251 Conn. 928 (1999).

X. Contents of Writings, Recordings and Photographs

§10-2 COPY OF NOTE ADMISSIBLE IN THE ABSENCE OF EVIDENCE THAT IT WAS NOT ACCURATE — *Cadle Co. v. Errato*, 71 Conn. App. 447, (August 6, 2002); Dranginis, J.; Trial Judge — Zoarski, J.

RULE: A copy of a writing is admissible to the same extent as an original, unless a genuine question is raised as to its authenticity.

FACTS: Suit on a note. Defendant objected to the copy of the note offered and demanded production of the original under the best evidence rule. Plaintiff explained that the original was at plaintiff's main office in Ohio. The court admitted the copy pursuant to the business record exception to the hearsay rule. The Appellate Court affirmed.

REASONING: The extensive analysis in the Appellate Court opinion about whether or not the note was admissible pursuant to the business record exception would have been unnecessary if the case had been tried under the Code. The case was tried in August of 1999 before the Code took effect.

C.C.E. §10-1 codifies Connecticut's best evidence rule and provides that the original must be admitted "except as otherwise provided by the Code..." §10-2 provides that a copy can be admitted unless there is a real question as to whether or not it is accurate.

Discovery

REQUEST TO PRODUCE — CONN. PRACT. BOOK §13-14(b)(4) — CLAIM "DOCUMENT NOT IN MY POSSESSION" FAILS — *ARB Construction v. Pinney Construction*, 75

Conn. App. 151 (February 18, 2003); Schaller, J.; Trial Judge — Winslow, J.

RULE: Trial court upheld in blocking use of a document at trial not produced in response to discovery on the basis that it was not in defendant's possession.

FACTS: Breach of contract action in which plaintiff subcontractor did work for defendant general contractor and claimed it was not paid. Defendant claimed plaintiff did not complete the job.

In October 2000, plaintiff filed a request to produce site plans. In February 2001, plaintiff filed a motion for default for failure to comply with the request for production. In April 2001, the court gave the defendant five weeks for full compliance. After the five weeks came and went, the plaintiff filed a motion for a noncompliance. On June 1, 2001, the first day of trial, the trial court precluded the introduction of any evidence not produced in response to the discovery orders.

On June 1, 2001, the defendant contacted another subcontractor and requested any site plans it possessed. The other subcontractor supplied the defendant with additional site plans. The additional site plans were disclosed to the plaintiff when they were offered, on the second day of trial, June 6, 2001. The trial court refused to allow the site plan in evidence. The Appellate Court affirmed.

REASONING: The failure of the defendant to make any attempt to contact the other subcontractor during the discovery process was found to be a violation of the court's order regarding discovery.

Expert Disclosure

DISCLOSURE STATING EXPERT PHYSICIAN EXPECTED TO TESTIFY "IN ACCORDANCE WITH" HIS NOTES AND REPORTS IS SUFFICIENT — *Catalano v. Falco*, 74 Conn. App. 86 (December 10, 2002); Per Curiam; Trial Judge — Shapiro, J.

RULE: The expert disclosure rules should not be construed to preclude expert testimony unless there is true prejudice.

FACTS: Plaintiff's disclosure stated that his treating orthopedic surgeon, Dr. Becker, was expected to testify concern-

ing his examination, diagnosis and treatment, "in accordance with his treatment notes and evaluation and consultation reports...." *Id.* at 90. The disclosure did not mention future treatment.

Defendant claimed that he did not learn until the first day of jury selection in July 2001 that Becker's testimony would address the possibility of future back surgery. Defendant filed a motion in limine to preclude this testimony. The trial court denied the motion. The Appellate Court affirmed.

REASONING: The Appellate Court clearly found the defendant's claim that he had no inkling that Becker would be testifying about the possibility of future surgery difficult to accept.

Becker had written a report in April 1999, in which he discussed conservative treatment and stated: "If this fails to adequately resolve symptoms, then he would need to consider the option of decompression and fusion at L4-5." *Id.* at 90. This report was supplied to the defendant in November 1999. Furthermore, during the plaintiff's deposition in December 2000, the plaintiff testified that Becker had informed him that he would require surgery if his condition did not improve with conservative treatment.

EXPERT DISCLOSURE — CONNECTICUT PRACTICE BOOK §13-4(4) — A PARTY CANNOT AVOID THE DISCLOSURE REQUIREMENT BY POSING HYPOTHETICAL QUESTIONS — *Ahern v. Fuss & O'Neill, Inc., et al.*, 78 Conn. App. (July 22, 2003), cert. denied, 266 Conn. 903 (September 9, 2003); Peters, J.; Trial Judge — Aurigemma, J.

RULE: In the face of a specific order requiring the plaintiff to provide "detailed" disclosures regarding an expert's specific opinions, an effort to avoid the mandates of the order at trial by posing hypothetical questions will be denied.

FACTS: The plaintiff purchased Somers Mill, a commercial building in Somers straddling the Scantic River. Plaintiff planned to renovate the mill for residential purposes, and hired the defendant engineers for the project.

In generating the development plan, the defendants allegedly represented to the plaintiff that the first floor of the

building was at an elevation of 182 feet, and that, since the 100 year flood level was 180 feet, that floor was usable for residential purposes. It turned out that the map relied on by the defendant engineer was in error and the actual flood elevation level was 189 feet, thus making development as a residence unfeasible. Plaintiff sued the engineers.

Plaintiff disclosed as an expert witness Edward Chiang, a professional engineer. The disclosure stated that he was expected to testify regarding the standard of care. In a subsequent written report, Chiang expressed his opinion that a competent engineer would have discovered the discrepancy regarding the flood level.

However, at deposition, Chiang waffled. He stated he had no opinion as to whether the defendant engineering firm had violated the applicable standard of care because: "I am not quite sure what exactly they did, so it really is difficult for me to give you my opinion about what they did. I only can give you what I think should be done." *Id.* at 210.

The defendants objected to the lack of specificity in the expert disclosure, the ambiguous nature of the report, and the seemingly contradictory deposition testimony. "The trial court issued an order to the plaintiff to provide detailed signed statements of the specific opinion or opinions of the expert and of the basis for those opinions. The court warned that '[a]n opinion not in the statement will not be admitted at the trial.'" *Id.* at 210-11. No further disclosure was made.

The defendants moved for summary judgment on the basis that, in the absence of expert testimony that the defendant engineers had committed malpractice, the plaintiff could not make out its case. The motions for summary judgment were granted. The Appellate Court affirmed.

REASONING: Plaintiff argues "that it should be afforded the opportunity to flesh out these disclosures at trial by posing hypothetical questions to Chiang that would describe the underlying facts. Under the circumstances of this case, we disagree." *Id.* at 211.

"Once the court required the plaintiff to produce a more specific expert opinion, the plaintiff had to disclose an expert's statement that these defendants acted negligently in failing to discover a discrepancy between a governmental flood plain study and a governmental flood plain map. In the absence of the required

disclosures, the trial court properly rendered judgment for these defendants. *Id.* at 212.

COMMENT: When you defend an expert deposition, consider doing a cross-examination of your own expert if he or she waffles. This will help on the disclosure front, and at trial may help in rehabilitating the expert when he gets cross-examined on his waffling opinion.

CONN. PRACT. BOOK,
§13-4(4) EXPERT TESTI-
MONY NOT CONFINED
TO SECOND DISCLO-
SURE — *Wagner v. Clark*
Equipment Co., 259 Conn.
114, (January 29, 2002);
Zarella, J.; Trial Judge —
Koletsky, J.

RULE: An expert should not be precluded from testifying based upon narrow readings of expert disclosures.

FACTS: Plaintiff was injured by a forklift. He brought a products liability action against the manufacturer. Before the first trial of the case, the defendant disclosed Walter Gerardi as an expert who would testify on whether or not the forklift was defectively designed. There was a plaintiff's verdict, but the case was reversed on appeal.

Before the second trial the defendant disclosed Mr. Gerardi again and stated that he would testify as to safe and proper material handling practices. The second disclosure was not labeled "supplemental." At the second trial, the plaintiff objected to any testimony beyond the scope of the second disclosure. The trial court confined the expert's testimony to that covered in the second disclosure because it was not labeled "supplemental." The Supreme Court reversed.

REASONING: A trial is a search for truth. Precluding the testimony of any witness as a result of hyper-technical readings of pleadings or disclosures stymies the search for truth. Under *Conn. Pract. Book*, §13-4(4), preclusion is the least favored remedy. A court has authority to preclude an expert *only* if the improper, or in this case unclear disclosure, "will cause undue prejudice", "undue interference with the orderly progress of trial of the case" or involves bad faith.

"The trial court in the present case did not limit Gerardi's testimony based on the existence of any of the factors enumerated in §13-4(4). *Id.* at 123.

On appeal, the plaintiff claimed that, even though the trial court did not apply

these factors, he would in fact have been unfairly surprised and unduly prejudiced if the court had allowed Gerardi to testify on design defect. The Supreme Court disagreed, pointing out that in a Motion in Limine, the plaintiff had stated, "[I]t is expected that the defendants will attempt to offer expert evidence to deny the plaintiff's claim of defect..." *Id.* at 125. This established that the plaintiff had anticipated such testimony. Furthermore, any prejudice in that regard would be far outweighed by the prejudice to the defendants in not being allowed to present expert testimony on the issue of design defect from their only expert witness on that point.

Earlier case law makes clear that even if the trial judge had found true surprise to the plaintiff, in the absence of bad faith by the defendant, the proper remedy would have been a continuance, which in this case could have been minimal as the witness had already been deposed on these issues.

Conn. Pract. Book §13-4(4)
— REDACTION OF
PORTION OF MEDICAL
REPORT DUE TO LATE
DISCLOSURE — *Opotzner*
v. Bass, 63 Conn.App. 555
(May 29, 2001); Landau,
J.; Trial Judge — Beach, J.

RULE: Disclosure of medical report on the eve of trial will result in excision of new opinions.

FACTS: Plaintiff was involved in an automobile collision in 1996. Plaintiff did not indicate at the scene that he was injured, and did not seek medical treatment for two weeks. When he first sought treatment, he complained of neck, leg and arm pain. Plaintiff's problems progressed so that, at the time of trial, he claimed traumatic brain injury, chronic pain and depression.

Plaintiff disclosed his family physician, Zaretzky, as an expert witness in January 1997, specifying that he would offer opinions on the plaintiff's neck, arm and back pain and muscle, ligament and joint injuries. Trial was scheduled to begin on January 11, 1999. On January 6, 1999 Zaretzky drafted a report that included opinions that the plaintiff had suffered a traumatic brain injury, chronic pain and depression as a result of the accident. The report was disclosed to defense counsel on January 7, 1999.

Defendant's counsel moved to preclude the report because Zaretzky's new opinions had not been disclosed in a time-

ly manner. The court allowed the report, but redacted the portions of the report where the family physician offered opinions that the plaintiff suffered from a traumatic brain injury, was suicidal and was a broken man. The Appellate Court affirmed.

REASONING: "Not only was Zaretzky's report created and disclosed on the eve of trial, it contained new opinions regarding Opotzner's medical conditions. The court exercised its discretion and redacted those portions of the report in which Zaretzky offered his opinions and those portions of the report that were more prejudicial than probative. In making discretionary evidentiary rulings, the court is charged with doing what is 'right and equitable under the circumstances and the law....' (Internal quotation marks omitted.) [*Washington v. Christie*, 58 Conn.App. 96], 100 [*cert. denied*, 254 Conn. 906 (2000)]. If the court had admitted the entire report on the eve of trial, the defendants would have been prejudiced because they did not have an opportunity to depose Zaretzky regarding his opinions. We, therefore, conclude that under the circumstances of the case the court did not abuse its discretion by redacting portions of the report." *Opotzner v. Bass*, at 568-69.

Rebuttal Testimony

REBUTTAL CANNOT BE
USED TO UNFAIRLY
SURPRISE OPPONENT
— *Hackling v. Casbro*
Construction of Rhode
Island, 67 Conn. App. 286,
(December 11, 2001); Foti,
J.; Trial Judge — Levin, J.

RULE: The admission of rebuttal evidence is within the sound discretion of the trial court.

FACTS: Plaintiff was injured when a piece of concrete was thrown off of a truck and struck him in the head. He was taken to the hospital by ambulance, treated and released. Just before the beginning of the trial, plaintiff disclosed that he was claiming a traumatic brain injury that depressed his IQ. Defendant responded that it wanted its own expert, Kimberlee Sass, to examine the plaintiff. Sass requested all of plaintiff's scholastic records, and plaintiff represented that he had complied with this request.

However, one report card remained undisclosed. During cross-examination of Sass plaintiff asked questions directly related to written comments on the

undisclosed report card. Defense counsel objected on the basis that the report card had not been disclosed and the objection was sustained.

In rebuttal, plaintiff attempted to call Vernon Koch, the headmaster of plaintiff's grade school, and through him admit the undisclosed report card as a business record. The trial court precluded both the report card and testimony designed to make essentially the same point. The trial court gave three reasons: (1) the report card should have been disclosed and plaintiff's claim that he had not disclosed it because it was in his mother's possession rather than his own was disingenuous; (2) the cross-examination of Sass reflected a planned strategy of surprise; (3) Sass was unavailable to return to court to deal with this new evidence. The Appellate Court affirmed.

REASONING: "It follows that the court also did not abuse its discretion when it excluded Koch's testimony, insofar as his testimony reflected the comments written on the report card. The plaintiff, however, sought to have Koch testify in rebuttal as to his personal recollection of the plaintiff. After reviewing the record, we conclude that the court properly excluded Koch's testimony because of the possibility of unfairness to the defendant. 'A litigation strategy that features surprise to the adversary is no longer tolerated.' (Internal quotation marks omitted.) *Baxter v. Cardiology Associates of New Haven, P.C.*, 46 Conn. App. 377, 385, 699 A.2d 271, cert. Denied, 243 Conn. 933, 702 A.2d 640 (1997)." *Hackling v. Casbro Construction of Rhode Island*, at 293.

PROPER SCOPE OF REBUTTAL TESTIMONY — *Cafro v. Brophy*, 62 Conn.App. 113 (March 6, 2001); Lavery, J.; Trial Judge — Hammer, J.

RULE: Rebuttal testimony cannot be offered to support a claim that was part of the plaintiff's case-in-chief.

FACTS: Plaintiffs bought a house from the defendant homebuilder. The house fell apart. Plaintiffs sued.

A major issue in the case was whether the house was structurally sound. During the defense case, defendant's expert testified about a report prepared by an engineer retained by the plaintiffs, Michael Culmo, who had neither testified nor been disclosed by the plaintiffs as an expert witness. Near the conclusion of

the defendant's case, the plaintiffs disclosed that they intended to call Culmo in rebuttal. The trial court allowed Culmo to testify in rebuttal. The Appellate Court reversed.

REASONING: The fact that the defendant's expert testified about a report prepared by Culmo was not enough to allow Culmo's opinions to be presented as rebuttal testimony. "A plaintiff is not entitled to a second opportunity to present evidence that should reasonably have been presented in its case in chief." *Id.* at 120.

COMMENT: This case illustrates how hostile appellate courts can be to the admission of rebuttal evidence. Therefore, at trial, be on the safe side and call all your witnesses during your case-in-chief.

Adverse Inferences — Medical Reports

COURT SHOULD INSTRUCT JURY NOT TO DRAW ADVERSE INFERENCE FROM USE OF MEDICAL REPORT INSTEAD OF TESTIMONY — *Richmond v. Ebinger*, 65 Conn. App. 776, (September 25, 2001); Flynn, J.; Trial Judge — Levin, J.

RULE: Failure to instruct jury not to draw an adverse inference from the fact that the plaintiff presented her case through medical reports rather than live medical witnesses is reversible error.

FACTS: Automobile collision case in which the plaintiff claimed permanent partial disabilities of between five and ten percent to her neck and back. She presented her medical case entirely through medical records and reports.

Plaintiff submitted the following request to charge:

"In this case, the plaintiff has introduced into evidence numerous medical records from her treating physicians. By authority of state law, medical records may be introduced by any party without the requirement that the treating physician come to court to present this information by live testimony. There is nothing wrong with doing that. These reports are admitted into evidence as a business entry, which is one of the many exceptions to the hearsay rule, and it is presumed that such medical reports were

made in the ordinary course of business. The plaintiff is not required to call as a witness all of the doctors who wrote these reports and this should not be held against the plaintiff that she did not do so. General Statutes §52-174(b)."

Id. at 779-80.

The court refused to give the charge, and instead commented to the jury that it may be difficult to assess the credibility of an expert "from a piece of paper rather than a witness testifying." *Id.* at 780. The Appellate Court found this to be harmful error.

REASONING: §52-174(b) specifically provides that no adverse inference may be drawn because of the decision to use a report rather than call a treating physician to testify. One of the reasons the statute was passed was to reduce the necessity of disrupting the schedules of physicians by bringing them to court. This decision will further this policy by encouraging plaintiffs to go with the report.

COMMENT: A request to charge based on this case should be in your standard requests.

Sufficiency of Evidence

EVIDENCE OF PAST MEDICAL EXPENSES IS NOT REQUIRED AS FOUNDATION FOR CLAIM OF FUTURE MEDICAL EXPENSES — *Doe v. Thames Valley Council for Community Action, Inc.*, 69 Conn. App. 850, (May 21, 2002); Peters, J.; Trial Judge — Koletsky, J.

RULE: Expert opinion that future medical treatment will be required is sufficient to support an award for future medical expenses.

FACTS: This case was discussed in §8-9, above. Plaintiff's expert testified that the defendant's sexual abuse of the children would probably cause "a profound, long term psychological impact on the thinking and emotions of the children and... the children will be at great risk for the development of an assortment of mental, emotional and relationship disorders." *Id.* at 878. The expert testified that the children would need further treatment in the future to address these problems.

The jury awarded economic damages to the parents of \$111,000 and economic damages to the children of \$195,000. The defendant filed a Motion to Set Aside claiming that, in the absence of evidence of medical expenses incurred before trial, there was no guidance for the jury about the cost of future treatment. The trial court denied the motion. The Appellate Court affirmed.

REASONING: "In support of their position, the defendants cite *Marchetti v. Ramirez*, 240 Conn. [49,] 56 [(1997)], in which our Supreme Court stated that '[t]he cost and frequency of past medical treatment... may be used as a yardstick for future expenses if it can be inferred that the plaintiff will continue to seek the same form of treatment in the future.' (Internal quotation marks omitted.)

"We disagree with the defendants' interpretation of *Marchetti*. The court expressly stated that expenses for past medical treatment 'may be used as a yardstick for future expenses....' (Emphasis added; internal quotation marks omitted.) *Id.* The court further confined the relevance of past medical treatment to cases in which the plaintiff 'will continue to seek the same form of treatment in the future.' (Internal quotation marks omitted.) *Id.* We find no support, and the defendants have failed to cite any, for the proposition that a showing of past medical treatment is necessary for an award of future medical expenses. While such evidence might be relevant if it exists, the absence of such a showing does not categorically preclude an award of damages for future expenses where it has been shown that future injury is reasonably probable." *Doe v. Thames Valley Council* at 879.

LOSS OF CONSORTIUM
— *Musorofitti v. Vlcek*, 65 Conn.App. 365 (August 28, 2001); Foti, J.; Trial Judge — Mihalakos, J.

RULE: A plaintiff spouse has the right to have the jury consider a claim for loss of consortium.

FACTS: This case was discussed earlier, in connection with the admissibility of a learned treatise. Mr. Musorofitti's case involved injuries to the spine and TMJ. His wife filed a loss of consortium claim

At trial, the couple testified as to changes in their marriage that resulted from the husband's injuries. The record does not indicate why the trial court

refused to charge the jury on loss of consortium. The Appellate Court reversed.

REASONING: "As previously discussed, the plaintiffs presented some evidence, although hardly overwhelming, that their marital relationship changed after the accident and that the plaintiff wife suffered harm as a result. We cannot say with conviction that, viewing the evidence in a light most favorable to the plaintiffs, a reasonable jury could not have returned a verdict for the plaintiff wife on her loss of consortium claim. The plaintiff wife was entitled to have her evidence considered by a jury because '[a]s we have noted before, '[a] party has the same right to submit a strong one....'" *Musorofitti v. Vlcek*, at 373 (internal citation omitted).

The Appellate Court remanded the case for a hearing in damages only on the wife's loss of consortium claim.

COMMENT: In preparation for argument on a motion for directed verdict, you should be armed with three things: (1) the ability to marshal the facts which make your prima facie case; (2) cases on the sufficiency of evidence such as this case and the *Harewood* case, discussed next; and (3) a copy of *Boehm v. Kish*, 201 Conn. 385 (1986). In *Boehm*, the Supreme Court directed trial courts, when considering the sufficiency of evidence, to allow the case to go to verdict, and then, if the judge felt there was insufficient evidence, to set the verdict aside. In that scenario, the plaintiff can appeal, and if the Appellate Court disagrees with the trial court, the verdict can be reinstated without a new trial. In addition, if the trial court allows a weak case to go to the jury, and the jury returns a defense verdict, there will be no appeal. On the other hand, if the judge refuses to let the case go to the jury and is wrong, a retrial is necessary.

DOUBLE OR TREBLE DAMAGES UNDER §14-295 — *Harewood v. Carter*, 63 Conn.App. 199 (May 1, 2001); Foti, J.; Trial Judge — Robinson, J.

RULE: A plaintiff has the right to have the jury consider a claim for multiple damages under C.G.S. §14-295.

FACTS: Plaintiff was traveling at approximately 25 M.P.H. in a 30 M.P.H. zone when the defendant struck her vehicle from behind, pushing it two car lengths forward into the car in front of hers. Defendant did not get out of her car

at the scene, and drove to her home a short distance away. No more than 30 minutes later, a police officer interviewed the defendant at home, and observed that she was acting in a disoriented manner, slurring her speech and stumbling while walking. The defendant told the officer she had no recollection of an accident, and denied being involved in or witnessing any accident. The defendant refused to answer the officer's questions regarding her consumption of alcohol before the accident.

Plaintiff's complaint included allegations that the defendant was traveling unreasonably fast and driving while intoxicated, and sought double or treble damages pursuant to C.G.S. §14-295. The trial court refused to send the §14-295 count to the jury. The Appellate Court reversed.

REASONING: The court found that, viewing the evidence in the light most favorable to the plaintiff, a jury could reasonably and logically have found that the defendant operated a motor vehicle while intoxicated or was traveling unreasonably fast.

The court then decided that, on remand, the jury need consider only whether the defendant violated these statutes, and if so, whether to double or treble the award.

Notice Pleading

VARIATION BETWEEN COMPLAINT AND EVIDENCE NOT MATERIAL UNLESS MISLEADING OR PREJUDICIAL — *Lyons v. Nichols*, 63 Conn.App. 761 (June 19, 2001); Foti, J.; Trial Judge — Stevens, J.

RULE: Variance between evidence and facts alleged in the complaint is immaterial if the opposing party is not misled or prejudiced.

FACTS: This was a defamation prosecution brought by a lawyer. The complaint alleged that the defamatory statements occurred between January 1992 and August 1993. Plaintiff sought to introduce as exhibit A-32 a letter written by the defendant and published in a newspaper on September 11, 1996, more than three years after the period specified in the complaint. The defendant objected to the admission of the letter in question. The trial court allowed the letter in evidence. The Appellate Court affirmed.

REASONING: "In the present case, it is clear that the variance between the complaint and exhibit A-32 is immaterial. The defendant was not misled as to the charge outlined in the complaint, nor was he prejudiced in maintaining his defense on the merits of the case. The operative complaint outlined facts that alleged that the defendant had defamed the plaintiff, and exhibit A-32 was offered as proof of that defamation. The court found that the plaintiff notified the defendant of the claim and demanded a retraction in connection with the publication of the letter that was entered into evidence as exhibit A-32. The court further found that the defendant knew that the defamatory nature of exhibit A-32 was among the claims being raised by the plaintiff at trial, and the defendant offered evidence in his defense. It is of no consequence that the contents of exhibit A-32 were not specifically mentioned in the complaint or did not fall within the time frame alleged in the complaint. Therefore, because the defendant was not misled as to the plaintiff's charge of defamation and was not prejudiced in maintaining a defense, the variance in the present case is immaterial." *Id.* at 766.

Verdict Form

C.G.S. §52-225d PERMITS JURY TO DIVIDE DAMAGES INTO MORE THAN TWO CATEGORIES — *Hamernick v. Bach*, 64 Conn.App. 160 (July 3, 2001); Schaller, J.; Trial Judge — Hickey, J.

RULE: C.G.S. §52-225d, which requires that a jury divide damages into economic and non-economic damages, does not prohibit a trial judge from asking the jury to divide damages into other categories.

FACTS: Automobile collision case in which plaintiff's counsel requested that the verdict form separate damages into five categories, instead of the usual two categories, economic and non-economic damages. The trial court granted this request, and the jury returned a verdict specifying separate sums for (1) past medical and related expenses; (2) past pain and suffering; (3) past loss of enjoyment of life's activities; (4) future pain and suffering; and (5) future loss of enjoyment of life's activities.

The defendant moved to set aside the verdict on the ground that §52-225d lim-

its how a jury can categorize damages, and the trial court does not have discretion to vary the formula. The Appellate Court affirmed the trial court.

REASONING: The statute does not abrogate the court's common law power to require a jury to render special verdicts or answer interrogatories.

Final Argument

REFUSAL TO ALLOW BLOWUPS OF TRIAL TRANSCRIPT DUE TO ORDER REQUIRING ADEQUATE NOTICE RE DEMONSTRATIVE AIDS — *Harlan v. Norwalk Anesthesiology, P.C.*, 75 Conn. App. 600 (March 18, 2003); Peters, J.; Trial Judge — Tierney, J.

RULE: Trial court has complete discretion in deciding what demonstrative aids can be used during final argument.

FACTS: *See*, Sections 7-3(a), 8-3(1), and 8-3(8) above. Plaintiff wanted to use blow-ups of trial transcript during final argument. The trial court precluded the use of the blow-ups on the basis that it violated its previous order that opposing counsel be notified, in advance, of any intention to use a demonstrative aid. The Appellate Court affirmed.

REASONING: The Appellate Court assumed without discussion that a blow-up of trial transcript is a demonstrative aid. This is probably a correct characterization. The simple rule is that any thing not marked as a full exhibit that is being shown to the jury, is a demonstrative aid.

SHOWING THAT WITNESS LICENSED TO PRACTICE MEDICINE IN CONNECTICUT INSUFFICIENT SHOWING OF AVAILABILITY TO ALLOW MISSING WITNESS ARGUMENT — *Harlan v. Norwalk Anesthesiology, P.C.*, 75 Conn. App. 600 (March 18, 2003); Peters, J.; Trial Judge — Tierney, J.

RULE: Before making a missing witness argument, the witness' availability for trial must be proved.

FACTS: *See*, Sections 7-3(a), 8-3(1), and 8-3(8) above. Before final argument, the defendant filed a motion to preclude the plaintiff from making a missing witness argument, because she had not established the availability of the witness

in question. Plaintiff had put in evidence that this witness had a valid state license that showed a Connecticut address. The trial court ruled that this was not good enough. The Appellate Court affirmed.

REASONING: "A license holder has no obligation to be in this state at any particular period of time." *Id.* at 611.

ADVANCE RULING REQUIRED FOR MISSING WITNESS ARGUMENT — *Raybeck v. Danbury Orthopedic Associates, P.C., et al.*, 72 Conn. App. 359 (September 17, 2002); Flynn, J.; Trial Judge — Radcliffe, J.

RULE: C.G.S. §52-216(c) requires an advance ruling before making a missing witness argument. The statute applies even if counsel does not explicitly argue to the jury that it should draw an adverse inference.

FACTS: *See*, Sections 4-1, 7-2, and 8-1(3) above. Plaintiff's expert, Dr. Sedlin, had indicated that if his wife had not been going to Tahiti, he would have referred her to his partner, Dr. Houseman, for pinning. Dr. Houseman was not called as a witness by either side and was not proven to be available to testify.

During closing argument, defendant's counsel argued as follows: "If he had a patient [that] he thought needed percutaneous pinning, he would refer that patient to his partner, who is an expert. *Maybe if he had been here, Dr. Houseman, we would have found out how those patients really would have been treated.*" *Id.* at 368 (emphasis in original).

Plaintiff's counsel requested a curative instruction, because Houseman had not been proved available to testify. The trial court denied the request, finding "that counsel did not ask the jury to draw an adverse inference from Dr. Houseman's absence at trial." *Id.* at 369. The Appellate Court found this to be error.

REASONING: Justice Flynn sets forth the most exhaustive and scholarly examination to date on C.G.S. §52-216(c). This opinion will be the starting point for any analysis of issues arising from this statute.

After carefully examining the common law development leading to the enactment of the statute, the language of the statute, and its legislative history, the Appellate Court holds that, before coun-

WOMEN IN

Candid Perspectives of



Susan Bysiewicz
Secretary of the State



Michelle Jacklin
Political Columnist



Edith Prague
State Senator



Nancy Valentine
Yale Women's Campaign School



Diana Urban
State Representative



POLITICS

Connecticut Women in Politics



Moira K. Lyons
Speaker of the House



Nancy Wyman
State Comptroller



**CONNECTICUT
TRIAL LAWYERS
ASSOCIATION**



sel may invite the jury to draw an adverse inference, counsel must give advance notice and seek a ruling from the trial court about whether or not availability has been proved. The missing witness argument is not permissible until the trial judge has made “a finding that the witness at issue was actually available.” *Id.* at 367. Furthermore, this rule cannot be avoided by making an argument that does implicitly, though not explicitly, asks the jury to draw an adverse inference.

ARGUMENT TO JURY THAT NO EVIDENCE WAS INTRODUCED ON A PARTICULAR POINT WHEN SUCH EVIDENCE IS INADMISSIBLE PERMITTED — *Durso v. Aquilino*, 64 Conn.App. 469 (July 24, 2001); Foti, J.; Trial Judge — Arnold, J.

LESSON: Get a ruling before final argument that your opponent cannot argue an adverse inference about evidence excluded as not properly admissible.

FACTS: On an icy roadway, the defendant lost control, crossed the double yellow lines and collided with an automobile traveling in the opposite direction. Plaintiff was a passenger in the defendant’s car.

Defendant pleaded *nolo contendere* to traveling unreasonably fast and failure to keep right. Defendant moved in limine to preclude the plaintiff from putting the charges or the pleas before the jury, and to preclude the police officer from giving opinions as to the cause of the accident. The trial court granted the motion. A redacted police report was admitted in evidence, and no questions were asked of the officer regarding the defendant’s speed or whether the defendant was at fault.

Defense counsel, Greg Lynch of McNamara & Kenney, then made the following final argument: “All right, let’s move on to the police officer. Nice fellow. A sergeant. Came in here and testified. There’s some things the sergeant did do now and some things the sergeant didn’t do. First of all, did he say anything about the speed of [the defendant’s] vehicle that you can recall? He didn’t. He didn’t say anything about the speed of [the defendant’s] vehicle at all. So, you didn’t hear anything about that. Did he say he was operating his vehicle too fast? Recklessly?

Anything of that nature? No. He filled out a form.” *Id.* at 476-77.

Plaintiff’s counsel objected after the argument. The clear implication of the argument was that the police officer had not reached any such conclusion. The court refused even to issue a cautionary instruction. The Appellate Court affirmed.

COMMENT/POINTER: When you argue a Motion in Limine such as this one, put on the record that defense counsel will not be permitted to make a final argument of this kind after the evidence in question has been precluded. Also, if something like this happens and the facts support you, you are entitled to argue during rebuttal that in fact, what your opponent implied did not happen (e.g., the defendant was cited for speeding) actually did occur, because the defendant has “opened the door.”

Footnotes:

¹More specifically, radios, a table and chair, custom sheets and towels, bow cushions, a toaster oven and coffeemaker, an anchor, life jackets, a ring buoy, an anchor light, a mast light, an automotive battery charger, a solar mini charger, a bait freezer, a horn and a remote spotlight.

²C.G.S. §52-184c, “Standard of care in negligence action against health care provider. Qualifications of expert witness,” provides:

(a) In any civil action to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, in which it is alleged that such injury or death resulted from the negligence of a health care provider, as defined in section 52-184b, the claimant shall have the burden of proving by the preponderance of the evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. The prevailing professional standard of care for a given health care provider shall be that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.

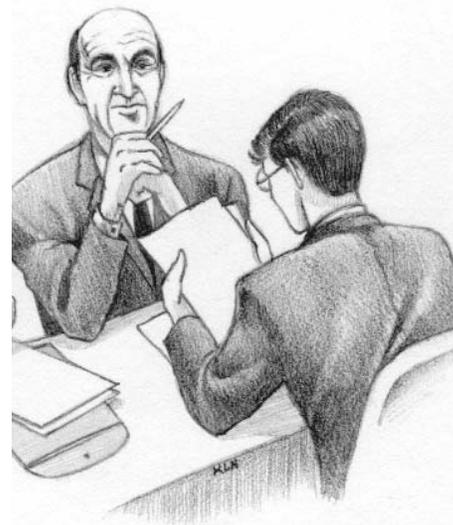
(b) If the defendant health care provider is not certified by the appropriate American board as being a specialist, is not trained and experienced in a medical specialty, or does not hold himself out as a specialist, a “similar health care provider” is one who: (1) Is licensed by the appropriate regulatory agency of this state or another state requiring the same or greater qualifications; and (2) is trained and experienced in the same discipline or school of practice and such training and experience shall be as a result of the active involvement in the practice or teaching of medicine within the five-year period before the incident giving rise to the claim.

(c) If the defendant health care provider is certified by the appropriate American board as a specialist, is trained and experienced in a medical specialty, or holds himself out as a specialist, a “similar health care provider” is one who: (1) Is trained and experienced in the same specialty; and (2) is certified by the appropriate American board in the same specialty; provided if the defendant health care provider is providing treatment or diagnosis for a condition which is not within his specialty, a specialist trained in the treatment or diagnosis for that condition shall be considered a “similar health care provider”.

(d) Any health care provider may testify as an expert in any action if he: (1) Is a “similar health care provider” pursuant to subsection (b) or (c) of this section; or (2) is not a similar health care provider pursuant to subsection (b) or (c) of this section but, to the satisfaction of the court, possesses sufficient training, experience and knowledge as a result of practice or teaching in a related field of medicine, so as to be able to provide such expert testimony as to the prevailing professional standard of care in a given field of medicine. Such training, experience or knowledge shall be as a result of the active involvement in the practice or teaching of medicine within the five-year period before the incident giving rise to the claim.

³Dr. Grossman was a specialist in pediatric surgery; Dr. Ruby was a surgeon with a subspecialty in vascular surgery; and Dr. Hellenbrand was a specialist in pediatrics and pediatric cardiology.

⁴“Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time or needless presentation of cumulative evidence.”





CTLA Law Reporter

By Kathleen L. Nastro, Associate Editor

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

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

JURY VERDICT

**Motor vehicle accident;
37-year-old male;**

**5% permanent impairment of neck;
VERDICT OF \$100,000.00, PLUS
OFFER OF JUDGMENT INTEREST**

In the case of *DeGennaro v. Gonzalez*, Docket No. CV 00-0274192, filed in the Judicial District of New Haven at Meriden, a jury returned a verdict on March 21, 2003 in favor of the plaintiff in the amount \$100,000.00.

The plaintiff, a 37-year-old male, was rear-ended by the defendant in Wallingford, Connecticut, when stopped at a red traffic light.

The plaintiff, Mr. DeGennaro, a volunteer fireman, was on his way to a call in his duties as a volunteer fireman.

The plaintiff did not immediately go to the emergency room, but took himself to the emergency room later that day. He was treated conservatively at first and eventually was sent to physical therapy for a period of months and then discharged. Many months later, the plaintiff continued to have problems with his neck and went to his family doctor, who again sent him back for another course of physical therapy. He was once again discharged with no permanency. After another gap in treatment of several months, the plaintiff again returned to his family doctor and was referred to an orthopaedic surgeon who evaluated him with a MRI, which was negative for any structural injury to the spine. He then had another short course of physical therapy, after which the orthopaedic surgeon, Dr. Jeffrey Pravda, found that he had a 5% permanent partial disability of his cervical spine.

The plaintiff's medical specials were approximately \$8,100.00 and he sustained two days of lost earnings in the amount of approximately \$200.00. The plaintiff testified that the injuries had a significant effect on his work, since he is an industrial mechanic and was required to do heavy work, including much work above his head. He also indicated that his avocation of being a volunteer fireman was affected and that he had decreased his hours as a volunteer fireman due to the physical demand of carrying an air pack and other physical requirements of the volunteer fireman position.

The testimony of Dr. Jeffrey Pravda was offered on videotape. Dr. Pravda testified to the permanency and also that he expected the plaintiff would require further periods of physical therapy, including traction, as well as muscle relaxant and anti-inflammatory medications in the future.

The insurance carrier in the case was the Allstate Insurance Company. Their final offer before trial was \$12,000.00. The policy of insurance was a \$20,000.00 policy and an Offer of Judgment was filed by the plaintiff for the policy limits.

The jury awarded \$33,322.67 in economic damages, which included the specials as well as \$25,000.00 in future economic damages. In addition, the jury awarded \$66,667.33 in non-economic damages. There was a collateral source offset for some of the medical bills, but the additional interest on the offer of judgment led to total damages of \$123,780.89.

Submitted by John J. Kennedy, Jr., Esq. of Kennedy, Johnson, D'Elia & Gillooly, New Haven.

JURY VERDICT

**Slip and Fall;
79-year-old female; 10% ppd
of right knee;**

**VERDICT OF \$190,000.00, Reduced
by 40% Contributory Negligence;
FINAL VERDICT OF \$114,000.00
PLUS INTEREST.**

In the case of *Olga Dinallo v. Richard Vitale, Trustee of the Buckingham Realty Trust, Peter Jay Alter, Successor Trustee of the Buckingham Realty Trust, Readco, LLC, and Tim Martin dba Martin Property Maintenance and Management*, Docket No. CV-00-0074054 S, filed in the

Superior Court for the Judicial District of Tolland at Rockville, a jury returned a verdict in favor of the plaintiff in the amount of \$114,000.00 on December 16, 2002.

The plaintiff was 79 years old on January 12, 1999, when she slipped and fell in the parking lot of a commercial shopping plaza located at 534 East Middle Turnpike, Manchester, CT 06040. The plaintiff was at the shopping plaza to do her laundry. The plaintiff did her laundry and, as she was returning to her car, she slipped on hard packed ice in the parking lot. After being transported by ambulance to Manchester Memorial Hospital, x-rays revealed a fracture of the inferior pole of the right patella with displacement. The plaintiff underwent surgery to her right knee. The plaintiff spent 3 days in the hospital followed by approximately 3 months of recuperation at her daughter's home.

The plaintiff testified that she saw the thick ice in the parking lot and that she proceeded very carefully to traverse the ice. A witness testified that he saw the plaintiff slip, fall and slide on the ice in the parking lot. The plaintiff's grandson testified that he arrived on the scene shortly after the plaintiff's fall and the area of the parking lot where the fall occurred was covered in ice.

The plaintiff was treated by Dr. Barry N. Messenger of Manchester, CT. Dr. Messenger's reports were provided to the jury in lieu of his testimony. Dr. Messenger's reports stated that the plaintiff suffered a 10% permanent partial disability of her right knee as a result of the injury. The plaintiff's medical specials totaled \$22,740.80.

The defendants, Richard Vitale, Trustee of the Buckingham Realty Trust, Peter Jay Alter, Successor Trustee of the Buckingham Realty Trust and Readco, LLC, represented by Janice D. Lai, Esq. of Halloran & Sage LLP and the defendant, Tim Martin dba Martin Property Maintenance and Management, represented by Patrick W. Finn, Esq. of Secor, Cassidy & McPartland, P.C., filed special defenses of contributory negligence and pressed these defenses at trial. The defendants claimed that the plaintiff failed to observe her surroundings and

failed to walk and proceed in a safe manner. The defendants claimed that the plaintiff was carrying a load of laundry that was too heavy. At trial the defendant, Tim Martin, testified that the parking lot was completely clear and he had plowed, sanded and salted the parking lot that day.

The defendants rejected an offer of judgment of \$100,000.00. The jury returned a verdict in the amount of \$22,740.80 in economic damages and \$167,259.20 in non-economic damages for a total verdict of \$190,000.00. The jury found the plaintiff to be 40% negligent and reduced the verdict by \$76,000.00 for a final verdict of \$114,000.00. Judgment interest on the award was \$10,507.08 for a total final verdict of \$124,507.08 plus costs.

Submitted by David A. Golas, II, Esq. and Jon D. Golas, Esq. of Golas, Golas & Golas, P.C., Manchester.

SETTLEMENT

Medical malpractice;

69-year-old male; septic hip — 25% permanency of the right leg; 14% permanency of the right arm; SETTLEMENT OF \$950,000.00.

In the case of *John Doe v. Dr. John Roe* filed in New Haven Superior Court, the plaintiff settled just prior to jury selection for \$950,000.00. The case concerned a 69-year-old man who woke up one morning with an extremely painful right leg. He immediately went to see his internist, who diagnosed the problem as being a pinched nerve.

The crux of the case was a factual dispute between the plaintiff and the doctor as to the nature and extent of the initial examination, which was performed at the doctor's office. The office notes indicate that the defendant physician performed straight leg raising and also palpated the right leg and hip. The record also places the location of the pain as being in the right shin. The plaintiff denied that the defendant physician palpated the leg or did straight leg raising. The plaintiff and his wife also were adamant that the complaints of pain were always as to the right hip area.

After the initial office visit, the plaintiff was sent home with instructions to take muscle relaxants and pain medication. While at home, his condition continued to deteriorate. There also was a factual dispute as to the number of times members of the plaintiff's family called the defendant's office to advise that the

plaintiff's health was continuing to deteriorate and the nature of the information which was conveyed in those conversations.

Eleven days after the initial consultation, the plaintiff was unable to walk and was transported by ambulance to the office of an orthopedic surgeon. The size of the office could not accommodate a stretcher, and the plaintiff was sent to Yale New Haven Hospital emergency room.

During the emergency room work up, blood tests revealed that the plaintiff had a highly elevated white blood count. Subsequently, his right hip was tapped and 40 cc's of purulent fluid was drained.

The plaintiff eventually was diagnosed as having a staphylococcus bacterial infection of the right hip (a septic hip). In addition, a staph infection also developed in his right shoulder as a result of a fall, which had occurred in his home approximately one week after the initial visit.

As a result of the extensive infection, the plaintiff had to undergo six surgical procedures on his right hip to drain and debride the infection. He also had to undergo several surgical procedures on his right shoulder, also to drain and debride the infection.

He initially was hospitalized for 51 days, during which time he received IV antibiotics.

He was readmitted a month later for 11 days and underwent a girdle wrap procedure, during which a portion of his right femoral head was excised due to osteomyelitis. He also underwent extensive plastic surgery to close his open hip wound.

The case was complicated by the fact that the plaintiff was born with a right hip dysplasia, which resulted in his right leg being 3 inches shorter than his left. Due to this condition, he wore a lift on the sole of his right shoe to compensate for the height difference.

The plaintiff's medical expenses totalled approximately \$185,000.00.

It was never determined how the infection initially seeded in the plaintiff's right hip. There was no dispute that even if the infection had been timely diagnosed, the plaintiff would have needed one or more surgical procedures, as well as a lengthy course of IV antibiotics.

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

JURY VERDICT Medical malpractice; VERDICT OF \$819,698.78

In the case of *Gilles Hebert, et al v. Harry Anderson, M.D.*, Docket No. CV 01 0805709S, pending in Hartford Superior Court, the jury awarded \$819,698.78. Gilles Hebert was a 65 year old retired carpenter, who underwent an open repair of a recurrent right inguinal hernia in January 2000. The patient had previous hernia surgeries in 1966, 1988, and 1995. The defendant performed the 1988 hernia repair.

At the time of the January 2000 surgery, the defendant noted extensive scar tissue formation. He also noted that the femoral vein and the femoral artery were in a position more anterior than he would have expected. The femoral nerve is typically just lateral to the femoral artery and in the same surgical plane. The defendant made no effort to identify the femoral nerve. Marlex mesh was sewed in place to repair the hernia defect.

Upon awakening, the patient experienced and reported extreme pain, weakness, and motor difficulties with regard to his right leg. Both his sensory changes and motor difficulties were consistent with the femoral nerve distribution. He was required to stay overnight and receive physical therapy the next day. His motor difficulty required that he utilize a walker for several weeks after discharge. He was ultimately seen by a neurologist, Dr. Edward Fredericks, at Hartford Hospital for a second opinion. Dr. Fredericks diagnosed the plaintiff as suffering from an injury to his femoral nerve and immediately referred him to a general surgeon. Exploratory surgery found dense adhesions and also found that the Marlex mesh was attached to the patient's femoral nerve with a suture. The nerve was freed of the mesh and suture material with only slight improvement of the patient's symptoms.

Mr. Hebert has continued to experience significant nerve pain with limited use of his right leg, despite extensive medical treatment, physical therapy and exercise. Dr. Fredericks opined that Mr. Hebert sustained a 30% impairment of his right leg.

The plaintiff claimed that the defendant failed to properly identify and spare the femoral nerve, particularly in light of the multiple past surgeries. The plaintiff also claimed that the defendant failed to re-explore the area in the immediate

post-operative period when he knew, or should have known, that there was some injury to the femoral nerve by virtue of the plaintiff's symptoms.

The defense claimed that extensive scar tissue and abnormal anatomy contributed to a difficult surgery and that the injury was caused by traction on surrounding structures rather than an injury from any suture. The defendant also questioned whether or not the suture found by the subsequent surgeon was, in fact, from this most recent hernia repair.

The subsequent treating (local) general surgeon testified on the issues of both liability and damages, as did an out-of-state expert.

The plaintiff's wife of 42 years made a loss of consortium claim based upon the patient's inability to walk any distance, walk without pain, golf, work around the house, etc.

The jury awarded economic damages of \$19,698.78, non-economic damages for Mr. Hebert of \$650,000, and damages for Mrs. Hebert's loss of consortium claim in the amount of \$150,000 for a total verdict of \$819,698.78.

Submitted by John J. Houlihan, Jr., Esq. of RisCassi and Davis, P.C., Hartford.

SETTLEMENT

Medical malpractice;

Death of a 13 month old infant; SETTLEMENT OF \$1,050,000.00.

In the case of *John Loos Et Al v. David Roberts, M.D. Et Al*, Docket No. X07-CV-01-0077800S, pending on the Complex Litigation Docket in Rockville, the estate of a 13 month old infant brought a wrongful death claim against Day Kimball Hospital of Putnam and Dr. David Roberts, the former Director of the Hospital's Pediatric Clinic.

The essence of the claim was that the staff physicians at the hospital and its pediatric clinic failed to timely diagnose and treat 13 month old Bianca Loos for signs and symptoms of bacterial meningitis when she was examined at the pediatric clinic on May 26, 1999, and again on the following morning. The signs and symptoms of bacterial meningitis in an infant include a high fever, vomiting, irritability and a high-pitched cry.

Bianca was admitted to Day Kimball Hospital the morning of May 27, 1999 by defendant Roberts. The claim was that even after the admission, defendant Roberts failed to order diagnostic tests, which would have confirmed that the

infant had meningitis and also failed to timely initiate antibiotic therapy.

Bianca's condition worsened throughout the day and in the early evening of May 27, 1999, she was transported by Life Star Helicopter to the Children's Medical Center in Hartford, where she died two days later.

The allegations against defendant Roberts also included a claim of reckless misconduct contending that he ignored repeated requests by Bianca's parents to examine and treat her after the hospital admission.

Medically, the case was complicated by the fact that even in cases of prompt treatment, there is a high mortality rate for infants who develop bacterial meningitis. Thus, the case included a claim for loss of chance.

The case was further complicated by the fact that defendant's insurance carrier, both for primary and excess insurance (Phico Insurance Company), became insolvent during the course of litigation.

The case settled for \$1,050,000.00, with the hospital paying \$700,000.00 and Dr. Roberts personally paying \$50,000.00. The remainder of the settlement was funded by the Connecticut Insurance Guaranty Association.

The plaintiffs did not seek more money from the hospital because of a concern that a larger payment would affect the ability of the hospital to provide healthcare to the residents of northeastern Connecticut.

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

JURY VERDICT

Employment; retaliatory discharge

claim under Family and

Medical Leave Act;

VERDICT OF \$140,000.00

(\$115,000 lost wages, \$25,000 lost benefits).

In the case of *René Palma v. Pharmedica Communications Inc.*, Docket No.3:00 CV 01128(HBF), pending in the U.S. District Court in Bridgeport, before Magistrate Judge Holly B. Fitzsimmons, the plaintiff sued her employer, Pharmedica, for whom she had worked for eight years in an administrative capacity.

She was discharged in January 1999, shortly after taking a medical leave to recuperate from gall bladder surgery. Before going on leave and at her physician's recommendation, she had requested on numerous occasions a reduced

work schedule following the surgery. Her employer refused to accommodate her request. Ultimately, she contacted the U.S. Department of Labor, which confirmed that she had a right to work a reduced schedule, and informed her employer of this fact. Six weeks later she was terminated, pursuant to what the employer described as a "reorganization".

After a three-day jury trial, she was awarded \$115,000 in lost wages and \$25,000 in lost benefits. Front pay and liquidated damages are currently being decided by the Court.

Submitted by Jeff Bagnell, Esq. of Garrison, Levin-Epstein, Chimes & Richardson, P.C., New Haven.

JURY VERDICT

Medical malpractice;

89-year-old female; intra-operative right hip fracture; \$810,000 PLUS OFFER OF JUDGMENT INTEREST OF \$180,000; TOTAL STIPULATED JUDGMENT \$992,331.12.

In the case of *Post v. Rubenstein*, a jury returned a verdict on behalf of the plaintiff for \$810,000. The plaintiff, Beulah Post, an 83-year-old widow, was admitted to Stamford Hospital after suffering a sub-trochanteric femur fracture. The fracture required the insertion of a metal inter-medullary rod down the canal of the femur, in order to achieve fixation and stability of the femur. Proper placement of the rod required that the surgeon, Dr. Henry Rubenstein, insert the rod into the soft top part of the plaintiff's femur and guide the rod down the middle of the bone. Proper placement also meant securing the rod with proximal and distal screws to ensure fixation of the fracture.

Instead of placing the rod from the top down the middle of the bone, the defendant inserted the rod at an angle and caused a second set of inter-trochanteric fractures higher up in the hip. The cause of these fractures was established through the use of pre-operative and post-operative x-rays.

Dr. Rubenstein was able to thread the rod down the canal, albeit from the wrong angle, as though he were merging into the center lane of a highway. When it came to securing the rod, however, he was unable to achieve "purchase" of the two proximal screws into the bone. The reason for this is that there was not enough bone left after the fractures caused by the defendant to secure the screws.

The defendant attempted a stopgap measure of securing the fracture site by wrapping cerclage wires around the femur in an effort to hold the femur together. He then sewed the plaintiff up. It was apparent that the plaintiff would need a second surgery to salvage the first attempt.

The plaintiff had a relative who was an orthopedic doctor from Washington, DC. He asked to see the films of the first surgery and, upon seeing the films, insisted that Beulah be transferred to Westchester Medical Center for her salvage operation. She was operated at Westchester by Dr. David Wellin, who performed a very extensive surgery to fix both the first fracture properly and the second set of fractures caused by the defendant during the first operation.

He cut the wires and removed the failed rod. He grafted bone from the iliac crest to fill in the missing bone from the first procedure. In putting her leg back together, he observed a "trough" of missing bone along the femur. This trough was the circumference of a "reamer," the device used to prepare the bone for placement of the rod. The trough was clear evidence of where the rod had been improperly placed. Dr. Wellin also removed a piece of a latex glove that had been left during the first surgery.

The defendant argued that there must have been small invisible fractures along the hip that could not be appreciated by x-ray before the surgery that became comminuted by the proper use of his instrumentation, which produces some stress on the bone even when properly used. He also argued that the plaintiff had "significant osteoporosis" that made her bone more fragile. The plaintiff argued that none of these possibilities impacted his ability to put the rod in the right place.

The plaintiff at the time of the operation was 83, and was leading a very active lifestyle for a woman of her age. She was a volunteer at the Stamford Hospital gift shop. She was an active member of the Stamford community. She walked, shopped, and drove on her own. She can no longer do any of these things without some assistance.

The defendant argued that the subtrochanteric fracture that the plaintiff

suffered prior to the defendant's involvement was so severe that it would have left her with a significant disability even if the first surgery were successful. The plaintiff's experts testified that if properly fixed, the fracture would have left Beulah with only a minor impairment, but that she would likely resume her pre-injury activities. Medical bills totaled \$138,000.

The insurer was MIX insurance. The plaintiff filed an offer of judgment for \$500,000. The defendant offered \$75,000 at the first pre-trial. The offer was increased to \$150,000 at the start of trial, and then \$250,000 toward the end of the case. A hi-lo agreement was offered with a low of \$100,000 and a high of \$750,000. All of these offers were rejected and the plaintiff continued to hold to \$500,000. The defendant continued to use the plaintiff's age as an argument for settling in his range.

The jury returned a verdict for \$810,000. The jury awarded \$110,000 for economic damages — medical bills, and \$700,000 for non-economic damages. With offer of judgment interest and various set-offs, the parties stipulated to judgment in the amount of \$992,331.12.

Submitted by Joshua D. Koskoff, Esq. of Koskoff, Koskoff & Bieder, Bridgeport.

SETTLEMENT

Left turn motor vehicle accident; Mild traumatic brain injury; C.N.A. Insurance Company; SETTLEMENT OF \$250,000.00.

In the case of *Chirag Sheth v. Matthew Long and Environmental Engineering*, Docket No. CV 98 0418315S, filed in the Superior Court for the Judicial District of New Haven at New Haven, the parties settled for \$225,000.00, after the jury announced that it was ready with its verdict, but before the verdict was read. The unreported verdict was \$900,000.00, reduced by 30% contributory negligence, for a total of \$590,000.00.

The highest offer filed by defendants was an offer of judgment in the amount of \$25,000.00, which was taken off the table during evidence.

The plaintiff had filed an offer of judgment in the amount of \$300,000.00, and his demand was reduced to \$100,000.00 during evidence.

On March 17, 1998, Chirag Sheth was driving to work when he made a left-hand turn into a private driveway. The defendant was traveling in the opposite direction in a commercial van. The force of the collision left skid marks of approximately 51 feet. The defendant claimed the road was wet, that he had been traveling at approximately the speed limit, and that the plaintiff turned suddenly in front of him.

Liability in this case was hotly contested with accident reconstructionists testifying for both parties concerning the cause of the accident. To compound the matter, Chirag Sheth, as a result of his mild traumatic brain injury, had a loss of memory for approximately 6 months and could not recall anything about the motor vehicle accident. Police officers, witnesses and the defendant said the plaintiff turned in front of the defendant and the defendant was not speeding.

The plaintiff had no medical insurance and was facing possible bankruptcy. After a number of judicial pretrials, the Court recommended a settlement in the amount of \$100,000.00 and continued in that recommendation through the entire trial. Chirag Sheth had approximately \$60,000.00 in medical bills and evidence was offered that while he was in college at the time of the accident, as a result of the accident he would not likely obtain a bachelor's degree and, therefore, suffered a loss of earning capacity in the future.

The jury deliberated for a day and a half. They accepted the plaintiff's per diem argument of \$20.00 per day for pain and suffering as a result of the traumatic brain injury and awarded most of the plaintiff's requested economic loss.

The jury accepted plaintiff's allegation that the defendant was likely late for work, speeding, and that in a commercial vehicle, he was under a duty to drive even slower given the wet roads. The jury assessed only 30% contributory negligence against the \$900,000.00 verdict for a net of \$590,000.00. The plaintiff accepted the \$225,000.00 tender after the jury announced that they had reached a verdict, but before the verdict was announced.

Submitted by Jon D. Biller, Esq. Of Biller, Sachs, Raio & Bonadies, Hamden.

**SETTLEMENT
Slip and fall on ice;
closed head injury;
SETTLEMENT OF \$750,000.**

In the case of *Darlene Thomas, Conservatrix of the Estate and Person of Henry Haselgruber v. Player's Choice, Inc., et al*, Docket No. CV 99 0499070 S, filed in the Superior Court for the Judicial District of New Britain, the parties settled for \$750,000.

On March 12, 1999, Henry Haselgruber, who was 62 years old, was injured while exiting a sports bar on Middle Street in Bristol, Connecticut, known as Chalker's Choice.

Mr. Haselgruber, who was single at the time, had been at the Moose Club approximately three hours with his niece's husband. The evidence was that Mr. Haselgruber consumed three beers during that time, before arriving at Chalker's Choice. When he and the niece's husband went into the building, it was crowded and they immediately decided to leave. They consumed no alcohol at Chalker's Choice. Mr. Haselgruber's companion exited the building through the front door. There was a concrete ramp with a descending slope that led to the parking lot next to the front door. Mr. Haselgruber had not walked up the concrete ramp to enter the front door. When Mr. Haselgruber exited the building, he slipped on an icy condition on the ramp. He violently struck his head and was picked up and led to the car and brought home. The companion also testified that he experienced an icy condition on the ramp, but was able to proceed without falling. The area was dark and the ice was difficult to see.

When Mr. Haselgruber was brought home, he had no obvious signs of bleeding. He was placed on the couch and left in that location to sleep until approximately 3:00 p.m. on the following afternoon, when it was obvious that he had some injury. He was taken by ambulance to New Britain General Hospital, after which a CAT scan demonstrated an acute left frontal subdural hematoma. Surgery was performed by Dr. Jonathan Ballon for evacuation of the hematoma. There was also a fracture line running the entire length of the skull. Mr. Haselgruber was discharged on March 29, 1999 to Maple View Convalescent Home, wherein he has continuously resided.

Suit was brought against the landlord, tenant and the snowplow contractor. The plaintiff retained the services of Dean Phillips to testify as a liability expert with respect to the roof structure that allowed water from the roof to deposit directly upon the concrete walk with the descending slope. He also was prepared to testify that the lighting in the area was extremely poor.

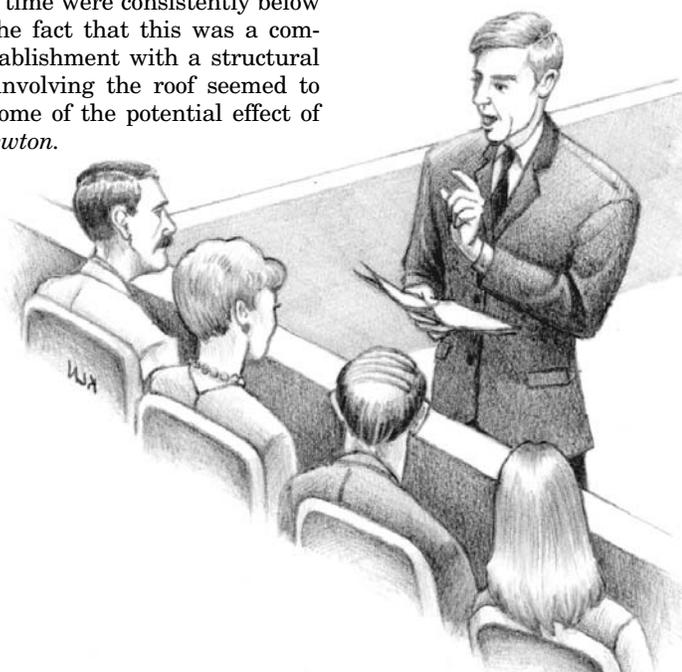
The record in the emergency room of the hospital reflected information concerning the fact that Mr. Haselgruber had hit his head on a pool table inside the establishment. There was no corroborating evidence and Dr. Ballon testified that the fracture line in the skull would have been more consistent with the fall on the concrete walk. That emergency room record also reflected a statement that Mr. Haselgruber was intoxicated. No blood alcohol reading was taken at the time of his arrival, nor were there any witnesses to support any consumption other than the three beers between 8:00 p.m. and 11:00 p.m. Dr. Ballon also testified that he saw no evidence of alcohol withdrawal while in the hospital, notwithstanding a history of an alcohol problem.

The defendants raised an issue concerning the precipitation on the date of the incident. Mr. Phillips obtained very exacting records from the Bristol Water Treatment Plant and the New Britain Water District to show the precipitation that had occurred during the 24 hours before the fall and that the temperatures during this time were consistently below freezing. The fact that this was a commercial establishment with a structural deficiency involving the roof seemed to minimize some of the potential effect of *Kraus v. Newton*.

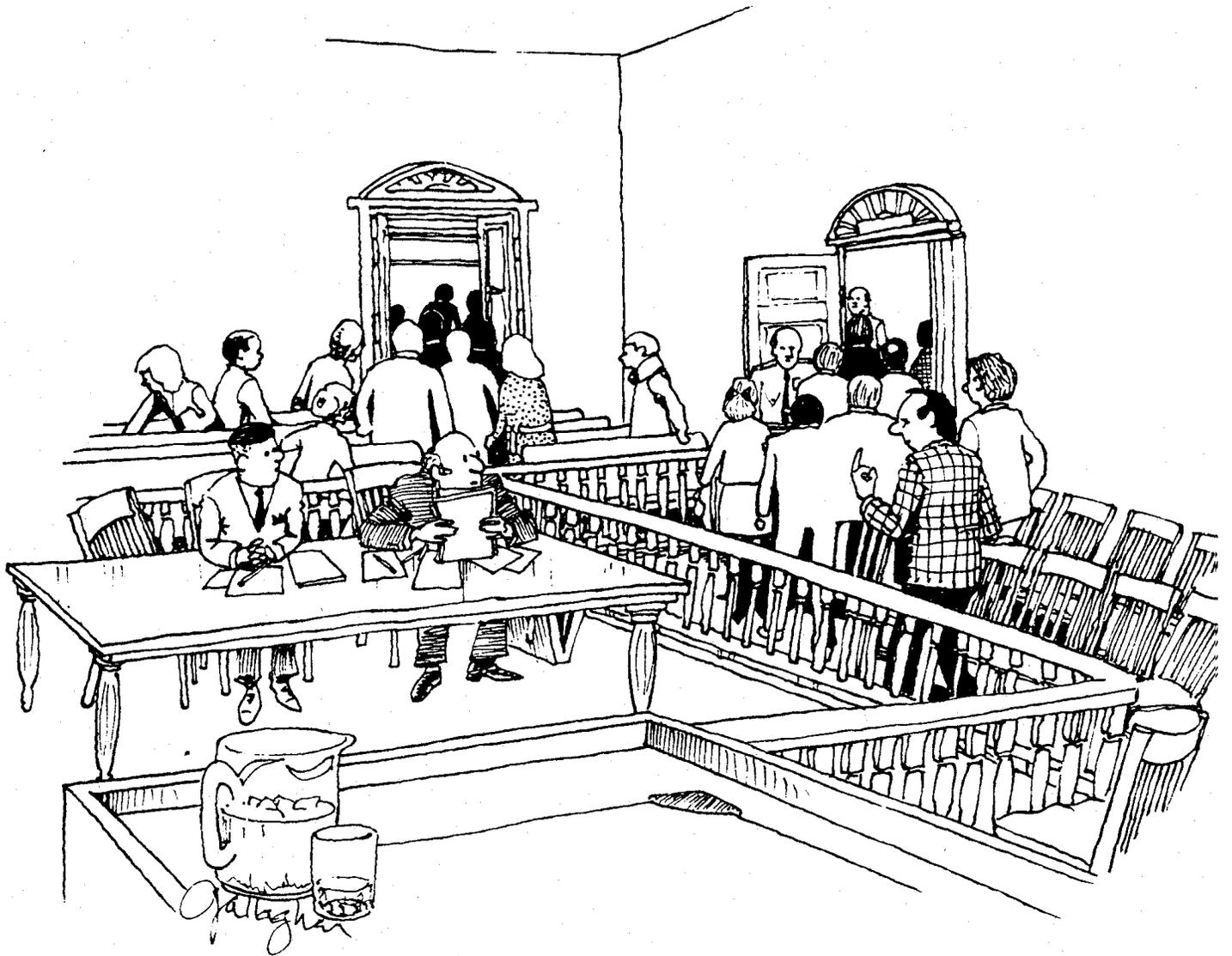
The matter was mediated with Magistrate Garfinkel in the U.S. District Court in Bridgeport by agreement of the parties. The medical specials were approximately \$200,000 and the wage claim was somewhat problematic because of the seasonal nature of Mr. Haselgruber's employment. Mr. Haselgruber had a good deal of cognitive and physical problems, which were evaluated in the context of a Life Care Plan. He was wheelchair dependent and incontinent of urine. The plaintiff's treating physician, Dr. Jacques Mendolsohn, reported that Mr. Haselgruber had continued impaired memory and recall with low frustration tolerance and lack of judgment.

A Motion for Protective Order had been filed with respect to the request that Mr. Haselgruber testify in deposition. The attorneys for the defendants, however, did have an opportunity to meet Mr. Haselgruber in an informal setting prior to the mediation. Although he was able to answer certain questions such as the identification of the president of the United States, there were several non-sequiturs in that discussion. He had a continual giggle in his response to almost any type of question and it was very obvious that he was limited. The case had been scheduled for trial in New Britain Superior Court on July 2, 2002.

Submitted by Richard J. Kenny, Esq. of Kenny, O'Keefe & Usseglio, P.C., Hartford.



LAW REPORTER



Medical Malpractice Tort “Reform:” It’s Just the Beginning

by William F. Gallagher



I keep a file on medical malpractice tort “reform” issues. I clip articles, letters, editorials, reports of studies, studies, and whatever else of interest on the issue that crosses my desk.

In thumbing through the file in preparing to write this editorial, I find items from *The Connecticut Law Tribune*: an editorial of the Advisory Board and an excellent essay by Norm Pattis about the doctor’s strike in West Virginia (both of which appear in the Miscellaneous Column of this issue [reprinted with permission]); I also find a letter to the editor of the *New Haven Register* from a gentleman from Killingworth; an essay by Ralph Nader published in *The Hartford Courant* (also reprinted in this issue); news articles about Jessica Santillian from *NewsDay*, *USA Today* and *The New York Times*; a letter I wrote to Toni Harp (my representative in the General Assembly) last January complaining about her offer of legislation proposing a \$250,000 cap on noneconomic damages in medical malpractice cases, euphemistically entitled “An Act Concerning the Stabilization of Medical Liability,” and countless memos from ATLA, Neil Ferstand, and others.

I have Tom Baker’s paper, “Research on Medical Malpractice: The Implications of Tort Reform in Connecticut.” Tom has nothing to do with trial lawyers or CTLA. He is a Connecticut Mutual professor of law and director of The Insurance Law Center at UConn Law School. He concludes that enacting caps for damages recoverable in medical malpractice actions will harm the most seriously injured victims of medical malpractice, without reducing significantly medical malpractice insurance premiums. His conclusion supports the proposition that caps on noneconomic damages in malpractice cases do not decrease insurance premiums, and are unfair to victims — particularly women, children and senior citizens.

I have several pronouncements from various proponents of malpractice “reform” about the need to alleviate frivo-

lous cases. I pause, and think, of course, some lawyers are over-zealous in the pursuit of a particular case and of course there are cases that should not be prosecuted, but experience teaches these are few and by far the exception.

Most all of the cases complained about are contingent fee cases, and lawyers who handle these cases are the first line of defense against baseless claims. Indeed, Connecticut statutes require in medical cases a “good faith certificate” supported by independent evidence that there is a sound reason to bring the case.

Even without this statute, there are studies that support the fact that lawyers are the first line of defense against baseless claims. Take a look at “Contingent Fee Lawyers as Gatekeepers in the Civil Justice System,” published in *Judicature* (July/August 1997), the bimonthly publication of The American Judicature Society. The article reports on a study that establishes that contingent fee lawyers turn down at least as many cases as they accept, most often because the potential clients do not have a legal basis for their case.

Practicing lawyers understand this intuitively. They have expenses and must meet a weekly payroll, and simply do not pursue “illegitimate” or “frivolous” cases that won’t generate a benefit for the attorney or the client.

It is obvious, indeed elementary, that we are right on the medical malpractice issues. What is really going on? What is driving the debate and keeping it on page 1 in the Legislature? What I believe is driving the medical malpractice issue is the global motive of tort “reformers” of personal and corporate immunity from redress in our justice system. A fundamental rewriting of our reparations system to one that denies access to our courts. This is the goal. As Dale Irwin said in his article last May in *The Kansas City Star* (also reprinted in this issue in our Miscellaneous Column), the “central idea” is to “steal rights, and keep individuals quiet.” Dale Irwin was writing about mandatory arbitration. We are now focusing on medical malpractice “reform.” Next it will be “civil justice reform,” and caps will be sought on noneconomic damages in all personal injury cases. It’s just the beginning.

This is why it is so important that we deny Corporate America and the Insurance Industry, the real parties in interest — not the doctors — any success. For if they succeed on this issue, they’ll be back next year on mandatory arbitration; caps on noneconomic damages in all cases; further limitations on contingent fees; mandatory structured payouts of economic damages; and on and on.

As trial lawyers we are responsible for the enforcement of rights and the preservation of our freedoms. Trial lawyers have caused manufacturers to make safer products; industry to provide safer workplaces; insurers to be aware of good faith requirements; governments to follow laws; and professionals — doctors, accountants and lawyers, to mention only a few — to be aware that negligence will not be tolerated.

Our air is cleaner, our water more drinkable, our endangered species less endangered, our workplace safer, our products safer, not because polluting or irresponsible industries have charitably changed their ways, but because trial lawyers have successfully forced these changes in a courtroom, and continue to do so.

We live in a country that regulates health and safety, and resolves disputes through the civil justice system. Private trial lawyers make that system work. If your insurance company doesn’t pay when it should, your car doesn’t run as promised, or your physician operates on the wrong leg, the recourse is to go to a trial lawyer and invoke the civil justice system. Our system needs trial lawyers ... just ask the doctors who have a filed class action lawsuits against their HMOs.

We have to fight these so-called “reformers” effort to turn our civil justice system on its head with the same tools we use in the trial of a case: thorough preparation, careful research, precise analysis and persuasive presentation. If we can do it in the courtroom, we can do it in the Legislature. To do so we must work together. If we fail the so-called “reformers” will take over. Once they control the civil justice system they will go on to the criminal justice system, and whatever else doesn’t suit their goals.

Workers' Compensation

June 1, 2003 – Nov. 21, 2003

By Robert F. Carter, Associate Editor

SUPREME COURT

Failure to compensate the claimant for scarring on her foot and ankle is not an unconstitutional violation of article first, Sec. 10, of the Connecticut constitution, which guarantees a remedy for every injured person. *Mello v. Big Y Foods, Inc.*, 265 Conn. 21 (July 29, 2003). That half a loaf is constitutional has always been the law in workers' compensation. Theoretically at some point, when the half a loaf has become a crumb, the bargain of "certain" benefits for exclusivity of remedy becomes unconstitutional. Not here.

Offer of judgment by plaintiff includes intervenor's claim

The slice of the judgment which goes to the intervening employer to pay the workers' compensation subrogation claim in a third-party action is not deducted from the judgment amount when determining whether offer-of-judgment interest must be paid. The defendant argued that the net judgment for the plaintiff, after deduction of the amount apportioned to the intervening employer, should be the measure, so that the net received by the plaintiff would not exceed the amount of the offer of judgment. Certainly not: the employer's claim is merely derivative, merely a slice of the plaintiff's damages. *Cardenas v. Mixcus*, 264 Conn. 314 (June 17, 2003).

APPELLATE COURT

Disputed disability claim does not require Form 36

Where a claimant made a disputed claim for disability benefits (which was denied by the commissioner at formal hearing) but where the respondent advanced about six months of benefits in a lump sum, the respondent was not required to pay additional disability benefits simply because it had failed to file a Form 36 and have it approved. The case was disputed and the benefits had been paid without prejudice, following a timely filing by the respondent of a notice of intention to contest liability. The Court held that the duty to file a Form 36 was not triggered, since there was no agreement, written or oral, between the parties. *Sellers v. Sellers Garage, Inc.*, 80 Conn. App. 15 (Oct. 21, 2003). The dictum is unclear to me: agreement as to what? Cases are often complex, with some aspects contested and other accepted.

Respondents should not be discouraged from paying benefits voluntarily even where other parts of the case, including even the issue of what type of benefits are being paid, remain disputed. Form 36s should be required, and are required, where there really is a meeting of the minds that an injury has occurred, and the claimant is appropriately receiving temporary total or other defined benefits. This case should not be construed to countenance chicanery by respondents tempted to claim that benefits are always being paid without prejudice in order to preserve the right to stop benefits without an approved Form 36. Conversely, the Form 36 procedure does not permit the claimant to induce the carrier to make a payment without prejudice then argue that it must pay continued weekly benefits in a case contested on that very issue.

Suarez refined re intent

In a decision attempting to clarify the legal definition of intentional injuries by employers under *Suarez v. Dickmont Plastics Corp.*, 229 Conn. 99 (1994), the Appellate Court held that the test iterated by the court below on summary judgment, requiring a showing of "inevitable" injury, was wrong as a matter of degree: substantially certain means more than substantial probability, but does not mean actual or virtual certainty, or inevitability. However, on the facts the Court sustained summary judgment against the plaintiff: allegedly a defective lathe, which had previously caused a similar injury, had not been repaired; the plaintiff's supervisor had, after the danger was made clear by the plaintiff, declined to have the dangerous condition fixed, but merely ordered the plaintiff to be careful; and the safety guard on the machine had not been strengthened to shield the operator after the first incident. The plaintiff had expert testimony supporting the substantial certainty of the injury, but the Court found that though the employer's actions might rise to recklessness, substantial certainty of injury was not inferrable on these facts. *Sorban v. Sterling Engineering Corp.*, 79 Conn. App. 444 (Sept. 16, 2003).

The salient fact in *Suarez*, which the Court held would suffice for a jury to infer intent to injury, was that the employer required employees to reach

into a dangerous machine and clean out bits of plastic while the machine was still running, with exposed moving parts. Summary judgment was not appropriate on the facts alleged in *Suarez*; the jury could make the call whether these facts allowed an inference of intentional injury. These cases are entirely factual, and there is no clear rule, and certainly no clear pattern, as to which ones can survive summary judgment and go to a jury. It is hit or miss, and mostly of course miss.

However one might decide the issue on these facts, the Court unfortunately cited language from municipal cases stating that wrongful failure to act to prevent injury is not equivalent to an intention to cause injury. However, in the setting of workplace injuries, this legal distinction is plainly inappropriate, and is not part of the *Suarez* analysis. Intentional acts of omission which cause conditions substantially certain to cause injury are clearly within the boundaries of *Suarez* intentionality, or else the case has little meaning. Omitting to keep the second guy from walking into the room where the first guy has just died of carbon monoxide poisoning is an intentional injury, if the employer knows the situation.

Date of injury rule applies to reduction of temporary total disability benefits

The respondent's right to reduce temporary total disability benefits by the amount of Social Security retirement benefits applies only to injuries after the effective date of Sec. 31-307(e), in 1993. Tacky argument by the respondent for retroactive application. *Esposito v. Waldbaum's, Inc.*, 78 Conn. App. 472 (Aug. 5, 2003). In fact, as we've pointed out previously, this statute is pretty tacky, and seems dubious to the extent it allows the employer to be credited with that part of the Social Security benefit which has been paid for by the employee's contributions. The next step would be to bar compensation by a means test.

Approval of Form 36 can be revisited at formal hearing

In a silly appeal by a respondent, the Appellate Court confirmed that the granting of a Form 36 at an informal hearing has no precedential or eviden-

tiary weight at a formal hearing later on the same issue. Of course it doesn't: either side can litigate the question fully, and the trial commissioner views the issue de novo. *Brinson v. Finlay Bros. Printing Co.*, 77 Conn. App. 319 (June 10, 2003).

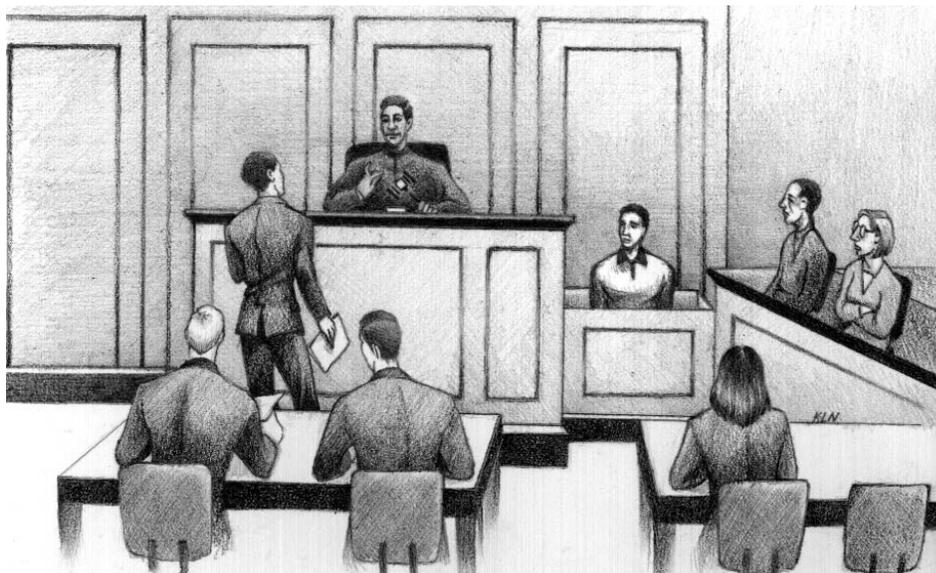
Abuse by supervisor grounds for civil action

The boss who, allegedly, threw tantrums at his women employees, said they were "like a cancer," etc., can be sued civilly for intentional infliction of emotional distress. *Benton v. Simpson*, 78 Conn. App. 746 (Aug. 19, 2003). *Semble, Carpenter v. Lamanna*, (Superior Court Litchfield, CV 01 0085889S Oct. 9, 2003) 35 Conn. L. Rptr. No. 16, 593 (Nov. 17, 2003). Remember that the Supreme Court, *ex cathedra*, held that employees are barred as a matter of public policy from bringing actions for negligent infliction of emotional distress against fellow employees, where the injury occurs within the context of continuing employment. *Period. Perodeau v. Hartford*, 259 Conn. 729 (2002). Since Sec. 31-275(16)(B)(ii) and (iii) bar mental-mental workers' compensation claims, the two viable civil actions are thus intentional infliction of emotional distress claims arising in continuing employment, and negligent and intentional infliction claims arising in the context of termination.

CRB

Entire disability from concurrently developing emphysema and asbestosis compensable

In a careful analysis of an important issue, the CRB held that where the claimant suffered from emphysema developed over many years of smoking, as well as from work-related asbestosis developed over many years and first manifested a few years ago, the entire respiratory disability is compensable. The respondent had argued that the emphysema was not sufficiently "pre-existing" to allow the entire disability to be compensable; but the CRB held that even if the claimant's emphysema began manifesting itself concurrently with his asbestosis rather than beforehand, both conditions now contribute to the claimant's overall lung impairment, and the entire disability is compensable. *Strong v. UTC/Pratt & Whitney*, 4563 CRB-1-02-8 (Aug. 25, 2003). The CRB made one observation, however, that shows a tendency of the Commission to go off the rails with respect to occupational disease analysis, at least from my perspective. The CRB stated "the claimant did not establish his lung condition as an occupational disease within the definition of Sec. 31-275(1) C.G.S., as no evi-



dence was offered to establish that his asbestosis was peculiar to his occupation." This analytical approach seems nuts to me, except perhaps in infectious disease cases, which is the source of this aspect of the old statute: asbestosis from workplace exposure is *always* an occupational disease, as the Commission recognized when the Compensation Review Division faced its first asbestosis lung cancer in *Cortes v. Allegheny Ludlum Steel Corp.*, 1 Conn. Workers' Comp. Rev. Op. 173 (1982), which was cited with approval in *Hansen v. Gordon*, 221 Conn. 29 (1992), along with the venerable Supreme Court precedents which established the Connecticut law on occupational disease. The respondent in *Cortes* argued that lung cancer, common outside the workplace, is not peculiar to the occupation of steelworker and therefore not an occupational disease; the CRD rejected the silly claim, citing *LeLenko v. Wilson H. Lee Co.*, 128 Conn. 499 (1942). Asbestos in the workplace is "a cause in excess of the ordinary hazards of employment" and therefore the disease it causes is an occupational disease under Connecticut law. It is the same with beryllium, tertiary amines, silica, talc, isocyanates, or any other weird substance which causes a disease in the workplace. One hopes that the CRB steers clear of a restrictive analysis of occupational disease which ignores the major Supreme Court cases on the subject.

Dangerous thinking about maximum medical improvement

Another errant tendency which has emerged in recent years is an unspoken assumption that the assessment of permanent partial disability means that a claimant can work. One sees this shoddy thinking in many ways, the most pernicious expression of which is the carriers

trick, so often practiced on unrepresented claimants, of getting a permanency rating and switching the claimant's benefits to permanent partial disability, without asking whether the claimant remains totally disabled from working. A claimant can certainly get as well as he or she is going to get, so that maximum improvement is reached, and still be unemployable. In recent years, however, commissioners sometimes seem to buy into this false premise: that reaching maximum medical improvement, and especially the signing of a voluntary agreement on permanency, automatically means that a claimant has a work capacity. For example, in *Fantasia v. Milford Fastening Systems*, 4574 CRB-4-02-9 (Sept. 30, 2003), the commissioner had awarded temporary total disability benefits up to the date of maximum medical improvement as reflected in a voluntary agreement on permanency, and was affirmed over a protest by the claimant that the temporary total benefits should have continued. As a matter of fact, that may have been fine; the opinion doesn't include factual information on that issue. However, the CRB gives as a *reason* for its affirmance that the claimant had agreed to the date of maximum medical improvement when he signed the voluntary agreement. That's bad. Agreeing to the extent of permanency and the date of MMI in a voluntary agreement has nothing to do with whether a claimant can work and whether temporary total disability benefits should be discontinued. Claimants often reach MMI with 75% respiratory disability, and go downhill from there. It is appropriate to have a voluntary agreement to protect the family. But the two issues, MMI and TT, are factually and legally completely unconnected.

Police-trainee, though unpaid, is eligible for benefits

The claimant was an unpaid supernumerary police office candidate injured while in police training. He had a day job. The CRB upheld the finding of employment relationship, and held that he was entitled to compensation based on the average production worker wage under Sec. 31-310a, plus the concurrent employment component. *Netto v. Derby*, 4535 CRB-4-02-6 (July 2, 2003). The CRB upheld the finding that the claimant became an employee under the Act when he was accepted for the police position and was sent for training, even though he was not yet being paid. The application for the training academy, signed by the police chief, in fact specified that the claimant was covered under the city's workers' compensation policy.

File review part of physician's testimony fee

A physician's charges for file review are part of his or her charges for testimony or deposition and therefore subject to reimbursement under Sec. 31-298 where the claimant is successful at the formal hearing. *Blahe v. Logistec Connecticut, Inc.*, 4544 CRB 3-02-6 (July 9, 2003). The CRB also held that where unreasonable contest and consequent Sec. 31-300 sanctions are not on the hearing notice and are not raised until proposed findings are submitted, the respondent should have another hearing in which to rebut the charges. It is always good to check the hearing notice and, if not get it amended, at least raise the missing issue at the beginning of the hearing. Putting all issues in a preformal memorandum is also a good idea, to obviate claims of surprise.

Out-of-state medical treatment may be authorized retroactively despite PPO plan appeal requirement

Maybe the most dangerous aspect of the company-selected-doctor managed care plans is the administrative appeal requirement, which may demand an appeal to a plan administrator before the denial of medical care may be reviewed by a commission. This is the wolf guarding the chicken house, and the claimant may be dead by the time a commissioner can help out, if the respondent has control. In *Dougherty-Clements v. Yale-New Haven Hospital*, 4548 CRB-3-02-7 (Oct. 27, 2003), the claimant moved to Texas and had surgery in Texas by a surgeon who noted that respondent's doctors gave her [the claimant] the run-around. The commissioner ruled the surgery compensable and authorized the out-of-state treatment retroactively. The CRB affirmed,

over the respondent's objections that the claimant was a captive of the managed care plan and its internal appeal procedures. A key basis of the affirmance was a provision in the plan which allowed employees residing more than fifteen miles outside Connecticut to treat outside the plan. However, the CRB laid down a broad and perfectly sensible rule that permits retroactive approval of local medical care for non-resident claimants without regard to medical plan provisions, on the ground that "equally beneficial" treatment would no longer be available in Connecticut due to the expense and inconvenience of having to return here for treatment." Good work by the CRB on this issue; this is surely the only sensible way to deal with non-residents.

Department of weird decisions

I may be missing this one but it seems to turn Sec. 31-355 into a toothless wonder: the CRB vacated and remanded a no-insurance case against the Second Injury Fund, where at the appeal the Fund produced commission records suggesting insurance coverage. The CRB acknowledged that Sec. 31-355 requires payment by the Fund where the employer doesn't pay, no matter what the reason, but inexplicably went on to excuse the Fund from paying the benefits, pending further fact-finding proceedings on the coverage issue. *Degnan v. Employee Staffing of America, Inc.*, 4580 CRB-3-02-10 (Oct. 27, 2003). Why on earth not have the Fund pay the guy? Section 31-355 tells the Fund to pay the claim if the employer doesn't, then chase the responsible parties, including a delinquent carrier if there is one. There is no requirement that the claimant has to prove the lack of insurance, just that the case is tried

and the employer fails to come up with the bucks. Here, the employer had stipulated the lack of insurance coverage, with no protest from the Fund at the time of the formal hearing.

SUPERIOR COURT

No action vs. fellow employee in test-track crash

A passenger in an automobile wrecked while being driven on a test track to try out safety equipment is barred from suing the fellow-employee driver under the motor vehicle exception to the prohibition against negligence claims against fellow employees. The Court found that this motor vehicle accident involved "special hazards of the workplace" and was not a risk to which the general public is exposed. *Miller v. Jutkowicz*, (Superior Court New Haven CV 02-0460536S (April 29, 2003), 34 Conn. L. Rptr. No. 14, 536 (June 16, 2003). Words never quite fit what this judge-made law is trying to achieve, but one gets the point. Strictly speaking, an employee-passenger in a Mack truck is exposed to special hazards of the workplace, but no one thinks that passenger would be barred from a civil action.

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Proposed Legislation Designed to Help Solve the Medical Malpractice Controversy

By Jay F. Malcynsky and Robert F. Shea
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Many CTLA members and our clients have worked very hard during the past 18 months to convince Connecticut lawmakers that an arbitrary cap on the noneconomic damages portion of jury awards is an unfair and unproductive proposal. It's unfair because the cap will extinguish the rights of many injured citizens—especially those who don't have significant lost wages and economic damages; and it's unproductive because a cap (as has been shown in other states with caps) does not reduce insurance rates. CTLA has offered other proposed solutions to lawmakers that don't take away the legal rights of injured citizens and instead require the insurance companies to contribute to the solution. The following are DRAFT versions of some of the proposals that are under consideration:

Section 1. Insurance Rate Freeze: (Effective from passage) From the effective date of this section to July 1, 2004, the Insurance Commissioner shall disapprove any rate filed pursuant to section 38a-676 of the general statutes for professional liability insurance for physicians and surgeons who practice neurosurgery or obstetrics and gynecology if the rate represents more than a ten per cent increase over the rate on file with the commissioner on June 1, 2003, for such insurance and insurer, unless the commissioner finds, after a hearing, that a ten per cent increase is inadequate in accordance with section 38a-665 of the general statutes.

Sec. 2. Prior Rate Approval and underwriting based upon loss experience and requirement that part-time physicians are given credit on their insurance rates. Section 38a-676 of the general statutes is repealed and the following is substituted in lieu thereof (Effective from passage):

(a) With respect to rates pertaining to commercial risk insurance, and subject to the provisions of subsection (b) of this section with respect to workers' compensation and employers' liability insurance and subsection (c) of this section with respect to certain professional liability insurance, on or before the effective date [thereof, every] of such rates, each admitted insurer shall submit to the Insurance Commissioner for the commissioner's information, except as to inland marine risks which by general custom of the

business are not written according to manual rates or rating plans, [every] each manual of classifications, rules and rates, and [every] each minimum, class rate, rating plan, rating schedule and rating system and any modification of the foregoing which it uses. Such submission by a licensed rating organization of which an insurer is a member or subscriber shall be sufficient compliance with this section for any insurer maintaining membership or subscribership in such organization, to the extent that the insurer uses the manuals, minimums, class rates, rating plans, rating schedules, rating systems, policy or bond forms of such organization. The information shall be open to public inspection after its submission.

(b) Each filing as described in subsection (a) of this section for workers' compensation or employers' liability insurance shall be on file with the Insurance Commissioner for a waiting period of thirty days before it becomes effective, which period may be extended by the commissioner for an additional period not to exceed thirty days if the commissioner gives written notice within such waiting period to the insurer or rating organization which made the filing that the commissioner needs such additional time for the consideration of such filing. Upon written application by such insurer or rating organization, the commissioner may authorize a filing which the commissioner has reviewed to become effective before the expiration of the waiting period or any extension thereof. A filing shall be deemed to meet the requirements of sections 38a-663 to 38a-696, inclusive, unless disapproved by the commissioner within the waiting period or any extension thereof. If, within the waiting period or any extension thereof, the commissioner finds that a filing does not meet the requirements of said sections, the commissioner shall send to the insurer or rating organization which made such filing written notice of disapproval of such filing, specifying therein in what respects the commissioner finds such filing fails to meet the requirements of said sections and stating that such filing shall not become effective. Such finding of the commissioner shall be subject to review as provided in section 38a-19.

(c) (1) Each filing as described in subsection (a) of this section for professional liability insurance for physicians and surgeons, hospitals or advanced practice registered nurses shall be subject to prior rate approval. Whenever a rate for such liability insurance is filed pursuant to this section, the commissioner shall give notice, to the extent practicable, to insureds affected by the filing, including, but not limited to, associations of such insureds. (2) The commissioner shall accept public comment on the filing for thirty days after the date the commissioner provides the notice required in subdivision (1) of this subsection. The commissioner shall hold a hearing on the rate filing if the commissioner receives a request for such hearing from an insured or association of insureds during the thirty-day period. The commissioner shall hold the hearing not later than thirty days after receiving the request for a hearing. If no hearing is requested, the commissioner may hold a hearing not later than ten days after the expiration of the thirty-day period. (3) The commissioner may approve a filing if the commissioner finds that the filing meets the requirements of sections 38a-663 to 38a-696, inclusive, or may approve the filing subject to conditions the commissioner prescribes as necessary to meet the requirements of sections 38a-663 to 38a-696, inclusive. If the commissioner finds that a filing does not meet the requirements of sections 38a-663 to 38a-696, inclusive, the commissioner shall disapprove the rate and shall send to the insurer or rating organization which made such filing written notice of disapproval of such filing, specifying in what respects the commissioner finds such filing fails to meet the requirements of sections 38a-663 to 38a-696, inclusive, and stating that such filing shall not become effective. Such approval or disapproval shall be made not later than ten days after the conclusion of any hearing held pursuant to subdivision (2) of this subsection, or not later than ten days after the conclusion of the thirty-day inspection period if no hearing was requested or held. If the commissioner takes no action within the ten-day period, the filing shall be deemed approved. Such finding of the commissioner shall be subject to review as provided in section 38a-19. (4) In

determining the rate for professional liability insurance for physicians and surgeons, hospitals or advanced practice registered nurses, an insurer or rating organization shall apply a credit or debit based on the insured's loss experience, or shall establish an alternate method of determining rates on the basis of the insured's loss experience. The insurer or rating organization shall include with any rate filed pursuant to this section a schedule of all such credits and debits or a description of such alternate method. No insurer or rating organization may use a rate for such liability insurance unless the insurer or rating organization has filed such schedule or alternate method with the commissioner and the commissioner has approved such schedule or alternate method in accordance with this section. In addition, an insurer or rating organization shall apply a credit to those physicians and surgeons who practice on a part-time basis.

(c) (d) The form of any insurance policy or contract the rates for which are subject to the provisions of sections 38a-663 to 38a-696, inclusive, other than fidelity, surety or guaranty bonds, and the form of any endorsement modifying such insurance policy or contract, shall be filed with the Insurance Commissioner prior to its issuance. The commissioner shall adopt regulations in accordance with the provisions of chapter 54 establishing a procedure for review of such policy or contract. If at any time the commissioner finds that any such policy, contract or endorsement is not in accordance with such provisions or any other provision of law, the commissioner shall issue an order disapproving the issuance of such form and stating the reasons for disapproval. The provisions of section 38a-19 shall apply to any such order issued by the commissioner.

Sec. 3. Increasing Protections for Doctors before an insurance company leaves the market. Section 38a-44 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective from passage*):

(a) [Any] Each insurer licensed to do business in this state, or authorized to do business on a nonadmitted basis, which intends to discontinue offering or substantially reduce its writings in a line or subline of insurance in this state shall send, by registered or certified mail, or deliver to the Insurance Commissioner written notice of its intent to take such action at least sixty days before the initial notice of cancellation or nonrenewal is delivered or mailed to the insureds.

This [section] subsection shall not apply to life insurance policies, [or] annuity contracts, or professional liability insurance policies covering physicians and surgeons, hospitals or advanced practice registered nurses.

(b) Each insurer licensed to do business in this state, or authorized to do business on a nonadmitted basis, which intends to discontinue offering or substantially reduce its writings in the lines of professional liability insurance covering physicians and surgeons, hospitals or advanced practice registered nurses in this state on a claims made basis shall send, by registered or certified mail, or deliver to the Insurance Commissioner written notice of its intent to take such action at least ninety days before the initial notice of cancellation or nonrenewal is delivered or mailed to the insureds. Upon receiving the notice from the insurer, if the commissioner determines that such liability insurance market does not provide for sufficient competition or availability of alternative insurance coverage options, the commissioner shall require the insurer to continue to provide such insurance coverage at the same or substantially the same premium to its insureds for an additional six-month period beyond the date the insurer intended to deliver or mail the initial notice of cancellation or nonrenewal to its insureds.

Sec. 4. Prohibition of non-cooperation provisions in settlement agreements. (NEW) (*Effective from passage, and applicable to causes of action pending on or accruing on or after said date*) No physician, hospital or other health care provider, or any person, firm, corporation or other entity acting on behalf of such physician, hospital or health care provider, shall as a condition of settling any medical claim or dispute with such physician, hospital or health care provider, require any person to enter into an agreement that contains a provision that prevents such person from (1) reporting the conduct of such physician, hospital or health care provider to any federal, state or municipal agency, or (2) voluntarily cooperating with any federal, state or municipal agency in an investigation of the conduct of such physician, hospital or health care provider.

Section 5. Increased Risk Spreading among health care providers. (NEW). (*Effective from passage*): Notwithstanding any other provisions of the law, with respect to professional liability insurance for obstetricians, the loss experience of obstetricians may not be weighted more

than seventy five percent in the calculation of insurance rates for obstetricians, and the loss experience for all medical providers, including physicians, nurses, hospital and professionals in the healing arts, may not be weighted less than twenty five percent in the calculation of rates for obstetricians.

Section 6. Study and make recommendations relating to the establishment of hospital "captive groups" or "risk-retention groups" under Connecticut law. (NEW) (*Effective from passage*): Commencing on July 1, 2004, the Legislature's Program Review and Investigations Committee shall conduct a study of the benefits of establishing hospital captive insurance groups or risk retention groups under Connecticut Law. The Committee shall make recommendations to the General Assembly on or before January 1, 2005.

Section 7. Deductibles. (NEW). (*Effective October 1, 2004*): Each entity offering medical malpractice liability insurance coverage to physicians and surgeons in this state shall offer coverage that shall allow each individual insured to select a deductible amount or self-insured retention amount as part of the policy of coverage.

DRAFT LEGISLATIVE PROPOSAL REGARDING PRE-SUIT MEDIATION IN MEDICAL MALPRACTICE CASES.

(NEW). Section 1. Before initiating a medical malpractice action, the attorney representing a claimant shall advise the claimant about the pre-suit mediation process set forth in this act. At his earliest opportunity following receipt of process as described in C.G.S. § 52-45a, the attorney representing a defendant in a medical malpractice action shall advise the defendant about the pre-suit mediation process set forth in this act.

Section 2. Subsection (b) of section 52-48 of the general statutes is repealed and the following is substituted in lieu thereof:

(b) All process, except in medical malpractice actions, shall be made returnable not later than two months after the date of the process and shall designate the place where court is to be held.

In medical malpractice actions, the process shall be made returnable not earlier than two months after the date of the process and shall designate the place where court is to be held.

(NEW). Section 3. During the time period between the date of the service of process and the return date in a medical

malpractice action, the plaintiff may send notice by certified mail to the defendant informing the defendant that the plaintiff is willing to mediate the claim before the action is returned to court. Upon receiving the process and a statement that the plaintiff is willing to mediate the subject matter of the lawsuit, if the defendant is willing to mediate, the defendant shall so notify the plaintiff.

If the plaintiff has not requested mediation, the defendant may send notice by certified mail to the plaintiff informing the plaintiff that the defendant is willing to mediate the claim before the action is returned to court. Upon receiving a statement that the defendant is willing to mediate the subject matter of the lawsuit, if the plaintiff is willing to mediate, the plaintiff shall so notify the defendant.

(NEW). Section 4. If the parties to the lawsuit have agreed to mediation, they shall promptly submit a joint request for mediation to the Superior Court. The request for mediation shall be granted if at least one plaintiff and at least one defendant have agreed to mediation. The

Superior Court shall then promptly appoint a mediator from a list maintained by the Court for this purpose. The return date required under section 52-48(b) of the general statutes, as amended by this act, shall be automatically extended until fourteen days beyond the date that the mediation process is completed.

(NEW). Section 5. Within thirty days after the appointment of a mediator, both parties shall submit to the mediator a memorandum setting forth the basis of liability. The parties shall not be required to exchange presentations to the mediator unless they so agree; however every party to the mediation shall provide copies of the relevant medical records and the complete office file within thirty days of receiving a written request for such records from any other party. The plaintiff shall set forth in a memorandum the basis of liability stating in detail the nature of the medical malpractice and shall further set forth the manner in which the medical malpractice caused the plaintiff's injuries. The memorandum

shall also set forth in detail the economic damages, and the nature of the non-economic damages. The defendant shall file a counter memorandum setting forth a defense as to liability, specifically, and causation.

(NEW). Section 6. The mediation process under this section shall be deemed to be settlement negotiations for evidentiary and confidentiality purposes. In addition, the findings or recommendations of the mediator or mediators, if made, shall not be admissible in any other court or administrative proceeding. The mediation may be terminated prior to its completion upon notice to all parties and the mediator that all of the plaintiffs or all of the defendants have chosen to do so. In such event, the plaintiff may return the process to the Superior Court. For the purpose of the times set forth in Practice Book § 10-8, the amended return date shall be the date of filing.

President's Notebook

continued from page 69

public information specialists were ready with messages to bring to legislators and the press.

CTLA expressed early and frequent sympathy for the doctors' insurance rate predicament. CTLA began, and continues, to cultivate a cordial and civil interaction with the medical and business community, based on accurate, factual information.

Unfortunately, early on, doctors' groups declared Connecticut a link in a "Crisis" campaign that had originated months earlier far away from Connecticut. Staying with the national plan, Connecticut doctors were unrelenting in their insistence on damage caps as the only solution for their premium woes. Recalcitrant medical society and insurance executives appeared before legislative committee after committee continuing to recite their "Caps Litany." Doctors even spurned, and fought actively to defeat, a bill that would have denied them caps, but would have brought a rate moratorium — holding out, instead for the immunity that the much-sought caps would confer.

More than a year since CTLA originally engaged the doctors and insurance companies over this issue, patients' rights are still intact. CTLA has not resorted to inaccurate or unfair arguments, or to impugning the character of the other side. It has been difficult to maintain residence on the high ground, however, because often the other side has not treated CTLA with such equanimity. Read your local newspaper. We are under attack, primarily on the editorial pages, by doctors throughout the state, who continue to paint us as greedy, uncaring, overly aggressive monsters. It's not just the doctors, however; and it's not just on the editorial pages.

The caps issue is still very much alive in Connecticut. There are still members of the general assembly in favor of capping non-economic damages. The doctors and their insurance companies continue to press for caps, and they show no signs of relenting. This issue will be taking us into the upcoming legislative session, and we will be proposing a comprehensive set of recommendations to help alleviate the malpractice insurance rate problem without compromising patient rights.

Nationally, the campaign for medical malpractice caps is part of a much larger agenda to restrict victims' access to the courthouse and provide immunity to all wrongdoers, under the banner of "tort reform." The national campaign is nothing short of an attack on trial lawyers and their clients. It is an aggressive, at times vicious, campaign.

But this caps issue has served a purpose; it has mobilized CTLA and trial lawyers, nationwide. We are all learning that we are now operating within a much broader context and must be increasingly more vigilant and proactive.

Our central tactic is still Reason. We continue to seek out those who oppose our positions. We continue to strengthen our positions with newly emerging facts, newly recruited allies and the ever-growing involvement of our members.

Be vigilant, be proactive, and be involved. If we are not all part of this fight, we stand to lose a great deal more than just the battle on caps.

Maximizing and Securing Your Judgment by Effective Use of Offer of Judgment and Prejudgment Procedures

By Stewart I. Edelstein — Cohen and Wolf, P.C., Bridgeport

Stewart I. Edelstein is a commercial litigator resident in the Bridgeport office of Cohen and Wolf, P.C. This article is available on the Cohen and Wolf website at www.cohenandwolf.com. The author acknowledges, with gratitude, the research assistance of Sandee Molden and Alison Clark in preparing this article.

PLAINTIFFS' OFFERS OF JUDGMENT

In Connecticut's state courts, and federal courts in Connecticut sitting in diversity, a plaintiff can recover 12% interest on the amount of a judgment, accruing from the filing of the complaint until the entry of judgment, if counsel for the plaintiff complies with Conn. Gen. Stat. §52-192a, and Practice Book §§ 17-14 to 17-18,¹ and the amount of the judgment equals or exceeds the amount of the offer of judgment.

For example, assume a \$550,000 offer of judgment and \$700,000 judgment. If the period between filing the complaint and the entry of judgment is three years, and the offer of judgment is filed six months before entry of judgment, offer of judgment interest is \$42,000, for a total of \$742,000. This amount is calculated based on 12% of \$700,000 for a period of six months. Based on the same facts, but assuming that the offer of judgment is filed at any time within eighteen months of filing the complaint, offer of judgment interest is \$252,000, for a total of \$952,000. This amount is calculated based on 12% of \$700,000 for a period of three years.

1. Purposes

- Conserve judicial resources by promoting settlements.
- Save the time and expense of trial.
- Encourage plaintiffs to make prompt offers to settle.
- Penalize defendants that fail to accept reasonable settlement offers.

See, e.g., *Blakeslee Arpaia Chapman, Inc. v. EI Constructors, Inc.*, 239 Conn. 708, 742, 761-762 (1997); *Nunno v. Wixner*, 257 Conn. 671, 686 (2001); and *Flynn v. Kaumeyer*, 67 Conn. App. 100, 107 (2001).

2. Applicability

- Offer of judgment procedures are available in any civil action seeking money damages, even if other relief is sought. Conn. Gen. Stat. §52-192a(a).
Practice Tip: Offer of judgment procedures are available to any plaintiff, and any counterclaiming or cross-claiming defendant. (As used herein, "plaintiff" refers to any party seeking money damages.)
- The offer of judgment Practice Book rules and statutes are procedural, and therefore apply even if another state's law governs substantive issues. *Paine Webber Jackson and Curtis, Inc. v. Winters*, 22 Conn. App. 640, 649 (1990), cert. den., 216 Conn. 820 (1990).
- The offer of judgment Practice Book rules and statutes do apply in federal court in diversity cases, because they create substantive rights in all civil plaintiffs to claim interest on responsible settlement offers formally made. *Frenette v. Vickery*, 522 F. Supp. 1098, 1100 (D. Conn. 1981). (The court in *Paine Webber* distinguishes *Frenette v. Paine Webber*, 22 Conn. App. at 654-655.) L. Civ. R. 68, the local rule in this district applicable to offers of judgment, provides, *inter alia*, for the sealing of the offer of judgment.
- The offer of judgment procedures do apply to tax appeals. *Loomis Institute v. Windsor*, 234 Conn. 169, 179-180 (1995).
- The offer of judgment procedures do apply in actions against municipalities. *Giannitti v. City of Stamford*, 25 Conn. App. 67, 79 (1991).
- The offer of judgment procedures do not apply in actions against the state. *Struckman v. Burns*, 205 Conn. 542, 556 (1987).
- The offer of judgment procedures do not apply to court-mandated arbitration proceedings. *Nunno v. Wixner*, 257 Conn. 671, 677 (2001), although in *Koepke v. Dandar, Inc.*, 19 Conn. L. Rptr. 582, 584 (1997), the court allowed offer of judgment interest in a civil action where the issues were decided by voluntary arbitration rather than by a hearing in damages.

3. Filing Offer of Judgment

(Conn. Gen. Stat. §52-192a(a))

- Timing: At any time after commencement of a civil action; not later than thirty days before trial.
Practice Tip: As discussed in 5(b) below, file the offer of judgment not later than eighteen months from filing the complaint.
- Form: Written "offer of judgment" signed by plaintiff or plaintiff's attorney, directed to defendant or defendant's attorney offering to settle the claim underlying the action and to stipulate to a judgment for a sum certain.
Practice Tip: Discuss with your client the advantages (12% interest on the amount of the judgment if the offer exceeds that amount) and consequence (if the offer is accepted, judgment enters for that amount) of filing an offer of judgment. If your client authorizes you to file an offer of judgment, send your client a letter confirming your authority before filing it, making explicit that, if accepted, judgment will enter in that amount. If your client does not authorize you to file an offer of judgment, send your client a letter confirming your explanation of the advantages and consequences of filing an offer of judgment and your client's decision not to authorize you to do so. For the reasons set forth in 5(b) below, explain the offer of judgment procedure to your client before the expiration of eighteen months from the filing of the complaint.
- Procedure: File the offer of judgment with the clerk and give notice of the offer of judgment to defendant's attorney, or, if defendant is not represented by an attorney, to defendant.
Practice Tip: Obtain a file-stamped copy of the offer of judgment filed with the court clerk and send your offer of judgment to defendant by certified mail, return receipt requested. In federal court actions, send a letter of transmittal to the court clerk regarding the sealing of your offer of judgment, as provided in L. Civ. R. 68.
- Frequency: A plaintiff may file only one offer of judgment as to

each defendant. *Shawhan v. Langley*, 249 Conn. 339, 346 (1999) (overturning prior law). But see section 6 below for modifications of this holding.

4. Acceptance or Rejection of Offer of Judgment

- a. A defendant has sixty days after receiving notice (but prior to jury verdict or court award) to file with the court clerk a written "acceptance of offer of judgment" agreeing to stipulation for judgment as contained in the offer of judgment. Judgment then enters accordingly. Conn. Gen. Stat. §52-192a(a).
- b. If a defendant does not accept the offer within sixty days, the offer is considered rejected and not subject to acceptance unless refiled in the same amount. Conn. Gen. Stat. §52-192a(a).
- c. Some courts have extended the time for accepting an offer of judgment, until plaintiff responded to defendant's discovery requests. See, e.g., *Daniel Quinn, et al. v. Collins*, 1 CSCR 239, 239 (1986); *Ahern v. O'Connell*, 4 CSCR 185, 186 (1989), and *McManus-Pesce v. Miller*, 29 Conn. L. Rptr. 304, 305-306 (2001). But in *Cohen v. Bridgeport Hospital*, 17 Conn. L. Rptr. 181, 181, 1996 WL 367737 (1996), the court denied the defendant's objection to the plaintiff's offer of judgment where the defendant based its objection on the fact that discovery was not complete when the offer was made.

Practice Tip: If you represent a defendant and you receive an offer of judgment, inform your client in writing immediately of the amount of the offer, advise your client of the offer of judgment procedure, and discuss whether to accept the offer. If you require further discovery to respond to the offer, file a motion to extend the time for accepting it, but obtain a ruling on your motion within sixty days of the filing of the offer of judgment, or your time for acceptance will expire.

5. Calculation of Interest if Offer of Judgment is Rejected

- a. If a plaintiff recovers an amount equal to or greater than the sum certain stated in the offer of judgment, the court shall add to the amount so recovered 12% annual interest on the amount recovered. Conn. Gen. Stat. §52-192a(b). This interest is not compounded.
 - 1) The amount recovered can include pre-judgment interest

for the wrongful detention of money pursuant to Conn. Gen. Stat. §37-3a at 10%, attorney's fees, and multiple damages. See, e.g., *Crowther v. Gerber Garment Technology, Inc.*, 8 Conn. App. 254, 267 (1986); *Edward Denike Tree Co. v. Butler*, 21 Conn. App. 366, 369 (1990); *Gillis v. Gillis*, 21 Conn. App. 549, 554-556 (1990), cert. den., 215 Conn. 815 (1990); *Patron v. Konover*, 43 Conn. App. 645, 648-650, 653 (1996), cert. den. 240 Conn. 911 (1997); *Aubin v. Miller*, 64 Conn. App. 781, 798 (2001); and *Flynn v. Kaumeyer*, 67 Conn. App. 100, 105-106 (2001).

Practice Tip: In determining the amount of the offer of judgment, take into consideration the likelihood of recovering pre-judgment interest, attorney's fees, and multiple damages.

- 2) In determining the amount recovered for purposes of awarding offer of judgment interest, a defendant is entitled to a credit for settlement payments the plaintiff received from other defendants and collateral source benefits. See, e.g., *Civiello v. Owens-Corning Fiberglass Corporation*, 208 Conn. 82, 89-90 (1988) and *Pajor v. Town of Wallingford*, 47 Conn. App. 365, 379-382 (1997).
- b. Interest at 12% begins from the date the complaint was filed with the court if the offer of judgment is filed not later than eighteen months from filing the complaint. Conn. Gen. Stat. §52-192a(b).

Practice Tip: In your tickler system, note a date well before the expiration of eighteen months from filing the complaint. Discuss with your client the option of filing an offer of judgment and the consequences of such filing. File your offer of judgment before the expiration of this time period.

- c. Interest at 12% begins from the date the offer of judgment was filed if filed later than eighteen months from the filing of the complaint. Conn. Gen. Stat. §52-192a(b).
- d. Interest at 12% runs through the date judgment enters. After the date judgment enters, interest runs at the rate of 10%, pursuant to Conn. Gen. Stat. § 37-3a.
- e. The award of offer of judgment interest is mandatory. See, e.g., *Blakeslee Arpaia Chapman, Inc. v.*

EI Constructors, Inc. 239 Conn. 708, 752 (1997) and *Lutynski v. B. and J. Trucking, Inc.*, 31 Conn. App. 806, 809, 811-812, aff'd, 229 Conn. 525 (1994).

- f. Since the award of offer of judgment interest is punitive and mandatory, an insurer must pay offer of judgment interest if awarded, even if the insurance policy does not provide for such payment. *Accettullo v. Worcester Ins. Co.*, 256 Conn. 667, 672-673 (2001).

Practice Tip: If the defendant has insurance, make sure the insurance adjuster is aware that, if the offer of judgment is not accepted, the insurer is liable for offer of judgment interest if the offer is not accepted and judgment enters for an amount equal to or in excess of that offer.

6. Multiple Offers of Judgment

- a. A plaintiff can file only one offer of judgment as to each defendant. See *Shawhan v. Langley*, 249 Conn. 339, 346-347 (1999).

Practice Tip: Be aware that, prior to *Shawhan v. Langley*, some Connecticut trial courts authorized a plaintiff to file more than one offer of judgment as to each defendant. Those decisions are no longer good law.
- b. A plaintiff may file either a unified offer of judgment against multiple defendants or a separate offer of judgment against each defendant. *Blakeslee Arpaia Chapman, Inc. v. EI Constructors, Inc.*, 239 Conn. 708, 743 (1997).

Practice Tip: In a jury case in an action against more than one defendant, prepare interrogatories to be submitted to the jury, seeking an itemization of the amount of the award as to each defendant individually, as provided in Practice Book §16-18.
- c. If a plaintiff files a unified offer of judgment as to multiple defendants, each defendant is liable for offer of judgment interest only if the recovery against that defendant exceeds the amount of the unified offer. See, e.g., *Blakeslee Arpaia Chapman, Inc. v. EI Constructors, Inc.*, 239 Conn. 708, 740-745 (1997).
- d. An amended offer of judgment is permissible when the offer is for the same amount as the original, but breaks down the original offer among defendants. See, e.g., *Nelson v. Armstrong*, 1 Conn. Law Rptr. 278, 279, 5 CSCR 168 (1990).

7. Appeals

- a. Whether the trial court properly awarded offer of judgment interest presents an issue of law, subject to *de novo* review on appeal. *Willow Springs Condominium Association, Inc. v. Seventh BRT Development Corp.*, 245 Conn. 1, 53-54 (1998).
- b. The appeal must be filed within twenty days of the date notice of the judgment is given. Practice Book §63-1.

PREJUDGMENT REMEDIES

In Connecticut's state courts, and federal courts in Connecticut sitting in diversity, a litigant can obtain, upon establishing the requisite probable cause, security for a judgment prior to commencement of or during the pendency of an action, and an order compelling disclosure of assets sufficient to secure a judgment.

1. Definitions

a. Prejudgment Remedy

A prejudgment remedy ("PJR") is any remedy or combination of remedies enabling a plaintiff by way of attachment, foreign attachment, garnishment or replevin to deprive the defendant in a civil action of, or affect the use, possession or enjoyment by that party of, his property prior to final judgment, not including a temporary restraining order. Conn. Gen. Stat. §52-278a(d). As used herein, "plaintiff" refers to the party applying for a PJR. Any defendant, upon filing a set-off or counterclaim containing a claim for money damages, may file a PJR application at any time. Conn. Gen. Stat. §52-278i. Presumably, this section applies to a defendant filing a cross-claim.

Practice Tip: If you are aware of an asset a defendant is about to convey, seek a temporary restraining order as to that asset when filing your PJR application. For the procedure to obtain a temporary restraining order, see Conn. Gen. Stat. §52-278c(c), Conn. Gen. Stat. §§52-471, *et seq.*, and Practice Book §4-5.

b. Property

Property includes any present or future interest in real or personal property, goods, chattels or choses in action, whether vested or contingent. Conn. Gen. Stat. §52-278a(e). To be subject to the PJR statute, the property must be located in Connecticut. However, the court has the power to issue an order directing the defendant to surrender to the court clerk stock certificates of publicly and privately traded securities located outside

Connecticut for purposes of a PJR. *See, e.g., Inter-Regional Financial Group, Inc. v. Hashemi*, 562 F.2d 152, 153-55 (2d Cir. 1977); *Hamma and Tenex Corporation v. Gradco Systems, Inc.*, 1992 U.S. Dist. LEXIS 17601, *8-10 (D. Conn. 1992); and *Lyons Hollis Associates, Inc. v. New Technology Partners, Inc.*, 2003 U.S. Dist. LEXIS 14580, *28-30 (D. Conn. 2003).

Practice Tip: Before filing an application for PJR, do an asset search and list specific assets in the PJR application sufficient to satisfy your judgment, as well as generally described assets. If, prior to securing those assets, the defendant conveys those assets, take advantage of Connecticut's fraudulent transfer statutes, as appropriate. *See* Conn. Gen. Stat. §§52-552 to 52-552l.

Practice Tip: If your case affects in any manner title to or interest in real property, you should file a notice of lis pendens at the commencement of the action, in addition to seeking a PJR to secure any monetary judgment. *See* Conn. Gen. Stat. §52-325.

Practice Tip: In an appropriate case, when filing an application for PJR, include an application for an order compelling the defendant to surrender stock certificates to the court clerk even if those certificates are located outside Connecticut.

c. Consumer Transaction

This is a transaction in which a natural person obligates himself to pay for goods sold or leased, services rendered or moneys loaned for personal, family or household purposes. Conn. Gen. Stat. §52-278a(b).

d. Commercial Transaction

This is a transaction that is not a consumer transaction. Conn. Gen. Stat. §52-278a(a).

2. Availability of Prejudgment Remedy

a. Statutory Compliance

A PJR is available only if the party seeking the PJR complies with Conn. Gen. Stat. §§52-278a to 52-278g, except in a commercial transaction where a defendant has executed a waiver as provided in Conn. Gen. Stat. §52-278f or for garnishment of earnings, as defined in Conn. Gen. Stat. §52-350a(5).

b. Federal Actions

A PJR is available in federal actions where the court sits in diversity, as well as in state court actions. *See, e.g., Inter-Regional Financial Group, Inc., supra*, 562 F.2d at 153; *Foreign Exchange Trade Associates, Inc. v. Onctur, S.A.*, 591 F. Supp. 1496, 1497 (S.D.N.Y. 1984); *Bergesen d.y. v. Lindholm*, 760 F. Supp. 976, 989 (D. Conn. 1991); and Fed. R. Civ.

P. 64, which contemplates and endorses use of prejudgment remedies available under state law where the federal court sits in diversity. *See also* L. Civ. R. 4(c), the local rule applicable in this district, which provides, *inter alia*, that "a party may secure a pre-judgment remedy, as permitted by, and in accordance with, the law of the State of Connecticut."

c. Actions Brought in Other States

There is authority to support the filing of an application for prejudgment remedy in Connecticut even if the underlying action is filed in another state. In *Cahaly v. Benistar Property Exchange Trust Company, Inc.*, 73 Conn. App. 267 (2002), a case on appeal to the Connecticut Supreme Court, the appellate court held that a plaintiff in a Massachusetts action can utilize Connecticut's PJR procedures to secure a future judgment in that action by attaching Connecticut assets of defendants while the Massachusetts action was pending. *Cahaly*, 73 Conn. App. at 276-77.

In *Cahaly*, the plaintiff, who had filed a Massachusetts action seeking more than \$1,000,000 in damages, sought a prejudgment remedy securing defendants' Connecticut assets to prevent their dissipation before the final adjudication in Massachusetts. The Massachusetts court had already determined that there was probable cause that the plaintiff would succeed on the merits in a prejudgment attachment hearing, and had granted an application to attach assets, but the defendants had insufficient assets in Massachusetts to fully secure the plaintiff's claim.

Based on these facts, the Connecticut court held that Connecticut's prejudgment remedy procedures can be applied to secure assets of defendants, even though ancillary to a Massachusetts action, and that there is no prerequisite that a final judgment enter in the foreign action before applying these procedures. The *Cahaly* court reasoned that plaintiffs must have the ability to secure assets in anticipation of enforcing future foreign judgments under the Uniform Enforcement of Foreign Judgments Act.

This decision is important because whenever a defendant over whom there is long arm jurisdiction in Connecticut has assets in this state, even if the principal action is brought elsewhere (at least in states having prejudgment remedy procedures), plaintiff's counsel can seek to secure a future judgment by taking advantage of Connecticut's PJR procedures. *Cahaly* arguably applies even where the forum state does not have a prejudgment remedy statute.

3. Documents Required (in duplicate)

a. Application

Conn. Gen. Stat. §52-278c(a)(1) sets forth the form of the application. The application must be accompanied by a notice and claim form as set forth in Conn. Gen. Stat. §§52-278c(e) and 52-278c(f).

Practice Tip: You must use the notice and claim form that is a court form, JD-CV-53.

Practice Tip: Include in your application specific reference to assets of the defendant you know about (such as identified bank accounts), as well as more generally described assets (such as any real or personal property of the defendant).

Practice Tip: For the amount of the PJR you seek, consider the factors in section 3(b) below.

b. Affidavit

The affidavit must be sworn to by the plaintiff or any competent affiant, setting forth a statement of facts sufficient to show that there is probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than that amount, taking into account any known defenses, counterclaims or set-offs, will be rendered in the matter in favor of the party seeking the prejudgment remedy. Conn. Gen. Stat. §52-278c(a)(2).

Practice Tip: In preparing the affidavit, information should be on personal knowledge. Where applicable, the amount of the PJR requested in the affidavit should include, in addition to amounts already due, projected amounts that will be due as of the time of the judgment, such as accrued interest, and if there is a basis to claim them, attorney's fees and multiple damages.

Practice Tip: If you have filed an offer of judgment that has not been accepted within sixty days, consider including in your PJR application, or seeking a supplemental PJR, for the projected amount of the offer of judgment interest.

c. Order for Hearing

This is an order that a hearing be held to determine whether the requested prejudgment remedy should be granted and that notice of such hearing be given. Conn. Gen. Stat. §52-278c(a)(3).

d. Summons

This is a summons commanding a proper officer to serve, at least four days before the date of the hearing, the application, a true and attested copy of the writ, summons and complaint, affidavit

and order and notice of hearing. Conn. Gen. Stat. §52-278c(a)(4).

Practice Tip: If you commence the action by serving a proposed unsigned complaint, you must manuscript the summons rather than using a court form. See Practice Book §8-1(b).

e. Proposed Unsigned Writ, Summons and Complaint

If the PJR application is filed before the commencement of the action, the proposed unsigned writ, summons and complaint must be included with the application, affidavit, order and summons.

Practice Tip: If you seek a PJR prior to the commencement of the action, the action is not commenced for statute of limitations purposes. See, e.g., *Howard v. Robertson*, 27 Conn. App. 621, 625-27 (1992) and *Raynor v. Hickock Realty Corporation*, 61 Conn. App. 234, 239-240, 242 (2000). Furthermore, you cannot seek discovery (with certain limited exceptions discussed in section 6 below) or proceed to close the pleadings. It is usually preferable to commence the action before filing a prejudgment remedy application, as provided in Conn. Gen. Stat. §52-278h. In that instance, personal service is not required where the party against whom you seek a PJR has filed an appearance, unless ordered by the court. Conn. Gen. Stat. §52-278m.

f. Entry Fee

The current entry fee is \$325 if the PJR application is filed with the proposed unsigned complaint, and \$100 if the PJR application is filed after filing the complaint. (The fee for filing a complaint is \$225.)

4. Hearing Issues

Practice Tip: Before filing a PJR application, determine the procedures applicable in the judicial district in which you will file it. Different judicial districts apply idiosyncratic procedures. For example, in the Judicial Districts of Litchfield and Hartford, no hearing is held the first time the application appears on the court calendar, and the parties must comply with standard orders prior to the PJR hearing. You will find these procedures in the court calendar, but for advance notice, call the court clerk.

a. Probable Cause

The standard for issuance of a PJR is whether there is probable cause that a judgment in the amount of the prejudgment remedy sought, or a greater amount, taking into account any defenses, counterclaims or set-offs, will be rendered in favor of the plaintiff. Conn. Gen. Stat. §52-278d(a)(1).

Probable cause is a bona fide belief in the existence of the facts essential under the law for the action such as would warrant a person of ordinary caution, prudence and judgment, under the circumstances, in entertaining it. Probable cause is a flexible common sense standard that does not demand that such belief be correct or more likely true than false. See, e.g., *Three S. Development Co. v. Santore*, 193 Conn. 174, 175-176 (1984); *Doe v. Rapoport, et al.*, 80 Conn. App. 111, 115-116 (2003); and *Cahaly v. Benistar Property Exchange Trust Company, Inc., et al.*, 73 Conn. App. 267, 278 (2002).

Practice Tip: This standard was changed by amendment to the PJR statutes in 1993. Accordingly, be wary of citation of cases decided under the old standard, which was "probable cause to sustain the validity of the plaintiff's claim."

Practice Tip: When defending a PJR application, be prepared to present at the PJR hearing evidence of your defenses, counterclaims and set-offs, to reduce the amount of the PJR, or possibly persuade the court to deny the application.

b. Insurance

The court must consider whether the payment of any judgment that may be rendered against the defendant is adequately secured by insurance. Conn. Gen. Stat. §52-278(d)(a)(2).

Practice Tip: Practice Book §13-12 provides that in any civil action, the existence, contents and policy limits of any insurance policy under which any insurer may be liable to satisfy part or all of a judgment which may be rendered in the action against any party or to indemnify or reimburse any defendant for payments made to satisfy the judgment is subject to discovery by interrogatory or request for production.

Practice Tip: When representing the defendant, determine whether your client has insurance covering the claim. If so, be prepared to present evidence of that insurance at the PJR hearing, and consider informing plaintiff's counsel of that insurance to obviate the hearing.

c. Exemptions

Whether the property sought to be subjected to the PJR is exempt from execution. Conn. Gen. Stat. §52-278d(a)(3). For property exempt from execution, and therefore not subject to a PJR, see Conn. Gen. Stat. §52-352b. The most significant exemption is \$75,000 of equity in a homestead. See Conn. Gen. Stat. §52-325b(t).

d. Bond

The court must consider whether, if the court grants the PJR, the plaintiff should be required to post a bond to

secure the defendant against damages that may result from the PJR or whether the defendant should be allowed to substitute a bond for the PJR. Conn. Gen. Stat. §52-278(a)(4). At any time after granting a PJR, the defendant may request that the plaintiff post a bond, with surety, in an amount sufficient to reasonably protect the defendant's interest in the property that is subject to the PJR against damages that may be caused by the PJR. If the court grants the defendant's request, the bond shall provide that if judgment is rendered for the defendant, or if the PJR is dismissed or dissolved, the plaintiff will pay the defendant damages directly caused by the PJR. Conn. Gen. Stat. §52-278d(d). In determining whether to grant a bond request and, if granted, the amount of the bond, the court shall consider the nature of the property subject to the PJR, the methods of retention or storage of the property and the potential harm to the defendant's interest in the property that the PJR remedy might cause. Conn. Gen. Stat. §52-278d(e).

Practice Tip: When opposing a PJR application, be prepared to put on evidence supporting the imposition of a large bond. The plaintiff may have difficulty obtaining a bond in the required amount, thus defeating the imposition of a PJR even if a PJR application is granted.

5. Allowance of PJR Without Hearing

a. Affidavit

A PJR may issue without a hearing if the supporting affidavit includes an allegation that the defendant 1) has hidden or will hide himself so that process cannot be served on him; 2) is about to remove himself or his property from Connecticut; 3) is about to fraudulently dispose of or has fraudulently disposed of any of his property with intent to hinder, delay or defraud his creditors; or 4) has fraudulently hidden or withheld money, property or effects which should be liable to the satisfaction of his debts. Conn. Gen. Stat. §52-278e(a).

Practice Tip: Connecticut courts are reluctant to grant ex parte PJRs. If you seek an ex parte PJR, support the application with compelling evidence satisfying the PJR requirements generally and Conn. Gen. Stat. §52-278e(a). If an ex parte PJR issues against your client, be aware of rights pursuant to Conn. Gen. Stat. §52-278e(d) to dissolve or modify the PJR.

b. Waiver in Commercial Transaction

Where the defendant has waived the right to notice and hearing, the attorney

for the plaintiff may issue a PJR without a court order if 1) the complaint sets forth a copy of the waiver; 2) the plaintiff files an affidavit showing the required probable cause; and 3) the plaintiff includes in the process served on the defendant notice satisfying the requirements of Conn. Gen. Stat. §§52-278e (b) and (c). Conn. Gen. Stat. §52-278f.

Practice Tip: If an ex parte PJR issues against your client based on this statute, review the waiver to determine whether it complies with the statutory requirements, and whether it is sufficiently clear to be valid. *See, e.g., Union Trust Co. v. Precast Incorp.*, 14 Conn. L. Rptr. 103, 104 (1995) (provision in commercial transaction "clearly indicates" waiver of any rights to notice or hearing).

c. Notice

If a PJR issues without hearing, the plaintiff must serve on the defendant a notice and claim form advising the defendant of statutory rights to object; to request that the plaintiff post a bond; to request that the PJR be dissolved, modified, or substituted by a bond; and to show that property subject to the PJR is exempt. Conn. Gen. Stat. §52-278e(b). This notice must also comply with the requirements of Conn. Gen. Stat. §52-278e(c) regarding garnishment and hearing procedures.

6. Discovery

a. Before PJR Hearing

If a PJR application is filed with a proposed unsigned writ, summons, and complaint, and you are opposing the application, consider obtaining discovery by agreement. Keep in mind, however, that since no action is pending in that circumstance, neither party has the right to compel discovery before the PJR hearing. If a PJR application is filed after the commencement of the action, you should consider conducting discovery before the PJR hearing, whether you seek a PJR or oppose it. Note that if you seek to take a deposition prior to the expiration of twenty days after the return day, you must obtain the court's permission, unless the adverse party has already sought discovery or is about to leave the state. *See Practice Book* §13-27.

b. Motion to Disclose Assets

The plaintiff can file with the application for PJR a motion seeking disclosure of assets of an appearing defendant in which the defendant has an interest, or debts owing to the defendant, sufficient to satisfy a prejudgment remedy. The existence, location and extent of the defendant's interest in such property or debts is subject to disclosure after the

court finds probable cause sufficient for granting the PJR. In lieu of disclosing assets, the defendant can move to substitute a bond with surety or other sufficient security. Conn. Gen. Stat. §52-278n.

Practice Tip: When filing an application for PJR, always file a motion for disclosure of assets. You then will have the information necessary to determine which of defendant's assets you want to encumber to secure your judgment. Keep in mind, however, that a defendant is required to disclose only assets having sufficient equity to satisfy the PJR.

7. Procedures after Granting PJR

a. Service and Return to Court

If the PJR application is submitted with a proposed, unsigned complaint, the clerk delivers to the plaintiff's attorney the proposed unsigned writ, summons and complaint for service, together with the PJR order. Before service, the plaintiff's attorney signs the writ, summons and complaint, and can change the return date. Conn. Gen. Stat. §52-278d(b). If the PJR application is submitted after commencement of the action, serve only the PJR order.

b. Motion for Stay

The court, upon the defendant's motion, may stay the PJR order if the defendant posts a bond, with surety, in a sum sufficient to indemnify the plaintiff for any damage accruing as a result of the stay. Conn. Gen. Stat. §52-278d(c).

c. Motion to Dissolve or Modify PJR

The defendant may move to dissolve or modify an ex parte PJR by motion or by filing a signed claim form, based on any of the following: an assertion of a defense, counterclaim, set-off or exemption; an assertion that any judgment that may be rendered is adequately secured by insurance; an assertion that the amount of the PJR is unreasonably high; a request that the plaintiff post a bond; or a request that the defendant be allowed to substitute a bond. Conn. Gen. Stat. §52-278e(d). The court must hold a hearing within seven business days after its filing. Conn. Gen. Stat. §52-278e(e). *See also* Conn. Gen. Stat. §52-278k, which provides for modification of PJRs, even if not ex parte PJRs.

Practice Tip: If a PJR order enters against your client, consider the advantages and feasibility of substituting a bond with surety. For example, if the order allows for attachment of real estate your client wants to mortgage, develop, or sell, substitute a bond with surety. Be aware that such a bond can be expensive, and may require 100% collateral.

Another alternative is to substitute another asset having the same equity as the asset the plaintiff has secured by the PJR order, by stipulation or motion.

d. Dismissal or Withdrawal of PJR

If a PJR application is granted, but the plaintiff, within thirty days thereof, does not serve and return to court the writ, summons and complaint for which the PJR was allowed, the court shall dismiss the PJR. Conn. Gen. Stat. §52-278j(a). If the PJR application is denied and the plaintiff, within thirty days thereof, does not serve and return to court the writ of summons and complaint for which the PJR was requested, or if a date for a hearing upon a PJR is scheduled but is not commenced within thirty days thereof (except as provided in Conn. Gen. Stat. §52-278e), the court shall order the application withdrawn. Conn. Gen. Stat. §52-278j(b).

e. Modification of PJR

The court can modify a PJR. Conn. Gen. Stat. §52-278k.

f. Appeal

Orders granting or denying a PJR after hearing, a motion to dissolve or modify a PJR, and a motion to preserve an existing PJR, are final judgments for purposes of appeal. The appeal must be taken within seven days of the rendering of the order. There is no stay of the order by taking the appeal unless so ordered by the judge who issued the order appealed from. Any such stay shall be granted only if the party taking the appeal posts a bond, with surety, in a sum sufficient to indemnify the adverse party for any damages accruing as a result of the stay.

If a defendant moves to discharge a PJR, the property affected may be restored to the use of the defendant if the defendant posts a bond with surety in an amount sufficient to indemnify the plaintiff for any damages which may accrue by the defendant's continued use of the property, until such time as such motion is decided. Conn. Gen. Stat. §52-278l.

¹ Practice Book §§17-22 to 17-13 provide for offers of judgment by defendants, but if a plaintiff does not accept a defendant's offer of judgment, and the amount of the judgment is less than the defendant's offer, the only consequence is that the plaintiff recovers no costs accruing after receiving notice of the filing of such offer, and must pay defendant's costs after the date of that filing, including attorney's fees not to exceed \$350. Conn. Gen. Stat. §§52-193 to 52-195 are the statutory counterparts to Practice Book §§ 17-11 to 17-13.

Daubert Tool Lets Lawyers Track Expert's History

By Robert J. Ambrogi

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Expert testimony can be the linchpin that makes or breaks a case. But lawyers have had a tougher time getting that testimony admitted since 1993, when the Supreme Court decided in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), that scientific testimony must be not only relevant, but reliable. In 1999's *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999), the court extended that rule to all experts.

This means that a lawyer preparing to qualify or challenge an expert at trial must answer a number of questions. What is the state of the case law under *Daubert*? How has the particular court or judge applied the rule? How have courts ruled on this type of expertise? Has this expert ever come before a judge?

But keeping up with the case law is no easy task. MDEX Online, a medical-legal consulting firm headquartered in Chicago, estimates there are more than 4,000 trial and appellate opinions interpreting and applying *Daubert* and its offspring, as well as thousands more state "gatekeeper" cases.

That is why MDEX developed a tool to help lawyers track these cases and, in particular, find out how specific experts or areas of expertise fared in the courts. Called "The Daubert Tracker" at www.dauberttracker.com, its central feature is a database of all reported *Daubert* and *Kumho* decisions, trial and appellate, backed up when available by full-text briefs, transcripts and docket entries.

It also includes recent cases applying *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), the U.S. Circuit Court for the District of Columbia decision requiring the exclusion of scientific evidence that is unproven or experimental. As of this writing, it was preparing to add all state gatekeeper cases as well as several thousand unreported cases.

The service, launched in August 2002, is composed of five distinct products:

- A searchable database of all reported cases.

- Core documents — docket sheets, briefs and transcripts — for each case.
- An e-mail update of new cases from the previous week.
- A quarterly journal with articles by trial attorneys, law professors, judges and experts.
- A series of "Web lectures" delivered by authorities on *Daubert* and scientific evidence.

A year subscription is \$495 with discounts for multiple users. You can instead purchase a two-hour session for \$25 or a half-hour for \$10. The full subscription includes the case law database, the e-mail update and the quarterly journal. Core documents and Web lectures cost extra. Briefs are \$20 each for subscribers and \$40 for others. Transcripts are \$30 for subscribers and \$60 for others. Documents and transcripts not in the database can be ordered for \$35 to \$60. Lectures are \$60 to subscribers, \$95 to others.

Conducting A Search

When you first log on, you arrive at the main page, where the search fields are set out in a box to the left. To the right, another box lists available Web lectures. In the center of the page is general product information.

You can search the database using any combination of the 10 available search fields. They allow you to search by expert's name, expert's discipline, specific federal or state court, area of law, party, judge, attorney, year and key word. You select the discipline, court and area of law from a drop-down list. You are permitted to select multiple disciplines.

In addition to these fielded searches, The Daubert Tracker recently added full-text-searching of opinions. It supports natural language and Boolean searches as well as more sophisticated techniques such as "Fuzzy" searching that will find a word even if it is misspelled.

Once you have entered a search, you come to a results screen with a list of the matching cases, showing for each the jurisdiction, court and case caption. Next to each listed item is a "View Case" button; clicking this takes you to the details of the case.

The main screen for each case has five tabs across the top: Case Details, Opinion, Docket, Briefs and Transcripts. Cases added to the database since

January also have a sixth tab, Summary.

The screen opens by default at Case Details, and begins with the experts — not just the ones who matched the search, but all who were challenged in the case — showing name, discipline, area of expertise and disposition (e.g., testimony admitted). The Details screen also lists court, parties, docket number, citation, counsel, judge and area of law.

Here is a key area in which the The Daubert Tracker distinguishes itself from other case law databases, said MDEX CEO Myles Levin. Even if the case never mentions the expert's name or expertise, The Daubert Tracker provides it and assigns a discipline.

From Case Details, you can click on any of the other tabs to reveal:

- *Opinion.* This is the full text.
- *Docket.* This is case docket listing pleadings and other filings. Order any of them by checking the box next to the item.
- *Briefs.* This feature lists any briefs available for purchase. The site provides briefs for appellate cases only, and then only for cases where the brief was available from the court or other source.
- *Transcripts.* This feature lists any transcripts available for purchase. Levin describes the collection of transcripts as "in its infancy," but he

is pursuing ways to add more.

- *Summary.* Only cases added since January include summaries.

If a brief, transcript or other document is available for purchase, the price is shown to the right of the item's description along with a check box to add the item to a "shopping cart." Once you have "checked out" by entering your credit card information, you go directly to a download page showing that item and any others you have purchased. You can download it immediately or anytime afterward.

Thousands more cases were expected to be added soon, Levin said. These include:

- State cases, such as the 1976 California decision adopting *Frye*, *People v. Kelly*, and its progeny. Levin said his staff identified the seminal cases for each state, collected all cases that cited them, and tracked down the experts' names and areas of expertise.
- More than 4,000 unreported cases, including pretrial evidentiary hearings.

The company also plans to add the ability to search by rule. Levin's staff found that many *Daubert*-type cases cited the applicable rule of evidence — most often Rule 702 of the Federal Rules of Evidence — but never mentioned the

Daubert decision. He located 3,600 such cases and was adding them to the database, along with the ability to search cases by cited rule.

The Daubert Tracker is not without its shortcomings. Among the most apparent:

- Inconsistent availability of briefs, transcripts and supporting documents. You never know until you click on the appropriate tab whether the brief or transcript is available.
- The initial results screen lists cases alphabetically, but does not show when they were decided. Adding dates here would be helpful. Even better would be the ability to sort results by date.
- Full-text cases have neither page nor paragraph numbers, so they cannot be cited without going to another source.
- Lack of a detailed help file. It makes up for this, however, with a thorough demo that serves as a tutorial as well.

Despite these shortcomings, The Daubert Tracker is a useful tool for trial lawyers. It is easy to use and understand, and provides precise information about expert witnesses not easily found elsewhere.

At \$10 for a half-hour session, a lawyer would be remiss not to check an expert through The Daubert Tracker.

Taxation of Personal Injury Settlements: Trap for the Unwary

By Jeffrey A. Baskies

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A recent decision by the California Court of Appeal, *Jalali v. Root*, highlights a serious problem for employment and personal injury lawyers. (See "Attorney Not Liable For Advice On Tax Consequences Of Settlement," *Lawyers Weekly USA*, June 23, 2003. Search words for LWUSA Archives: Jalali and bifurcated.)

While ultimately the attorney prevailed in this case, there is nevertheless an important lesson in this case for every

employment litigator and personal injury lawyer and for any tax lawyer working with one.

The Facts

In *Jalali*, a woman settled a suit for racial discrimination against her former employer for \$2.75 million. However, after attorney fees and taxes, she was left with only \$700,000. She felt cheated by the amount she paid in taxes, and sued her attorney, Walter Root III. She claimed that Root advised that she'd only be subject to income tax on her share of the settlement after deducting his contingent fee. The IRS, however, taxed the entire settlement amount and phased out her deductions for the fees that she paid as a result of the "alternative minimum tax" ("AMT").

The 4th District Court of Appeal in California overruled a trial court victory for Jalali and ordered judgment in attor-

ney Root's favor, basically stating that the plaintiff failed to show she could have done any better by way of a trial. The court found that Root's work in the underlying employment discrimination case to have been exemplary. The opinion stated that had Jalali refused the settlement (claiming that as a result of the taxes it wasn't enough to settle), then she could not prove she would have received more money at trial.

So, in this case, the attorney was not held liable. But he had to endure a malpractice suit, a trial (including a judgment against him) and an appeal. The case shows lessons that can be learned and ways in which others can avoid those problems.

The Problems

The problems highlighted in the *Jalali* case relate to the taxation of personal injury settlements (which for purposes of

this article include settlements in employment discrimination cases, as well). The taxation of personal injury settlements generally creates two types of problems. On the one hand, there is an issue of what portion — if any — of a settlement should be subject to tax. On the other hand, there is the issue of how the attorney fees will be treated for federal income taxation.

1. Taxation Of Settlements

Generally, recoveries for physical harm are not taxable while recoveries for non-physical injuries — lost wages, emotional damages, punitive damages, etc. — are taxable. And in many cases this means a portion (and sometimes all) of the damages recovered in personal injury suits are subject to federal income taxation.

While the merits of that policy may be debated, it has been well-settled law for some time. Unfortunately, too often the taxation of settlements is not adequately considered.

In order to adequately address the tax consequences of damages, the primary issue for lawyers to consider is what portion of a settlement can and should be attributed to non-taxable theories of recovery and what portion should be attributed to taxable theories of recovery. The allocation of damages can be a difficult and contentious issue. There is a strong incentive (currently there is potentially a 35 percent differential — the maximum income tax rate) to categorize as much of a settlement as untaxable as possible.

Attorneys representing their personal injury clients can sometimes get caught up in these issues. As you are drafting settlement agreements, you (or your clients) may push to categorize damages as non-taxable in the agreement. That leads to clients taking positions on income tax returns. And sometimes filing those returns leads to defending those positions in IRS audits or in Tax Court proceedings.

It is important to note the potential liability pitfalls that can trap personal injury attorneys when they are asked to advise clients in this area. To be blunt: Get too aggressive and your client may get burned. If you “promised” too much, the client may then sue you for giving bad tax advice. While you may have innocently tried to help your client take the “strongest” position possible, if you didn’t explain the risks (audit risks, interest and penalty risks, Tax Court litigation risks, etc.), your client may claim you malpracticed. And you will be forced to defend yourself — all for something that makes you no additional revenue and does you no particular good.

2. Deducting Attorney Fees

The second problem — the one highlighted in *Jalali* — relates to the deductibility of attorney fees.

As *Jalali* involved a civil rights claim, the damages were all subject to income tax either as non-physical damages or punitive damages. So that was not the issue. Instead, the issue was how the attorney fees would be handled.

In general, the income tax laws subject all forms of income to taxation. Taxpayers are then allowed to deduct certain expenses against the income when calculating their taxes. One important item of deduction is the legal fees incurred in the production of the income. As a result, in general, civil rights settlements (like the \$2.75 million one in *Jalali*) are taxable and the attorney fees incurred to generate the income are deductible on the litigant’s Form 1040.

If that were the whole taxation story, there would have been no case.

What’s missing is the impact of the “alternative minimum tax.” The AMT was designed to disallow certain deductions and recalculate a taxpayer’s return to “insure that millionaires (back when millionaires were *really* millionaires) couldn’t use itemized deductions and tax credits to shield themselves entirely from federal taxes.”

The AMT was created more than three decades ago and developed under a tax code that had a high rate of income tax and permitted a huge amount of deductions and credits. However, since 1981, there has been a steady movement in the tax code to reduce the marginal rates and eliminate many of the deductions. Thus, the tax environment, which gave birth to the AMT, does not exist today.

Further undermining the AMT is the fact that it was designed to only impact wealthy taxpayers but has grown to impact many in the “middle class.” Finally, and most importantly to this case, the AMT has “metamorphosed into a terror for civil rights plaintiffs,” as Judge David G. Sills found in his opinion for the California Court of Appeal.

The terror in this case came from the AMT reducing the amount of attorney fees that could be deducted by the client. As a result, the amount of income tax she owed turned out to be more than she claimed she anticipated (by more than \$300,000). Further, as a result of the higher tax, the client claimed the amount of the net settlement she received (after taxes and fees) was less than her bottom line acceptable amount to settle. Had she properly understood the amount she’d be left after fees and taxes, she claimed, she would not have accepted the settlement.

Thus, based on the facts reported in this case, it appears her attorney misunderstood the impact of the ATM when advising her client about the settlement. However, the attorney argued, the ATM is hard to understand and there is a split of authority on the issue of how to handle attorney fees. It is true, the federal circuits are split on whether a plaintiff should report the full settlement as income and then deduct attorney fees, or should report only the net amount (settlement minus fees) as income and don’t bother with the deduction.

As Judge Sills wrote: “The whole area is tailor-made for a national moot court competition, since it involves a substantial split in the federal appellate courts, and ultimately turns on a common law doctrine (the ‘assignment of income’ doctrine) on which reasonable minds could differ.”

Having said all of that, the real problem for personal injury and employment attorneys is not misunderstanding the AMT. Most citizens do not understand the AMT. The trap for employment and PI attorneys, instead, stems from holding themselves out as tax experts. By giving tax advice to their clients concerning the settlement of personal injury and employment cases, many lawyers unwittingly are holding themselves out as experts. And many litigants are relying on their tax advice when deciding whether or not to accept settlement offers. That’s where the trouble lies and the liability begins.

What caused the problem for Walter Root — the attorney/defendant in the *Jalali* case — was the following assertion (according to testimony quoted by the appellate court): “This is my field. I know what taxes are for discrimination cases.” By trying to explain the taxation to his client and not directing her to seek expert assistance to consider the impact of the AMT on the settlement, the attorney exposed himself to this suit.

But how many attorneys are immune? How often do personal injury attorneys counsel clients on matters just like this one? How often are employment attorneys asked to help clients in settlements by explaining the taxation of the settlement and/or the attorney’s fees?

This situation — or others like it — probably comes up often in the careers of litigators. To avoid problems or future malpractice claims, there are basically two choices: (1) personal injury and employment attorneys can become true tax experts and dive into the AMT regulations with gusto, or (2) they can adopt the lessons explained below.

The Lessons

The lessons in this case are actually fairly simple. Unless attorneys are prepared to become truly an expert on the issues of taxation of damages, then they should adopt a simple technique taken from television.

We all learned from the cops on "Hill Street Blues" (and other TV shows) that the only way to ensure *Miranda* rights were properly administered was to write them down on a piece of paper and read them to suspects. Similarly, lawyers opining on the tax consequences of settlements should write this down and read it to their clients prior to accepting any settlement offers:

"While I am an experienced personal injury lawyer, and I am generally familiar with the tax consequences of settlements of personal injury lawsuits, you should know your rights:

"1. You have the right to an attorney (or accountant) from whom you may seek expert opinions on the taxation of your settlement.

"2. You are generally obligated to include damages from personal injury suits (other than those compensating physical injury) in your ordinary income and report them on your form 1040.

"3. You generally have the right to deduct attorneys fees on your federal income tax return (form 1040) to help offset the income — if any — generated by your personal injury settlement.

"4. You have the right to pull your hair out trying to understand the 'alternative minimum tax' (the 'AMT'); however, at the least, you should know that the AMT may cause you to lose the benefit of any or all of your deductions.

These simple "settlement taxation warnings" may save you from years of future litigation troubles. Indeed, these simple warnings may have helped attorney Walter Root avoid a time consuming and obviously worrisome trial and appeal.

In this case, the court went out of its way to congratulate Root on a job well done in the underlying discrimination case, and noted it was a shame the client litigated against him. But that just goes to show you that even a job well-done can lead to future headaches.

So let's be careful out there.

Neil Ferstand, CTLA Executive Director, has authored several Law Letters to membership. We have included three of the most recent letters in this column.

Reminding them what you stand for

"Attacking trial lawyers is a cheap applause line, but it works. It's almost impossible to go too far when it comes to demonizing lawyers." Frank Luntz, pollster, *Language of the 21st Century – House Majority Briefing Book*.

You have to hand it to Frank Luntz, particularly in view of the fact that his premise has found purchase within a large segment of the business and medical community, as well as Congress, a growing number of state legislatures, and, most damaging, the jury pool.

His remarks shouldn't be surprising really; the effort to remake public policy and the civil justice system has been decades in the making. To be successful, proponents need only the confluence of a favorable political climate and sophisticated misinformation campaign to boost it to success. Decades of demonizing trial lawyers for so-called lawsuit abuse have left a wake of a confused and sometimes bitter public which, more often than not, unwittingly supports "tort reform."

Recently, here in Connecticut, the medical community (shadowed by the insurance industry) has gone flat out to strip ordinary citizens of their constitutional right to represent their community by sitting as jurors to decide malpractice damages. Current tort reform proposals, particularly damage caps, replace jurors with a pre-packaged brand of justice, pre-approved by the insurance industry.

If these kinds of concepts are adopted and expanded, corporate America will own justice for the foreseeable future.

This past March 31st, at the outset of a major tort reform effort in Ohio, the *Dayton Daily News* summed the effort up in an editorial "...here's what the business community and politicians doing their bidding really are saying: You ordinary citizens — can't be trusted. You are too stupid to understand evidence presented in personal injury cases. You lack the integrity to be fair. The judicial branch of government requires radical change. The public's power, as jurors, to render justice should be stripped away. ***Leave it to us, they say, hand us the keys to the courthouse.***"

At the risk of stating the obvious, representing plaintiffs in this climate isn't too comfortable. And I hope that by now it's not necessary to remind you that this is happening in Connecticut.

As Pastor Neimoller put it in the most quoted Holocaust text: "First they came for the Communists, but I was not a Communist-so I said nothing. Then they came for the Social Democrats, but I was not a Social Democrat-so I did nothing. Then they came for the trade unionists, but I was not a trade unionist. And then they came for the Jews, but I was not a Jew-so I did little. Then they came for me, there was no one left who could stand up for me."

All over the country, they are coming for the trial lawyers. Trial lawyers in Connecticut are still standing. Let's make sure you take every opportunity to remind whoever will listen what you stand for. Do it often, starting now.

The Litigation Industry and Its Depredations

"There is virtually no business or profession that is not under siege by the *litigation industry*. As a result of the industry's *depredations* against the people of Connecticut there is a palpable ground swell that will inevitably result in meaningful tort reform."

Dr. Leonard Ferrucci, Chair
Legislative Committee — Fairfield County
Medical Association
Stamford Advocate 11/20/03 - Letter

Dep • re • da • tion (v.) 1. A predatory attack; a raid. 2. To ransack; plunder. **(Hey, he's talking about you!)**

Now the time is coming ripe for the business community to accomplish its wish list, virtually all of which is calculated to make life difficult, if not impossible, for citizens who try to navigate through the court system. If ever there was a time for business interests attempting to pass the legislation they have long sought, such as caps on damages, further restricting vicarious liability and immunities of every stripe, there could hardly be a better public atmosphere.

A clear example of this coordinated effort came recently in an op-ad on the editorial page of the *New York Times* placed on behalf of the Washington Legal Foundation (WLF). A self described advocacy and communication organization "dedicated to educating policy makers and the public," a major portion of WLF's fund-

ing emanates from the Scaife Foundation. They're the folks that brought us the American Tort Reform Association (ATRA) and countless other right wing think tanks and pseudo-research organizations.

WLF Chairman, Daniel J. Popeo, has this to say: "Unlike most other industries in America right now, the **litigation industry** is operating in an endless bull market. But without a regulator, that bull will remain out of control, running roughshod over our economy. Perhaps it's time for the public to seriously consider effective government oversight of the **litigation industry.**"

Litigation Industry: Is Dr. Ferrucci clipping the editorial pages of the *New York Times*, or did he come up with the phrase by himself? No, more likely he is singing from the same songbook as the American Medical Association, a long-time member of ATRA.

Matters not. What does matter is that trial lawyers are themselves under siege and must realize that they can only count on one another in a combined effort to strike back through education and advocacy — telling policy makers and the general public about the value of the civil justice system.

Along these lines and parallel with CTLA, a few of our members have been putting their heads together developing ideas designed to advance the cause. If you'd care to join this discussion, please send me your thoughts. nferstand@cttriallawyers.org. Short of that, all I ask is that during this most difficult time when plaintiff rights are continuously under attack — that you continue to support CTLA. ***It truly is the only voice of the plaintiff's trial bar in Connecticut and it deserves your continued and active support.***

Will There Be Justice in Athens?

"The Greek philosopher Thucydides was once asked; "When will there be justice in Athens? He responded "There will be justice in Athens when those who are not injured are as outraged as those who are."

Lately, in legislative matters regarding tort reform, we often hear from trial lawyers that despite the arguments proffered by the other side, "**we will prevail because we're right.**"

In the current political and media climate, regardless of the preponderance of the evidence and the strength of your argument, it takes more than being "right" to prevail. It takes a clear understanding of who and what you're up against. So far, revelations in this area have been few and far between and,

unfortunately, usually ignored.

Chief Justice William H. Rehnquist wrote not long ago that ".....the life of the law is not political philosophy but experience." *California v. U.S.*, 438 U.S. 645, 648, (1978) (Rehnquist, J.) To the contrary, in our era, the life of the law is evolving according to political philosophy. ***Or, more accurately, raw political power disguised as political philosophy.***

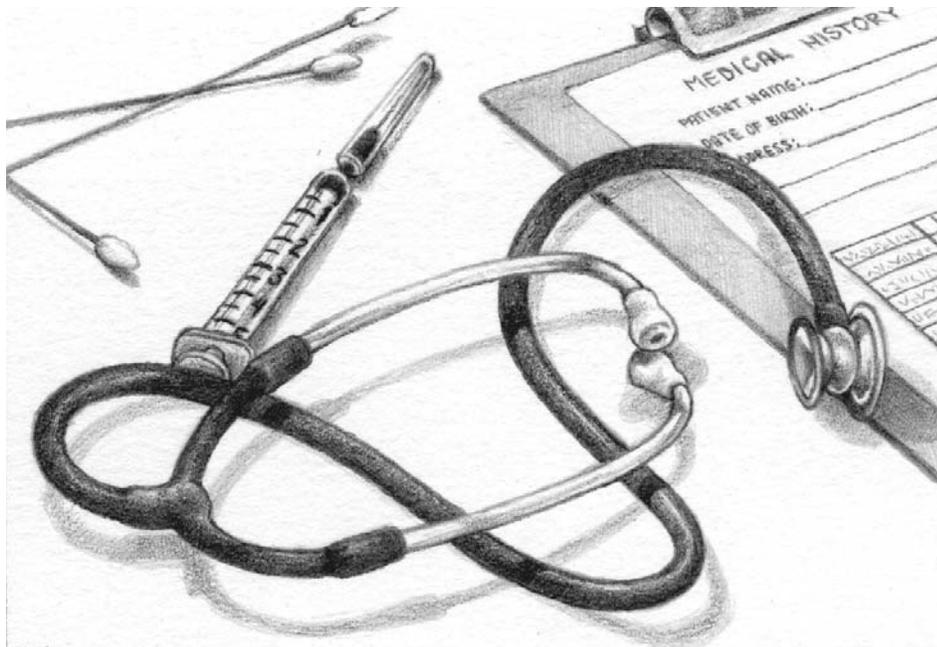
Propounding this philosophy is a network of over 500 seemingly independent organizations and think tanks. They have proliferated over the last three decades, founded, supported and controlled primarily by five foundations. They were named in a 1999 National Committee for Responsible Philanthropy study entitled "\$1 Billion for Ideas."

They are the Scaife Family Foundation, Olin Foundation, Coors Foundation, Bradley Foundation and the Koch Family Foundation.

The Commonweal Institute, Menlo Park, California, is a nonprofit, nonpartisan think tank and communications organization committed to advancing a moderate to progressive agenda. On October 1, 2003, The Institute released a comprehensive white paper entitled, "**The Attack on Trial Lawyers and Tort Law.**" ***This is a critical wake-up call to anyone who is at all interested in what lies behind the political agenda and the attack on trial lawyers, their clients and the civil justice system.***

The carefully referenced report describes the huge movement behind the tort reform effort in illuminating detail. It exposes tort reform advocates' broad political agenda. It outlines their anti-government ideology that advocates privatization, Social Darwinian competition and unregulated markets as the solutions to all social problems. Their manipulating and false messages push public attitudes closer to their ideology. They are incrementally creating a political climate favorable to politicians and public officials who advocate tort reform.

In this milieu, there will be no "**justice in Athens**" unless trial lawyers vocally enter the debate and proactively mitigate this growing threat. ***For your copy of the Commonweal Institute report,*** please see the front page of CTLA's website listed above or call CTLA at (860) 522-4345.





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Newsworthy items of general interest

The Free Market Versus Tort Reform

Michael Collins, CBS Marketwatch, November 5, 2003. For complete story, search <http://.cbs.marketwatch.com>.

Michael Collins states that he has a question for politicians who call themselves “conservatives”, yet are pushing for laws to limit legal damages or make it more difficult for patients, investors and consumers to sue. The question is:

What ever happened to the principle that less government intervention is better?

Five questions to ask conservatives, according to Mr. Collins, are:

1. If it's wrong for government to limit the prices pharmaceutical companies can charge for drugs, and the amount doctors charge for treatment, why would it be right to limit the amount of damages a harmed patient can be awarded in a lawsuit?
2. If you believe it's too hard for doctors to get malpractice insurance, why is it the consumer's fault, rather than the insurance industry or the medical system?
3. If you believe the government shouldn't tell a company how to do business, or how much it can pay its executives, why would you support a limit on how much lawyers can make suing those businesses on behalf of defrauded consumers or investors?
4. If you believe government shouldn't stop companies from moving off shore to avoid regulation and taxes, why would you believe the government should prevent plaintiff's lawyers from “venue shopping” to find a court more favorable to their consumer lawsuit?
5. If as a conservative you believe in “state's rights,” why would you want to force class action consumer suits out of state courts and into federal courts?

Want to be Interviewed on the Radio? Well, Just Pay Up

By Jacques Steinberg

This article appeared in The New York Times on October 27, 2003. Mr. Steinberg is a reporter for The Times.

The caller to Joanne Doroshow's office last month described himself as working for Sky Radio Network, a company that produces programming for Forbes Radio, one of the audio channels available to passengers on American Airlines.

As the executive director of the Center for Justice and Democracy, a nonprofit organization that casts itself as a champion of consumer rights, Ms. Doroshow was asked if she would be interviewed for a talk show examining the issue of tort reform. When Ms. Doroshow agreed, she said, the caller informed her that it would cost her organization \$5,900 to have its point of view heard. When Ms. Doroshow balked, she said, the caller offered to see if it could be reduced to \$3,500.

“I was furious,” Ms. Doroshow said. “I thought this was another way corporations are dominating what people hear, and are getting only their side presented because they're willing to pay for it.”

Ms. Doroshow was so angry that she directed lawyers for the center, whose board includes Erin Brockovich and Ralph Nader, to draft a complaint letter to the Federal Trade Commission, which the center intends to submit today. It asks that Sky Radio, which also produces programming for United, Delta, Northwest and several other airlines, be required to disclose prominently that its news-style programs are actually little more than paid advertisements.

That the regulation of airline audio programming represents something of uncharted territory was underscored by the reaction of a spokesman for the trade commission. When reached on Friday, the spokesman said he was not sure if airline programming fell under its purview, that of the Federal Communications Commission or the Department of Transportation.

In writing to the trade commission, Ms. Doroshow said she wanted to ensure that producers of airline programming —

available to three million passengers a month on American Airlines, a unit of the AMR Corporation, according to Sky Radio — were held to the same disclosure standards as Web search engines (which have been directed by the F.T.C. to disclose if a company has paid for high placement) or infomercials (which generally are supposed to announce whether guests have been paid).

Marc Holland, the founder and chief executive of Sky Radio, said that Forbes Radio consists of 30 minutes of actual news content (supplied to Sky Radio by Forbes editors) followed by about 90 minutes of public-affairs programming known as “The Business and Technology Report” that is assembled by Sky Radio. (The company said it had an arrangement for an audio channel on Delta flights that included news programming from National Public Radio.)

It is this latter part of programming on the Forbes channel that Ms. Doroshow was invited to appear on, Mr. Holland said. And he is unapologetic about the price she was asked to pay. He said that hundreds of companies — “Oracle, Dell, every tech company, most of the pharmaceutical companies, all the big energy companies” — have agreed to make their representatives available for interviews, for a similar fee.

Last month, the company announced in a news release that it had interviewed its “3,000th client,” which it said was a tie between an executive from British Petroleum (who had been interviewed about alternative energy initiatives) and a lawyer from McDonald's (who was interviewed about corporate governance). Both had paid to be interviewed, Mr. Holland said.

Because Sky Radio must pay the airlines an undisclosed fee for its airtime and does not accept more conventional advertising, the fees paid by its guests are among its only sources of income, Mr. Holland said. The seven-year-old, privately held company projects revenues of about \$5 million this year, he said.

While Mr. Holland said that an announcer intones at several points in the latter part of the broadcast that “the guests on the show may have paid a fee to appear,” he acknowledged that no such disclaimer appears in the programming guide in the back of the airline's maga-

zine. The only clue that the Forbes programming is separated from the paid programming is a thin line.

Asked if the thin line in the airline magazine was sufficient to distinguish Forbes' independent programming from that of Sky Radio, Monie Begley, a Forbes spokeswoman, said it was.

"It's very clear to me," she said, before acknowledging: "I don't know if it is for a passenger."

To be interviewed free, Mr. Holland said, "you have to be a senator. You have to be a president. You have to be a secretary of state. You'd have to be huge. Or you'd have to have influence with us. It's a gift."

Among the precious few on whom he has bestowed that gift, Mr. Holland said, were former President Jimmy Carter and Madeleine K. Albright, the former secretary of state, whose interviews are prominently displayed this month on the Sky Radio Web site, www.skyradionet.com.

Of Ms. Doroshov's complaint that she was effectively being shaken down, Mr. Holland added: "Let them take it up with the Better Business Bureau."

* * * * *

Litigation Boom Spurs Efforts to Shield Assets

by Rachel Emma Silverman

This article appeared in The Wall Street Journal on October 14, 2003.

THE DRUMBEAT of litigation against doctors, accountants, business executive and other professionals is prompting a growing number of people to play defense: They're putting their money where creditors can't get to it.

A key technique is the so-called asset-protection trust. The idea is to put a big chunk of your money in an irrevocable trust. The trust is run by an independent trustee, who may opt to give you payments from time to time. If done correctly, the trust — which has to be located in a jurisdiction that has passed special laws — generally can't be touched by creditors if you're sued or file for bankruptcy protection. Doctors have been setting up asset-protection trusts for years to protect themselves from malpractice litigation. But with the latest round of corporate scandals and the passage of the Sarbanes-Oxley Act, which makes top executives and directors accountable for their company's financial results, more

executives are seeking asset-protection trusts.

"They don't want to lose everything they've worked hard for," says Gideon Rothschild, a partner at law firm Moses & Singer LLP, in New York.

Nobody tracks exactly how many asset-protection trusts are drafted each year, especially since many are located in exotic offshore jurisdictions. But lawyers and trust companies say interest in them seems to be increasing. National City Corp's Delaware-based trust company, which started only 10 months ago, expects to pull in \$200 million in asset-protection trust business in its first two years. John Dadakis, a partner at Morrison & Foerster in New York, has seen his asset-protection work increase fourfold since the late 1990s.

Most asset protection trusts are located offshore, in locales like the Cook Islands, Nevis and Gibraltar, which have attracted sizable trust business by enacting laws that protect trusts from U.S. creditor claims.

But the number of U.S.-based trusts is now picking up as states change their laws, partly to lure people who are worried about putting their wealth abroad. Alaska, Delaware, Rhode Island, Nevada, and as of this year, Utah, now permit these trusts for both residents and non-residents. About 1,500 domestic asset protection trusts holding more than \$2 billion in assets have been created since 1997, estimates Richard Nanno, managing director and trust counsel, Wilmington Trust Co., Del.

Rising malpractice insurance rates are a key reason. In Florida, for example, climbing premiums have spurred many physicians to forgo coverage altogether, and instead use other asset-protection techniques. Marc Singer, a partner at Singer Xenos Wealth Management, Coral Gables, Fla., says that about 60% of his physician clients "go bare" and drop malpractice insurance because of the high cost and limited coverage of policies. That's a big jump from 10 years ago, when only about 20% of his clients practiced without insurance.

A recent survey of individuals with more than \$1 million in assets found that 35% had some form of asset-protection plan, compared with just 17% of respondents in 2000. And more than 61% of the respondents who didn't have an asset-protection plan were interested in creating one, up from only 43% in 2000, found

the study by Prince & Associates, Redding, Conn., a market research and consulting firm.

Domestic asset-protection trusts are controversial, because they haven't yet been tested in court and it is still unclear how well they'll hold up. Article IV of the Constitution says that each state should have "full faith and credit" in the legal judgments made in other states. Lawyers, therefore, worry that a plaintiff who wins a judgment in a New York court might be able to enforce the ruling against an asset-protection trust created in Delaware.

"We are very careful to point out that this is not necessarily bulletproof, but that it is the best thing going," says Peter Valente of law firm Blank Rome.

People setting up asset-protect trusts have to pay attention to avoid running afoul of the law. While creating an offshore asset-protection trust may sound sketchy, they're legal as long as they're not used to evade income taxes; you have to disclose the assets and income in the trust to the Internal Revenue Service.

Another caveat: People shouldn't set up an asset-protection trust if you know you have a potential legal action looming on the horizon. Courts are likely to rule against such a trust, calling it a "fraudulent conveyance," if it is set up right before a lawsuit, bankruptcy or divorce.

Brian D. and Elizabeth G. Weese, the owners of a now-defunct Baltimore bookstore chain, recently faced several lawsuits charging that they fraudulently moved nearly \$20 million in assets to a Cook Islands trust called "Book Worm II" to avoid creditors ahead of bankruptcy. Several months ago, the Weeses settled the case for more than \$12 million; the money was provided by Ms. Weese's father, Rite Aid Corp. founder Alexander Grass.

Domestic asset-protection trusts also can also be used to ease estate taxes. Because you give your assets to the trust, the funds are out of your estate for estate-tax purposes. However, the trust can't make payments to you on a regular basis, or that would invite the scrutiny of the IRS. "You can't use the trust as a checking account," says Mr. Nanno, of Wilmington Trust.

Asset-protection trusts don't come cheap. Offshore asset-protection trusts can cost anywhere from \$20,000 to \$50,000 to set up, plus annual administrative fees of \$2,000 to \$5,000 and asset-

management fees of about 1% on the assets placed in the trust. Domestic asset-protection trusts cost less, running anywhere from \$3,000 to \$10,000 in attorney's fees, plus asset-management fees of roughly 1%.

Because of the high fees, asset-protection trusts generally don't make sense unless you're willing to put at least \$1 million in them. Still, a few financial-services companies, like National City Corp., cater to smaller trust accounts of about \$500,000, attractive to professionals at earlier stages in their careers.

Lawyers caution that you shouldn't put all of your assets into the trusts, because you're only a so-called discretionary beneficiary. That means you won't have regular access to the trust assets.

* * * * *

CTLA's Lobbying Expenditure Defended: Much Less Than the Medical Side of the Issue

The following letter by Carl Anderson, treasurer of CTLA, was printed in The New London Day on November 24, 2003. Carl responded to an earlier editorial in The Day on the issue.

Letters To The Editor:

Regarding The Day's editorial, "For Sale: State Capitol" published Nov. 18, this year's Connecticut Trial Lawyers Association's (CTLA) lobbying expenditure doesn't come close to the combined total spent by the Connecticut Medical Society, the Connecticut Medical Insurance Co., hospitals and others, all clamoring to place a value of \$250,000 on the suffering of patients killed and injured by negligence. Lost limb? Blindness? Can never have children? Grossly disfigured? No matter, one size fits all, no jury need judge the fairness.

Doctors and insurance companies against patients is an unlikely alliance since the doctors are currently litigating against insurance companies over reimbursement practices. But a \$250,000 cap on non-economic damages accomplishes the same for each — lawsuits by people with low or no wages and, hence, low money losses.

It's true, a good portion of our lobbying budget was spent laying evidence before legislators that showed caps were unfair, ineffective and would literally rob many

of the injured — women, children and elderly — of their right to the courthouse.

Most of the rest was spent on telling legislators about measures that could really make a difference, like requiring insurance companies to open their books and justify their obscene rate increases, and requiring hospitals and doctors to take proven measures to reduce the medical negligence that underlies the problem. And the doctors and hospitals kept singing their "one-note caps tune."

Our lawmakers weren't buying. Lots of victims visited them in the course of their investigations. It wasn't too hard for lawmakers to identify with them and refrain from victimizing them a second time by taking away their rights.

CTLA is proud that year after year we spend our lobbying budget fighting the efforts of insurance companies and countless other corporate interests looking to take away the injured person's right to challenge them in a court of law. We're likely to continue this practice into the foreseeable future with increasing dedication.

Carl D. Anderson
Norwich

* * * * *

Knowing, Not Doing: Study Measures Gap Between Medical Knowledge, Practice

The following is an article by Matt McMillen that appeared in The Washington Post on September 30, 2003.

Each year, more than 57,000 people die because they do not receive the care that the medical profession and health care community agrees they need.

According to "The State of Health Care Quality 2003," a report released September 18 by the National Committee for Quality Assurance (NCQA), this is not a measure of medical errors or an analysis of patient access to health care. It is an accounting of the simpler but perhaps more sobering fact that, despite record per-capita spending on health care, the quality of U.S. medical practice badly trails the state of medical knowledge. Effective treatments for many conditions are available, the report asserts, but many patients are not receiving them.

"The report's findings don't surprise me at all," said Jim Martin, president of the American Academy of Family

Physicians (AAFP). "We have an incredibly dysfunctional healthcare system."

The death toll, the report states, is only one consequence of a "health care system [that] regularly fails to deliver care we know to be appropriate." There is a huge financial burden as well. The NCQA estimates that more than \$1 billion is spent each year on hospital care that would not have been needed if more people received timely preventive treatment and that businesses lose \$11.5 billion due to nearly 41 million needlessly missed work days.

In preparing its report, the NCQA, an independent, nonprofit monitor of the health care industry that receives both corporate and foundation support, drew on Quality Compass, its database of clinical performance, accreditation and member satisfaction reports from more than 500 commercial, Medicare and Medicaid organizations.

Focusing on hypertension, cholesterol management, depression, diabetes and other health conditions for which effective management strategies have been developed, the report assessed the rate at which each condition was properly treated by health plans, hospitals and practitioners. Overall, the authors found the performance of the health care system to be "wildly inconsistent."

In New England, for example, 93 percent of pregnant women received timely prenatal care from commercial health plans. The number was 81 percent in South Central states, which include Mississippi, Alabama, Kentucky, Texas and others. In the South Atlantic region, which includes the Washington area, that rate was 86 percent. The report attributes 1,500 avoidable infant deaths each year to a failure to deliver timely prenatal care.

Percentages of patients receiving appropriate breast cancer screenings, beta blocker treatment after a heart attack, advice on how to quit smoking, and other preventive care also vary widely from region to region.

"The good news," says Carolyn Clancy, director of the Agency for Healthcare Research and Quality (AHRQ), a division of the U.S. Department of Health and Human Services, "is that performance at a high level is possible . . . but there is a lot of room for improvement."

Proper treatment and management of depression and other mental health conditions, says the report, remains a "criti-

cal shortcoming of our health care system.” Only one in 10 Medicare patients sees a doctor the recommended three times after depression is diagnosed.

That’s if you can get a diagnosis. Because many managed care organizations delegate mental health coverage to other providers, primary care physicians often won’t be reimbursed if they screen for depression or other mental disorders.

Martin of the AAFP is blunt about the often frustrating reality of his practice: “If I code something as depression, I don’t get paid,” he says. “If I code it as insomnia, I do . . . [Then] when the quality assessment people come around, they say we are not treating enough people for depression.”

For Seiji Hayashi, a family physician at the District’s Walker Jones Community Clinic, another frustration is the lack of technology to aid communication: “Patients often go from clinic to clinic. . . . Without technology, we can’t collaborate with colleagues [to give those patients continuity of care].”

Effective communication with patients is also crucial, especially in the case of chronic conditions like hypertension. “I have a lot of trouble controlling [patients’] blood pressure,” says Hayashi. “Among my patient population, there is difficulty understanding when and why they take the medications.”

With improved technology, best practices standards and guidelines for could be better communicated among physicians. Beta blocker and diuretic medications, for example, are now considered a first line of treatment for controlling blood pressure. But, says Hayashi, “I see so many patients on calcium channel blockers [whose doctors] have never put them on anything else,” even though these drugs have been shown to be less effective than beta blockers and diuretics. “That is a lack of use of evidence.” The NCQA report estimates that failure to adequately control high blood pressure leads to more than 28,000 deaths per year.

“If there is a reason why” the doctor is not following the standard treatment, says Oscar Morgan, chief operating officer of the National Mental Health Association, “the doctor should be held accountable and should explain his or her reasons.”

Among the NCQA’s recommendations for change is a move toward greater transparency and accountability within the health care system that will allow

consumers to select health plans based on performance. And, says the AHRQ’s Clancy, “that is what this report does. . . . It gives people a sense of how the [health care system] is doing over time.”

Meanwhile, there are all those people dying and all that money being spent needlessly. As former Sen. David Durenberger, an NCQA board member and chairman of the Minnesota-based National Institute of Health Policy, says, “You look at these results and you wonder how people can take so long to adapt to what we know is right.”

* * * * *

Many Doctors Lack Training to Ease Patients’ Severe Pain

This article by Diane Meier appeared in USA Today on September 8, 2003. Diane Meier, M.D., a professor of geriatrics at Mount Sinai School of Medicine, directs the school’s Center to Advance Palliative Care and Hertzberg Palliative Care Institute.

As a physician, I often witness the suffering that can come with life-threatening illness. I have been called to the bedsides of very sick patients who are in pain, extreme discomfort or in states of serious depression. In these circumstances, I feel the responsibilities of my profession most acutely: to heal, to ease hurt and, above all, to do no harm.

This is not always easy, as a host of recent studies suggest:

- A majority of patients with cancer and other serious illnesses suffer from pain and discomfort, despite the fact that most such symptoms can be safely and effectively treated.
- Oncologists report that two-thirds of their patients suffer from pain, and 75% of these patients categorize their pain as moderate to very severe.
- Untreated pain is common. A study of 9,000 hospitalized, severely ill adults found that half of the conscious patients who died in the hospital experienced moderate to severe pain during their last 72 hours of life.

If this is not troubling enough, consider the disturbing results of a recently released survey I conducted with physicians who treat seriously ill patients. Nearly 20% of them reported that they had received at least one request to help a terminally ill patient die. The major reasons for these requests were intolerable

pain and physical discomfort. I can think of no clearer signal of unbearable distress than patients asking for help in hastening their own deaths.

Many Americans argue that such findings support the need for physician-assisted suicides. I disagree, because I believe we doctors should help improve the quality of our patients’ lives before we consider helping to end them.

Palliative care

Physicians want to relieve their patients’ suffering, but most simply do not know how. Despite some improvements in medical education in palliative care, doctors often still are not trained to treat the pain and complex physical and mental distress of life-threatening illness. During nine years of medical education, I didn’t hear a single lecture on pain management.

The solution is simple. We can dramatically improve physicians’ skills in relieving pain, in communicating with patients and their families and in recognizing and treating psychological symptoms such as depression and anxiety. This can best be accomplished by establishing palliative care programs in hospitals and nursing homes, where the sickest patients are treated and where doctors and nurses receive bedside training.

Palliative care programs specialize in treating the pain and suffering of seriously ill patients to maximize quality of life. As the director of such a program at a large teaching hospital, I have seen thousands of patients find relief and avoid the discomfort and despair that might drive a person to want to end his or her life. Numerous studies show palliative care programs achieve similar results in a variety of health care settings.

Financial disincentives

Further, our health care system does not now reimburse financially pressed hospitals and overworked physicians for the enormous amounts of time required to aggressively treat the pain, complex symptoms and mental distress that destroy a patient’s quality of life. Medicare, Medicaid and commercial insurers must ensure that palliative care exists in hospitals and nursing homes by building payment and quality incentives into the reimbursement system.

Finally, families of the seriously ill must demand palliative care services for their loved ones who are suffering. Only then will these essential programs be readily available to those most in need.

In an ironic twist, one of the most compelling arguments for these solutions comes from Oregon, the only state where physician-assisted suicide is legal. In almost half of Oregon's reported requests for assistance in dying, patients' desire for assisted suicide prompted their doctors to relieve pain more successfully or to refer them to hospice for comprehensive care of all their needs near life's end. The level of suffering that prompted the cry for help was treated, and life, once again became worth living. That's what I call good medical care.

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Medical Injuries Wreak Havoc Beyond Patients' Pain and Suffering

By Kathleen Fackelmann

This article appeared in USA Today on October 8, 2003.

Medical injuries in U.S. hospitals that are largely preventable add up to a substantial burden in terms of unnecessary deaths and additional days spent in the hospital, a study out Wednesday says.

More than 32,000 Americans each year die as a result of such errors, the study says. But even people who survive pay a price: They often have to pick up some fraction of the cost of the extra-long hospital stay, says study author Chunliu Zhan of the Center for Quality Improvement and Patient Safety, part of the U.S. Department of Health and Human Services.

A 1999 report by the Institute of Medicine said up to 98,000 Americans die every year from errors that occur in hospitals, doctor's offices, outpatient clinics and elsewhere. The new study, published in the *Journal of the American Medical Association*, takes a detailed look at the medical mistakes that happen just in hospitals.

The researchers pored over records from 994 hospitals in 28 states, a sample that represented about 20% of the nation's hospitals. The team focused on 18 specific injuries that can be caused by human error and added up the burden, including extra hospital time and added costs.

Nationwide, the team estimates such injuries result in about 2.4 million extra days in the hospital and \$9.3 billion in extra charges for longer stays and more care.

The report uncovered a number of medical injuries, such as:

- Potentially deadly infections of the bloodstream that can crop up after surgery, the No. 1 problem the researchers found. The team found that people who got such infections had a 22% higher risk of dying. Survivors had to stay an extra 11 days and had a hospital bill that was \$58,000 higher than people who didn't get an infection.
- Reopening of a wound after surgery, often because of an infection. That injury means patients often spend 10 extra days in the hospital and have hospital charges that are \$40,000 higher.
- Leaving a medical instrument or sponge in a patient's body, a mistake that rarely kills but often leads to two extra hospital days and \$13,000 in additional charges.

Zhan says the surgical infections often occur when staff members don't wash hands or instruments properly.

But Nancy Foster of the American Hospital Association says that in many cases infections occur even though staff members have followed state-of-the-art infection control. The bugs that cause these infections are constantly changing to evade even the strictest control measures.

Many of the injuries in this report can be chalked up to crisis conditions in which doctors and nurses must work at lightning speeds to save a patient's life, the hospital association's Rick Wade adds.

* * * * *

New Study: Education Tied to Medical Malpractice Risk

The following is a summary of an article appeared in Best Wire on October 10, 2003. For a complete story, search www.ambest.com. Only subscribers can access this article.

Researchers and actuaries long have known that a doctor's specialty has a lot to do with the risk of being sued — thus the sky-high premium rates paid by neurosurgeons and obstetricians. But a new study in the October issue of *Quality and Safety in Health Care* is the first to draw a link between education and risk, adding yet another wrinkle to the medical-malpractice debate. The study, pub-

lished by an arm of the British Medical Association, looked at 30,000 U.S. physicians and found that the medical school a doctor attended was a clear predictor of whether that doctor would be sued for malpractice. Researchers, led by Dr. Teresa M. Waters of the University of Tennessee Health Science Center in Memphis, examined malpractice claims over an eight-year period involving 30,000 doctors in Florida, Maryland and Louisiana. About 11% of those doctors were involved in lawsuits at some time during that study period. "Consistent differences in malpractice experience exist among medical schools," the study concluded, but researchers need to look at other explanations for those differences as well, Waters wrote. "Underlying these developments is the belief that these data provide useful information about a physician, but there is a relative dearth of empirical studies indicating what the value of that information is," Waters wrote later in the report.

* * * * *

Medical Ignorance Contributes to Toll From Aortic Illness

A simple seldom-used test can detect lethal aneurysms

The death of John Rosnow last summer illustrates one of modern medicine's most preventable failings. Mr. Rosnow collapsed after a daily exercise regime that included riding his bike seven miles. Yet the death of Mr. Rosnow, 70, was hardly inevitable. The aortic aneurysm that killed him had been growing for years, not days. Had he spent \$40 to \$150 on a non-invasive ultrasound test, his arterial bulge almost certainly would have been found. Then he could have undergone an insured surgical procedure that is 90% successful at repairing aneurysms. Aneurysms may be the most preventable common killer that doctors rarely warn about. They account for more deaths in the U.S. than brain cancer or AIDS. And by all accounts, aneurysm deaths are underreported because sudden, unexplained deaths are often simply labeled "cardiac events." Yet despite the growing accuracy of screening technology, the medical community has never made much effort to detect aneurysms, and most general practitioners never advise patients to get tested.

An article reporting these facts appeared in *The Wall Street Journal* on June 10, 2003, authored by Kevin Helliker. On November 11, 2003, in an article by Mr. Helliker and Thomas M. Burton, the *Wall Street Journal* ran a front-page piece captioned :

**Knowledge Gap
Medical Ignorance Contributes
to Toll From Aortic Illness
Many Doctors Don't Realize
Aneurysms Are Treatable; A Paucity
of Specialists**

After aortic aneurysms struck her ex-husband and his brother, Debra McMillan learned that the often-fatal condition can be hereditary. So last autumn, when pain suddenly ripped through the chest of her 19-year-old son, she rushed him to an emergency room in Omaha, Neb., and told the doctor about the family's medical history.

But she says the ER doctor at Nebraska Methodist Hospital dismissed her talk of aneurysms, which are bulges that can lead to lethal ruptures in the aorta, the body's largest artery. Instead, the doctor diagnosed Ms. McMillan's son, Tyler Kahle, with a minor lung infection and sent him home, she says. In following days, the young man and his mother visited their family physician and returned to Nebraska Methodist. During each visit, she asked whether her son's continuing chest pain could be connected to the family history of aneurysms. Each doctor answered no — but without ever examining Mr. Kahle's aorta, she says.

Eight days after his symptoms began, the young man died of a ruptured aorta. Ms. McMillan has filed a malpractice suit against Nebraska Methodist in state court in Douglas County, Neb. The hospital has denied any liability, saying it provided adequate care.

The Kahle case illustrates a deadly discrepancy between the available medical knowledge about aortic aneurysms and the ignorance of many front-line physicians. The discrepancy contributes to what may be thousands of unnecessary deaths each year.

A common misconception among physicians is that aortic disease is rare, when in fact it kills an estimated 25,000 Americans a year. That is a larger toll than that of AIDS and most kinds of cancer. Another misconception is that little can be done about aortic aneurysms. The reality is that improvements in diagnostic-scanning methods introduced since

the 1980s, and greater experience with aortic surgery, have vastly enhanced the ability to detect and repair aneurysms.

Behind these misconceptions is an anomaly in the medical profession's structure: There is no medical specialty devoted to treating or educating others about the aorta.

Aortic disease "falls squarely between about four different specialties," says Eric Isselbacher, a cardiologist at Harvard Medical School. "There's an education gap among physicians about aortic disease, and this gap isn't small. It's huge."

The depth of medical unfamiliarity with this illness became clear in September, following the sudden death of Hollywood star John Ritter, 54. He suffered an aortic dissection, a tear in the weakened wall of an aneurysm. Although dissection kills quickly by disrupting blood flow to major organs, the aneurysm that typically causes this event takes years to grow, during which time it can be detected and removed. Yet in media interviews after Mr. Ritter's death, doctor after doctor described dissection as rare and undetectable.

Such comments disheartened aortic experts. "I've been distressed by the series of physicians getting on the screen and calling this kind of death unpreventable," says Dianna Milewicz, director of medical genetics at the University of Texas Health Sciences Center in Houston. "The message should have been that John Ritter's children should be screened for this," adds John Elefteriades, chief of cardiovascular surgery at Yale-New Haven Medical Center. It hasn't been disclosed whether Mr. Ritter ever was checked for aortic problems.

Despite the diagnostic and surgical breakthroughs, recent academic studies suggest that there has been little or no improvement in a longstanding misdiagnosis rate of about 35% for aortic dissections, compared with about 5% for heart attack. Even with rupturing abdominal aortic aneurysms — a variety that tends to strike a highly identifiable group, men over 60 with a history of smoking and arteriosclerosis — studies have found a misdiagnosis rate of about 30%. The in-hospital mortality rate from aortic dissection hasn't declined in decades.

"No physician can diagnose a condition he never thinks about," observes Michael DeBaakey, an inventor of aortic aneurysm-replacement surgery in the

1950s and, at 95, still on staff at Methodist Hospital of Houston.

Medical News

This isn't the first time doctors have been slow to absorb news of medical advances. Hungarian physician Ignac Semmelweis discovered in 1847 that merely by washing their hands, physicians could avoid spreading infection. But medical leaders resisted his teachings, and hand-washing didn't gain wide acceptance for years. In the 1840s, rudimentary communication slowed the spread of knowledge. Today, many physicians complain they are so swamped by information — from journals, drug and device companies, and continuing-education courses — that they can't absorb all of the latest news.

In the case of aortic disease, this problem is heightened by the lack of blood-vessel specialists dedicated to getting out the word about aneurysms. Every other significant body part — brain, heart, lungs, bone and so on — boasts its own specialty association. Fifteen-thousand podiatrists in the U.S. focus on feet.

The aorta is the River Nile of blood vessels. It rises from the heart nearly to the neck, then descends through the chest and abdomen, carrying blood for every organ and limb. But only about 300 nonsurgical doctors in the U.S. specialize in blood vessels. Cardiologists are responsible for the cardiovascular system, and typically are very knowledgeable about the tiny coronary arteries that channel blood from the aorta back into the heart. But their training leaves many of them in the dark about aortic disease.

A small corps of aortic experts from various specialties are beginning to focus more attention on aneurysms. But there is a long way to go, especially in medical schools, where the experts say aortic problems typically receive inadequate study.

During eight years as a medical student and resident at West Virginia University, obstetrician Devin Ciliberti says he rarely heard any mention of aortic illness. "If it ever came up, it was like, 'This goes at the bottom of your list'" of possible diagnoses, says the physician, who finished his residency in 2001. In particular, research suggesting that pregnancy heightens the risk of dissection never came up, Dr. Ciliberti adds.

This all became relevant when 25-year-old Julie Neal Lee came to The Women's Hospital of Greensboro, N.C.,

last November. She was 37 weeks pregnant and in extreme distress, but clearly not in labor, Dr. Ciliberti says. He says he ordered tests for kidney stones, a pregnancy-related high-blood-pressure condition called pre-eclampsia and anything else he could think of. All proved negative. Hours passed, and the young woman was frantic with pain.

Finally, Dr. Ciliberti ordered a computerized-tomography, or CT, scan of Ms. Lee. "Even then, I wasn't thinking about aortic dissection," he says. The scan, taken more than seven hours after she arrived, showed an aortic dissection. Dr. Ciliberti performed an emergency Caesarean, saving the baby. But Ms. Lee died after aortic-repair surgery by another doctor.

Her parents, Harold and Robin Lee, say they blame Dr. Ciliberti for failing to diagnose the problem sooner, but they haven't gone to court. Dr. Ciliberti says, "I don't think a quicker diagnosis would have saved her, but I don't know for sure." He attended Ms. Lee's wake and funeral and says he has spent much of the past year learning about aortic dissection. Women's Hospital declines to comment.

Driving Progress

Specialists drive most medical progress, educating generalists and promoting prevention. Twenty years ago, few Americans had heard of prostate cancer, but urologists have spurred screening and awareness campaigns, and U.S. deaths from that disease fell 21% between 1990 to 2000.

With no comparable campaign, unfamiliarity with aneurysms prevails in many emergency rooms and physicians' offices. Michael Giusti, 44, entered the ER at Methodist Medical Center in Peoria, Ill., one night in June 1998, complaining of chest pain and asking whether his aorta should be scanned, says his wife, Kathy Schwindenhammer, who accompanied him. For 13 years, he had been undergoing scans to monitor an aortic aneurysm that previously hadn't caused any symptoms and only now was approaching a dangerous size, she says. In the ER, two residents picked up a textbook and began flipping pages before concurring with the primary physician on duty that a scan wasn't needed, she says.

In fact, aortic experts say that any person with an aneurysm who experiences significant chest pain ought to have a scan done. But the doctors at Methodist

Medical diagnosed Mr. Giusti with a pulled chest muscle and sent him home, his wife says. He died there that day of an aortic dissection.

The hospital has denied any negligence. But in 2002 it agreed to pay Ms. Schwindenhammer \$850,000 to settle a suit she had filed, Illinois state-court records show.

Twenty years ago, diagnosing aneurysms was extremely difficult, and surgery to repair the condition had a high mortality rate. The fatalism that surrounded the ailment — which can stretch a vessel normally the diameter of a garden hose to that of a soda can — was captured by a comment a century ago by medical pioneer William Osler: "There is no condition more conducive to clinical humility than aneurysm of the aorta."

Today, this shouldn't be true. Aortic aneurysms don't show up well on X-rays. But the advent of high-tech scans — such as CT; abdominal ultrasound; magnetic-resonance imaging, or MRI; and echocardiogram — have made aneurysms relatively easy to catch. (The scans cost from \$40 to \$2,000, depending on the aneurysm's location.) Medical geneticists have identified high-risk groups in whom the condition ought to be suspected. And with experience, surgeons have improved to roughly 90% the success rate of replacing damaged sections of aorta with Dacron hose.

One obstacle to disseminating information on the aorta is corporate profit. Medical-device and drug companies, which are playing an increasingly large role in shaping continuing-education seminars, tend to focus on products they sell, such as coronary stents, which are used to prop open clogged coronary arteries. Industry hasn't developed a comparable product for repairing aneurysms that is inexpensive or effective enough to replace most surgery. For cardiologists trying to keep up with their field, "pharmaceutical and device development for the coronary arteries is where the money and glamour are," says Harvard's Dr. Isselbacher.

Some heart doctors don't even realize that action can be taken. When an echocardiogram — a scan of the heart and surrounding vessels — found a large aneurysm in the chest of Donald Kehe four years ago, his cardiologist in Las Vegas called a private meeting with Mr. Kehe's wife. "He took my hands in his hands, looked me in the eyes and said there was no hope — that Donald should

tell his loved ones goodbye," says Rowena Kehe. After a friend pointed Mr. Kehe, then 69, toward Cedars-Sinai Medical Center in Los Angeles, Sharo Raissi, that hospital's top cardiovascular surgeon, removed the aneurysm. A few months later, instead of telling his family goodbye, Mr. Kehe treated them to a Hawaiian vacation. Mr. Kehe, now 71, is alive and well today.

Classic Symptom

In some aneurysm cases, the knowledge gap is especially clear because multiple cardiac doctors miss danger signs. Daniel Slaughter, a 37-year-old father of four, entered Methodist Hospital of Indianapolis in May 2001, experiencing chest pain radiating into his neck. That is a typical symptom of aortic dissection. He was bleeding into the sac around the heart, a common consequence of aortic dissection. And an echocardiogram found that his aorta was 50% larger than normal, according to a hospital report.

Yet the cardiologist who signed the echocardiogram report noted in it that the heart and aorta looked normal. A second cardiologist and a cardiac surgeon never looked at the echocardiogram, according to subsequent written statements they made in administrative proceedings. A week after entering Methodist, Mr. Slaughter died. After learning in the autopsy room that the cause of death was aortic dissection, the cardiac surgeon called Mr. Slaughter's widow. "He said, 'This probably won't help you now, but I could have saved him,'" says Paige Slaughter. She has named the hospital and three doctors in a proceeding that Indiana requires before the filing of a malpractice suit. Methodist Hospital denies any negligence.

Dr. Eleftheriades, the top aortic surgeon at Yale-New Haven, and Craig Miller, his counterpart at Stanford Medical Center, say they are each asked about twice a month by lawyers for plaintiffs and defendants to review cases alleging malpractice related to aortic disease. In only about half are the doctors' or hospitals' actions legally defensible, say the doctors, who are paid for their opinions but typically don't testify in court. Both physicians say that doctors' performance in heart-attack cases they review is defensible far more often.

Banding Together

At some hospitals, including Massachusetts General in Boston, cardiologists, surgeons and other physicians

are banding together to form aortic centers that draw on a range of specialties. In June, the American Heart Association published in its journal, *Circulation*, an article on heredity and aortic aneurysms. Still, AHA President Augustus Grant says, "I don't think aortic dissection is analyzed with the frequency it should be" at cardiac conferences.

Aortic disease generally strikes two types of victims. The first are men typified by James Whitehead, a University of Arkansas professor who at 67 had a long history of smoking and high blood pressure. This August, he experienced sudden, intense pressure in his chest, radiating into his jaw. At Washington Regional Medical Center in Fayetteville, Ark., he tested negative for a heart attack but remained stricken by pain so intense that morphine failed to numb it, his family says. Eight hours after his arrival, doctors did the CT scan that revealed he had an aortic dissection, and by then, it was too late, his family says. He died before reaching the operating room. Washington Regional declines to comment.

The second type of aneurysm victims are young, fit people cursed with a genetic predisposition for aortic problems. Most people in this category don't know they have an aneurysm, although family history can provide a clue.

So can body type. Aortic experts say that especially tall, lanky people entering an emergency room suffering sudden and intense chest or back pain ought to be considered possible aneurysm victims. People with strikingly long limbs may have Marfan's syndrome, a connective-tissue disorder, and Marfan's sufferers statistically have a much-greater-than-average risk of dissection.

Eric Eshleman, 28 years old, 6-foot-8 and 190 pounds, entered Atlanta's Northside Hospital in September 2000 suffering sudden, severe back pain. His wife, Britt Eshleman, says it was the first time she had ever seen him cry. Neglecting to scan his aorta, the hospital prescribed painkillers and sent him home, his wife says. Seven days later, he died of an aortic dissection. The county autopsy report describes him as "marfanoid appearing."

Ms. Eshleman has sued Northside for malpractice in state court in Fulton County, Ga., alleging that based on her husband's body type, among other factors, the hospital should have tested more aggressively for aortic dissection. The

hospital says the suit "is without merit."

The seriousness of aortic dissection is lost on many doctors. Sandy Morris, 13, arrived in July 1998 in the emergency room at Ohio's Columbus Children's Hospital, complaining of intense chest pains. Her parents knew their daughter had Marfan's, and they say they knew the pain might indicate an aortic dissection. They even knew enough to request an echocardiogram. But doctors failed to do one, testing Sandy instead for heart attack, the Morrises say. That test came back negative, because Sandy was having an aortic dissection, the parents say. Court records show that doctors scheduled an MRI scan but for the following morning, about eight hours after Sandy had arrived at 11 p.m. She didn't live that long. "Why don't they do something, Daddy?" were the last words Andrew Morris says he heard his daughter speak.

Children's Hospital has settled a malpractice suit filed by the parents in state court in Columbus on terms that weren't disclosed. The hospital declines to discuss the case. In 2000, Children's Hospital and the Ohio State University Medical Center, which share faculty, opened a Cardiovascular Connective Tissue Disorders Clinic. That unit serves patients with Marfan's and others who have a genetic predisposition to develop aortic disease.

Extreme Pain

Aortic dissection is one of few conditions that causes pain so severe it often isn't relieved by morphine, experts say. Even so, after doctors rule out heart attack, they sometimes neglect to test patients experiencing this level of chest or back pain for aortic problems.

Christopher Cole, 39, a manufacturing executive in Elyria, Ohio, once broke his leg in six places in an amateur motorcycle race. His foot ended up pointing backward, he says. On another occasion, the South Africa native was hit by shrapnel while serving in that country's military in the 1980s. The pain from his aortic dissection 14 months ago was far worse than from either of those injuries, he says. "When my heart would beat, it felt as if my skin was tearing," he says.

But it took doctors an alarmingly long time to conclude that anything was wrong with his aorta. When he arrived at Elyria Memorial Hospital, near Cleveland, in August 2002, doctors and nurses ran various tests, but not a scan that would have shown the dissection, he says. Mr. Cole stayed overnight at the hospital, and the

next morning a cardiologist told him they couldn't find anything wrong and he could go home. Mr. Cole did, but his pain grew worse. It took two more visits to the ER the next day before doctors finally gave him a CT scan. When that showed a dissection, he was flown immediately by helicopter to the Cleveland Clinic. Lars G. Svensson, the clinic's chief aortic surgeon, performed successful emergency surgery.

Dr. Svensson says Mr. Cole probably wouldn't have survived more than another two hours without it. The surgeon estimates that every second or third aneurysm case he gets was originally misdiagnosed. An Elyria Hospital spokesman declines to comment.

Aortic dissection and rupture are fatal far more often than heart attack. As a result, some doctors are aggressive about testing for aortic disease. When Howard Carney entered St. Luke's Hospital in Kansas City, Mo., last year, complaining of sudden, intense chest pain, Dr. Lance Waldo immediately ordered a CT scan that showed an aortic dissection. Mr. Carney, 36, underwent emergency surgery and today is fine. "I'm paid to be a pessimist," says Dr. Waldo.

Not every case of aortic rupture or dissection can be diagnosed. Composer Jonathan Larson died of an aortic dissection in 1996 after two New York City hospitals misdiagnosed him. The 35-year-old's death drew widespread attention because it came after the final dress rehearsal of his show "Rent," the rock opera that went on to huge success. Yet Diane Sixsmith, one of the physicians charged by New York state medical authorities with investigating the case, concluded no negligence occurred. Mr. Larson had complained only of flu-like symptoms, and it would have been a huge leap to guess that he had a disintegrating aorta, says Dr. Sixsmith, chairman of emergency medicine at New York Hospital Queens Medical Center and a leader in efforts to educate physicians about aortic disease.

Pregnant Patient

Many aortic dissections and ruptures involve aneurysms that doctors spot but fail to treat. An echocardiogram picked up Lori Irving's aortic aneurysm in 1998, her mother, Patty Irving, says. But her cardiologist, who was employed by Kaiser Permanente, said nothing about it, the mother adds. The younger Ms. Irving, a psychology professor at Washington State University in Vancouver, Wash., was then 35. In mid-

2000, she became pregnant. Aortic experts say that any woman of child-bearing age who has an aneurysm should be warned that pregnancy severely compounds the dangers. "We'd never have gotten pregnant if we'd known about the risk factor," says Mike Morgan, Lori's husband.

When intense chest pain sent Ms. Irving to the emergency room at Southwest Medical Center, a Kaiser Permanente hospital in Vancouver, during the last month of her pregnancy in April of 2001, she had no way of knowing the cause. Doctors didn't take an echocardiogram, her mother says. They diagnosed the 38-year-old patient with indigestion and sent her home, her mother says. That same day, Lori Irving and the unborn baby died.

Kaiser declines to comment, citing a settlement and confidentiality agreement with Lori Irving's husband.

Father and Son

Some physicians hope that the story of Tyler Kahle's family could help educate the profession about the dangers of aneurysms. An article scheduled to appear in the winter issue of the *Annals of Emergency Medicine* describes the failure of three sets of medical personnel in Omaha to scan the aorta of Mr. Kahle, the 19-year-old whose mother rushed him to the emergency room and told doctors about the family's medical history. "Scanning him very likely would have saved his life," says Dr. Milewicz, the University of Texas genetics expert who co-wrote the journal article.

In August 2001, about a year before Tyler's death, his uncle, Tom Kahle, had entered St. Luke's Hospital in Cedar Rapids, Iowa, complaining of chest pain. He told doctors about his family's history of aneurysm, relatives say. But the hospital discharged him without scanning his aorta, the relatives add. Two days later, Tom Kahle, 37, died of an aortic dissection. His family has filed a negligence suit against St. Luke's in state court in Linn County, Iowa. The hospital has denied any liability.

Terry Kahle, Tom's brother and Tyler's father, survived a dissection in 1998. After attending Tyler's funeral in Omaha last year, Terry Kahle returned to his home in Atlanta with his older son, Marcus, 23. Almost immediately, Marcus started complaining of chest pains. "I figured it was the power of suggestion, but I wasn't taking any chances," the father says.

Rushing his son to the emergency room at St. Joseph's Hospital in Atlanta, Mr. Kahle says he requested a scan of the young man's aorta — only to be told that aortic disease didn't strike people that young. Mr. Kahle, an auto technician who says he had never stood up to a doctor before, did so then.

"There were tears in my eyes," he says. "I said, 'Listen, I just buried my 19-year-old son last week, and I buried my brother last year — both of them aortic aneurysms. We're not leaving here until you scan my son.'"

After getting scanned, Marcus Kahle underwent emergency surgery to repair an aortic aneurysm. Today, he is alive and well in Atlanta.

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Doctors Suggest Slogan: West VA is for Whiners

By Norm Pattis, *Law Tribune*
Contributing Writer

This essay appeared in Norm Pattis' column in the Connecticut Law Tribune on January 27, 2003, 29 CLT 4. He is a partner at Williams & Pattis in New Haven.

If I lived in West Virginia I am not sure what I would do if I needed a doctor. I certainly would not hire Dr. Greg Saraco. He told the nation the other day that doctors are afraid to accept legal responsibility for their actions. Why, if he can't prosper without consequences, he'd rather not work. Call him the cry baby welfare doc.

Saraco was on national television recently explaining why he and other physicians are walking off the job. They've decided to take a 30-day vacation. They're calling it a job action.

What has caused these takers of the Hippocratic Oath to turn their back on those in need? Their malpractice insurance rates are too high. And unless the government steps in to provide them with relief, they are going to stop practicing. Good, I say. The world needs fewer doctors who believe that they are entitled as a matter of right to a risk-free Platinum American Express card.

Listening to the doctors' lobby, one would think that every doctor in the country has been found liable for malpractice and is standing at the poor house door. In fact, few judgments are ever rendered against doctors. In Connecticut, for

example, there were only a handful of verdicts against doctors last year.

Rising malpractice rates are not the problem of doctors alone. Many attorneys now struggle to afford coverage. There is no mass exodus of lawyers from the profession. Some even do the shocking thing: They trust their skill and experience. A doctor refusing to gamble on his or her own competence is a sorry sight.

In a post-Enron world, with stock markets tumbling and investors taking a beating, no one seems willing to focus on the extent to which for-profit insurance companies are gouging the professions. Instead, the insurance industry resorts to the strategy of dividing and conquering.

You know the tune: Blame the lawyers. We're the bad guys, it seems. The world would be a far, far better place for doctors if they could err with impunity. Sort of like a day care center in which no one is ever given a time out, candy is served on demand and the potty training is optional. Only here the insurers collect the allowances.

When someone is injured, lawyers ask a jury of ordinary people to do something about it. When we are right, juries respond. When we are wrong, and we often are, a jury sends us home with nothing. Doctors pay insurers to protect them from lawyers and the judgments of juries. And insurance companies make a lot of money along the way.

What is not being said about the doctors' revolt in West Virginia? The doctors there already enjoy a state-subsidized insurance policy. They are upset that their premiums are increasing. The same guys and gals screaming about socialized medicine aren't above subsidies, it seems. Just leave them the Rolex and summer home.

There will be no talk of national health insurance or a national health-care system under the current administration. The limbs of the new police state extend only for purposes of control, not health and welfare. But there is an obvious solution to the doctors' woes. Create a public health system with the equivalent of public defenders. Pay decent, but not spectacular salaries, as our public lawyers earn. Those who want more can gamble on the market, as do lawyers.

In the meantime, Dr. Saraco, stop your whining and accept the risks of adulthood. The Hippocratic Oath was not a risk-free license to gouge on the ill and infirm.

A Bad Act

By Sheila A. Huddleston, *Law Tribune*
Contributing Writer

This essay appeared in the Connecticut Law Tribune for November 3, 2003. Sheila Huddleston writes an appellate column, "On Appeal," in the Law Tribune. She is an appellate attorney at Shipman & Goodwin in Hartford.

Oct. 1 has come and gone, and Public Act 03-154 is — at least for now — the law of the land. It says that “The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.”

As everyone knows — although the text does not reveal it — P.A. 03-154 was the legislature’s response to the Supreme Court’s decision in *State v. Courchesne*. More precisely, P.A. 03-154 is a response to the interpretive methodology described by the *Courchesne* majority. As such, P.A. 03-154 is profoundly different from other statutes that provide interpretive guidance to the courts.

The General Statutes are full of provisions that tell courts how to address particular issues. At the outset, General Statutes §§ 1-1(a) provides that “words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly.” Nor is §§ 1-1 the only statute that provides an interpretive gloss. The phrase “shall be construed” appears 637 times, the word “definitions” more than 1,100 times. So what’s wrong with P.A. 03-154?

The answer is simple. The other statutes clarify the legislature’s intent: §§ 1-1(a) is the legislature’s way of saying that it generally uses words in their ordinary meaning, except when it doesn’t; definitional provisions tell the courts that the legislature intends a term to have a specific meaning in a particular context. P.A. 03-154 does not provide guidance as to the legislature’s intent either generally or in particular statutes. It tells courts

how to exercise their judicial power. That power, as Justice Marshall wrote 200 years ago in *Marbury v. Madison*, is “to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”

Now, no one disagrees with the first sentence of P.A. 03-154. The *Courchesne* majority agrees that “the language of the statute is the most important factor to be considered,” and because “all language has limits,” courts are not free to attribute meanings to legislative texts that their language will not support.

But the second sentence of P.A. 03-154 is radical. In decreeing that “extratextual evidence of the meaning of the statute shall not be considered” unless the statute is ambiguous or unworkable, the legislature attempts to forestall constitutional officers of a co-equal governmental branch from using their own judgment in performing their fundamental duty.

To be sure, the Senate debated its constitutional authority to pass this act. The Senate proponent correctly observed that, although the constitution vests the “judicial power” in the courts, it further provides that the “powers and jurisdiction” of the courts are to be prescribed by law. (The “powers and jurisdiction” provision has more than one plausible interpretation.) He then argued that “We are the law.”

But, in my view, state Sens. Kevin Sullivan and Mary Ann Handley had stronger arguments. As Sen. Sullivan observed, “the people assign certain powers to ourselves in the legislature, and the people assign certain powers to the executive and assign certain powers to the judicial branch, a co-equal branch of government ... we, too, are obligated to give deference to that fundamental constitutional authority that we have divided in three parts. Not one. Because we are not the law. The law is the summation of those three parts and what those three parts determine it to be. We are but one part of the process.”

I agree. I think that P.A. 03-154 is both unnecessary and unconstitutional. The *Courchesne* decision was not as revolutionary as the legislature believes. It was merely explicit about what many courts have long done but have not always discussed.

The *Courchesne* majority recognizes the limitations of legislative history. It acknowledges the primacy of the statutory text in its interpretive hierarchy. Its

belief that it should consider all available information to reach a full understanding of a particular statute is, to me, less alarming than the legislature’s attempt to take away the court’s interpretive tools.

There is a place for an interpretive dialogue between the legislature and the courts. When the legislature disagrees with a judicial interpretation of a statute, it can and frequently does amend the statute to make its meaning clearer. (As far as I have been able to determine, the legislature has not yet attempted to overrule the substantive result of *Courchesne*.) What the legislature cannot do, within our constitutional framework, is to tell judges that they cannot even think about statements made in the legislative forum in their attempt to discern the legislature’s purpose.

The Case for TV

By Henry Schleiff

This essay appeared on the Op-Ed page of The New York Times on September 3, 2003. Henry Schleiff is chairman and chief executive of Court TV.

Both Kobe Bryant and Scott Peterson face not only serious criminal charges but also an onslaught of publicity. In the case of Mr. Bryant, the basketball star charged with sexual assault, so far cameras have been allowed in the courtroom. In the case of Mr. Peterson, charged with murdering his pregnant wife, the judge has closed next month’s preliminary hearing to cameras.

Trials and most judicial proceedings are meant to be public, of course, and cameras make it possible for more citizens to see them. But there are limits. If a judge determines that cameras would be inappropriate in a particular case, that decision should not be subject to appeal. The judge presides over the courtroom, and he or she must have the ultimate discretion to determine what is in the public interest — even if that decision goes against the interests of the electronic media.

That said, cameras should be routinely permitted in the courtroom, as are reporters for the print media. A judge should have to explain the reasoning for imposing a ban. At present, all 50 states allow cameras in some courts. Thirty-eight allow them in criminal courts. The federal government permits them only in certain appellate courts, but there is a

growing consensus that having cameras in courtrooms serves the public interest.

Under no circumstances, however, should cameras be allowed in the jury room. Given the variety and popularity of reality TV today, I can easily envision a midseason replacement series on one of the networks called "Live From the Jury Room." Such a series might be good for Nielsen ratings, but it would be bad for our system of justice.

That's because jury deliberations are meant to be private. Juries must be free to make independent judgments of guilt or innocence, free from having to explain the evolution of their thinking, and free from concerns that their discussions could expose them to threats — or worse — from those who disagree with them.

The camera should be used to make more accessible those elements of government that are truly meant to be public, like trials, not to invade those elements that are properly private, like jury deliberations. The beauty of the camera is that it can expand the courtroom and enable the public to freely observe the functioning of the judicial branch of government, as was intended by the founders.

* * * * *

Stop Corporations From Robbing Us With a Fountain Pen

By Dale Irwin, Kansas City Star

This article was published in The Kansas City Star on May 15, 2003.

"Yes, as through this world I've wandered I've seen lots of funny men; some will rob you with a six-gun, and some with a fountain pen." — 'The Ballad of Pretty Boy Floyd,' by Woody Guthrie. Judge Jay Daugherty recently wrote... about the constitutional right to a jury. 'Without a jury of one's peers, the system simply does not work the way the authors of our Constitution envisioned,' he said. 'Justice is too important to be left to judges and lawyers alone. Justice must remain in the hands of ordinary people.' But today justice is being wrested from the hands of ordinary people. Armed with form contracts, corporations are silently stealing our rights. Contracts today have clauses robbing individuals of their rights to a jury — indeed, the right to go

to court at all. Such clauses are buried in employment contracts, loan agreements and agreements for cell phone, car and computer purchases....These are 'mandatory' arbitration clauses. Under them, signers virtually forfeit all their rights to go to court, no matter how badly a company may have cheated them....The corporation may have been in a thousand other arbitrations for cheating customers the same way, and no individual, or the public, will be able to find that out. That is the central idea of mandatory arbitration: to steal rights, and keep individuals quiet. It is also used to avoid class actions, thus robbing consumers of their only effective means to check petty thievery on a grand scale. With the stroke of a pen, a disreputable business places its conduct beyond the reach of the civil justice system. Even if someone spots such a clause in a contract, he has no power to force any change in the agreement....How did this all come about? The answer is found in a 1930s federal law providing for arbitration of disputes without court intervention. Arbitration clauses can make sense for big businesses that have legal disputes with each other. But in the 1990s the clauses began popping up in consumer contracts....Why hasn't Congress done anything to correct this lopsided state of affairs? Well, it has, sort of. Recognizing the often inherent unfairness of mandatory arbitrations, Congress has come to the rescue of...car dealers. Just last fall it passed a law banning arbitration clauses in car dealer franchise agreements....One would think these dealers, having so recently escaped mandatory arbitration, would not shackle their own customers with it. Not so. I know of cases where franchise car dealers in Kansas City are using arbitration clauses to stifle consumers' claims against them. And so the theft of some of every consumer's most fundamental rights — to go to court, to have a jury of peers — goes on. Many brave Americans fought and died for these rights that are being brazenly stolen by the strokes of modern fountain pens. Write to your senators and representatives. Send them a copy of this column. Tell them that you and all citizens deserve the fundamental rights that legislators have so far - outrageously — preserved only for franchise car dealers."

* * * * *

Judicial Nominations War

This editorial appeared in The Hartford Courant on November 16, 2003.

Twenty-eight appellate court nominations have been confirmed by the Senate since President George W. Bush took office. Six nominations have been blocked by Democratic threats of filibusters. Overall, 168 of Mr. Bush's judicial nominees have been confirmed, a number higher than the confirmations in the first Reagan administration.

This 97 percent batting average ought to be kept in perspective as the partisan war rages over whether a minority in the Senate should be able to deny the will of the majority.

Watching the filibuster drama orchestrated by Republicans last week, one would think the republic itself was in danger of collapsing unless the president gets his way in every instance. Democratic and Republican senators railed against each other in an angry confrontation rarely witnessed on Capitol Hill in recent times.

A little quiet, please. America will survive this clash and may emerge better for the experience.

Presidential nominations should not be rubber-stamped. The Senate is constitutionally responsible for giving its advice and consent. Common sense and fairness tell us that advice and consent is given through committee hearings and a floor vote to confirm or reject.

A president deserves the courtesy of an up or down vote on his choices. Nominees should not be kept in limbo for years, as has happened with the Bush Six.

Republicans, too, have played the sabotage game. Sixty of President Bill Clinton's judicial nominations were blocked when the GOP controlled the Senate. But because the two parties have torpedoed nominations doesn't mean they are justified in using the tactic.

Filibusters, those endless monologues and debates intended to choke a bill or a nomination that otherwise would pass, are not enshrined in the Constitution. In the mid-19th century senators permitted the practice in their rules to prevent what the Founders referred to as the tyranny of the majority from ever strangling the nation.

The paradox is that Democrats haven't even filibustered the nominees. They have threatened to do so. Again last week, Republicans unsuccessfully sought a cloture vote to prevent endless debate from taking place. Cloture requires 60 yeas, a three-fifths majority.

If Mr. Bush's nominees were, as their critics contend, ideological extremists, surely a majority of senators would have the good sense to deny confirmation. Democrats need only sway two Republican senators to deny confirmation.

History tells us that filibusters often delay but rarely deny what a determined president seeks. In the fight over the 1964 Civil Rights Act, southern Democrats and a few Republicans filibustered for 57 days. They failed to overcome.

Surely a Senate vote on the six Bush nominees wouldn't doom America. If the judges turn out to be disasters, voters will remember the next time they choose a president.

An article in The Wall Street Journal by David Rogers on October 30, 2003 reported on this issue as well.

To summarize the article, it emphasized that to understand the steady consolidation of republican power over government, once you look at the fight for control of the Sixth Circuit U.S. Court of Appeals and America's heartland. The consequences can be huge for the type of justice dispensed. Republican and Democratic appointed judges often interpret the law differently, not just on socially charged issues like abortion rights or capital punishment, but also on less obviously ideological issues, such as the rights of the disabled and access to corporate records. With the Supreme Court now hearing less than half the number of cases it did 20 years ago, the 12 circuit courts have gained tremendous influence — both because they are more often the final word and because a unique quirk in the way they operate can accentuate ideological differences. That is why Senate Democrats are resorting to filibuster tactics to slow Republican advances and most high-profile fights are about President Bush's nominees to the circuit level. Individuals, such as Mississippi's Charles Pickering — whose nomination to the Fifth Circuit has met opposition from civil-rights groups and faces a Senate cloture vote — get more attention. But the Sixth, home to the Senate's top two Republican leaders, stands out as a divisive chapter in its own right and better illustrates the broader national battle under way.

Insurers Are to Blame For Malpractice 'Crisis' By Ralph Nader

This article appeared in The Hartford Courant on September 14, 2003. Ralph Nader, a consumer advocate in Washington and native of Winsted, was a Green Party presidential candidate in the 2000 election.

Connecticut doctors want the state legislature to address the medical malpractice "crisis." On March 26, about 1200 doctors, some wearing white lab coats, flooded the state Capitol to demand a \$250,000 lifetime cap on noneconomic damages in medical malpractice lawsuits.

Connecticut doctors missed the mark when they marched on Hartford. They should have picketed insurance companies instead of pushing for limitations on the court rights of patients injured by incompetence, negligence or worse. Insurance reform, not "tort reform," should be the priority.

Accordingly, the Connecticut State Medical Society is taking steps to advance insurance reform. Guess how their most recent victory against the insurance industry — a \$470 million class action settlement agreement with Aetna — was won? A lawsuit. Yet doctors would deny that same legal right to their patients. Note to doctors: The term is "Hippocratic," not "hypocritical."

At the same time it was condemning uncapped damages for pain and suffering by permanently injured patients, the CSMS had filed a lawsuit against six of the largest insurance HMOs in the country. Tim Norbeck, executive director of the CSMS, told the Indianapolis Star in April 2002: "Insurers hold all the trump cards. You can't compromise with them. Doctors are lambs, and the insurance companies are lions. I think our patient care system depends on this [legal action]."

The doctors' suit charged that the insurers "unfairly and deceptively employed an arsenal of acts and practices designed to delay, hinder, reduce and/or eliminate making payments." The settlement was a victory for doctors and patients, but basic insurance reform is needed.

Patients and physicians alike should beware of medical malpractice insurance

accounting. In addition, by not surcharging the few bad doctors in these specialties, the good specialists pay as much as the negligent specialists. Just 5 percent of doctors account for 54 percent of all malpractice payouts.

A *Wall Street Journal* investigative article in 2002 reported that a "price war that began in the early 1990s led insurers to sell malpractice coverage to obstetrician-gynecologists at rates that proved inadequate to cover claims. ... A decade of short-signed price slashing led to industry losses." Further, a decline in insurers' investment income produced higher premiums.

Donald J. Zuk, chief executive of SCPIE Holdings, Inc., a leading malpractice insurer in California, told *The Wall Street Journal*, "I don't like to hear insurance company executives say it's the tort injury-law system. It's self-inflicted."

Nonetheless, unscrupulous insurers continue to blame rising premiums on a specter of increased litigation. Connecticut does not have a litigation explosion. According to *The New York Times*, the number of medical malpractice lawsuits filed year in Connecticut changed little from 1992 to 2002. During this same period, malpractice insurance rates soared. Advocates of restricting rights claim that court verdicts have skyrocketed, but this claim is misleading. Jury verdict research fails to factor in a zero-dollar value for each of the many verdicts in favoring doctors and hospitals. In addition, most medical malpractice suits are privately settled out of court. The omission of these important facts result in inflated claims.

A Harvard School of Public Health study estimated that 80,000 lives are lost each year as a result of medical malpractice in hospitals. These preventable deaths exceed the combined annual fatality toll from motor vehicle crashes, AIDS and fires. This is the real medical malpractice crisis.

The civil justice system should be made more, not less, accessible to injured patients. With less than 1 in 10 malpractice victims even filing claims, the state legislature should strengthen the medical licensing board so the many good doctors can effectively report dangerous physicians, hospital practices and related insurance industry greed. An ounce of prevention is worth a pound of cure.

Med-Mal Caps Assault Jury System

This editorial appeared in The Connecticut Law Tribune March 31, 2003 in the "Advice of Counsel" column. The "Advice of Counsel" column is produced by The Advisory Board of the Connecticut Law Tribune.

The insurance industry and the medical profession assert that caps of \$250,000 for non-economic damages are a cure for rising medical malpractice insurance costs.

The essence of this argument is that a jury in a medical malpractice case cannot be trusted to place fair value on non-economic damages. Although non-economic damages are often referred to as "pain and suffering," they are better characterized as a loss of life's activities. These non-economic damages include: death, brain damage, blindness, disfigurement, quadriplegia, paraplegia, loss of a limb, physical pain, and emotional distress. For example, if a cap were applied in the case of death, all death damages would be limited to \$250,000 except for payment of medical expenses and lost wages if the individual was a wage earner. Caps are most prejudicial to non-wage earning seniors, children, the poor, and women, because serious injuries prevent day-to-day functioning.

A distrust of the jury system — that jurors cannot be trusted to fairly assess non-economic damages — is what underlies the cap proposal. However, we trust juries in capital penalty cases to assess life or death, and in other civil cases to assess damages.

When analyzed, non-economic damages are dramatically different on a case-by-case basis and can be fairly assessed only upon consideration of severity of injury, personal impact, age, and all other circumstances. An excellent example is that of a 35-year-old mother of three who recently testified before the Connecticut Legislature as to her injuries as a result of an improper epidural during childbirth, causing her to be a paraplegic. Her non-economic injuries are the inability to walk, being confined to a wheelchair, loss of bowel and bladder function, the inability

to play with her children in the playground, the constant task of keeping her body free of ulcers and infection, and the inability to function as a young wife and mother. Is the one-size-fits-all cap of \$250,000 a fair and adequate limit on this young mother's limitation of life's activities? Why should a jury be precluded from assessing her fair damages?

Ironically, of those cases in Connecticut that are litigated to verdict, hospitals and physicians prevail approximately 65 percent of the time. How can the jury be right 65 percent of the time and not be trusted to assess fair non-economic damages 100 percent of the time? Our system has demonstrated over many years that juries can be trusted to assess fair damages.

Importantly, the history of caps in other states has demonstrated that they do not reduce the cost of malpractice insurance, and the insurance companies in Connecticut do not claim that, as a result of this special interest legislation, they will reduce malpractice premiums.

When California passed its medical malpractice cap limitation in the 1970s, the cost of malpractice insurance continued to skyrocket. It was not until California enacted cost control legislation for medical malpractice insurance companies that medical malpractice rates stabilized. It is, therefore, clear that the jury decisions are not driving the cost of medical malpractice insurance rates.

Pennsylvania Attorney Promotes Filing Certificates of Merit to Rid the Legal System of "Junk Defenses"

Piaul Krupski of NBC News reported on MSNBC News on September 9, 2003 that Hazelton, PA attorney and ATLA member Bob Powell asserted that a recent report by the General Accounting Office (GAO) proves there is no crisis in access to healthcare in Pennsylvania as asserted by the proponents of damage limits in malpractice cases. Powell said insurance companies, hospital and doctors should be required to file certificates of merit to rid the legal system of "junk defenses" just as lawyers now are asked to certify lawsuits they are prosecuting aren't frivolous. Powell is president of The Committee for Justice for All, a northeastern Pennsylvania coalition group he said is fighting for victims' and consumers' rights. The CJA staged a press conference outside the Luzerne County Courthouse. He said the GAO report exposes the claim of shrinking access to healthcare as "nothing but a hollow scare tactic designed to blackmail the Legislature and get people to relinquish their fundamental right to have a jury decide fair compensation for their injuries."

For complete story see www.msnbc.com/local/hss/m324227.asp?Oct=302&cp=1.



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)

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Creating & Using Multi-Media Presentations in the Courtroom **April 16, 2004**

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