THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

Volume 24, No. 3
Spring 2012

FAR-REACHING EFFECTS…

By: Christopher Miller, Esq.

Pictured at L are members of the Pittsburgh Steelwheelers, from the September 2011 5K Run/Walk/Wheel event on the North-Shore in Pittsburgh. Far right in the first row is Bob Eyler, Treasurer of the Steelwheelers. President Josh Geist and 5K Chair Chris Miller are in the back row, center.

As many of our members are aware, for the past 11 years WPTLA has held an annual fundraiser, The President's Challenge 5K Run/Walk/Wheel, benefitting the Pittsburgh Steelwheelers. This event was the idea of then-President of WPTLA, The Honorable Beth Lazzara. Her thoughts were for WPTLA to give something back to a local charity, an organization that truly needs help, on an annual basis.

Instead of reiterating the importance of this story from the perspective of WPTLA, I thought our members should gain some insight and perspective of what this event has meant to those who benefit from it – The Pittsburgh Steelwheelers.

Eleven years ago, when this event began, the Pittsburgh Steelwheelers were on the verge of extinction. Facing financial hardships, low morale, and limited participation, the organization, which is comprised of wheelchair athletes, considered shutting down their operation.

"We really didn't have an annual budget back then, as we had no money in our organization," according to Bob Eyler. "Our fundraising at that time was limited to raffles or small fundraisers where we would maybe raise $500.00 or a $1,000.00. We raised what we could, and scraped by as best as we could."

At that time, the Steelwheelers' quad rugby team had 5 active players, and the basketball squad participation was also limited. Their equipment was outdated and in poor condition, and their participation in tournaments was very low because of the costs involved. When they were able to participate, they were staying in the cheapest hotels they could find, with conditions so poor they sometimes had to check out and head home.

Some of the cold, hard facts about wheelchair athletics are it is not cheap to participate. One quad rugby chair costs approximately $3,500.00. The cost of a basketball wheelchair averages $2,200.00.

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UPCOMING EVENTS FOR WPTLA

The **Annual Judiciary Dinner** will be on **Friday, May 4** at **Heinz Field** in Pittsburgh, PA.

May 15 is the date of a **one credit Lunch 'n Learn CLE program** featuring WPTLA Member **Rick Lettieri of E-Discovery Counsel**.

Thursday, May 24 will be our **Annual Ethics Seminar and Golf Outing.** CLE program and lunch begins at 11:00 and shotgun start for golf is at 1:00. New location this year is Shannopin Country Club.

President
Joshua P. Geist

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A Message from the President …

By: Joshua P. Geist, Esq.

Enjoy a Cup of Hot Coffee

How many times have you told someone you are a trial lawyer and the first thing they want to talk about is the McDonald's Hot Coffee case? How often does a potential juror talk about the McDonald's Hot Coffee case in voir dire? Have you ever had a client tell you why their case isn't the McDonald's Hot Coffee case?

What do you tell people when they bring up the McDonald's Hot Coffee case?

A new documentary film entitled Hot Coffee tells the true story of the McDonald's Hot Coffee case. The film also tells the story of how the civil justice system has been under heavy attack by big business for over 25 years. They launched a public relations campaign, starting in the mid-80's and continuing over the last two decades, to convince the public that we have out-of-control juries, too many frivolous lawsuits and a civil justice system that needs reforming. They have used anecdotes, half-truths and sometimes out and out lies in their efforts, and for one purpose – to put limits on people's access to the court system, the one and only place where an average citizen can go toe to toe with those with money and power and still have a shot at justice.

The McDonald's Hot Coffee case serves as a springboard into understanding our civil justice system. Hot Coffee tells the story of a child born with cerebral palsy because of medical malpractice at birth and how a state-mandated cap on damages has affected his family, as well as how dramatically different his life is compared to his identical twin brother's. Hot Coffee also explores the story of a former Mississippi Supreme Court Justice and how big business interests spent millions of dollars advertising against him and found a way to have him criminally prosecuted on false charges. Finally, Hot Coffee shows the success of the tort reform movement and its impact on average people in the form of mandatory arbitration contracts. The film introduces a young woman who accused her co-workers of rape when working in Iraq for KBR/Halliburton. The woman signed an employment contract with a mandatory arbitration clause which took away her right to a jury trial.

So what can you do? First, you should watch the movie. You can watch it on HBO. If you have HBO you can also log on to www.hbogo.com and watch it on your computer. Second, you should show Hot Coffee to everyone in your office. You can also show Hot Coffee to your neighbors. If you log on to www.hotcoffeethemovie.com, you can learn how to have a "House Party" and screen the movie to friends and neighbors. I plan on showing Hot Coffee to many of my clients, especially the ones who tell me why their case isn't the McDonald's Hot Coffee case. Lastly, when someone wants to tell you about the McDonald's Hot Coffee case, you should tell them the truth about the case. You can watch Hot Coffee to learn the facts. You can also go to the Hot Coffee website and click on FAQ to learn the truth about the McDonald's Hot Coffee case.

Unfortunately, we will never have the millions to spend on a public relations campaign that competes with big business, the pharmaceutical industry or the insurance industry. However, we can tell the truth about the civil justice system and inform the public one by one. I see it as just another obligation we have as trial lawyers.

FAR REACHING EFFECTS ... *Continued from Page 1*

And this is just the initial purchase cost. Add to that the annual maintenance of the wheelchairs, such as replacing approximately 200 wheelchair tubes at a cost of $4.00 per tube, approximately 25 wheelchair tires at $30.00 per tire, and 5-10 axles at $20.00 per axle, annual maintenance costs add up considerably.

Not only are the Steelwheelers now able to afford the equipment and travel costs, they have been able to hold their own annual quad rugby tournament, the Steel City Slam Quad Rugby Tournament at Slippery Rock University, for the past 9 years. This tournament draws other quad rugby teams from as far away as Charlotte, Chicago, and Ottawa. The cost to the Steelwheelers for hosting such an event is in excess of $7,000.00 annually.

Despite the costs involved and through the efforts of WPTLA and the Steelwheelers themselves, the organization is now on solid ground and thriving. The quad rugby team now has approximately 15 active players (most teams average 8-10), and the basketball team has 10 active players. The quad rugby team participates in 7-8 tournaments annually, while the basketball team plays approximately 25-30 games annually. Additionally, they are able to financially help members who otherwise could not afford to be involved in wheelchair athletics.

Not only have the finances, morale, participation, and membership increased, the importance of what our annual 5K means to them cuts much deeper than that…

"The Steelwheelers are a family of misfits, we are from all different backgrounds but we all share a common goal – to excel with our disabilities in our daily lives while at work, as students, as husbands and wives, and as parents. We use sports as a motivator, much like a support group, to let each of us know that we are not alone in our struggles. The Steelwheelers gives us the confidence to do the unthinkable and overcome our disabilities to reach our goals." -- Dan Berry

"Steelwheeler basketball has meant a chance for me to relate to and learn from others with disabilities. Learning skills such as how others make their everyday lives easier… Also, the Steelwheelers have helped me to create a better psychological attitude personally of what I can do… not can't do!" -- Lee Tempest

"… From 26 mile marathons to quad rugby, it's given me a stronger body and mind to continue into the future by staying healthy and helping newly injured people get involved in wheelchair sports." -- Jerry "Bull" Baylor

"The Steelwheelers have given me the opportunity to be active in sports, which has helped me to be more active in life." -- Matt Berwick

"The team is the place that truly showed me that even though I have a disability, I am not disabled. The team has shown me that you can still be active in sports, get married, have kids, further your education and do whatever it is that you want. The team is a group of people who have all accepted their disability, but that doesn't let their disability hold us back." -- Rick Fox

This is precisely why I am proud to be a trial lawyer, why we should all be proud to be trial lawyers. Every day we get up, go to work and fight for those who are unable to fight for themselves. Every day one of us gives back in some way to someone who needs our help. Whether it is through making a donation or participating in or otherwise supporting this event, the efforts of our members have had far-reaching effects that we cannot even begin to imagine. As Bob Eyler has put it time and time again, "The generosity of WPTLA has meant survival to the Steelwheelers," which as can be seen has meant so much to their members.

In This Issue

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SPRAIN vs STRAIN

By: Justin D. Scott, DC, CCEP

There is often misconception and confusion about the terms "sprain" and "strain" both in everyday verbal use as well as in legal documentation. In addition, the grading of these injuries is relatively simple yet sometimes causes discrepancies as there is some physician subjectivity involved.

A "sprain" refers to an injury to a ligament, while a "strain" refers to an injury to a muscle or tendon. Ligaments are fibrous tissue that connects bone to bone, while tendons connect muscle to bone. These injuries generally have similar mechanisms and are usually caused by overstretching and/or tearing/rupture of the involved anatomy. If the anatomy damaged is a ligament, the term "sprain" is appropriate; if it is a muscle or tendon, "strain" should be used.

Both sprains and strains are generally classified as Grade I (mild), Grade II (moderate), or Grade III (severe). These are defined as follows (note that the term "tearing" is generally used to describe ligament damage in sprains while the term "rupture" describes muscle belly or tendon damage in strains):

Grade I – Overstretching of the involved anatomy with little or no tearing/rupture. While painful, the injured region is generally fully functional and able to tolerate weight bearing. These injuries generally do not require more than time and rehabilitation to fully heal.

Grade II – Partial tearing/rupture of the involved anatomy is present, as well as full or partial loss of function and difficulty weight bearing. Diagnostics are often required to evaluate the extent of the damage and splinting and or casting may be required in addition to longer recovery times and more extensive rehab. Surgery is not generally needed in these moderate injuries.

Grade III – Complete tearing or rupture is present along with significant if not full loss of function and weight bearing. Diagnostics are required and these injuries often require surgery as well as extensive rehabilitation. This is the most severe category.

Healing times for each of these classes of injury depend on the part of the body affected as well as other factors, such as overall health and motivation of the patient. While the grading of these injuries seems to be simple, there is physician opinion/subjectivity involved. One doctor may categorize and injury as grade I while another may diagnose the same injury as a grade II. There is no concrete criterion to discern the two. Grade III diagnoses are generally more universally, as these are objectified by complete tear or rupture as documented on advanced imaging, usually MRI.

Dr. Justin D. Scott, of the Scott Spine and Rehabilitation Center, can be reached at 724-719-2900 or dr.scott@ScottSpineandRehab.com.
http://www.scottspineandrehab.com/Scott_Spine_and_Rehab.html

Save The Date!

Thursday, May 24, 2012

WPTLA Ethics Seminar/Golf Outing

11:00 CLE / 11:30 Lunch / 1:00 Golf

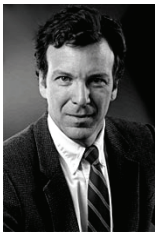
New Location!!
Shannopin Country Club,
Pittsburgh, PA

Correction

In the recent issue of The Advocate, Vol. 24, No. 2, an error was made in identifying a volunteer with our Habitat for Humanity Community Outreach efforts.

Christian Anderson, the son of Member Laura Tocci, was inadvertently identified as Christian Tocci.

Our apologies for this mistake.



POLARIZE THE CASE: REVEAL THE ROTTEN CORE OF THE DEFENSE[1]

By: Rick Friedman, Esq.

Plaintiffs' lawyers are getting clobbered in court, according to the U.S. Department of Justice's Bureau of Justice Statistics 2009 report. The survey gives us much to consider:

- Plaintiffs "won" about half of tort trials (51%).
- The median award in these "wins" was $24,000.
- The median award when auto cases were "won" was $15,000.

Can we agree that most of the plaintiffs and their lawyers who "won" verdicts of less than $24,000 were not out celebrating afterwards? Can we go further and agree that most of the verdicts below the median were actually *losses?* The clients' medical expenses and litigation costs were likely equal to or greater than the verdicts. The clients received grossly inadequate compensation for their injuries and their lawyers lost money. That's a *loss.*

That means we are losing approximately 75 percent of all cases that go to trial: 49 percent to defense verdicts and 25 percent to "wins" of less than $24,000. But it is even worse than that, isn't it? We have all seen or experienced verdicts of $75,000, $100,000 or even $400,000 that are real losses in any true sense of the word. How can you tell if such a verdict is a loss? Look at who is celebrating after the verdict and who has an empty, sick feeling in the pit of their stomach.

It is hard to quantify how many of the above-median verdicts are also losses, but let me offer up my guesstimate: at least 40 percent—though it is probably higher. This analysis leaves us confronting the reality that tort plaintiffs lose about 85 percent of the cases that go to trial.

An important cause in many of these losses is the plaintiff's lawyer's failure to clarify the defense's true position. Much has been written about our task of telling the story of the case. Of course we have to do that; but that leaves out an important component of the trial—the defense position. The defense position is often intentionally ambiguous, fuzzy, and obscure. We need precision, clarity, and skill to build a house. The defense requires none of these abilities to tear it down.

In a typical rear-end collision, admitted-liability case, the plaintiff's position is usually, "I was hurt in the collision, and I'm still hurting." We may have constructed the plaintiff's story in a variety of ways to help prove these points. We use the tools of expert witnesses, lay witnesses, documents, and photographs to build her "house"—that is, her case. At the end of the trial, we ask the jurors to pass judgment on this house.

In a typical rear-end collision, admitted-liability case, the defense does its best to keep us from building the house. Then, in closing argument, the defense lawyer points to crooked windows, uneven steps, and leaky roof and tells the jurors they should not "buy" the house. Who would want to buy a house with crooked windows and uneven steps? The jurors reject our house. But we never ask them to pass judgment on the defense "house." In fact, usually the defense makes no effort to build a house. Again, it is much easier to tear down a house than to build one.

The three most common tools the defense uses interfere with our house-building are:

1. Real or apparent inconsistencies
2. Insinuation
3. Dirt

The defense usually uses these together in an overlapping attack on our plaintiff and her case.

Inconsistencies

The defense can make any inconsistent fact, no matter how trivial or benign, look suspicious. The plaintiff testified that he had been earning $35,000 per year, but his tax returns show $32,000 per year—he must be lying about his income to get a bigger verdict. He says he drove to the hospital and arrived about 9:00 a.m., but the hospital record shows he arrived at 10:00 a.m.—where was he during this unaccounted-for hour? Seeing a lawyer?

As any trial lawyer knows, inconsistencies are everywhere in the documents underlying a lawsuit. Most are inconsequential and innocent differences in perception or recollection. As the defense lawyer keeps pointing them out, they begin to look sinister. The defense lawyer does not have to weave these inconsistencies into any credible story. He just has to say: "Look at all these inconsistencies. Something's not right here folks. Wish I could tell you what it is, but I know you will do the right thing." ("Don't buy this house.")

[1] Adapted from Rick Friedman, "Polarizing the Case: Exposing and Defeating the Malingering Defense". Trial Guides, 2007 (www.trialguides.com).

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POLARIZE THE CASE… *(Continued from Page 5)*

Insinuation

Of course, the defense lawyer wants the jury to believe your client is lying, faking and exaggerating. But usually, he will not say that. Instead, he will point to the IME doctor's testimony that most people with this sort of injury are fully recovered in three months. "Why not the plaintiff? The IME doctor just can't explain it . . . What do you think jurors?" ("Don't buy this house.")

Dirt

It is easier to throw mud at a wall than to clean it off. The defense will move heaven and earth to let the jury know your client is divorced, smokes pot, has a criminal conviction, or is a member of any group the jury might dislike. Defense lawyers know that jurors are likely to make illogical leaps from these facts to conclusions about the merits of liability or damages claims.

Notice that none of these tactics require the defense to tell a credible story (or build its own "house.") The defense need only keep offering up inconsistencies, innuendos, and dirt to create an uneasy stink in the courtroom. That is enough to defeat most plaintiffs' cases.

Typical plaintiffs' responses? Explain away the inconsistencies. Work the medical issues harder. Personally attack the defense lawyer. We *may* need these tactics, but they are often not enough. Remember, *ties go to the defense.* The preponderance-of-the-evidence-in-favor-of-the-plaintiff cases also go to the defense. Our tactics still leave the jurors with only one choice—accept or reject plaintiff's "house." And only the most incompetent of defense lawyers will fail to break some windows and put some leaks in the roof of your house.

The essence of polarizing a case is giving the jury a choice between two houses, the plaintiff's and the defendant's. Stated another way, whose position is more likely true, plaintiff's or defendant's? The challenge is that most defense lawyers instinctively know they do not want to take a position. Calling plaintiff a liar, for example, feels dangerous to them—and it is. So instead, the defense talks about "atypical symptoms," "inconsistencies," and "lack of objective evidence of injury" and hopes the jurors will draw their own conclusion that plaintiff is malingering or exaggerating.

If you only take away one concept from this article, let it be this: **notice when the defense or a defense witness is failing to take a position.** If they have a story or position of their own that they are willing to articulate, then you have something to attack. If they are not stating a position, then **you have to state it for them.**

So, for example, in an admitted-liability case when I know the defense has an IME report stating that my client is "exaggerating her symptoms," I will tell the jury: "The primary issue for you to decide is whether Mrs. Smith is a liar and a cheat, as the witness hired by the defense is saying. If she is, you should send her out of here with nothing. But if she is honest about her injuries and symptoms, then she is entitled to a fair verdict." The defense now has a choice, embrace its real position that Mrs. Smith is a liar, or disavow it. Watching defense lawyers make this choice on the spur of the moment in front of the jury can be comical.

That is polarizing: "Are you saying 'X' or aren't you?" We force the defense to make a choice. And after the defense makes a choice (or we do it for them), we get to attack *their* house. The jury then gets to decide not whether *our* roof leaks, but whether our house is better than the defense house.

One of my favorite authors wrote a whole book describing how to force the defense to take a position, and how to then attack that position[2]. There are things we can do in pleadings, discovery and at trial, and they all involve the same basic concepts. Here they are in context of a case in which the defense would like the jury to conclude that plaintiff is malingering:

- **Force the defense witnesses to take a position.** Is the plaintiff malingering or not? Make each witness endorse one story or another. Either the plaintiff has been hurt and has legitimate symptoms and injuries, or the plaintiff is faking. Do not let witnesses imply or insinuate. Force them to answer the question: "Is she faking or not?" An "I don't know" answer may be acceptable under certain conditions[3], but do your best to make the witness pick a side.

- **Don't let the defense or their witnesses retreat from their position.** They will try. Before they completely understand where you are going, they will sense they are heading down a perilous road. They will try to backtrack or retreat to murky insinuation. Do not allow this. They can continue to endorse the malingering position or they can renounce it. Do not allow them to stay in the murk.

- **Destroy that position.** You will see that once the choice is between malingering and non-malingering, the medical evidence often becomes clearer. Most reputable doctors are reluctant to state that someone is malingering in the absence of clear evidence. Much of the literature that clouded the picture can be neutralized or even helpful when the choice is malingering or non-malingering. For

[2] Rick Friedman, *Polarizing the Case: Exposing and Defeating the Malingering Myth* (Trial Guides 2007). www.trialguides.com. The book simplifies and explains these concepts in more detail, giving concrete steps for implementation.

[3] See Chapter 6 in *Polarizing the Case.*

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POLARIZE THE CASE… *(Continued from Page 6)*

example, if "85 percent of people with this injury are backat work in six weeks," is there any literature stating that the other 15 percent are malingering?

- **Repeatedly draw attention to how the defense is defending the case.** As a practical matter, by calling your client a malingerer, the defendant and defense lawyer have put their own characters at issue. What sort of person runs a red light, smashes into someone else, and then calls that person a malingerer? A desperate, immoral person with desperate, immoral lawyers. The "drawing attention" part is done at trial. Before then, we are preparing to draw attention by taking every opportunity to get the defendant to commit to its position that the plaintiff is a malingerer.

When you follow these steps, you force the defense to sponsor a particular story or view of the facts. If the defense says plaintiff is *not* malingering, that is good for you, right? If the defense says plaintiff *is* malingering, the jury can examine that claim out in the open and test it against all the evidence. In short, polarizing the case gives the jury two competing versions of the facts to choose from. Either:

1. The plaintiff was hurt and is still hurt, or
2. The plaintiff is a liar, a cheat and a fraud.

Which is more likely?
You have made a fuzzy, murky defense strategy into a clear and open target. Now that you have forced the defense into the open, bring in the witnesses to attack the defense position. The plaintiff loved to bowl with her daughter every Saturday morning. Since the accident she has given this up. Which is more likely, that she gave it up because of her injuries, or because she has been faking for the last two years in hopes of recovering money in a lawsuit? The plaintiff returned to work one week after the accident. Is that what malingerers do? Note: the defense has put the plaintiff's character in issue. Any evidence of good character is now likely relevant.

Again, notice how often the defense in your cases fails to openly state the position it wants the jurors to adopt. The more you notice this, the more likely you are to come up with a way to win. Polarizing is just one way.

The same concepts apply to many aspects of trial: your client has a burglary conviction that will come into evidence although it has nothing to do with the admitted liability or damages. The defense never made a reasonable settlement offer. Why not? Because it believes a jury will discount the damages on account of the conviction. So why not speak the truth to the jury:

> We are here because the defense thinks it got lucky. When Mr. Jones ran the red light, he didn't hit a schoolteacher, or a housewife driving her kids to school. He hit my client, a man who served time in jail for his mistakes and was trying to build a respectable life. The defense thinks it got lucky—that you will give Mr. Jones a free pass for running the light on account of my client's conviction.

That's the truth, isn't it? Why not say it?

The moral core of many defense positions is rotten. That is why defense lawyers often won't state them aloud in the courtroom. It is up to us to identify the true defense position and have the courage to state it openly[4]. Once we have done that, a certain calm and clarity settles over the litigation and trial process. The jurors will have a simple choice between two houses, two stories, two competing worldviews. Ours will never be without warts and defects, but compared to the rot of the defense, it looks pretty good.

Author Bio
Rick Friedman is the author of *Rules of the Road, On Becoming a Trial Lawyer* and *Polarizing the Case* (the latter of which is the basis for this article). He conducts a national trial practice through his firm, *Friedman|Rubin*, with offices in Bremerton, Washington and Anchorage, Alaska.

PROTRUSIONS VERSUS EXTRUSIONS
(Intervertebral Disc Pathology, Part 3 of 3)

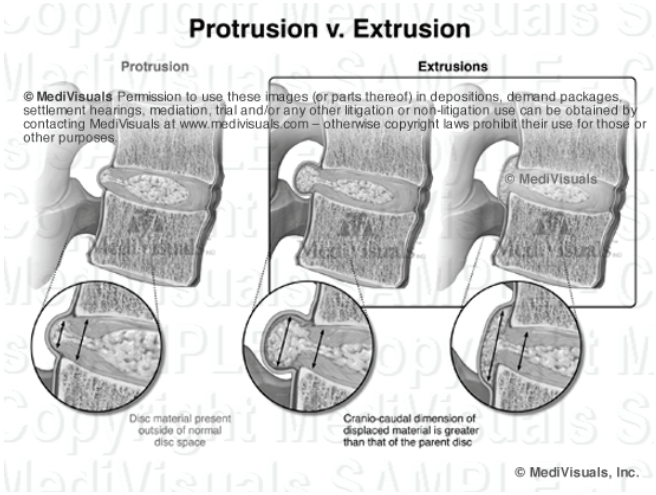
By: Robert Shepherd MS, Certified Medical Illustrator,
Vice President and Director of Eastern Region Operations, MediVisuals Incorporated

This blog is the third in a series referencing language and labels used by health professionals to describe intervertebral disc pathology as defined by a 1995 joint undertaking by representatives from the North American Spine Society, the American Society of Spine Radiology and the American Society of Neuroradiology. As a result of their efforts, a more uniform and widely accepted use of nomenclature to define intervertebral disc pathology was developed and published in "Nomenclature and Classification of Lumbar Disc Pathology".

The first blog in the series dealt with "Bulges" v. "Herniations", "Symmetrical" and "Asymmetrical" disc bulges and "Broad-based" v. "Focal" herniations. The second blog addressed "Anular Tears and Fissures". This blog addresses the use of "Protrusion" and "Extrusion" to describe intervertebral disc herniations.

"Protrusion" and "Extrusion" are essentially used to further classify types of disc herniations. The term "Protrusion" refers to a disc herniation in which the portion of disc material that is outside the normal confines of the disc space is equal to or less than its aperture where the disc material extrudes from the parent disc. Examples of disc "Protrusions" and "Extrusions" are shown in the below images.

The image to the left shows a disc "Protrusion". Note how the superior and inferior dimensions of the disc material that protrudes from its normal confines (highlighted by the arrow on the left) is not as great as the area where the protruding disc material actually exits its normal confines and boundaries (represented by the arrow on the right in the image). By comparison, the two illustrations to the right show two different disc "Extrusions". Note how the dimensions of the protruding disc material are greater than the point where it exits its normal confines.



It is important to appreciate that disc "Protrusions" and "Extrusions" are terms that may be used to further describe "Broad-based" or "Focal" herniations. For example, the disc pathology referred to in the above illustration as a "Protrusion" could also be "Broad-Based," if it extends between 25 and 50% of the distance around the circumference of the vertebral body. Similarly, the disc pathology shown in the illustrations referred to as "Extrusions" could also be referred to as "Focal" if extending less than 25% of the distance around the circumference of the vertebral body (see blog from 08/24/11 for further clarification between "Broad-based" and "Focal" herniations).

(Shepherd, Robert. "Protrsion v. Extrusion." *MediVisuals Incorporated.* MediVisuals Incorporated. 21 Sept. 2011. Web. 30 Sept. 2011.)

THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES

VOLUME 24, 2011-2012

Issue	Article Deadline Date	Publication Date
Summer '12	May 11, 2012	Late June, 2012

COMP CORNER

By: Thomas C. Baumann, Esq.

THIRD-PARTY TORT CLAIMS AND COMPROMISE AND RELEASE

A Philadelphia County case provides an exercise in caution for all practitioners in Compromise and Releases where there is a third-party claim ongoing. *Louise Holts v. Thyssenkrupp Elevator Corporation d/b/a Thyssen Security Elevator and United Elevator Company*, 2011 Phila. Ct. Com. Pl. Lexis 235 involves a Workers' Compensation case and a third-party matter. Holts was injured when she fell into an elevator on September 29, 2009. She brought an action against the above named defendants and received Workers' Compensation benefits. In the Report of Occupational Injury, her injuries were listed as to her forehead, lip, finger, and knee. A Notice of Compensation Payable was issued on October 15, 2007. In September 2008, Holts has an MRI scan, which demonstrated a left shoulder rotator cuff injury. Also in September 2008, Holts filed a Petition to Review the description of injury with the Bureau of Workers' Compensation to include "lumbosacral and cervical strains and sprains injuries."

The Workers' Compensation Judge granted the Petition to Review pursuant to a Stipulation entered into by Holts and her employer. The Stipulation added the above-mentioned lumbosacral and cervical injuries and did not mention a rotator cuff injury.

On July 27, 2010, the parties entered into a Compromise and Release Agreement by stipulation, resolving the work-related injury, which was described as "contusions of the head, right knee and left second finger." A Workers' Compensation Judge then granted the Petition to Seek Approval of the Compromise and Release Agreement.

In the third-party litigation, the Claimant sought to include damages for a left shoulder rotator cuff injury. The Trial Court granted third-party defendant's Motion in Limine, precluding evidence that the Claimant injured her shoulder in the work-related accident.

The Jury concluded negligence existed, but the negligence did not cause the Plaintiff's injury. Holts subsequently appealed, arguing, among other theories, the Trial Court should not have granted the Motion in Limine preventing Holts from offering evidence about a left shoulder injury.

The Court concluded the Doctrine of Collateral Estoppel "precludes plaintiff from introducing evidence of other injuries not litigated in the Workers' Compensation matter against her employer or was not, more specifically, part of the Stipulation Agreement entered into and judicially approved during the Workers' Compensation proceedings." Slip Opinion, Page 6. The Court noted Holts never sought to add the shoulder injury to the description of injury, despite filing a Petition for Review listing other injuries a week after she had undergone a diagnostic test, which demonstrated the existence of the shoulder problem. The Court also noted, with significance, the stipulations in the Compromise and Release Agreement, which did not include reference to a shoulder injury. The Court stated, "This Trial Court is bound to accept the term of the judicially approved Stipulation, particularly, the injuries plaintiff and her employer agreed were suffered. Undisputedly, this Stipulation did not include a shoulder/rotator cuff injury." See Slip Opinion at page 7.

The Holts case serves as a reminder that where other litigation exists at the time of a Compromise and Release, the parties need to be very careful as to the description of injury contained in the Stipulation. Defense counsel are also cautioned to exercise care as the description would likely affect the subrogation rights of the employers/Workers' Compensation carrier. In cases where different firms represent the injured worker in the respective actions, the author recommends communication between counsel regarding injury description at the time the Workers' Compensation case is concluded by Compromise and Release. Plaintiffs will need to step carefully in these situations.

Don't agree with what you've read?
Have a different point of view?

If you have thoughts or differing opinions on articles in this issue of The Advocate,
please let us know.
Your response may be published in the next edition.

Send your articles to *admin@wptla.org, Attn: Bernie*

THE NEW JOINT AND SEVERAL LIABILITY AMENDMENTS - MAXIMIZING YOUR CLIENT'S RECOVERY FROM THE DEEP POCKET, BUT LESS THAN 60% CULPABLE DEFENDANT

By: David M. Landay, Esq.

The joint and several liability amendments clearly apply when the plaintiff timely sues multiple defendants in the same action. Based on a careful reading, these amendments do not apply when an additional defendant is joined after the plaintiff's statute of limitations expires, however. This may provide a tactical approach that maximizes the plaintiff's recovery.

Under the Rules of Civil Procedure, any party may join as an additional defendant any non-party who may be solely liable or "liable to or with the joining party" on any cause of action involving the occurrence on which the underlying cause of action is based. Pa. R.C.P. 2252. The plaintiff can then recover from the additional defendant if the additional defendant is either alone liable to the plaintiff or is jointly liable with the original defendant. The plaintiff recovers as though the additional defendant had been originally sued. PA. R.C.P. 2255(d).

When an additional defendant is joined after the plaintiff's statute of limitations has run, the additional defendant cannot be directly liable to the plaintiff. *Dickson v. Lewandowski*, 228 Pa. Super. 57, 323 A.2d 169 (1974). Hence, an original defendant and a late-joined additional defendant can never be jointly and severally liable to the plaintiff. An original defendant, however, can always join an additional defendant at any time for a claim of contribution or indemnity. This claim is the original defendant's own separate cause of action. It does not arise until he has been held liable to the plaintiff. *Hileman v. Morelli*, 413 Pa. Super 316, 605 A.2d 377 (1992).

The joint and several liability amendments, as already noted, limit the liability of a defendant who is less than 60% at fault to his proportionate share of liability. Under the amendments' language, however, this to only applies when the defendants among whom liability is being apportioned are jointly liable to the plaintiff.

The operative subsection of the amended Act, subsection (a.1), is titled "Recovery against joint defendant: contribution". 42 Pa. C.S.§7102(a.1). Although the term "joint tort-feasors" is defined by statute, 42 Pa. C.S.§8322, the term "joint defendant" is not.

Subsection (a.1)(1) provides that where liability is attributed to multiple defendants, each defendant is liable for his proportionate share.

Significantly, subsection (a.1)(2) provides that except as set forth in paragraph (3) (which includes a defendant who is at least 60% at fault):

> A defendant's liability shall be several and not joint, and the court shall enter a separate and several judgment in favor of the plaintiff and against each defendant for the apportioned amount of that defendant's liability.

42 Pa. C.S.§7102(a.1)(2) (emphasis added).

Statutes are not presumed to make changes in the common law or prior existing law beyond what is expressly declared in their provisions. *Krivijanski v. Union R.R. Co.*, 357 Pa. Super. 196, 205, 515 A.2d 933, 938 (1986). Moreover, a statute of limitations, like all statutes, must be read with reason and common sense. Its application must not be made to produce something that the legislature could never have intended. *Fine v. Checcio*, 582 Pa. 253, 270, 870 A.2d 850, 860 (2005). Finally, it is presumed that the General Assembly intends the entire statute to be effective and certain. 1 Pa. C.S.§1922(2) (Statutory Construction Act).

The only logical reading of (a.1)(1) and (a.1)(2) is that their provisions only apply to comparative fault among defendants who can be directly liable to the plaintiff, i.e., defendants who can be jointly liable ("joint defendants"). Under any other interpretation, the court would have to enter a separate judgment for the plaintiff and against an additional defendant found liable even if that defendant was joined after the expiration of the plaintiff's statute of limitations. The legislature could not have intended such an absurd result. Hence, the amendments and their limitations do not apply to an additional defendant joined too late.

Under the amendments, when an additional defendant is joined late, the plaintiff is entitled to a judgment against the original defendant for the full amount of the verdict. The original defendant is then entitled to a judgment against the additional defendant for the amount he pays in excess of his proportionate share.

This analysis suggests a viable but sometimes risky strategy: suing the less culpable defendant at the last possible minute. This can be best illustrated by an example.

Assume that P is a passenger in D-1's car. D-1, who is speeding, wrecks into D-2, who has just pulled onto the road without yielding the right of way. P is severely injured.

P's damages are $1 million. D-1 has the minimum liability insurance limits of only $15,000.00 while *Continued on Page 11*

THE NEW JOINT AND SEVERAL*...(Continued from Page 10)*

D-2 has liability insurance limits of $1 million. There is no underinsured motorist coverage and D-1 is judgment proof.

Assume that a reasonable jury would determine that D-1 is 95% at fault while D-2 is only 5% at fault.

If P timely sues D-1 and D-2, then he can collect up to 95% of his damages from D-1 and his insurer ($15,000.00). Applying the amendments, D-1 can only collect 5% of his damages from D-2 and his insurer ($50,000.00).

If P is willing to risk losing the recovery of $15,000.00 from D-1, he can sue D-2 alone right before the statute of limitations expires. Then, when D-2 joins D-1 as an additional defendant, D-1 cannot be directly (or jointly) liable to P. As discussed above, subsection (a.1) does not apply. D-2 remains severally liable for the entire verdict even though he is only 5% at fault. P can collect $1 million from D-2 and his insurer. D-2 still has a right to contribution of $15,000.00 from D-1.

If the court rejects the above analysis, P still collects $50,000.00 from D-2, but collects nothing from D-1 because D-1 was joined too late. Therefore, this approach must be taken with the client's complete informed consent.

If D-1 is uninsured (assuming no applicable uninsured motorist coverage), then this approach may carry little or no risk. P then cannot recover anything from D-1 anyway. The main risk P takes in waiting to sue D-2 alone is losing the opportunity to do discovery to timely identify other viable defendants. A comprehensive investigation should eliminate this risk in most cases.

If the legislature had intended the limitations on joint and several liability to apply even when one or more of the defendants cannot be directly or jointly liable to the plaintiff, then it could have easily said so. For instance, it could have written §(a.1)(2) using some of the same language from former §7102(b) now repealed, as follows:

> A defendant's liability shall be several and not joint, and the court shall enter a separate and several judgment in favor of the plaintiff and against each defendant *against whom the plaintiff is not barred from recovery* for the apportioned amount of that defendant's liability.

Legislative intent controls. When the words of the statute are clear and free from all ambiguity, they are not to be disregarded under the pretext of pursuing its spirit. 1 Pa. C.S.§1921(b).

NEIGHBORHOOD LEGAL SERVICES OFFERS PROTECTION FROM ABUSE CLE, MAY 4

"Helping Domestic Violence Victims Obtain Protection Orders" ***May 4, 2012, 9:00 a.m. - 1:30 p.m.***

This course trains attorneys to obtain final protection from abuse orders (PFAs) for victims of domestic violence. It is open to all attorneys interested in volunteering for NLSA's PFA program. The law firm of K&L Gates will host the training at 210 Sixth Avenue, Pittsburgh, 15219, on Friday, May 4, 9:00 a.m. to 1:30 p.m. (registration from 8:30 to 9:00 a.m.). CLE CREDITS: 3 substantive, 1 ethics. REGISTRATION FEE: **Free** for attorneys or paralegals volunteering to take PFA referrals; $80 for non-volunteers; $20 for non-volunteers who do not want CLE credit. Space is limited. Registration will be accepted on a first come/first served basis.

Get a registration form at http://www.nlsa.us/news/seminar2.html or call Mary Ann Troper-Malley at 412-586-6134.

"Representing Clients in Expungement Proceedings" ***May 4, 2012, 9:00 a.m. - 11:45 a.m.***

Current and prospective Member firms and legal departments of the Pittsburgh Pro Bono Partnership are invited to participate in a new program that will serve individuals facing barriers to employment because of criminal records that are eligible for expungement. A CLE training program offered by Neighborhood Legal Services Association and hosted by Buchanon Ingersoll will be held on Friday, May 4, 9:00 a.m.- 11:45 a.m. (registration from 8:30 to 9:00 a.m.), Moses Hampton Room 20th floor, Oxford Centre, 301 Grant St., Pittsburgh, PA 15219.
Get a registration form at http://www.nlsa.us/news/seminar5.html or contact Sharon Goldsmith at goldsmiths@nlsa.us or 412-586-6101.

For more information about the Pittsburgh Pro Bono Partnership or to find out if your firm or corporation is a member, contact Katie Kenyon at 412-263-1837 or kmk@pietragallo.com.

HOT OFF THE WIRE!

By: Chris Hildebrandt, Esq

SUPREME COURT OF PENNSYLVANIA

An uninsured motorist is permitted to seek tort damages for economic loss from an alleged third-party tortfeasor.

Corbin v. Khosla, 2012 Pa. LEXIS 350 (Feb. 21, 2012)

This case reached the Supreme Court via the Third Circuit's petition for certification of the following question of law: "Does § 1714 of the Motor Vehicle Financial Responsibility Law preclude an uninsured motorist from recovering tort damages for economic losses from an alleged third-party tortfeasor." The Supreme Court held that "Section 1714 of the MVFRL does not preclude an uninsured motorist from recovering tort damages for economic loss from an alleged third-party tortfeasor under the tortfeasor's liability coverage."

It was undisputed that the plaintiff was operating an uninsured vehicle at the time of the collision with the defendant's vehicle. Defendant filed a motion for partial summary judgment, seeking the dismissal of the plaintiff's claims for economic damages and a declaration that the plaintiff was precluded from recovering non-economic damages under section 1705.

The Supreme Court determined that claims for first-party benefits are fundamentally distinct from claims for third-party benefits. The Supreme Court analyzed subchapters A and B of the MVFRL and concluded there was no ambiguity when the sections were considered together. The Supreme Court reasoned Pennsylvania attempts to deter motorists from driving without insurance in two ways. First, uninsured motorists are limited in their recovery of non-economic damages by virtue of defaulting to limited tort. Second, uninsured motorists are precluded from making claims for first-party benefits; this preclusion is clearly "a sanction or penalty for driving without insurance," and "deprives the uninsured driver of speedy payment of medical and wage loss benefits from any first-party carrier through a direct claim against a policy for no-fault benefits." The Supreme Court concluded the MVFRL sanctions uninsured drivers by thrusting them "into the uncertainty, time and expense required to sue the tortfeasor, establish fault, and recover payment limited to economic damages . . . from the tortfeasor's insurance company under the third-party liability provisions of the insured's policy.

Accordingly, uninsured motorists are permitted to seek tort damages for economic loss from an alleged third-party tortfeasor under the tortfeasor's liability coverage.

SUPERIOR COURT OF PENNSYLVANIA

A party seeking to withhold documents pursuant to the attorney-client privilege has the burden of demonstrating that the documents were related to a fact of which the attorney was informed by his client for the purpose of securing either an opinion of law, legal services or assistance in a legal matter.

Custom Designs & Manufacturing Co. v. Sherwin-Williams Co., 2012 PA Super 33 (Feb. 15, 2012)

Plaintiff sued Sherwin-Williams, alleging its products self-heated or spontaneously-combusted, resulting in a fire which significantly damaged the plaintiff's business. During discovery the plaintiff learned of two memoranda regarding observations the day after the fire and conversations with witnesses which had been prepared by a Sherwin-Williams employee and directed to Sherwin-Williams' in-house counsel. Sherwin-Williams objected to the production of the memoranda based upon the attorney-client privilege and attorney work product protection.

The question before the Superior Court was whether "intra-company communications concerning an impending claim to the in-house counsel responsible for providing legal advice with respect to that claim [are] protected by the attorney-client privilege."

The Superior Court noted Sherwin-Williams, as the party invoking the privilege, had the initial burden of producing sufficient facts to demonstrate the privilege was properly invoked. Reviewing the record, the Superior Court determined Sherwin-Williams was unable to demonstrate the memoranda were prepared at the request of in-house counsel. In addition, the record demonstrated the employee who prepared the memoranda visited the plaintiff's facility the day after the fire, because the plaintiff was a large customer and the employee was concerned the fire would impact the plaintiff's ability to purchase Sherwin-Williams' products. Thus, according to the Superior Court, the employee was not asked by counsel to investigate the cause of the fire "in preparation for litigation," but instead went to the site "for the purpose of aiding a major client."

The Superior Court concluded Sherwin-Williams did not properly invoke the attorney-client privilege, because it failed to meet its burden of demonstrating the memoranda related "to a fact of which the attorney

Continued on Page 13

HOT OFF THE WIRE … *(Continued from Page 12)*

was informed by his client . . . for the purpose of securing either an opinion of law, legal services or assistance in a legal matter." Accordingly, the Superior Court affirmed the trial court's order requiring the production of the memoranda.

Where an insurer alleges that an insured's uninsured motorist claim is barred by the insured's failure to give timely notice of the existence of a phantom vehicle, the insurer is not required to establish prejudice by demonstrating conclusively what evidence a timely investigation would have discovered.

Vanderhoff v. Harleysville Insurance Co., 2012 PA Super 22 (Feb. 6, 2012)

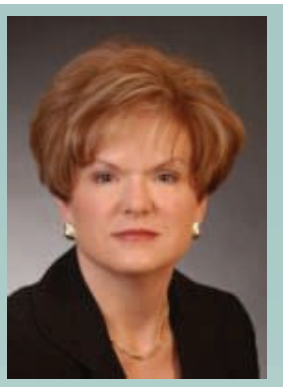
On October 4, 2001, the plaintiff rear-ended a vehicle operated by Ryan Piontkowski. The plaintiff contended a white vehicle had cut off Mr. Piontkowski, causing him to stop suddenly, causing the plaintiff to rear-end his vehicle. Harleysville was not placed on notice of the alleged phantom vehicle until June 2002, when the plaintiff filed a claim for uninsured motorist benefits.

Previously, the Supreme Court had determined that a showing of prejudice was necessary before an insurer could deny coverage based upon untimely notice. Vanderhoff v. Harleysville Ins. Co., 997 A.2d 328 (Pa. 2010). On remand, the trial court held an evidentiary hearing. The trial court concluded Harleysville failed to establish prejudice "as it did not show that the result would have been different had there been timely notice of the phantom vehicle."

The Superior Court determined the trial court's decision "constitutes a clear abuse of discretion, as it does not comport with reason." The Superior Court reasoned it is "nearly axiomatic that the insurer cannot know what evidence it might discover" if an investigation was conducted upon "a timely report of an unidentified vehicle." According to the Superior Court, "if the insurer could establish with certainty what evidence it would have discovered, it would, by definition, not be prejudiced by the lack of timely notice." Thus, the Superior Court concluded the trial court erred in requiring Harleysville to establish conclusively what evidence a timely investigation would have discovered.

The Superior Court noted the record demonstrated that the only evidence of the existence of the phantom vehicle was the plaintiff's testimony. There was no physical evidence of a phantom vehicle, the existence of the phantom vehicle was neither mentioned in the police report nor in the plaintiff's claim for workers' compensation benefits, and the only available eyewitness testified as to the absence of any phantom vehicle. These facts appeared to influence the Superior Court's decision.

PICTURES & PROFILES QUESTIONNAIRE



Name: Veronica A Richards

Firm: Richards & Richards LLP

Law School: Duquesne University

Year Graduated: 1989

Special area of practice/interest, if any: Medical Malpractice

Most memorable court moment: I was getting ready to start a trial when my clients told me that they could not continue with the case because they are 'in the witness protection program' and they could not risk disclosure of their real identities

Most embarrassing (but printable) court moment: In Ohio at a settlement conference I told the Judge that we would not contribute and he ordered the Deputy to take me to jail for 72 hours or get whatever my client would have to pay in legal fees for my jail time

Most memorable WPTLA moment: It's happened again and again-I ask for help from a fellow WPTLA member and I am overwhelmed with the generosity and intelligence of my colleagues

Happiest/Proudest moment as a lawyer: My first plaintiff's verdict was $25,000 for a mentally ill woman. Her response was "thank you-no one has ever stood up for me in my life." My expert cost exactly $25,000-money well spent!

Best Virtue: Loyalty

Secret Vice: It wouldn't be a secret if I told

People might be surprised to know that: I am a master cake decorator

Favorite movie (non-legal): It's a Wonderful Life

Favorite movie (legal): Rocky- it's about the underdog-I watch a certain scene before every trial

Last book read for pleasure, not as research for a brief or opening/closing: Steve Jobs

My refrigerator always contains: Butter

My favorite beverage is: The answer to my secret vice is the same so I can't tell

My favorite restaurant is: Hyeholde

If I wasn't a lawyer, I'd be: A singer but I can't sing. . .

A VIEW FROM THE BENCH

By: The Hon. Beth A. Lazzara

Closing Arguments

It appears we are almost at the end of our discussion of trial basics, given today we start to discuss closing arguments. Recently, I had an attorney, during his closing in front of a jury, lament that the closing is called a "closing argument." His point was that the word "argument" implied a heated disagreement, which wasn't the situation in the case at hand where most of the facts were agreed on. My thought at the time was that counsel was missing the boat. A closing argument is not about being disagreeable or heated with your opponent. It is about trying to persuade by reasoning, by drawing inferences from facts, and by addressing and discussing points of fact and law in a case in a way that is most favorable to your side. Isn't that what an argument, in the legal sense, truly is?

Unfortunately, it seems many attorneys don't fully understand the concept of a closing argument. Too many seem to agree with the attorney I mentioned above. Too many miss out on the incredible opportunity they are given to ARGUE (in the best sense of the word) to the jury, with no interruption and with the full focus and attention of the jury. It is a priceless chance to present your version of the case in front of the jury. It is an opportunity that should not be wasted, squandered, or misused.

So, what makes a good closing argument? It might be easier to start with what a good, effective closing argument is not. A good closing argument is NOT:

- A mere recitation or summary of the facts and evidence introduced at trial.
- A wandering, stream of consciousness discussion of the case.
- A bash-fest, where you attack anyone and everyone who annoyed you during the case.
- A point by point refutation of your opponent's closing.
- A timid suggestion to the jury to find in your favor.
- A chance to create facts to help you win.
- A chance for you to focus on you and your practice instead of the client and case at hand.
- Delivered seated at counsel table.
- Delivered in a monotone.
- Muddled.
- Read verbatim from notes.
- The time to lose or pack away your exhibits.
- The time to forget about demonstrative evidence.
- The time to shout red-faced at the jury.
- The time to forget to talk about the law and what you are required to prove to win.
- The time to fail to address holes poked in your case.
- Prepared as it is being delivered.

A good closing is a carefully *crafted, persuasive* legal argument of your theory of the case. It is your last chance to clearly explain to the jury why your position is the correct one. Remember, the jury has not lived with the case for months or years as you have. Jurors have only been involved in the case for a few days. Your closing is the opportunity to clearly explain your position to them, to bring your knowledge of the case to them in an uninterrupted format, to tie the whole case up with a pretty bow and present it to them.

It is an absolute truth that **you cannot persuade until the jurors understand**. Therefore, your job in the closing is to make the jurors fully and completely understand your theory of this case. This means you MUST weave together the facts introduced at trial with the law that is going to be provided to the jury by the judge in order to make a cohesive, tight theory of why your client should win.

This should not be a hard thing to do. You should have your detailed proof outline. This is the basis for your closing as it should contain the step-by-step outline to prove your case. You have heard the facts presented. You should have notes of what went on at trial. Add the facts into your proof outline if there are things that came up that you did not anticipate when you prepared the outline. Make sure all of the defenses presented at trial are also included in your proof outline. You've had your charging conference. You can adjust the law on your proof outline to reflect the charge that will be given. Your complete after-trial proof outline is the document from which you can craft a clear, understandable and persuasive closing.

It absolutely boggles my mind to consider the number of closings I have seen and heard where the elements of the law are not discussed with the jury. You all know what the jury does in the jury room, right? They try to fit the facts of the case into the law as it was read to them. Don't let the jurors

A VIEW FROM THE BENCH...(Continued from Page 14)

have the first crack at fitting the facts into the legal elements! Do it in your closing! That is what the closing is for! Use your ELMO, or blow up the specific charge on a board so that you can walk the jurors through how the law and facts fit together. Write on your board under each element the facts that support it or at least the witness's name that supports that element. Hearing things alone does not make the same impression as seeing and hearing together does.

You know, it has always been the case that the jurors decide the case without seeing or having an actual copy of the charge. The rationale in the caselaw that prohibited the jury from getting the charge was all set forth in criminal cases. Well, lo and behold, we here in the criminal division are now permitted, by RULE, to provide the substantive portions of the charge to the jury. The rationale of that caselaw is now out the window. Take copies of Rule of Criminal Procedure 646, as well as Criminal Jury Instruction 7.11, when you go to the charging conference. Ask the judge to provide the substantive portions of the charge to the jury in writing. Then, as you go through the actual language of the negligence charge during your closing, you will know they will have the same language with them in the jury room. If your case is strong in terms of the law, you should definitely do this. If you have a case where you need to gloss over a few of the elements, then you should not do this.

Look, most of us are not F. Lee Bailey. However, you don't need to be in order to deliver a good, solid closing. You need to talk to the jurors in a conversational tone, with rising or falling pitch as the facts may indicate. You don't need to impress them with your vocabulary or command of literature from which to make reference to your case. You need to talk to them as you would a friend or relative who you are trying to convince (without the swearing for some of you!). Use regular language and as much emotion as the case requires. No need to go overboard. Jurors recognize puffing and dramatics, and they don't like either. Be mindful a dramatic or artistic presentation is not going to hide the lack of substance in your closing. Content should come first and foremost.

We'll talk a little about content next time. I have to go listen to another closing……..

SPONSOR SPOTLIGHT

NAME: George Audi

BUSINESS/OCCUPATION: The James Street Group - Settlement Planner (Structured Settlements-Structured Attorney Fees-Trust Consultation/Administration-Lien Resolution)

FAMILY: Wife-Denise, Daughter-Gabriella (14), Son-Dylan (12), Goldendoodle - Chase Utley Audi (4)

INTERESTS: Baseball, Golf, Billiards, Cooking dinner for my family

PROUDEST ACCOMPLISHMENT: Marrying way above my head and having 2 children that are smarter and more athletic than I ever was

FUNNIEST/WEIRDEST THING TO HAPPEN TO YOU ON THE JOB: Drove 6 hours to Buffalo for two appointments. Halfway there, the first appointment cancelled and when I arrived at the 2nd appointment, client was not in. He was at the hospital tending to his son who had broken his collarbone that morning in gym class. 12 hours of driving...in the snow...and cold...only to come back empty handed

FAVORITE RESTAURANT: Barclay Prime / Hyde Park / Go Fish

FAVORITE MOVIE: Caddyshack...hands down

FAVORITE SPORTS TEAM: Phillies / Steelers (season ticket holder)

FAVORITE PLACE(S) TO VISIT: Anyplace warm during the winter

WHAT'S ON MY CAR RADIO: MLB/ESPN/PGA/ Country/Classic Rewind/Bob Dylan

PEOPLE MAY BE SURPRISED TO KNOW THAT: I host a live TV show monthly called "Golf Talk"...and....My hair is naturally curly

SECRET VICE: Scotch and Cigars...but it's not much of a secret

BY THE RULES

By: Mark E. Milsop, Esq.

JURISDICTIONAL PREILIMINARY OBJECTIONS CAN BE DEFEATED

A recurrent question is when a Defendant may be sued under Pennsylvania's long arm statute[1]. In evaluating the existence of continuous and systematic part of a defendant's business, it may be tempting to think that where a defendant does not have a physical presence here and only a small portion of its business is conducted here, there will not be jurisdiction. However, Judge Wettick's recent decision in Townsend v. Buchanan, Ingersoll & Rooney, No. GD 09-013427 (Allegheny County 2012) makes it clear that the percentage of business does not need to be large.

In Townsend, one of the Defendants, Proskauer Rose LLP ("Proskauer") filed preliminary objections as to jurisdiction.[2] The facts revealed that Proskauer was a New York corporation which does not own or lease property in Pennsylvania. There are also no employees or bank accounts in Pennsylvania. It did not advertise here but did maintain a website. There is some recruiting activity at one law school. It owns a backup server located in Philadelphia. Less than one percent of their attorneys are licensed in Pennsylvania and no partner lives in Pennsylvania.

[1] 42 Pa. C.S.A. §5301 provides:

> **(a) General rule.**--The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person, or his personal representative in the case of an individual, and to enable such tribunals to render personal orders against such person or representative:
>
> (1) Individuals.--
>
> (i) Presence in this Commonwealth at the time when process is served.
> (ii) Domicile in this Commonwealth at the time when process is served.
> (iii) Consent, to the extent authorized by the consent.
>
> (2) Corporations.--
>
> (i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.
> (ii) Consent, to the extent authorized by the consent.
> (iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth.
>
> (3) Partnerships, limited partnerships, partnership associations, professional associations, unincorporated associations and similar entities.--
>
> (i) Formation under or qualification as a foreign entity under the laws of this Commonwealth.
> (ii) Consent, to the extent authorized by the consent.
> (iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth.

[2] The case arose out of the handling of a merger and related tax issues.

No more than 1.5% of Proskauer's clients had Pennsylvania mailing addresses and no more than 1.88% of revenue came from Pennsylvania clients with Pennsylvania addresses. However, the annual revenue from clients with Pennsylvania addresses was $7 million dollars. Hence, Judge Wettick held that there was sufficient contact even if only 1.88% of revenue came from clients with Pennsylvania addresses.

In doing so, Judge Wettick insightfully observed that if 5 attorneys[3] of a 20 attorney firm engaged in full time representation of Pennsylvania clients, this would clearly be sufficient to meet the jurisdictional requirements. Where the firm is larger, the only difference would be in the percent of business done in Pennsylvania. Hence, the test must be the amount of activity and not the percent of activity.

Accordingly, the Preliminary Objections as to jurisdiction were denied. The lesson to be learned is not to allow large Defendants mislead the Courts into looking at percentages in evaluation whether their contacts with Pennsylvania are continuous and systematic.

MORE ON THE DISCOVERY OF SOCIAL MEDIA CONTENT

In the Fall issue, I commented on the issue of discovery of social media content. In reading another article from an author with a contrary opinion, I note that he commented on the Facebook Privacy Policy and suggested that this dispels an expectation of privacy. The author is correct that this rationale was included in the McMillen v. Hummingbird Speedway 2010 Pa. Dist. & Cnty. Dec. Lexis 270 (Jefferson County 2010) and Largent v. Reed, (Franklin County 2011). However, I write to note the fallacy of this provision. Even if the Facebook Privacy Policy states that it will disclose information in response to subpoenas, to use a common expression, this puts the horse before the Cart. Such a statement defeats the plaintiff's expectation of privacy only if the plaintiff would reasonably expect that their Facebook postings can be properly subpoenaed in a civil case. I would submit that Facebook cannot be properly subpoenaed; and as such, the plaintiff has a right to expect that his non-public postings will remain confidential.[4]

[3] The five attorney analysis seems to be based upon the fact that Judge Wettick concluded that at a billing rate of $700 per hour, Proskauer would produce $10,000 hours of work for clients with billing addresses in Pennsylvania. Apparently, based upon a 2,000 billable hour year, this would amount to 5 fulltime attorneys.

[4] Grasping for straws a defendant may argue that if a subpoena is served, Facebook will respond and the plaintiff should know this. However, the Pennsylvania Rules of Civil Procedure specifically provide a procedure for the service of third party subpoenas that allows for an objection period before a subpoena may even be served. See Pa.R.C.P. No. 4009.21 et. Seq.

Trying to Reason with Hurricane Season.

Chip Bell. Tarentum, PA:
Word Association Publishers,
2011. 206 pages.
Reviewed by: Brittany Huey

Chip Bell's follow-up novel to *Come Monday* reunites the reader with his forthright protagonist, Jake Sullivan, in *Trying to Reason with Hurricane Season.* The novel opens with a historic moment: a peace treaty between the United States and Cuba is scheduled to be signed in several months' time in Miami with a meeting of the President of the United States and the Castro brothers. After landing Benjamin Matthews, the corrupt former Attorney General, a spot in prison, Jake is turning his life around. He has been reinstated as Chief Prosecutor in the Miami Office of Justice, he has quit drinking, and he and his wife are giving their relationship another chance. The President of the United States names Jake the Federal Prosecutor for the treaty signing. But, when an unheard of Cuban splinter group called "The Birth of New Madrid" employs an assassin to kill the President of the United States; the President of Cuba, Raul Castro; and the former President of Cuba, Fidel Castro, Jake is thrown into a chaotic and dangerous situation. As if this was not enough, he has the burden of arranging the signing of the treaty during hurricane season. Some intense investigative work and dedication allow Jake and his best friend, Mike Lang, to keep their heads above water and stay on top of these threats. However, everything flips as Bell introduces captivating twists and turns, completely changing the plot of the story and causing readers to question each character's involvement. Taking the reader from the bustle of Miami to the backwoods of West Virginia to a magnificent return to Key West, Bell's story races to its riveting conclusion.

Trying to Reason with Hurricane Season maintains the action and humor that Bell presented in his first novel, but this second one adds some romance and science fiction, providing elements everyone can enjoy. Bell's short chapters make the book a page turner. He will introduce a minor character for a few short pages, but the character always plays an important role, even if he is killed off at the chapter's close. And while the majority of the novel follows Jake and Mike, there are a few chapters where the reader follows the villain, which is an absorbing and stimulating view into the criminal's thoughts and actions. This novel does what few sequels are able to do; it provides an equally entertaining and action-packed story. Bell tops it.

WPTLA Member Charles L. (Chip) Bell, Jr. is a practicing attorney specializing in personal injury litigation, with his main office in Arnold, Pennsylvania. He attended Duquesne University School of Law and graduated Cum Laude. He attended Allegheny College in Meadville, Pennsylvania and graduated Phi Beta Kappa and Magna Cum Laude. He served in the United States Army from 1972 to 1974.

Chip Bell lives in New Kensington, Pennsylvania with his wife, Linda. He is the father of two daughters, Jennifer and Jessica.

Trying to Reason with Hurricane Season *is his second novel.*

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CALENDAR OF EVENTS

Friday, May 4, 2012	Annual Judiciary Dinner	Heinz Field Pittsburgh, PA
Tuesday, May 15, 2012	CLE Lunch 'n Learn Program	Allegheny County Courthouse Pittsburgh, PA
Thursday, May 24, 2012	Ethics Seminar & Golf Outing	Shannopin Country Club Pittsburgh, PA

ECONOMIC HORIZON

By: Bernard C. Caputo, Esq.

The term "lost earnings capacity" refers to the detrimental effect an injury has on an otherwise healthy individual's general ability to earn a living. Loss of earning capacity means there is a loss of earning power and the ability to earn money. Williams v. Dulaney, 331 Pa.Super. 373, 480 A.2d 1080 (1984) (citing Christides v. Little, 274 Pa. Super. 350, 418 A.2d 438 (1980)). Justice Musmanno gives a simple illustration of loss of earning capacity in DiChiacchio v. Rockcraft Stone Prods. Co., 424 Pa. 77, 225 A.2d 1913 (1967):

> An injured working man, who was earning $100 a week before an accident and received $125 a week after the accident, could still establish impairment of earning power if the facts indicated, had it not been for his injuries, his pay envelope would have contained $150 a week.

Id. at 915. The Court goes on to say:

> The test is not exclusively a comparison of before-and-after figures, but a determination as to whether, because of the injuries, the injured man's economic horizon has been shortened.

Id. In other words, loss of earning capacity refers to the economic disadvantage suffered by an injured Plaintiff because he is unable to perform certain functions, jobs, or tasks which he could have done, had he not been injured.

The test to determine impaired earning capacity is whether the plaintiff's economic horizon has been shortened due to the injuries sustained as a result of the tortfeasor's negligence. Harding v. Consolidated Rail Corp., 423 Pa. Super. 208; 620 A.2d 1185 (1993) (citing Lewis v. Pruitt, 337 Pa.Super. 419, 487 A.2d 16 (1985).). One example of an award for impairment for loss of earnings capacity is found in Bochar v. J.B. Martin Motors, Inc., 374 Pa. 240, 97 A.2d 813 (1953).

In Bochar, the plaintiff, a telephone repairman, suffered a permanent limitation of the motion of his knee. The injury prevented him from returning to his former duties, but it neither prevented his employment at a desk job nor reduced his earnings. The defendant contended there was no evidence of impairment of earning power, because the plaintiff's wages were higher after the accident than before.

The Court found the status of the immediate change in wages does not determine the loss of earnings capacity, but rather, where permanent injury is involved, the whole span of life must be considered. Therefore, the question becomes whether or not the economic horizons of the disabled person have been shortened because of the injuries sustained. Bochar, Id. "The normal status of a healthy person is to progress, and to the extent that his progress has been curtailed, he has suffered a loss which is properly computable in damages." Id.

In Frankel v. Todd, 393 F.2d 435 (3rd Cir. 1968), the Third Circuit considered whether the District Court erred in refusing to submit the issue of plaintiff's loss of earning capacity to the jury. The plaintiff, a 19 year-old college student, was seriously and permanently injured in an automobile accident. Plaintiff sustained a concussion, damage to internal organs, and fractures of the pelvis, which left her with a limping gait. In addition to the limp, Plaintiff continued to suffer headaches, dizziness, ringing in her ears, and blurred vision. After analyzing Pennsylvania law regarding lost earning capacity, the Court reversed the decision of the lower court, instead finding the issue should have been submitted to the jury to determine whether plaintiff's economic horizon had been limited by the accident.

> It requires no great stretch of the imagination to conclude that in the instant case it might well transpire that the plaintiff will have to give up her teaching employment because of her disabling injuries and that she might be compelled to accept employment at a lesser compensation, and that the jury could have so found. Further, the jury could have justifiably found, at the minimum, the plaintiff's opportunities for advancement in the teaching profession have been diminished by her disability. Id. at 434.

The Superior Court reaffirmed the "economic horizon" standard in the case of Mathis v. United Engineers & Constructors, 381 Pa.Super. 466, 554 A.2d 96 (1989). In Mathis, the plaintiff was employed at the Henkels Company, where his duties included lifting heavy objects and performing other strenuous manual labor. However, after the accident upon which the action was based, Mathis performed only light janitorial work. The Court held that despite the fact that the plaintiff continued to receive the same union wage, he was still entitled to present expert testimony on damages for loss of future earnings capacity. The Court stated, "the jury could have concluded that Mathis was no longer capable of working as an all purpose laborer and that he would not be able to secure another position at union wage if he lost his job at Henkels." Id. at 474, 554 A.2d at 104.

It is irrelevant that the plaintiff was not actually employed at the time of the injury, so long as Plaintiff is able to establish his or her economic horizon has been narrowed.

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ECONOMIC HORIZON … *(Continued from Page 18)*

Riddle v. Anderson, 85 Pa. Commw. 271, 481 A.2d 382 (1984). See also, Frankel, supra.

In Riddle, a college student received serious head injuries while a passenger in a car involved in an automobile accident. The jury found both the driver and the Pennsylvania Department of Transportation negligent and responsible for Plaintiff's damages, in the amount of $55,000.00. Although Plaintiff sought future lost earnings, the jury did not make an award for that harm. A new trial was granted on the basis of an inadequate award, and Defendants appealed. Plaintiff was studying architectural engineering. Plaintiff produced evidence of his past academic achievements, as well as the testimony of a vocational expert to establish that he would have completed his architectural engineering course before the accident. In addition, both Plaintiff's neurosurgeon and the vocational expert stated an opinion that plaintiff was unable to complete his education because of brain damage resulting from the accident. Based on this evidence, the Commonwealth Court affirmed the trial court's finding Plaintiff had met his burden of proving that his economic horizons had been narrowed; thus, the verdict was inadequate.

Evidence of diminished earnings capacity need not be established with mathematical exactness. Richardson v. LaBuz, 81 Pa.Commw. 436, 474 A.2d 1181 (1984). It is legally sufficient if the evidence affords the fact finder a reasonably fair basis for calculation. Fish v. Gosnell, 316 Pa.Super 565, 463 A.2d 1042 (1983). In essence, this means if a plaintiff proves his or her ability to perform duties of employment has been impaired, then the factfinder can award damages for loss of earning power. Plaintiff need only present some evidence from which the factfinder can reasonably infer that earning power will probably be reduced or limited in the future. Kearns v. Clark, 343 Pa.Super. 30, 38, 493 A.2d 1358, 1364 (1985).

Also, just because an individual is able to maintain the same salary after an incident as before, does not mean his economic horizons should not be considered during trial. In Ruzzi v. Butler Petroleum Co., 527 Pa. 1; 588 A.2d 1 (1991), Plaintiff suffered a permanent back injury when he fell from a ladder. Unknown to the plaintiff, who lit a torch to cut some rusted bolts from sign, a nearby gasoline tank had a hole, which resulted in an explosion that threw him from the ladder to the ground. Due to his back injury, the plaintiff's work exertion had to be modified, and he could only perform light work. He took a less physically demanding job but, fortunately, suffered no pay cut. The defense claimed that because the plaintiff suffered no loss in salary, the expert witness's testimony was contrary to evidence. However, the Court ruled:

> Earning capacity has to do with the injured person's economic horizons, not his actual earnings, and the fact that Ruzzi was fortunate enough to earn as much as he had formerly earned, but at a new and less physically demanding job, does not establish that a loss of earning capacity, on these facts, is contrary to the evidence.

Id. Plaintiff may have been fortunate enough to earn an equal salary after the incident as before, but his ability to progress has been significantly limited with the severe injury to his back, preventing the more extensive work, such as heavy lifting, he was previously accustomed to.

In Watson v. Doe, 25 Phila. 490; 1993 Phila. Cty. Rptr, Plaintiff was delivering supplies to a terminal at the Philadelphia International Airport. The area in which he was making his deliveries was secured by a curtain gate, which is accessed with a key by a Statewide or City employee. Plaintiff was granted access to the terminal to deliver some supplies, but when he went to retrieve a second round, the gate lowered and knocked him to the ground. As a result, the plaintiff injured the back of his neck, his left shoulder, and his left knee. Due to the seriousness of his injuries, Plaintiff's work had to be modified. Expert witness Dr. Zaslow testified Plaintiff "is not a candidate to do any work that would require him standing, or walking, or climbing, or bending, or kneeling, stooping, things of this sort, no physical work whatsoever." Id. Evidence of permanent injury by itself is sufficient to submit the question of [Plaintiff's] lost economic horizons to the jury. Id. (citing Janson v. Hughes, 309 Pa. Super. 419, 487 A.2d 16 (1985).).

WHY I DOUBLE CHECK CLIENT'S ANSWERS TO INTERROGATORIES

Q - Please set forth a detailed description of all injuries you claim to have sustained as a result of the subject accident?

A - None

Well, that makes it easy, doesn't it?

---Dominic D. Salvatori, Esquire

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…Through the Grapevine

Past President Jerry I. Meyers, **Past President Charles E. Evans**, **Member Todd R. Brown**, and **Member Gregory R. Unatin**, all of Meyers Evans, have moved their office to The Gulf Tower, Ste 3200, 707 Grant St, Pittsburgh, PA 15219.

Member Julian Gray, of Julian Gray Associates, has opened a second office at Summerfield Commons, 2535 Washington Rd, Ste 1111, Pittsburgh, PA 15241. P: 412-833-4400

Member Brian DelVecchio, of DelVecchio & Miller, has a new office address. Brian can be reached at 2322 Glenwood Dr, Kalamazoo, MI 49008.

New Member Rebecca R. Boyle can now be found at 904 Highland Ave, Pittsburgh, PA 15219. P: 412-848-6618 Email: beckyboyle5110@gmail.com

Member Andrew Hladio was injured in an automobile accident recently. While maintaining a law practice, Andy is also a district judge in Beaver County. Our best wishes for a speedy recovery to Andy.

Member Virginia Spencer Scott has new contact information. Virginia can now be reached at the Scott Law Office, 1110 Centre City Tower, 650 Smithfield St, Pittsburgh, PA 15222 P: 412-683-2343

Member Jon R. Perry was recently honored by The Pennsylvania State University with the Service to Society Alumni Award. Jon received this distinguished award for his work in founding, along with his wife, the Pennies From Heaven Keeping Families Together Fund, whose primary mission is to provide financial assistance to parents with sick children admitted to the Children's Hospital of Pittsburgh in order to allow the parents to remain with the child during the hospital admission. To learn more about the Fund, visit www.penniesfromheavenpittsburgh.org.

Member David J. Lozier has opened a new practice in Beaver County. He can be reached through David J. Lozier, Esq., 115 Mervis Dr, Beaver Falls, PA 15010. P: 724-544-9377 Email: davidjlozier@gmail.com

The law firm of Feldstein Grinberg Stein & McKee, of which **Past President Jay Feldstein** and **Member Frank C. Rapp** are employed, has changed. The new firm name is FGSM, P.C.