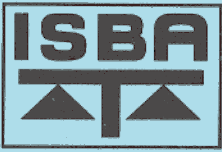

TORT TRENDS

April 1994
Vol. 29, No. 4

Statements or expressions of opinion or comments appearing herein are those of the editors or contributors, and not necessarily those of the association or section.

From the editors

Dear Readers,

This issue of *Tort Trends* contains three articles written by members of the Tort Law Section Council of the Illinois State Bar Association; a letter from Judge O'Connell regarding changes to Rules of the Circuit Court of Cook County and a letter from Joseph B. McDonnell of Churchill, McDonnell & Hatch responding to James P. Ginzkey's article entitled "Changing role of IMEs," which appeared in the December 1993 *Tort Trends*; finally we close with an article entitled "Indivisible injuries—aggravation of prior injuries," written by William A. Allison of Allison & Kelly.

Mr. Allison has submitted his work purportedly in response to one written by me in the December 1993 *Tort Trends*. However, my piece did not discuss apportionment at all. Furthermore, I cannot agree with the premise that the burden of proof shifts to the defendant when the plaintiff cannot prove which defendant or act caused which injury.

The first article in this issue is entitled "It's time to say good-bye to the six-month CTA notice requirements," written by Charles R. Winkler. The second article is entitled "Legal malpractice issues facing the tort law practitioner" written by Mark L. Karno. The third article is entitled "Should our roads be safe for intoxicated drivers?" written by Scott D. Lane. Lastly, is the correspondence from Judge O'Connell requesting the opinion of the Illinois State Bar Association Tort Law Section on his proposed changes to the Rules of the Circuit Court of Cook County. (The Illinois State Bar Association Tort Law Section has responded in the affirmative to Judge O'Connell's proposed changes.)

Also, we would like to apologize for neglecting to give credit to Mr. Tom Pakenas of the Law Offices of Richard F. Mallen, as co-author of "Lost and found: parties find severe sanctions when crucial evidence is lost" which appeared in the October 1993 issue of *Tort Trends*.

As always, we invite our readership to submit written comments or rebuttal articles on anything that you feel is appropriate. If the materials meet with our editorial policy, they will be published for all to share. Please send written comments to Joseph R. Marconi, Suite 2200, 222 North LaSalle Street, Chicago, Illinois 60603.

Sincerely,
Joseph R. Marconi, co-editor

It's time to say good-bye to the six-month CTA notice requirement

By Charles R. Winkler, Winkler & Gorey, Ltd., North Riverside, IL

Once upon a time there were 10 people who sued the CTA. The *"Murphys"* consisting of *Niziolek, Bonner, Patinkin, Sanders and Murphy* and the *"Malones"* consisting of *Vidra, Grabowski, Weimer, Thomas and Malone*. The judge told the *Murphys* to go home. Your notice is wrong, you filed it too late; now this is your fate. A jury listened to the *Malones* and gave them some money. Funny? No. Sad, unfair and still the law.

Sec. 41 of the Metropolitan Transit Authority Act (the "MTAA") sets forth a one-year statute of limitations on any personal injury action against the CTA and mandates the filing of a written notice within six months of the date of the injury. The notice must be filed in the office of the secretary of the CTA board and also in the offices of the general counsel for the CTA. It must be signed by the injured party or the party's attorney. It must state the name and address of the injured person, the date, time, and loca-

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The *Malones* complied and a jury ruled in their favor. The *Bonner* decision questions the continued need for the notice requirement. There are probably 100 appellate and supreme court decisions wrestling with the question of what constitutes a proper written notice to the CTA. Our reviewing courts should no longer be required to answer the question. The time has come to repeal the notice requirement of the MTAA.

Appendix

The *Malone* group consists of the following cases against the CTA reported in the Cook County Jury Verdict Reporter:

Malone	(D/A: 02/26/88)	KK-10-2	12/17/93
Thomas	(D/A: 12/18/85)	HH-44-16	08/14/92
Weimer	(D/A: 01/16/86)	JJ-39-7	07/02/93
	(D/A: 10/10/87)	JJ-38-	06/25/93
	(D/A: 02/12/87)	JJ-17-3	01/29/93

The *Murphy* group consists of the following cases against the CTA reported in the Official Reporter:

Murphy (D/A: 05/12/86)
191 Ill. App. 3d 918, 548 N.E. 2d 403, 139 Ill. Dec. 18

Sanders (D/A: 11/24/87)
220 Ill. App. 3d 505, 581 N.E. 2d 211, 163 Ill. Dec. 260

Patinkin (D/A: 08/10/88)
214 Ill. App. 3d 973, 574 N.E. 2d 743, 158 Ill. Dec. 630

Bonner (D/A: 11/04/90)
249 Ill. App. 3d 210, 618 N.E. 2d 871, 188 Ill. Dec. 301

Niziolek (D/A: 04/12/90)
251 Ill. App. 3d 537, 620 N.E. 2d 1097, 189 Ill. Dec. 780

The other cases cited are:

Fujimura v. CTA, (1977) 67 Ill. 2d 506, 368 N.E. 2d 105, 10 Ill. Dec. 619

Saragusa v. City of Chicago, (1976) 63 Ill. 2d 288, 348 N.E. 2d 176

Pothier v. CTA, 238 Ill. App. 3d 702, 606 N.E. 2d 531, 179 Ill. Dec. 699

Camp v. CTA, 82 Ill. App. 3d 1107, 403 N.E. 2d 704, 38 Ill. Dec. 473

The two statutes cited are:

Sec. 41 of the Metropolitan Transit Authority Act, 70 ILCS 3605/41

Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/8-101

Legal malpractice issues facing the tort law practitioner

By Mark L. Karno, Chicago

To state a cause of action for attorney malpractice, a party must plead facts establishing an attorney-client relationship, the breach of a duty owed by virtue of that relationship, and loss or injury proximately caused by that breach. *Howard v. Druckemiller,* 238 Ill.App.3d 937, 611 N.E.2d 1, 183 Ill.Dec. 148. The law distinguishes between errors of negligence and those of mistaken judgment. *Barth v. Reagan,* 139 Ill.2d 399, 564 N.E.2d 1196, 151 Ill.Dec. 534 (1990). Malpractice liability may be imposed when the combined wisdom of the bar is that a reasonably competent attorney would not have exercised his or her judgment in that manner. *Mayol v. Summers, Watson and Kimpel,* 223 Ill.App.3d 794, 585 N.E.2d 1176, 1184, 166 Ill.Dec. 154, 162 (4th Dist., 1992). In *Collins v. Reynard,* 154 Ill.2d 48, 607 N.E.2d 1185, 180 Ill.Dec. 672 (1993) the supreme court held that a complaint against a lawyer for professional malpractice may be couched in either contract or tort and that recovery may be sought in the alternative. A lawyer is never liable in a malpractice action for punitive damages. Illinois Code of Civil Procedure section 2-115. However, an attorney is liable under the Contribution Among Joint Tortfeasors Act (740 ILCS 100/1 *et seq.*) *Fairer v. Ambrose & Cushing P.C.,* 154 Ill.2d 384, 609 N.E.2d 315, 182 Ill.Dec. 12 (1993). Damages must have occurred and are measured as the loss suffered in the client's underlying legal action or on the basis of some evidence that the client's legal position was somehow compromised by the breach of the duty alleged. *Suppressed v. Suppressed,* 206 Ill.App.3d 918, 565 N.E.2d 101, 151 Ill.Dec. 830 (1st Dist., 5th Div., 1990). Settlement of the underlying lawsuit does not insulate an attorney from a malpractice claim. *McCarthy v. Pedersen & Houpt, et al.,* No. 1-92-3250 (1st Dist., 5th Div., July 23, 1993).

This article will address a number of issues facing the tort law practitioner seeking to practice defensively and avoid committing professional malpractice by pointing out some of the major pitfalls to avoid. This article is not all encompassing but only highlights the major problem areas facing the tort law practitioner and will familiarize the practitioner with the major issues and general principles of law in that problem area. This is in the hope that by being armed with knowledge that it will help to keep the attorney out of the problem areas discussed.

1. *Dismissal pursuant to Supreme Court Rule 103(b).* In *Gray v. Hallet,* 170 Ill.App.3d 600, 525 N.E.2d 89, 121 Ill.Dec. 283 (5th Dist., 1988) attorney Hillary Hallet was successfully sued by a former client and became liable to pay the former client $450,000 in a legal malpractice claim, when the underlying case that Hillary Hallet was handling for the client was dismissed in accordance with Supreme Court Rule 103(b).

Supreme Court Rule 103(b) provides for the dismissal of a complaint, with prejudice, where the plaintiff failed to exercise reasonable diligence in serving a defendant after the expiration of the statute of limitations. The plaintiff has the burden of showing reasonable diligence in the service of process once the issue is either raised by the court

or defense counsel has merely filed a motion to dismiss raising the Supreme Court Rule 103(b) issue. *Alsobrook v. Cote,* 133 Ill.App.2d 261, 273 N.E.2d 270 (1st Dist., 4th Div., 1971). *Segal v. Sacco,* 136 Ill.2d. 282, 555 N.E.2d 719, 144 Ill.Dec. 360 (1990), sets forth the factors a court considers in reviewing a Rule 103(b) motion. They are:

(1) the length of time in obtaining service;
(2) the activities of the plaintiff;
(3) the plaintiff's knowledge of the defendant's whereabouts;
(4) the ease with which the defendant could have been found;
(5) special circumstances which would affect plaintiff's efforts;
(6) the defendant's knowledge of the pendency of the lawsuit; and
(7) actual service over the defendant.

Reviewing courts interpreting Rule 103(b) generally have affirmed a dismissal pursuant to the rule when only a matter of months have gone by with no activity having taken place in regard to serving summons on the defendant. (See, e.g., *Paglis v. Black,* 178 Ill.App.3d 1062, 534 N.E.2d 206, 128 Ill.Dec. 186 (3rd Dist., 1989) where the appellate court held that an unexplained delay of five months in obtaining service upon the defendants, where the plaintiffs conceded that they knew where defendants' offices were located, warranted dismissal of the action based upon plaintiffs' lack of reasonable diligence; and *Cannon v. Dini,* 226 Ill.App.3d 82, 589 N.E.2d 653, 168 Ill.Dec. 253 (1st Dist., 2d Div., 1992) seven months. Compare, *Segal v. Sacco,* 136 Ill.2d 282, 555 N.E.2d 719, 144 Ill.Dec. 360 (1990), where the supreme court found that 19 weeks was too short a time to allow the dismissal to be with prejudice.)

In the past, a plaintiff's attorney, when confronted with a Rule 103(b) motion, would file a motion to voluntarily dismiss the complaint pursuant to 735 ILCS 5/2-1009. That code section provides for the voluntary dismissal of lawsuits and also grants a plaintiff one year to refile their action. Then the attorney would promptly re-serve the defendant with a summons in the refiled action. However, since the case of *O'Connell v. St. Francis Hospital,* 112 Ill.2d 273, 492 N.E.2d 1322, 97 Ill.Dec.449 (1986) the rule now is that: "In ruling on the pending Rule 103(b) motion, the trial court may consider the circumstances surrounding plaintiff's service of process in his original as well as his refiled complaint." Accordingly, a plaintiff's attorney can no longer rely upon what used to be a safe harbor from Rule 103(b) motions. (Cf., *Martinez v. Erickson,* 127 Ill.2d 112, 535 N.E.2d 853, 129 Ill.Dec. 88 (1989), holding that a trial court must examine the totality of circumstance and not ignore obvious diligence on the part of plaintiff after refiling.)

Another Rule 103(b) problem area arises out of the case of *Williams v. Bolsten,* 184 Ill.App.3d 832, 540 N.E.2d 966, 133 Ill.Dec. 100 (1st Dist., 5th Div., 1989). The appellate court affirmed the trial court's holding that the dismissal of a lawsuit against the employer, who was sued only as the principal of the tortfeasor employee, for lack of reasonable diligence in obtaining the service of process over the employer, was an adjudication on the merits as to the co-defendant employee, as agent, in accordance with Supreme Court Rule 273. There, the employee was promptly served with summons. Thus, the plaintiff's action against the employee driver was barred, too, on the grounds of collateral estoppel. The reverse holds true as well, i.e., the dismissal of the agent in accordance with Rule 103(b) bars an action against the employer/principal. *Ziemba v. Anania,* 231 Ill.App.3d 99, 596 N.E.2d 157, 172 Ill.Dec. 878 (1st Dist., 5th Div., 1992).

2. *Motions that dispose of a case being heard before a motion to voluntarily dismiss a case.* Prior to the case of *Gibellina v. Handley,* 127 Ill.2d 122, 535 N.E.2d 858, 129 Ill.Dec. 93 (1989), it was a practice among plaintiffs' attorneys that when confronted with a motion to dismiss their client's complaint for failure to comply with discovery in accordance with Supreme Court Rule 219(c), a Rule 103(b) motion, or when confronted with a motion for summary judgment after it had been determined that the plaintiff was barred from naming an expert witness in a professional malpractice action as a sanction pursuant to Rule 219(c) or Rule 220, (which in some instances can be fatal to the case, See, *Barth v. Reagan,* 139 Ill.2d 399, 564 N.E.2d 1196, 151 Ill.Dec. 534 (1990) and case cited therein), the plaintiff's attorney would then take a voluntary dismissal pursuant to 735 ILCS 5/2-1009(a). The attorney would then promptly refile the action after curing the problem. In the *Gibellina* case, the supreme court held that effective as of the date of that opinion, (February 22, 1989) a trial court may hear and decide a dispositive motion which has been filed prior to a section 2-1009 motion when that motion, if favorably ruled upon by the court, could result in a final disposition of the case.

Later cases held that if a defendant's attorney announced to the plaintiff's counsel their intent to file a motion for summary judgment, that the motion was "before the court" and the trial court would have discretion as to which motion it would hear first. *Fumarolo v. Chicago Board of Education,* 142 Ill.2d 54, 566 N.E.2d 1283, 153 Ill.Dec. 177 (1990). Also, noncompliance with even one of the three requirements of 735 ILCS 5/2-1009 will cause plaintiffs to lose their right to voluntarily dismiss. *Vaughn v. Northwestern Memorial Hospital,* 210 Ill.App.3d 253, 569 N.E.2d 77, 155 Ill.Dec. 77 (1st Dist., 2d Div., 1991), appeal denied 139 Ill.2d 605, 575 N.E.2d 924, 159 Ill.Dec. 117 (1991). One of these requirements include the payment of costs to the defendant. The *Gibellina v. Handley* line of cases has recently been codified by amendments to 735 ILCS 5/2-1009.

The malpractice issue can also arise in situations where an attorney has: failed to disclose the full extent of an expert witness' testimony, *Stennis v. Rekkas,* 233 Ill. App.3d 813, 599 N.E.2d 159, 175 Ill.Dec. 45 (1st Dist., 4th Div., 1992); and where the attorney fails to seasonably comply with outstanding discovery in sufficient time to comply with a court order. *Vahn v. Northwestern Memorial Hospital,* 210 Ill.App.3d 253, 569 N.E.2d 77, 155 Ill.Dec. 77 (1st Dist., 2d Div., 1991) appeal denied 139 Ill.2d 605, 575 N.E.2d 924, 159 Ill.Dec. 117 (1991). The latter is especially true in those counties or before those judges who continue Rule 219(c) motions for compliance dates.

In a similar vein, defense attorneys' failure to comply with discovery through their own fault may cause their clients to be defaulted or face other sanctions in accordance with Supreme Court Rule 219(c), too, resulting in malprac-

tice exposure for the defense counsel.

3. *Failing to file a case within the applicable statute of limitations.* There are numerous statutes of limitation relating to various actions enumerated in 735 ILCS 5/13-101 through 5/13-224. The enumerated limitation periods are self-explanatory. An attorney's failure to file a case within those time periods is an obvious area of potential malpractice. Aside from these obvious statutes of limitation issues, there are special notice requirements and shorter statutes of limitation for personal injury actions against the CTA and local government bodies. For example, a lawsuit against a local governmental agency must be filed within one year (745 ILCS 10/8-101); and lawsuits filed against the Chicago Transit Authority require specific notice of claim procedures which impose a strict six month notice of injury deadline (70 ILCS 3605/41).

A new area of concern for defense counsel arises out of the emerging case law governing statutes of limitation and statutes of repose being imposed upon third-party complaints seeking contribution. In *Hayes v. Mercy Hospital and Medical Center*, 136 Ill.2d 450, 557 N.E.2d 873, 145 Ill.Dec. 894 (1990), the supreme court held that the limitations period imposed by the Medical Malpractice Statute of Repose (735 ILCS 5/13-212) bars a culpable party's claim for contribution if not filed within the same statutory four-year period allowed an innocent plaintiff. Prior to that decision, the prevailing thought among defense counsel was that a claim for contribution was timely filed if it was filed during the pendency of the underlying action, if one should exist, *Laue v. Leifheit*, 105 Ill.2d 191, 473 N.E.2d 939, 85 Ill.Dec. 340 (1984); or, within two years after a party had paid more than their pro rata share to a victim. 735 ILCS 5/13-204. Subsequent decisions have extended the *Hayes* principles to all tort cases, *Caballero v. Rockford Punch Press and Manufacturing Co.*, 244 Ill.App.3d 333, 614 N.E.2d 362, 185 Ill.Dec. 228 (1st Dist., 3d Div., 1993), with the statute of limitations beginning to run from the time the party seeking contribution is given notice of the nature of the underlying action.

Defense attorneys must also concern themselves with the interplay between a statute of repose, a statute of limitation and a tolling statute as they apply to filing and/or barring an action for contribution. The distinction between them and their effect is explained in the *Caballero* opinion by quoting *Mega v. Holy Cross Hospital*, 111 Ill.2d 416, 490 N.E. 2d 665, 95 Ill. Dec. 812, which stated that a "period of repose gives effect to a policy different from that advanced by a period of limitations; [the period of repose] is intended to terminate the possibility of liability after a defined period of time, regardless of a plaintiff's lack of knowledge." *Mega* at 422.

On a related topic, there are numerous instances when an attorney declines to take on the case of a prospective client and the attorney fails to communicate this fact in writing to the prospective client. A statute of limitation will expire and the lawyer draws a malpractice claim alleging that the attorney failed to file the prospective client's claim in a timely manner. This can also arise where the attorney merely speaks to a person about the case with no intention of ever representing that person, or where he agrees to act as a liaison with an insurance company claims adjuster but does not agree to represent the client in a lawsuit. *Czubak v. Lupel & Amari*, Circuit Court of Cook County, Illinois Case No. 86 L 26208. The practitioner should memorialize conversations with any prospective client by letter sent via certified mail when there is no intent to represent that person. The attorney must also have written fee agreements with all clients which spell out the nature and extent of the representation.

4. *Failure to follow the* Chicago Daily Law Bulletin. In Cook County there are some cases that are listed in the *Chicago Daily Law Bulletin* wherein no other notice of the case's pendency will be given. If the attorney fails to follow the *Law Bulletin*, it is possible that the client's case will become dismissed for want of prosecution or that a default order will be entered. If the attorney never receives notice of the adverse court order, the lawyer will face potential malpractice exposure.

5. *Supreme Court Rules governing mandatory arbitration cases.* In those counties wherein smaller civil claims are subject to mandatory arbitration pursuant to Illinois Code of Civil Procedure sections 2-1001A to 2-1009A, Supreme Court Rules 90 through 95 provide a whole new set of pitfalls for the tort law practitioner. I refer the reader to Supreme Court Rules 90(g) and 91(b) which were amended, effective June 1, 1993, to give greater teeth to sanctions imposed upon a party not taking the arbitration process seriously. Now an attorney failing to participate in an arbitration hearing in good faith faces the possibility of being debarred from rejecting the award or other sanctions as permitted by Supreme Court Rule 219(c).

6. *Failure to advise a client about alternative dispute resolution.* One issue that has not yet ripened into a malpractice case against an attorney but could be a future issue for the profession evolves around the growth of alternative dispute resolution. Much to the chagrin of the battle-hardened trial lawyer, ADR is here to stay. Under the current state of the law, an attorney generally controls the means of achieving a result for a client and the client controls the end result by accepting or rejecting settlement offers as communicated by the attorney.

Robert F. Cochran, Jr., in an article captioned "Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow The Client To Control Negotiation and Pursue Alternatives to Litigation," 47 Washington and Lee Law Review 819 (1990), suggests that an attorney could be found liable for malpractice to a client by not allowing a client to choose the means of resolving a dispute by reason of an informed consent theory which he analogizes to the medical malpractice informed consent cases. Whether any court will adopt this theory is yet to be seen. However, this does warrant the attention of the practitioner.

7. *Defendant being sanctioned for defense counsel engaging in ex parte communications with plaintiff's treating medical providers.* In *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill.App.3d 581, 499 N.E.2d 952, 102 Ill.Dec. 172 (1st Dist., 4th Div., 1986) appeal denied 113 Ill.2d 584, 505 N.E.2d 361, 106 Ill.Dec. 55 (1987), cert. denied, 483 U.S. 1007, 107 S.Ct. 3232, 97 L.Ed.2d 738 (1987), the court held that:

> Because public policy strongly favors both the confidential and fiduciary nature of the physician-patient relationship, it is thus axiomatic that conduct which threatens the sanctity of the relationship runs afoul of public policy. That being so, we believe, ..., that ex

parte conferences between defense counsel and a plaintiff's treating physician jeopardize the sanctity of the physician-patient relationship and, therefore, are prohibited as against public policy. *Petrillo,* at 177.

Subsequent cases have extended the *Petrillo* principle to: prohibiting ex parte communications between a defendant hospital and its own staff physician who treated the plaintiff, *Ritter v. Rush-Presbyterian-St. Luke's Medical Center,* 177 Ill.App.3d 313, 532 N.E.2d 327, 126 Ill.Dec. 642 (1st Dist., 3rd Div., 1988); a physician who consulted plaintiff's treating physician, *Mondelli v. Checker Taxi Co.,* 197 Ill.App.2d 258, 554 N.E.2d 266, 143 Ill.Dec. 331 (1st Dist., 5th Div., 1990); a nurse who assisted the defendant physician in treating the plaintiff, *Roberson by Isaac v. Liu,* 198 App.3d 332, 555 N.E.2d 999, 144 Ill.Dec. 480 (5th Dist., 1990); ex parte communication between a doctor and his own attorney, prior to suit, where after suit is filed, the attorney represents another doctor who is sued in the same case and who has the same malpractice insurance carrier, *Bayleander v. Method,* 230 Ill.App.3d 610, 594 N.E.2d 1317, 171 Ill.Dec. 797 (1st Dist., 5th Div., 1992); to written communications with the physician. *Lewis v. Illinois Central Railroad Co.,* 234 Ill.App.3d 669, 600 N.E.2d 504, 175 Ill.Dec. 573 (5th Dist., 1992); and to ex parte communications between the plaintiff's treating physician and the attorney for defendant, the medical corporation, for whom the physician was employed at the time of the alleged malpractice. *Testin v. Dreyer Medical Clinic,* 238 Ill.App.3d 883, 605 N.E.2d 1070, 179 Ill.Dec. 56, (2d Dist., 1992), petition for leave to appeal allowed, 147 Ill.2d 647, 612 N.E.2d 524, 183 Ill.Dec. 872 (1993). It does not extend to an intern who took plaintiff's history and testified regarding that recorded admission. *Tomasovic v. American Honda Motor Company, Inc.,* 171 Ill.App.3d 979, 525 N.E.2d 1111, 121 Ill.Dec. 804 (1st Dist., 3d Div., 1988) cert. den'd 122 Ill.2d 595 (1988). *Compare, Almgren v. Rush-Presbyterian-St. Luke's Medical Center,* 240 Ill.App.3d 585, 608 N.E.2d 92, 181 Ill.Dec. 19 (1st Dist., 2d Div., 1992) petition for leave to appeal allowed, 149 Ill.2d 647, 612 N.E.2d 510, 183 Ill.Dec. 858 (1993), where the trial court's order granting the defendant's attorney the right to conduct an ex parte conference with a psychiatric resident who treated the plaintiff at the defendant's hospital was reversed.

The attorney malpractice issue arises where the trial court enters a sanction that effectively prevents the defendant from asserting an otherwise viable defense or causing a client to expend sums of money that the client would not otherwise be forced to spend. This results from the fact that in the face of a *Petrillo* violation, the trial court can either find the violating attorney in contempt of court or enter any sanction permissible for the violation of a discovery rule in accordance with Supreme Court Rule 219(c). *Roberson by Isaac v. Liu,* 198 Ill.App.3d 332, 555 N.E.2d 999, 144 Ill.Dec. 480 (5th Dist., 1990); even where the conduct was harmless or conducted in good faith. *Pourchot v. Commonwealth Edison Co.,* 224 Ill.App.3d 634, 587 N.E.2d 589, 167 Ill.Dec. 320 (3d Dist., 1992).

This entire issue is continuing to evolve. On November 17, 1993, the supreme court heard oral arguments in the consolidated *Almgren* and *Testin* cases. Additionally, the Supreme Court Rules Committee has proposed a new Rule 221 which has been the subject of debate at many Bar Association committee meetings and at a public hearing. This proposed rule would relax the absolute prohibition of defense counsel engaging in an ex parte communication with a treating physician or health care provider. As this issue evolves, the practitioner must keep up.

8. *Failure to plead violations of the Structural Work Act or other strict liability and burden of proof shifting causes of action.* There are some instances wherein a plaintiff's attorney will file a complaint and go to trial against a defendant claiming only that "negligence" caused the injuries and damages sustained by the client. However, some cases fit within the parameters of the Structural Work Act wherein the burden of proof is much easier and the plaintiff can avoid comparative fault issues arising in the case. *Simmons v. Union Electric Company,* 104 Ill.2d 444, 473 N.E.2d 946 (1984). This is especially important where the plaintiff is more than 50 percent at fault for his or her own injuries and is thereby barred from any recovery, on a negligence theory, by reason of 735 ILCS 5/2-1107.1 and 5/2-1116. Other cases fit within the parameters of "*res ipsa loquitur*" which can shift the burden of proof to the defendant's attorney; and strict liability in tort. Some of these cases might not be successful on a negligence count but would be successful on one of these other theories. If the plaintiff's attorney failed to pursue these alternative theories, the attorney must have a well reasoned explanation for choosing not to plead them.

A somewhat related issue evolves from the different pleading requirements in the state and federal courts. In the recent case of *Johnson v. Methodist Medical Center of Illinois,* Docket No. 92-2937 (U.S. Seventh Circuit Court of Appeals, December 1, 1993) the plaintiff's attorneys pleaded very specific allegations of medical malpractice utilizing a form of complaint one would normally file in state court. The allegations of the complaint did not match the allegations of the plaintiff's expert witness' testimony as to the deviation from the standard of care by the defendant. The defense attorneys filed a motion for summary judgment which was granted. The plaintiff's motion to file an amended complaint was denied. The Seventh Circuit Court of Appeals affirmed. Thus, if the plaintiff's attorney had merely filed a complaint setting forth a short and plain statement of the claim showing the they were entitled to relief (F.R.C.P. 8(a)), without specifying any acts of malpractice, the case would still be pending. This is a trap for the unwary which must be avoided.

9. *Investigation.* There are some cases where an attorney fails to thoroughly conduct an investigation, including the taking of discovery from one's opponent. The attorney gets to trial and then is suddenly ambushed by the opponent's attorney offering surprise testimony, due to the lack of preparation on the part of the attorney. Examples of this abound and most readers undoubtedly have their own war stories. Given the liberal scope of discovery in our state, (See, *Monier v. Chamberlain,* 31 Ill.2d 400, 202 N.E.2d 15 (1964)), this is an area to which the tort law practitioner must never fall victim.

10. *The plaintiff's attorney not knowing the value of cases in that jurisdiction.* Some plaintiffs' attorneys use the rule of thumb, whereby they multiply the total dollar value of the client's medical bills by three resulting in a dollar number that is needed to settle the client's bodily injury claim. However, in a case where a young girl

receives severe permanent scarring across her face from a dogbite and incurs a medical bill of less than $500, three times the medical bills, where liability is clear, is wholly inadequate unless a collectibility issue exists.

11. *Settling cases without client approval.* Some attorneys have a practice of settling a case without notifying the client. It is easy to imagine circumstances wherein a client refuses to go through with a settlement and turns around and sues the attorney. However, as a practical matter, if one attorney attempts to enforce a settlement with another attorney when the client did not agree to it, the courts are reluctant to enforce the settlement agreement unless the settlement agreement was entered into in open court, or the client gave the attorney express authority to use their own judgment in the settlement of the case. The courts generally recognize that the client has the ultimate decision in the settlement of a case. See e.g., *Estate of Fender v. Fender,* 96 Ill.App.3d 1029, 422 N.E.2d 107, 52 Ill.Dec. 426 (1st Dist., 2d Div., 1981). But, Cf., *Parker v. Board of Trustees,* 74 Ill.App.2d 467, 220 N.E.2d 258 (5th Dist., 1966), which holds that where the attorney has no specific authority to enter into stipulations for a client, but does so, the client's remedy does not lie in collateral attack on the judgment but in an action against the attorney.

A related issue is where an attorney fails to notify the client of a settlement demand or offer. See, Legal Malpractice in Settling Case, 87 ALR 3d 168 at 183. In federal court, where the rules permit a party to make an offer of judgment, pursuant to F.R.C.P. 68, communicating a settlement offer to a client is very important. This is true since a plaintiff who obtains a judgment against a defendant for an amount, less than the offer of judgment, is subject to paying the defendant's costs incurred from the time of the offer of judgment.

12. *Timely appeals/post-trial motions.*

Another area of concern to the tort law practitioner exists when an attorney fails to write a letter to the client advising the client when the time to appeal expires. Days after the time expires, the client decides to appeal the order and learns that it cannot be appealed because the time to appeal expired. The client then turns around and sues the lawyer for failing to file a notice of appeal. In all scenarios where an appeal could be filed, the tort law practitioner should either file a notice of appeal automatically which can subsequently be withdrawn or, after speaking to the client on the telephone, write a letter to the client via certified mail, advising the client as to when the appeal deadline is and confirming the course of action agreed upon. Another issue arises from filing a premature notice of appeal, which is ineffective (See *Blanchette v. Martell,* 52 Ill.App.3d 1029, 368 N.E.2d 458, 10 Ill.Dec. 863 (1977)).

In a similar vein, it is a common practice for a trial lawyer to refer a client on to another lawyer to represent the client in an appeal. It is important to call appellate counsel into the case early to give input as to the contents of the notice of appeal. This results from the rule that when an appeal is taken, it is from a specified judgment only and a reviewing court does not acquire jurisdiction to review other judgments which have not been specified in the notice of appeal. *E.M. Melahn Construction Comapny v. Village of Carpenterville,* 100 Ill.App.3d 544, 427 N.E.2d 181, 56 Ill.Dec. 101 (2d Dist., 1981). Thus, strict compliance with Supreme Court Rule 303(c) which governs the form and contents of a notice of appeal can be a problem area. The practitioner should call upon appellate counsel at the earliest possible time, even before preparing a post-trial motion, to avoid malpractice exposure.

Another issue arises when an attorney who practices primarily in state court handles a matter in the federal court. There are different time limits for filing post-trial motions and notices of appeal in the federal court as compared to our state courts. (Motions in federal court seeking a new trial or to alter or amend a judgment shall be served not later than 10 days after entry of the judgment, in accordance with F.R.C.P. 59. In state court, 735 ILCS 5/2-1301(e) gives a party a full 30 days.)

13. *Structured settlements.* In structured settlements if the plaintiff's attorney is not careful in negotiations, the client may be considered to be in constructive receipt of the cost of the structured settlement in which case the plaintiff loses the tax benefits of the structured settlement. This could result in a malpractice claim against the attorney for the increased taxes that the client would be forced to pay. Guidance to the attorney as to what constitutes "constructive receipt" comes from Treasury Regulation 1.451-2(a) and examples contained therein.

The plaintiff's attorney in the process of settling a case, wherein the structured settlement issue is raised, and who has not been exposed to the issues that arise with them would be well advised to read: Paul J. Lesli, Brent B. Danninger & Robert W. Johnson, *Structured Settlements* (1986), especially chapter 4 which is titled "Tax Considerations."

Another issue relating to the structured settlement is that insurance companies regularly assign the annuity to another company. The plaintiff's attorney must investigate the rating of the assignee company by the various rating agencies such as *Moody's Standard* and *Poors* or *Value Line.* If one of the contracting entities for the annuity does not have the highest rating from one of the rating agencies, then the attorney must advise the client, in writing, and obtain a consent or later face the possibility of facing the client in front of a jury to explain why. The attorney should also consider having the insurance company grant a security interest in favor of the client on specified property of the insurance company to secure the annuity. This would give the client a preference in the event the insurance company were liquidated.

14. *Additional insurance.* A plaintiff's personal injury attorney must obtain a copy of one's own client's insurance policies in the initial interview. The failure to ascertain the existence or lack thereof of additional insurance in a serious personal injury claim is a blatant mistake for the tort law practitioner. Additionally, where an uninsured or an underinsured motorist claim may exist, the client's insurance company must be notified as soon as possible of the possible existence of an uninsured/underinsured motorist claim to avoid being forced to prosecute a declaratory judgment action on the issue of the "timeliness of notice," which could yield an unfavorable result.

Likewise, the failure of the plaintiff's attorney to notify the client's insurance carrier of an underinsured motorist's insurance company's offer of policy limits, prior to the plaintiff's acceptance of it, pursuant to 215 ILCS 5/143a-

2(6) and giving the insurance company the opportunity to match the offer and exercise its subrogation rights could result in the plaintiff being denied underinsured motorist coverage and a malpractice action being filed against the attorney. See, *Standard Mutual Insurance Company v. Petreikis*, 183 Ill.App.3d 272, 538 N.E.2d 1327, 131 Ill.Dec.771 (4th Dist., 1989). There are many other subrogation and also lien issues which create malpractice concerns for the plaintiff tort law practitioner. They generally arise when the plaintiff's attorney having actual or constructive knowledge of their existence disburses funds without obtaining the necessary releases. A detailed discussion of these issues is beyond the scope of the article.

15. *Referred files.* There are circumstances where one lawyer will refer a lawsuit to another on the eve of trial. If the referring lawyer has failed to properly prepare the case for trial, the receiving attorney should not accept the case and the responsibilities that go with it, unless the case can be voluntarily dismissed and refiled to cure any problems. Sometimes the best case a lawyer takes on is the one not taken on.

In a related vein, an attorney employed to bring a malpractice case against another attorney must take whatever steps are necessary to attempt to salvage the first attorney's mistake or face a malpractice action being brought by the client. *Land v. Auler*, 186 Ill.App.3d 382, 542 N.E.2d 509, 134 Ill.Dec. 330 (4th Dist., 1989).

16. *Volume practitioner.* The high volume practitioners must have a docketing system to keep track of their files. Many of the problems described above could be minimized if the lawyer managed clients' matters more effectively so that files did not fall between the cracks and go for months without being reviewed by an attorney. In some law firms, the solution to keeping better track of its files may also require the firm to hire more attorneys to work its files properly.

Conclusion

This article addressed some of the major problem areas facing the tort law practitioner. Diligence, organization and knowing what to do and what not to do are the keys to a long and successful career in the tort law field, without getting sued for malpractice. Since tort law practitioners face many hurdles to get around in order to avoid a malpractice claim being filed against them, they must expand their arsenal of knowledge so that they have the weaponry to avoid being hit. With laws and court rulings continually changing the field, a lawyer practicing in this area must constantly keep up with the changing environment. Lawyers must also maintain communication lines with clients and diligently pursue clients' matters with which they have been entrusted. If these general principles are followed by the tort law practitioner, then that practitioner should minimize the chances of being named as a party to a malpractice action.

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Should our roads be safe for intoxicated drivers?

By Scott D. Lane

A civil justice system often reflects the attitudes of the general public. Therefore, it should come as no surprise that in Illinois drunk drivers are frowned upon by the legislature, the judges and, perhaps most importantly, the juries.

The question is, however, should our civil justice system allow compensation to intoxicated drivers who are injured, not because of their intoxication but because of a municipality's failure to maintain public roads? In other words, should our roads be safe for all drivers, including those drivers who may be intoxicated? This issue is presently before the Appellate Court of Illinois, First District, Third Division in the case of *Gillaird v. County of Cook, et al.*, No. 92-2635.

A. *Gillaird v. County of Cook, et al.*

Gillaird involves a two-car collision between the plaintiff, Perry Gillaird, Jr., and defendant, Henry Toennes, which occurred on December 2, 1985, approximately one-half mile east of Western Avenue on Sauk Trail Road in Cook County, Illinois. On December 3, 1985, Mr. Gillaird died as a result of this collision. At autopsy, Mr. Gillaird was found to have a blood alcohol level of 242 mg/dl. Mr. Toennes was also severely injured. He went into a coma and was unable to provide deposition testimony. There were no eyewitnesses to this occurrence.

The estate of Perry Gillaird filed suit against Mr. Toennes and Cook County. The plaintiff subsequently settled with Henry Toennes. The cause continued against Cook County based on allegations of negligent maintenance of Sauk Trail Road at the point of the collision.

At the time of trial, Cook County presented a motion for summary judgment primarily based on the contention that Cook County did not owe a duty of care to Mr. Gillaird since he was not an intended user of the county road. This contention was based on the fact that Mr. Gillaird was legally intoxicated at the time he was operating his motor vehicle. The trial court granted Cook County's motion on this basis.

B. A duty of care is owed to an intoxicated driver who is using a public road in an intended and permitted manner

The duty of a unit of local government is governed by the Local Governmental and Governmental Employees Tort Immunity Act, ch. 85, par. 1-101, *et seq.* (1985). Section 3-102(a) of the Act provides in relevant part:

> Except as otherwise provided in the Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the *use* in the exercise of ordinary care of people whom the entity intended and permitted to *use* the property in a *manner* in which and at such times as it was reasonably foreseeable that it would be *used*...(Emphasis added).

Illinois courts have focused on the *use* of the property and the *manner* in which the property is being used at the time of the occurrence to determine whether a duty is owed to the injured person. The manner in which property is