Presented by The District *of* Columbia Bar

Continuing Legal Education Program

Tort Damages in the District of Columbia 2020

November 5, 2020

D.C. Bar Conference Center
901 4th Street NW, 2nd Floor
Washington, DC

DCBAR

Presented by the District of Columbia Bar
Continuing Legal Education Program

Tort Damages in the District of Columbia 2020

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Faculty:

Hon. Joan Zeldon
Senior Judge, D.C. Superior Court

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Personal Injury Damages

Hon. Joan Zeldon
Crystal S. Deese, Esq.
Denis Mitchell, Esq.
Todd P. Kendrick, Esq.
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DC BAR
Continuing Legal Education

Tort Damages in the District of Columbia 2020
Offered by Webinar for MCLE Credit
Thursday, November 5, 2020

Agenda

6:00 p.m. – 7:30 p.m.

- Damages caps in the District of Columbia, Maryland, and Virginia
- Assessing damages pre-suit
- Evidence needed to prove damages
- Determining if damages are speculative
- Experts on reducing damages to present value
- Likelihood of recovering punitive damages

7:30 p.m. – 7:45 p.m.

- Break

7:45 p.m. – 9:15 p.m.

- Damages in mediation
- Handling damages at trial
- Preparing your client to testify and sit through the testimony of others
- Verdict sheets
- Jury instructions

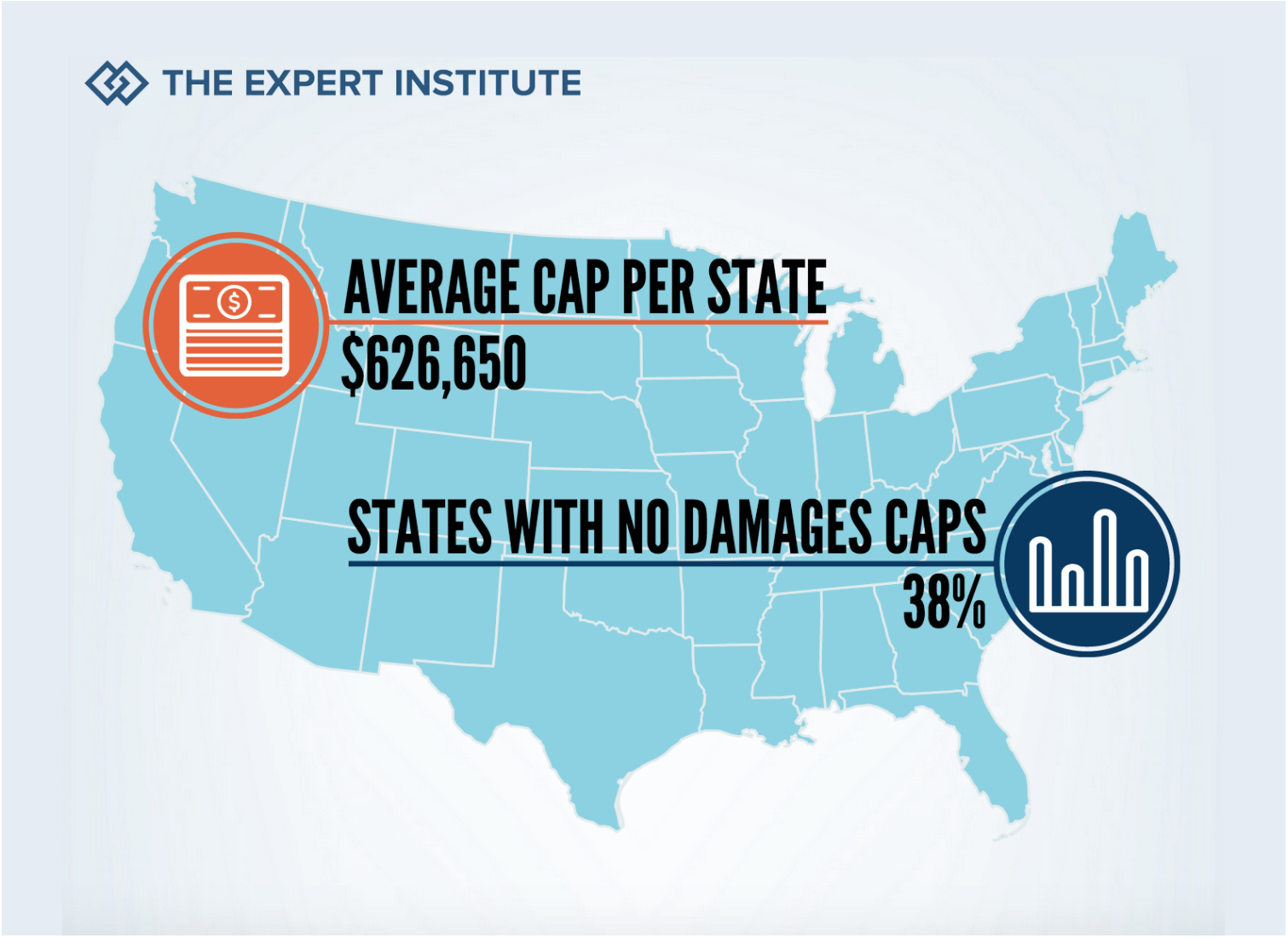
Tort Damages

Hon. Joan Zeldon (Ret.)
Crystal S. Deese, Esq.
Denis Mitchell, Esq.
Todd P. Kendrick, Esq.

Sponsored by the D.C. Bar November 5, 2020

Damages

D.C. – NO caps


THE EXPERT INSTITUTE
AVERAGE CAP PER STATE
$626,650
STATES WITH NO DAMAGES CAPS
38%

Damage Caps - Maryland

- **Maryland** – Caps non-economic damages in personal injury & wrongful death cases (Md. Code, Cts. & Jud. Proc., 11-108); $875,000.00 as of Oct. 2020.

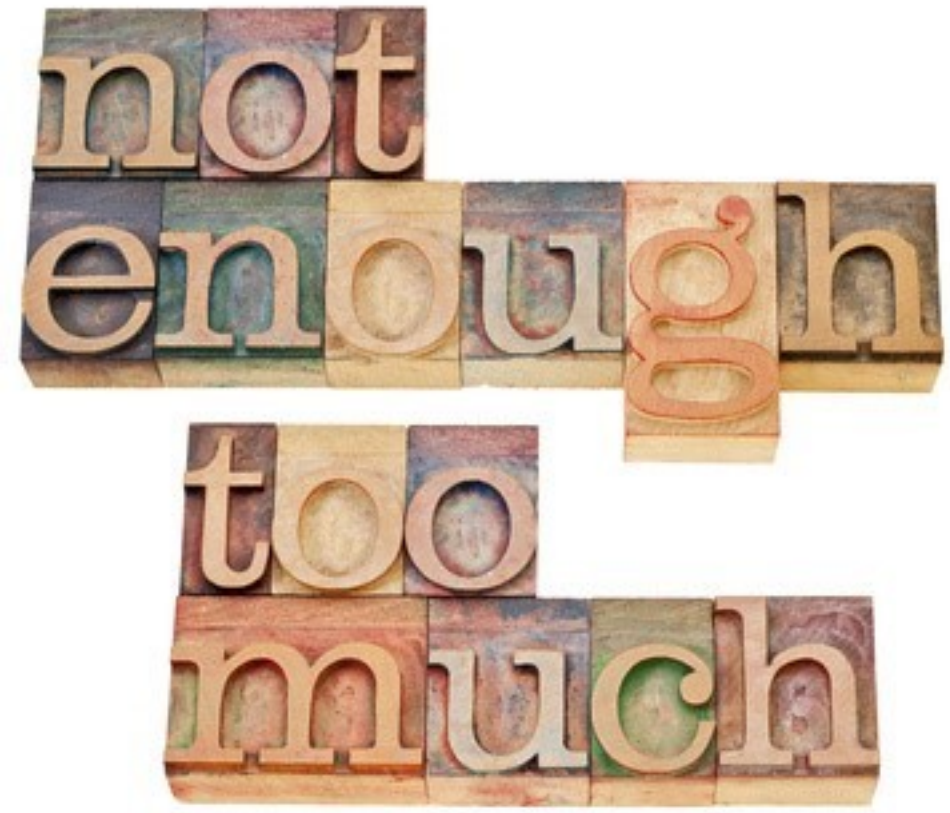
- **Maryland** – Caps non-economic damages in medical malpractice cases (Md. Code, Cts. & Jud. Proc., 3-2A-09); $830,000.00 as of Oct. 2020.

Damage Caps - Virginia

- **Virginia** – Caps medical malpractice awards (Va. Code § 8.01-581.15); $2.45M as of July 2020.
- **Virginia** Caps punitive damage awards in medical malpractice cases (Va. Code § 8.01-38.1); $350,000.00; &
- **Virginia** – does not cap personal injury damages outside of medical malpractice cases.

Certainty of Damages

TOO SPECULATIVE



It’s different for babies

Economist Required?

Medical Records

Clements v. United States, 669 A.2d 1271, 1273 (D.C. 1995).

- Medical facts, routinely performed procedures, and Diagnosis about which competent physicians would agree.

Pathologically germane – *Marlow v. Cerino*, 313 A.2d 505 (Md. App. 1974).

- `pathologically germane' statement `must fall within the broad range of facts which under hospital practice are considered relevant to the diagnosis or treatment of the patient's condition.‘

- having significant bearing upon and relation to the disease or injury from which one suffers.”

Neeley v. Johnson, 211 S.E.2d 100, 215 Va. 565 (1975).

- If you want an opinion from medical records to be called to the jury's attention, you need to call the person who wrote the note as a witness at trial

Future Care Needs

LIFE CARE PLAN

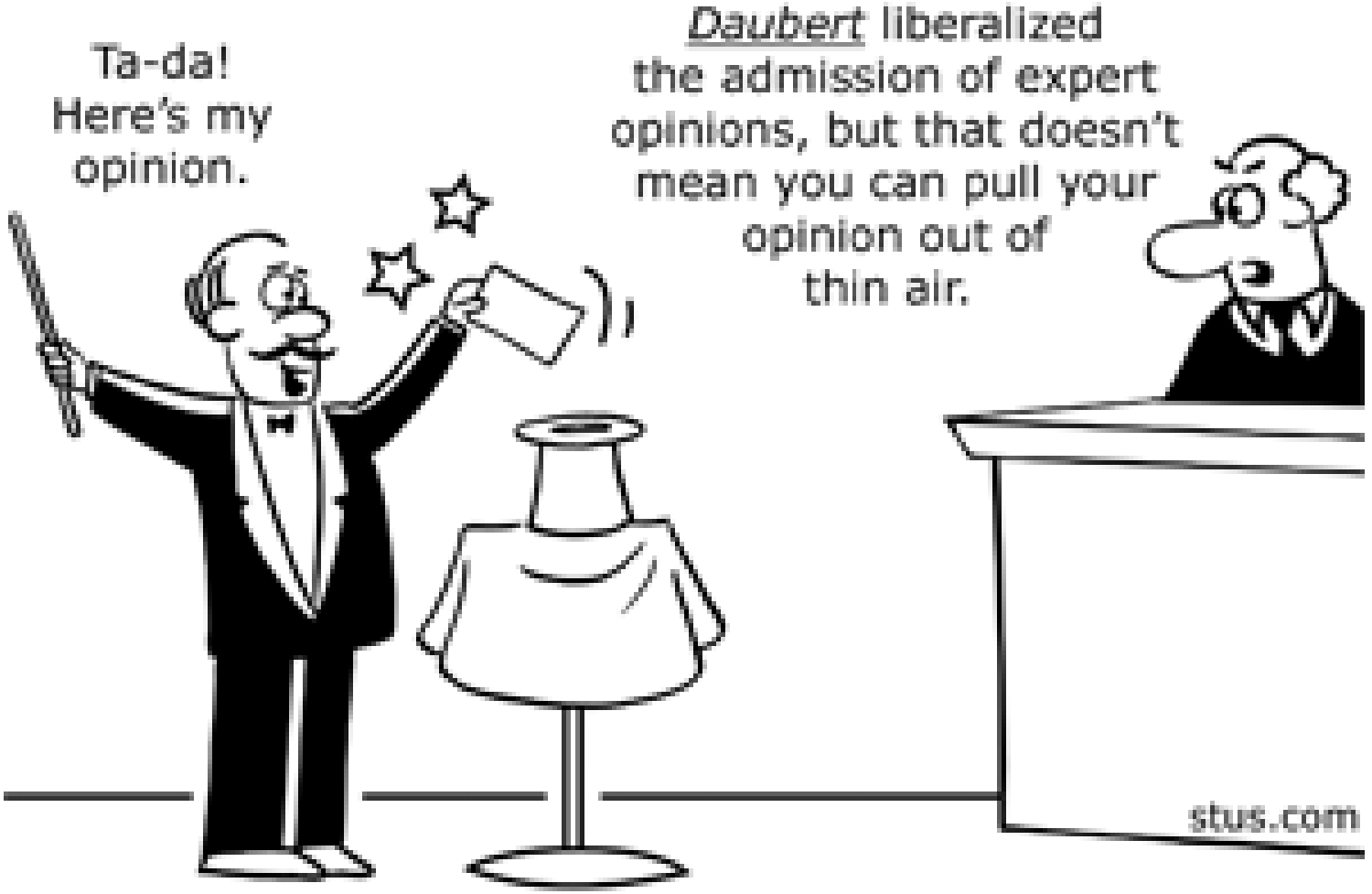
Projected Therapeutic Modalities

Therapy	Age/Year Initiate	Age/Year Suspended	Frequency	Cost
Physical Therapy	4/2000	Lifetime	1-2 x/wk for the next 2-3 yrs reducing to 1x/wk through age 22 then 4-6x/yr *Supplement home based program provided by care takers	$100.00-$180.00 per session
Occupational Therapy	4/2000	Est. age 8/2004 10/2006	1-2 x/wk for the next 2-3yrs reducing to 1x/wk x 2-3yrs	$100.00-$180.00 per session
Speech Therapy	4/2000	next 2-3 yrs	1-2 x/yrs for the next 2-3 yrs	$100.00-$107.00 per session

Photograph admissibility

Medical bill admissibility

Motorola, Inc. v. Murray, 147 A.3d 751 (D.C. 2016)



Collateral Source Rule

- "The collateral source rule provides, as a general proposition, that a party may recover full compensatory damages from a tortfeasor regardless of the payment of any amount by any independent party (a 'collateral source'), such as an insurance carrier."

Appellate and Trial Courts

- Hardi v. Mezzanotte, 818 A.2d 974 (D.C. 2003).
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- Albano v. Yee, 219 A.2d 567 (D.C. 1967).
- Bushong v. Park, 837 A.2d 49 (2003).
- Shell v. Rock Creek Nursing Center, Inc., 2014 WL 926261 (D.C. Super. Jan. 3, 2014).

Arguing Damages to the Jury

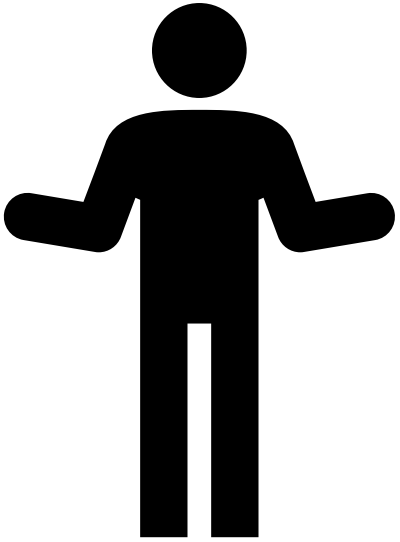
Punitive damages

THAT'S OUTRAGEOUS!


Jury
Instructions
Normal
JUN 27 14 FRI
OnTheMoveShow.com

Remittiturs

Questions???



Tab 1

281 F.Supp.2d 279
United States District Court,
District of Columbia.

Enrique CALVA–CERQUEIRA, Plaintiff,
v.
UNITED STATES of America, Defendant.

Civil Action No. 99–1198 (RMU).
|
Document Nos. 125, 126, 134.
|
Sept. 10, 2003.

In awarding damages to automobile accident victim under Federal Tort Claims Act (FTCA), the District Court, Urbina, J., held that: (1) plaintiff was entitled under District of Columbia law to $5,000,000 in pain and suffering damages; (2) collateral source rule permitted injured plaintiff to recover all of his medical costs, regardless of any amounts written off by plaintiff's medical care providers; (3) market interest rate method was applicable to calculate the likely escalation of future wages and future care costs and then discount those future damages figures to present value using an after-tax discount rate; (4) reversionary trust for damages award for future medical costs was not appropriate; and (5) plaintiff's damages were limited to the amount requested in the administrative claim.

Order in accordance with opinion.

Attorneys and Law Firms

***282** Gerard E. Mitchell, Laurie A. Amell, Stein, Mitchell & Mezines, Washington, DC, for the Plaintiff.

Edith M. Shine, Robert E. Leidenheimer, Jr., Assistant United States Attorney, Washington, DC, for the Defendant.

Danny C. Onorato, Barry Coburn, Coburn & Schertler, Washington, DC, Guardian ad litem.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

URBINA, District Judge.

I. INTRODUCTION

This case involves a 1998 collision ("the accident") between a bus owned and operated by defendant United States and an automobile operated by plaintiff Enrique Calva–Cerqueira. As a result of the accident, the plaintiff suffers from paralysis, decreased sensation in the left side of his body and is wheelchair bound. The plaintiff, who was 18–years–old at the time of the accident, brings this case pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.* On May 3, 2001, the court determined that the defendant was liable for the accident. Having presided over an eight-day trial on the plaintiff's actual damages and likely future damages, the court now determines that substantial evidence supports an award of the following compensatory damages: $5,000,000 for pain and suffering, $899,325 for past medical expenses, $2,562,906 for future lost wages, and $15,435,836 for future medical and related expenses. The court reduces the award to a total of $20,000,000 because the plaintiff's original claim for damages requests that amount. Finally, resolving two miscellaneous issues, the court declines to adopt the defendant's request for a reversionary medical trust and determines that the defendant shall pay the fees of the guardian *ad litem.*

II. FINDINGS OF FACT

A. Procedural History

1. On August 3, 2000 the court granted the defendant's motion to bifurcate the liability and damages portions of this action. On May 3, 2001, after a three-day bench trial on the issue of liability, the court determined that the defendant was liable for the accident and resultant injuries to the plaintiff. Findings of Fact and Conclusions of Law dated May 3, 2001 ("FFCL") at 16. Beginning on December 9, 2002, the court presided over an eight-day bench trial on the issue of the plaintiff's damages. On February 25, 2003, the parties filed proposed findings of fact and conclusions of law.

B. Summary of the Plaintiff's Life Before the Accident

2. The plaintiff was born on November 16, 1979, the second son of Maria Teresa Cerqueira and Roberto

*283 Calva. Pl.'s Ex. 146. His older brother Daniel was born in 1977. *Id.*

3. The plaintiff spent his early years in Mexico City. *Id.;* Pl.'s Ex. 121. His parents separated in 1984 and divorced two years later. Pl.'s Ex. 146. After completing first and second grade in Mexico City, the plaintiff moved with his mother and brother to Ithaca, New York. Pl.'s Exs. 121, 146. The plaintiff's elementary school grades ranged from average to above average. Pl.'s Ex. 121. The plaintiff and his brother spent the summer of 1991 with their father in Mexico, and then elected to remain in Mexico with their father. Pl.'s Ex. 146. The plaintiff's school grades from 1991 through 1994 ranged from average to good. Pl.'s Ex. 121.

4. On December 25, 1994, the Calva–Cerqueira family was on a vacation in Italy when they were involved in a motor vehicle accident ("1994 accident"). Tr. 2/81–83, 2/104.[1] Roberto Calva, the plaintiff's father and a pediatrician, testified that he attended immediately to his son and observed no loss of consciousness. *Id.* Although the other occupants of the vehicle were not injured, the plaintiff suffered a fracture of the maxillary sinus, the thin bone which serves as the orbital floor and the upper boundary of the maxillary sinus. Tr. 2/36, 2/82–83.

5. The defendant presented evidence attempting to prove that this 1994 accident caused the plaintiff a mild brain injury, and the plaintiff presented evidence to the contrary. *E.g.,* Tr. at 1/38, 2/36, 3/46–48, 3/75, 5/62–64, 6/127–28, 8/106–07, 8/127–28; Def.'s Exs. 21A, 23A, 53; Pl.'s Exs. 23, 111A–B. No such brain injury is documented in the plaintiff's medical records. *Id.* In addition, the defendant's evidence of the plaintiff's alleged mild brain injury is not compelling and would require this court to speculate. *Id.*

6. While living with his father in Mexico, the plaintiff suffered an emotional breakdown and was hospitalized for six weeks for detoxification from cocaine, inhalants, alcohol and other illegal drugs. Tr. 3/112–13, 3/117, 3/122–23; Pl.'s Ex. 35. Upon discharge from the detoxification program, the plaintiff was diagnosed as having a depressive disorder. Pl.'s Ex. 32.

7. In January 1997, the plaintiff moved to the United States to live with his mother in Fairfax, Virginia. Pl.'s Ex. 146. He participated in a second substance abuse treatment program and saw a psychiatrist, Dr. Eliot Sorel, from January through November 1997, but continued to abuse drugs during that period. Tr. 1/90–91, 5/64–65, 5/109–11, 7/5–22; Pl.'s Exs. 6, 27, 49.

8. In November of 1997, Dr. Sorel recommended that the plaintiff consent to urine screening. Pl.'s Ex. 49. Despite his family's encouragement, plaintiff chose to discontinue seeing his psychiatrist and continued to abuse illegal drugs and alcohol. *Id.;* Tr. 5/114–15, 7/49. Dr. Sorel's records indicate that the plaintiff was using marijuana three *284 times a week in late 1997. FFCL at 7. The plaintiff continued this frequency of usage up to the time of the accident. *Id.*

9. At the plaintiff's post-accident urine drug screening, which was administered at 11:15 on the morning of the accident at George Washington University Hospital, he tested positive for cannabis. *Id.* The laboratory report indicated that the test was a "presumptive screen only," and could be positive up to two weeks after marijuana use. *Id.*

10. Due to academic difficulties at W.T. Woodson High School caused by his mid-semester enrollment, the plaintiff failed three classes, received a "B" in a math class, and then withdrew from the school. Tr. 4/82–83, 5/66; Pl.'s Ex. 121. He subsequently enrolled at the Fairfax County Adult Education program, which afforded him an opportunity to earn the equivalent of a high school diploma. *Id.* His English teacher stated that he loved learning, was very bright and motivated, and had clear goals. Tr. 4/74–75. She added that he had an excellent attendance record and "was definitely college material." Tr. 4/82.

11. The plaintiff held several part-time jobs during the 1997–98 school year. Pl.'s Ex. 146. He worked at Kentucky Fried Chicken ("KFC") from April 29, 1998 until the date of his injury, June 14, 1998. *Id.* The plaintiff's supervisor at KFC at the time of the accident, Maria Rivera, testified that he was enthusiastic, smart, intelligent, very motivated, and had perfect attendance. She said that she promoted him twice and that she would

hire him back. Tr. 4/6–9. The plaintiff also played soccer with the Fairfax Police Youth Club League during the 1997–98 school year. Tr. 5/67. Jason Velasco, the plaintiff's soccer coach, testified to the plaintiff's perfect attendance over three seasons, interest in college, excellent physical condition, aptitude, and the absence of any hint of neurological problems. Tr. 3/130–33.

12. The plaintiff's rehabilitation psychiatrist, Dr. Sorel, testified that the plaintiff had demonstrated improvement. Tr. 7/55. Although the plaintiff did not enroll in urinalysis drug testing as Dr. Sorel had hoped, ambivalence is usual and customary for late adolescent patients. Tr. 7/61–62. Thus, the plaintiff was, more likely than not, on the road to full recovery immediately prior to the fateful accident.

13. Considering the plaintiff's pre-accident circumstances, the court finds that the plaintiff's prospects improved when he returned to the United States to live with his mother, largely due to her close supervision of him. Tr. 5/70–75, 5/105–20. The plaintiff's academic and social performance showed improvement: by spring 1998 the plaintiff was better adapted socially, holding down a job, and looking forward to college following graduation from high school. Tr. 5/118–20. He had exhibited interest in taking the SAT, secured checking and savings accounts in his own name, and paid many of his own expenses. Tr. 1/67–70, 2/85–100, 5/105–18. The plaintiff's mother testified that he had taken steps toward college and, like her other son Daniel, he would ***285** attend the northern Virginia community college ("NOVA") and then continue on to a four-year college. Tr. 5/118–20. Similar to the plaintiff's work at a fast food restaurant while attending school, Daniel worked at a bagel store while he attended NOVA. Tr. 5/120. The plaintiff had discussed attending NOVA with his brother, psychiatrist, soccer coach, and a family friend. Tr. 1/70, 1/75, 3/132, 4/96; Pl.'s Ex. 23A. The plaintiff's brother's path—working at a restaurant during school, attending NOVA while living at home, then enrolling at Georgetown and medical school—served as a road map for the plaintiff. Tr. 1/62–63, 5/120.

14. The plaintiff was a bright young man with good cognitive functions. His standardized testing scores showed above average intelligence, and he frequently scored his best grades in subjects such as mathematics, science, and English that indicate his potential for higher cognitive functioning. Tr. 4/75, 4/96. Further, the plaintiff has a highly educated family: his mother has a doctorate degree in nutrition, his father is a medical doctor and practicing pediatrician and gastroenterologist, his brother is attending medical school, and an uncle and a cousin are practicing veterinarians. Tr. 2/81–85, 5/61–62.

15. The plaintiff's vocational rehabilitation expert, Dr. Estelle Davis, testified that the plaintiff would likely have finished college and at least two years in a graduate program. Tr. 4/34–37. She based her opinion on her interviews of the plaintiff's mother, teacher and tutor; her review of the plaintiff's academic, intelligence testing, medical and drug treatment records; and the educational level of the plaintiff's family. *Id.*

16. The defendant's vocational rehabilitation expert, Mr. Steven Shedlin, considered similar information, but while he did not focus on the educational achievements of the plaintiff's family, he did focus on the plaintiff's alleged pre-accident brain injury. Tr. 7/197–98. Mr. Shedlin stated that the plaintiff's drug abuse was a serious concern, because drug abusers generally cannot maintain employment. Tr. 7/197. Ultimately, Mr. Shedlin opined that the plaintiff would not complete college. Tr. 7/197–98.

17. The testimony of the plaintiff's expert, Dr. Davis, is more credible than that of Mr. Shedlin because it addressed the facts of this case more thoroughly and more realistically. For example, the plaintiff's two promotions at Kentucky Fried Chicken belie Mr. Shedlin's suggestion that the plaintiff could not work because he was abusing drugs—demonstrating that his drug problem was not as severe as Mr. Shedlin believed. Tr. 4/6–9, 7/197.

18. Based on the plaintiff's family history and substantial progress toward full recovery by early June 1998, the court finds, by a reasonable

certainty, that the plaintiff likely would have finished college and two years in a graduate program. Tr. 2/154–55, 3/94, 4/46–47; 7/62–63.

C. The Accident

19. On Sunday, June 14, 1998, the plaintiff was involved in a tragic ***286** motor vehicle accident. FFCL at 2. On that morning, the plaintiff, then 18 years old, was driving his car eastbound on Eye Street, S.W. at its intersection with South Capitol Street in Washington, D.C. *Id.* The other vehicle involved in the accident was a Smithsonian Institution bus, which was proceeding southbound on South Capitol Street when it collided with the plaintiff's car. *Id.* The plaintiff's car weighed an estimated 3,380 pounds (including occupants), while the Smithsonian bus weighed an estimated 25,950 pounds (including occupants). *Id.* The bus driver was driving in excess of the applicable 25 mph speed limit when she drove through a red light and into the intersection where she hit the plaintiff's car. *Id.* at 13–14.

D. The Plaintiff's Post–Accident Medical Treatment

20. The plaintiff arrived by ambulance at the George Washington University Hospital Emergency Department at 9:25 a.m. on June 14, 1998. Pl.'s Ex. 1 at 5, 9–10; Tr. 1/6–7. He had sustained multiple traumas including injuries to the brain, skull and chest and was in a deep coma. *Id.*

21. After three weeks of treatment at George Washington University Hospital, the plaintiff was transferred in a comatose state to the National Rehabilitation Hospital ("NRH"). Pl.'s Exs. 2, 4; Tr. 4/110–18. He remained at NRH until December 24, 1998, and began to communicate verbally in August 1998. *Id.* His mother sat with him everyday. Tr. 5/68.

22. On January 4, 1998, the plaintiff moved to the Learning Services Corporation where he received 24–hour supervision from skilled trainers specializing in the care of brain-injured adults. Pl.'s Ex. 5 at 16–19. Following the plaintiff's departure in March 1999 from the Learning Services Corporation, he began outpatient rehabilitation training in an adult day program at NRH. Pl.'s Ex. 7; Tr. 1/79–80. He is currently receiving physical therapy three times per week at Fairfax Rehabilitation, Incorporated. *Id.*

23. The plaintiff continues to reside with his mother in Fairfax, Virginia. He has someone with him at all times. Tr. 5/77–82.

24. The plaintiff has incurred medical bills totaling $899,325.46 as a result of the accident. Pl.'s Ex. 158. According to his mother, her insurance company has a medical lien in the amount of $400,000–$500,000. Tr. 5/92–93. The court finds that the record includes no proof that the plaintiff's health care providers did not require full payment from the plaintiff and no proof of the exact amount of the insurance company's lien.

E. The Plaintiff's Injuries Caused By the Accident

25. The plaintiff suffered severe and permanent injuries, physical and mental disabilities, pain, emotional distress, disfigurement, deformity, and inconvenience as a result of the defendant's negligence. Tr. 1/34–40, 2/47–50, 2/53–54.

26. Dr. Thomas P. Naidich, a professor of neuroradiology at Mt. Sinai Medical Center and the author of ***287** innumerable articles and books on brain imaging, summarized the plaintiff's brain imaging studies. Tr. 2/46. Dr. Naidich explained that the plaintiff's imaging studies unequivocally demonstrate that the accident caused by the defendant inflicted extensive brain tissue damage that permanently altered the configuration of the plaintiff's brain, including the cortex, brain stem, and cerebellum. Tr. 2/47–50, 2/53–54. Specifically, the MRI and CT films show skull base fractures on the right and left sides, the absence of the right frontal lobe, and hemorrhagic damage and scarring in the basal ganglia affecting the putamen, globus pallidus, caudate and the internal and external capsules. Tr. 2/46–48. In addition, there has been partial loss and damage to the crossing fibers of the commissure or corpus collosum, the lenticular nucleus, the midbrain, the fibers connecting the brain and spinal cord,

the cerebral peduncles, and the thalamus, as well as fractures of the bones in the left ear. Tr. 2/48–58. A comparison of the MRI films of February 28, 1997 with the MRI films of December 16, 1999 shows that the accident caused substantial scarring and atrophic volume loss of the right superior frontal gyrus, middle frontal gyrus, precentral gyrus and to some extent the right postcentral gyrus. Tr. 2/56. In the wake of the trauma to the brain, multiple hemorrhages resulted in diffuse bleeding in various areas of the brain and when those areas liquified as part of the necrotic process they left behind multiple cavities. Tr. 2/53–54. P.E.T. scanning performed on February 16, 2000 confirmed the absence of functional brain activity in many of these areas. Pl.'s Ex. 10.

27. Dr. Anthony, J. Caputy, a neurosurgeon, Dr. Naidich, Dr. Richard N. Edelson, a neurologist, and Dr. Paul Fedio, a neuropsychologist, explained the functional significance of the loss of these neuroanatomical regions of the plaintiff's brain. Tr. 1/34–36, 1/46, 1/51–52, 2/16, 2/21–23, 2/27–32, 2/53, 2/145, 3/45. The extensive damage to the plaintiff's brain has resulted in serious impairment of higher cortical functions, neurocognitive deficits, and multiple neuromuscular disabilities with paralysis, paresis, and contractures of the musculoskeletal system in the torso, head, and four extremities. *Id.* The brain injury has rendered the plaintiff quadriparetic and resulted in a complete loss of mobility such that he now requires wheel-chair transportation plus assistance in making all transfers between wheelchair, bed, and bathing facilities. Tr. 2/23–29, 2/45, 3/45–46. The damage also has resulted in the inability of the plaintiff's brain to process and retain information, as well as a loss of ability to integrate information received from sensory and motor experience. *Id.* The absence of the plaintiff's right frontal cerebral area has caused him to encounter great difficulty in cognition, thinking and control of impulses. *Id.;* Tr. 2/147–49. According to Dr. Naidich, the body has much less ability to compensate when a person has suffered bilateral or multifocal injuries, making it more likely to have permanent, irreparable ***288** damage as the plaintiff exhibits. Tr. 2/76.

28. The damage to the plaintiff's cerebellum has hindered the plaintiff's spatial orientation and equilibrium. Tr. 1/24, 1/35, 5/74–75. Damage to the plaintiff's thalamus and hypothalamus has resulted in the loss or impairment of body sensation, long and short term memory function, learning, information retrieval and use, visual spatial orientation, and appetite. Pl.'s Ex. 156; Tr. 1/133, 2/45, 4/113.

29. Dr. Fedio evaluated the cognitive and personality functions of the plaintiff over five formal sessions and a home visit in May 2002 to assess the plaintiff's home environment. Pl.'s Exs. 202B, 202C; Tr. 1/142–44. Based on his own extensive testing and review of the plaintiff's school and medical records, Dr. Fedio concluded that the 1998 accident caused a tremendous amount of brain injury that has left the plaintiff severely impaired. Tr. 1/145. He noted that the primary loss is the massive hole in the plaintiff's right frontal lobe but that there is extensive injury all over the plaintiff's brain. *Id.*

30. Wechsler Adult Intelligence Scale testing showed that the plaintiff's language skills (left brain) are still relatively good, but that his visuospatial skills (right brain) are severely impaired. Pl.'s Exs. 161A–B, 202B at 6–7, 202C at 4–5. The accident also impaired the plaintiff's memory, perceptual organization, processing speed, and ability to understand information quickly. Tr. 2/163–65; Pl.'s Exs. 202B at 8–9, 202C at 5–6. Since the accident, the plaintiff has exhibited a very limited capacity for learning. Tr. 2/148. The plaintiff also has exhibited severe attention and concentration deficits since the accident, and has a severe memory and learning disability. Pl.'s Exs. 202B at 8, 202C at 5–6.

31. Dr. Edelson explained that there are "islands" of preserved function, such as verbal skills, but the plaintiff has lost other cognitive processes that are essential to overall cognitive performance. Tr. 3/52.

32. The plaintiff also has an executive function disorder which manifests itself in a severe

disability in practical reasoning and problem solving. He lacks the ability to plan and to foresee the consequences of his behavior. Tr. 2/146. The plaintiff has lost the area of the frontal lobe that controls judgment, decision-making and social decorum. Tr. 1/115, 4/43.

33. The evidence demonstrates that the plaintiff is permanently disabled from gainful employment, even in a protected environment, and most likely will not finish college. Pl.'s Ex. 202C at 8; Tr. 4/44.

34. Dr. Ross Silverstein, a board-certified psychiatrist and clinical professor at Georgetown University, has been treating the plaintiff since October 2000 and has been seeing the plaintiff about once a month since March 2001. Tr. 3/82. Dr. Silverstein testified to his psychiatric diagnosis of dementia secondary to head trauma, and explained that the plaintiff's emotional, mental, and cognitive functioning is principally determined by the massive brain injury suffered as a result of the 1998 accident. Tr. 3/82–83. Dr. Silverstein described the plaintiff ***289** as a vulnerable individual with multiple emotional, cognitive, and behavioral problems who requires ongoing psychiatric treatment. *Id.* The plaintiff is completely out of touch with the reality of his life and has an unrealistic sense of his abilities and goals. *Id.* at 83. Dr. Silverstein testified that the plaintiff could become depressed as the reality of his deficits becomes more apparent to him. Tr. 3/86–87. Dr. Silverstein explained that the plaintiff will require psychiatric assistance for the remainder of his life, on an average of one session per month. Tr. 3/92. Dr. Silverstein was particularly concerned that the plaintiff would suffer acute deterioration if he were taken away from his family and put back into a group home or institutional setting. Tr. 3/93. He was specifically concerned that the plaintiff would "see the world as having given up on him" and "might experience that as punishment." *Id.*

35. Experts for the plaintiff and the defendant agreed that the plaintiff is dependent upon some level of assistance 24 hours a day, seven days a week. Tr. 1/148, 3/49–50, 4/141–42, 4/149, 5/175, 6/91, 6/99, 6/147–48. Even at night the plaintiff frequently requires assistance. His mother testified that he wakes up at night to go to the bathroom or to seek comfort. Tr. 5/99. He has fallen out of bed at least six times within the last year. Tr. 5/100. Leaving the plaintiff alone would not be safe because he could fall, have a seizure, leave the stove on, or attempt a dangerous maneuver in his wheelchair. Tr. 3/50, 4/14–15, 4/178, 5/79–80, 6/91.

36. The court observed the plaintiff and watched a short videotape of his home functioning. Through these observations, the court finds that the plaintiff is a severely impaired individual who is wheel-chair bound, unable to ambulate, unable to transfer or move unassisted from chair to bed, and dependent on the assistance of others. Tr. 3/160, 5/64–75. In contrast, prior to June 14, 1998, the plaintiff had excellent motor functions and was able to walk, hike, jog, run, swim, play soccer, lift heavy objects, and otherwise function as a fully normal 18–year–old male. Tr. 3/130–33, 4/70–71. He was a gifted soccer player, described by his former coach as having "an incredible left foot" and by his mother as "dynamite on the soccer field." Tr. 3/131, 5/67.

37. The plaintiff appreciates many of his deficits. Tr. 6/31. He suffers mental anguish when he hears that he will never walk again and is self conscious about his surgical scars. Tr. 1/83, 4/17, 5/72. He is frustrated and anxious over questions of sexuality. Tr. 1/84. He feels hurt and frustrated when he upsets others by his inability to learn and understand. Tr. 3/140. He feels disheartened when reminded of the long list of courses he must complete to graduate from NOVA. Tr. 5/76.

38. In summary, as a result of the plaintiff's severe head and brain injuries, he suffers the loss of many bodily and mental functions and a great deal of pain, suffering, and mental anguish. The plaintiff has paralysis and decreased sensation in the left side of his body. Tr. 4/182. He has lost physical ***290** strength, is wheelchair bound, and has to wear braces. Tr. 3/165; 2/23–29, 2/45; 3/45, 5/80. His braces pinch and

cause pain. Tr. 3/165, 5/84–85. His exercises also cause pain. Tr. 4/170, 5/78–79. He suffers incontinence. Tr. 5/126. Aging will afflict him more severely, so that at age 40 he will more closely resemble a 60 or 70 year-old person. Tr. 3/54. He gets depressed at times and will likely develop depression in the future. Tr. 3/89, 3/99.

F. Future Medical Care and Related Needs

39. The parties each presented life care plans demonstrating that the plaintiff requires chronic care for the remainder of his life expectancy including full-time attendant care either at home or in a group residential setting. Pl.'s Ex. 151; Def.'s Ex. 19. The plaintiff's expert, Ellen Barker, R.N., and the defendant's expert, Linda Kopishke, R.N., both prepared life care plans for the plaintiff. *Id.* Both life care plans account for the fact that the plaintiff is wheelchair bound and contemplate extensive services based on a life expectancy of 70 years. *Id.* The first major difference between the plans is whether this care should be provided in the plaintiff's family setting or in a group setting. *Id.* The second is the hourly wage of attendants. *Id.* The third major area of dispute concerns the frequency of medical and related services. Tr. 1/125–34, 4/130–31, 5/176–77; Pl.'s Ex. 151.

40. Addressing the first factual issue, the court considers that the plaintiff's mother, father and brother are committed to keeping the plaintiff in his home environment and outside the confines of a group home or institutional setting. Tr. 1/78, 5/86, 5/123, 8/24. The plaintiff's physiatrist, Dr. Stephen Wills, testified that the plaintiff is not suited for an adult daycare program or group home due to the extent of his injuries. Tr. 4/130. For these reasons, the plaintiff's well-being would be better served by living with or close to his family and not receiving care at a group home.

41. Considering the second factual issue, the provisions for attendant care, the court recognizes that the Barker life care plan provides for a day-time skilled-care attendant charging $50 per hour and a different evening and night-time attendant charging $8–10 per hour. Pl.'s Ex. 151 at 18. The defendant's experts, Ms. Kopishke and Dr. Alan Frankel (the defendant's economist), testified that no skilled-care attendants charging $50 per hour exist—rather, the hourly rate is lower. Tr. at 6/96, 8/82–83. In contrast, Ms. Barker testified that this is a reasonable fee for a nurse or medical student working through an employment agency, and she had confirmed this belief several years ago when she spoke to an employment agency in the Fairfax area. Tr. at 1/171–72. Judging the testimony and relevant facts, the court finds Ms. Barker's testimony more credible than that of Ms. Kopishke or Dr. Frankel on this wage issue.

42. Turning to the third major factual issue regarding the life care plans, the court finds that Dr. Richard ***291** Zorowitz, a professor of rehabilitation medicine who testified for the defendant, agreed with the plaintiff's experts that the Kopishke plan was deficient in not providing for care by specialists in neurology, orthopedics, urology, pulmonology, ear-nose-and-throat, plastic surgery, and nutrition. Tr. 5/176–77; Pl.'s Ex. 153. The Barker plan expressly covers these services, and Dr. Wills testified that these services are necessary for the plaintiff's care. Tr. 4/130–35; Pl.'s Ex. 151.

43. After listening to the extensive testimony regarding the two life care plans, and reviewing the testimony and the plans themselves, the court finds that the plaintiff's life care plan addresses the plaintiff's future medical care and related needs far better than the defendant's plan. Pl.'s Ex. 151; Def.'s Ex. 19. The court also finds that the plaintiff's experts—Nurse Barker, who created the plan, Dr. Wills, the plaintiff's physiatrist, and Dr. Edelson, the plaintiff's neurologist—have reasonably recommended the items in the plan as necessary for the plaintiff's future care. *E.g.,* Pl.'s Ex. 151; Tr. 1/120, 4/130–35.

G. Present Value Calculations

44. The plaintiff's expert economist, Dr. Richard Lurito, utilized a methodology which calculates the likely escalation of the plaintiff's future medical and related expenses and future lost wages, and then discounts those future damages figures to

their present value using an after-tax discount rate. Tr. 4/203–06; *see also* Pl.'s Exs. 203F, 203G (Dr. Lurito's reports). This approach recognizes that some categories of costs and wages generally increase faster than inflation. Pl.'s Ex. 153.

45. On the other hand, the defendant presented two experts each with different approaches to estimating the current value of future economic costs. Tr. 8/30–131. First, Dr. Alan Frankel utilized a "real" or net interest rate approach. Tr. 8/35–36; *see also* Def.'s Exs. 27A–D (Dr. Frankel's reports). The "real" interest rate represents the difference between the overall rate of return on investments and the overall rate of inflation. *Id.* This method, which uses this "real" interest rate as the net discount rate, assumes that the growth in medical and related care costs and in the wages of college graduates will be same as the growth in the consumer price index generally. Tr. 8/63–64, 8/138–40. Second, Mr. Thomas Walsh proposed a "market present value" approach, which uses the cost of an annuity to determine the cost of a future stream of payments. Tr. 8/112; *see also* Def.'s Exs. 20A–E (Mr. Walsh's reports).

46. The field of economics is not an exact science and provides multiple methods for reaching the same goal: the estimate of future losses. One significant difference between Dr. Lurito's calculations and Dr. Frankel's calculations is that Dr. Frankel did not use an after-tax discount rate for most of his calculations, while Dr. Lurito did. *Compare* Tr. 8/49–50, 8/86 *with* Tr. 4/207–08 *and* Pl.'s Ex. 163; Pl.'s Ex. 203G at 10. The choice of an after-tax versus before-tax discount rate significantly affects the calculation of the net discount rate by ***292** which future sums are being reduced to present value. *See* Pl.'s Ex. 163. Overall, of the three experts, the court finds the plaintiff's expert, Dr. Lurito, most clear and compelling.

47. The court also finds that the bulk of the plaintiff's future economic damages consists of health care and attendant care costs. Pl.'s Ex. 153. If the rate of growth in these items is understated, or if future costs are discounted at an excessive rate, the consequences to the plaintiff could be devastating—he might not be able to pay for medical care needed because of the defendant's negligence. *Compare* Def.'s Ex. 27D at Ex. 20 (Dr. Frankel's chart, showing that the present value of the plaintiff's life care plan when calculated with a 3.0 percent discount rate is $7,001,712) *with* Tr. 4/213 *and* Pl.'s Ex. 153 (Dr. Lurito's chart, showing that the present value of the plaintiff's life care plan when calculated with a –0.5 percent discount rate is $14,237,416 to $15,534,956).

48. Dr. Lurito projected that the cost of the items in Ms. Barker's life care plan will rise at a rate faster than the overall rate of inflation. Tr. 4/209–11, 5/17. He assumed that the overall rate of inflation will be 3.0 percent per year and that the cost of items in Ms. Barker's life care plan will rise at an average rate of 5.0 percent per year. Tr. 4/205–06, 4/209–12; Pl.'s Ex. 153. He based this assumption on (a) a current annual growth rate in medical care services costs of 5.35 percent; (b) a likely future growth as described in the 2002 Economic Report of the President;[2] and (c) a growth in the costs of medical care services over the 1986–2001 period of 5.67 percent per year. Tr. 4/210–12; Pl.'s Exs. 164 at 149, 203G.

49. In an economy where the overall demand for personal and home care aides is projected to increase by 67 percent by the year 2010, it is likely that the prices charged by home care agencies will generally grow faster than consumer prices. Tr. 5/52–53; Pl.'s Ex. 172 at 188. Thus, it is more probable than not that, as in the past 20 years, average earnings for health care providers and average prices for medical-related goods and services will continue to rise at approximately 1.5 times the overall inflation rate. Pl.'s Exs. 152A–B, 203G; Tr. 5/52–54, 8/139–40. Accordingly, Dr. Lurito's calculation of the likely future ***293** growth in medical and related expenses is reasonably certain.

50. Turning to the future lost wages estimate, Dr. Lurito calculated the likely escalation in the wages that the plaintiff would have enjoyed absent his injuries caused by the accident. Tr. 5/16–24. Dr. Lurito supports his use of a 4.5 percent escalation rate for the plaintiff's future earnings absent injury with the 2002 Economic

Report of the President, which shows that the earnings of college and post-college educated males in the United States have historically increased by a yearly amount well in excess of the inflation rate. Tr. 5/23–24; Pl.'s Ex. 171.

51. As with future medical and related expenses, the failure to take longstanding economic reality into account—that is, making the assumption that the earnings of college graduates will increase at the rate of overall inflation—would result in a significant understatement of the plaintiff's probable future earnings loss. Tr. 5/17–24. Thus, the court is persuaded that the plaintiff's future earnings, absent injury, would have been at the level of a person with two years of graduate study, and that such earnings would likely have grown at an average of 4.5 percent per year as calculated by Dr. Lurito. Tr. 5/23–24; Pl.'s Exs. 171, 203G.

52. Reducing the plaintiff's future lost earnings and medical and related expenses to present value, Dr. Lurito applied a 4.5 percent after-tax discount rate. Tr. 4/205–08, 5/46; Pl.'s Ex. 163. Dr. Lurito based his choice of discount rate on the rate of return on conservative bond and money market investments. Pl.'s Ex. 152E. The actual before-tax yield on this portfolio is 5.2 percent and the after-tax yield is 3.9 percent. Pl.'s Ex. 152E.

53. Dr. Lurito calculated the present value of plaintiff's future medical and related expenses based on an after-tax discount rate of 4.5 percent and an overall growth rate of 5.0 percent, producing a net discount rate of negative 0.5 percent. Tr. 4/213. Dr. Lurito calculated the present value of the plaintiff's future lost earnings based on an after-tax discount rate of 4.5 percent and growth rate of 4.5 percent, producing a net discount rate of zero percent. Tr. 5/21.

54. Having observed and reviewed the testimony of the expert economists, the court is satisfied that Dr. Lurito's methods and calculations are based on substantial evidence and provide a reasonably certain estimate of the plaintiff's future lost wages and medical and related expenses.

III. CONCLUSIONS OF LAW

A. Legal Standard for Compensatory Damages

[1] In cases arising under the FTCA, the law of the state where the misconduct occurred governs substantive tort liability, including the nature and measure of damages to be awarded. *Richards v. United States,* 369 U.S. 1, 11, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962). "In the District of Columbia, the primary purpose of compensatory damages in personal injury cases 'is to make the plaintiff whole.' " *District of Columbia v. Barriteau,* 399 A.2d 563, 566 (D.C.1979) (quoting *Kassman v. Am. Univ.,* 546 F.2d 1029, 1033 (D.C.Cir.1976)).

***294** [2] [3] Courts must base compensatory damages awards on substantial evidence and not on mere speculation. *Wood v. Day,* 859 F.2d 1490, 1493 (D.C.Cir.1988); *Romer v. District of Columbia,* 449 A.2d 1097, 1100 (D.C.1982). Substantial evidence is more than a scintilla, but the evidence "need not point entirely in one direction." *Doe v. Binker,* 492 A.2d 857, 860 (D.C.1985). Described differently, substantial evidence is that which forms "an adequate basis for a reasoned judgment." *Romer,* 449 A.2d at 1100. While the plaintiff need not prove damages to a mathematical certainty, the court must have a reasonable basis upon which to estimate the damages. *Wood,* 859 F.2d at 1493; *Spar v. Obwoya,* 369 A.2d 173, 180 (D.C.1977).

[4] [5] Regarding damages for the future consequences of a tort, an item is recoverable if the plaintiff proves by a reasonable certainty that the future consequence would have occurred or will occur. *Wood,* 859 F.2d at 1492–93; *Sheehan v. United States,* 822 F.Supp. 13, 17 (D.D.C.1993); *Curry v. Giant Food Co. of the Dist. of Columbia,* 522 A.2d 1283, 1291 (D.C.1987). Courts have defined the "reasonable certainty" standard as identical to the preponderance of the evidence standard. *Moattar v. Foxhall Surgical Assocs.,* 694 A.2d 435, 439 (D.C.1997) (citing *Wilson v. Johns–Manville Sales Corp.,* 684 F.2d 111, 119 (D.C.Cir.1982)). In addition, courts should only award damages for future medical expenses when the expenses are reasonable and necessary. *Muenstermann v. United States,* 787 F.Supp. 499, 522 (D.Md.1992).

Using this framework, the court considers the individual types of compensatory damages that the plaintiff requests: pain and suffering, past medical expenses, future lost wages, and future medical and related expenses.

B. Pain and Suffering

The plaintiff requests an award of $8,000,000 for his past and future pain and suffering as caused by the accident. Pl.'s 2d Am. Prop. FFCL at 93. The defendant argues that an award of $750,000 would be reasonable. Def.'s Prop. FFCL at 31.

[6] The plaintiff in the instant action has presented substantial evidence to prove that he suffers from severe and permanent injuries, physical and mental disabilities, pain, emotional distress, disfigurement, deformity and inconvenience as a result of the defendant's negligence. *Wood,* 859 F.2d at 1492; *see also Doe,* 492 A.2d at 861 (explaining that pain and suffering damages are appropriate for "conscious" pain and suffering). The plaintiff has proven that he appreciates many of his deficits. *Jones v. Miller,* 290 A.2d 587, 590 n. 5 (D.C.1972) (stating that in determining pain and suffering damages, the court may consider the nature and extent of the injured party's suffering and his "internal condition perceptible to his senses"). For example, he suffers mental anguish when he hears that he will never walk again, he is self conscious about his surgical scars, he is frustrated and anxious over questions of sexuality, and he feels hurt and frustrated when he upsets others by his inability to learn and understand. Beyond these items, the record also attests to many other losses and a great deal of pain, suffering, and mental anguish. For example, the plaintiff has paralysis and decreased sensation in the left side of his body. He is wheelchair bound and has to wear painful braces at all times. His stretching and other exercises are very painful. Prior to the accident, the plaintiff was healthy, intelligent, looking forward to attending college and a skilled soccer player.

In *Athridge v. Iglesias,* the court considered brain injuries similar to those of the ***295** instant plaintiff. *Athridge v. Iglesias,* 950 F.Supp. 1187, 1192 (D.D.C.1996). Like the plaintiff in this case, the plaintiff in *Athridge* suffered brain damage resulting in loss of memory; damage to the frontal lobe resulting in lost ability to socialize, concentrate and modify behavior; physical impairment; loss of ability to integrate information and execute plans; and emotional trauma. *Id.* While the plaintiff in *Athridge* functioned well enough to hold part-time minimum wage employment, the plaintiff in this case will most likely not be able to secure paid employment, though he might be able obtain volunteer employment. *Id.* at 1193. In *Athridge,* the court awarded the plaintiff $4,000,000 for the pain and suffering he had endured and would continue to endure, noting that the defendant must compensate the plaintiff for his severe mental and physical injuries. *Id.* at 1194.

Considering the pain and suffering that the plaintiff has already suffered and will continue to suffer throughout his life because of his injuries, and considering the $4,000,000 damage award in *Athridge* for a plaintiff with similar but slightly less severe injuries, the court awards the plaintiff $5,000,000 in pain and suffering damages. *Wood,* 859 F.2d at 1493; *Athridge,* 950 F.Supp. at 1192. Especially when compared to the plaintiff in *Athridge,* the plaintiff's injuries provide a reasonable basis for this award. *Id.*

C. Past Medical Care Expenses

The plaintiff requests an award of $899,325 for the medical care expenses that he incurred because of the accident. Pl.'s 2d Am. Prop. FFCL at 73–75. The defendant does not contest this amount, but asks the court to subtract from this award the amounts that his health care providers forgave or "wrote-off." Def.'s Reasonable Value Br. at 2. The defendant explains that the amount that the plaintiff actually paid—as opposed to the amount paid plus the written-off amounts—represents the reasonable value of the care. *Id.* The plaintiff objects to this request, arguing that pursuant to the collateral source rule, any written-off amounts are irrelevant and the award for past medical expenses should be $899,325, the amount billed. Pl.'s Reply at 9.

[7] [8] Plaintiffs are entitled to recover for past medical care expenses as well as the cost of reasonable diagnostic examinations. *Friends For All Children, Inc. v. Lockheed Aircraft Corp.,* 746 F.2d 816, 824–26 (D.C.Cir.1984). In the District of Columbia, compensatory damages are subject to the collateral source rule, which states that "payments to the injured party from a collateral source are not allowed to diminish damages recoverable from the tortfeasor." *Hardi v. Mezzanotte,* 818 A.2d 974, 984 (D.C.2003). This collateral source rule applies when

either (1) the source of the benefit is independent of the tortfeasor or (2) the plaintiff contracted for the possibility of a double recovery. *Hardi,* 818 A.2d at 984.

[9] The collateral source rule explicitly permits compensatory damages to include written-off amounts. *Hardi,* 818 A.2d at 984. In *Hardi,* the health care provider reduced the required payment pursuant to a contractual agreement with the injured plaintiff's insurance company. *Id.* Just as the defendant argues here, Dr. Hardi argued that the plaintiff should not be able to recover written-off amounts. *Id.* at 984–85. The court ruled that the collateral source rule applied and the injured plaintiff should receive the benefit of the agreement "including any reduction in payments that the insurance carrier was able to negotiate [for the plaintiff]." *Id.* The court relied in part on a case where the hospital did not charge for medical services, explaining that "the interests of society are ***296** likely to be better served if the injured person is benefitted than if the wrongdoer is benefitted." *Id.* at 984 (citing *Hudson v. Lazarus,* 217 F.2d 344, 346 (D.C.Cir.1954)).

The collateral source rule applies in this case because the source of the benefit, the plaintiff's medical care providers' alleged writing-off of costs, is independent of the tortfeasor. *Hardi,* 818 A.2d at 984. The collateral source rule permits the plaintiff to recover all of his medical costs, regardless of any written-off amounts. *Id.* Accordingly, the court awards the plaintiff $899,325 as damages for his past medical expenses. *Friends For All Children,* 746 F.2d at 824–26.

D. Discounting to Present Value Awards for Future Damages

Before addressing the substance of the damages awards for future lost wages and medical and related expenses, the court discusses the methodology of calculating the present value of an award for future losses. For this purpose, the plaintiff advocates using the market interest rate method, while the defendant favors the real interest rate methodology and offers testimony of the use of an annuity as relevant to the present value calculation. Pl.'s 2d Am. Prop. FFCL at 78; Def.'s Prop. FFCL at 24, 29.

[10] Courts must discount to present value lump-sum damages awards intended to compensate for future medical costs or future lost wages. *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 533, 536–37, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983); *Hull v. United States,* 971 F.2d 1499, 1510 (10th Cir.1992); *see also Martinez v. United States,* 780 F.2d 525, 528 (5th Cir.1986) (explaining that for FTCA cases, state law determines how to account for inflation). The leading case regarding calculating the present value of future damages is *Pfeifer,* which involves calculating future lost wages in an action brought pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 904–05. *Pfeifer,* 462 U.S. at 523–53, 103 S.Ct. 2541. In discounting a lump-sum award for future damages to present value, the discounting methodology must take into account two factors. *Id.* at 537, 103 S.Ct. 2541. First, the methodology must take into account the time-value of money, that is, the fact that money awarded today can be invested to earn a return. *Id.* Second, the methodology must consider the effects of inflation. *Id.* at 540–41, 103 S.Ct. 2541. The discount rate should be based on the interest that can be earned with the safest available investments. *Pfeifer,* 462 U.S. at 537, 103 S.Ct. 2541.

[11] Regardless of the method of calculation, the court must rely on competent evidence in determining the discount rate. *Colleen v. United States,* 843 F.2d 329, 331 (9th Cir.1988); *Hull I,* 971 F.2d at 1511. In calculating the discount rate, courts should not select a time period "over which to compare inflation and interest rates that provides a decidedly aberrational result." *Trevino v. United States,* 804 F.2d 1512, 1519 (9th Cir.1986); *see also Scott v. United States,* 884 F.2d 1280, 1286–87 (9th Cir.1989).

[12] The first case in this jurisdiction that dealt with the effects of inflation in arriving at an award for loss of future income was *Barriteau,* 399 A.2d 563. Dr. Lurito, the plaintiff's economics expert in this case, was also the plaintiff's expert in *Barriteau,* a personal injury case. In that case, Dr. Lurito used the market interest rate method, applied an escalation factor based on the 20–year history of wages for nurses and nurses' assistants, and reduced future losses to present value by applying an after-tax discount rate. *Id.* at 568–69. *Barriteau* is the primary authority in this ***297** jurisdiction for the proposition that "the loss of future earnings—or, more precisely, the loss of future earning capacity—is a distinct item of damages which, if properly proved at trial, may result in recovery for the plaintiff." *Nat'l R.R. Passenger Corp. v. McDavitt,* 804 A.2d 275, 290 (D.C.2002) (engineer's wages

assumed to grow at an annual rate of three percent) (citing *Barriteau,* 399 A.2d at 567).

In an FTCA case, the Ninth Circuit held a military hospital liable for causing severe disability to a newborn child. *Trevino,* 804 F.2d at 1514. In evaluating the district court's award of damages for future lost wages and damages for future medical expenses, the Ninth Circuit explained that the rate of increase in wages may differ from the rate of increase in medical costs over the same period. *Id.* at 1519. "For this reason, the measure of inflation for the purpose of calculating the discount rate to be applied to the medical expense portion of [the plaintiff's] award may be different than that employed in fixing the discount rate applicable to the lost wage portion of her award." *Id.* Like in *Trevino,* to calculate the present value of the damages in a manner that accounts for medical costs that [may] rise faster than the rate of inflation, the court uses one net discount rate to calculate the present value of the future medical costs and a second net discount rate to calculate the present value of the future lost wages. *Id.; see also Pfeifer,* 462 U.S. at 537, 541–44, 548, 103 S.Ct. 2541; *Samaritan Inns, Inc. v. District of Columbia,* 114 F.3d 1227, 1238 n. 13 (D.C.Cir.1997) (citing *Pfeifer,* 462 U.S. at 536–42, 103 S.Ct. 2541).

[13] As in *Barriteau,* Dr. Lurito utilized the market interest rate method in the instant case. Dr. Lurito calculated the likely escalation of future wages and future care costs and then discounted those future damages figures to present value using an after-tax discount rate. *Barriteau,* 399 A.2d at 569. As discussed by the Supreme Court in *Pfeifer,* this "market interest rate" method entails (a) estimating future rates of inflation for various items of future damages; (b) calculating the effects of future inflation on such items; (c) determining an appropriate after-tax market interest rate; and (d) applying the after-tax market interest rate to determine the present value of the plaintiff's future damages. *Pfeifer,* 462 U.S. at 542–44, 548, 103 S.Ct. 2541. The market interest rate approach is different from the "total offset approach," which assumes that the rate of increase in wages and prices is always exactly offset by the after-tax market interest rate. *Id.* It is also different from the "real interest rate" approach, which excludes evidence of future price inflation and discounts by the observed or nominal market interest rate less inflation. *Id.* at 546–48, 103 S.Ct. 2541.

In this case, Dr. Lurito used a 4.5 percent after-tax discount rate to reduce to present value the plaintiff's future lost earnings and medical and related expenses. His choice of this rate is in line with the basic economic principles discussed in *Pfeifer,* 462 U.S. at 537, 103 S.Ct. 2541. In that case, the Court explained that the discount rate should be based on the rate of interest that the plaintiff would earn on "the best and safest investments." *Id. Pfeifer* also requires that the discount rate should represent the after-tax rate of return. *Id.* Use of an after-tax discount rate is based on the taxability of earnings on investments, and the effects of taxation are mitigated to the extent that medical expenses are deductible against income. Dr. Lurito explained that even if medical and related expenses are deducted, the first 7.5 percent of such expenses, and any ***298** income over and above 92.5 percent of such expenses, would be taxable.

The appropriate net discount rate depends on the economic facts that the parties have proven. *Culver v. Slater Boat Co.,* 722 F.2d 114, 120–21 (5th Cir.1983) (stating that "while the studies find that the real rate varies, estimates uniformly fix its amount over any fairly lengthy period as falling into a range that runs from 3.0 percent to a negative rate of 1.5 percent"). Significantly, the leading case in the District of Columbia on this subject involved application of a net discount rate of negative 0.75 percent. *Barriteau,* 399 A.2d at 566; *cf. Hughes v. Pender,* 391 A.2d 259, 262 (D.C.1978) (applying a 1.0 percent discount rate). Thus, in light of District of Columbia law and the facts of this case, the court accepts Dr. Lurito's use of a 0.0 percent net discount rate for the loss of future wages award and a negative 0.5 percent net discount rate for the future medical and related expenses. The court has a reasonable basis for using these net discount rates: they are based on reliable expert testimony and they comport with the facts of this case. *Barriteau,* 399 A.2d at 566, *Trevino,* 804 F.2d at 1519.

Considering the defendant's annuity evidence, the court notes that evidence regarding the cost of an annuity is not a fair measure of the present value of the plaintiff's future damages. *Wood,* 859 F.2d at 1492–93. First, while the court must consider annuity evidence to the extent it relates to the present value calculation, there is no requirement that plaintiff accept an annuity, nor is there any evidence in this case that the plaintiff will in fact invest the proceeds of his judgment into an annuity. *Muenstermann,* 787 F.Supp. at 526–27 (absent agreement

of parties, the court has no alternative but to order the payment of a lump sum). Second, annuity-cost testimony is predicated on the invalid assumption that the plaintiff would "put all his eggs in one basket." *Id.* For these reasons, and based on the testimony of the economics experts, the court considers and rejects the defendant's annuity evidence. *Wood,* 859 F.2d at 1492–93.

E. The Plaintiff's Award for Future Lost Wages

The court now turns to the plaintiff's claims for future lost wages. The plaintiff seeks an award of $2,562,906, and the defendant asserts that the award should be $546,663. Pl.'s 2d Am. Prop. FFCL at 93; Def.'s Prop. FFCL at 12.

[14] Considering the plaintiff's request for future lost wages, the court must evaluate whether he has proven the future consequences of the accident by a reasonable certainty. *Wood,* 859 F.2d at 1492. In order for the estimate of future lost wages to be reliable, the court must base it on facts specific to the plaintiff. *Wash. Metro. Area Trans. Auth. v. Davis,* 606 A.2d 165, 178 (D.C.1992). Because the plaintiff has not yet chosen a livelihood, the court must determine future lost earnings on the basis of potential rather than demonstrated earning capacity. *Hughes,* 391 A.2d at 263. The court must extrapolate that potential from the plaintiff's individual characteristics such as age, sex, socio-economic status, family characteristics, criminal behavior, academic record, intelligence and dexterity. *Id.* Further, "the plaintiff's occupational abilities, industriousness, work habits and experience are relevant" in estimating the future earnings he would accrue over the course of his lifetime. *McDavitt,* 804 A.2d at 290.

Accordingly, the court considers that before the accident the plaintiff had several problems, including (1) the past abuse of alcohol, marijuana, cocaine, inhalants, and intravenous drugs, (2) the present abuse of marijuana and (3) a diagnosis of depression. ***299** The plaintiff's prospects improved, however, in January 1997 when he returned to the United States to live with his mother, largely due to her close supervision of him. At the time of the accident, the plaintiff was in school, was excelling in his position at Kentucky Fried Chicken, was a devoted and reliable member of a soccer team, and was planning to attend NOVA. *McDavitt,* 804 A.2d at 290. The plaintiff's brother's path had provided him with a road map to graduate school. Indeed, his entire family is very well-educated: his mother has a doctorate degree, his father is a pediatrician, his brother is in medical school, and an uncle and a cousin are veterinarians. *Athridge,* 950 F.Supp. at 1193 (finding it reasonably likely that an injured adolescent would have earned a professional degree given his family's academic history and his own academic record). Significantly, the plaintiff was a bright young man with good cognitive functions, fluency in English and Spanish, and a decent academic record. *Id.* The court also found credible the testimony of the plaintiff's vocational rehabilitation expert, Dr. Davis, that but for the accident the plaintiff would have completed college and two years of graduate study. *Hughes,* 391 A.2d at 263. In sum, the evidence demonstrates to a reasonable certainty that but for the accident the plaintiff would have completed college and two years of graduate study. *Athridge,* 950 F.Supp. at 1193; *Wood,* 859 F.2d at 1492–93; *Hughes,* 391 A.2d at 263; *McDavitt,* 804 A.2d at 290.

After determining the amount of future earnings that the plaintiff would have earned but for the tort, the court must discount the amount to its present value. *Barriteau,* 399 A.2d at 568. Dr. Lurito, the plaintiff's expert economist, relied on Dr. Davis' conclusion that, absent the 1998 injury, the plaintiff would probably have graduated from college and completed two years of graduate study. *Groobert v. Pres. & Directors of Georgetown College,* 219 F.Supp.2d 1, 6 (D.D.C.2002) (demonstrating that an expert economist is permitted to rely on other expert opinions). Dr. Lurito testified that the plaintiff's estimated after-tax future lost wages, reduced to present value with a zero percent net discount rate (obtained by subtracting a 4.5 percent growth rate from a 4.5 percent after-tax discount rate), amount to $2,562,906. *Pfeifer,* 462 U.S. at 537, 103 S.Ct. 2541 (explaining that "the lost stream of income should be estimated in after-tax terms, the discount rate should also represent the after-tax rate of return to the injured worker"). Because the court concludes that Dr. Lurito's calculations are reasonable and based on substantial evidence, the court awards the plaintiff $2,562,906 for future lost wages. *Wood,* 859 F.2d at 1492–93.

F. The Plaintiff's Award for Future Medical and Related Expenses

Considering the issue of future medical and related expenses, the court notes that the plaintiff asks for $15,435,836 for these future costs. Pl.'s 2d Am. Prop. FFCL at 93. The defendant argues that this award should be $3,805,000. Def.'s Prop. FFCL at 20. In estimating the cost of the plaintiff's future medical and related expenses, the court recognizes the significant discrepancy between the parties' estimates.

[15] **[16]** The plaintiff is entitled to an award for future medical and related expenses that are reasonable and necessary. *Muenstermann,* 787 F.Supp. at 522; *see also Friends For All Children,* 746 F.2d at 824–26. Yearly evaluations and diagnostic examinations are proper items of damages when recommended to ensure that the plaintiff's treatment is proceeding properly and that any physical, emotional or developmental difficulties are diagnosed early. ***300** *Muenstermann,* 787 F.Supp. at 523; *see also Friends For All Children,* 746 F.2d at 824–26. Equipment purchases are also a proper item of damages where the evidence shows that the plaintiff's development will improve with the assistance of such equipment. *Muenstermann,* 787 F.Supp. at 523. When the plaintiff's future need for full-time attendant care is more likely than not, an award including such care is proper. *Muenstermann,* 787 F.Supp. at 523; *Ramrattan v. Burger King Corp.,* 656 F.Supp. 522, 524–25 (D.Md.1987). The argument that the plaintiff does not need attendant care because a family member is providing it is unpersuasive. *Lester v. Dunn,* 475 F.2d 983, 985–86 (D.C.Cir.1973). In addition, a plaintiff has no duty to mitigate her damages award by accepting a less costly form of medical care. *Muenstermann,* 787 F.Supp. at 523; *Ramrattan,* 656 F.Supp. at 525. Rather, the plaintiff "may select from among a number of reasonable alternatives." *Id.*

After listening to and reviewing the extensive testimony regarding the plaintiff's life care plan, the court concludes that the plaintiff's experts recommend all of the items in the plaintiff's life care plan as reasonable and necessary for the future treatment of his injuries as caused by the accident. *Muenstermann,* 787 F.Supp. at 523. Furthermore, while the provisions for the plaintiff's attendant care is highly contested and costly—especially because the plaintiff's plan does not include group care —the court concludes that the plaintiff has no duty to accept a less costly form of care. *Id.* Thus, the award of damages to pay for eight hours per day of skilled attendant care and 16 hours per day of non-skilled attendant care is proper. *Id.* The court concludes that the plaintiff has proven to a reasonable certainty that the items listed in his proposed life care plan are reasonable and medically necessary. *Muenstermann,* 787 F.Supp. at 523; *Ramrattan,* 656 F.Supp. at 525.

[17] Dr. Lurito, the plaintiff's expert economist, relied on Nurse Barker's life care plan to calculate the plaintiff's future medical and related expenses as necessitated by the accident. As stated previously, an expert economist may rely on the opinions of other experts. *Groobert,* 219 F.Supp.2d at 6. Dr. Lurito testified that the plaintiff's estimated future medical and related expenses, reduced to present value with a negative 0.5 percent net discount rate (obtained by subtracting a 5.0 percent growth rate from a 4.5 percent after-tax discount rate), amount to $15,435,836. *Pfeifer,* 462 U.S. at 537, 103 S.Ct. 2541. Because the court concludes that Dr. Lurito's calculations are reasonable and based on substantial evidence, the court awards the plaintiff $15,435,836 for future medical and related expenses. *Id.; Wood,* 859 F.2d at 1492–93.

G. Reversionary Medical Trust

[18] The defendant argues that the court should permit the defendant to provide the plaintiff's damages award for future medical costs in a reversionary trust. Def.'s Prop. FFCL at 20–23. The plaintiff and the court-appointed guardian *ad litem* object to this proposal. Pl.'s Reversionary Trust Br. at 4; GAL Reversionary Trust Br. at 2.

In determining whether a reversionary trust is appropriate, the court gives significant weight to whether the plaintiff or his guardian *ad litem* consent to the use of a reversionary trust. *Hull I,* 971 F.2d at 1504. The burden is on the requesting party to show that a reversionary trust is in the best interest of the injured party. *Hill v. United States,* 81 F.3d 118, 121 (10th Cir.1996). Courts have routinely rejected requests for reversionary trusts ***301** where the injured party, through his guardian ad litem, objects to the trust and the defendant offers no evidence of the benefit to the injured party. *Id.; Wyatt v. United States,* 944 F.Supp. 803, 804 (E.D.Mo.1996) (rejecting motion for reversionary trust when the competent adult plaintiff objected and the defendant offered no reason why a trust would benefit him). Because the plaintiff and his guardian *ad litem* both oppose the imposition of a reversionary

trust, the defendant has presented no evidence in support of its request and the defendant has not demonstrated that a trust is in the best interest of the plaintiff, the court denies the request for a reversionary trust. *Hill,* 81 F.3d at 121; *Hull I,* 971 F.2d at 1504–05.

H. Guardian *ad Litem* Costs

The plaintiff asks the court to tax the guardian *ad litem* fees against the United States as costs. Pl.'s 2d Am. Prop. FFCL at 91. The defendant objects to this request. Def.'s GAL Fees Br. at 1. The plaintiff, however, has not submitted any evidence detailing the relevant guardian *ad litem* costs.

[19] In FTCA actions, courts have interpreted Federal Rule of Civil Procedure 54(d) to allow taxation of guardian *ad litem* expenses as costs against the United States. *Hull I,* 971 F.2d at 1510 ("*Hull I* "); *Lebron v. United States,* 279 F.3d 321, 332 (5th Cir.2002). Rule 54(d) states, "costs other than attorneys' fees shall be allowed ... to the prevailing party unless the court otherwise directs; but costs against the United States ... shall be imposed only to the extent permitted by law." Fed.R.Civ.P. 54(d). Where the same person performs services as a guardian *ad litem* and as an attorney, only fees for services rendered in the role of guardian *ad litem* are taxable as costs. *Hull I,* 971 F.2d at 1510. The Tenth Circuit defined this guardian *ad litem* role as acting as an officer of the court and looking after the interests of the plaintiff. *Id.* (remanding to "determine what portion of the guardian *ad litem's* fees was properly taxed as costs and what portion should have been deducted from the damages award as attorney's fees"). Even if the guardian *ad litem* performed legal tasks for the plaintiff, such as legal research, the court can tax these expenses as costs so long as the guardian *ad litem* did not perform the legal tasks in the role of the plaintiff's attorney. *Hull v. United States,* 53 F.3d 1125, 1128 (10th Cir.1995) ("*Hull II* ").

To the extent the guardian *ad litem* was performing his guardian role—acting as an officer of the court and looking after the interests of the plaintiff—the defendant should pay his costs. Thus, the court grants the plaintiff's request for taxation of the guardian *ad litem* expenses as costs against the defendant. *Hull I,* 971 F.2d at 1510; *Hull II,* 53 F.3d at 1128. Because the plaintiff has not submitted detailed and sworn records from the guardian *ad litem,* however, the court cannot determine what amount of his fees are for services rendered in the guardian *ad litem* role, and what amount are for services rendered as an attorney. Therefore, the court orders the plaintiff to submit an affidavit from the guardian *ad litem* detailing any services rendered in the guardian *ad litem* role, and any services rendered in an attorney role, and itemizing all fees and costs. *Id.*

I. FTCA Cap on the Damages Award

On September 8, 1998, pursuant to the FTCA, the plaintiff's counsel filed with the defendant an administrative tort claim seeking $20,000,000 for "personal injury." Compl. Ex. C (Form 95 dated Sept. 8, 1998). The plaintiff now asks the court for a damages award of $26,898,067. Pl.'s Prop. FFCL at 93. The defendant argues that the FTCA limits the plaintiff's recovery ***302** to the amount in the administrative claim, $20,000,000. Def.'s Resp. at 16. The plaintiff has presented no evidence on this issue and has not addressed this issue.

[20] Considering the relevant law, the court notes that the FTCA explicitly states that a plaintiff's damages under the FTCA are limited to the amount requested in the administrative claim unless the plaintiff can satisfy a stringent "newly discovered evidence" or "intervening facts" standard. 28 U.S.C. § 2675(b); *Pullen v. United States,* 1997 WL 350003, at *2, 1997 U.S. Dist. LEXIS 8910, at *18–*20 (D.D.C. June 11, 1997). If a plaintiff could have reasonably obtained the information on the specific injuries needed to make out the worst-case scenario when he filed the original claim, then new information about the injuries will not qualify as "newly discovered evidence" or "intervening facts." *Dickerson v. United States,* 280 F.3d 470, 476 (5th Cir.2002). Newly discovered evidence is evidence that materially differs from the worst-case prognosis of which the claimant knew or could reasonably have known when he filed the claim, not evidence that merely bears on the precision of the prognosis. *Zurba v. United States,* 318 F.3d 736, 741 (7th Cir.2002); *Low v. United States,* 795 F.2d 466, 471 (5th Cir.1986).

In this action, the plaintiff has not argued that any evidence could qualify as "newly discovered evidence" or "intervening facts." Indeed, as the defendant points out, the plaintiff's condition has improved since he filed

his administrative claim. Def.'s Resp. at 16. Having reviewed the evidence of the plaintiff's condition, the court concludes that no "newly discovered evidence" or "intervening facts" exist that could justify an increased amount for the plaintiff's personal injury claim. *Dickerson,* 280 F.3d at 476. Accordingly, the court limits the plaintiff's damages award to $20,000,000.

IV. CONCLUSION

For all these reasons, the court grants the plaintiff the following compensatory damages: $5,000,000 for pain and suffering, $899,325 for past medical expenses, $2,562,906 for future lost wages and $15,435,836 for his future medical and related expenses. The court reduces the total award to $20,000,000 to account for the fact that the plaintiff's administrative claim for damages requests that amount. The court also declines to adopt the defendant's request for a reversionary medical trust and determines that the defendant shall pay any fees of the guardian *ad litem* for services rendered in the guardian *ad litem* role. An order directing the parties in a manner consistent with this Memorandum Opinion is separately and contemporaneously issued this —— day of September, 2003.

All Citations

281 F.Supp.2d 279

Footnotes

1 References to the official trial transcript are to the day and page. In other words, "Tr. 1/6–7" denotes the trial transcript for day 1 of the trial at pages 6–7.

2 The 2002 Economic Report of the President states:

> Health care spending grew rapidly during the past decade, from $916.5 billion in 1990 to $1,311.1 billion in 2000, or more than 3.6 percent a year on average (2.6 percent a year in per capita terms; Chart 4–1). *Home health care expenses and drugs were the fastest growing categories of this expenditure* (Chart 4–2). The real, constant-dollar cost of private health insurance increased by 4.9 percent a year between 1984 and 1999.... Growth in health care costs is projected to accelerate, with total expenditure predicted to account for 16 percent of GDP by 2010. Over the longer term, forecasts predict that health care spending will become even more predominant in the economy, continuing a 60–year economic trend and reaching as much as 38 percent of GDP under conservative assumptions.

2002 Econ. Report of the Pres. at 149 <http:// w3.access.gpo.gov/usbudget/fy2003/pdf/2002_erp.pdf> (emphasis added).

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Tab 2

West's Annotated Code of Maryland
Courts and Judicial Proceedings
Title 11. Judgments (Refs & Annos)
Subtitle 1. Judgments--Miscellaneous (Refs & Annos)

MD Code, Courts and Judicial Proceedings, § 11-108

§ 11-108. Noneconomic damages related to personal injury or wrongful death

Currentness

Definitions

(a)(1) In this section the following words have the meanings indicated.

(2)(i) "Noneconomic damages" means:

1. In an action for personal injury, pain, suffering, inconvenience, physical impairment, disfigurement, loss of consortium, or other nonpecuniary injury; and

2. In an action for wrongful death, mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, care, marital care, parental care, filial care, attention, advice, counsel, training, guidance, or education, or other noneconomic damages authorized under Title 3, Subtitle 9 of this article.

(ii) "Noneconomic damages" does not include punitive damages.

(3) "Primary claimant" means a claimant in an action for the death of a person described under § 3-904(d) of this article.

(4) "Secondary claimant" means a claimant in an action for the death of a person described under § 3-904(e) of this article.

Personal injury actions arising on or after July 1, 1986

(b)(1) In any action for damages for personal injury in which the cause of action arises on or after July 1, 1986, an award for noneconomic damages may not exceed $350,000.

(2)(i) Except as provided in paragraph (3)(ii) of this subsection, in any action for damages for personal injury or wrongful death in which the cause of action arises on or after October 1, 1994, an award for noneconomic damages may not exceed $500,000.

(ii) The limitation on noneconomic damages provided under subparagraph (i) of this paragraph shall increase by $15,000 on October 1 of each year beginning on October 1, 1995. The increased amount shall apply to causes of action arising between October 1 of that year and September 30 of the following year, inclusive.

(3)(i) The limitation established under paragraph (2) of this subsection shall apply in a personal injury action to each direct victim of tortious conduct and all persons who claim injury by or through that victim.

(ii) In a wrongful death action in which there are two or more claimants or beneficiaries, an award for noneconomic damages may not exceed 150% of the limitation established under paragraph (2) of this subsection, regardless of the number of claimants or beneficiaries who share in the award.

Awards by health claims arbitration panel

(c) An award by the health claims arbitration panel in accordance with § 3-2A-05 of this article for damages in which the cause of action arose before January 1, 2005, shall be considered an award for purposes of this section.

Juries not to be informed of limitations

(d)(1) In a jury trial, the jury may not be informed of the limitation established under subsection (b) of this section.

(2)(i) If the jury awards an amount for noneconomic damages that exceeds the limitation established under subsection (b) of this section, the court shall reduce the amount to conform to the limitation.

(ii) In a wrongful death action in which there are two or more claimants or beneficiaries, if the jury awards an amount for noneconomic damages that exceeds the limitation established under subsection (b)(3)(ii) of this section, the court shall:

1. If the amount of noneconomic damages for the primary claimants equals or exceeds the limitation under subsection (b)(3)(ii) of this section:

A. Reduce each individual award of a primary claimant proportionately to the total award of all of the primary claimants so that the total award to all claimants or beneficiaries conforms to the limitation; and

B. Reduce each award, if any, to a secondary claimant to zero dollars; or

2. If the amount of noneconomic damages for the primary claimants does not exceed the limitation under subsection (b)(3)(ii) of this section or if there is no award to a primary claimant:

A. Enter an award to the primary claimant, if any, as directed by the verdict; and

B. Reduce each individual award of a secondary claimant proportionately to the total award of all of the secondary claimants so that the total award to all claimants or beneficiaries conforms to the limitation.

Verdicts under Title 3, Subtitle 2A

(e) The provisions of this section do not apply to a verdict under Title 3, Subtitle 2A of this article for damages in which the cause of action arises on or after January 1, 2005.

Credits

Added by Acts 1986, c. 639. Amended by Acts 1989, c. 5, § 1; Acts 1989, c. 629; Acts 1994, c. 477, § 1, eff. Oct. 1, 1994; Acts 1997, c. 318, § 1, eff. Oct. 1, 1997; Acts 2000, c. 61, § 1, eff. April 25, 2000; Acts 2004, c. 25, § 1, eff. April 13, 2004; Acts 2004, 1st Sp. Sess., c. 5, § 1, eff. Jan. 11, 2005.

Notes of Decisions (140)

MD Code, Courts and Judicial Proceedings, § 11-108, MD CTS & JUD PRO § 11-108
Current through all legislation from the 2016 Regular Session of the General Assembly

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Proposed Legislation

West's Annotated **Code** of **Maryland**
Courts and Judicial Proceedings
Title 3. Courts of General Jurisdiction--Jurisdiction/Special Causes of Action (Refs & Annos)
Subtitle 2a. Health Care **Malpractice** Claims (Refs & Annos)

MD Code, Courts and Judicial Proceedings, § 3-2A-09

§ 3-2A-09. Noneconomic **damages**, **medical** expenses, and future loss of earnings

Currentness

Causes of action arising on or after January 1, 2005

(a) This section applies to an award under § 3-2A-05 of this subtitle or a verdict under § 3-2A-06 of this subtitle for a cause of action arising on or after January 1, 2005.

Causes of action arising between January 1, 2005, and December 31, 2008

(b)(1)(i) Except as provided in paragraph (2)(ii) of this subsection, an award or verdict under this subtitle for noneconomic **damages** for a cause of action arising between January 1, 2005, and December 31, 2008, inclusive, may not exceed $650,000.

(ii) The limitation on noneconomic **damages** provided under subparagraph (i) of this paragraph shall increase by $15,000 on January 1 of each year beginning January 1, 2009. The increased amount shall apply to causes of action arising between January 1 and December 31 of that year, inclusive.

(2)(i) Except as provided in subparagraph (ii) of this paragraph, the limitation under paragraph (1) of this subsection shall apply in the aggregate to all claims for personal injury and wrongful death arising from the same **medical** injury, regardless of the number of claims, claimants, plaintiffs, beneficiaries, or defendants.

(ii) If there is a wrongful death action in which there are two or more claimants or beneficiaries, whether or not there is a personal injury action arising from the same **medical** injury, the total amount awarded for noneconomic **damages** for all actions may not exceed 125% of the limitation established under paragraph (1) of this subsection, regardless of the number of claims, claimants, plaintiffs, beneficiaries, or defendants.

Jury award of damages

(c)(1) In a jury trial, the jury may not be informed of the limitation under subsection (b) of this section.

(2) If the jury awards an amount for noneconomic **damages** that exceeds the limitation established under subsection (b) of this section, the court shall reduce the amount to conform to the limitation.

(3) In a wrongful death action in which there are two or more claimants or beneficiaries, if the jury awards an amount for noneconomic damages that exceeds the limitation under subsection (b) of this section or a reduction under paragraph (4) of this subsection, the court shall:

(i) If the amount of noneconomic damages for the primary claimants, as described under § 3-904(d) of this title, equals or exceeds the limitation under subsection (b) of this section or a reduction under paragraph (4) of this subsection:

1. Reduce each individual award of a primary claimant proportionately to the total award of all primary claimants so that the total award to all claimants or beneficiaries conforms to the limitation or reduction; and

2. Reduce each award, if any, to a secondary claimant as described under § 3-904(e) of this title to zero dollars; or

(ii) If the amount of noneconomic damages for the primary claimants does not exceed the limitation under subsection (b) of this section or a reduction under paragraph (4) of this subsection or if there is no award to a primary claimant:

1. Enter an award to each primary claimant, if any, as directed by the verdict; and

2. Reduce each individual award of a secondary claimant proportionately to the total award of all of the secondary claimants so that the total award to all claimants or beneficiaries conforms to the limitation or reduction.

(4) In a case in which there is a personal injury action and a wrongful death action, if the total amount awarded by the jury for noneconomic damages for both actions exceeds the limitation under subsection (b) of this section, the court shall reduce the award in each action proportionately so that the total award for noneconomic damages for both actions conforms to the limitation.

Verdict for past medical expenses

(d)(1) A verdict for past medical expenses shall be limited to:

(i) The total amount of past medical expenses paid by or on behalf of the plaintiff; and

(ii) The total amount of past medical expenses incurred but not paid by or on behalf of the plaintiff for which the plaintiff or another person on behalf of the plaintiff is obligated to pay.

(2)(i) A court may on its own motion, or on motion of a party, employ a neutral expert witness to testify on the issue of a plaintiff's future medical expenses or future loss of earnings.

(ii) Unless otherwise agreed to by the parties, the costs of a neutral expert witness shall be divided equally among the parties.

(iii) Nothing contained in this subsection limits the authority of a court concerning a court's witness.

Credits
Added by Acts 2004, 1st Sp. Sess., c. 5, § 1, eff. Jan. 11, 2005.

Editors' Notes

CROSS REFERENCES

Civil procedure, judgments, noneconomic **damages**, see Courts and Judicial Proceedings, § 11-108.

RESEARCH REFERENCES

ALR Library

26 ALR 5th 245, Validity, Construction, and Application of State Statutory Provisions Limiting Amount of Recovery in **Medical Malpractice** Claims.

Encyclopedias

16 Am. Jur. Trials 471, Defense of **Medical Malpractice** Cases.
Maryland Law Encyclopedia **Damages** § 40, Mitigation or Reduction--Payment by Joint Tortfeasor.
Maryland Law Encyclopedia **Damages** § 41, Mitigation or Reduction--Compensation Received from Collateral Source.
Maryland Law Encyclopedia Death; Dead Bodies § 37, Amount--Statutory **Cap**.
NOTES OF DECISIONS

Cap on non-economic damages

Trial court in wrongful death and survival action brought by estate and family of deceased patient against doctors for allegedly committing **medical malpractice** by misdiagnosing patient's cancer was required to apply the statutory **cap** on non-economic **damages** for **malpractice** claims to jury's verdict before reducing **damages** award based on settlement with joint tortfeasor. Lockshin v. Semsker, 2010, 987 A.2d 18, 412 Md. 257. **Damages** 63; Health 834(2)

The **cap** on non-economic **damages** in **medical malpractice** action must be applied to reduce the award or verdict prior to any reduction based on a joint tortfeasor settlement. Lockshin v. Semsker, 2010, 987 A.2d 18, 412 Md. 257. **Damages** 63; Health 834(1)

Cap on non-economic **damages** applied to wrongful death and survival action brought by deceased patient's estate and family against doctors for allegedly failing to diagnose patient's cancer, even though patient had elected in his **medical malpractice** action to waive arbitration. Lockshin v. Semsker, 2010, 987 A.2d 18, 412 Md. 257. Health 834(2)

The **cap** on non-economic **damages** in **medical malpractice** actions applies to all health care **malpractice** claims, including those for which arbitration has been waived. Lockshin v. Semsker, 2010, 987 A.2d 18, 412 Md. 257. Health 834(1)

MD Code, Courts and Judicial Proceedings, § 3-2A-09, MD CTS & JUD PRO § 3-2A-09
Current through all legislation from the 2016 Regular Session of the General Assembly

End of Document

West's Annotated Code of Virginia
Title 8.01. Civil Remedies and Procedure (Refs & Annos)
Chapter 4. Limitations of Actions (Refs & Annos)
Article 1. In General (Refs & Annos)

VA Code Ann. § 8.01-230

§ 8.01-230. Accrual of right of action

Currentness

In every action for which a limitation period is prescribed, the right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person or damage to property, when the breach of contract occurs in actions ex contractu and not when the resulting damage is discovered, except where the relief sought is solely equitable or where otherwise provided under § 8.01-233, subsection C of § 8.01-245, §§ 8.01-249, 8.01-250 or other statute.

Credits
Acts 1977, c. 617; Acts 1996, c. 328.

Notes of Decisions (412)

VA Code Ann. § 8.01-230, VA ST § 8.01-230
Current through End of the 2016 Reg. Sess.

End of Document

West's Annotated Code of Virginia
Title 8.01. Civil Remedies and Procedure (Refs & Annos)
Chapter 4. Limitations of Actions (Refs & Annos)
Article 3. Personal Actions Generally (Refs & Annos)

VA Code Ann. § 8.01-243

§ 8.01-243. Personal action for injury to person or property generally; extension in actions for malpractice against health care provider

Effective: July 1, 2016
Currentness

A. Unless otherwise provided in this section or by other statute, every action for personal injuries, whatever the theory of recovery, and every action for damages resulting from fraud, shall be brought within two years after the cause of action accrues.

B. Every action for injury to property, including actions by a parent or guardian of an infant against a tort-feasor for expenses of curing or attempting to cure such infant from the result of a personal injury or loss of services of such infant, shall be brought within five years after the cause of action accrues. An infant's claim for medical expenses pursuant to subsection B of § 8.01-36 accruing on or after July 1, 2013, shall be governed by the applicable statute of limitations that applies to the infant's cause of action.

C. The two-year limitations period specified in subsection A shall be extended in actions for malpractice against a health care provider as follows:

1. In cases arising out of a foreign object having no therapeutic or diagnostic effect being left in a patient's body, for a period of one year from the date the object is discovered or reasonably should have been discovered;

2. In cases in which fraud, concealment, or intentional misrepresentation prevented discovery of the injury within the two-year period, for one year from the date the injury is discovered or, by the exercise of due diligence, reasonably should have been discovered; and

3. In a claim for the negligent failure to diagnose a malignant tumor, cancer, or an intracranial, intraspinal, or spinal schwannoma, for a period of one year from the date the diagnosis of a malignant tumor, cancer, or an intracranial, intraspinal, or spinal schwannoma is communicated to the patient by a health care provider, provided that the health care provider's underlying act or omission was on or after July 1, 2008, in the case of a malignant tumor or cancer or on or after July 1, 2016, in the case of an intracranial, intraspinal, or spinal schwannoma. Claims under this section for the negligent failure to diagnose a malignant tumor or cancer, where the health care provider's underlying act or omission occurred prior to July 1, 2008, shall be governed by the statute of limitations that existed prior to July 1, 2008. Claims under this section for the negligent failure to diagnose an intracranial, intraspinal, or spinal schwannoma, where the health care provider's underlying act or omission occurred prior to July 1, 2016, shall be governed by the statute of limitations that existed prior to July 1, 2016.

However, the provisions of this subsection shall not apply to extend the limitations period beyond 10 years from the date the cause of action accrues, except that the provisions of subdivision A 2 of § 8.01-229 shall apply to toll the statute of limitations in actions brought by or on behalf of a person under a disability.

D. Every action for injury to the person, whatever the theory of recovery, resulting from sexual abuse occurring during the infancy or incapacity of the person as set forth in subdivision 6 of § 8.01-249 shall be brought within 20 years after the cause of action accrues.

E. Every action for injury to property brought by the Commonwealth against a tort-feasor for expenses arising out of the negligent operation of a motor vehicle shall be brought within five years after the cause of action accrues.

Credits

Acts 1977, c. 617; Acts 1986, c. 389; Acts 1986, c. 454; Acts 1987, c. 294; Acts 1987, c. 645; Acts 1987, c. 679. Acts 2008, c. 175; Acts 2011, c. 617; Acts 2011, c. 641; Acts 2013, c. 551; Acts 2013, c. 689; Acts 2014, c. 586; Acts 2016, c. 190.

Notes of Decisions (263)

VA Code Ann. § 8.01-243, VA ST § 8.01-243
Current through End of the 2016 Reg. Sess.

End of Document

West's Annotated Code of Virginia
Title 8.01. Civil Remedies and Procedure (Refs & Annos)
Chapter 3. Actions (Refs & Annos)
Article 3. Injury to Person or Property (Refs & Annos)

VA Code Ann. § 8.01-38.1

§ 8.01-38.1. Limitation on recovery of punitive damages

Currentness

In any action accruing on or after July 1, 1988, including an action for medical malpractice under Chapter 21.1 (§ 8.01-581.1 et seq.), the total amount awarded for punitive damages against all defendants found to be liable shall be determined by the trier of fact. In no event shall the total amount awarded for punitive damages exceed $350,000. The jury shall not be advised of the limitation prescribed by this section. However, if a jury returns a verdict for punitive damages in excess of the maximum amount specified in this section, the judge shall reduce the award and enter judgment for such damages in the maximum amount provided by this section.

Credits
Acts 1987, c. 255.

Notes of Decisions (12)

VA Code Ann. § 8.01-38.1, VA ST § 8.01-38.1
Current through End of the 2016 Reg. Sess.

End of Document

Tab 3

759 A.2d 682
District of Columbia Court of Appeals.

John D. CROLEY, Appellant/Cross–Appellee,
v.
REPUBLICAN NATIONAL COMMITTEE,
et al., Appellees/Cross–Appellants.

Nos. 99–CV–482, 99–CV–398.
|
Argued May 11, 2000.
|
Decided Sept. 21, 2000.

Assault victim, who was Harvard Business School graduate and owner of computer company, brought action against political party national committee and committee's security guard, alleging assault, battery, and negligence arising from incident in which guard took physical action to stop victim from taking photographs on public street. After jury returned verdict for victim in amount of $1.2 million, the Superior Court, Reggie Walton, J., vacated the $600,000 award for lost future earnings, but denied request for remittitur and motion for new trial. On cross-appeals, the Court of Appeals, Reid, J., held that: (1) award for lost future earnings could be based upon earning potential rather than demonstrated earning capacity; (2) evidence supported jury's award of $600,000 for lost future earnings; (3) evidence did not support claim for punitive damages; (4) evidence of victim's head or brain injury was excludable as a sanction for failure to provide discovery; and (5) exclusion of evidence pertaining to victim's head or brain injury did not violate Americans with Disabilities Act (ADA).

Affirmed in part, vacated in part, and remanded with instructions.

Attorneys and Law Firms

*685 Tom Watson for appellant/cross-appellee.

Robert Lynch for appellee/cross-appellant.

Before REID, GLICKMAN, and WASHINGTON, Associate Judges.

Opinion

REID, Associate Judge:

In this personal injury action, brought by appellant/cross-appellee John D. Croley against appellees/cross-appellants the Republican National Committee ("the RNC") and others, the jury returned a $1,200,000.00 verdict in favor of Mr. Croley for assault, battery and negligence, including $600,000.00 for lost future earnings. [1] In response to a post-trial motion by the RNC and Mr. Jasper Mills, the trial court vacated the award of $600,000.00 for lost future earnings. On appeal, Mr. Croley challenges the decision of the trial court to vacate the award for lost future earnings. In addition, he claims that the trial court erred by: (1) not allowing the jury to consider his claim for punitive damages; and (2) excluding his head or brain injury claim. In their cross-appeal, the RNC and Mr. Mills contend that the trial court erred by not granting their post-trial motion for judgment on the assault, battery and negligence claims. They also argue that the trial court abused its discretion by failing to grant their post-trial motion for a new trial and remittitur.

We affirm the trial court's judgment in No. 99–CV–398, denying the appellees/cross-appellants' post-trial motions for judgment on Mr. Croley's assault, battery and negligence claims, and for a new trial or remittitur. In No. 99–CV–482, we affirm the trial court's judgment regarding *686 punitive damages, and the exclusion of evidence concerning Mr. Croley's head or brain injury claim; but vacate its judgment pertaining to the award of lost future earnings and remand this matter with instructions to reinstate the $600,000.00 award for lost future earnings.

FACTUAL SUMMARY

The record before us shows that on the evening of March 26, 1984, Mr. Croley exited his home located on Ramsey Court, in the District of Columbia, to take photographs of an overflowing trash dumpster belonging to the Capitol Hill Club which is located immediately adjacent to Ramsey Court, a public street, and the RNC office building. Due to ongoing health concerns on the part of Ramsey Court residents because of the poor maintenance of the dumpster, and its attraction of rodents, Mr. Croley decided to document its condition, and its immediate

surrounding area, by taking photographs. He planned to present the photographs at an upcoming zoning hearing.

As Mr. Croley was taking photographs of the dumpster, he was approached by two RNC security guards, Mr. Mills and James E. Lyons. The two RNC security guards informed Mr. Croley that he was not permitted to engage in night time activities on Ramsey Court. Since Ramsey Court was a public street, Mr. Croley ignored the RNC security guards and continued to take photographs. At trial, Mr. Croley described the actions taken by the guards:

> As I was turning around to take another picture, Mr. Mills grabbed me and pulled me toward him. And then I—I don't remember anything, until I was on the pavement, with Mr. Mills standing over me. I was sort of on my side, curled up a little bit, and my left side. And Mr. Mills was standing over me, with one foot —I guess it would have been his left foot at my back, and his right foot at my chest. And then ... I started calling for the police....

After the police arrived and assisted him, Mr. Croley chose not to go to the hospital because he was "confused about being groggy, and [ ] just wanted to go home." However, a few days following the attack, Mr. Croley was taken to the Georgetown University Hospital ("the GUH") by a friend because of chest pains. As he stated at trial:

> I remember I was sitting at a table in my house, and I remember reaching across for a phone, to make a phone call, and having excruciating pain right here in my chest. And it was very intense; it hurt a lot, and I didn't know why.

Mr. Croley was examined in an emergency room for possible chest trauma, and was released.[2] Several days later, he returned to the GUH for a follow-up visit relating to his chest pain. He was examined and released that same day.[3]

Approximately one year later, on April 25, 1985, after filing his personal injury lawsuit on March 26, 1985, Mr. Croley sought treatment at the Medical University of South Carolina due to his persistent chest pains.[4] Following his observation ***687** and examination of Mr. Croley, Dr. Hendrix noted that:

> The chest pain, I'm sure, is muscular skeletal. He did suffer trauma to that area in April, 1984. And I believe the pain is certainly muscular skeletal in origin.

Five years later, on October 30, 1990, Dr. Gerald I. Shugoll, a cardiovascular specialist engaged by the RNC, examined Mr. Croley's chest area and concluded that:

> [Mr. Croley's] chest pain is typically chest wall in origin, and seems to be localized to the costochondral cartilage at the fourth, left junction, and can be reasonably attributed to the [March 26, 1984] assault that he suffered. Thus, there is no [ ] cardiovascular impairment sustained as a result of the March 26, 1984 incident, but his persistent chest wall pain can be reasonably related back to that [March 26, 1984] incident.

On March 8, 1994, Mr. Croley went to the Johns Hopkins University Medical School, again complaining of chest pains. Dr. Srinivasa Raja, a professor at the Medical School, examined Mr. Croley and stated that:

> Based on our examination as well as interviewing the patient, we felt that his systematology, at least relating to the anterior chest wall of pain, which was the main symptom that the patient complained or presented to us, could be explained by a chronic—a syndrome called chronic costochondritis.... We indicated to him that this appeared to be more of a problem related to the chest wall than the heart.

In his report, Dr. Raja concluded, to a reasonable degree of medical certainty, that Mr. Croley's chest injury was the result of his March 26, 1984 assault. [5]

In addition to his physical injuries, in 1993 Mr. Croley was also diagnosed with Post Traumatic Stress Disorder ("PTSD"). As a result of this condition, he began to receive Social Security Disability Insurance payments. An affidavit from Dr. Mary Beth Williams, a licensed clinical social worker, explained that:

> One of the most significant parts of this is that [Mr. Croley] feels as if [the attack is] recurring again, whenever he's had the physiological pain associated with the chest injury. And this chronic pain is a constant, constant reminder that he's had of the events that's happened. And when he has that pain—and I've seen this happen in my office as well—that you can see him almost, what I would call, "zone out," and I have to bring him back into the room ... He also has reported to me that after it happened he would do anything he could to stay out of the way of the alley, and would walk blocks out of his way just so he didn't have to go through that area, because it was reminiscent of [the attack].

Based upon her observations, Dr. Williams concluded that the cause of Mr. Croley's PTSD is the 1984 assault that he suffered on Ramsey Court. [6] Dr. Williams also ***688** opined that, due to his condition, "[Mr. Croley's] participat[ion] as a party and/or witness in the trial of his case would present a significant risk to [his] life."

On September 1, 1995, Mr. Croley was examined for a potential head injury by Dr. Kenneth Plotkin, a board certified neurologist at the Georgetown Medical Center. Dr. Plotkin ordered an MRI. After completing his study of Mr. Croley, Dr. Plotkin diagnosed him with a brain injury that he deemed to be consistent with a traumatic blow to the head. Appellees/cross-appellants requested an independent medical examination ("IME" or "examination") of Mr. Croley by Dr. Charles H. Epps, Jr. Mr. Croley sought a protective order on February 18, 1997, claiming that he had already agreed to an examination by Dr. Bruce Ammerman. On May 13, 1997, and October 6, 1997, the trial court ordered Mr. Croley to appear for the IME by Dr. Ammerman. After further delay, during which Mr. Croley asked for information relating to "the manner, conditions and scope" of the neurological exam, and after Dr. Williams submitted an affidavit on February 3, 1998, declaring that Mr. Croley was suffering from extreme anxiety about the IME, the trial court issued an order on February 20, 1998, granting appellees/cross-appellants' motion to preclude the presentation of evidence at trial, by Mr. Croley, pertaining to his alleged head or brain injury claim. [7] The order stated, in part:

> Despite the clear instructions of the court, the plaintiff has not yet submitted to an IME, and only recently raised the purported reason why he has failed to do so. [footnote omitted].
>
> Because the defendant is entitled to have the IME conducted to adequately defend against this action, and having the IME conducted as now proposed by the plaintiff would inevitably delay the commencement of the trial, [footnote omitted] the court is reluctantly compelled to preclude the introduction of any evidence regarding the plaintiff's alleged head injury during the trial of this case [footnote omitted].

During trial on his assault, battery, negligence, and intentional infliction of emotional distress claims, Mr. Croley offered extensive testimony concerning the negative impact that the assault by Mr. Mills and Mr. Lyons had on his overall future. As an undergraduate student at Oklahoma State University, Mr. Croley regularly made the "President's List of Distinguished Students," with the exception of his final semester when he made "one 'B'." Immediately following his graduation from Oklahoma State, he entered the Harvard Business School, and graduated with an MBA in 1976. After his graduation, until the time of the assault in 1984, Mr. Croley held numerous consulting positions with various firms or corporations. He specialized in what was then a relatively new area, "business computerization." He was employed as a consultant with the "Management Analysis Center," a consulting firm. Upon leaving that position, Mr. Croley became a consultant for "1 st Data Corporation," and began

work for the United States Senate's "Computerized Automated Correspondence Management System." He developed "a prototype system ... to move [the Senate] from answering their correspondence by typewriters and magnetic card typewriters to using computers to manage their correspondence." Following his work with the Senate, Mr. Croley served as a consultant to the H.J. Heinz Company to "determin[e] their fiscal distribution and logistics policies, corporate-wide, throughout North America."

In 1979, Mr. Croley began a "time-sharing" business in the District, the "Croley ***689** Computer Company"; and also became active in other endeavors. His computer company provided various membership organizations with interactive computerized assistance for the maintenance of current proprietary membership data. Later, he sold the time-sharing assets of the company [8] and began "consulting and leasing computers and commodities" to various entities, including the Environmental Protection Agency ("the EPA") and the George Washington University ("GWU"). His eighteen month contract with the EPA, for which he was awarded $360,000.00, began in 1982 and ended in 1983. For his forty-eight month contract with GWU, which commenced also in 1982, he was awarded $172,000.00. [9] Mr. Croley testified that although he was the sole shareholder of the company, he "didn't draw a salary" because he "always re-invested the earnings into the company." He relied upon real estate that he owned near Harvard Square in Massachusetts to "provide[ ] a positive income [to] pa[y] for [his] living expenses." The Massachusetts property was purchased with consulting fees that he received. Furthermore, his computer company paid his living expenses while he was in the District, and eventually purchased a house for him in the District. He acknowledged on cross-examination that for the years 1983 through 1985, his "personal earnings were not extensive," but he asserted that "some of the corporations did okay." In addition to his business pursuits in the District, Mr. Croley was involved with, or a member of the Capital Hill Restoration Society; the D.C. Zoning Commission; the D.C. Recreation Department; the D.C. Master's Swimming Team; and the Harvard Business School Alumni Club.

After a seven day trial in October 1998, the jury returned a verdict in favor of Mr. Croley in the amount of $1,200,000.00. In response to post-trial motions filed by the RNC and Mr. Mills, on February 25, 1999, the trial court issued an order vacating the $600,000.00 award for "future loss damages," but denied the request for remittitur and the motion for a new trial.

ANALYSIS

The Lost Future Earnings Issue

On appeal, Mr. Croley argues that the jury's $600,000.00 award for lost future earnings should be reinstated because he presented sufficient evidence at trial illustrating that "[p]rior to the assault, he was a successful entrepreneur in the field of business consulting." He relies, in part, on evidence pertaining to his contracts with EPA and GWU. He also asserts that: "The alternate model of earnings presented by Dr. [Thomas Charles] Borzilleri was appropriate." The RNC and Mr. Mills support the trial court's decision to vacate the $600,000.00 award for lost future earnings "because Mr. Croley did not present *any* evidence of personal earnings." (Emphasis supplied).

[1] [2] [3] "In the District of Columbia, the primary purpose of compensatory damages in personal injury cases 'is to make the plaintiff whole.' " *District of Columbia v. Barriteau,* 399 A.2d 563, 566 (D.C.1979) (quoting *Kassman v. American Univ.,* 178 U.S.App.D.C. 263, 267, 546 F.2d 1029, 1033 (1976)) (other citations omitted). Thus, "[a] claim for damages for loss of future earnings resulting from injuries suffered due to the negligence of others is a cognizable element of damages during the life of the injured party." *Moattar v. Foxhall Surgical Assocs.,* 694 A.2d 435, 438 (D.C.1997) (citing *Barriteau, supra,* 399 A.2d at 567). However, such damages must be "properly proved at trial." *Barriteau, supra,* 399 A.2d at 567. Generally, " '[w]hile ***690** damages are not required to be proven with mathematical certainty, there must be some reasonable basis on which to estimate damages.' " *Estate of Underwood v. National Credit Union,* 665 A.2d 621, 642 (D.C.1995) (quoting *Romer v. District of Columbia,* 449 A.2d 1097, 1100 (D.C.1982)). As we stated in *Curry v. Giant Food Co. of the District of Columbia,* 522 A.2d 1283 (D.C.1987):

> The rule is that recovery of damages based on future consequences of a tort is available only if such consequences are reasonably certain. Unless

> there is nonspeculative evidence demonstrating that future suffering, additional medical expense, and loss of income will occur, the question should not be submitted to the jury.

Id. at 1291 (citing *American Marietta Co. v. Griffin,* 203 A.2d 710, 712 (D.C.1964)) (other citation omitted).

[4] Since "arriving at a [reasonable] sum representing future loss of earnings often involves a complicated procedure," *Barriteau, supra,* 399 A.2d at 568, "the trier-of-fact must have evidence pertaining to the age, sex, occupational class, and probable wage increases over the remainder of the working life of the plaintiff." *Id.* Furthermore, it is well settled that ' "the task of projecting a person's lost earnings lends itself to clarification by expert testimony because it involves the use of statistical techniques and requires a broad knowledge of economics." ' *Barriteau, supra,* 399 A.2d at 568 (quoting *Hughes v. Pender,* 391 A.2d 259, 262 (D.C.1978)). Indeed, "where the existence of substantial future economic loss becomes an issue, the use of expert testimony likely would be necessary since seldom will lay witnesses possess the requisite background to testify on a matter such as this—one not likely to be within the common knowledge of the average lay [person]." *Id.* at 569.

[5] **[6]** **[7]** In determining whether there was sufficient evidence to sustain a lost future earnings claim, "we must view the evidence in the light most favorable to appellant." *Estate of Underwood, supra,* 665 A.2d at 643 (referencing *Sere v. Group Hospitalization, Inc.,* 443 A.2d 33, 38 (D.C.), *cert. denied,* 459 U.S. 912, 103 S.Ct. 221, 74 L.Ed.2d 176 (1982)); *see also Bond v. Ivanjack,* 740 A.2d 968, 974 (D.C.1999); *Curry, supra,* 522 A.2d at 1291. Moreover, we will sustain the trial court's ruling admitting or excluding expert testimony about lost future earnings "unless a clear abuse of discretion is shown." *Hughes, supra,* 391 A.2d at 262 (citing *Ohio Valley Constr. Co., Inc. v. Dew,* 354 A.2d 518, 522 (1976)) (other citation omitted). However, expert testimony that is "based on mere speculation or guesswork," *Morgan v. Psychiatric Inst. of Washington,* 692 A.2d 417, 426 (D.C.1997) citing *Romer, supra,* 449 A.2d at 1100)), or that "[is not] based upon evidence in the record," *Barriteau, supra,* 399 A.2d at 569, "can[not] provide a rational basis for the jury's determination of an individual's future earnings...." *Hughes, supra,* 391 A.2d at 263; *see also Morgan, supra,* 692 A.2d at 426.

In this case, Mr. Croley presented evidence concerning his then recent contracting and consulting work prior to his assault, including details about an eighteen month $360,000.00 contract with EPA, and a forty-eight month lease with GWU for $172,000.00, payable in quarterly installments of $10,800.00. He candidly admitted that his "personal earnings were not extensive," because he "always re-invested the earnings into [his computer] company." He stated, however, that his computer company paid him expenses and purchased a home for him in the District. In addition, he presented the testimony of Dr. Borzilleri, an expert in economics, who attempted to "approximate[ ] the kind of money that [Mr. Croley] would have been able to make over the course of his lifetime had he not been injured." Since Dr. Borzilleri did not "have a lot of background, or a lot of statistical information, or a lot of history on Mr. Croley," he "essentially look[ed] at the statistical data and sa[id], ***691** on average[,] here's what ... a person [of Mr. Croley's age] with a M.B.A. from Harvard might be expected to earn over the course of their work lives." He did not know whether Mr. Croley had "any income, salary, [or] expenses that were paid" prior to his injury, and further, admitted that he had "no wage history" for Mr. Croley. Dr. Borzilleri testified that he was aware of the computer company that Mr. Croley established in 1979, but did not have any "income tax returns," "payroll records," or "earnings statements" with regard to this company. Dr. Borzilleri stated: "I know he was doing something during the course of the year with his computer corporation. But I don't know if it made any income for him or if it paid expenses for him; I just don't have any financial data on it." Consequently, Dr. Borzilleri's opinion as to the lost future earnings issue was predicated upon Mr. Croley's "date of birth, the fact that he had an M.B.A., a Master's in Business Administration from Harvard University; and ... statistical data ... relative to both Harvard MBA's and basic information that's collected by the United States government concerning the earnings of males with a master's degree, by age." Dr. Borzilleri stated his conclusions as follows:

> I estimate that the present value of [Mr. Croley's] future losses—If we treat him as the average person in the United States, with a Master's Degree—is approximately two million dollars. That is, over the course of the lifetime a person of his age, with a Master's Degree

> would be expected to earn about two million dollars ... from 1984 on out, for the rest of their life work. On the basis of being a Harvard graduate, I estimate that number would be closer to three million dollars. I've got 2.9 million dollars, because Harvard graduates earn substantially more money than do—with an M.B.A.—than do people ... with other kinds of Master's Degree's.

The judge who presided over the trial pertaining to Mr. Croley's complaint was reluctant to permit Dr. Borzilleri to testify, essentially because he considered the economist's proposed testimony, which Mr. Croley's counsel proffered prior to his testimony, to be "speculative." However, the judge concluded that he was bound by the ruling of another judge, earlier in the case, that Dr. Borzilleri's testimony would be admitted. Nevertheless, on February 23, 1999, in response to appellees/cross-appellants' post-trial motion for judgment and/or for a new trial or remittitur, the trial court concluded that the $600,000.00 award rendered by the jury for lost future earnings was not supported by the evidence presented at trial, and accordingly vacated that amount. As the trial court stated:

> The plaintiff did not offer any evidence, through testimony or otherwise, upon which the jury could assess what the defendant's earnings had been before the incident. Dr. Borzilleri did not base his testimony on such evidence either. Rather, Dr. Borzilleri based his opinion that the plaintiff would acquire future earnings during his work-life of approximately three million dollars solely on the fact that he acquired a masters degree in business administration ("MBA") from Harvard University. Although the plaintiff is an MBA graduate from Harvard, he obviously was not achieving monetarily at the level of his counterparts prior to the events that caused this action to be filed, if Dr. Borzilleri's testimony is accurate. That being the case, the plaintiff is not entitled to recover what the universe of Harvard MBA graduates of the plaintiff's age are expected to earn during their work-life. The plaintiff is only entitled to recover what the record supports he is reasonably expected to earn.

We recognized in *Barriteau, supra,* that "arriving at a [reasonable] sum representing future loss of earnings often involves a complicated procedure." *Barriteau, supra,* 399 A.2d at 568. This is particularly true in this unique case which involved a ***692** relatively recent graduate of the Harvard Business School who, at the time of his injuries, had begun to establish himself as a consultant and self-employed expert in the then new field of business computerization. Mr. Croley had elected to put his earnings into a computer company which he established, and in which he was the sole shareholder, and to subsist on proceeds from a Massachusetts real estate purchase and expenses paid to him by his computer company. Thus, at the time of his injury and lawsuit, he did not have a traditional record of personal earnings. Nonetheless, through his testimony and documentary evidence, he demonstrated his ability to generate business, covering a four year period, from a federal agency and a university in an amount totaling $532,000.00.

[8] **[9]** "In determining the loss of earnings or earning capacity of a self-employed individual or partner, consideration may be given to several factors, including loss of profits from the business, the cost of substitute labor, the value of the plaintiff's services, and plaintiff's draw against profits." Marilyn Minzer, *et al.,* DAMAGES IN TORT ACTIONS § 10.35[1], vol. 2 (Matthew Bender & Co.2000) (footnotes omitted). Since Mr. Croley put his earnings into his computer company and was the sole employee of the company, under the circumstances, the best measure of his lost future earnings would be the value of his services. This value could be ascertained in two ways: (1) the amount of business he was able to obtain for his company, that is, the $532,000.00 covering a four year period, and (2) the testimony of an economic expert concerning what a person of his educational background, sex, and age would have earned had he not been injured on March 26, 1994.

Significantly, when it discounted the testimony of Dr. Borzilleri and vacated the jury's $600,000.00 award for lost future earnings, the trial court did not focus on the expert's methodology, his assumptions, the jury's conclusions in relation to the calculations of the economist, and the other evidence of record as to the value of Mr. Croley's services to his business computerization endeavors. Dr. Borzilleri estimated Mr. Croley's lost future earnings by:

(1) Determining from a statistical table in a document called "Money Income in the United States, 1984," that a person in Mr. Croley's age bracket who holds a Master's degree would have earned approximately $32,000 in 1984, the year of his injury.

(2) Considering a BUSINESS WEEK MANUAL showing the median starting pay for a Harvard Business School graduate in 1997.

(3) Applying assumptions made by the Social Security Administration in its annual SOCIAL SECURITY TRUSTEE'S REPORT to ascertain "earnings growth rates."

(4) Assuming that Mr. Croley would work to age 65, and reducing the number of his remaining work years by a "work life expectancy" factor to account for breaks in employment.

(5) Calculating the amount that Mr. Croley would have paid in income taxes (approximately twenty-five to thirty percent of the estimated future earnings), and also making an assumption regarding fringe benefits by using the United States Chamber of Commerce's average benefit rate of 29.6 percent. [10]

(6) Based on data from the federal government's Pension Benefit Guarantee Corporation, determining the "present value" of Mr. Croley's future earnings, taking into consideration the possibility of an early death.

Neither the RNC nor Mr. Mills presented any expert testimony at trial challenging the methodology used by Dr. Borzilleri in this rather unique case. Nor do they ***693** attack the methodology on appeal. Instead, they contend that: "Dr. Borzilleri did not have a proper factual foundation on which to base his projections for Mr. Croley's future earnings." However, there is nothing in the record before us indicating that the "data" discussed by Dr. Borzilleri is not "of a type reasonably relied upon by experts in [his] particular field in forming opinions or inferences" on the issue of Mr. Croley's lost future earnings. *See* Fed.R.Evid. 703. Nor is there anything which suggests that the jury unreasonably interpreted Dr. Borzilleri's testimony, or the other evidence presented in the case. Indeed, the jury obviously took into consideration the $532,000.00 Mr. Croley generated for his computer company in the early 1980's, and reduced Dr. Borzilleri's work life calculations for a person of Mr. Croley's age who holds either a Harvard M.B.A. or a general Master's degree, from $2.9 million and $2 million, respectively, to $600,000.00, a substantial reduction of $2.3 million and $1.4 million, respectively. As Mr. Croley argues, this reduction translates into "a conservative [annual] award" of approximately $35,000.00 from the date of trial to his 65th birthday.

The parties do not cite any case that is squarely in accord with the one before us. Nor have we been able to find such a case. Mr. Croley relies mainly on *Forman v. Korean Air Lines Co., Ltd.*, 318 U.S.App.D.C. 6, 84 F.3d 446 (1996); *Athridge v. Iglesias,* 950 F.Supp. 1187 (D.D.C.1996); and *Hughes, supra.* Both *Athridge* and *Hughes* involved minors who had established no work history at the time of injury (*Athridge*) and death (*Hughes*); and testimony by an economic expert. [11] In this case, Mr. Croley is not a minor and had worked for some seven to eight years prior to his injuries. The court in *Forman, supra,* permitted plaintiff's expert to "calculate[ ] [Ms.] Forman's future earnings ... based on the average earnings of a college-educated female of her age," because she "had only recently received a green card" and higher paying positions had not previously been available to her. *Id.* at 449–50.

[10] **[11]** **[12]** The parties cite no case that fits the factual and procedural circumstances of Mr. Croley's, and we have been unable to find one. Nonetheless, there are critical guiding legal principles for the resolution of the lost future earnings issue which may be distilled from cases concerning lost future earnings: (1) the plaintiff has the burden of demonstrating, with reasonable certainty, that he has sustained a loss of future earnings or earning capacity, [12] *see Moattar, supra,* 694 A.2d at 439; and (2) sufficient evidence must be presented to preclude jury speculation or conjecture, *see Morgan, supra,* 692 A.2d at 426. In applying these critical guiding principles to the case before us, we are cognizant that: "Proof of damages by

a self-employed person is sometimes difficult to reduce to specifics...." *Sears, Roebuck and Co. v. Facciolo,* 320 A.2d 347, 349 (Del.1974). Thus, in a case, such as the instant one, involving a self-employed consultant in the relatively new ***694** field of business computerization, who has demonstrated a capacity to generate business by obtaining contracts from governmental and educational entities, "it is not improper for a calculation [of lost future earnings] to be based upon earning potential rather than demonstrated earning capacity." *Butera v. District of Columbia,* 83 F.Supp.2d 25, 35 (D.D.C.1999) (citing *Hughes, supra,* 391 A.2d at 263).[13] However, as in this case, it is helpful if the trial record contains some evidence of particular contracts or business (here, the EPA and GWU contracts) obtained through the personal efforts of the self-employed consultant, prior to the date of injury. In addition, any expert testimony concerning future earning capacity must not be "speculative," or "based on unrealistic assumptions regarding the plaintiff's future employment prospects." *Boucher v. U.S. Suzuki Motor Corp.,* 73 F.3d 18, 21 (2d Cir.1996) (citation omitted). In that regard, nothing in the record before us indicates that the methodology used by Dr. Borzilleri to calculate Mr. Croley's lost future earnings was speculative, or based on unrealistic assumptions. Dr. Borzilleri provided detailed information concerning his methodology, and set forth assumptions predicated on federal and business documents. He presented options based on a person of Mr. Croley's sex and age holding a general Master's degree, and a Harvard Master's degree in business administration. The RNC and Mr. Mills had an opportunity to cross-examine Dr. Borzilleri on his methodology and his assumptions.

[13] Accordingly, we conclude that the record before us reflects "some reasonable basis on which to estimate damages." *Estate of Underwood, supra,* 665 A.2d at 642 (quoting *Romer, supra,* 449 A.2d at 1100). Moreover, it is clear from the record that "the future consequences of [the] tort [against Mr. Croley] are reasonably certain." *Curry, supra,* 522 A.2d at 1291 (citing *American Marietta Co., supra,* 203 A.2d at 712). Testimony from Mr. Croley, and medical testimony not only from Mr. Croley's own doctors, but also from the expert hired by the RNC, established the causal connection between the assault committed on Mr. Croley by the RNC and Mr. Mills on March 26, 1984, and Mr. Croley's injuries, as well as his subsequent inability to resume his normal work patterns. Furthermore, it is reasonably certain from the record that the value of Mr. Croley's future services would have amounted to at least $35,000.00 per year, but for the assault and resulting injuries, and that the jury award of lost future earnings did not result from speculation or conjecture. Rather, the jury took into consideration not only the testimony of Dr. Borzilleri, but also weighed that testimony in light of the $532,000.00 in EPA and GWU contracts generated by Mr. Croley in the two years prior to his injury. Therefore, viewing the evidence in the light most favorable to Mr. Croley, *see Estate of Underwood, supra,* 665 A.2d at 643 (referencing *Sere, supra,* 443 A.2d at 38), we are constrained to conclude that the trial court abused its discretion by vacating the jury's award of $600,000.00 in favor of Mr. Croley for lost future wages.

The Punitive Damages Issue

Mr. Croley maintains that the trial court committed error by not allowing the jury to consider his claim for punitive damages. The trial court deferred the punitive damages issue until after the jury rendered its verdict. After the jury's verdict, the trial court refused to submit the question of punitive damages to the jury because the jury found the RNC and Mr. Mills not liable on Mr. Croley's claim of intentional infliction of emotional distress, and because the elements of this intentional tort include: "extreme and outrageous conduct ***695** on the part of the defendants," "conduct committed by the defendants that was intentional or reckless," and "the infliction by the defendants of severe emotional distress on the plaintiff." The RNC and Mr. Mills agree that since the jury did not find them liable for intentional infliction of emotional distress, there was no basis for an award of punitive damages.

[14] "[W]e have repeatedly recognized that a plaintiff's request to submit the issue of punitive damages to the jury is governed by the normal test for a triable issue of fact: whether there was evidence from which a jury reasonably could find the required malicious intent or willful disregard of another's rights." *King v. Kirlin Enterprises, Inc.,* 626 A.2d 882, 884 (D.C.1993) (citing *Robinson v. Sarisky,* 535 A.2d 901, 907 (D.C.1988)). Furthermore, in *Jonathan Woodner Co. v. Breeden,* 665 A.2d 929, 938 (D.C.1995), *reh'g denied,* 681 A.2d 1097 (D.C.1996), we stated:

> [T]o sustain an award of punitive damages, the plaintiff must prove, by a preponderance of the evidence, that the defendant committed a

> tortious act, and by clear and convincing evidence that the act was accompanied by conduct and a state of mind evincing malice or its equivalent.

We also said in *United Mine Workers of America, Int'l Union v. Moore,* 717 A.2d 332 (D.C.1998), that to prove punitive damages, "[a] showing of evil motive or actual malice is ... required." *Id.* at 341(citing *Arthur Young & Co. v. Sutherland,* 631 A.2d 354, 372 (D.C.1993)). *See also Jemison v. National Baptist Convention,* 720 A.2d 275, 285–86 n. 10 (D.C.1998) (A claim for punitive damages requires a showing of "fraud, ill will, recklessness, wantonness, oppressiveness, willful disregard of the plaintiff's rights, or other circumstances tending to aggravate the injury" (citation omitted)). In considering whether the issue of punitive damages should have been submitted to the jury, we must "view the evidence in the light most favorable to the party seeking punitive damages ... bearing in mind that the requisite state of mind ... may be inferred from all the facts and circumstances of the case." *King, supra,* 626 A.2d at 884 (quoting *Robinson, supra,* 535 A.2d at 906) (internal quotations omitted).

[15] We need not decide whether a claim for punitive damages is barred when a jury finds no liability for intentional infliction of emotional distress but liability is found on other intentional torts, because we are satisfied that Mr. Croley did not present clear and convincing evidence to satisfy the elements of punitive damages, and no reasonable inference that the elements were met may be made on the record in this case. The District of Columbia standard jury instruction on punitive damages provides, in relevant part:

> You may award punitive damages only if the plaintiff has proved with clear and convincing evidence:
>
> (1) that the defendant acted with evil motive, actual malice, deliberate violence or oppression, or with intent to injure, or in willful disregard for the rights of the plaintiff;
>
> AND
>
> (2) that the defendant's conduct itself was outrageous, grossly fraudulent, or reckless toward the safety of the plaintiff.

A review of the record and testimony in this case reveals no evidence satisfying all of the elements of punitive damages. At trial, Mr. Croley testified he had complained to the police about parking by the RNC on Ramsey Court and signs that the RNC had placed on the RNC building saying, "Parking by permit only." In January 1984, several months before the March 26, 1984 assault, a fuel oil truck trying to make a delivery to Mr. Croley's house could not get through because of RNC cars parked on Ramsey Court, "people from the [RNC]" refused to move the cars. On at least one occasion when a police officer arrived in response to Mr. Croley's complaint, Mr. Mills was called ***696** out and asked to produce the permit for the "parking by permit only" signs. Mr. Mills refused to produce the permit and, later, a District of Columbia official apparently ordered the signs to be removed. In recounting the disagreement with Mr. Mills about parking, Mr. Croley mentioned no personal encounter with Mr. Mills that manifested "outrageous" or "reckless" conduct "toward [his] safety" prior to the assault. Nor did he mention any heated words or derogatory comments uttered by Mr. Mills or Mr. Lyons before the assault on March 26, 1984. After detailing how he went outside on Ramsey Court to take pictures of the dumpster, the condition of the surrounding area, and Mr. Mills' statement that he could not engage in any activity on Ramsey Court, Mr. Croley described the assault on him in the following words:

> As I was turning around to take another picture, Mr. Mills grabbed me and pulled me toward him. And then I—I don't remember anything, until I was on the pavement, with Mr. Mills standing over me. I was sort of on my side, curled up a little bit, and my left side. And Mr. Mills was standing over me, with one foot —I guess it would have been his left foot at my back, and his right foot at my chest. And then I—when I—I was a little—I started calling for the police ...

This account is devoid of comments or mention of gestures by Mr. Mills or Mr. Lyons which would satisfy the requirements for an award of punitive damages. Although the jury could infer, from Mr. Croley's recitation of the March 26 events, deliberate and intentional conduct by

Mr. Mills and Mr. Lyons resulting in the assault and battery of Mr. Croley, the required showing of entitlement to punitive damages is more stringent and must rise to clear and convincing evidence. The jury could reasonably infer from Mr. Orban's and Mr. Croley's testimony that Mr. Mills had placed his foot on Mr. Croley's chest after he was thrown to the ground and had left a "red mark" or an "abrasion" on his chest, but nothing in either man's testimony shows, by clear and convincing evidence, that this act satisfied the requirements for the award of punitive damages. *See United Mine Workers, supra,* 717 A.2d at 341–42. Based on our review of the record, we are satisfied that the trial court did not err in refusing to submit the issue of punitive damages to the jury, since as a matter of law Mr. Croley was not entitled to such damages. [14]

The Issue of the Head or Brain Injury Claim

Mr. Croley contends that the trial court erred by excluding his head or brain injury claim as a sanction for his failure to meet a discovery deadline. The RNC and Mr. Mills argue that Mr. Croley's failure to appear for the scheduled and agreed upon IME by Dr. Ammerman was tactical and "willful," and that "the trial court [had] no alternative but to exclude his brain injury claim."

The record before us does not appear to be complete with respect to Mr. Croley's head or brain injury claim, which apparently was made some time after September 1, 1995 when Dr. Plotkin of the Georgetown Medical Center examined Mr. Croley and concluded that he had sustained a brain injury consistent with a traumatic blow to the head. On February 13, 1997, counsel for the RNC and Mr. Mills wrote to the then attorney for Mr. Croley requesting that Mr. Croley contact Dr. Ammerman "to arrange for an independent medical examination as soon as possible." The parties held a pretrial conference with the trial court (the Honorable Lee Satterfield) on May 13, 1997, and Mr. Croley was ordered to "submit to an IME ***697** by June 30, 1997." Mr. Croley did not comply with the order. On August 20, 1997, the RNC and Mr. Mills filed a motion to dismiss Mr. Croley's lawsuit or to prohibit the introduction of evidence pertaining to the head or brain injury claim. The trial court signed an order on October 2, 1997, granting the motion in part and denying it in part. Judge Satterfield ordered Mr. Croley to submit to the examination within twenty days of the docketing of his order; if he failed to comply, he would be barred from introducing evidence on his head injury claim.

Between October 21, 1997 and January 8, 1998, counsel for the respective parties exchanged correspondence regarding the court ordered examination by Dr. Ammerman. In essence, Mr. Croley demanded clarification regarding the "manner, conditions, and scope" of the examination, and the RNC and Mr. Mills pressed for Mr. Croley to appear for the IME. The RNC and Mr. Mills filed a renewed motion on January 15, 1998 to dismiss the lawsuit and/or to preclude the introduction of any evidence relating to Mr. Croley's head or brain injury. In response, on January 27, 1998, Mr. Croley lodged a motion to compel the RNC and Mr. Mills to provide information concerning the manner, conditions, and scope of Dr. Ammerman's examination. The January 28, 1998 response of the RNC and Mr. Mills detailed the information about the examination that had been provided to Mr. Croley in November 1997.

Mr. Croley filed a February 3, 1998 supplemental reply in which he declared that on January 28, 1998, he met with his certified trauma specialist, Dr. Mary Beth Williams, and that the examination by Dr. Ammerman had been scheduled for March 2, 1998. Trial on Mr. Croley's complaint was to begin on that date. An attached affidavit from Dr. Williams pointed out that she had been treating Mr. Croley since 1993 for "a number of psychological abnormalities[,] including depression, extreme anxiety, difficulty in concentration, sleep disorders, hypervigilance, tunneling, withdrawal, and traumatic amnesia." She stated that she saw Mr. Croley on January 28, 1998, and "found [him] to be suffering from extreme anxiety about the [examination] by Dr. Ammerman." The trial court (the Honorable Reggie B. Walton) signed an order on February 20, 1998, denying the RNC's and Mr. Mills' motion to dismiss the lawsuit, but granting their motion to preclude Mr. Croley from presenting evidence concerning his head or brain injury claim. The trial court issued a separate order on the same day denying Mr. Croley's motion to compel the RNC and Mr. Mills to provide information about the manner, conditions and scope of Dr. Ammerman's examination. Subsequently, on February 25, 1998, counsel for Mr. Croley moved for a temporary stay of the proceedings and submitted an affidavit from Dr. Williams stating that Mr. Croley had been admitted "to Dominion Hospital, a psychiatric Hospital in Falls Church, Virginia" because of a substantial increase in Mr. Croley's anxiety, and opining that "Mr. Croley was seriously embarking on the

initial stages of contemplating suicide." After repeating his psychological abnormalities, she expressed the opinion that he suffered from PTSD, and added:

> Based on my education, training, and 26 years of experience specializing in stress reactions, as well as my 10 years as a specialist in treating persons suffering from Post Traumatic Stress Disorder, it is my professional opinion that Mr. Croley is currently suffering from a mental disability and that at this time having to participate as a party and/or witness in the trial of his case would present a significant risk to Mr. Croley's life.

Mr. Croley required six months of therapy, and trial was rescheduled for October 19, 1998. In response to Mr. Croley's July 9, 1998 motion for reconsideration of the trial court's order excluding evidence pertaining to Mr. Croley's alleged head injury, and the opposition to the motion, Judge ***698** Walton denied reconsideration on August 17, 1998, concluding:

> The history of this case convinces the court that granting the plaintiff's motion would only further delay the resolution of this case, which at this point is approximately 13 years old. And the plaintiff has not presented to the court anything of substance that causes it to believe that he would now undergo the [examination]. Without more than his own representation that he will submit to the [examination], ... the court declines to change its Order of February 20, 1998.

The trial court denied Mr. Croley's subsequent emergency motion to stay the trial proceedings to permit an interlocutory appeal of the court's August 17, 1998 order denying the motion for reconsideration.

[16] [17] [18] As we consider the difficult issue as to whether the trial court abused its discretion in excluding evidence of Mr. Croley's head or brain injury as a discovery sanction, we are mindful of a longstanding principle to which we have adhered: "The trial court has broad discretion of apply discovery sanctions."[15] *Weiner v. Kneller,* 557 A.2d 1306, 1309 (D.C.1989) (citing *Lyons v. Jordan,* 524 A.2d 1199, 1201 (D.C.1987)). Abuse of discretion "may only be found where the trial judge has imposed 'a penalty too strict or unnecessary under the circumstances.' " *Id.* (quoting *Henneke v. Sommer,* 431 A.2d 6, 8 (D.C.1981) (citation omitted)). The trial court's discovery rules "generally favor strict adherence to time frames established at the beginning of the litigation process." *Mizrahi v. Schwarzmann,* 741 A.2d 399, 403 (D.C.1999). Nonetheless, our cases have emphasized "that dismissal should be granted under only the most severe circumstances and that the sanction should fit the offense." *Vincent v. Anderson,* 621 A.2d 367, 371 (D.C.1993) (citations omitted). In *Mizrahi, supra,* a case in which we vacated the trial court's judgment because we "conclude[d] that the trial court abused its discretion in denying an enlargement of time for plaintiff to take depositions of ... defendant's experts when the defendant had had the opportunity to depose all of plaintiff's experts," *id.* at 406, we followed a list of factors set forth in *Dada v. Children's Nat'l Med. Ctr.,* 715 A.2d 904, 909 (D.C.1998) to assess the trial court's exercise of discretion:

> (1) whether allowing the evidence would incurably surprise or prejudice the opposite party;
>
> (2) whether excluding the evidence would incurably prejudice the party seeking to introduce it;
>
> (3) whether the party seeking to introduce the testimony failed to comply with the evidentiary rules inadvertently or willfully;
>
> (4) the impact of allowing the proposed testimony on the orderliness and efficiency of the trial; and
>
> (5) the impact of excluding the proposed testimony on the completeness of information before the court or jury.

741 A.2d at 403–04.[16] Finally, "[w]hen a party asking for extension of discovery is ***699** primarily responsible for delays, it is of course less likely to prevail on its request than if the opposing party has been the obstructing force in efficient operation of the legal system." *Id.* at 405.

In this case, almost one year elapsed between February 3, 1997, when the RNC and Mr. Mills requested that Mr. Croley schedule an IME with Dr. Ammerman regarding his head or brain injury claim, and February 3, 1998, when Mr. Croley presented an affidavit from Dr. Williams detailing his psychological abnormalities and his extreme anxiety about the examination by Dr. Ammerman. By February 3, 1998, Mr. Croley had failed to comply with at least two court orders compelling him to submit to the examination. Furthermore, after the trial court issued its February 20, 1998 order precluding Mr. Croley from introducing evidence relating to his alleged head or brain injury, he waited until July 9, 1998 to file a motion for reconsideration, even though he was aware that his trial had been rescheduled for October 19, 1998. By the time the trial court denied his motion for reconsideration, on August 17, 1998, only two months remained before trial was to begin on his complaint, which he had filed on March 26, 1985.

[19] We note at the outset of our analysis of the head or brain injury issue, that the trial court did not dismiss Mr. Croley's lawsuit, as the RNC and Mr. Mills requested. Rather, the trial court appropriately imposed the lesser sanction of excluding evidence on one of Mr. Croley's claims. Furthermore, application of the *Mizrahi, supra,* factors on this record leads us to the conclusion that the trial court did not abuse its discretion in excluding evidence of Mr. Croley's head or brain injury as a sanction for failure to provide discovery. First, permitting Mr. Croley to introduce evidence pertaining to his head or brain injury claim, without the completion of the IME requested by the RNC and Mr. Mills, would incurably prejudice their defense by establishing an uneven playing field. Even if the trial court had accorded Mr. Croley one last opportunity to appear for the examination, the RNC and Mr. Mills would have had only two months prior to trial to schedule and take Dr. Ammerman's deposition and to mount their defense strategy against the claim. Second, it is apparent that preventing Mr. Croley from introducing evidence pertaining to his head or brain injury claim incurably prejudiced him because he was denied the opportunity to claim compensable damages relating to that injury.

Third, contrary to his assertions, it does not appear from the record before us that Mr. Croley's failure to comply with the court's orders to submit to the examination was inadvertent, prior to early February 1998. Even though he had been in treatment with Dr. Williams since 1993, no affidavit from her was presented to the trial court until early 1998. The absence of an affidavit prior to that time leaves a reasonable inference that Mr. Croley's resistance to the examination, prior to February 1998, was tactical. Fourth, allowing Mr. Croley to submit evidence regarding his head or brain injury would clearly impact the orderliness and efficiency of the trial since the trial court may have had no alternative but to continue a matter that had already been beset by numerous delays over thirteen years, in order to create a level playing field. *See Mizrahi, supra.* Thus, notions of judicial economy would have been compromised. Fifth, the exclusion of the head or brain injury claim did not impact the completeness of information before the jury, with regard to the assault. Even without knowledge that Mr. Croley may have suffered from a particular type of prolonged head trauma from the attack, the jury was nevertheless presented with substantial evidence concerning the assault, ***700** including the chest and psychological trauma (PTSD) which Mr. Croley suffered.

Application of the *Mizrahi* factors leads us to the conclusion that the scales tip in favor of the RNC and Mr. Mills with regard to Mr. Croley's head or brain injury claim. On balance, the RNC and Mr. Mills would have suffered more prejudice than Mr. Croley. In addition, Mr. Croley must be faulted for failing to inform the trial court, after the initial court order compelling him to appear for the examination by Dr. Ammerman, that his psychological abnormalities precluded him from complying immediately with the order.

Mr. Croley raises one other matter which must be addressed with reference to the exclusion of evidence regarding his head or brain injury. He argues that the trial court abused its discretion by excluding evidence of his head or brain injury because, under the Americans With Disabilities Act of 1990 ("the ADA"), 42 U.S.C.A. § 12101 *et seq.,* it failed to make "a 'reasonable accommodation' to account for [his] disabilities, and to make 'reasonable modifications to the rules, policies, or practices' of the court to afford [him] equal opportunity to participate in the court's activities." Specifically, he claims that the trial court did not accommodate his PTSD. Mr. Croley apparently first raised the ADA in his February 25, 1998 motion for temporary stay of proceedings and continuance of the case for sixty days. However, he did not cite the ADA in his July 9, 1998 motion

for reconsideration of the trial court's order excluding evidence about his head or brain injury claim, but did include a reference to the ADA and the exclusion of the head injury evidence in his September 16, 1998 emergency motion to stay the trial court proceedings pending an interlocutory appeal.

[20] **[21]** "The [ADA] prohibits certain employers from discriminating against individuals on the basis of their disabilities." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999). The statute provides, in pertinent part, that: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Courts have been deemed to fall under the definition of "public entity." *See Green v. North Arundel Hosp. Assoc., Inc.*, 126 Md.App. 394, 730 A.2d 221, 232 n. 10 (1999) ("Under the ADA's definition, state courts are public entities"); *Galloway v. Superior Court of the District of Columbia,* 816 F.Supp. 12, 19 (D.D.C.1993) ("The Superior Court and the District of Columbia are public entities within the meaning of the [ADA]"). Furthermore, under the ADA, a person is considered a "qualified individual with a disability" if he or she:

> (A) has a physical or mental impairment that substantially limits [17] one or more of the major life activities of such individual; [18] (B) has a record of such an impairment; or (3) is regarded as having such an impairment.

Id. at § 12102(2). Therefore, to establish that PTSD is a "disability" protected by the ADA, Mr. Croley must first show that his disorder has substantially limited one of his major life functions. *See Floyd Adams v. Autozoners, Inc. et al.*, 1999 WL 744039, at *3, 1999 U.S. Dist. LEXIS 14999, at 7 ***701** ("[P]laintiff's allegation that he suffered from a mental impairment, PTSD, is not enough to assert a disability protected by the ADA. Plaintiff must also show that the impairment limited one of his major life functions"); *Hamilton v. Southwestern Bell Tel. Co.*, 136 F.3d 1047, 1050 (5 th Cir.1998) ("To determine if [plaintiff] has presented facts that indicate his PTSD is an ADA disability, we first examine whether his PTSD is an impairment that substantially limits any major life function"). To demonstrate that he has a " 'record of impairment,' " Mr. Croley must show that he "has a history of ... a mental or physical impairment that substantially limits one or more of his major activities.' " *Id.* (quoting 29 C.F.R. § 1630.29(k)). To establish that he is regarded as having a disability, Mr. Croley must show a mistaken belief that an "impairment substantially limits one or more major life activities." *Id.* Thus, under all three of the statutory ways in which Mr. Croley could demonstrate a disability within the meaning of the ADA, he must point to a substantial limitation in one or more major life activities.

[22] **[23]** Mr. Croley "bears the burden of establishing an ADA violation...." *Memmer v. Marin County Courts,* 169 F.3d 630, 633 (9 th Cir.1999). The record on appeal is devoid of evidence showing that: 1) Mr. Croley's PTSD "substantially limits one or more of [his] major life activities"; 2) he has a "record of impairment" demonstrating that this disorder "substantially limits one or more of [his] major life activities"; or 3) he is regarded as having such an impairment. *See* 42 U.S.C. § 12102(2). Dr. Williams provided an affidavit in February 1998, stating, in part:

> Since the Spring 1993, I have provided therapy to Mr. Croley. During this time, I have found Mr. Croley to be suffering from certain psychological abnormalities manifested as traumatic amnesia, extreme anxiety, depression, difficulty in concentration, sleep disorders, hypervigilance, tunneling, and withdrawal. I have diagnosed Mr. Croley as suffering from PTSD.... [A]t this time[,] having to participate as a party and/or witness in the trial of this case would present a significant risk to Mr. Croley's life.

Dr. Williams does not articulate how Mr. Croley's PTSD has "substantially limited" his ability to perform such "major life" activities "as caring for [him]self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). Indeed, Dr. Williams' affidavit does not discuss any major life function, within the meaning of the federal regulations. *See* 42 U.S.C. § 12102(2)(A). Nor does Dr. Williams' affidavit assert that no corrective measures or

medication could correct Mr. Croley's medical condition. *See Sutton, supra,* 527 U.S. at 482–83, 119 S.Ct. 2139 ("A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently 'substantially limits' a major life activity").

Even if Mr. Croley could satisfy the "impairment in one or more major life activity" requirement, he would still have two hurdles to meet under the ADA. First, he would have to establish that the conduct of litigation, including the scheduling of discovery, is a "service, program or activity" within the meaning of the ADA. *See* Ann K. Wooster, *When Does a Public Entity Discriminate Against Disabled Individuals in its Provision of Services, Programs, or Activities Under the Americans With Disabilities Act,* 42 U.S.C.A. § 12132, 163 A.L.R. Fed. 339 (2000). Mr. Croley cites *Galloway, supra,* but that case concerned exclusion of a blind person from jury service, and thus, did not concern the conduct of litigation, including discovery, by private parties. Second, assuming, without deciding, that the conduct of litigation, including discovery, by a private individual is a "service" or "activity" ***702** under the ADA, Mr. Croley must demonstrate that he sought and was denied reasonable accommodation. *See Memmer, supra,* 169 F.3d at 633 (citation omitted). Nothing in the record before us shows any effort on Mr. Croley's part to seek specific reasonable accommodation so that he might appear for an examination by Dr. Ammerman. For example, he did not ask to have Dr. Williams present at the site of the examination; nor did he ask that the duration of the examination be limited. While he sought information as to the manner, conditions and scope of the examination, he made no specific request for reasonable accommodation. Simply put, Mr. Croley has failed to sustain his burden of proof under the ADA. Therefore, we conclude that the trial court did not abuse its discretion in excluding evidence of Mr. Croley's head or brain injury claim.

The Denial of the RNC's and Mr. Mills' Post-trial Motion for Judgment As to the Assault, Battery, and Negligence Claims

The RNC and Mr. Mills contend that the trial court erred in denying their post-trial motion for judgment with regard to Mr. Croley's assault, battery and negligence claims. They assert that Mr. Mills' use of force was not clearly excessive, and that Mr. Croley did not sustain his burden of proving negligence. Mr. Croley supports the trial court's denial of the motion for judgment.

[24] **[25]** " 'Generally, a motion for judgment after trial and verdict is granted only in extreme cases.' " *Bond, supra,* 740 A.2d at 972 (internal quotation omitted) (quoting *United Mine Workers, supra,* 717 A.2d at 337 (citing *Daka, Inc. v. Breiner,* 711 A.2d 86, 96 (D.C.1998))) (other quotation omitted). "Judgment n.o.v. should be awarded only when, viewing the evidence and all reasonable inferences in the light most favorable to the party who secured the jury verdict, no juror could reasonably reach a verdict for the opponent of the motion." *McKnight v. Wire Properties, Inc.,* 288 A.2d 405, 406 (D.C.1972) (citations omitted); *see also Bond, supra,* 740 A.2d at 972.

[26] We agree with the trial judge that when the evidence and all reasonable inferences are viewed in the light most favorable to Mr. Croley, "the jury had an adequate basis to conclude that [he] was assaulted by [Mr. Mills] and that his use of force against [Mr. Croley] was excessive. Moreover, the jury could conclude from the evidence it received that Mr. Mills' actions amounted to negligence." The RNC and Mr. Mills rely primarily on *Jackson v. District of Columbia,* 412 A.2d 948 (D.C.1980) and *Gabrou v. May Dept. Stores Co.,* 462 A.2d 1102 (D.C.1983). Each of these cases involved law enforcement officers who were engaged in lawful arrests. When he was assaulted, Mr. Croley was not the subject of a lawful arrest. Moreover, the record on appeal clearly shows that excessive force was used against Mr. Croley. With respect to Mr. Croley's negligence claim, there was sufficient evidence presented from which a reasonable jury could conclude that Mr. Mills did not exercise ordinary care in confronting Mr. Mills, and that his negligence was the proximate cause of Mr. Croley's injuries. Consequently, we see no basis for disturbing the trial court's denial of the post-trial motion for judgment.

The Denial of the RNC's and Mr. Mills' Motion for a New Trial or Remittitur

The RNC and Mr. Mills contend that the trial court abused its discretion in denying their motion for a new trial or remittitur. They claim, in part, that the lost future earnings award tainted the remaining sum given to Mr. Croley, and that the jury award was excessive.

[27] [28] [29] "We review the trial court's ruling on a motion for a new trial only for abuse of discretion." *Bond, supra,* 740 A.2d at 972 (citing *United Mine Workers, supra,* 717 A.2d at 337) (other citation omitted). " 'To grant a motion for a new trial, the trial court must find that the ***703** verdict is against the weight of the evidence, or that there would be a miscarriage of justice if the verdict is allowed to stand.' " *Id.* (quoting *United Mine Workers, supra,* 717 A.2d at 337). " 'This court will not reverse the trial court's [granting] of a motion for ... remittitur unless the trial court has abused its discretion.' " *Daka, supra,* 711 A.2d at 100 (quoting *Safeway Stores, Inc. v. Buckmon,* 652 A.2d 597, 606 (D.C.1994)) (other citations omitted). Furthermore, " '[w]e are particularly reluctant to substitute our judgment for that of the trial judge who was present at and observed the entirety of the ... trial.' " *Id.* (quoting *Capitol Hill Hosp. v. Jones,* 532 A.2d 89, 93 (D.C.1987)).

On this record, we conclude that the trial court applied correct legal principles and did not abuse its discretion in denying the motion for a new trial or remittitur. The trial court carefully considered arguments made by the RNC and Mr. Mills and stated, in part:

> "[T]rial courts have historically given great weight to jury verdicts ..." *Louison v. Crockett,* 546 A.2d 400, 403 (D.C.1988). And when parties have chosen the jury process as the means of resolving a legal dispute, it only seems proper for the court to afford significant deference to the collective wisdom of the jury.
>
> Although the $600,000 award [for damages other than those for lost future earnings] is significant, and in fact is at odds with how the court saw the evidence, the court cannot substitute its views for the jury's evaluation of the evidence. The court reaches this conclusion because ... the court believes the evidence was sufficient for the jury to find that the plaintiff was the victim of the negligence and assaultive behavior by the defendants. Moreover, the plaintiff testified that he suffered physical injury during the event and thereafter has suffered from post traumatic stress. The plaintiff has received medical treatment for the physical injury he testified he sustained and has received extensive therapy for what his expert witness testified was post traumatic stress, which she attributes to the encounter which resulted in the filing of the lawsuit....

In addition, the trial court specifically disagreed "with the defendant's argument that the presentation of Dr. [Borzilleri's] testimony infected the entire verdict." Given this analysis, we see no abuse of discretion in the denial of the RNC's and Mr. Mills' motion for a new trial or remittitur.

Accordingly, for the foregoing reasons, we affirm the trial court's judgment in No. 99–CV–398, denying the appellees/cross-appellants' post-trial motions for judgment on Mr. Croley's assault, battery and negligence claims, and for a new trial or remittitur. In No. 99–CV–482, we affirm the trial court's judgment regarding punitive damages, and the exclusion of evidence concerning Mr. Croley's head or brain injury claim; but vacate its judgment pertaining to the award of lost future earnings and remand this matter with instructions to reinstate the $600,000.00 award for lost future earnings.

All Citations

759 A.2d 682

Footnotes

1 The jury verdict found the RNC and Jasper E.R. Mills, one of the men who assaulted Mr. Croley, liable for assault, battery and negligence.

2 The GUH medical records indicate, in part, that Mr. Croley "was mugged Mon[day] evening, but can't recall trauma to chest, other than being thrown to ground."

3 The GUH medical records show the following entry: "eight days ago was mugged, and sustained some possible chest trauma."

4 Medical records from the Medical University of South Carolina contain the following notes, in part:

> This 34–year–old white male was in his normal state of health until April, 1984, when he was physically assaulted in Washington, D.C. He was seen in the [emergency room], and felt to have muscular skeletal chest pain; however, an EKG revealed T-wave inversion.... The above-named patient was seen as an out-patient at the Medical University Hospital on February 15, 1985.... The patient states that since that time he has had chest pain along the left sternal border, and radiating around the axillae. This is more or less constant, but it has been less for the past two months,

until yesterday, when he came into Charleston, by air; and this was aggravated by carrying his luggage.... There is some tenderness along the left sternal border and of the third, fourth and fifth ribs in that area.

5 Mr. Russell Orban and his wife were friends of Mr. Croley at the time of the 1984 assault. At trial, Mr. Orban testified that he saw Mr. Croley on the night after the assault. Mr. Croley "was pretty banged up." He "had ... [a] red mark, a welt or an abrasion on his chest." He described the abrasion as "semicircular and shaped round, like an ark, in the center of his chest."

6 Mr. Orban, and Ms. Vincette Felice Goerl, a woman whom Mr. Croley dated until January 1992, described Mr. Croley's behavior before and after the March 26, 1984 assault. Mr. Orban stated that before the assault, Mr. Croley was "a sharp, bright business man ... [who was] detail oriented." In addition, "[h]e had a very good, quick, able mind and was a friendly person, a lot of fun to be around." Ms. Goerl testified that after the assault, Mr. Croley was not as focused. He was "seemingly more frustrated by his inability to give more time to [his] work." He was not as positive in his attitude, was "less social" and his surroundings went from "neat" to "cluttered."

7 On August 17, 1998, the trial court denied the "plaintiff's motion to reconsider the order prohibiting introduction of any evidence regarding plaintiff's claim for head injury based on plaintiff's additional psychiatric treatment and therapy."

8 Mr. Croley never revealed the precise dollar amount that he gained from this assets sale.

9 The lease between the company and GWU, which was introduced into evidence, called for quarterly payments in the amount of $10,800.00 for the period December 1, 1982 through November 30, 1986.

10 Under this methodology, Mr. Croley would have earned $59,896.00 in 1996, after taxes; and $74,997.00 in the year 2002, after taxes.

11 We said in *Hughes, supra:*

> In a case such as this, involving a person who has not yet made his choice of livelihood, future lost earnings must be determined on the basis of potential rather than demonstrated earning capacity. That potential must be extrapolated from individual characteristics, such as age, sex, socio-economic status, educational attainment, intelligence and dexterity.

391 A.2d at 263 (citation omitted). Similarly, the expert in *Athridge, supra,* based his testimony as to the minor plaintiff's "permanent diminution in ... earning capacity" on "the demonstrated earning capacity of someone of plaintiff's race, sex, age, and educational level." *Id.* at 1192.

12 The trial court instructed the jury that Mr. Croley "must prove his damages with reasonable certainty," and that the jury could award damages for "any lost earnings or earning capacity that [he] may incur in the future." Courts do not always agree on the distinction, if any, between lost earnings and lost earning capacity, or lost future earnings and lost future earning capacity. *See* Minzer, *et al., supra,* § 10.00; § 10.14.

13 In *Butera, supra,* the plaintiff's son was killed while working as an undercover operative for the Metropolitan Police Department.

14 Given our conclusion regarding punitive damages, we need not consider Mr. Croley's arguments that the trial court should: (1) take judicial notice of Federal Election Commission documents relating to the annual receipts of the RNC, and (2) permit the jury to consider evidence concerning the cost and duration of his litigation.

15 Super. Ct. Civ. R. 37(b)(2)(B) provides in pertinent part:

> (b) *Failure to comply with order.*
>
> (2) Sanctions by this Court. If a party ... fails to obey an order to provide or permit discovery ... the court may make such orders in regard to the failure as are just, including among others the following:
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence.

16 These factors are quite similar to those set forth in *Meyers v. Pennypack Woods,* 559 F.2d 894, 904–05 (3d Cir.1977), which we referenced in *Weiner, supra,* 557 A.2d at 1310:

> (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified, (2) the ability of that party to cure the prejudice, (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court, and (4) bad faith or willfulness in failing to comply with the court's order.

We noted that the *Meyers* "court indicated that the validity of the excuse offered by the party seeking to introduce the witness and the importance of the excluded testimony were also significant factors." *Weiner, supra,* 557 A.2d at 1310.

17 Federal regulations define the term "substantially limits" as follows:

> Substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity....
>
> 29 C.F.R. § 1630.2(j)(3)(i).

18 Although the ADA does not define "major life activities," the EEOC regulations state that

> [m]ajor life activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
>
> 29 C.F.R. § 1630.2(i).

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449 A.2d 1097
District of Columbia Court of Appeals.

Charles R. ROMER, Sr., et al., Appellants,
v.
DISTRICT OF COLUMBIA, Appellee.

No. 81–695.
|
Argued July 1, 1982.
|
Decided Aug. 31, 1982.

Pipe fitter and his wife brought action against the District of Columbia to recover damages for back injuries sustained by the pipe fitter while working for a company under contract to the District and for loss of consortium. The Superior Court, Leonard Braman, J., entered judgment for plaintiffs and denied their motion for new trial, and they appealed. The Court of Appeals, Kelly, J., held that: (1) an award of $21,500 for medical expenses, pain and suffering, and lost wages was not so grossly inadequate as to mandate reversal of trial court's denial of the motion for new trial, and (2) the wife's claim for loss of consortium was not barred for lack of adequate notice to the District.

Affirmed in part and reversed in part.

Pryor, J., dissented and filed opinion.

Attorneys and Law Firms

***1097** Wayne M. Mansulla, Washington, D.C., with whom Patrick S. Guilfoyle, Washington, D.C., was on the brief, for appellants.

***1098** William J. Earl, Asst. Corp. Counsel, Washington, D.C., with whom Judith W. Rogers, Corp. Counsel, and Charles L. Reischel, Deputy Corp. Counsel, Washington, D.C., were on the brief, for appellee.

Before NEWMAN, Chief Judge, and KELLY and PRYOR, Associate Judges.

Opinion

KELLY, Associate Judge:

This appeal from an award of damages, entered after a jury verdict, presents the issues of whether the trial court erred in denying appellants' motion for new trial based on the claim that the verdict was grossly insubstantial, in instructing the jury not to award damages to appellant Charles Romer for future medical expenses, and in vacating appellant June Romer's award for loss of consortium. We reverse as to the jury award to Mrs. Romer and otherwise affirm. [1]

On November 12, 1974, appellant Charles Romer, [2] a pipe fitter for the John C. Grimberg Construction Company, slipped and fell on a slippery material and injured his back. The company was then under contract to the District of Columbia and performing services at the Blue Plains Sewage Treatment Facility.

Appellant testified to a history of back problems. In 1972, he sprained his back and experienced pain down his legs. This injury was aggravated in 1973 when he strained his back while reaching for a fire extinguisher. He had an operation in June 1974, to relieve back and neck strain, after which his surgeon, Dr. Lorenzo Marcolin, advised him that he could return to work on light duty status. Romer testified that he returned to work in September 1974, at a time when his back did not bother him. He stated that he was never given light duty, but did say that he worked with lighter weight pipe than some of the other workers.

Dr. Marcolin testified that on November 4, 1974, nine days before the instant accident, appellant was experiencing low back pain, especially at the end of the day, mild radiation to the right buttock, numbness and tingling in the left buttock, and a flare-up of neck problems. He determined that appellant had a 35% disability in his back and a 15% disability in his neck. On the whole, the doctor was pleased with Romer's progress since the June 1974 operation. He prescribed Tandearil and a back brace.

Dr. Marcolin examined appellant immediately after the November 12 accident, and found that the fall had severely aggravated appellant's back problems, causing pain and radiation down the left leg and pain in the neck with numbness into the left hand. No evidence of a recurrent herniated disc or of a new rupture was found.

On April 4, 1975, Dr. Marcolin performed a lumbar laminectomy and found that appellant had a herniated or extruded disc. His opinion was that the November 1974 accident caused the disc problem because he had observed the same disc during the June 1974 operation and it was then hard and calcified. In 1976, Romer experienced excruciating pain while turning over in bed. A subsequent myelogram revealed a bulging disc. Dr. Marcolin believed that this problem was also caused by the November 1974 fall. He testified that Romer next visited a Dr. Leroy at a pain clinic in Wilmington, Delaware, and received some relief.

At an office visit on September 30, 1976, Dr. Marcolin noted that appellant had been fitted earlier with a transcutaneous nerve stimulator. He had been off pain medication for eight weeks and was getting along reasonably well. At his most recent visit before trial, on November 24, 1980, appellant had no more than 15% motion in any plane of his back. Dr. Marcolin concluded that Romer was totally disabled, that he would never return to employment ***1099** as a pipe fitter, and that most of his back problems dated from his November 1974 fall.

Dr. Gerald Schuster examined appellant on June 8, 1979, and testified that he is a poor candidate for future surgery. Dr. Schuster did recommend that Romer lose weight and participate in a psychological behavioral counseling group so that he could learn to cope with his pain, but Romer failed to follow these suggestions. He found a 50% permanent disability which he related to appellant's spinal problem, and it was his opinion that the disability and restrictions were related to the November 1974 fall. Dr. Schuster concluded that Romer could never return to work as a pipe fitter because the job requires heavy lifting. He stated that appellant should not be a laborer or do work requiring excessive bending and twisting. He also recommended that Romer attend a pain clinic and enter a rehabilitation program.

Dr. Harvey Ammerman also testified that appellant was not a candidate for future surgery. He felt that a training program could be developed for Romer to do light work so that he could be fully employed. He recommended a job where Romer could move around and sit or stand. Dr. Ammerman testified that had appellant not experienced the November 1974 injury, he could have only worked as a pipe fitter for three months to three years because of his earlier injuries and operations.

Appellant testified that he is in constant pain from his back injury; his wife testified that after November 12, 1974, their sexual relations were limited because Romer experiences so much pain. The jury found for the Romers. It awarded Charles Romer $21,500 for his medical expenses, pain and suffering, and lost wages, and awarded his wife $5,000 for loss of consortium.

I

[1] Appellant contends that the trial court erred in denying the motion for a new trial on the ground that the verdict was grossly insubstantial. [3] In reviewing the denial of a motion for a new trial based on a claimed inadequate verdict, this court will reverse only when the amount of the award evidences prejudice, passion or partiality on the part of the jury or where the verdict appears to be an oversight, mistake, or consideration of an improper element. *Hughes v. Pender,* D.C.App., 391 A.2d 259, 263 (1978). An appellate court should order a new trial only when the award is contrary to all reason. *Taylor v. Washington Terminal Co.,* 133 U.S.App.D.C. 110, 113, 409 F.2d 145, 148, *cert. denied,* 396 U.S. 835, 90 S.Ct. 93, 24 L.Ed.2d 85 (1969); *Hughes v. Pender, supra* at 263.

[2] In this case, it was within the province of the jury to award a modest amount for appellant's pain and suffering. The jury could have determined that many of Romer's medical problems stemmed from injuries sustained before the November 1974 fall. Dr. Marcolin testified that nine days before the fall, Romer was 35% disabled in his back and 15% disabled in his neck. Dr. Schuster stated that in June of 1979, Romer had a 50% permanent disability related to his spinal problem. From this testimony, the jury may have concluded that appellant had suffered only a 15% loss of bodily motion as a result of the instant fall. It could also have considered the evidence that Romer failed to follow the recommendations of his doctors to perform only light duty, to lose weight, and to participate in psychological behavioral therapy. Likewise, the jury was justified in awarding a small amount for lost wages considering Dr. Ammerman's testimony that appellant's employment prognosis as a pipe fitter was not promising but that he could become fully employed. Moreover, the award to Romer was several thousand dollars more

than his out of pocket medical expenses. We conclude, therefore, that although insubstantial, the verdict was not so grossly inadequate as to mandate reversal of the *1100 trial court's denial of the motion for new trial.

II

[3] [4] [5] In assessing appellant's assertion that the court erred in instructing the jury not to award damages for future medical expenses, we note that an appellate court must weigh the persuasive character of the evidence in determining whether to allow a claim. *Palmer v. Connecticut Railway & Lighting Co.*, 311 U.S. 544, 558, 61 S.Ct. 379, 383, 85 L.Ed. 336 (1941). Damages may not be based on mere speculation or guesswork. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, 250, 75 L.Ed. 544 (1931); *Palmer v. Connecticut Railway & Lighting Co., supra,* 311 U.S. at 558–59, 61 S.Ct. at 383–384; *Edmund J. Flynn Co. v. LaVay,* D.C.App., 431 A.2d 543, 550 (1981). The evidence offered must form an adequate basis for a reasoned judgment, *Palmer v. Connecticut Railway & Lighting Co., supra,* 311 U.S. at 558, 61 S.Ct. at 283; but "[j]uries are allowed to act upon probable and inferential, as well as direct and positive proof." *Story Parchment Co. v. Paterson Parchment Paper Co., supra,* 282 U.S. at 564, 51 S.Ct. at 251; *Edmund J. Flynn Co. v. LaVay, supra* at 550. While damages are not required to be proven with mathematical certainty, there must be some reasonable basis on which to estimate damages. *Designers of Georgetown, Inc. v. E. C. Keys & Sons,* D.C.App., 436 A.2d 1280, 1281 (1981); *District Concrete Co. v. Bernstein Concrete Corp.*, D.C.App., 418 A.2d 1030, 1038 (1980).

[6] In this case, several physicians testified about the treatment Romer should undergo in the future. It was suggested that he have transcutaneous nerve stimulation (TNS), repeated injections into the epidural space, and psychological behavioral counseling (pain clinic), with a continuing rehabilitative program. Surgery was not recommended. No evidence was introduced as to the duration of the suggested treatments, however, and although bills were submitted on the cost of Romer's previous injections and TNS treatment, there was no evidence on the past or future estimated cost of psychological counseling. Counsel recognized this lack of evidence in his closing argument when he told the jurors that they would have to figure the estimated cost of future medical expenses on their own. Accordingly, as there was no basis upon which the jury could have reasonably calculated or inferred the cost of Romer's future medical expenses, if any, the court correctly refused to allow the jury to speculate in this area of damages. [4]

III

[7] Finally, it is argued that the court erred in setting aside the award to June Romer for loss of consortium because she failed to give the city government adequate notice of her claim pursuant to D.C.Code 1981, § 12–309, which provides:

> An action may not be maintained against the District of Columbia for unliquidated damages to person or property unless, within six months after the injury or damage was sustained, the claimant, his agent, or attorney has given notice in writing to the Commissioner [Mayor] of the District of Columbia of the approximate time, place, cause, and circumstances of the injury or damage.

Notice was sent to the Mayor of the District of Columbia stating that appellant had a claim arising out of injuries he sustained while working on a job site for the John C. Grimberg Co. on November 12, 1974. [5] Following *Boone v. District of Columbia,* 294 F.Supp. 1156 (D.D.C.1968), [6] the court vacated *1101 the award to Mrs. Romer because neither she, her agent, nor her attorney had notified the Mayor that she was asserting a claim of loss of consortium based on her husband's injuries.

Under § 12–309, potential claimants are required to provide an early warning to District officials regarding litigation likely to occur in the future. *See Pitts v. District of Columbia,* D.C.App., 391 A.2d 803 (1978). This requirement was intended by Congress to ensure that District officials would be given prompt notice of claims for potentially large sums of money so that they could: quickly investigate before evidence became lost or witnesses unavailable; correct hazardous or potentially hazardous conditions; and

settle meritorious claims. *See Washington v. District of Columbia,* D.C.App., 429 A.2d 1362 (1981) (en banc); *Breen v. District of Columbia,* D.C.App., 400 A.2d 1058 (1979); *Shehyn v. District of Columbia,* D.C.App., 392 A.2d 1008 (1978); H.R.Rep.No. 2010, 72 Cong., 2d Sess. 2 (1933). Consequently, this section gives the District a "litigative advantage over an ordinary civil defendant who may learn of claims against him for unliquidated damages at any time within the longer statute of limitations period." *Pitts v. District of Columbia, supra* at 807 (citation omitted). [*Gwinn v. District of Columbia,* D.C.App., 434 A.2d 1376, 1378 (1981).]

The notice statute is to be construed strictly because it is in derogation of the common law, *id.;* thus "precise exactness" is not absolutely essential with respect to the details of the statement giving notice. *Washington v. District of Columbia, supra* at 1365; *Braxton v. National Capital Housing Authority,* D.C.App., 396 A.2d 215, 217 (1978); *Pitts v. District of Columbia, supra* at 807. For example, a police report may substitute for formal notice under the statute when it gives at least the same degree of specificity required of a written notice. *Id.* at 808.

[8] Claims for loss of consortium are collateral to a spouse's claim for injuries; the two claims are tied together and the one (consortium) is dependent on the other (injuries). As long as the injured spouse's notice provides the District with sufficient information to allow it to investigate the accident, to try to settle claims, and to prevent future accidents, formal notice of a claim for loss of consortium will provide the city with no additional information necessary to effectuate the purposes of the statute. The District is not prejudiced by not receiving notice of a spouse's claim for loss of consortium. A cursory investigation would reveal the nature of the claimant's injuries and his or her marital status. Accordingly, we decline to follow *Boone v. District of Columbia, supra,* and hold that a spouse need not specifically assert a claim for loss of consortium when the injured spouse duly notifies the Mayor of the District of his or her claim and the details of the accident pursuant to D.C.Code 1981, § 12–309. *Cf. City of Houston v. Glover,* 355 S.W.2d 757 (Tex.Civ.App.1962) (notice to the city that the deceased was driving his automobile, crashed into a tree and died eleven days later is sufficient to apprise the City of a claim for pain and suffering sustained by the deceased before his death); *Ficara v. City of New York,* 17 Misc.2d 752, 186 N.Y.S.2d 361 (1959) (where notice of wife's claim is signed by husband, and his name is in the title of the claim, leave is granted to amend the notice of claim against the City of New York to state that the husband's claim is for loss of his wife's services and consortium and for medical expenses). *See Dellums v. Powell,* 184 U.S.App.D.C. 324, 566 F.2d 216 (1977), *cert. denied,* 438 U.S. 916, 98 S.Ct. 3146, 57 L.Ed.2d 1161 (1978) (notice is sufficient under D.C.Code 1973, § 12–309 although it names some but not all claimants in a class action suit for false arrest).

[9] In this case, the notice to the District provided all the details of the "time, ***1102** place, cause, and circumstances" of Romer's accident. The District had adequate notice to permit it to investigate the circumstances surrounding his claim. A cursory investigation would have revealed, and did reveal, that Romer suffered painful injuries to his back and that he is married. Accordingly, under our holding today, Mrs. Romer's claim for loss of consortium is not barred for lack of adequate notice to the District.

Affirmed in part and reversed in part.

PRYOR, Associate Judge, dissenting:

I would affirm the trial court's ruling with respect to the claim for loss of consortium. The notice requirement of D.C.Code 1981, § 12–309 could be viewed, as the majority holds, as being satisfied by timely written notice of the alleged primary tort. However, a loss of consortium is a related but separate cause of action. Given the unambiguous language of the statute, I do not think we are free to interpret it broadly and thereby alter its meaning. Rather, I believe that *Boone v. District of Columbia,* 294 F.Supp. 1156 (D.D.C.1968), which we have cited in the past, correctly analyzes the problem.

I agree with the majority's opinion in all other respects.

All Citations

449 A.2d 1097

Footnotes

1 Appellants additionally contend that the trial court erred in refusing to give a requested instruction on causation. This point is purely academic since the jury found appellee legally responsible for appellants' injuries.

2 Hereafter, when speaking of appellant, we refer to Charles Romer.

3 In denying the motion, the court wrote: "While the court was surprised by the niggardly verdict and no doubt would have rendered a very substantial judgment on a bench trial, it cannot conclude that the verdict was beyond any rational approach to the case."

4 We note that since Romer refused earlier recommendations of his physicians, he might also refuse to undergo future treatments.

5 This notice is conceded to be adequate under the statute.

6 In *Boone, supra,* the United States District Court for the District of Columbia interpreted § 12--309 and held that a spouse must notify the District of a claim of loss of consortium. We have often cited *Boone* with approval; *e.g., Braxton v. National Capital Housing Authority,* D.C.App., 396 A.2d 215 (1978); *Pitts v. District of Columbia,* D.C.App., 391 A.2d 803 (1978); *Miller v. Spencer,* D.C.App., 330 A.2d 250 (1974), but have not cited the case squarely for its holding.

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999 F.2d 549
United States Court of Appeals,
District of Columbia Circuit.

Linda L. JOY, Individually and as Legal Representative of Robert A. Joy, Deceased; as Personal Representative and Administratrix of the Estate of Robert A. Joy; and as Guardian and Next Friend of Tatum Joy and Brenna Joy
v.
BELL HELICOPTER TEXTRON, INC., et al.
ALLISON GAS TURBINE DIVISION OF GENERAL MOTORS CORP., Appellant,
v.
Jack C. TURLEY; and the Government of District of Columbia.

Nos. 91–7128, 91–7129 and 91–7168.
|
Argued Feb. 5, 1993.
|
Decided July 27, 1993.
|
Rehearing and Suggestion for Rehearing En Banc Denied in No. 91–7128 Sept. 21, 1993.

Estates of helicopter crash victims brought products liability action against manufacturer of helicopter engine, and manufacturer sought contribution from District of Columbia and from pilot. The United States District Court for the District of Columbia, John H. Pratt, J., entered judgment against manufacturer, and it appealed. The Court of Appeals, Buckley, Circuit Judge, held that: (1) evidence of similar engine failures was properly admitted; (2) jury instructions were proper; (3) question whether pilot was negligent was for jury; (4) question whether District of Columbia could be liable for contribution would be certified to its Court of Appeals; and (5) remand of one claim against manufacturer on issue of damages was required.

Affirmed in part, reversed and remanded in part, and certified to District of Columbia Court of Appeals in part.

See also 961 F.2d 963.

*551 **3 Appeals from the United States District Court for the District of Columbia (D.C. Civil Nos. 88–02165, 88–02351, and 88cv03012).

Attorneys and Law Firms

Mark A. Dombroff argued the cause for Allison Gas Turbine Div. of General Motors Corp. With him on the brief was Dane B. Jaques. Tom K. Hammitt also entered an appearance for Allison Gas Turbine Div. of GMC.

David N. Webster argued the cause for appellees Linda L. Joy, et al., in No. 91–7128. Sally A. Regal and Julia Porter also entered appearances for Joy, et al.

Jon W. Brassel argued the cause for appellee Jack C. Turley. With him on the brief was James A. McGuire.

Donna M. Murasky, Asst. Corp. Counsel, argued the cause for appellee District of Columbia in Nos. 91–7128 and 91–7129. With her on the brief were John Payton, Corp. Counsel, and Charles L. Reischel, Deputy Corp. Counsel.

Before BUCKLEY, SENTELLE, and RANDOLPH, Circuit Judges.

Opinion

Opinion for the court filed by Circuit Judge BUCKLEY.

BUCKLEY, Circuit Judge:

This case arises out of a 1987 helicopter crash in which all three passengers were killed and the pilot, Jack Turley, was seriously injured. After the crash, the passengers' survivors and Mr. Turley brought suit in district court against Allison Gas Turbine *552 **4 Division of General Motors Corporation ("Allison"), the manufacturer of the helicopter's engine. Allison, in turn, sought contribution from the District of Columbia for its handling of the attempted rescue, and from Mr. Turley for alleged negligence in flying the helicopter. Prior to trial, the court granted the District's motion for summary judgment on the ground that the "public duty doctrine" rendered the District immune from liability for the actions of the police officers who participated in the rescue effort. A trial was then held, at the conclusion of which the jury returned verdicts for the plaintiffs against Allison. The jury also determined that Mr. Turley was not negligent;

accordingly, the court entered judgment in favor of Mr. Turley on Allison's contribution claim.

Allison now appeals these judgments. Its claims of error may be divided into three categories. First, Allison argues that a retrial on liability is warranted because the district court improperly admitted certain evidence and issued erroneous jury instructions. Second, Allison contends that the district court erred by granting judgment in favor of Mr. Turley and the District on the contribution claims. Finally, it asserts that the damages award to plaintiff Linda L. Joy should be reversed because the district court improperly permitted the jury to award damages for loss of consortium and failed to exclude "speculative" expert testimony concerning her late husband's earning capacity.

Finding no fault in the district court's evidentiary rulings or its jury instructions, we affirm the jury's verdict that Allison is liable to the plaintiffs. We also affirm the judgment that Mr. Turley was not negligent in piloting the helicopter, and hence is not liable for contribution. We reverse and remand, however, the damages award to Ms. Joy. Finally, because the question whether the District may be held liable presents a novel issue of D.C. law, we will certify this question to the D.C. Court of Appeals.

I. BACKGROUND

A. The Crash

At approximately 7:30 A.M. on August 21, 1987, a helicopter crashed into the Potomac River in Washington, D.C. The aircraft came to rest upside down and partially submerged. Jack Turley, the pilot, freed himself from the wreckage and was rescued almost immediately by civilians on the scene. The three passengers—Victoria N. Hinckley, Robert A. Joy, and William Weems—remained inside the helicopter.

A number of people in the area observed the crash and placed emergency calls to notify the District's Metropolitan Police Department. In response, the Department immediately dispatched a boat from its Harbor Patrol unit. The boat arrived at the site within approximately three minutes of the crash. Unfortunately, however, the officers on board, at least one of whom was a certified police diver, did not have their scuba diving equipment with them. As a result, they left the scene of the accident to retrieve the equipment.

While the Harbor Patrol officers were gathering their equipment, other Harbor Patrol officers and members of the D.C. Fire Department secured the crash scene. Allison offered an affidavit of a civilian scuba diver who stated that she was present at the scene and had access to diving equipment. She told the officers that she wanted to rescue the passengers, but the officers ordered her not to do so. A second eyewitness reported that "three or four qualified scuba divers" arrived in a boat and offered their assistance. They, however, were also ordered to stay out of the water. Still another eyewitness stated that he began to put on his scuba diving equipment when he saw the crash, but stopped when the Harbor Patrol arrived.

Eventually, the Harbor Patrol divers returned with their gear and commenced rescue operations. The witnesses reported that more than twenty minutes had elapsed between the time of the crash and the time the officers were prepared to dive. Although the police divers were able to remove the passengers from the helicopter, all of them died later in the day. According to Allison's medical expert, Dr. Michael Baden, the passengers did not die from injuries caused by the impact of the crash, but rather from being submerged for an extended period of time. ***553** ****5** Dr. Baden testified that if the passengers had been removed within the first ten minutes after the crash, they would have had a greater than 50 percent chance of survival. Dr. Baden also stated that if the passengers had been submerged for more than ten minutes but less than fifteen, it would have been possible, but unlikely, that they would have survived.

B. The Cause of the Crash

The parties agreed that the helicopter engine lost power because a critical part, the spur adapter gearshaft ("SAG"), failed. The SAG, along with its mating part, the compressor coupler adapter, connects the turbine (power producing) section of the engine to its compressor (air intake) section. The failed SAG was a replacement part manufactured by Allison in 1982 and installed in the engine that year. The SAG had an anticipated useful life of 3,500 hours, but it failed after 1,450.7 hours in service.

Plaintiffs contended that the SAG failed because it had been improperly "carburized" (i.e., hardened) during manufacturing, as shown by an unusual "microstructure" (grain pattern) in the part. By contrast, Allison argued that the SAG failed because (1) the SAG

and the compressor coupler adapter had been misaligned during an overhaul by a third party, and (2) foreign material in the engine's oil system blocked the flow of oil through the jet that provided lubrication to the forward spline of the SAG.

In addition to the controversy over the underlying cause of the SAG failure, the parties also disputed whether negligence on the part of Mr. Turley, the pilot, contributed to the crash. A helicopter can be safely landed in the event of an engine failure by performing a maneuver called an "autorotation." The altitudes and airspeeds from which a safe autorotation can be performed are set forth in what is known as a height velocity ("H/V") diagram. If, however, a helicopter is flown within a particular region of the H/V diagram (the "restricted area"), it is extremely difficult to land the helicopter safely in the event of a power failure.

There is little question that, at the time the helicopter lost power, Mr. Turley was flying at an altitude of approximately two hundred feet. The H/V diagram indicates that at that altitude a helicopter's airspeed should be no less than 43 miles per hour. Allison, however, presented eyewitness testimony designed to show that Mr. Turley was flying at a slow airspeed, or perhaps even hovering. Accordingly, Allison claimed that Mr. Turley's negligent piloting was the cause of the crash.

In response, Mr. Turley contended that he was adhering to Federal Aviation Administration restrictions that required him to fly below 200 feet along a specified helicopter route to avoid commercial air traffic coming in and out of National Airport. He further alleged that in accordance with these constraints, he was performing a maneuver known as a "button hook turn" that required him to "transition[ ] through" the restricted area of the H/V diagram. Brief for Appellee Turley at 5.

II. DISCUSSION

A. The Substantive Law to be Applied

[1] Jurisdiction over this case in the district court was founded on diversity of citizenship pursuant to 28 U.S.C. § 1332. As a result, the substantive tort law of the District of Columbia governs this dispute. *See Schleier v. Kaiser Found. Health Plan of the Mid–Atlantic States, Inc.*, 876 F.2d 174, 180 (D.C.Cir.1989) ("Although the Rules of Decision Act, and hence *Erie Railroad v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), do not strictly apply with respect to D.C. law, we apply D.C.'s substantive law analogously for reasons of uniformity and respect for the D.C. Court of Appeals."); *see also Williams v. United States Elevator Corp.*, 920 F.2d 1019, 1022 (D.C.Cir.1990) (quoting *Schleier*).

[2] The D.C. Court of Appeals has adopted the principles of strict products liability set forth in section 402A of the Restatement (Second) of Torts. *See Payne v. Soft Sheen Products, Inc.*, 486 A.2d 712, 720 & n. 6 (D.C.1985); *Berman v. Watergate West, Inc.*, 391 A.2d 1351, 1356–57 (D.C.1978); ***554** ****6** *Cottom v. McGuire Funeral Serv., Inc.*, 262 A.2d 807, 808 (1970). Section 402A imposes liability upon "one who sells any product in a defective condition unreasonably dangerous to the user or consumer," provided that (1) "the seller is engaged in the business of selling such a product," and (2) the product "is expected to and does reach the user or consumer without substantial change in the condition in which it is sold." Restatement (Second) of Torts § 402A (1965). In order to recover, an injured plaintiff must demonstrate not only that the product is defective, but also that the defect proximately caused plaintiff's injury in that "but for the defect, the injury would not have occurred." *Payne,* 486 A.2d at 725.

[3] D.C. law also "recognizes that there may not be a single proximate cause for every injury; several causes may combine to produce the harm." *R. & G. Orthopedic Appliances & Prosthetics, Inc. v. Curtin,* 596 A.2d 530, 544 (D.C.1991). Accordingly, a defendant who is held liable for a plaintiff's injury may be entitled to recover contribution from other parties who breached their duties of care in ways that proximately caused the injury. *See id.*

B. Issues Relating to Liability

1. Admission of Evidence Concerning Other SAG Failures

[4] **[5]** In a product liability case, evidence of other incidents involving the allegedly defective product is considered relevant under Rule 401 of the Federal Rules of Evidence, and hence presumptively admissible under Rule 402, "only if a plaintiff shows that the incidents occurred under circumstances substantially similar to those at issue in the case at bar." *Brooks v. Chrysler Corp.*, 786 F.2d 1191, 1195 (D.C.Cir.1986) (quoting *McKinnon v. Skil Corp.*, 638 F.2d 270, 277 (1st Cir.1981)) (internal quotation marks omitted); *see also Exum v. General*

Elec. Co., 819 F.2d 1158, 1162 (D.C.Cir.1987). Even if substantial similarity is demonstrated, however, a district judge may still exclude evidence of other incidents under Rule 403, which provides that

> [a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed.R.Evid. 403; *see Brooks,* 786 F.2d at 1195. A district judge's ruling on whether the requisite degree of similarity has been shown or evidence should be excluded under Rule 403 may be reversed only for abuse of discretion. *See Exum,* 819 F.2d at 1162; *Brooks,* 786 F.2d at 1195.

[6] In the present case, the district court permitted plaintiffs to submit into evidence "Technical Data Reports" ("Reports") prepared by Allison that analyzed SAG failures that had occurred in two unrelated accidents. These were introduced during testimony by plaintiffs' expert metallurgist, Dr. Douglas Chisholm. Allison challenges the admission of the Reports. It contends that the SAG failures described in the Reports were not substantially similar to the SAG failure in the present case and that the prejudicial effects of this evidence far outweighed its probative value.

We turn first to the question of substantial similarity. Although the issue is close, we find that the district court did not abuse its discretion. By contrast with plaintiffs' allegation that the SAG in Mr. Turley's helicopter failed due to improper carburization, a metallurgical defect, the SAG failures discussed in the Reports resulted from severe wear. This difference in the mode of failure weighs against a finding that the incidents were substantially similar. Still, the SAGs described in the Reports broke in precisely the same location as the SAG in Mr. Turley's helicopter (i.e., the forward spline section), and all three failures occurred well before the end of the estimated useful life of the SAGs involved. Notably, we have not required that accidents occur in precisely the same manner in order to qualify as being substantially similar. *Cf. Exum,* 819 F.2d at 1162–63 (holding that the district court erred by excluding evidence of other accidents in a case involving a claim of negligent design, despite the fact that the accidents occurred under somewhat different circumstances ***555** ****7** than the accident that was the subject of the suit).

[7] More to the point, the substantial similarity standard is relaxed when the unrelated incidents are introduced for a purpose other than to prove that the product was unreasonably dangerous. As we observed in *Exum:*

> How substantial the similarity must be is in part a function of the proponent's theory of proof. "If dangerousness is the issue, a high degree of similarity will be essential. On the other hand, if the accident is offered to prove notice, a lack of exact similarity of conditions will not cause exclusion provided the accident was of a kind which should have served to warn the defendant."

Id. at 1162–63 (quoting 1 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence § 401[10]). In the present case, plaintiffs introduced the Reports not to establish dangerousness, but rather to refute Allison's suggestion that the SAG in Mr. Turley's helicopter could not have been defective because it was manufactured according to specifications. Indeed, plaintiffs offered to withdraw the evidence if Allison would stipulate that parts can fail despite meeting manufacturing specifications, an offer that Allison refused. Admittedly, the use of the Reports to demonstrate that parts meeting specifications can fail is not so analytically distinct from the matter of dangerousness as is the question of notice. We nevertheless conclude that the difference is sufficient to warrant admission of the evidence concerning the other SAG failures.

Moving to Allison's claim that the Reports should have been excluded under Rule 403, we emphasize at the outset that

> [t]he standard for exclusion under Fed.R.Evid. 403 is somewhat exacting. "Relevant evidence may be excluded if its probative value is *substantially outweighed* by the danger of unfair prejudice."

C.A. Assocs. v. Dow Chem. Co., 918 F.2d 1485, 1489–90 (10th Cir.1990) (quoting Fed.R.Evid. 403) (emphasis in original); *see also id.* at 1490 (noting that "Rule 403 is an extraordinary remedy to be used sparingly") (quoting *Wheeler v. John Deere Co.,* 862 F.2d 1404, 1410 (10th Cir.1988)). Moreover, because the district court

has distinct advantages over this tribunal in performing the balancing required by the Rule, the district court's discretion is at its height when carrying out this function. *See United States v. Long,* 574 F.2d 761, 767 (3d Cir.1978). Indeed, "[i]f judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." *Id.; see also United States v. Boney,* 977 F.2d 624, 631 (D.C.Cir.1992) (quoting *Long*). In view of these considerations, we find no fault with the district court's ruling.

In attempting to surmount the formidable obstacles to overturning the district court's Rule 403 ruling, Allison relies primarily on *Brooks v. Chrysler Corp.,* 786 F.2d 1191 (D.C.Cir.1986). The plaintiffs in that case argued that a Chrysler Lebaron automobile crashed because its "lip-in dust-boot" permitted corrosive material to enter the braking mechanism, thereby leading to "brake piston seizure." *Id.* at 1192. The district court denied the plaintiffs' attempt to submit exhibits relating to a National Highway Traffic Safety Administration ("NHTSA") investigation of Chrysler cars as evidence of prior occurrences of such seizures. *See id.* at 1192–93. On appeal, we upheld the district court's decision. We noted that the exhibits were only "minimally probative" because they indicated that the primary cause of brake piston seizure was an "out-of-groove" dust-boot, not the entrance of corrosive materials into the braking mechanism. *See id.* at 1195, 1197. We then found that the district court had not abused its discretion by concluding that this limited probative worth was outweighed by the danger of prejudice, delay, and jury confusion. In particular, we emphasized that introduction of the exhibits could have led to extended discussion of the 330 consumer surveys that formed the basis of the investigation, and that those surveys contained, *inter alia,* a number of "highly inflammatory remarks about Chrysler" that might well prove prejudicial. *Id.* at 1198.

Allison's reliance on *Brooks* is misplaced for two reasons. First, *Brooks* held only that the district court did not exceed the bounds of its discretion by *excluding* the plaintiffs' ***556** ****8** evidence of other incidents. Accordingly, *Brooks* does not clearly demarcate the boundary of the district court's discretion to *admit* evidence that might have prejudicial implications. Second, the facts of *Brooks* are readily distinguished from the facts of the instant case. In particular, the dangers of undue prejudice and delay were substantially greater with the exhibits proffered in *Brooks* than the Reports admitted into evidence in the present case. While admission of the NHTSA exhibits in *Brooks* would have exposed the jury to significant amounts of extraneous and highly inflammatory material, the Reports contained no such material and played only a minor role during the two-week trial.

2. The Jury Instructions

[8] **[9]** **[10]** It is well established that "[a] defendant is entitled to an instruction on a defense theory if it has a basis in the law and in the record." *Hasbrouck v. Texaco, Inc.,* 842 F.2d 1034, 1044 (9th Cir.1987), *aff'd,* 496 U.S. 543, 110 S.Ct. 2535, 110 L.Ed.2d 492 (1990). Nevertheless, "[a]s long as a district judge's instructions are legally correct ... he is not required to give them in any particular language," *Miller v. Poretsky,* 595 F.2d 780, 788 (D.C.Cir.1978); and jury instructions are not considered erroneous if, when viewed as a whole, "they fairly present the applicable legal principles and standards," *EEOC v. Atlantic Community Sch. Dist.,* 879 F.2d 434, 436 (8th Cir.1989). An alleged failure to submit a proper jury instruction is a question of law subject to *de novo* review; the choice of the language to be used in a particular instruction, however, is reviewed only for abuse of discretion. *See Hasbrouck,* 842 F.2d at 1044.

[11] At the close of the evidence in the present case, the district judge issued the following instructions to the jury on the matter of liability:

> You are instructed that the law imposes liability upon a seller of a product which causes injury to another or his property due to a defect in the product, which makes the product unreasonably dangerous.
>
> It is not necessary for the plaintiffs to show that the defendant acted unreasonably or negligently; rather the focus is upon the product itself. A product is unreasonably dangerous when it is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases the product.
>
> Thus, if you find that the product, the spur adapter gearshaft, had a defect which made it unreasonably dangerous and that the defect proximately caused the injury to the plaintiffs, then your verdict should be for the plaintiffs.

> If you determine, after considering all of the evidence, direct and circumstantial, that the accident which resulted in the plaintiff Turley's injuries and the death of Robert Joy and Victoria Hinckley would not have occurred in the ordinary course of things but for the existence of a defect in the spur adapter gearshaft, then you can infer that the cause of the accident arose from a defect in the manufacture of the spur adapter gearshaft.
>
> The law does not require the plaintiffs to prove the mechanical failure by specific physical evidence, nor does it require the plaintiff to prove exactly what part of the spur adapter gearshaft was defective, as plaintiffs may prove the defect solely by circumstantial evidence.
>
> *The plaintiffs must prove that at the time of the incident that the spur adapter gearshaft was not in a substantially changed condition with respect to the defect alleged.*
>
> *In other words, the plaintiffs must prove, by a preponderance of the evidence, that the spur adapter gearshaft was not substantially changed in a manner that made the spur adapter gearshaft unreasonably dangerous between the time that the engine left Allison's hands and the time of the accident.*

Joint Appendix ("J.A.") at 809–11 (emphasis added).

Before issuing these instructions, the district court denied Allison's request that the instructions focus on whether the *engine* was in a substantially changed condition at the time of the accident, rather than whether the ***557 **9** SAG had been substantially changed. Allison now argues that the district court's instructions were erroneous because they eliminated from the jury's consideration the basic theory of Allison's defense: that the crash was caused by either misalignment of the SAG or the use of contaminated oil that blocked the lubrication system. According to Allison, both of these changes occurred long after the engine left its control, but could not be considered under the district judge's instruction, which would render Allison liable so long as the SAG was not in a substantially changed condition.

We find no merit in Allison's claim. As an initial matter, the district court's instruction fairly stated the applicable law. Both parties agree that the helicopter's engine lost power because the SAG failed. Accordingly, the relevant issues under D.C. products liability law were whether (1) the SAG was defective at the time it entered the stream of commerce, and (2) the SAG proximately caused plaintiffs' injuries.

Moreover, as plaintiffs argued at trial, an instruction focusing on whether the engine as a whole had been substantially changed might well have been misleading. The engine was manufactured in 1972 and had since been altered in many respects through overhauls and maintenance activities, including the installation of the new SAG in 1982. Under the jury instructions advocated by Allison, however, these changes might have operated as an improper shield against liability. The jury would likely have concluded that the engine as a whole had been substantially changed, thereby leading to a verdict for Allison, even if the SAG was in fact both flawed and responsible for the crash.

Finally, it is specious to claim that the district court's jury instructions prevented the jury from reaching a verdict for Allison if the jury agreed with Allison's theory of the case. If the jury adopted Allison's view that the accident was caused by misalignment or inadequate lubrication, it could have held for Allison on any or all of the following grounds: (1) the SAG was not defective, (2) the SAG had been substantially changed as a result of the misalignment or poor lubrication, or (3) any defect that was present in the SAG was not a proximate cause of the crash.

C. The Contribution Claims

1. The Pilot

Allison raises three claims of error with respect to the judgment that the pilot, Jack Turley, was not negligent, and hence is not liable for contribution. First, Allison contends that the district court erred by refusing its request for an instruction on the doctrine of negligence per se. Second, Allison argues that the district court inappropriately issued an instruction on the "sudden emergency doctrine." Third, Allison asserts that there was insufficient evidence to support the finding that Mr. Turley was not negligent.

a. Negligence Per Se

[12] Under the negligence per se doctrine recognized by the District of Columbia, "where a particular statutory or regulatory standard is enacted to protect persons in the plaintiff's position or to prevent the type of accident that

occurred ... [an] *unexplained* violation of that standard renders the defendant negligent as a matter of law." *Ceco Corp. v. Coleman,* 441 A.2d 940, 945 (D.C.1982) (quoting *Richardson v. Gregory,* 281 F.2d 626, 629 (D.C.Cir.1960)) (emphasis in original); *see also Rong Yao Zhou v. Jennifer Mall Restaurant, Inc.,* 534 A.2d 1268, 1273 (D.C.1987) (quoting *Ceco*); *Lewis v. Washington Metro. Area Transit Auth.,* 463 A.2d 666, 674 (D.C.1983) (same). If, however, the defendant puts forth evidence excusing the violation, the violation may be considered evidence of negligence rather than negligence per se. *See Rong Yao Zhou,* 534 A.2d at 1274; *Lewis,* 463 A.2d at 674; *Ceco,* 441 A.2d at 945; *cf. Robinson v. District of Columbia,* 580 A.2d 1255, 1257 (D.C.1990) (stating that a violation may be excused if the defendant demonstrates that he did "everything a reasonable person would do" to avoid that violation).

[13] Prior to closing arguments, Allison requested that the district court instruct the jury on the negligence per se doctrine because there was evidence that Mr. Turley ***558 **10** had violated two Federal Aviation Regulations that were in effect at the time of the accident. Specifically, Allison referred to 14 C.F.R. § 91.9 (1987) (subsequently recodified at 14 C.F.R. § 91.13(a) (1992)), which states that "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another," and 14 C.F.R. § 91.79 (1987) (subsequently recodified at 14 C.F.R. § 91.119 (1992)), which provides:

> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
>
> (a) *Anywhere.* An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

According to Allison, the evidence indicating that Mr. Turley was flying at an altitude-airspeed combination within the restricted area of the H/V diagram suggested that Mr. Turley violated these regulations, and thus a negligence per se instruction was in order. The district court, however, refused to issue the requested instruction, and Allison now challenges that ruling.

We find that the district court acted properly in refusing to give the negligence per se instruction. We conclude, first, that section 91.9 is far too general to be the subject of a negligence per se instruction. There is ample authority in D.C. law for the proposition that an alleged violation of a statute or regulation gives rise to a claim of negligence per se only when that statute or regulation sets forth specific guidelines to govern behavior. For example, in *District of Columbia v. Mitchell,* 533 A.2d 629 (D.C.1987), the plaintiff alleged a violation of a statute requiring that the D.C. Department of Corrections be "responsible for the safekeeping, care, protection, instruction, and discipline" of inmates at the Lorton Reformatory. *Id.* at 639. The court observed that "the statute implicitly recognizes a duty of reasonable care under the circumstances, the same common law standard we generally apply in all contexts of alleged negligence." *Id.* The court then determined that "[w]e see nothing in the statute—certainly no specifics—that could give rise to a claim of negligence *per se.* " *Id.; see also Lewis,* 463 A.2d at 674 (holding that no negligence per se instruction was warranted in a case in which plaintiffs alleged a violation of a building code provision requiring that "neighboring property and structures ... shall be sufficiently supported" while construction was underway). Similarly, in the present case, section 91.9 simply restates the general common law duty that pilots should exercise reasonable care (i.e., they may not be "careless"). As a result, no negligence per se instruction was required.

Allison seeks to avoid this conclusion by arguing that section 91.9 "is not merely a general statement of negligence for which no definable acts would trigger its application." Reply Brief for Appellant at 12. In particular, Allison claims that two National Transportation Safety Board ("NTSB") decisions —*Harris v. Oeming,* [1989–92 Transfer Binder] Av.L.Rep. (CCH) ¶ 22,764, at 15,780 (Apr. 16, 1992), and *Harris v. Holmes,* [1989–92 Transfer Binder] Av.L.Rep. (CCH) ¶ 22,763, at 15,778 (Apr. 16, 1992)—have clearly established that section 91.9 is violated by flying a helicopter at an altitude-airspeed combination within the restricted area of the H/V diagram. These decisions, however, are merely applications of the broad standard set forth in section 91.9. By contrast, a common sense approach to the negligence per se doctrine suggests that specific obligations must be set forth on the face of a regulation for that doctrine to come into play. Moreover, even if it were possible to flesh out a general standard through administrative decisions for purposes of the negligence per se doctrine, the decisions cited by Allison were rendered five years after the accident at issue in the present case. Thus, one can hardly expect these decisions to have provided clear rules to govern Mr. Turley's conduct.

From the standpoint of the negligence per se doctrine, section 91.79(a) suffers from precisely the same defect as section 91.9. Under section 91.79(a), a pilot is required to fly at an altitude from which he may make an emergency landing without "undue hazard to persons or property." This, however, is simply another way of saying that a pilot must exercise "due care." Certainly, it is impossible ***559 **11** to discern from the face of this rule any specific instructions concerning flight operations. *Compare* 14 C.F.R. § 91.79(a) (1987) *with* 14 C.F.R. § 91.79(b) (1987) (making it unlawful to fly an aircraft "[o]ver any congested area of a city, town, or settlement ... [at] an altitude [less than] 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft"); *see also Tinkler v. United States,* 700 F.Supp. 1067, 1073–74 (D.Kan.1988) (finding a pilot negligent for flying in violation of 14 C.F.R. § 91.79(b)), *aff'd,* 982 F.2d 1456 (10th Cir.1992). Accordingly, as with section 91.9, section 91.79(a) cannot properly give rise to a negligence per se instruction.

b. The Sudden Emergency Doctrine

[14] Allison's next claim of error concerning the contribution claim against Mr. Turley relates to the district court's decision to issue an instruction on the "sudden emergency" doctrine. Specifically, the judge instructed the jury that

> [i]f you determine from the evidence that the pilot, Jack Turley, was, at the time of the occurrence, confronted with a sudden emergency not of his own making, then you must determine whether, in the light of all of the alternatives available to him, and the time available to him to recognize and evaluate these alternatives, he made a choice that a reasonable, prudent person should have made.

J.A. at 809. Allison contends that this instruction was erroneous because (1) Mr. Turley's alleged negligence —flying at an altitude-airspeed combination within the restricted area of the H/V diagram—was a cause of the emergency; and (2) Allison alleged that Mr. Turley was negligent prior to, rather than after, the engine failed.

We agree with Allison that the sudden emergency instruction does seem inappropriate. The sudden emergency doctrine elaborates the common law standard of reasonable care by directing a jury to consider the constraints imposed on an actor who must make decisions under severe and unanticipated conditions. *See* Restatement (Second) of Torts § 296 cmt. b (explaining that under the doctrine, the jury "in determining the propriety of the actor's conduct must take into account the fact that he is in a position where he must make a speedy decision between alternative courses of action and that, therefore, he has no time to make an accurate forecast as to the effect of his choice"). In the present case, there was testimony that Mr. Turley made decisions after the engine failure that may have affected the likelihood of the passengers' survival. Specifically, he chose to land the helicopter in the Potomac rather than amid the cherry trees by the Jefferson Memorial. Allison, however, did not suggest that Mr. Turley erred in making this choice, or that he acted in any way improperly during the emergency conditions that existed after the engine failed. Instead, Allison claimed only that Mr. Turley had been negligent by flying within the restricted area of the H/V diagram, an action that he allegedly took before the onset of the emergency.

Nevertheless, even if we were to find that the sudden emergency instruction was improperly given, the issuance of the instruction would not constitute reversible error. It is well established that challenges to jury instructions are subject to the harmless error rule. *See* Fed.R.Civ.P. 61; *Williams,* 920 F.2d at 1022–23. Accordingly, reversal is appropriate only if "the trial court's error could have affected the substantial rights of the parties." *Williams,* 920 F.2d at 1023.

In the present case, there is no possibility that the sudden emergency instruction had any adverse effect on the verdict. If the jury had agreed with Allison that Mr. Turley was negligent prior to the engine failure, the sudden emergency instruction would not have inhibited the jury from finding in Allison's favor. Moreover, the instruction left it open to the jury to determine whether Mr. Turley was responsible for the sudden emergency by stating that

> [i]f you determine from the evidence that ... Turley[ ] was, at the time of the occurrence, confronted with

> a sudden emergency *not of his own making*....

J.A. at 809 (emphasis added). Thus, if the jury concluded that Mr. Turley was responsible for the emergency, as Allison claimed, the instruction would have been irrelevant.

***560 **12** *c. The Sufficiency of the Evidence*

[15] [16] We review *de novo* Allison's contention that there was insufficient evidence to support the jury's finding that Mr. Turley was not negligent, and hence that the district court should have set aside the jury's verdict in ruling on the contribution claim. Reversal is appropriate, however, only if "the evidence, together with all inferences that can reasonably be drawn therefrom is so one-sided that reasonable men could not disagree on the verdict." *Anderson v. Group Hospitalization, Inc.*, 820 F.2d 465, 472 (D.C.Cir.1987) (quoting *Romero v. National Rifle Ass'n of Am., Inc.*, 749 F.2d 77, 79 (D.C.Cir.1984)) (brackets omitted). Moreover, in evaluating the issue, we must view the evidence in the light most favorable to Mr. Turley. *Id.* Applying this standard, we conclude that the district court acted properly by entering judgment in accordance with the jury's verdict.

Allison's attempt to demonstrate that the evidence was insufficient focuses exclusively on the evidence concerning the helicopter's airspeed at the time the engine failed. Allison observes that the parties agreed that Mr. Turley was flying at an altitude of 200 feet, and that the H/V diagram indicates that a successful autorotation would generally not be possible from that altitude unless the helicopter was travelling at a rate of at least 43 miles per hour. Accordingly, Allison contends that "the only fact for the jury to determine in deciding [Mr.] Turley's negligence was whether he was flying slower than 43 mph when the engine stopped operating." Brief for Appellant at 21. Allison then contends that eyewitness accounts, physical evidence from the helicopter wreckage, and Mr. Turley's pretrial admissions all support the view that he was travelling at considerably less than that speed.

If we agreed with Allison's premise that the determinative issue is whether Mr. Turley was flying at less than 43 miles per hour, we might well accept its preferred conclusion. Indeed, even Mr. Turley admitted during his testimony that he was travelling at an airspeed below the 43 miles per hour threshold at the time the engine failed. Nevertheless, the mere fact that Mr. Turley was flying in the restricted area of the H/V diagram would not necessarily compel a reasonable jury to conclude that Mr. Turley was negligent. To the contrary, the record contains evidence that, when viewed in the light most favorable to Mr. Turley, suggests that he did exercise reasonable care under the particular set of circumstances with which he was confronted.

Mr. Turley testified at the trial that the engine failed while he was performing a button hook turn, and that this turn was necessitated by Federal Aviation Administration ("FAA") restrictions requiring him to fly along a prescribed helicopter route to avoid air traffic coming in and out of National Airport. Mr. Turley further testified that before making the turn he was flying at 55 miles per hour, just under the 60 miles per hour limit imposed by the flotation devices on his helicopter; that performing the turn necessarily led to a decrease in the helicopter's speed; and that it is relatively common for helicopter pilots to "transition through" the restricted area of the H/V diagram at some point during a typical flight to conform to air traffic instructions.

In an attempt to discredit Mr. Turley's account, Allison points to the statements of several witnesses that describe Mr. Turley's helicopter as "hovering" over the Potomac in the minutes prior to engine failure. Based on these statements, Allison contends that Mr. Turley's helicopter was essentially motionless at the time the failure occurred. This evidence, however, is far from unambiguous. Indeed, at least one of the statements directly corroborates Mr. Turley's account. Specifically, Robert Love reported that "the helicopter moved forward and banked off to the right" and that "[j]ust at the end of this motion the engine just quit," J.A. at 159, a depiction that matches Mr. Turley's testimony concerning the button hook turn.

Allison also cites two other pieces of evidence to support its version of events. First, it points to the testimony of Richard Belle, a NTSB investigator, who interviewed Mr. Turley in the hospital shortly after the accident. According to Mr. Belle, Mr. Turley reported that the helicopter was in a "stable hover" at the time of the engine failure. Mr. ***561 **13** Belle noted, however, that Mr. Turley was "groggy" at the time of the interview, and that he appeared to be under the effects of pain medication.

Second, Allison observes that Charles Herron, a Bell Helicopter accident investigator, testified that in his opinion Mr. Turley's helicopter was "at a hover or very low airspeed," which he subsequently estimated to be less than 22 miles per hour. But Mr. Herron stated that this opinion was premised largely on the NTSB witness statements, which, as discussed above, are susceptible of more than one reasonable interpretation.

Thus, we conclude that the evidence is more than sufficient to uphold the jury's verdict. A reasonable jury could readily have concluded that Mr. Turley's account accurately depicted the conditions of the flight, and that his flying within the restricted area of the H/V diagram did not indicate that he failed to use reasonable care under the circumstances, which included most notably the FAA restrictions governing the flight. There are, of course, discrepancies among the various accounts. Resolving these discrepancies, however, is quintessentially a matter for the jury.

2. The District of Columbia

[17] The district court granted summary judgment on Allison's contribution claim against the District on the ground that the District was immune from liability under the public duty doctrine. Allison argues that the district court misread existing D.C. precedents. Because we find that Allison's contribution claim presents an unresolved and critically important question of D.C. law, we will certify the question to the D.C. Court of Appeals.

[18] Under the public duty doctrine as it has been elaborated by the D.C. Court of Appeals, the District "and its agents owe no duty to provide public services to particular citizens as individuals." *Hines v. District of Columbia,* 580 A.2d 133, 136 (D.C.1990); *see also Platt v. District of Columbia,* 467 A.2d 149, 151 (D.C.1983). As a result, the District is generally immune from tort liability for actions taken by its officers in the course of providing public services. *See Hines,* 580 A.2d at 136.

There is, however, an exception to the public duty doctrine for cases in which a "special relationship" is established between public officers and a particular individual. A special relationship does not arise merely because an individual requests that the District provide emergency assistance. Thus, the District may not be held liable for the failure of its officers to respond to emergency calls in an "adequate and timely" fashion. *See id.* at 138–39 (finding no special relationship in a case in which emergency medical technicians failed to respond promptly and with the proper equipment to a medical emergency). Nevertheless, a special relationship may exist when "there is justifiable reliance on a specific undertaking to render aid." *Hines,* 580 A.2d at 138; *see also Platt,* 467 A.2d at 151 (finding that a special relationship arises when there is "(1) a direct contact or continuing contact between the victim and the governmental agency or official; and (2) a justifiable reliance on the part of the victim"). A special relationship may also exist if public agents commit acts of "affirmative negligence" that "actually and directly worsen the victim's condition." *Johnson v. District of Columbia,* 580 A.2d 140, 142 (D.C.1990). This "affirmative negligence" concept can be incorporated within the "justifiable reliance" framework on the theory that "a victim may arguably 'rely' on an emergency crew not to worsen h [is] condition." *Id.* at 143.

To the best of our knowledge, the D.C. courts have not addressed the precise question whether interference by the police with civilian rescue efforts may constitute the type of affirmative negligence that can create a special relationship, and thereby give rise to liability on the part of the District. Notwithstanding this silence, the district court determined that no special relationship could be established based on the facts of this case. As an initial matter, the court held that the mere fact that the Harbor Patrol boats "were not equipped with scuba gear when they arrived at the scene" could not provide a basis for liability because this was "essentially an allegation that the District's rescue ***562** ****14** operation was untimely and inadequate." *Joy v. Bell Helicopter Textron, Inc.,* No. 88–2165, mem. op. at 9 (D.D.C. Feb. 28, 1991). The court then turned to the affirmative negligence claim. Relying on a Superior Court opinion that was adopted by the D.C. Court of Appeals in *Warren v. District of Columbia,* 444 A.2d 1, 3, 4–9 (D.C.1981) (en banc), the district court reasoned that a special relationship may arise from affirmative negligence only when the alleged actions constitute "ordinary negligence"—that is, actions "for which anyone ... would be held liable"—such as "negligent handling of an attack dog, negligent operation of a motor vehicle, or the negligent use of a firearm." *See Joy,* mem. op. at 11 (quoting *Warren,* 444 A.2d at 7). By contrast, the court found that a special relationship does not arise from "allegations of negligence [that] derive solely from defendants' status as police employees and from plaintiffs' contention that defendants failed to do

what reasonably prudent police officers would have done in similar circumstances." *Id.* (quoting *Warren,* 444 A.2d at 8). According to the court, the present case involved the latter type of allegation:

> The issue that Allison seeks to put in front of the jury is whether the officers in this case acted as reasonably prudent police officers in preventing the civilians from undertaking the rescue. But the public duty doctrine prevents a jury from deciding precisely these types of issues.... [D]iscretionary acts during a rescue operation can not be later dissected at trial and subject to an expert's opinions as to whether, in hindsight, he acted as a reasonably prudent police officer.[9] We think that the public duty doctrine correctly protects the courts and the public from the legal morass which would arise if these types of discretionary acts were to go to trial.

Id. at 12–13.

In challenging the district court's decision, Allison argues that the actions of the Harbor Patrol officers constitute precisely the type of affirmative negligence that suffices to create a special relationship. For support, Allison cites *Johnson v. District of Columbia,* 580 A.2d 140 (D.C.1990). In that case, District officers failed to respond to an emergency call concerning a victim who had suffered a heart attack. *See id.* at 141. When two firefighters did arrive on the scene after more than thirty minutes and two additional calls, they allegedly had "no equipment ... other than an oxygen mask and a mouth-to-mouth resuscitation mouthpiece," and acted "casually and slowly" in dealing with the victim's distress. *Id.* The D.C. Court of Appeals held that although the public duty doctrine rendered the District immune from liability for the tardiness of the response and the failure of the firefighters to have appropriate equipment when they arrived, *see id.* at 142, there was a triable question of fact as to whether certain actions taken by the firefighters on the scene could have created a special relationship. *See id.* at 143 (noting allegations that, *inter alia,* the firefighters "failed to provide proper cardiopulmonary resuscitation [and] failed to properly manage [the victim's] airway"). According to the court:

> [T]he only relevant issue is whether any affirmative acts of the firefighters worsened [the victim's] condition. That is, appellant must show that some act of the firefighters in administering emergency medical assistance to [the victim] actually made [her] condition worse than it would have been had the firefighters failed to show up at all or done nothing after their arrival.

Id. at 142. Relying on this language, Allison argues that, by interfering with the private rescue efforts of the civilian scuba divers, the Harbor Patrol officers actually made the passengers' situation "worse than it would have been had the [officers] failed to show up at all." Moreover, Allison observes that in at least one jurisdiction with a similar public immunity doctrine, it has been held that the ***563 **15** government may be found liable for police actions that "actually worsen[ ]" a victim's situation by discouraging civilian rescuers "from taking ... steps to render aid and assistance." *Fochtman v. Honolulu Police and Fire Dep'ts,* 65 Hawaii 180, 649 P.2d 1114, 1117 (1982).

In response, the District argues that Allison cannot establish the "justifiable reliance" element necessary to create a special relationship because "there is *no* evidence that the helicopter passengers were even aware of the MPD's rescue efforts, much less that they relied on such efforts." Brief for Appellee District of Columbia at 11–12 (emphasis in original). This claim is grounded on the notion that a victim must actively manifest his reliance upon his would-be rescuers in order to qualify for the special relationship exception to the public duty doctrine. Such a position, however, is directly contradicted by *Johnson,* in which the court found that the plaintiff's allegations, if proven, were sufficient to provide a basis for liability, despite the fact that the victim was unconscious throughout the District's failed rescue attempt. *See* 580 A.2d at 141.

More substantially, the District likens the present case to *Nichol v. District of Columbia Metropolitan Police Department,* a companion case to *Warren* that was decided in the same opinion. *See Warren,* 444 A.2d at 3–4. In *Nichol,* a vehicle repeatedly rammed the rear of the plaintiff's car. When the plaintiff stopped, the occupants of the other vehicle began to beat him. Shortly thereafter, a police officer arrived on the scene and separated the plaintiff from his assailants. In the process, the officer inhibited the efforts of the plaintiff's companion to learn the assailants' identities, thereby making it impossible for the plaintiff to take legal action against them. *See id.* at 3. Lacking another viable alternative, the plaintiff brought

an action against the District alleging that the officer had acted negligently by (1) impeding the effort to learn the assailants' identities and then (2) failing to obtain the information himself. *See id.* The D.C. Court of Appeals, however, held that the suit was barred by the public duty doctrine. The court stated that "the effort to separate the hostile assailants from the victims—a necessary part of the on-scene responsibility of the police—adds nothing to the general duty owed the public and fails to create a relationship which imposes a special legal duty." *Id.* The District contends that in the present case, as in *Nichol,* the actions taken by the Harbor Patrol officers in barring the civilian scuba divers from undertaking rescue efforts constitute "a necessary part of the on-scene responsibility of the police," rather than the type of "affirmative negligence" that may establish a special relationship.

After reviewing the relevant authorities, we conclude that the question presented by Allison's contribution claim constitutes an appropriate matter for certification to the D.C. Court of Appeals. Under D.C. law, "a Court of Appeals of the United States" may certify "questions of law" to the D.C. Court of Appeals when "it appears to the certifying court [that] there is no controlling precedent in the decisions of the District of Columbia Court of Appeals." D.C.Code Ann. § 11–723 (1989). The use of such certification procedures "in a given case rests in the sound discretion of the federal court." *Lehman Bros. v. Schein,* 416 U.S. 386, 391, 94 S.Ct. 1741, 1744, 40 L.Ed.2d 215 (1974); *see also Tidler v. Eli Lilly & Co.,* 851 F.2d 418, 426 (D.C.Cir.1988) ("*Tidler* "); *Eli Lilly & Co. v. Home Ins. Co.,* 764 F.2d 876, 884 (D.C.Cir.1985) ("*Home Insurance*"). In the present case, two significant considerations lead us to the view that we should exercise our discretion to certify.

The first and "most important consideration" is that we are "genuinely uncertain" as to whether interference by public officers in private rescue efforts may give rise to a special relationship under D.C. law. *Tidler,* 851 F.2d at 426; *see also Lee v. Wheeler,* 810 F.2d 303, 306 (D.C.Cir.1987) (finding certification appropriate in a case in which the court was "uncertain as to an important point of Maryland law" and "found no pertinent cases from that State authoritatively to guide [it]"); *Home Insurance,* 764 F.2d at 884 (noting "uncertainty of state law" as one factor supporting a decision to certify). Weighing in favor of the view advanced by Allison is the fact that discouraging civilian rescue attempts appears to qualify as an affirmative act, not just an omission, that may well have ***564 **16** left the passengers worse off than if the Harbor Patrol officers had never arrived on the scene. *Cf. Johnson,* 580 A.2d at 142. Moreover, by contrast with the district court's decision, it is at least possible to construe the actions of the Harbor Patrol as the kind of negligence for which "anyone—police or civilian—would be liable." *Warren,* 444 A.2d at 7. Specifically, although a private individual generally has no obligation to rescue a person who is in peril, once he undertakes a rescue he may be liable for negligence committed during that effort. *But see id.* at 7 n. 3 (observing that the D.C. Court of Appeals has refrained from endorsing the negligent rescue doctrine); *see also Johnson,* 580 A.2d at 142 n. 3. Such negligence could well include dissuading or preventing other qualified individuals on the scene from rendering aid when there is a lack of equipment to effectuate the initial rescue plan.

At the same time, there is authority to support the District's view of the case. As the district court noted, the Superior Court opinion adopted in *Warren* drew a distinction between "ordinary negligence on the one hand and a novel sort of professional malpractice on the other." *Warren,* 444 A.2d at 8. In the present case, the actions of the Harbor Patrol officers may have been influenced by a variety of considerations—the danger of injury to the civilian divers, the danger that the civilian divers might have exacerbated the injuries of the passengers, and crowd control issues—that "derive solely from [their] status as police employees." *Id.* Thus, to the extent that Allison's contribution claim is, in effect, a claim that the officers "failed to do what reasonably prudent police employees would have done in similar circumstances," the District should be shielded from liability by the public duty doctrine. *Id.*

Moreover, the District appears to be correct in asserting that this case is in many respects similar to the *Nichol* case that was decided along with *Warren.* As in *Nichol,* the officers in the present case directed well-intentioned individuals at the scene not to take action. Furthermore, just as the officer in *Nichol* had a responsibility to get the identification information sought by the victim's companion, *see Warren,* 444 A.2d at 3, the officers in the present case had a duty derived from their public safety role to perform essentially the same task the civilian scuba divers hoped to accomplish—rescue the drowning passengers. And, in both cases, the police failed to perform

their duty adequately, thereby leaving the victims worse off.

Our decision to certify is also supported by the fact that "this case is one of extreme public importance" in which the District of Columbia has a "substantial interest." *Home Insurance,* 764 F.2d at 884. Indeed, one can hardly imagine a more significant issue for the District than the conditions under which its police officers will be held liable in tort for actions taken in the course of performing their public functions.

In view of the foregoing, we will certify the following question to the D.C. Court of Appeals:

> Does the public duty doctrine render the District of Columbia immune from tort liability in a case in which District police officers interfere with the private rescue efforts of civilians at the scene of an accident, thereby worsening the condition of the victims?

D. The Damages Award to Ms. Joy

[19] The jury awarded Linda Joy, Robert Joy's widow, $750,000 under the D.C. Wrongful Death Act ("WDA"), D.C.Code Ann. §§ 16–2701 to 16–2703 (1989), along with $500,000 for loss of consortium. It also awarded $500,000 to each of Ms. Joy's two children under the WDA, and $100,000 to Mr. Joy's estate under the Survival Act, *id.* § 12–101. Allison challenges this award on the grounds that (1) loss of consortium damages are not available under the WDA, and (2) the district court improperly permitted Ms. Joy to introduce expert testimony by Dr. John Glennie concerning the income and investment profits that Mr. Joy might have earned and realized had he not perished in the crash. We agree with Allison on both points, and accordingly remand Ms. Joy's case for a retrial on damages.

***565 **17** *1. Loss of Consortium*

At common law, there was no cause of action available to a surviving spouse or next of kin when an individual died as a result of a wrongful act. *See Ciarrocchi v. James Kane Co.,* 116 F.Supp. 848, 850 (D.D.C.1953). The underlying theory was that "a personal right of action dies with the person." *Id.* Because there was no common law right of action, any remedy for wrongful death "had to be by statute." *Id.* The first such statute was Lord Campbell's Act, enacted in England in 1846. This Act did not by its terms restrict recovery in wrongful death cases to the pecuniary losses experienced by a decedent's survivors, but it was so interpreted from the outset. *See id.* at 850–51 (discussing *Blake v. Midland R. Co.,* 10 Q.B. 93 (1852)).

The District of Columbia's wrongful death statute was originally enacted in 1885, Act of Feb. 17, 1885, ch. 126, 23 Stat. 307 (1885), and was substantially revised in 1948, Pub.L. No. 676, § 1, 62 Stat. 487 (1948). *See generally* Chauncey B. Chapman, Jr. & Calvin H. Cobb, Jr., *Recent Statutes, Affecting Wrongful Death, the Survival of Actions, and a Survivor's Testimony in the District of Columbia,* 37 Geo.L.J. 418, 422–24 (1949) (discussing the 1948 revisions). As amended, it provides:

> When, by an injury done or happening within the limits of the District, the death of a person is caused by the wrongful act, neglect, or default of a person or corporation, and the act, neglect, or default is such as will, if death does not ensue, entitle the person injured, or if the person injured is married, entitle the spouse, either separately or by joining with the injured person, to maintain an action and recover damages, the person who or corporation that is liable if death does not ensue is liable to an action for damages for the death, notwithstanding the death of the person injured, even though the death is caused under circumstances that constitute a felony.
>
> The damages shall be assessed with reference to the injury resulting from the act, neglect, or default causing the death, to the spouse and the next of kin of the deceased person; and shall include the reasonable expenses of last illness and burial. Where there is a surviving spouse, the jury shall allocate the portion of its verdict payable to the spouse and next of kin, respectively, according to the finding of damage to the spouse and next of kin.... An action may not be maintained pursuant to this chapter if the party injured by the wrongful act, neglect, or default has recovered damages therefor during his life.

D.C.Code Ann. § 16–2701. Allison contends that this statute does not provide for the recovery of damages for loss of consortium, and we agree.

The sole case that is directly on point is *Ciarrocchi v. James Kane Co.,* 116 F.Supp. 848 (D.D.C.1953). In that case, the plaintiff sought to recover damages for loss of consortium for the allegedly wrongful death of her husband. The court made clear that the WDA authorizes recovery only for "pecuniary losses, which include the value of the lost earnings and of the personal service and attention which would have been of material value to the members of the family, *and not the loss of society and companionship.*" *Id.* at 849–50 (emphasis added). It also declined to extend to cases involving deaths the rule of *Hitaffer v. Argonne Co.,* 183 F.2d 811 (D.C.Cir.1950), *overruled on other grounds by Smither & Co. v. Coles,* 242 F.2d 220, 226 (D.C.Cir.1957), which held that a wife, like a husband, has a common law cause of action for loss of consortium due to a negligent injury to her spouse. *See Ciarrocchi,* 116 F.Supp. at 851. The court observed that the *Hitaffer* holding "did not in any way change or affect the action for damages because of death by wrongful act," and that "[t]he death action, being in derogation of the common law, cannot be liberalized by judicial construction, but must be done by statute." *Id.*

Subsequent decisions by the D.C. Court of Appeals and this court, while not addressing the issue directly, are consistent with *Ciarrocchi.* As an initial matter, the D.C. Court of Appeals continues to emphasize that the "wrongful death statute[ ] must be strictly construed" because it stands as a "derogation[ ] from the common law." ***566 **18** *Waldon v. Covington,* 415 A.2d 1070, 1075 n. 17 (D.C.1980). Moreover, in *Doe v. Binker,* 492 A.2d 857 (D.C.1985), the court described the damages recoverable under the WDA in essentially the same terms used in *Ciarrocchi,* omitting any reference to damages for loss of consortium. *See id.* at 863. Specifically, the court stated that a WDA plaintiff was entitled to recover only for (1) "pecuniary loss—calculated as the annual share of decedent's dependents in the decedent's earnings, multiplied by the decedent's work life expectancy, and discounted to present value"; and (2) "the value of the services lost to the family as a result of decedent's death." *Id.* Finally, in *Elliott v. Michael James, Inc.,* 559 F.2d 759 (D.C.Cir.1977), this court noted that "[e]ven though a few states may have permitted recovery for ... loss of decedent's 'society,' we have not so ruled." *Id.* at 767 n. 19.

Perhaps more telling than these decisions is the utter absence of authority to support Ms. Joy's position. Indeed, Ms. Joy is unable to cite any D.C. or Federal court case that sanctions the award of loss of consortium damages under the WDA.

In arguing that damages for loss of consortium should be available, Ms. Joy relies heavily on the legislative history of the Anti–Sex Discriminatory Language Act ("ASDLA"), D.C.Law 1–87, 23 D.C.Reg. 1134 (Aug. 10, 1976) (designated as D.C.Law 1–87 at 23 D.C.Reg. 2544 (Oct. 22, 1976)), a statute that amended the WDA in such a way as to make it sex-neutral. In particular, section 21 of the ASDLA changed language that read:

> ... if the person injured is a married woman, entitle her husband, either separately or by joining with the wife ...

to read instead:

> ... if the person injured is married, entitle the spouse, either separately or by joining with the injured person ...

See id. § 21. Ms. Joy observes that, in recommending passage of this law, the Committee on the Judiciary and Criminal Law of the D.C. Council explained its purpose in the following terms:

> Section 21 amends D.C.Code § 16–2701. D.C.Code § 16–2701, which provides a remedy for wrongful death, makes reference to a husband's right to recover for loss of consortium when his wife is injured by referring to a situation which would "if the person is a married woman, entitle her husband, either separately or by joining with the wife, to maintain an action and recover damages". The language is changed by deleting references to "woman" and "husband" and substituting the word "spouse" where necessary, since women are also entitled to recover for loss of their husband's consortium. See *Hitaffer v. Argonne Co.,* 87 U.S.App.D.C. 57, 183 F.2d 811, 23 A.L.R.2d 1366 (1950).

Council of the District of Columbia Report of May 20, 1976 on Bill No. 1–36, the "Anti–Sex Discriminatory Language Act," at 15. Ms. Joy argues that this passage indicates that "the City Council specifically intended that *both* widows and widowers be able to recover for loss of consortium resulting from the death of their spouses." Brief for Appellee Joy at 3 (emphasis in original). At oral

argument, counsel for Ms. Joy embellished this argument by claiming that even if the D.C. Council were operating under the mistaken impression that husbands had a cause of action for loss of consortium under the pre–1976 WDA, the legislative history evinces an intent to add a cause of action for wives.

This argument is more resourceful than persuasive. It is abundantly clear that the overriding purpose of the ASDLA was not to change the substantive rights provided by D.C. law, but merely to make them equally available to men and women. A solitary fragment of legislative history, particularly one that appears to rest on a flawed understanding of preexisting law, simply does not provide a basis for adopting a contrary interpretation. Moreover, Ms. Joy's apparent alternative argument—that the ASDLA added a cause of action for loss of consortium for wives even if no such cause of action exists for husbands—would twist the purpose of the ASDLA beyond all recognition. Instead of ensuring equality of rights between the sexes, it would become a vehicle for institutionalizing inequality.

Ms. Joy's next argument relies on the decision of the D.C. Superior Court in *Bonan v. Washington Hosp. Ctr.*, 119 Daily Wash.L.Rep. ***567 **19** 1685 (D.C.Sup.Ct.1991). In particular, Ms. Joy points to the following comment:

> *The [plaintiff's] allegation claimed loss of consortium as an element of plaintiff's wrongful death damages, and properly so,* because under District of Columbia law there is no common law right of action for loss of consortium in a death case.... As noted by the United States Court of Appeals for the District of Columbia Circuit ... *the Wrongful Death Act provides the sole right of action for loss of consortium in a death case.*

Id. at 1692 (emphasis added). As support for this statement, the *Bonan* court relied on this court's decision in *Brown v. Curtin & Johnson, Inc.*, 221 F.2d 106, 107 (D.C.Cir.1955). *See Bonan,* 119 Daily Wash.L.Rep. at 1692.

It is true that we have, on occasion, looked to decisions of the Superior Court for "authoritative guidance" on matters of D.C. law. *Norwood v. Marrocco,* 780 F.2d 110, 112 (D.C.Cir.1986). In the present case, however, we decline to assign any weight to *Bonan* in interpreting the WDA. Significantly, the passage in *Bonan* to which Ms. Joy refers is pure dictum. The actual holding of *Bonan* has to do with the extent of damages recoverable in an action under the Survival Act, D.C.Code Ann. § 12–101. *See Bonan,* 119 Daily Wash.L.Rep. at 1692. In addition, to the extent that *Bonan* does suggest that loss of consortium damages are recoverable under the WDA, the court misread the principal precedent on which it relied. *Cf. Norwood,* 780 F.2d at 113 (emphasizing that deference to the Superior Court's interpretation was appropriate because its decision represented "a well-reasoned, carefully researched opinion on local law"). Specifically, the case cited by the court, *Brown v. Curtin & Johnson, Inc.*, does not hold that loss of consortium damages are available in a wrongful death case. It merely holds that there is no common law right of action for loss of consortium in such a case, so that if loss of consortium damages are recoverable at all, it must be under the WDA. *See Brown,* 221 F.2d at 107. Moreover, it is worth noting that *Brown* cites *Ciarrocchi* with approval. *See id.*

Ms. Joy's final line of attack is to note that there has been a decided trend in the law toward allowing recovery for loss of consortium in death cases, even in jurisdictions with wrongful death statutes that limit recovery to purely "pecuniary losses." The Supreme Court noted this trend in *Sea–Land Services, Inc. v. Gaudet,* 414 U.S. 573, 587–88 & n. 21, 94 S.Ct. 806, 816–17 & n. 21, 39 L.Ed.2d 9 (1974), and accordingly held that damages for "loss of society" are recoverable in maritime wrongful death cases. *See id.* While it is possible that the D.C. Court of Appeals may one day embrace this trend,

> [a] federal court in a diversity case is not free to engraft onto ... state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits.

Tidler, 851 F.2d at 424 (quoting *Day & Zimmerman, Inc. v. Challoner,* 423 U.S. 3, 4, 96 S.Ct. 167, 168, 46 L.Ed.2d 3 (1975)). At the current time, we see no "authoritative signal," *see id.* (quoting *Dayton v. Peck, Stow & Wilcox Co.*, 739 F.2d 690, 694 (1st Cir.1984)), indicating that the D.C. Court of Appeals would be in any way receptive to the idea of awarding loss of consortium damages under the WDA. Accordingly, we must conclude that such damages are not available.

2. The Expert Testimony

[20] **[21]** Rule 702 of the Federal Rules of Evidence provides that

> [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed.R.Evid. 702. A district court has broad discretion regarding the admission or exclusion of expert testimony, and reversal of a decision on these matters is appropriate only when that discretion has been abused. *See United States v. Hall,* 969 F.2d 1102, 1109–10 (D.C.Cir.1992). Moreover, admission of such testimony does not constitute an abuse of discretion merely because the factual bases for an expert's opinion are weak. *See Burlington* ***568** ****20** *Northern, Inc. v. Boxberger,* 529 F.2d 284, 286–87 (9th Cir.1975) (indicating that admission of expert testimony constitutes an abuse of discretion only when that testimony qualifies as "rampant speculation"). Notwithstanding the breadth of its discretion, we find that the district court erred by allowing Ms. Joy to introduce Dr. Glennie's testimony.

For sixteen years prior to his death, Mr. Joy and his wife owned and operated the Red Balloon Toy Store. The Joys' 1986 income tax return indicated that Mr. Joy made $14,680 (i.e., one-half of the Joys' combined income of $29,361). At the trial, Dr. Glennie presented four scenarios under which he provided a range of estimates for the income that Mr. Joy might have earned if he had survived the crash. Under "scenario 4," Mr. Joy was assumed to continue to operate the toy store on a full-time basis, resulting in a 1992 annual income of $35,907, and total lifetime income having a present discounted value in 1990 of $570,908. "Scenario 3" assumed that Mr. Joy would devote half of his time to the toy store and the other half to "consulting and wholesaling" activities. The projected result was a 1992 income of $58,742 and a total income with a present discounted value of $893,670. "Scenario 1" and "scenario 2" assumed that Mr. Joy would have moved into consulting and wholesaling on a full-time basis, with the second scenario assuming greater success than the first. Under scenario 1, Mr. Joy was projected to earn $81,578 in 1992 and a total discounted income of $1,210,467; under scenario 2, Mr. Joy was projected to earn $97,536 in 1992 and a total discounted income of $1,428,165.

Dr. Glennie's bases for concluding that Mr. Joy might move into consulting were (1) his conversations with Ms. Joy and (2) the fact that Mr. Joy had once assisted a woman in Texas in starting a toy store, although he received no compensation for his services except perhaps a discount on a car. Dr. Glennie's conclusion that Mr. Joy would move into wholesaling was premised on the fact that Mr. Joy had on occasion received discounts for pooling his inventory purchases with other toy stores.

Dr. Glennie also testified that over Mr. Joy's lifetime, the value of his real estate investments would have increased to $4,823,438, with a present discounted value of $1,218,988. Although Dr. Glennie characterized this estimate in broad terms as encompassing all possible real estate ventures that Mr. Joy might have pursued, the estimate was in fact based on his projections for the increase in value of a single piece of unimproved land in the Virgin Islands that Mr. Joy had purchased for $60,000. Dr. Glennie's analysis proceeded in two steps. First, Dr. Glennie assumed that a house worth $170,000 would be built on the property based on the fact that Mr. Joy had recently acquired a building permit. Second, Dr. Glennie estimated that this new house would appreciate at 11 percent a year for the remainder of Mr. Joy's life. The 11 percent figure was based on Dr. Glennie's estimate of the "net value" of the appreciation, over and above the rate of appreciation of other housing in the area, of a house Mr. Joy had owned and recently sold in the District of Columbia, along with a factor for inflation. Dr. Glennie attributed the greater appreciation of Mr. Joy's Washington house to the improvements he had personally made on it, and assumed that similar improvements would result in a like appreciation of the value of the yet-to-be-built house in the Virgin Islands.

Allison argues that the district court should have excluded Dr. Glennie's testimony because it "was based solely on guesswork, speculation, and conjecture." Brief for Appellant at 45. We agree with this assessment. Indeed, as Allison suggests, this case is similar in many respects to *In re Air Crash Disaster at New Orleans,* 795 F.2d 1230, 1233 (5th Cir.1986), a case that this court cited with

approval in *Coleman v. Parkline Corp.,* 844 F.2d 863, 867 n. 3 (D.C.Cir.1988). In *Air Crash,* a district court allowed the plaintiffs to introduce expert testimony concerning the income that their father would have earned if he had not died in the 1982 crash of a Pan American airplane. *See* 795 F.2d at 1231, 1234–35. The decedent was a "key figure" in the management of a group of marine companies that filed for bankruptcy shortly after his death. *See id.* at 1232. The Fifth Circuit held that the testimony was so fundamentally flawed ***569 **21** that the district court had abused its discretion by failing to exclude it. The court observed, *inter alia,* that (1) the expert's assumption that the decedent would have received an 8 percent salary increase each year for forty years was "unsupported by the record and completely incredible"; (2) the expert's assumption that the decedent would maintain an effective tax rate of 5 percent throughout his career was "[e]ven more incredible"; (3) the expert "failed to consider ... the limits on future expansion" of the decedent's companies, the "cyclical nature" of the marine industry, "or the future personal choices [the decedent] might make to avoid work-related health or stress problems later in his career"; and (4) the expert "inappropriate[ly]" assumed that the decedent would begin saving at a rate of up to 20 percent a year, despite the fact that he had virtually no savings at the time of his death. *See id.* at 1234–35.

As in *Air Crash,* there is little, if any, basis in the record for Dr. Glennie's estimates of Mr. Joy's future earning capacity. Most prominently, the assumption that Mr. Joy would move into consulting and wholesaling appears to be wholly speculative. Indeed, Dr. Glennie simply made up new lines of work for Mr. Joy. With respect to consulting, one lone instance in which Mr. Joy helped a person set up a toy store in Texas and received no monetary compensation can hardly provide a foundation for serious estimates of Mr. Joy's future earnings as a consultant. This is especially so in light of the fact that Dr. Glennie made no effort to contact the Texas store owner to determine how helpful Mr. Joy's assistance had been. Similarly, there is no evidence that Mr. Joy ever received independent compensation for his alleged wholesaling activities.

Ms. Joy resists this conclusion by pointing to her own testimony that she had discussed with her husband the possibility of his expanding into consulting. She adds that the evidence at trial "clearly established that Robert Joy was a talented and creative person...." Brief for Appellee Joy at 11. It should be obvious that these facts, which Allison does not dispute, are not sufficient to lift Dr. Glennie's projections out of the realm of pure conjecture.

Dr. Glennie's estimate of the future value of Mr. Joy's real estate investments is also highly speculative. For example, Dr. Glennie based his projections on a single piece of property in the Virgin Islands without ascertaining the experience of investors in the Virgin Islands housing market. If, however, property values were declining in that market, it is possible that any "net value" that Mr. Joy might have added would be dwarfed by the general decline.

Perhaps recognizing the weakness of her position, Ms. Joy falls back on the claim that Allison was able to cross-examine Dr. Glennie and present its own economic expert to highlight the flaws in Dr. Glennie's analysis, thereby enabling the jury "to weigh the testimony of both experts and reach its own conclusion." *Id.* at 12. She might have added that this case is distinguishable from *Air Crash* in at least one respect: Dr. Glennie presented one estimate of Mr. Joy's lifetime earnings (scenario 4) that could be considered "non-speculative" in addition to the three other estimates for which there was no adequate foundation. Presumably, the existence of a non-speculative estimate would have increased the jury's ability to arrive at an appropriate damages award.

Nevertheless, in view of the patent flaws in Dr. Glennie's testimony, we must resist "the temptation to answer objections to receipt of expert testimony with the shorthand remark that the jury will give it 'the weight it deserves.' " *Air Crash,* 795 F.2d at 1233. Indeed, we have already indicated that we will turn a "sharp eye" to "those instances, hopefully few, where ... the decision to receive expert testimony was simply tossed off to the jury under a 'let it all in' philosophy." *Coleman,* 844 F.2d at 867 n. 3 (quoting *Air Crash,* 795 F.2d at 1234). This appears to be precisely such a case.

In closing, we note that our conclusion with respect to Dr. Glennie's testimony is unaffected by the Supreme Court's recent decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Although the Court in *Daubert* recognized that the Federal Rules ***570 **22** of Evidence embody a "general approach of relaxing traditional barriers to 'opinion' testimony," *see id.* 509 U.S. at ——, 113 S.Ct. at 2790 (quoting *Beech Aircraft*

Corp. v. Rainey, 488 U.S. 153, 169, 109 S.Ct. 439, 450, 102 L.Ed.2d 445 (1988)), it also emphasized that Rule 702 "clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify," *id.,* 509 U.S. at ——, 113 S.Ct. at 2795. In particular, the Court observed that Rule 702 permits an expert to testify only when "scientific, technical, or other specialized *knowledge* will assist the trier of fact," *id.* (quoting Fed.R.Evid. 702) (some emphasis deleted), and that "the word 'knowledge' connotes more than subjective belief or unsupported speculation." *Id.* As discussed above, Dr. Glennie's testimony concerning Mr. Joy's future career path fails to meet this standard.

III. CONCLUSION

We affirm the judgments that (1) Allison is liable to plaintiffs, and (2) Mr. Turley is not liable to Allison for contribution because he was not negligent in piloting the helicopter. We reverse and remand, however, the damages award to Ms. Joy. Finally, we will certify to the D.C. Court of Appeals the question whether the District is rendered immune from liability under the public duty doctrine when its officers interfere with civilian rescue efforts, thereby worsening the condition of accident victims.

So ordered.

All Citations

999 F.2d 549, 303 U.S.App.D.C. 1, 37 Fed. R. Evid. Serv. 480, Prod.Liab.Rep. (CCH) P 13,594

Footnotes

FN[9] This case provides a telling example of why public officials are held to have a duty to the public at large and not to specific individuals. The officers did not only owe a duty to the passengers stranded in the helicopter, they also had a duty to protect the civilians who wanted to enter the water from harming themselves by attempting a rescue. The officers' decision not to allow the civilians to attempt a rescue, it must be emphasized, was a discretionary act.

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771 F.Supp. 427
United States District Court,
District of Columbia.

Linda WHEELER TARPEH–DOE, et al., Plaintiffs,
v.
UNITED STATES of America, et al., Defendants.

Civ. A. No. 88–0270–LFO.
|
July 24, 1991.

Mother and legal guardian of child who was blind and suffered from severe neurological damage as result of illness he contracted shortly after his birth while mother was employed overseas by United States agency filed suit under Federal Tort Claims Act, claiming that State Department violated its duty to provide child, as dependent of its employee, with appropriate medical care. The District Court, Oberdorfer, J., held that: (1) discretionary function exception to Federal Tort Claims Act protected defendants from claim of negligent retention of physician overseas, but did not apply to their failure to supervise that physician more closely; (2) under District of Columbia law, Department had voluntarily assumed duty to provide overseas employees with level of medical care higher than that available from local facilities and negligently supervised physician whose negligent acts and omissions proximately caused child's injuries, and mother was not contributorily negligent by failing to seek physician's services at earlier time; and (3) in addition to sum to be determined for future maintenance, mother and legal guardian were entitled to cost of maintenance incurred, unreimbursed expenses incurred on behalf of child by mother, and present value of child's prospective lost earnings.

Order accordingly.

Attorneys and Law Firms

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Randall Hunt Norton, John Jude O'Donnell, Thompson McGrail O'Donnell & Harding, Washington, D.C., for Wheeler Tarpeh–Doe.

MEMORANDUM

OBERDORFER, District Judge.

Plaintiffs Linda Wheeler Tarpeh–Doe and Marilyn Wheeler seek relief for injuries ***430** suffered by Nyenpan Tarpeh–Doe pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) & 2671 *et seq.* [1] Tarpeh–Doe is the mother of Nyenpan, an eight year old boy who is blind and suffers from severe neurological damage. Nyenpan is a long term patient and resident at the Wheat Ridge Regional Center in Wheat Ridge, Colorado, where he receives constant and complete care. Marilyn Wheeler, a Colorado resident, is Nyenpan's grandmother and legal guardian.

Linda Wheeler Tarpeh–Doe is employed by the United States Agency for International Development ("AID"). The State Department Office of Medical Services in Washington, D.C. has responsibility for the provision of health care worldwide to employees of the State Department, AID, and other government agencies. With respect to overall medical policy, the Uniform State/AID/USIA Regulations [2] provide that:

> The general medical policy of the Department of State is to assist all American employees and their dependents in obtaining the best possible medical care. This includes personnel of the Department and all agencies participating in the medical program by agreement. *This policy extends to the most remote parts of the world, so that no employee need hesitate to accept an assignment to a post where health conditions are hazardous, medical service poor, or transportation facilities limited. Principal and administrative officers, and their designees, and principal representatives of participating agencies are cautioned to be alert to any medical and health problems of employees and their dependents and to take appropriate action promptly.*
> 3 Foreign Affairs Manual ("FAM") § 681.2.; Defendants' Exhibit ("Defs. ex.") 1 (emphasis supplied). The State Department, through its Office of Medical Services, provides and is responsible for overseeing

Regional Medical Officers in areas of the world in which adequate local care is not available. Deposition of Jerome M. Korcak ("Korcak dep.") at 10. Regional Medical Officers are physicians responsible for the provision of "medical care, counsel and examinations for American employees and their dependents within the framework of these regulations and the capability of the physician, considering the facilities and time available." § 682.2–2(a)(1).

In 1981, AID assigned Tarpeh–Doe to a post in Monrovia, Liberia. At that time, Dr. Theodore E. Lefton was the Regional Medical Officer assigned to the embassy in Monrovia. Dr. Lefton had been stationed in Monrovia for four years (two two-year terms) and was scheduled to remain for an indefinite period. *See* Deposition of Theodore E. Lefton ("Lefton dep.") at 150. However, in March, 1982, a routine State Department inspection at the Monrovian embassy revealed widespread dissatisfaction with Dr. Lefton's attitude and lack of availability. *See* Depositions of Herbert W. Schulz ("Schulz dep.") at 30 & 58 and John J. Crowley ("Crowley dep.") at 50, 56, & 75. Following the inspection, William Swing, then U.S. Ambassador in Liberia, and Jerome M. Korcak, then Medical Director of the Office of Medical Services at the State Department in Washington, D.C., decided to curtail Dr. Lefton's assignment to Monrovia because of his poor attitude and availability. Swing preferred curtailing Dr. Lefton's assignment as early as possible. However, Dr. Korcak was reluctant ***431** to support that preference and was not overly concerned about Dr. Lefton's provision, or more accurately, lack of provision of medical services. On May 17, 1982, following discussions in late April and early May, 1982 (including discussions with Dr. Lefton), Korcak and Swing came to an agreement to permit Dr. Lefton to remain at post until November 1, 1982. *See* Defs. exs. 2–4; *see also infra,* at 433–34. There is no evidence that Dr. Korcak gave any special instructions to Dr. Lefton or placed his service under heightened scrutiny, despite the deficiencies in his services which prompted the decision to terminate his assignment. Nor is there any evidence of any special effort by Dr. Korcak to expedite selection and assignment of either a temporary or permanent replacement for Dr. Lefton.

On May 18, 1982, while stationed with AID in Monrovia, Linda Wheeler Tarpeh–Doe delivered Nyenpan. Within three weeks of birth, the baby contracted a bacterial infection that developed into what was ultimately diagnosed as spinal meningitis. On June 5, 1982, Tarpeh–Doe brought the baby to the health unit at the United States embassy in Monrovia. On Saturday, June 5, 1982, Nyenpan was examined at the embassy health clinic by Dr. Lefton, who forthwith referred the mother and child to an American pediatrician, Dr. David E. Van Reken. Dr. Van Reken was employed by an American mission in Monrovia not affiliated with the embassy. The baby remained under Dr. Van Reken's care at local hospitals for the next twelve days. On June 17, 1982, Nyenpan, his parents, and an embassy nurse were evacuated to the United States to enable the family to seek additional medical treatment for Nyenpan. By that time, however, he was beyond hope of recovery.

Plaintiffs claim that the Department of State in Washington, D.C. violated its duty to provide Nyenpan, a dependent of its employee, with the "best possible medical care" and "to be alert to any medical and health problems of ... dependents and to take appropriate action promptly" as required by the Uniform State/AID/USIA Regulations. 3 FAM § 681.2. Specifically, plaintiffs allege that the following acts or omissions of defendants constituted negligence. First, plaintiffs assert that the State Department failed to inform Tarpeh–Doe that her health benefits included the option to travel to Europe or the United States to deliver her child. Second, plaintiffs claim that the State Department and its Office of Medical Services acting concurrently with the Ambassador negligently retained Dr. Lefton even after it learned of the widespread dissatisfaction with the doctor's attitude and availability. In addition, plaintiffs contend that the Office of Medical Services in Washington negligently failed to supervise Dr. Lefton adequately, especially once it was on notice of complaints about his attitude and availability and that his term had been curtailed at the time he treated Nyenpan. Third, plaintiffs allege that the State Department negligently failed to deliver to Monrovia a message from Dr. Schroeter, a neonatologist in Colorado who had been contacted by Marilyn Wheeler in preparation for evacuation, that he felt it was imperative that he speak with the treating physician in Liberia. Finally, plaintiffs claim that the Office of Medical Services in Washington negligently conducted the wrong test on a sample of spinal fluid sent to it from Monrovia for laboratory tests. Plaintiffs contend that defendants' negligence proximately caused Nyenpan's injuries. At a trial held on November 26—December 4, 1990, the parties produced through

testimony and designated deposition transcripts the factual evidence summarized below.

I.

A. The Inspection

1.

The Inspector General's office of the State Department routinely investigates embassies every three to five years. In February and March, 1982, a team of five or six inspectors from that office visited Monrovia, Liberia as part of an inspection tour that included visits to four embassies in West Africa. The inspection of the Liberian embassy took place from February 22 ***432** to March 5. *See* Plaintiffs exhibit ("Pls. ex.") 33. With respect to health services, the inspectors wrote in their final report:

> The medical facility is totally inadequate. It is crowded, dingy, and anti-therapeutic, among other shortcomings....
>
> The Medical Unit must also improve its image and responsiveness. The inspectors received numerous complaints about it. Health units should make a positive contribution to morale and welfare, and the unit in Monrovia does the opposite.
>
> . . . . .
>
> Complaints about the quality of official US health services have been so widespread that it may be the single most significant non-environmental negative factor affecting morale at this post.

Id., Inspection Memoranda 6.2f & 1.2 at 5. When the inspectors returned to Washington they met to report the results of the inspection with administrators of the Office of Medical Services, including Dr. Jerome Korcak, then Medical Director. In the debriefing, the inspectors explained to Dr. Korcak and others that employees on post had complained in particular about Dr. Lefton's attitude and availability. On April 6, 1982, soon after returning from the inspection tour, Ambassador John J. Crowley, the leader of the inspection team, visited Dr. John Beahler, then Deputy Medical Director, because he felt on a personal and professional basis that he should inform Beahler of the situation. Crowley dep. at 71. Crowley told Beahler that "there is 'widespread' discontent with Dr. Lefton's performance as RMO in Monrovia." *See Id.* at 71; Korcak's Memorandum to the File about Complaints regarding Dr. Lefton's Performance, defs. ex. 3 at 1. On April 27, members of the inspection team met with Dr. Korcak. The team informed Dr. Korcak that " 'a majority of personnel' in responses on questionnaires and in spontaneous oral complaints indicated their dissatisfaction with Dr. Lefton's attitude and availability." *Id.* at 3. They told him that "the magnitude and intensity of the complaints was unprecedented in their experience." *Id.*

Ambassador Crowley believed that "there was a remarkable level of discontent with the medical officer at this post" compared with other inspections. Crowley dep. at 56 & 63. Crowley (who emphasized that the team was not qualified to evaluate Dr. Lefton's medical competence from a technical standpoint) explained further that the general trend of complaints about Dr. Lefton were his "insensitivity, aloofness, lack of sympathy, lack of ... bedside manner, and also frequent unavailability." *Id.* at 49. Herbert W. Schultz, a member of the inspection team, also stated that the intensity and magnitude of the complaints about Dr. Lefton's attitude and availability were unprecedented. Schultz dep. at 58. Schultz believed that the problem was that Dr. Lefton did not care and was not available outside the hours of 8:00 a.m. to 5:00 p.m. *Id.* at 42.

Dr. Lefton was unavailable at times because he travelled out of Liberia for long vacation weekends. He was able to obtain free travel on Pan American Airlines because his wife worked as a flight attendant for Pan Am. Dr. Korcak was aware of these trips because following these weekends, on Monday mornings, Dr. Lefton would sometimes drop by Dr. Korcak's office in Washington. Korcak dep. at 153. He did not approve of them. *Id.* at 154.

Moreover, Dr. Korcak and others in the Office of Medical Services were informed by the inspection team and embassy officials of several incidents illustrative of Dr. Lefton's poor attitude and lack of availability that reveal an even more serious adverse effect on medical services. For example, in February or March of 1982, a U.S. Marine was injured in a car accident thirty to forty miles outside of Monrovia. Dr. Lefton was asked to go to the scene of the accident to administer medical care. He

refused. Ambassador Swing felt that Dr. Lefton's refusal was unreasonable and ordered Lefton to go to the scene of the accident. *See* Crowley dep. at 49–50; Swing dep. at 17. In addition, Dr. Lefton refused a request to make a house call to administer care to a sick child on at least one occasion. *See* Dustin dep. at 37. In ***433** another incident, Dr. Lefton failed to accompany an American who suffered from burns to the airport to be evacuated. Ambassador Swing felt this was inappropriate and went to the airport himself to show support. Swing dep. at 18–19. In general, Dr. Lefton was unwilling to respond to urgent situations. Swing dep. at 20.

2.

Ambassador Swing was aware of problems with Dr. Lefton even before the inspectors' visit. Either he or the Office of Medical Services had proposed curtailing Dr. Lefton's assignment in Monrovia earlier than March, 1982. (Testimony of Perkins). Following the inspection, Ambassador Swing, Dr. Korcak, and Dr. Lefton entered into a series of discussions that led towards the termination of Dr. Lefton's assignment in Monrovia. On April 6, following Beahler's meeting at the Office of Medical Services in Washington with Crowley in which Crowley reported that the complaints about Dr. Lefton were unprecedented, Beahler called Dr. Lefton, who was also in Washington at the time for training. Beahler related to Dr. Lefton the complaints Crowley had reported to him. Beahler suggested that Dr. Lefton discuss the situation with Ambassador Swing when he returned to Liberia to try to resolve the problem. He did not instruct Dr. Lefton to make himself more available to his patients in Liberia nor did he establish reporting requirements to assure that the Office of Medical would be apprised of any serious problem there. *See* Memorandum to the File from Jerome M. Korcak on the subject of "Complaints regarding the Performance of Theodore E. Lefton, M.D., Regional Medical Officer, Monrovia" recording Korcak's summary of meetings and telephone calls from April 6, 1982 to April 28, 1982, defs. ex. 3. On April 12, Dr. Lefton sent a letter to Swing acknowledging some of the problems and proposing certain remedies, including a reduction in the time patients were required to wait to be seen at the health unit and improved communications procedures to insure that Dr. Lefton received messages and that patients could locate him. Pls. ex. 51.

On April 16, Korcak in Washington received a telephone call from Swing and Dr. Lefton in Monrovia. *See* Memorandum to the File from Korcak, defs. ex. 3 at 1–2. First, Korcak was advised by Swing that he and Dr. Lefton had worked out a "gentleman's agreement" that Lefton would be reassigned rather than continuing his assignment in Monrovia. Then Korcak informed Dr. Lefton (who took the phone) that he could be reassigned to Sanaa or Islamabad. Dr. Lefton requested leave without pay for a year. Korcak responded that he could not authorize leave without pay if Lefton had no other reason for it than that he did not want to work in the posts offered. Dr. Lefton said he would have to think about it. *See id.*

On April 26, Korcak met in Washington with Dr. Lefton (who accompanied an evacuee to the United States). At that time, Korcak was told by Dr. Lefton of his intention to resign because Pan Am did not fly to either of the available posts, so that his wife would not be able visit him if he accepted the assignments offered. *Id.* at 2. Korcak advised Dr. Lefton that if he (Lefton) could persuade Swing to permit him to stay in Monrovia until June, 1983, more opportunities for reassignment would be available. *Id.* Dr. Lefton then spoke in Washington to a Mr. Mandersheim.[3] Mr. Mandersheim called Ambassador Swing to urge a compromise. *Id.* On April 27, Korcak received a call from Swing who told him he had spoken with Mr. Mandersheim and that he understood that Dr. Lefton wanted to revise the "gentleman's agreement." Korcak told Swing that the assurances he had given Swing previously that the Office of Medical Services would replace Dr. Lefton promptly had been contingent on Dr. Lefton's acceptance of another assignment. Since Dr. Lefton wanted to resign instead, Korcak did not believe a doctor could be located to replace Dr. Lefton in Monrovia until the following spring, a year away. Ambassador Swing told Korcak he would reconsider his decision. ***434** *Id.* at 2–3. On the afternoon of April 27, Korcak met with members of the investigation team who informed him of the widespread complaints about Dr. Lefton. *Id.* at 3. On April 28, Korcak phoned Ambassador Swing and told him that the inspectors' briefing had given him "a greater appreciation for the magnitude of the difficulties associated with Dr. Lefton's tenure at post." *Id.* Korcak suggested that Swing make Dr. Lefton's continuing assignment contingent on resolution of the difficulties. He assured Swing, however, that if the circumstances continued, the Office of Medical Services

would proceed "with all deliberate speed" to find a replacement. Swing responded that this proposal was "the most attractive available to him." *Id.* However, on April 30, Ambassador Swing called Korcak again. He stated that, following another meeting with Dr. Lefton, he had "reached the conclusion that Dr. Lefton's reputation at post is sufficiently tarnished that an extension of his tenure beyond September, 1982 would be neither in the interest of the post nor of Dr. Lefton." Defs. ex. 2. He informed Korcak that he would permit Dr. Lefton to stay until September 1982 because he did not want the post to be without a physician and "because Dr. Lefton [had] requested this time so he could have a visit from his daughter." *Id.* Swing further informed Korcak that he thought the post could tolerate being without a physician for two or three months thereafter.

In further telephone conversations, Swing and Korcak reached a compromise permitting Dr. Lefton to remain in Monrovia until November 1, 1982. Swing confirmed this agreement in writing in a letter to Korcak dated May 17, 1982. Defs. ex. 4. Swing explained that the rationale for this decision was "(a) to give M/MED a reasonable period in which to find a replacement for Dr. Lefton; (b) to meet some of Dr. Lefton's concerns including a visit this summer by one of his children to Liberia; and (c) to provide Monrovia and the other posts in his area of jurisdiction adequate coverage until a replacement can be located and placed." *Id.* In addition, Swing expressed concern in light of Dr. Lefton's forthcoming departure about additional responsibilities that had been given to Dr. Lefton to provide emergency coverage to Dakar and areas around it when another doctor would be on leave in August. *Id.* On June 15, 1982, Korcak wrote a letter to Dr. Lefton in which he again raised the issue of reassignment. *See* Defs. ex. 5 (partially illegible copy). On June 16, Korcak wrote to Ambassador Swing and informed him of the letter to Dr. Lefton. He added, in response to Swing's concern about the decision to add coverage of Dakar to Dr. Lefton's responsibilities, that he did not believe that Dr. Lefton's planned departure constituted reason to reconsider that decision. Defs. ex. 6; Pls. ex. 53 (partially illegible copy). Korcak further noted that he was under a recent "modified hiring freeze," raising additional concerns about approval of a replacement. *Id.*

Korcak made several attempts to reassign Dr. Lefton rather than accept his resignation. At no time did Dr. Korcak instruct Dr. Lefton to make himself more available to his patients, to attend more closely to his patients' medical needs, or to immediately report any serious medical situation in Monrovia to the Office of Medical Services. This was true despite the fact that Korcak had "learned over the years that [problems with medical officers] rarely involved medical competence ... but when we did have problems, it involved physicians' attitudes, what was expected of them." Korcak dep. at 157. Korcak's uncritical response to the inspectors' reports of complaints about Dr. Lefton and to Ambassador Swing's dissatisfaction with Lefton's performance is possibly explained by Korcak's otherwise high impression of Dr. Lefton. Throughout the period of discussions, he viewed Dr. Lefton as "very positive and upbeat." *Id.* at 160. When Korcak first received complaints, he was not overly concerned because he knew Dr. Lefton as a "bright young physician who was astute and competent." *Id.* at 170–71. He had "admired his acumen" in annual medical meetings. *Id.* at 171. Korcak thought many of the complaints at post about Dr. Lefton following Dr. Lefton's difficult divorce ***435** and remarriage came from persons at post who were sympathetic to Lefton's first wife. *Id.* at 161–62. As a result of considerations such as these, it did not occur to Korcak or others in the Office of Medical Services to reprimand Dr. Lefton or to establish a plan for additional medical advice, support, and supervision in the event of a serious medical situation that might (and was more likely to) occur given Dr. Lefton's poor attitude and lack of availability.

B. The Injury

In September, 1980, Linda Wheeler Tarpeh–Doe (then Linda Wheeler) became a Certified Public Accountant. Her parents were also CPAs. She was then 23 years old. She applied for and was awarded a position as an accountant with AID. AID assigned her, for her first overseas station, to Monrovia, Liberia. On December 29, 1980, in preparation for her assignment, she began approximately five months of training in Washington, D.C. *See* Pls. ex. 28.

On May 26, 1980, Linda Wheeler left the United States. She arrived in Monrovia on May 27. The next day, she began her first day of work at the Comptroller's Officer of the AID mission there. *See* Pls. ex. 26A. In July, 1981, she developed gynecological problems. On the morning of July 7, 1981, she visited the health unit at the embassy.

Either Dr. Lefton or Billie Clement, the State Department nurse stationed at the embassy health unit, told her that the embassy health unit did not treat gynecological conditions and referred her for treatment to Dr. Johnson, a local obstetrician and gynecologist. (Testimony of Tarpeh–Doe).[4] Clement called Dr. Johnson and arranged an appointment for Wheeler later that morning. Linda Wheeler visited Dr. Johnson on July 7 and 8, and again on August 1 and 20, and on September 2, 1981. *See* Pls. ex. 26A. On September 9, 1981, she visited Dr. Kassas, another local doctor, to obtain a pregnancy test. The results were positive.

She had been referred to Dr. Kassas by Nyenpan (Ben) Tarpeh–Doe, an employee of the Liberian Ministry of Justice, whom she had met on her first day in Monrovia. She visited with Ben almost daily thereafter for several months. *See* Tarpeh–Doe's daily calendar, Pls. ex. 26A. On July 12, Ben had asked her to marry him. *Id.* On September 16 and 21, Ben and Linda visited the embassy health unit so that Ben could receive a physical examination and other tests required for their marriage. On January 16, 1982, Linda Wheeler and Ben Tarpeh–Doe were married. During one of the September visits to the embassy health clinic, Linda told Dr. Lefton that she was pregnant. Dr. Lefton normally referred patients to other doctors for prenatal care but would also see a pregnant woman periodically to assure himself that things were well. Lefton dep. at 136–38. However, he scheduled no such subsequent visit for Tarpeh–Doe and did not see her again until June 4, 1982, after she had delivered her baby. *See* Embassy health records, Defs. ex. 23.

Tarpeh–Doe visited Dr. Johnson for prenatal care throughout her pregnancy, which was easy and without complications. On May 18, 1982, Tarpeh–Doe delivered Nyenpan. Her delivery, attended by Dr. Johnson at Cooper's Clinic (a local health facility unassociated with the embassy), was also complication-free. On May 21, she was released from the clinic to return to her home in Monrovia. She visited Dr. Johnson on May 23 when the baby's umbilical cord dropped and again on May 24 because the baby had thrush. On May 25, Dr. Johnson examined Tarpeh–Doe and found her to be well. On May 29, Dr. Johnson examined Nyenpan and found him to be well also. On the morning of Wednesday, June 2, Dr. Johnson again examined both mother and child. He found no sign of problems. That evening, however, according to Tarpeh–Doe's calendar notation, she became "sick with malaria." *See* Pls. ex. 26B.

***436** The next day, Thursday, June 3, she still did not feel well. She was visited by Kate Jones Petrone. Petrone was a friend who lived in the same building. She was also employed by AID, and had begun her first assignment overseas in May, 1981, at the same time as Tarpeh–Doe. That evening, Petrone called the embassy health unit to ask that someone be sent to examine Tarpeh–Doe. In response, a Dr. Feir came to the Tarpeh–Does' apartment at approximately 10:00 p.m. He was the State Department psychiatrist assigned to the Liberian embassy (but did not live at the embassy). Nurse Billie Clement also came because Dr. Feir wanted a woman to be present. Dr. Lefton (who lived at the embassy) was unavailable; Clement could not recall why. (Testimony of Clement).

Clement found Linda in bed and Ben holding the child. Petrone recalled that Clement looked at the baby and said that she didn't think the baby looked right. Petrone Dep. at 10–11. However, Clement did not recall examining the child. (Testimony of Clement). Dr. Feir gave Linda a limited examination without being able to fully examine, diagnose and treat her. He suggested that she try to find Dr. Johnson that night and come to see Dr. Lefton at the embassy health unit the next morning. Ben located Dr. Johnson, who visited the apartment at about 1:00 a.m. on Friday, June 4. Dr. Johnson examined Linda and treated her for malaria, staph infection, and mastitis. He did not examine the baby, who was sleeping.

Later that Friday morning, Tarpeh–Doe visited the embassy health unit. There is a conflict of testimony as to whether she brought the baby with her.[5] Dr. Lefton treated her with ampicillin for mastitis. *See* Defs. ex. 23. Tarpeh–Doe had not been breast feeding while she was ill. Nevertheless, Dr. Lefton advised her to resume breast feeding. *Id.* Dr. Lefton was not aware at that time that Feir and Clement had visited Tarpeh–Doe the night before but had not examined the baby. Lefton dep. at 64. There is no indication that he inquired into the condition of the baby or offered to see him.

Later that Friday, the baby was lethargic and was not feeding. At 5:00 p.m. that Friday evening, his parents took him to an emergency facility at Cooper's Clinic, where Dr. Tirad, a local physician, treated him with ampicillin for skin rash and fever. The baby did not improve, however.

At 8:00 p.m. the same evening, his parents took him to the emergency room at the Catholic Hospital in Monrovia. There two local doctors examined him and treated him with an electrolyte solution for dehydration. He was not admitted at either facility and returned home with his parents. He slept through the night, which he had never done before.

At 9:00 a.m. on Saturday morning, June 5, Tarpeh–Doe woke Nyenpan to try to feed him. The baby "became rigid" in her arms for one to two seconds, and the Tarpeh–Does left to take him to see Dr. Johnson in his office. On their way to Dr. Johnson's office, they passed Clement. Clement expressed surprise that Tarpeh–Doe was not home in bed due to her own illness. When she heard that the baby was ill and that the parents were proceeding on their way to Dr. Johnson's office, Clement advised them to accompany her to the embassy health unit instead. (Testimony of Tarpeh–Doe). The four of them arrived at the embassy health unit at about 10:30 a.m. On the way, Nyenpan suffered a second period of rigidity, or seizure. Once there, Clement went to find Dr. Lefton. Within five minutes, Dr. Lefton arrived. He examined the baby, who experienced a third seizure at the clinic. Dr. Lefton administered gentamicin and procaine penicillin. He informed the parents that the child could be evacuated on a Pan Am flight scheduled to leave that evening at 11:00 p.m. Then, Dr. Lefton sent Mary Awantang, the State Department lab technician assigned to the Liberian embassy health unit, to find Dr. Van Reken, a pediatrician, and bring him to the clinic to examine the baby. Dr. Lefton had never referred a ***437** patient to Dr. Van Reken previously. Lefton Dep. at 58. A pediatrician to whom he had referred patients in the past was out of town on June 5.

When Awantang located Dr. Van Reken, he was lecturing to medical students. He left the lecture and came to the embassy, arriving at approximately 11:30 a.m. Dr. Van Reken, Dr. Lefton and the other medical personnel took Nyenpan into an examining room. After examining the baby, the doctors informed the Tarpeh–Does that their son had spinal meningitis. Dr. Van Reken said that he could "make the baby well." The Tarpeh–Does expressed their preference for evacuation to the United States. In an attempt to dissuade them, Dr. Van Reken told them of an Indian family whose child had contracted spinal meningitis. That family had flown to India for treatment. However, upon returning, they informed Van Reken of the treatment given there. It was the same treatment Van Reken would have provided in Liberia, had they stayed. The Tarpeh–Does still preferred evacuation. There is no indication that Drs. Lefton and Van Reken determined that evacuation would have been more risky than treatment in Monrovia. Nonetheless, Dr. Lefton decided not to permit the parents to evacuate. Instead, he transferred the care of the child to Dr. Van Reken. Dr. Van Reken was the head of the pediatric ward at John F. Kennedy (JFK) Hospital in Monrovia and told the Tarpeh–Does that he wanted to admit the child there. Dr. Lefton had never sent a patient to JFK and was not familiar with its facilities or conditions. Lefton dep at 59. However, Ben Tarpeh–Doe, in his reporting work for a newspaper issued by the Liberian Ministry of Justice, had researched conditions at various Monrovian hospitals. The Tarpeh–Does informed the doctors that Ben had found that the conditions at JFK were appalling. The Tarpeh–Does vehemently opposed placement of their child in JFK, noting to the doctors that the hospital was known popularly as "Just For Killing."

Over the parents' objections, and with the knowledge and concurrence of Dr. Lefton, the baby was taken to JFK by the parents, accompanied by Dr. Van Reken and Clement. They arrived at about 12:00 noon. The hospital did not place him in a room until 1:30 p.m. During that hour and a half, the parents continued to express to Dr. Van Reken their objections to admitting their child to JFK. Once the baby was given a room, Dr. Van Reken left the hospital to deliver a speech. Clement also left after the baby was admitted to a room. On Dr. Van Reken's instructions, Ben Tarpeh–Doe went to a local pharmacy to purchase certain prescriptions not available at the hospital. At 4:00 p.m., Dr. Van Reken returned and left instructions for administration of care during the night, such as when to administer various medications. Tarpeh–Doe stayed through the night accompanied by several friends, including Petrone, Charlene Fergusen, a nurse, and Welma Witten, a doctor. Fergusen and Dr. Witten's spouses were on contract with or employed by AID. The conditions at JFK were unsanitary. There were small cockroaches inside the baby's incubator that came out in large numbers when the heating unit in the incubator was turned on. There were also large cockroaches in the room and rats present both inside and outside of the room. (Testimony of Tarpeh–Doe); Petrone dep. at 14.

During the night of June 5–6, neither Dr. Van Reken nor Dr. Lefton visited the baby at JFK. Moreover, no hospital doctor could be located at crucial times during the night. Medical records from JFK indicate that the infant was treated by a Dr. Waiwaiku at 7:30 p.m., 9:00 p.m., and 6:30 a.m. Pls. ex. 2. Dr. Lefton did not know Dr. Waiwaiku, nor whether he was a resident or an intern. Lefton dep. at 161. When the times came during the night to administer medicine as specified earlier by Dr. Van Reken, Tarpeh–Doe and her friends could not find any doctor in the hospital nor any other person authorized to administer the medicines. During the night, Nyenpan developed a fever and suffered more seizures. Dr. Witten felt that he should be on oxygen. Tarpeh–Doe and her friends asked the hospital employees for oxygen but they were informed that the hospital ***438** had only one unit and that that unit was in use. They called the embassy to ask to use an oxygen unit. Someone there informed them that the embassy had no oxygen unit. When Tarpeh–Doe and her friends were unable to locate any other doctor or a nurse during the night, Dr. Witten, concerned about a particularly bad seizure, administered valium.

Late the next morning, Sunday, June 6, Dr. Van Reken arrived at JFK. Tarpeh–Doe and her friends told Dr. Van Reken that they wanted Nyenpan transferred to another hospital. Dr. Van Reken at first refused. However, at the insistence of Tarpeh–Doe and her friends, especially Dr. Witten and Fergusen, he ultimately relented. But he asked the Tarpeh–Does not to put anything in writing about the conditions at JFK. He also requested that they leave at the hospital the prescriptions they had purchased the previous evening and not used. Early that afternoon, Nyenpan was transferred to the ELWA hospital.

The conditions at ELWA were better than those at JFK. The facilities were cleaner and the nurses were more attentive. The hospital had access to more medications. A private nurse was hired to attend the baby every night from 10:00 p.m. to 6:00 a.m. While Nyenpan was a patient at ELWA, Dr. Van Reken visited him daily. In addition, Ben Tarpeh–Doe was acquainted with a doctor at ELWA who was able to help them at times when they could not find other doctors. Dr. Lefton finally visited Tarpeh–Doe and Nyenpan at ELWA, but only once. He examined the mother but not the baby. Ambassador Swing also visited them.

Nyenpan did not improve at ELWA. He continued to suffer periodically from seizures. His temperature did not remain constant. The doctors altered the dosage and mix of medications several times. The Tarpeh–Does discussed Nyenpan's condition with Dr. Van Reken, only to be informed that he did not know what was wrong or what was causing the meningitis. The Tarpeh–Does continually asserted their preference for evacuation, and offered to pay the cost of evacuation if necessary. After a few days at ELWA, Dr. Van Reken agreed that the child should be evacuated and offered to accompany the child if necessary. Nonetheless, the evacuation was not authorized until June 17. On June 17, Nyenpan, the Tarpeh–Does and Clement flew from Liberia to Colorado, by way of Dakar and New York. On arrival in Colorado, Nyenpan was admitted into the University of Colorado hospital.

Nyenpan was treated at the University of Colorado hospital for approximately two weeks. Doctors informed the Tarpeh–Does that their child had suffered severe brain damage. *See* Hospital Records, Pls. ex. 5. Towards the end of Nyenpan's stay at the University of Colorado hospital, the doctors asked the Tarpeh–Does whether they wanted the hospital to remove life support systems. The doctors believed that the child would die within twenty four hours without life support. Nyenpan's parents agreed to the removal of life support, and feeding and other tubes were removed. Defying the doctors' predictions, Nyenpan survived. (Testimony of Tarpeh–Doe); *see also* Pls. ex. 5 (e.g., entry for June 30 stating "do not resuscitate"). Three or four days later, on July 3, 1982, the Tarpeh–Does took Nyenpan to Marilyn Wheeler's home.

On July 25, 1982, AID assigned Tarpeh–Doe to work in its Washington, D.C. office. Nyenpan lived with her in Washington. He received daily therapy at the Hospital for Sick Children and was admitted at times to Children's Hospital. He continued to suffer from seizures. Dr. Adrian Smith, a neurologist who treated Nyenpan at Children's Hospital during that time, described his condition as spastic and non-communicative. She also stated that he was incapable of meaningful motor movements and unable to feed himself. She believed that he was blind but that there was some brain stem motion with respect to hearing. She testified that the damage was permanent, and that she was doubtful that there would be any improvement. (Testimony of Smith).

After Tarpeh–Doe had worked in Washington for more than a year, AID informed her that she would have to take another ***439** overseas assignment. To work overseas, an employee and dependents must be granted medical clearance, i.e. examined and found medically qualified, for a post. *See* Pls. exs. 35 & 59, 3 FAM 681.6(i). Nyenpan was not granted medical clearance. The family made arrangements for him to be admitted in December, 1983, to the Wheat Ridge Regional Center in Colorado. To provide assistance for Nyenpan, the State of Colorado required that he have a resident guardian. Just before he was admitted to Wheat Ridge, Marilyn Wheeler became his legal guardian. (Testimony of Marilyn Wheeler). On April 1, 1984, Linda Wheeler Tarpeh–Doe accepted an assignment with AID in Jamaica.

At Wheat Ridge, where Nyenpan remains, and will remain for the foreseeable future, he receives extensive care. He has no independent skills. *See* Deposition of Joseph William Thompson at 22. He has no functional control over his arms and legs, though he can move them. *Id.* at 22–23. He is blind. He continues to have ten to twelve seizures a year. *Id.* at 21. Care providers feed and dress him. *Id.* at 22. They also turn him every hour or two to prevent skin breakdown. *Id.* at 18. In addition, they sometimes give him baths or massages, read him stories, or take him outside in a wheelchair. Deposition of Deborah Jean Azuero at 15. He does not communicate in any meaningful way but responds positively to the care providers who are familiar to him. Thompson dep. at 23.

C. The Treatment

Plaintiffs allege that Drs. Lefton and Van Reken misdiagnosed and mistreated Nyenpan's illness in Monrovia. Specifically, they claim that Dr. Lefton's administration of antibiotics at the embassy health clinic on June 5, prior to any testing, masked accurate results in subsequent tests. They also argue that Nyenpan could have been evacuated immediately and that he should have been evacuated sooner than June 17. Defendants argue that the doctors' actions did not fall below the standard of care. At trial, the parties produced extensive evidence in support of their positions. This evidence, summarized below, is relevant only to the degree that it relates to the issue of whether there was a causal link between the State Department's acts and omissions in Washington, D.C. and Nyenpan's injuries.

1.

The medical experts who testified at trial agreed that Nyenpan's brain damage was caused by spinal meningitis, an infection of the meninges covering the spinal cord and brain. They suspected bacterial, rather than viral, meningitis. Bacterial meningitis can have a devastating effect very quickly in neonates (as it apparently did in Nyenpan's case). To identify the bacterial agent, the cerebrospinal fluid (CSF) of a patient, obtained by spinal tap or lumbar puncture, is cultured. Cultures of other samples can also aid in diagnosis.

However, neither Nyenpan's doctors nor the expert witnesses could identify with certainty the bacterial agent causing his meningitis—despite three CSF cultures, cultures of blood and other body fluids, and examination of other indicators such as white blood cells, glucose, potassium and sodium analyses, and temperature levels. Using the diagnoses of the various treating physicians and lab reports, the experts identified three possible agents: staphylococcus (staph), streptococcus (strep), and salmonella, all of which are endemic to Western Africa. Staph and strep are "Gram positive" bacteria, i.e. they react in a particular way to a "Gram's stain." Salmonella, on the other hand, is a "Gram negative" bacteria. Gram positive and Gram negative bacteria are treated with different antibiotics.

On June 5, when Nyenpan was first brought to the embassy health unit, Drs. Lefton and Van Reken, assisted by Clement and Awantang, took blood and stool cultures and a culture of fluid from skin lesions. In addition, Dr. Van Reken performed a lumbar puncture to obtain a CSF sample for testing. A smear of the CSF performed that morning revealed white blood cells (WBCs) and two rare Gram positive cocci on the stain of the CSF sample. *See* Defs. ex. 27; Awantang dep. at 118. ***440** That result was unusual and left the medical personnel uncomfortable, since, if the baby had meningitis, the stain should have evidenced numerous bacteria. *Id.* However, the presence of WBCs indicated meningitis even without strong evidence of a bacterial agent. (Testimony of Smith). A Gram's stain of the skin fluid showed "few gram positive cocci and many WBC's." Defs. ex. 27.

After overnight culture, the CSF sample taken at the embassy health clinic on June 5 was sterile, though it had revealed two rare Gram positive cocci on smear the day before. *See* Defs. ex. 27. In contrast, fluid taken from the skin lesions, after culture overnight, demonstrated heavy growth of Gram positive cocci, which was later revealed to be staph. *Id.* Stool cultures revealed a similar form of staph. *Id.* No malarial parasites were found. Dr. Van Reken diagnosed and treated Nyenpan for "Group B" strep, a Gram positive meningitis. Pls. ex. 3.

On June 10, blood and CSF tests were repeated at ELWA. Cultures of those tests were also sterile. *Id.* and Pls. ex. 2. Dr. Van Reken requested that Mary Awantang send a portion of the CSF sample obtained on June 10 to the State Department Office of Medical Services to obtain a counter immuno-electrophoresis (CIE) test. *See* Defs. ex. 27 at 2. This test reveals specific antibodies and could have aided the doctors in detecting salmonella, were that bacteria present. *See* Pls. ex. 43; Lefton dep. at 99–100. However, instead of conducting a CIE test, the State Department in error sent the sample to a laboratory in Washington, D.C. accompanied by a request for an immuno-electrophoresis test, which is used to detect multiple sclerosis. *See* Pls. exs. 43 & 39 (cable dated June 21, 1982). When Nyenpan reached the University of Colorado hospital, blood, urine, and CSF cultures were repeated for a third time. The blood tests revealed salmonella. The other cultures were sterile. Accordingly, Nyenpan was treated in Colorado for salmonella sepsis, a blood infection. *See* Pls. ex. 5; (testimony of Dr. Wientzen).

Dr. Adrian Smith and Dr. Edward Gross, plaintiffs' experts, expressed the opinion that Nyenpan suffered from salmonella meningitis that Drs. Lefton and Van Reken failed to diagnose and treat. (Testimony of Dr. Smith, Dr. Gross). In support, they noted that a bacterial agent causing sepsis can cross the "blood/brain barrier" and lead to meningitis more readily than a bacterial agent causing a skin infection. (Testimony of Dr. Smith); *see also* Defs. ex. 34 at 965. Drs. Raoul L. Wientzen and Marianne Schuelein, defendants' experts, believed that Nyenpan's meningitis was caused by a Gram positive bacteria. (Testimony of Dr. Wientzen, Dr. Schuelein). Like Dr. Van Reken, Drs. Wientzen and Schuelein believed that the causative bacteria was Group B strep, even though strep was never cultured from any sample and skin and stool cultures had revealed staph.

2.

a.

Defendants contend that Dr. Lefton was not responsible for Nyenpan's injuries because the child was already devastated and beyond hope of recovery when his parents brought him to the embassy health unit on June 5. Dr. Lefton believed to the contrary that when the child was brought to the embassy health unit on June 5 he was neurologically and physiologically intact. *See* Pls. ex. 1B; Lefton dep. at 70. The experts offered conflicting views on the question of when Nyenpan was beyond hope of recovery. Dr. Wientzen, whose expert testimony overall was highly persuasive, offered two answers to this question. When first asked whether Nyenpan was beyond hope of recovery at the embassy health clinic, Dr. Wientzen testified that he was beyond hope sometime during the middle of the first hospital day, i.e., June 6. When asked again, though, he changed his opinion and stated that he believed the baby was beyond hope on June 5. However, he also testified that many people with the symptoms Nyenpan had on June 5 recovered to lead a normal life. (Testimony of Wientzen). Dr. Gross believed that when Nyenpan was brought to the clinic, there was no permanent structural damage ***441** to the brain. He testified that, more likely than not, had the baby been treated aggressively for Gram negative meningitis, he would have recovered. He believed the baby became devastated some time between June 5 and June 17, and he was not sure when. (Testimony of Gross). Dr. Schuelein believed that Nyenpan was devastated by the time he arrived at the embassy health unit. (Testimony of Schuelein). The experts' conflicting opinions on this point suggest that it is very difficult if not impossible to pinpoint with certainty the earliest time at which Nyenpan was beyond hope of recovery. Nevertheless, appraisal of the testimony indicates that it is more likely than not likely that Nyenpan was beyond hope of recovery at least by the time or shortly after his transfer to ELWA on June 6. Therefore, the critical time period for administering proper care was between June 3 and June 6.

b.

On June 5, 1982, when Dr. Lefton first examined Nyenpan and before Dr. Van Reken arrived, Lefton promptly administered procaine penicillin and gentamicin before taking any samples for culture, such as blood, skin pustule, or urine or stool samples. Dr. Lefton also did not record any pulse or respiratory readings prior to administering antibiotics. Plaintiffs contend that the antibiotics took effect so quickly that the samples obtained by Dr. Van Reken one hour later were sterile. The experts agreed that it would be below the standard of care not to obtain body fluid and other samples prior to the administration of antibiotics where possible. Nonetheless, treatment of Gram positive bacteria leads almost immediately to sterilization of CSF cultures, while treatment of Gram negative bacteria does not cause sterilization of CSF cultures for one to eleven days. *See* McCracken, Jr., *The Rate of Bacteriologic Response to Antimicrobial Therapy in Neonatal Meningitis,* 123 Amer.J.Dis. Child 547 (1972), Defs. ex. 38. Thus, it is unlikely that the medications administered by Dr. Lefton masked detection of Gram negative bacteria in the CSF smear obtained on June 5 in the hour or so that elapsed between administration and the lumbar puncture. *See id.; see also* defs. ex. 35 at S217, Figure 4. On the other hand, it is probable that the June 4 administration of ampicillin by Dr. Tirad at Cooper's Clinic along with Dr. Lefton's administration of procaine penicillin and gentamicin on June 5 masked detection of strep, staph, or other Gram positive bacteria on June 5. *See id.;* (Testimony of Wientzen, Gross). Dr. Van Reken diagnosed Gram positive meningitis and treated Nyenpan accordingly—therefore, any masking effect of Gram positive bacteria had little or no impact on the diagnosis and treatment.

c.

Plaintiffs further argue that the decision not to evacuate Nyenpan on June 5 was below the standard of care. Dr. Lefton stated that he did not want to evacuate the baby because of the risk of lack of oxygen on the plane while the baby was having a seizure. Lefton dep. at 177. He clarified that intubation (insertion of a tracheal tube) during a seizure would be more difficult in a plane. *Id.* at 178. However, he also stated that he was not aware that there would be no oxygen available at JFK hospital. *Id.* at 167. Dr. Gross testified that the technology and procedures that would have been required for evacuation on June 5 were no different than those that were in fact employed or available on June 17, namely intubation, suction, intravenous feeding, and oxygen. (Testimony of Gross). Dr. Wientzen testified that intubation is easier in a hospital, that lighting is better, and that shock and respiratory failure could have caused problems on an airplane. However, he did not state that it would have been dangerous to move Nyenpan on June 5. He testified that, within a 48–72 hour period from when the parents presented Nyenpan at the embassy health clinic, there was no reason not to evacuate the baby. (Testimony of Wientzen). Dr. Schuelein testified that the baby should not have been evacuated due to the risk of continued seizures and status epilepticus, which might require administration of anti-convulsants. (Testimony of Schuelein). ***442** However, Nyenpan continued to suffer from seizures up to and following June 17.

Plaintiffs also contend that if Dr. Lefton felt that commercial evacuation was too dangerous, he could have requested the services of a Military Airlift Command (MAC) plane. MAC planes are specially equipped with medical equipment and personnel for transportation of severely ill or injured patients. State Department policies permit an Regional Medical Officer to request MAC services where there is (1) an immediate threat to life; (2) no adequate local facility; and (3) no other available suitable transportation. (Testimony of Dr. Paul Allen Goff, Medical Director of the Office of Medical Services since 1988); *see also* 3 FAM § 686.4–2, Pls. exs. 36 & 59. The Air Force retains the discretion whether to grant a request for a MAC plane. (Testimony of Goff); Pls. ex. 36. According to Goff, if Dr. Lefton had requested MAC services to evacuate Nyenpan, that request would have been supported by the State Department. (Testimony of Goff). Dr. Lefton made no such request.

In addition, plaintiffs contend that Nyenpan could have been evacuated sooner than June 17. The Tarpeh–Does continually requested evacuation and offered to pay for it. Within a few days of Nyenpan's admission into ELWA, Dr. Van Reken advocated evacuation and offered to accompany the child. However, Dr. Lefton retained the final authority to approve evacuation, despite his withdrawal from decisions about Nyenpan's medical care.[6] Defendants produced no evidence explaining or otherwise giving any reason why Dr. Lefton waited until June 17 to approve evacuation.[7] It is more likely than not that, even if Nyenpan could not have been evacuated on June 5, he could have been evacuated much earlier than

June 17. However, because he was probably beyond hope of recovery earlier than June 17 and perhaps as early as June 6, defendants failure to evacuate him between June 6 and June 17 did not cause his injuries.

D. The State Department's Role

1. State Department Policy

Plaintiffs allege that the Department of State in Washington, D.C. failed to provide the level of medical care promised in its policy manuals. The Uniform State/AID/USIA Regulations establish medical policies, benefits, and procedures for both employees and Regional Medical Officers such as Dr. Lefton in the field, as well as the Office of Medical Services (also referred to as M/MED) and other organizations in the United States. As noted, the Uniform State/AID/USIA Regulations provide that the State Department's general policy is "to assist all American employees and their dependents in obtaining the best possible medical care ... so that no employee need ***443** hesitate to accept an assignment to a post where health conditions are hazardous, medical service poor, or transportation facilities limited." 3 FAM § 681.2.; Pls. ex. 59. The Medical Director of the Office of Medical Services in Washington is responsible for directing, managing, and supervising the medical and health program and operations. *See* 3 FAM § 681.6(j), Pls. ex. 35, (effective June 16, 1972); § 681.6(k) (effective March 11, 1985), Pls. ex. 59; Korcak dep. at 10.

The State Department provides Regional Medical Officers as a benefit of employment in locations where local medical services are poor, because it would be difficult to find people to serve in many areas of the world without medical support. *Id.* at 14. In 1982, the Department employed 39 Regional Medical Officers (not including psychiatrists). *Id.* at 10. In addition to their responsibility for the provision of "medical care, counsel and examinations for American employees and their dependents," § 682.2–2(a)(1), Medical Officers must "[m]aintain liaison with Post Medical Advisors, local physicians, hospitals, laboratories, and public health officials on matters pertinent to the Department of State medical program." § 682.2–2(a)(3). One of the Medical Officer's duties, where medical care is not up to United States standards, is to be aware of conditions at local facilities in order to be able to advise employees which local facilities to use. Korcak dep. at 15; (testimony of Goff).

Officials of the Office of Medical Services claim that it is impractical, if not impossible, for the Office in Washington, D.C., to supervise the daily activities of Regional Medical Officers in the field. (Testimony of Korcak, Goff). Nonetheless, Regional Medical Officers normally consult the Office of Medical Services in cases involving serious medical problems. Korcak dep. at 29. Indeed, the Uniform State/AID/USIA Regulations require such consultation: "The Department of State principal officer, medical officer, or nurse, *will* report telegraphically by 'MED CHANNEL' ... to the Deputy Assistant Secretary for Medical Services (M/MED) each serious illness or injury of employees or their dependents." 3 FAM § 682.2–8 (emphasis added). The Regulations further provide: "The advice of a Department of State medical officer or the Office of Medical Services (M/MED) may be requested at any time. It should be obtained in all cases where there is doubt as to the need for the treatment recommended by another physician...." *Id.* at § 685.4–1.

Moreover, Regional Medical Officers generally obtain approval from the Office of Medical Services for evacuations. Thus, the Uniform State/AID/USIA Regulations provide:

> Eligible American employees or dependents who are unable to obtain suitable medical care abroad for an overseas-incurred illness or injury may be authorized by the post to receive medical care in U.S. facilities. ... In such cases, the post shall telegraph in advance via "MED CHANNEL" ... to give the diagnosis and to request instructions from the Deputy Assistant Secretary for Medical Services (O/MED). In emergency situations where the well-being of the employee precludes prior consultation with O/MED, the delegated officer at post ... may authorize travel to Washington, D.C., but shall immediately inform O/MED the reason for the evacuation, give the date and mode of arrival,

> and request that arrangements for hospitalization be made.
>
> . . . . .

Id. at § 685.4–2. Finally, the Regulations provide that "[a]ny American Foreign Service employee or any of his dependents ... who require medical care for illness or injury ... while located or stationed abroad in a locality where there is no qualified person or facility to provide such care ... *shall* be eligible to travel at Government expense to the nearest facility where suitable care can be obtained, whether or not the medical care is at Government expense." 3 FAM § 686.1 (emphasis added). The Regulations thus demonstrate that, even though the Office of Medical Services is unable practically to supervise the day-to-day decisions of Regional Medical Officers in the field, ***444** the Office strongly requires, or at least recommends and strongly supports, close communications during medical emergencies.

ii. State Department Actions

Despite the regulations described above, the Office of Medical Services had very little contact between June 5 and June 17, 1982 with Dr. Lefton or anyone else in Monrovia regarding Nyenpan Tarpeh–Doe's illness. On June 5, when the Tarpeh–Does first brought Nyenpan to the embassy health unit and Dr. Van Reken discussed evacuation with them, Tarpeh–Doe requested that Petrone contact Tarpeh–Doe's mother, Marilyn Wheeler, to attempt to arrange a receiving physician for the evacuation. On the afternoon of June 5, Petrone phoned Wheeler, informed her that Nyenpan was seriously ill, and asked her to find a receiving physician in Colorado for Nyenpan's evacuation. On June 5 or 6, Wheeler located a neonatologist at the University of Colorado, Dr. Gerhardt Schroeter, who agreed to serve as receiving physician. Dr. Schroeter told Wheeler that he thought it was essential that he speak to the attending physician in Liberia as soon as possible. Wheeler was unable to phone Liberia directly, and so on Saturday or Sunday, June 5 or 6, she contacted the State Department in Washington, using a list of telephone numbers given to her by her daughter. She first called a medical emergency number. The person who answered that call referred her to the Liberian desk. She informed a person there that she had received a call about the evacuation and been asked to locate a receiving doctor and hospital. She identified the doctor and hospital and relayed the message that Dr. Schroeter thought it was imperative that he speak with the attending physician. She was told that they were not aware of the planned evacuation. At some point, she was told they had sent a cable, but that the telephone was not working. Wheeler did not receive a copy of the cable and did not hear again from the State Department until she received notice of the June 17 evacuation. Then, she again contacted Dr. Schroeter and arranged for an ambulance to meet the arriving family at the Denver airport.

In response to Marilyn Wheeler's June 5 or 6 telephone message to the State Department that she had arranged for a receiving physician in preparation for evacuation, the State Department sent a cable over "MED CHANNEL" to Liberia. That cable, dated June 7, stated:

> 1. M/MED INFORMED VIA TELEPHONE CALL FROM SUBJECT'S MOTHER THAT THE NEONATAL CENTER AT UNIVERSITY OF COLORADO WILL ACCEPT MRS. WHEELER AND INFANT. POINT OF CONTACT IS DR. GERHARDT SCHROTER [sic], TELEPHONE (303) 199–1211.
>
> 2. TODATE [sic] M/MED UNAWARE OF THE ABOVE NEED. PLEASE ADVISE ASAP.

See Pls. ex. 39. In response, on June 8, a cable from the embassy in Liberia stated:

> 1. SUBJECT BECAME ILL 3 JUNE 1982 PRESENTING WITH POOR SUCK, TEMPERATURE ELEVATION, LETHARGY, IRRITABILITY, STAPH LESSIONS [sic] OVER PERINEUM AND BUTTOCKS. MOTHER WHO HAD BEEN BREAST FEEDING WAS BEING TREATED BY LOCAL PHYSICIAN FOR BREAST ABSCESS.
>
> 2. SPINAL FLUID POS FOR STAPH LIKE ORGANISM. SUBJECT IN ELWA HOSPITAL ON PENICILLIN AND CHLORAMPHENICOL. SEIZURE [sic] HAVE SUBSIDED. SUBJECT RECEIVING ANTICONVULSIVE MEDS.
>
> 3. CONDITION STABILIZING. WOULD PLAN TO MOVE SUBJECT AT TIME WHEN PARENTERAL THERAPY COMPLETED. EARLIEST WOULD BE 13 JUNE.

4. SUBJECT HAS CONTACTED HER PARENTS IN DENVER AREA REGARDING ACCEPTING FACILITY. SUBJECT WILL NEED CARE OF NEONATOLOGIST REGARDING CNS PROBLEMS. SPONSOR DESIRES TO *445 COST CONSTRUCT DENVER IN LIEU OF FRANKFURT. PLS ADVISE.

Id.

A return cable from the Department of State to the Liberian embassy dated June 9 stated:

1. THE MEDICAL DIRECTOR AUTHORIZES MEDICAL TRAVEL OF SUBJECT TO DENVER, COLORADO ON COST CONSTRUCTION BASIS MONROVIA / FRANKFURT / MONROVIA.

2. MEDICAL CLEARANCE ANNULLED PENDING OUTCOME OF EVALUATION AND TREATMENT.

3. WILL SCHEDULE APPOINTMENTS WHEN DEFINITE ETA KNOWN.

4. CONTACT FOR REINSTATEMENT OF MEDICAL CLEARANCE AND ADMINISTRATIVE ASSISTANCE IS DR. HUNGERFORD OR DR. KEARY. 202–632–8122.

Id. There is no evidence of further communication until June 16, when the Liberian embassy cabled the State Department that:

1. SUBJECT NOW STABLE ENOUGH TO TRAVEL TO NEONATAL INTENSIVE CARE UNIT AT U. OF COLORADO

....

4. AS YET HAVE NOT RECEIVED RESULTS OF CIE ON SUBJECT'S SPINAL FLUID OR BLOOD THAT WAS HAD CARRIED TO M/MED LAST WEEK. WOULD APPRECIATE KNOWING ORGANISM.

Pls. ex. 39. Dr. Lefton recalled communicating with the Department of State by telephone during this time. Lefton dep. at 110. However, he could not remember with whom he spoke or what he discussed. There was no evidence of any contact regarding Nyenpan's illness between the Office of Medical Services in Washington, D.C. and any person in Liberia beyond that described in the cables above.

E. Tarpeh–Doe's Benefits

Plaintiffs claim that the State Department never informed Tarpeh–Doe that her medical benefits included the option to evacuate to deliver her child in Europe or the United States. Plaintiffs assert that, had she been informed, she would have taken advantage of that benefit and delivered her child in the United States, where bacterial infection is less prevalent and medical care is more advanced. Tarpeh–Doe testified that she was never told and did not know of that right. However, defendants produced evidence to the contrary.

As part of employee training, Gertrude Slifkin presents a lecture on employee relations and insurance. She includes in her lecture information about the State Department policy regarding evacuation of pregnant women for delivery of their children. (Testimony of Slifkin). Tarpeh–Doe attended that lecture on December 30, 1980, the second day of her nine week training course in Washington prior to travelling to Monrovia. *See* Tarpeh–Doe's lecture notes, Pls. ex. 27 at 6. However, she does not recall mention of this benefit in the lecture, nor did she record such mention in her lecture notes. *See id.* Slifkin did not recall the particular lecture attended by Tarpeh–Doe.

Alfreda Mitchell, a nurse assigned to the embassy health unit in Monrovia who was present when the Tarpeh–Does visited Dr. Lefton in September, 1981 so that Ben could receive tests in preparation for their marriage, heard Tarpeh–Doe tell Dr. Lefton that she was pregnant. Mitchell recalled overhearing Dr. Lefton tell Tarpeh–Doe in response that she should evacuate for delivery. (Testimony of Mitchell). Tarpeh–Doe did not recall that Dr. Lefton so informed her. Moreover, Dr. Lefton did not testify that he so informed her. He stated that he was not aware of any other American mother who had delivered a child in Liberia. *See* Lefton dep. at 131. He also stated that a decision by a pregnant woman not to evacuate for delivery would have been reported on the woman's medical chart. *Id.* at 133. No such decision was recorded on Tarpeh–Doe's chart. From 1969–1972, when Dr. Eben H. Dustin, Director of Medical Services at the

State Department *446 in 1988, was Regional Medical Officer in Monrovia, Liberia, no woman delivered her first child in Monrovia. Dustin dep. at 55. When Dustin was Regional Medical Officer in Monrovia, he discussed evacuation with every pregnant woman. *Id.* at 57.

While the evidence described above is not conclusive, defendants produced additional evidence indicating that Tarpeh–Doe did not evacuate to deliver her child because she could not afford to forego pay during the time she would be required to be absent from her position in order to do so. The airlines and the State Department require pregnant women who want to deliver a child elsewhere to leave their overseas post six weeks prior to their scheduled delivery date and remain away for six weeks following delivery. Maternity benefits include reimbursement for travel and medical expenses for pregnant women who chose to evacuate to deliver their children but do not include paid leave for the twelve weeks a woman must be away from her post. Thus, unless a woman has otherwise accumulated twelve weeks of paid leave, she must take leave without pay to take advantage of this "benefit." Petrone recalled asking Tarpeh–Doe why she didn't go home to have the baby. Tarpeh–Doe responded that she couldn't afford to do so. Petrone dep. at 16–17. However, Gertrude Slifkin testified that when Tarpeh–Doe visited her to discuss medical benefits upon her return to the United States with Nyenpan, while the two walked across the street to the medical division, Slifkin asked Tarpeh–Doe why she had delivered her baby in Liberia. Tarpeh–Doe responded that she did not want to be away from post and that she did not have enough accumulated leave to receive pay during her time away. (Testimony of Slifkin).

Therefore, the evidence does not clearly establish when and how defendants informed Tarpeh–Doe that her benefits included the right to evacuate for delivery, albeit without pay. But Slifkin's recollection of Tarpeh–Doe's expressed reason for not evacuating to deliver her child indicates that it is more likely than not likely that Tarpeh–Doe, though she may not have been aware of specific details of the options available to her for evacuation, was generally aware that evacuation was a possibility but that she could not afford it. No evidence was adduced that any person informed her of the potential risks of delivery in Liberia, of the risks to neonates in Liberia, or of the prevalence of infectious diseases there.

II.

A.

This Court has jurisdiction over a claim against the United States for personal injury caused by the negligence of a governmental employee acting within the scope of employment. The Court's jurisdiction extends to "circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). The relevant acts and omissions, if any, took place in the District of Columbia. Therefore, District of Columbia tort law determines whether defendants are liable for plaintiffs' claims.

B.

[1] Defendants argue that the discretionary function exception to the Federal Tort Claims Act deprives the Court of jurisdiction here. The discretionary function exception exempts from the FTCA any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). The Supreme Court has clarified the application of this provision as follows: First, whether an act or omission constitutes a discretionary function is determined by "the nature of the conduct, rather than the status of the actor...." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)* 467 U.S. 797, 813, 104 S.Ct. 2755, 81 L.Ed.2d 660, *reh. denied,* 468 U.S. 1226, 105 S.Ct. 26, 82 L.Ed.2d 919 (1984). Second, the exception covers only *447 actions that involve "an element of judgment or choice." *See Berkovitz v. United States,* 486 U.S. 531, 536–37, 108 S.Ct. 1954, 1958–59, 100 L.Ed.2d 531 (1988); *Dalehite v. United States,* 346 U.S. 15, 34, 73 S.Ct. 956, 967, 97 L.Ed. 1427 (1953). Finally, the exception applies only to "government actions and decisions based on considerations of public policy." *Berkovitz,* 486 U.S. at 537, 108 S.Ct. at 1959. Thus, "[w]here there is room for policy judgment and decision there is discretion." *Dalehite,* 346 U.S. at 36, 73 S.Ct. at 968. If regulations provide specific directions, therefore, an employee's failure to follow those directions

is not protected by the discretionary function exception. *Berkovitz,* 486 U.S. at 542–43, 108 S.Ct. at 1961–62. For example, the Coast Guard's failure to ensure that a light bulb at a lighthouse was operational did not involve a permissible exercise of policy discretion. *See id.* at 538 n. 3, 108 S.Ct. at 1959 n. 3, discussing *Indian Towing Co. v. United States,* 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955).

The Supreme Court has recently clarified the discretionary function exception. *United States v. Gaubert,* 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991). The plaintiff in *Gaubert* pursued a tort claim against the Federal Home Loan Bank Board arising out of its supervision and day-to-day management of a thrift unit, the Independent American Savings Association. The Fifth Circuit, distinguishing between policy-making decisions and operational ones, determined that the discretionary function exception did not apply to the agency's intervention in day-to-day affairs. The Supreme Court disagreed and held that the discretionary function exception applies to operational decisions as well as policy and planning decisions. *Id.* 111 S.Ct. at 1275. Describing the exception, the Court explained that

> if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation. If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy. On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.
>
> Not all agencies issue comprehensive regulations, however. Some establish policy on a case-by-case basis, whether through adjudicatory proceedings or through administration of agency programs. Others promulgate regulations on some topics, but not on others. In addition, an agency may rely on internal guidelines rather than on published regulations. In any event, it will most often be true that the general aims and policies of the controlling statute will be evident from its text.
>
> When established governmental policy, as expressed or implied by statute, regulation or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion.

Id. 111 S.Ct. at 1274 (citations omitted). The Court further stated:

> There are obviously discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary function exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish.

Id. 111 S.Ct. at 1275 n. 7.

Therefore, defendants are protected by the discretionary function exception if their allegedly negligent acts or omissions involved an exercise of choice or judgment that conformed with the purposes of the State Department's medical policy. With respect to plaintiffs' claim that defendants failed to inform Tarpeh–Doe that her benefits included the option to deliver her child outside of Liberia, any failure to inform was not based on a permissible exercise of discretion because the State Department's medical policy can in no way be furthered ***448** by a judgment that employees should not be informed about their benefits. Similarly, neither defendants' failure to transmit Marilyn Wheeler's message from Dr. Schroeter that he felt it was imperative that he speak with the treating physician, nor defendants' failure to conduct the requested test on the sample of Nyenpan's spinal fluid sent to Washington, D.C., involved any permissible exercise of choice in conformance with the State Department's medical policy or any other public policy. That conduct more closely resembles an employee's failure to follow the directions specified in regulations in *Berkovitz* or the Coast Guard's failure to replace a light bulb in *Indian Towing. See Berkovitz,* 486 U.S. at 538 n. 3 & 542–43, 108 S.Ct. at 1959 n. 3 & 1961–62.

In contrast, Korcak's participation in the decision to retain Dr. Lefton for part of the time it took to locate a replacement for him involved consideration of

factors that conformed to the State Department's medical policy. The Medical Director is charged with providing medical officers in the field as well as removing medical officers who are unable to perform their responsibilities. Swing and Korcak jointly decided to curtail Dr. Lefton's assignment in Monrovia but to permit him to remain at post for several more months. One of the reasons for that decision—permitting Dr. Lefton to remain in Monrovia so that his daughter could proceed as planned to visit him in August, 1982—did not involve any permissible exercise of judgment related to the State Department medical policy. However, the decision was also based on an attempt to minimize the gap between Dr. Lefton's departure and the arrival of a replacement physician, taking into account the potential risks of leaving the post without a physician assigned there. Consideration of those factors is protected by the discretionary function exemption. No evidence established the degree to which each reason affected the decision. But the presence of protected considerations renders the entire decision immune. Accordingly, defendants are protected by the discretionary function exception from plaintiffs' claim that they negligently retained Dr. Lefton in Monrovia.

Nevertheless, defendants had a self-imposed responsibility under State Department regulations to supervise the provision of medical services by whomever they retained in Monrovia. *See, e.g.,* 3 FAM §§ 681.2 & 685.4–1 & 4–2, Defs. ex. 1. Defendants' failure to supervise Dr. Lefton more closely even after the inspectors alerted defendants to Dr. Lefton's flagrant derelictions of his official and professional responsibilities[8] was not a permissible exercise of choice or discretion; that failure involved *no decision.* When defendants permitted Dr. Lefton to remain at post for several months, they conspicuously failed to consider and to make any decision about enhanced supervision of Dr. Lefton in light of the manifestly increased risks to which they exposed State Department personnel in Monrovia by not replacing or reinforcing him. Thus, there is no evidence that defendants' lack of response was the result of *any* exercise of choice or judgment, much less a permissible choice or judgment based on State Department medical policy. The discretionary function exemption therefore does not apply to defendants' failure to supervise Dr. Lefton more closely.

III.

A.

To prove a tort claim under District of Columbia law, plaintiffs must show (1) a duty owed to plaintiffs by defendants; (2) a breach of that duty; and (3) an injury to plaintiffs proximately caused by defendants' breach of duty. *See, e.g., District of Columbia v. Fowler,* 497 A.2d 456, 462 n. 13 (D.C.1985); *Morrison v. MacNamara,* 407 A.2d 555, 560 (D.C.1979).

B.

[2] **[3]** Plaintiffs contend that defendants had the duty to provide Tarpeh–Doe and her dependents with "the best possible medical care," as provided in Uniform State/USIA/AID Regulations. 3 FAM ***449** § 681.2. Federal regulations do not establish a duty by the government in the absence of an analogous cause of action under local tort law. *See, e.g., Art Metal–U.S.A., Inc. v. United States,* 753 F.2d 1151, 1157 (D.C.Cir.1985). Where an analogous duty is recognized under local law, however, federal regulations provide evidence that the government has assumed such a duty, as well as evidence of the standard of care assumed. *Id.* at 1158. Plaintiffs argue that defendants voluntarily assumed the duty to provide Linda and Nyenpan with "the best possible medical care." Plaintiffs also contend that defendants assumed that duty as part of their special relationship with her. Plaintiffs further contend that defendants established that duty by publishing it in regulations and manuals. District of Columbia courts have found duties to exist in all of these circumstances. *See, e.g., Arnold's Hofbrau, Inc. v. George Hyman Constr. Co.,* 480 F.2d 1145, 1148 (D.C.Cir.1973) (voluntary assumption of duty); *Kline v. 1500 Massachusetts Ave. Apartment Corp.,* 439 F.2d 477, 482–83 (D.C.Cir.1970) (special relationship, including employer-employee relationship); *Lucy Webb Hayes Nat. Training School v. Perotti,* 419 F.2d 704, 710 (D.C.Cir.1969) (duty based on normal practices as well as internal procedures or manuals).

Courts have also found that an employer's employment manuals are relevant to determining the terms of the employment contract. *See, e.g., Washington Welfare Assoc. v. Wheeler,* 496 A.2d 613, 615 (D.C.1985). The terms of a contract between parties, in turn, may in some circumstances help to define whether a defendant owes

a duty to a plaintiff. *See, e.g., Kline, supra,* 439 F.2d at 481–82. The State Department not only defines its medical policy as assisting all employees in obtaining the best possible care, it defined the reason for that policy: "so that no employee need hesitate to accept an assignment to a post where health conditions are hazardous, medical service poor, or transportation facilities limited...." 3 FAM § 681.2. This explanation, supported by Korcak's testimony that it would be difficult to find employees to serve in certain areas of the world without medical support, indicates that defendants viewed the provision of enhanced medical services as a part of the employment contract—in consideration for which employees accepted assignments at medically risky posts. Reliance on those services by employees who accept a position for overseas service is highly likely. Reliance by plaintiffs is one factor D.C. courts have considered in finding a duty to exist under tort law based on a special relationship. *See, e.g., Morgan v. District of Columbia,* 468 A.2d 1306, 1313–14 (D.C.1983) (en banc).

In addition, actual or constructive notice of dangerous conditions is relevant to whether there is a duty. *See, e.g., id.* at 481 & 483; *District of Columbia v. Fowler,* 497 A.2d 456, 461 (D.C.1985). Here, the State Department had actual notice of Dr. Lefton's lack of availability and of his refusal to respond to serious medical situations on several occasions in the past as well as the diseases which lurked in Monrovia. Moreover, the Foreign Affairs Statute provides that an action against the United States under the FTCA is the exclusive remedy for a claim for damages for personal injury allegedly arising from the negligence of "supporting personnel of the Department of State in furnishing medical care or related services...." 22 U.S.C. § 2702(a); *see also United States v. Smith,* 499 U.S. 160, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991). That statute thus anticipates tort liability for any negligent acts by Department of State employees related to the provision of health care. For all of these reasons, the State Department owed a duty to plaintiff to provide her with a level of medical care higher than that available from local facilities in Liberia. Defendants promised Tarpeh–Doe "the best possible medical care." Although federal regulations provide some evidence of the standard of care to be applied, District of Columbia law also provides that the standard of care in negligence cases is "reasonable care under the circumstances." *See, e.g., Morrison v. MacNamara,* 407 A.2d 555, 560 (D.C.1979).

*450 C.

[4] Plaintiffs' claim that the State Department failed to inform Tarpeh–Doe of her right to evacuate to deliver her child must fail. As described above, the facts do not support Tarpeh–Doe's contention that she was not informed. Accordingly, even if defendants had a duty to inform her, plaintiffs fail to show a breach of that duty. Plaintiffs' claim that the Office of Medical Services failed to conduct the correct laboratory test on the CSF sample sent to Washington, D.C. on June 10, 1982 also must fail. To the extent that the Office of Medical Services offered to perform tests on samples sent to Washington, D.C., it had a duty to plaintiff to competently perform those tests. However, since Nyenpan's injuries were more likely than not likely irreversible by June 10 when a CSF sample was sent for a CIE test to the Office of Medical Services in Washington, D.C., any negligence by the Office of Medical Services in conducting the wrong test is unlikely to have caused Nyenpan's injuries.

D.

[5] [6] Plaintiffs also claim that defendants negligently failed to relay a message from Dr. Schroeter that he felt it was imperative that he speak with the treating physicians as soon as possible.[9] By assuming responsibility for the provision of medical care and by accepting Wheeler's message, defendants had a duty to accurately relay that message. Defendants did not refute whether the message was relayed; thus, they breached that duty.

The more difficult question is whether that breach was the cause of Nyenpan's injuries. A defendant's conduct must be a "substantial factor" in causing a plaintiff's harm to support a finding of proximate cause. *See, e.g., Lacy v. District of Columbia,* 424 A.2d 317, 319–21 (D.C.1980). Had Dr. Lefton or Dr. Van Reken received Dr. Schroeter's message and called him—and had Dr. Schroeter offered advice upon which they could have more effectively treated the baby, all prior to the point at which the baby was beyond hope of recovery, perhaps the infant would have recovered. However, this chain of causation is too attenuated to support a finding that defendants' failure to relay the message was a substantial factor in bringing about the injuries. The facts and inferences to be drawn from them indicate that the State Department

in Washington delayed transmission of the first telegram (absent the message that Dr. Schroeter wanted to speak with the treating physicians) for approximately two days, until June 7.[10] But because Nyenpan was likely beyond hope of recovery by June 6, it is unlikely that communication after that date could have served to help him. Furthermore, telephone communication between Liberia and the United States was not always possible.[11] Moreover, no expert testified that if ***451** Dr. Schroeter had spoken with Dr. Lefton or Dr. Van Reken he could have offered advice that would have led to Nyenpan's recovery. As a result, plaintiffs' claim that defendants' failure to relay Dr. Schroeter's message caused the infant's injuries cannot succeed.

E.

[7] **[8]** Plaintiffs allege that defendants negligently failed to supervise Dr. Lefton. District of Columbia courts recognize such a claim of negligent supervision. *See International Distributing Corp. v. American District Telegraph Co.*, 569 F.2d 136, 139 (D.C.Cir.1977); *Kendall v. Gore Properties, Inc.*, 236 F.2d 673 (D.C.Cir.1956); *Anderson v. Hall*, 755 F.Supp. 2, 5 (D.D.C.1991); *Murphy v. Army Distaff Foundation, Inc.*, 458 A.2d 61 (D.C.1983). A finding of negligent supervision does not require a finding that the tort was committed in the principal's interest, as does a finding of negligence on a theory of *respondeat superior* in the District of Columbia. *See International Distributing*, 569 F.2d at 139; *Lyon v. Carey*, 533 F.2d 649, 651 (D.C.Cir.1976). Instead, to define negligent supervision claims, District of Columbia courts cite with approval the criteria listed in § 213 of the Restatement (Second) of Agency (1957):

> A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
>
> (a) in giving improper or ambiguous orders or in failing to make proper regulations; or
>
> (b) in the employment of improper persons or instrumentalities in work involving risk or harm to others; or
>
> (c) in the supervision of the activity; or
>
> (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his services or agents, upon premises or with instrumentalities under his control.

See, e.g., International Distributing Corp., 569 F.2d at 139; *Anderson*, 755 F.Supp. at 5; *Murphy*, 458 A.2d at 63–64. Foreseeability is one factor considered by D.C. courts in imposing liability for negligent supervision. *See, e.g., Kline v. 1500 Massachusetts Ave. Apartment Corp*, 439 F.2d at 483. But foreseeability is not required—a defendant may be liable unless the "chain of events appears 'highly extraordinary' in retrospect." *Lacy v. District of Columbia*, 424 A.2d 317, 319–20 (D.C.1980).

[9] **[10]** The facts and circumstances here support a finding of negligent supervision. First, defendants were on notice of Dr. Lefton's unavailability. Defendants knew that Dr. Lefton's unavailability was not the result of other commitments or responsibilities but was instead the result of Dr. Lefton's unwillingness to provide medical care. The complaints from employees, relayed directly to both Beahler and Korcak from the inspectors, indicate that Dr. Lefton's reluctance to perform his duties went beyond the specific incidents described and extended to his patients' daily problems locating him, getting messages to him, and receiving any medical care after daytime, weekday, hours. Furthermore, defendants knew that Dr. Lefton had left the post repeatedly for personal travel, had refused to make house calls, and had refused to travel to administer medical care. Once Dr. Lefton's assignment had been curtailed, his supervisors should have recognized that his commitment to his responsibilities was unlikely to increase and was, if anything, likely to dwindle yet further. Ambassador Swing may have realized this when he expressed to Korcak his concern for adding the provision of medical services to Dakar to Dr. Lefton's responsibilities during the summer. Korcak, however, dismissed these concerns. Unwilling to be dissuaded from his positive impression of Dr. Lefton, Korcak discouraged Swing from his attempts to curtail Dr. Lefton's assignment in Monrovia and encouraged Dr. Lefton to seek further extensions of his stay in Monrovia. The situation was rife with the potential for a serious mishap resulting directly from Dr. Lefton's inaction. A doctor's inaction, in addition to a doctor's actions, can constitute malpractice —a doctor who fails to provide needed medical services to a patient with whom ***452** that doctor has a professional relationship may be liable for abandonment unless the

doctor is replaced by an equally qualified physician. *See Ascher v. Gutierrez,* 533 F.2d 1235, 1236 (D.C.Cir.1976). The evidence indicates that Dr. Lefton's supervisors at the Office of Medical Services failed to appreciate, or even to consider, the risk of serious medical problems likely to arise from Dr. Lefton's reluctance to provide care. Accordingly, defendants breached their duty to Tarpeh–Doe.

[11] Dr. Lefton's negligent actions and omissions proximately caused Nyenpan's injuries. Dr. Lefton did not administer or in any way supervise or check on any gynecological, prenatal, or obstetrical care to Linda Wheeler Tarpeh–Doe despite her manifest need for such care. Instead, he referred her to a local gynecologist and obstetrician for care for a period of over nine months without advising her that she should or could call him if she needed advice, without arranging to see her even once to determine whether she was receiving adequate local care, and without inquiring about her care of her treating physicians. He did not inform her of the known risks of delivery and post-natal care of a child, particularly a first child, in disease-ridden Monrovia. He never alerted her to the conditions of the various clinics and hospitals in Monrovia, some of which were evidently notorious. He did not visit her upon or after her delivery. When she became sick on Thursday, June 3, and needed prompt attention at 10:00 p.m. he was unavailable for unexplained reasons—the likely inference being that he refused to make a house call as he had refused several times in the past. When Tarpeh–Doe visited Dr. Lefton for treatment for mastitis on Friday, June 4, Dr. Lefton did not examine, or even ask about, the child. He advised her at that time to resume breast feeding. That advice, if followed, could have caused or increased the child's exposure to infectious bacteria. When the Tarpeh–Does came to Dr. Lefton on June 5, he did not administer any tests. Dr. Lefton considered, but decided against, attempting to evacuate the child by commercial airplane. He did not request the services of a MAC flight for evacuation. He handed over all care to Dr. Van Reken, a physician to whom he had never referred a patient before. He permitted Dr. Van Reken to admit Nyenpan into a local hospital with deplorable conditions at a critical point in the baby's care—against the baby's parents' vehement objections. He was not familiar with the conditions at JFK, despite his duty to be aware of conditions at local health facilities in order to advise State Department and AID employees where to safely obtain services. He did not visit or inquire about his American charges at JFK hospital during the initial afternoon of June 5, nor did he visit or inquire that night or the next morning. He never evaluated its facilities for himself to determine whether the parents' pronounced fears were justified. He did not check to see whether medications, or oxygen, or 24–hour care by doctors or other trained medical attendants, would be available there. He did not contact the Office of Medical Services immediately to request advise or support from a neonatologist or an expert in bacterial spinal meningitis in the United States. Moreover, he did not cable the Office of Medical Services until he received a brief request for information from them. When he did cable the Office, he did not inform persons there that he had not examined the child since June 5 nor that he had turned over care to Dr. Van Reken, nor did he request assistance or advice. He did not visit Tarpeh–Doe until June 12. After the June 5 visit to him at the embassy health clinic, he did not examine the baby at all. He did not authorize evacuation either upon the parents' repeated requests or upon Dr. Van Reken's approval of evacuation.

In short, Dr. Lefton washed his hands of Linda Wheeler Tarpeh–Doe and her baby and turned his back on them, doing as little as possible to attend to Tarpeh–Doe's care during pregnancy or to plan for the close medical supervision of mother and child after delivery. He was supposed to be the family doctor. Had Dr. Lefton provided Tarpeh–Doe with gynecological or prenatal care or taken any interest at all in her ***453** condition by anticipating and preparing himself and herself for the risks awaiting the mother and child after delivery, he would have visited her or otherwise made himself available so that she would have automatically called or visited him with the child on Friday, or even Thursday, when she first noticed signs of illness. Had she felt that he would willingly, rather than reluctantly, attend to her medical needs, she would have sought him out instead of waiting until Nyenpan required emergency care and seeking that care from local, inadequate, facilities. On June 5, had Billie Clement not directed the Tarpeh–Does to the embassy health unit, it is even possible that Nyenpan would have received better care from Dr. Johnson at Cooper's Clinic than he received from Dr. Lefton who permitted Dr. Van Reken to place him in a hospital with roaches and rats and with no medications, no medical attendants during the night, and no oxygen. From Tarpeh–Doe's arrival in Monrovia throughout her pregnancy, delivery, and, most important, from the onset of the post-natal illness of

mother and child, Dr. Lefton took none of the initiatives required of him by the State Department directives or by any conceivable standard of care for a physician in his circumstances.

Dr. Lefton's acts and omissions render it difficult to determine with any degree of certainty the true cause of the infant's failure to recover. D.C. courts have established that where a defendant's acts or omissions create uncertainty as to whether, had the defendant acted otherwise, the outcome would have been more favorable to the plaintiff, that uncertainty does not provide a defense against the plaintiff's showing of proximate cause. *See, e.g., Daniels v. Hadley Memorial Hospital,* 566 F.2d 749, 757 (D.C.Cir.1977); *Ascher v. Gutierrez,* 533 F.2d 1235, 1238 (D.C.Cir.1976). It is more likely than not likely that improved pre- and post-natal care for Linda and Nyenpan, advice for sanitary precautions, or earlier treatment for Nyenpan would have averted this tragedy and/or resulted in the child's full recovery. Dr. Lefton was responsible for failing to provide that earlier advice and treatment. Therefore, plaintiffs have shown by a preponderance of the evidence that Dr. Lefton's conduct, in particular his omissions, were a substantial factor in causing Nyenpan's injuries.

[12] The ultimate question remains whether defendants are liable for "permitting, or failing to prevent" Dr. Lefton's negligence. Restatement (Second) of Agency § 213. Defendants argue that it would have been impossible for the Office of Medical Services to participate in decisions regarding Nyenpan's care. This contention is controverted by defendants' own regulations. The Uniform State/AID/USIA Regulations require the Office of Medical Services to support Regional Medical Officers in serious medical emergencies that take place in foreign countries, to receive notification of medical emergencies, and to authorize evacuations. Dr. Lefton could and should have instantly communicated with Washington. Additionally, while 3 FAM § 681.2 provides that post officers "are cautioned to be alert to any medical and health problems of employees and their dependents and to take appropriate action promptly," only medical officers at the Office of Medical Services in Washington had the medical expertise required to predict the risk of medical emergencies stemming from Dr. Lefton's failure to provide services. Therefore, Dr. Lefton's negligent acts and opinions were under defendants' control. *See* Restatement (Second) of Agency § 213(d).

Moreover, Dr. Lefton's lack of care could have and should have been foreseen by the United States defendants. Dr. Lefton's supervisors at the Office of Medical Services could and should have anticipated and taken several steps to decrease the likelihood of the medical disaster that occurred here. Defendants could and should have directed Dr. Lefton to focus more attention on his responsibilities and to make himself available in the evenings and on weekends. Furthermore, defendants could and should have imposed additional reporting requirements. For example, they could have advised or ordered Dr. Lefton to report any serious illness immediately by telephone or telegram. Medical officers in Washington ***454** (the only responsible persons competent to fully assess the medical risks in a tropical climate like Monrovia of Dr. Lefton's poor attitude and lack of availability) also could have warned Ambassador Swing and Deputy Chief of Mission Perkins, as well as supporting medical personnel including Nurse Clement and Dr. Feir, to alert the Office of Medical Services immediately to any potential need for medical advice or treatment—such as the first pregnancy of a woman planning to deliver in Monrovia. They could have required Dr. Lefton to put in place plans for the care of the mother and child in the event of a pregnancy of and birth to an AID employee during the time remaining to Dr. Lefton in Monrovia. Had defendants done so, it is more likely than not likely that Dr. Lefton or someone else in Monrovia would have informed the Office of Medical Services of Tarpeh–Doe's pregnancy and delivery and Nyenpan's illness. Had defendants been advised of the pregnancy and delivery, they could have taken steps to assure that Tarpeh–Doe was fully informed of risks to neonates in Monrovia and advised as to safety precautions and that Dr. Lefton was prepared for the event. Had they been advised of Nyenpan's illness on June 3 or 4, or even upon being alerted of the illness by Marilyn Wheeler, presumably on June 5, defendants could have acted promptly to assure that Dr. Lefton was not again declining to provide medical services as he had in the past—by promptly phoning and telegraphing Liberia to find out what the situation was and offering support and advice. Defendants could have arranged for a neonatologist familiar with meningitis to discuss Nyenpan's care directly with Drs. Lefton and Van Reken. Defendants could have advised Dr. Lefton as to whether evacuation was possible or advisable. In that next 24 hours, very likely a crucial period, defendants could have supported and supervised many of Dr. Lefton's decisions.

Again, defendants' failure to supervise Dr. Lefton more closely creates uncertainty as to whether, had they acted otherwise, Nyenpan would have recovered. *See Daniels,* 566 F.2d at 757; *Ascher,* 533 F.2d at 1238. Defendants thus "[permitted] or [failed] to prevent negligence or other tortious conduct by persons ... under [their] control." Restatement (Second) of Agency § 213. In the unusual circumstances here, having been alerted to Dr. Lefton's deficiencies, knowing the severe risks of tropical diseases such as those confronting a newborn and its mother in Monrovia, defendants had a self-imposed duty to see to it that Dr. Lefton was informed, readily available, and in charge with a previously approved plan for treatment if necessary and hospitalization or evacuation in just such an emergency as occurred here.

F.

[13] Defendants urge the Court to find that Tarpeh–Doe was contributorily negligent by failing to seek Dr. Lefton's services earlier than June 5. This contention is not supportable. Tarpeh–Doe was a 24 year old woman with little experience living and obtaining medical care overseas. She had just experienced her first pregnancy and delivery. She was learning for the first time how to care for an infant, without the support of family or friends from years past, in a country with poor local health facilities. She received virtually no support or medical care from Dr. Lefton. She herself was sick with malaria, staph infection, and mastitis when her infant became critically ill—in that condition she took him to two emergency rooms and the embassy health unit and stayed up overnight in his hospital room, attended only by friends and not by the professionals responsible for her care or the care of her child. Tarpeh–Doe's actions and omissions in this case were reasonable under the circumstances. Therefore, for the reasons stated, defendants are liable to plaintiffs for any damages they suffered.

III.

A.

[14] Plaintiffs' damages include amounts paid for past care for the child as well as future payments for care and lost income Nyenpan would have earned as an adult. The parties agree on the appropriate ***455** method of computing the expected rate of increase in the cost of future medical care offset by the present value of future payment for that care. However, as discussed below, the parties dispute Nyenpan's life expectancy and the amount of future lost wages.

Plaintiffs claim damages of $322,443.57 for Nyenpan's institutionalization at Wheat Ridge Regional Center to date, $4,969.18 for unreimbursed expenses paid by Tarpeh–Doe on his behalf, $4,657,400 for the present value of the cost of future medical and personal care at Wheat Ridge, and $1,008,434 in income and benefits Nyenpan could have received over his lifetime, less expenses and taxes. These claims total $5,993,246.75. Plaintiffs also seek damages for emotional suffering, pain, and disfigurement. Defendants argue that if plaintiffs are entitled to recover, the damage award should total $1,281,563, consisting of $4969 for unreimbursed expenses by Tarpeh–Doe, $702,844 for the present value of future expenses, and lost income of $573,750. Defendants argue that damages should not include the past costs of hospitalization at Wheat Ridge because those costs were paid by Medicare. However, plaintiffs filed on the record in this case an assignment agreement between the Department of Social Services of the State of Colorado and plaintiffs' attorneys. *See* Notice of Filing (filed November 26, 1990). That agreement states that the State of Colorado has the legal right to recover the amount of Medicaid payments made by it from any third party liable for the recipient's injuries. *Id.* In that agreement, plaintiffs agree to pay to Colorado the amount the State has paid in expenses from any recovery up to the amount of 50% of that recovery. Accordingly, damages awarded to plaintiffs by the terms of the agreement will be payable to the State of Colorado to the extent indicated.

B.

[15] Plaintiffs' expert economist Dr. Herman Miller calculated Nyenpan's lost income to be $1,008,434, using the census tables to determine the present value of the income of an American male college graduate with a work life of 38 years, less taxes and plus benefits. Miller dep. at 15. Defendants, in contrast, argue that the expected earnings should be reduced significantly. *See* Defs. ex. 41; (testimony of Schiller). In support, defendants' expert economist Dr. Bradley Robert Schiller argues that, since

Nyenpan's father was Liberian and his mother worked in Liberia when he was born, he could not be expected to spend his entire working life in the United States. (Plaintiffs noted on cross-examination of Dr. Schiller that Ben Tarpeh–Doe was now an American citizen and worked in the United States.) Aside from the reduced wages he could be expected to receive in Liberia, Dr. Schiller argued that his work life would be shorter by several years. He also believed that, once part of his work life had been spent in Liberia, he would receive less income in the United States. Moreover, Dr. Schiller argued that the appropriate measure of future earnings in the United States for Nyenpan (whose mother is white and whose father is black) is the average earnings of black men, not those of all men. Defs. ex. 41; (testimony of Schiller).

Defendants' argument that Nyenpan's projected earnings should be reduced because he might spend part of his working life in Liberia is not convincing. Insufficient evidence exists to support such a reduction. Furthermore, defendants' argument that average black male earnings are an appropriate measure of Nyenpan's future earnings cannot be accepted, since Nyenpan is half black and half white. Moreover, it would be inappropriate to incorporate current discrimination resulting in wage differences between the sexes or races or the potential for any future such discrimination into a calculation for damages resulting from lost wages. The parties did not cite any precedent on this question. Accordingly, upon request by the Court, Schiller submitted a calculation of the average earnings of all college graduates in the United States without regard to sex or race. Defs. ex. 44. Adjusted for changes in worklife expectancy, this calculation resulted in lost wages of $882,692. ***456** Dr. Schiller further adjusted this amount to reduce the income amount to earnings, to include FICA payroll taxes in the tax deduction, and to make certain adjustments in the net discount rate, resulting in total lost wages of $573,750. These adjustments appear to be reasonable and were not contested by plaintiffs. The average wages for all persons are lower than average black male wages; thus, the incorporation of women's expected earnings lowers the estimate even further than defendants' estimate. Nevertheless, estimating Nyenpan's future earnings based on the average earnings of all persons appears to be the most accurate means available of eliminating any discriminatory factors. Accordingly, the accompanying Order grants plaintiffs $573,750 in lost earnings.

C.

[16] In calculating the cost of future care, plaintiffs rely on the opinion expressed by their expert, Dr. Harold Stevens, a neurologist, that Nyenpan's life expectancy is 10% less than the life expectancy of an average person. *See* Stevens dep at 12. Dr. Stevens based this estimate not on any statistical evidence but on his personal experience of encounters with hundreds of children he had followed through adulthood who had severe nervous system damage. *Id.* at 21–22. He also noted that there is tremendous variability of longevity in persons suffering from post-meningitic syndromes. *Id.* at 22. Plaintiffs' expert economist Dr. Miller testified that the average eight year old male has a life expectancy of 72, i.e. 64.3 additional years. Miller dep. (de bene esse) at 10–11. Thus, plaintiffs assumed that Nyenpan would live 55 more years, 10% less than average. *Id.* at 11. Although costs at Wheat Ridge, which were $232 a day or $84,680 a year in 1990, had increased at the rate of 18% a year during the past five years, Miller estimated the growth rate of medical costs over Nyenpan's life would average 7% a year. *Id.* at 12. In arriving at that figure, he explained that medical costs had increased by an average of 8% a year for the past 20 years, and that he couldn't conceive of their increasing at the rate of 18% a year for the next 55 years. *Id.* at 19. To determine the present value of those costs, Miller used a discount rate of 7%, which he derived from the rate of return on long-term, insured, tax-free municipal bonds. *Id.* at 17 & 20. On the assumption that the increase in cost would equal the discount rate, Miller calculated future medical costs by multiplying the number of years Nyenpan was expected to live (55) by the annual cost of care ($84,680) arriving at $4,657,400. *Id.*

Defendants' expert Dr. Marianne Schuelein testified in contrast that she believed that Nyenpan's life expectancy was an additional 8.3 years, not 55 years. She based that figure on an article in the *New England Journal of Medicine* entitled "The Life Expectancy of Profoundly Handicapped People with Mental Retardation." Defs. ex. 33. A study of 4,513 profoundly mentally retarded persons who were immobile and were fed by others found an average life expectancy for children ages 5–9 to be an additional 8.3 years. Defs. ex. 33 at 588, Table 4. The average life expectancy of persons who survived to the age of 20 rose, rather than fell. Dr. Schuelein also testified that most children with Nyenpan's difficulties

die in the first 9 years, and that in her 23 years of experience, she had not seen persons with Nyenpan's injuries survive beyond the age of 20. One of the problems she noted was the difficulty diagnosing diseases in such persons. (Testimony of Dr. Schuelein). Like Dr. Miller, defendants' expert economist Dr. Schiller believed that the increase in medical costs over the years would be offset by the discount rate. Accordingly, defendants estimated Nyenpan's future medical costs to be $702,844.

This conflict of expert opinion as to Nyenpan's life expectancy creates an issue that is difficult to resolve equitably. A lump sum award of damages may be too crude an instrument. If the 8.3 year estimate is too low, the plaintiffs will lose relief to which they are plainly entitled. If the 55 year estimate is too high, they will realize a gross windfall at great expense to the taxpayers. There should be a way to ***457** minimize the guesswork. It can be determined with reasonable certainty what it will cost to maintain Nyenpan per year, i.e. $84,680.00, adjusted in future years for inflation (or deflation).

A solution may be available through one of several alternative mechanisms: (1) defendants could undertake to pay an annual amount (adjusted for inflation) for the benefit of Nyenpan during his lifetime; or (2) defendants could be required to contribute to a trust a discounted principal sum measured originally by the 55 year life expectancy anticipated by plaintiffs' experts, with distributions by the trustee from income and, if necessary, from principal, in amounts appropriate to maintain Nyenpan during his lifetime with the remainder reverting to defendants at his death.[12] *See, e.g., Friends For All Children v. Lockheed Aircraft Corporation,* 563 F.Supp. 552 (D.D.C.1983); 587 F.Supp. 180, 202 (D.D.C.1984). Finally, it is conceivable that (3) commercial insurance companies would be willing to bid on a commercial annuity, the cost of which would be measured by Nyenpan's life expectancy as determined by the insurance carrier on the basis of actuarial experience generally adjusted to reflect Nyenpan's unique condition. *See, e.g., Nemmers v. United States,* 795 F.2d 628, 635 (7th Cir.1986); *but see Friends for All Children,* 563 F.Supp. at 553. Accordingly, the accompanying Order will require counsel for both parties to investigate these alternatives and to file on or before September 9, 1991 either a joint proposal or separate ones for payment by defendant of the cost of maintaining Nyenpan during his remaining years.

Finally, it is found and ruled that, in addition to a sum (to be determined) for future maintenance of Nyenpan, plaintiffs are entitled to (1) $322,443.53 for the cost of his maintenance incurred through October, 1990, (2) $4,969.18 for unreimbursed expenses incurred on behalf of Nyenpan by his mother, Linda Tarpeh–Doe, and (3) $573,750[13] the present value of Nyenpan's prospective lost earnings. The accompanying Order will enter judgment for the resulting total of $901,162.71 and schedule further pleadings with respect to reimbursement for the cost future maintenance for life.

D.

[17] Plaintiffs' request for damages for Nyenpan's emotional distress and pain and suffering must be denied. It is highly likely that Nyenpan has suffered and will suffer extreme emotional distress as a result of his condition. However, Nyenpan now receives excellent and caring attention from those who attend to his needs. It is not clear that a monetary award would serve to compensate him for his suffering or otherwise benefit him in any way. Furthermore, such an award may be barred under the FTCA as punitive damages. *See, e.g., Molzof v. United States,* 911 F.2d 18 (7th Cir.1990), *cert. granted,* 499 U.S. 918, 111 S.Ct. 1305, 113 L.Ed.2d 239 (1991); *see also Flannery v. United States,* 718 F.2d 108, 111 (4th Cir.1983), *cert. denied,* 467 U.S. 1226, 104 S.Ct. 2679, 81 L.Ed.2d 874 (1984); *but see Rufino v. United States,* 829 F.2d 354, 362 (2d Cir.1987); *Shaw v. United States,* 741 F.2d 1202, 1208 (9th Cir.1984); *Kalavity v. United States,* 584 F.2d 809, 811 (6th Cir.1978). Should the Supreme Court resolve the split in the circuits on this issue by determining that an award of damages for loss of enjoyment of life to a comatose or similarly incapacitated plaintiff is appropriate under the FTCA, the Court will consider an application from plaintiffs for modification of judgment with respect to damages for pain and suffering.

Plaintiffs request leave to amend their complaint to request a total of $8,000,000 in damages. *See* Plaintiffs' Motion to Amend *ad damnum* to Conform to the Evidence (filed December 3, 1990). That motion is moot. For all of the reasons explained above, an accompanying Order grants judgment for plaintiffs, grants judgment of ***458** $901,162.71 and requests further briefing on the discount rate and rate of increase in costs to apply to a calculation of future medical costs.

APPENDIX A

Government Exhibit DX–1

UNIFORM STATE/AID/USIA REGULATIONS

686 Medical Travel

686.1 Authorization for Travel of Employee or Dependent

a. Any American Foreign Service employee or any of his dependents as defined in section 681.6a who require medical care for illness or injury not the result of vicious habits, intemperance, or misconduct, while located or stationed abroad in a locality where there is no qualified person or facility to provide such care, and except as provided in section 684.7–4, shall be eligible to travel at Government expense to the nearest facility where suitable medical care can be obtained, whether or not the medical care is at Government expense.

b. The principal or administrative officer (see section 681.4) may authorize travel, with the concurrence of the responsible officer of the respective agency, of any such employee or dependent to the nearest locality abroad where there can be provided suitable medical care, such as diagnosis, specialized examination, special inoculations, emergency dental care, hospitalization, or obstetrical care which, in his judgment, is inadequate or unavailable at the post, and which cannot or should not be delayed until the employee is eligible for home leave, transfer, or other official travel. The principal or administrative officer, drawing upon competent medical advice, shall determine: (1) the medical need for travel, (2) the nearest locality where suitable medical care can be obtained, and (3) the medical need for one or more attendants (see section 686.2).

c. An employee or a dependent may elect to travel for medical care to a locality other than the nearest authorized locality but he will be required to pay any travel cost and, if medical care is at Government expense, any cost of such medical care which exceeds, respectively, the cost of travel to or cost of medical care at the nearest authorized locality.

d. Travel shall not be authorized for employees or dependents to take routine medical examinations or to receive routine immunizations except when local medical facilities are inadequate and (1) direct transfer to another overseas post is scheduled and the Medical Director specifically requests a predeparture medical examination pursuant to section 684.7–2b(3) or (2) a special examination pursuant to section 684.2d is specifically ordered by appropriate officials designated in section 684.3–3.

686.2 Authorization for Travel of Attendants

The services of an attendant or attendants to accompany an employee or a dependent to a locality where suitable medical care can be obtained may be authorized by the principal or administrative officer (see section 681.4) when it is determined on the advice of competent medical authority that the patient is too ill to travel unattended or is too young to travel alone. When the Military Air Command (MAC) is utilized to evacuate a patient, adequate medical attention en route is normally provided by MAC. Some indication of the reason for evacuation should be given to the patient and, in every instance, the basic problem and possible reactions of the patient should be discussed with the attendant. When in the judgment of the principal or administrative officer the services of a nonemployee medical attendant are warranted, such services may be contracted for as indicated in section 686.2b.

All Citations

771 F.Supp. 427

Footnotes

1 Plaintiffs brought this action in pursuit of several claims. Two claims alleging negligence arising outside of the United States were dismissed on October 25, 1988 because the FTCA does not authorize tort claims arising in a foreign country. *See* 28 U.S.C. § 2680(k); *see also United States v. Smith,* 499 U.S. 160, 111 S.Ct. 1180 & at 1187 n. 11, 113 L.Ed.2d 134 (1991). On another claim, a partial summary judgment granted to plaintiffs holding that the administrative resolution of plaintiffs' foreign claims violated due process was reversed on appeal. *Tarpeh–Doe v. United States,* 904 F.2d 719 (D.C.Cir.1990), *reh. denied,* No. 89–5210 (August 13, 1990), *cert. denied,* 498 U.S. 1083, 111 S.Ct. 955, 112

L.Ed.2d 1043 (1991), *reversing Tarpeh–Doe v. United States,* 712 F.Supp. 1 (D.D.C.1989). The remaining claims allege negligence occurring in the United States.

2 A relevant excerpt of these regulations, submitted as Defendants' Exhibit 1, is attached as Appendix A to this Memorandum.

3 Mr. Mandersheim's full name and position were not identified in the evidence produced.

4 Ben Tarpeh–Doe, who married Linda Wheeler, did not testify at trial. All references to the testimony of Tarpeh–Doe refer to Linda Wheeler Tarpeh–Doe's testimony.

5 Petrone recalled that Tarpeh–Doe brought the child with her, Petrone dep. at 11; Clement recalled that she did not. (Testimony of Clement).

6 On June 17, Tarpeh–Doe visited the embassy. That day, not aware that evacuation already had been approved, she inquired of Alan Swan, the AID Executive Officer, when evacuation would be approved. He told her that no date had been scheduled. Later that day, she encountered Clement, who informed her that she was making arrangements to accompany Nyenpan's evacuation that evening as a medical attendant. Tarpeh–Doe went immediately to Dr. Lefton, who confirmed the evacuation. Swan later told Tarpeh–Doe that Dr. Lefton had asked him not to tell the Tarpeh–Does that their evacuation had been approved that day. Tarpeh–Doe dep. at 108–09.

7 Plaintiffs presented some circumstantial evidence raising the suspicion of an improper reason, i.e. that the evacuation was postponed until a replacement could be found for Tarpeh–Doe's supervising officer. As an accountant, Tarpeh–Doe worked for the Acting Comptroller in Monrovia. Only Tarpeh–Doe and the Acting Comptroller were authorized to certify AID vouchers. Certification of vouchers was required for processing of all AID checks, including payroll checks. (Testimony of Tarpeh–Doe); Petrone dep. at 15–16. Following a going away party, the acting Comptroller left Monrovia on June 5, 1982, on the 11:00 p.m. flight on which Dr. Lefton had first planned to evacuate Nyenpan. During Nyenpan's illness, Tarpeh–Doe certified all AID vouchers, which were brought to her at ELWA on many days so that she could remain at her son's bedside. (Testimony of Tarpeh–Doe). A new certifying official arrived in Liberia on the morning of June 18, 1982. Defendants did not present any evidence in contravention of the obvious damaging conjectures that can be drawn from these facts. Nevertheless, plaintiffs do not urge a finding that the State Department purposely delayed evacuation of a severely ill child for over ten days until a certifying official could be brought in to certify checks.

8 *See also infra,* section III–E, pp. 61–63.

9 Defendants argue that Dr. Schroeter's message was hearsay and should be excluded from evidence. However, that evidence is not admitted for the truth of the assertion. Marilyn Wheeler testified that she gave that message to an operator at the State Department. Moreover, whether advice from a specialist, particularly a neonatologist familiar with infectious diseases, might have led to improved care and Nyenpan's recovery is not dependent on accepting the truth of Dr. Schroeter's assertion.

10 Marilyn Wheeler did not recall whether she called the State Department with her message on Saturday, June 5, or Sunday, June 6. However, for several reasons, it is more likely than not likely that she relayed the message on June 5. When Kate Jones Petrone first telephoned Wheeler to request that she arrange for a receiving physician, it was afternoon in Liberia. Therefore, it was seven hours earlier in Colorado, very likely early in the morning of June 5. It is likely that Petrone would have informed Wheeler that the evacuation was scheduled to take place at 11:00 p.m. that evening, June 5. It is also likely that Wheeler would have recognized the urgency of the situation and made every attempt to locate a receiving physician that day. The State Department did not relay Wheeler's message to Liberia until Monday, June 7. Accordingly, if that message were received on the afternoon of June 5, not only did no one relay the portion of the message that Dr. Schroeter wanted to speak with the treating physicians, no acted at all on that message for two days—over the weekend.

11 Kate Jones Petrone succeeded in contacting Marilyn Wheeler by telephone on June 5. However, after Wheeler contacted the State Department, someone informed her that the cable had been sent on June 7 but that they could not contact personnel in Liberia by telephone. (Testimony of Wheeler).

12 It may be that Nyenpan's grandmother could be trustee or co-trustee.

13 No trust is contemplated for this sum pending consideration of plaintiffs' obligation for attorneys' fees and disbursements which the court expects to review.

Tab 4

399 A.2d 563
District of Columbia Court of Appeals.

DISTRICT OF COLUMBIA, Appellant,
v.
Agnes BARRITEAU and
Thomas Barriteau, Appellees.

No. 13110.
|
Argued Oct. 17, 1978.
|
Decided March 16, 1979.

Patient and her husband brought action to recover against District of Columbia on theory that spinal tap was negligently performed on patient while she was being treated at clinic which was an agency of the District. The Superior Court, District of Columbia, George H. Revercomb, Trial Judge, rendered judgment for spouses, and District appealed. The Court of Appeals, Newman, C. J., held that: (1) it is proper for jury to consider impact of future inflation in arriving at future loss of income in personal injury cases if the record contains a proper factual predicate consisting of competent evidence setting the future rate of inflation within reasonable limits; (2) trial court did not err in permitting jury to consider effects of future inflation in arriving at a damage award representing patient's loss of future income, and (3) issue whether trial court erred in excluding cross-examination of economist as to effect of taxation on patient's loss of future earnings was not properly preserved for review.

Affirmed.

Attorneys and Law Firms

***564** Edward E. Schwab, Asst. Corp. Counsel, Washington, D. C., with whom John R. Risher, Jr., Corp. Counsel, Washington, D. C., at the time the brief was filed, and Richard W. Barton, Deputy Corp. Counsel, Washington, D. C., were on the brief, for appellant.

Jack H. Olender, Washington, D. C., with whom Daniel R. Kane, Washington, D. C., was on the brief, for appellees.

Before NEWMAN, Chief Judge, and NEBEKER and YEAGLEY, Associate Judges.

Opinion

NEWMAN, Chief Judge:

This case arises from a negligence action in which the jury returned a verdict in favor of appellees and awarded damages totalling $225,000. [1] In this appeal, the District of Columbia concedes the issue of liability, but challenges the amount of the damage award. Two issues are presented ***565** for our determination: (1) whether the trial court erred in permitting the jury in a personal injury case to consider the impact of future inflation in arriving at a damage award representing appellee's loss of future earnings; and (2) whether the trial court erred in refusing to allow the District to cross-examine appellee's expert witness as to the future impact of income taxes on appellee's loss of future income. After setting forth the relevant facts in Part I, we discuss in Part II the issue of future inflation and conclude that it is a proper factor for the jury to consider in determining loss of future earnings. In Part III, we conclude that the District has not properly preserved the issue of income taxes for resolution on appeal. We affirm.

I.

On March 27, 1975, Mrs. Agnes Barriteau was treated at the Upshur Street Clinic, an agency of the District of Columbia. During the course of this treatment, a doctor, while attempting to perform a spinal tap, punctured her approximately thirteen times at a vertebral interspace substantially above the accepted situs for performing spinal taps. As a result, Mrs. Barriteau sustained traumatic injury to the Conus medullaris, in the spinal cord, resulting in paralysis of the lower extremities and bodily function organs. These injuries necessitated emergency surgery and the performance of a decompressive laminectomy. [2] The conceded negligence of appellant left Mrs. Barriteau with a left leg smaller and weaker than the right through atrophy, inability to properly lift the left foot, a pronounced limp, trembling of the foot, back pain from a pelvic tilt from the leg and foot injury, and urological complications. [3]

At trial the evidence established that Mrs. Barriteau, who was a nursing assistant at the time of her injuries,

cannot perform her work since it requires lifting and strenuous movement. She can do only "baby-sitting", or companion-type work for private patients and she can do this only on a limited basis. In addition, appellee's vocational expert witness testified that Mrs. Barriteau would be unlikely to "succeed at most sedentary factory jobs." The vocational expert concluded that Mrs. Barriteau would be virtually unemployable except in a limited capacity in her field of nursing assistance.

Evidence also established that Mrs. Barriteau was 39 years old at the time of her injury in March 1975. She was then employed as a full-time nursing assistant receiving wages at an annual rate of $6,422 which at the time of trial would have been $8,580. As a result of the injuries to her spinal cord and the restriction in her work activity to only part-time, light-duty nursing assistant's work, she has sustained a pay reduction to only $4,000 per year at the time of trial in October 1977.

To quantify Mrs. Barriteau's claim for lost earnings and future loss of earning capacity, appellees utilized the expert testimony of an economist, Dr. Richard J. Lurito. [4] Dr. Lurito testified that his projections of Mrs. Barriteau's salary were based on her history of earnings and that he based her life expectancy on HEW tables. He stated that her work life/retirement date was based on relevant figures of the Department of Labor Statistics using the median age of 62. He also stated that her salary and benefits at the time of trial would have amounted to $8,580 per year.

Taking her salary of $8,580, Dr. Lurito then applied an escalation factor of six percent a year which was based on a study of the kind of occupations under discussion, nurses and nurses' assistants. He then calculated *566 the number of dollars that Mrs. Barriteau would likely have earned from the time of her injury to the end of her expected work life at age 62, had she not been injured. That gross figure came to $331,384. Dr. Lurito testified that he chose the six percent escalation factor based on an analysis of workers' compensation that has been experienced in the economy over the past 30 years. He explained that the six percent escalation included a factor for productivity growth as well as an inflation factor. He noted that in recent years the rate of inflation alone has been substantially higher than six percent, but over the long term the six percent figure was a reasonable figure. Dr. Lurito also testified that recent increases for nurses and nurses' assistants have been substantially more than six percent per annum.

Dr. Lurito next reduced the $331,384 gross figure to its present value by applying a 5.25 percent discount rate. In computing the discount factor he worked from a prior 20-year average because he was projecting a 20-year average. He testified that the 5.25 percent discount rate was composed of government bond averages and corporate bond averages over a period of years. Dr. Lurito then applied the six percent escalation factor to the $4,000 annual income Mrs. Barriteau is now capable of earning because of her injuries and projected it to age 62. That figure came to $160,971. Applying a 5.25 percent discount factor to that yielded a present value of $91,318. The difference between the two present value figures is $103,399, the amount of the loss, as projected by Dr. Lurito.

Counsel for the District cross-examined Dr. Lurito on his projections and the assumptions which formed the basis for his figures. The District had Dr. Lurito prepare a list of his assumptions and used the list in cross-examination and closing argument to the jury. The District also requested rulings from the trial court that they be allowed to cross-examine Dr. Lurito regarding the impact of federal and District of Columbia income taxation on Mrs. Barriteau's projected loss of future income. The trial court denied the request. The District made no proffer of what it expected Dr. Lurito's testimony on income taxation would be. Nor did the District present any expert witnesses of its own or proffer of such witnesses' testimony on the issue of income taxes.

The jury returned a verdict for Mrs. Barriteau of $200,000 and verdict for Mr. Barriteau of $25,000 for loss of consortium. The District filed a motion for a new trial or in the alternative for a remittitur. The trial court denied appellant's motion and this appeal followed.

II.

The District of Columbia contends that the trial court erred in permitting the jury to consider the impact of future inflationary trends in arriving at a damage award representing appellee's projected loss of future earnings. This issue is one of first impression in this jurisdiction. [5]

[1] [2] In the District of Columbia, the primary purpose of compensatory damages in personal injury cases "is to make the plaintiff whole." Kassman v. American University, 178 U.S.App.D.C. 263, 267, 546 F.2d 1029, 1033 (1976). See *567 Snowden v. District of

Columbia Transit System, Inc., 147 U.S.App.D.C. 204, 205, 454 F.2d 1047, 1048 (1971); Hudson v. Lazarus, 95 U.S.App.D.C. 16, 18, 217 F.2d 344, 346 (1954). "(D)amages awarded in personal injury actions are aimed at compensating the victim or making good his losses." D. Dobbs, Handbook of the Law of Remedies s 8.1 at 540 (1973). For this reason, loss of future earnings is a distinct item of damages, which if properly proved at trial, may result in recovery for the plaintiff. See McDermott v. Severe, 25 App.D.C. 276, 290 (1905), Aff'd, 202 U.S. 600, 26 S.Ct. 709, 50 L.Ed. 1162 (1906); Washington and Georgetown Railroad v. Patterson, 9 App.D.C. 423, 436 (1896). See generally C. McCormick, McCormick on Damages s 86 at 299-309 (1935). [6]

There exists a trend among a number of courts to allow the jury to consider the impact of future inflation in arriving at damage awards representing loss of future income in personal injury cases. See Willmore v. Hertz Corp., 437 F.2d 357, 359-60 (6th Cir. 1974); Lumber Terminals, Inc. v. Nowakowski, 36 Md.App. 82, 373 A.2d 282, 290-91 (1977); Ossenfort v. Associated Milk Producers, Inc., 254 N.W.2d 672, 683-84 (Minn.1977); Markham v. Cross Transportation, Inc., 376 A.2d 1359, 1364 (R.I.1977); Schnebly v. Baker, 217 N.W.2d 708, 727-28 (Iowa 1974); Plourd v. Southern Pacific Transportation Corp., 266 Or. 666, 677-79, 513 P.2d 1140, 1146-47 (1973). Cf. Cords v. Anderson, 80 Wis.2d 525, 549-52, 259 N.W.2d 672, 683-84 (1977) (jury may consider effect of inflation on future medical expenses). Recognizing that plaintiffs might not be adequately compensated if juries were not allowed to consider inflation, these courts have observed that "(i)nflation has become a fact of life within the experience of everyone. It has continued to a greater or lesser extent throughout most of our lifetimes. Most people have found it necessary to reckon with this in their own financial planning for the future." Seaboard Coast Line Railroad v. Garrison, 336 So.2d 423, 424 (Fla.App.1976). [7]

Other courts maintaining that consideration of the future effects of inflation is merely a speculative enterprise have refused to allow juries to consider such evidence in arriving at damage awards. See Williams v. United States, 435 F.2d 804, 807 (1st Cir. 1970); Sleeman v. Chesapeake and Ohio Railway Co., 414 F.2d 305, 307-08 (6th Cir. 1969). See generally II F. Harper & F. James, The Law of Torts s 25.11 at 1323-26 (1956). [8]

***568** We are of the view that those opinions which permit evidence of inflation are the better reasoned ones. To preclude the jury from considering the impact of future inflation not only ignores past economic trends which demonstrate the decline of the purchasing power of the dollar, but also assumes that the purchasing power of the dollar will remain forever constant. We are of the opinion that this position is contrary to sound economics in view of the fact that governmental, private, and personal financial planning are based precisely on such future trends. While predicting future rates of inflation does involve some degree of speculation, that is not a sufficient basis for entirely precluding such evidence since there is speculation and imprecision inherent in any computation of loss of future economic benefit. Indeed, the alternative that of precluding any consideration of inflation is equally as speculative. As the court in United States v. English, 521 F.2d 63, 75 (9th Cir. 1975) observed:

> While predicting future inflationary trends, or extrapolating from present ones, may be speculative, so are most predictions courts make about future incomes, expenses (as, for example, in the case of the wrongful death of an infant). Since it is still more probable that there will in the future be changes in the purchasing power of the dollar, it is better to try as best we can to predict them rather than to ignore them altogether.

[3] We hold that it is proper for the jury to consider the impact of future inflation in arriving at future loss of income in personal injury cases. We do not suggest by our holding that in all cases the jury should be allowed to consider inflation. There must be a proper factual predicate in the record to support the jury's consideration of future inflationary projections. "(A) jury should never be permitted to guess as to a material element of the (plaintiff's) case such as damages . . . ." Courtney v. Giant Food, Inc., D.C.App., 221 A.2d 92, 94 (1966). In short, there must be competent evidence which sets the future rate of inflation within reasonable limits.

[4] Courts which allow the jury to consider inflation in computing loss of future earnings have used two methods. Some courts allow evidence that assumes that the plaintiff would have had wage increases equivalent to

the inflationary trend. This figure is then reduced to its present value. See D. Dobbs, Supra, s 8.7 at 575. Other courts allow juries to consider inflation by not reducing the award to its present value. See Leavitt v. Gillaspie, 443 P.2d 61, 68-69 (Alaska 1968); Beaulieu v. Elliott, 434 P.2d 665, 671 (Alaska 1967). We reject the view that inflation may be taken in consideration by not reducing the award to its present value.

We are aware that arriving at a sum representing future loss of earnings often involves a complicated procedure. To arrive at a reasonable figure the trier-of-fact must have evidence pertaining to the age, sex, occupational class, and probable wage increases over the remainder of the working life of the plaintiff. For this reason, in personal injury cases no less than wrongful death cases, "the task of projecting a person's lost earnings lends itself to clarification by expert testimony because it involves the use of statistical techniques and requires a broad knowledge of economics." Hughes v. Pender, D.C.App., 391 A.2d 259, 262 (1978).

[5] [6] [7] [8] Not every element of damages warrants the use of expert testimony, and the decision to admit expert testimony lies within the sound discretion of the trial court. Id.; District of Columbia v. Davis, D.C.App., 386 A.2d 1195, 1200 (1978). Generally, "when the subject dealt with is so distinctly related to some science, profession, business or occupation as to be beyond the ken of the average layman, its clarification ***569** calls for the use of expert testimony." Id., citing Waggaman v. Forstmann, D.C.App., 217 A.2d 310, 311 (1966). The test simply stated is whether such expert testimony "will be likely to aid the trier in the search for truth." Jenkins v. United States, 113 U.S.App.D.C. 300, 306, 307 F.2d 637, 643 (1962). However, where the existence of substantial future economic loss becomes an issue, the use of expert testimony likely would be necessary since seldom will lay witnesses possess the requisite background to testify on a matter such as this one not likely to be within the common knowledge of the average layman. In sum, "(t)he complexities of economics, no less than those of medicine, merit the assistance of expert testimony, so important to an adequate assessment of plaintiff's damages." Ossenfort v. Associated Milk Producers, Inc., supra at 684. As this court has recently observed, "(w)hen properly utilized, such expert testimony can provide a rational basis for the jury's determination of an individual's future earnings, and thus can minimize the risk of jury speculation present whenever future earnings must be predicted." Hughes v. Pender, supra at 263.

[9] [10] Of course the expert testimony must have a proper factual foundation and must be based upon evidence in the record. We note that expert testimony on the impact of future inflation on the loss of future earnings like all other properly admitted testimony is only Evidence of future inflationary trends. The expert may be cross-examined and contrary expert evidence also may be introduced.

[11] In the present case, we are satisfied that the expert's testimony was supported by a proper factual foundation. Appellee's expert testified as to facts in the record. He based his calculations of her loss of future income on analysis of workers' compensation and inflation rates over the past 30 years. Moreover, appellant was permitted to cross-examine appellee's expert economist. Appellant's trial counsel had the expert prepare a list of his assumptions, and used those assumptions in his cross-examination and closing argument to the jury. We hold that the trial court did not err in permitting the jury to consider the effects of future inflation in arriving at a damage award representing appellee's loss of future income.

III.

As its second assignment of error, the District contends that the trial court erred in excluding cross-examination of appellee's economist as to the effect of taxation on appellee's loss of future earnings.

[12] It is well settled that " '(q)uestions not properly raised and preserved during the proceedings under examination . . . will normally be spurned on appeal.' " Kassman v. American University, supra, 178 U.S.App.D.C. at 266, 546 F.2d at 1032, quoting Miller v. Avirom, 127 U.S.App.D.C. 367, 369-70, 384 F.2d 319, 321-22 (1967). To properly preserve excluded testimony for review on appeal, trial counsel must normally make an offer of proof. See generally Super.Ct.Civ.R. 43(c). This offer of proof is " not to meet a technical requirement but (is necessary) to lay the foundation for an affirmative showing of error." Shlopak v. Davison, D.C.Mun.App., 34 A.2d 126, 127 (1943). See Reamer v. Blumenthal, D.C.Mun.App., 154 A.2d 364, 366 (1959); Pitts v. United

States, D.C.Mun.App., 95 A.2d 588, 590 (1953); Brown v. Haas, D.C.Mun.App., 72 A.2d 39, 40 (1950).

[13] In the present case, the District made no such offer of proof and presented no witnesses on the issue of taxation in its own behalf during trial. The District came to trial, not with projections of such tax consequences, but with a naked request that it be permitted to cross-examine appellee's expert economist on this subject without any showing that the expert possessed sufficient information upon which he could base an opinion. As the court stated in Good v. A. B. Chance Co., 565 P.2d 217, 226 (Colo.App.1977), when confronted with a similar issue:

During cross-examination of the plaintiff's expert, (appellant) sought to elicit a ***570** simple answer from the expert that income taxes had not been considered in his compilation of figures. The expert was not permitted to answer. (Appellant) did not show that the witness had information upon which to base an opinion on the effect of income taxes and made no offer of proof on the projected tax burden.

Under these circumstances, the trial court did not err in refusing to permit (appellant's) general inquiry about the effect of income taxes on anticipated future earnings.

In view of the state of the record in this case, we cannot say that the trial court committed error on this issue.

Affirmed.

All Citations

399 A.2d 563

Footnotes

1 Verdict for Mrs. Barriteau was for $200,000; verdict for Mr. Barriteau for loss of consortium was for $25,000.

2 A laminectomy is an operation involving the excision of the posterior arch of a vertebrae.

3 Dr. Everett Gordon, who examined Mrs. Barriteau for defendant, established that she sustained 25 percent permanent disability to her entire body as a result of the injury to her leg and foot and a 10 percent permanent disability to her entire body as a result of the injury to her back. She must remain under a urologist's care for weakness of the bladder.

4 Dr. Lurito was qualified as an expert witness by the trial court without objection by the District.

5 Appellee contends that Washington & Rockville Ry. v. La Fourcade, 48 App.D.C. 364, 368-69 (1919) and Hord v. National Homeopathic Hosp., 102 F.Supp. 792, 796-97 (D.C.1952), Aff'd, 92 U.S.App.D.C. 204, 204 F.2d 397 (1953), should control our disposition of the case at bar. In La Fourcade, the court held that in estimating damages for personal injuries the jury could take into account the fact that the value of the dollar had significantly depreciated between the time of the accident and the time of trial. In Hord, the court reviewed a damage award alleged to be excessive on the ground that smaller awards in earlier cases for similar injuries were held to be excessive. The court merely rejected the validity of comparing earlier cases with the case at bar where there had been substantial inflation in the interim. See United States v. English, 521 F.2d 63, 72-73 (9th Cir. 1975). In the present case, we are confronted with the validity of a jury taking into account impact of future inflation. While these cases are illuminative, they are not dispositive.

6 Simply stated, the loss of the future earning capacity represents the amount that the injured party would have earned but for the injury. Therefore, evidence must be presented regarding the demonstrated earning capacity of the injured party prior to the injury and this figure must be projected over the remaining working life of the injured party taking into account expected future earning increases. Secondly, the actual future earning capacity must be ascertained, and this sum is determined by evaluating what the injured party can now be expected to earn in light of diminished physical capacity. Finally, both must be reduced to their present value, using a valid discount rate. The difference between the two present value figures is the present value of the loss of future earnings. See generally O'Connor and Miller, The Economist-Statistician: A Source of Expert Guidance in Determining Damages, 48 Notre Dame Law 354, 362-63 (1972).

7 Courts have also allowed juries to consider the impact of future inflation on the loss of the decedent's future earnings in wrongful death cases. See United States v. English, supra at 72-74; Perry v. Allegheny Airlines, Inc., 489 F.2d 1349, 1353 (2d Cir. 1974); Good v. A. B. Chance Co., 565 P.2d 217, 225-26 (Colo.App.1977). The above-cited federal cases were based on federal claims where the court applied the state substantive law of damages. We perceive no difference in the rationale supporting jury consideration of inflation in wrongful death cases as opposed to personal injury cases.

8 Harper and James have appropriately characterized this debate:

Future trends in the value of money are necessarily unknown and so always render such damages speculative in a way we cannot escape. If the estimates represent a straight-line projection of present living costs, they will be frustrated by fluctuations either way. If prophecy of change is heeded, frustration will follow if no change, or the opposite change, occurs. When courts have consciously grappled with the problem they have either found all prophecy too speculative and so, perforce, have taken the equally speculative course of betting on a continuance of the status quo; or they have made intuitive and not always very wise judgments that present conditions represent a departure from some imaginary norm to which they think we shall rapidly return. It is not at all clear that courts would be willing to hear experts on the matter, or that they would get much real help if they did. For the most part the problem which is inevitably present in every case of future loss is not analyzed and the present value of money is assumed to be the proper basis. (II F. Harper & F. James, Supra at 1325-26 (footnotes omitted).)

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876 F.2d 174
United States Court of Appeals,
District of Columbia Circuit.

Ingeborg SCHLEIER, Personal Representative of the Estate of Shedd H. Smith, Deceased, Appellee,
v.
KAISER FOUNDATION HEALTH PLAN OF THE MID–ATLANTIC STATES, INC., Appellant.

No. 88–7106.
|
Argued Dec. 2, 1988.
|
Decided May 26, 1989.
|
Rehearing and Rehearing En Banc Denied Aug. 2, 1989.

Personal representative of deceased patient's estate brought action under District of Columbia survival statute claiming that patient's health maintenance organization's physicians negligently failed to diagnose and treat patient's latent coronary artery disease. The United States District Court for the District of Columbia, George H. Revercomb, J., returned a $825,000 lump-sum verdict in plaintiff's favor, and HMO appealed. The Court of Appeals held that: (1) HMO was vicariously liable for negligence of physician brought in as consultant by HMO physician; (2) expert testimony was not required to prove patient's lost future wages due to ample testimony regarding employment history and background; (3) expert guidance was necessary to assist jury on issues of inflation and discounting to present value; and (4) defendant was entitled to instruction that any damage award would not be subject to taxation to guide jury in determining patient's lost earnings.

Vacated in part and remanded.

***175** ****416** Appeal from the United States District Court for the District of Columbia (Civil Action No. 86–01736).

Attorneys and Law Firms

Richard W. Boone, Arlington, Va., for appellant.

Leonard Keilp, for appellee.

Before RUTH BADER GINSBURG and SILBERMAN, Circuit Judges, and FLOYD R. GIBSON,* Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit.

Opinion

Opinion PER CURIAM.

****417** ***176** PER CURIAM:

Kaiser Foundation Health Plan of the Mid–Atlantic States, Inc. [hereinafter Kaiser] appeals from a judgment entered on a jury verdict in favor of Ingeborg Schleier [hereinafter Schleier], as Personal Representative of the Estate of Shedd H. Smith, her husband. Schleier brought this action under the District of Columbia survival statute claiming that Kaiser physicians negligently failed to diagnose and treat Smith's latent coronary artery disease which caused his death on June 20, 1983.

The case was submitted to the jury on Schleier's negligence claim and the jury returned a $825,000 lump-sum verdict in her favor. Kaiser now appeals raising several issues. For the reasons herein stated we hold that it was reversible error not to instruct the jury, as defendant requested, that any award to plaintiff would not be subject to income taxation; we therefore reverse the judgment in part and remand for a new trial on damages.

I. BACKGROUND

At the time of his death, Shedd Smith was a 48–year–old urban planner for the General Services Administration in Washington, D.C. Kaiser is a health maintenance organization that provides health care to federal government employees. Smith was a paid Kaiser subscriber.

Smith was first treated at a Kaiser Clinic for abdominal pain in March 1983. On May 6, 1983, Smith spoke with a Kaiser advice nurse and complained of continual stomach pain. Six days later Smith called Kaiser again, this time because of a forty-five minute episode of severe chest pain radiating into his left shoulder. Smith was sent to the Fairfax Hospital Emergency Room where an

electrocardiogram (EKG) was performed and interpreted as having non-specific S–T wave changes. Although the tests were inconclusive as to whether Smith had suffered a heart attack, a Kaiser physician admitted Smith to Fairfax Hospital Coronary Care Unit. The next day, Dr. Sherber, a cardiologist who was an outside consultant and not a Kaiser physician, was brought in to examine Smith.

Sherber's initial conclusion, after reviewing the information then available, was that it was unlikely that Smith had suffered a heart attack. However, he scheduled additional tests. Sherber found Smith's MUGA [1] test was normal but his stress EKG was abnormal. Nevertheless, Sherber thought it unlikely that Smith had coronary heart disease, and did not recommend further cardiac testing, nor did he restrict any of Smith's activities. The results of the stress EKG were then sent to Kaiser to be placed in Smith's medical chart.

During the four nights following his MUGA test, Smith complained to a Kaiser physician of profuse night sweats. After reviewing Smith's medical chart, which had not yet been updated to include his abnormal stress EKG, a Kaiser physician told Smith that the night sweats were not cardiac related. [2] Smith did not suffer any other symptoms until June 19, 1983, when he began to sweat heavily and became exhausted after mowing his lawn and doing some housework. The next day his condition deteriorated. He began to vomit and was in a very weak and tired condition.

Schleier, concerned about her husband's state, called the Kaiser advice nurse who responded that Smith would have to sweat out his condition. After making this phone call, Schleier returned to her husband and found him gasping for air. She called the rescue squad but before it arrived Smith had stopped breathing despite her attempts to resuscitate him. Smith died in the ambulance en route to the Fairfax Hospital Emergency Room.

Kaiser raises several issues on appeal including the court's denial of Kaiser's motion to transfer the case to the Eastern District of Virginia, as well as the trial court's decision denying Kaiser's motion for a judgment notwithstanding the verdict.. ***177** ****418** Kaiser also claims that it was not adequately shown that it breached its contractual duty to provide adequate health care, nor was it shown that Kaiser was liable for Sherber's negligence. Kaiser asserts that the jury could not properly determine Smith's lost future earnings, because it was not given sufficient guidance on Smith's employment history, his life expectancy, inflation or discounting to present value. Finally, Kaiser contends that the jury was not adequately instructed that any amounts awarded as damages would not be subject to income taxation.

II. DISCUSSION

A. *Motion to Transfer*

[1] We first consider the appellant's contention that the district judge abused his discretion when he refused to transfer this case to the United States District Court for the Eastern District of Virginia pursuant to 28 U.S.C. § 1404(a) (1982). Kaiser notes that although Smith worked in the District of Columbia, he resided in Virginia and received all medical care rendered by Kaiser in Virginia. Kaiser is incorporated and has its principal place of business in the District of Columbia, thus the diversity jurisdiction of the district court was properly invoked. Kaiser, however, argues that the convenience of the witnesses and parties, as well as the interests of justice, compelled a transfer of this case to Virginia. Its arguments are not forceful. As the change of venue was merely from Washington, D.C. to Alexandria, Virginia, no witness or party was to be particularly convenienced by the move. Neither would the interests of justice be served, as District of Columbia law would continue to apply even if the case were moved to Virginia. *See Van Dusen v. Barrack,* 376 U.S. 612, 639, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964) (where defendant seeks transfer, transferee court ordinarily is "obligated to apply the state law that would have been applied if there had been no change of venue").

B. *Kaiser's Liability for its Independent Contractor's Negligence*

Next we examine Kaiser's appeal of the court's denial of Kaiser's motions for a directed verdict. When considering the denial of a motion for a directed verdict, we must look at all the evidence in the light most favorable to the non-movant and resolve all conflicts in the evidence in the non-movant's favor. *Bell v. May Dep't Stores Co.,* 866 F.2d 452, 455 (D.C.Cir.1989). Bearing that standard in mind, we find insubstantial Kaiser's contention that it is not vicariously liable for the negligence of Sherber, its consulting physician, because he is an independent contractor.

[2] To determine whether the requisite "master-servant" relationship exists between an employer and an independent contractor for the purpose at hand, *i.e.,* ascertaining whether the employer is liable for the independent contractor's negligence, the District of Columbia considers five factors: "(1) the selection and engagement of the servant, (2) the payment of wages, (3) the power to discharge, (4) the power to control the servant's conduct, (5) and whether the work is part of the regular business of the employer. Standing alone, none of these *indicia,* excepting (4), seem controlling...." *LeGrand v. Insurance Co. of N. Am.,* 241 A.2d 734, 735 (D.C.1968). An application of those factors to the instant case supports the conclusion that Kaiser is liable for Sherber's negligence. Sherber was brought in as a consultant by a Kaiser physician, so it cannot be gainsaid that Kaiser selected and engaged him. The record does not reveal who paid Sherber, so that point is inconclusive. It does, however, appear as though Kaiser could discharge Sherber from the Smith case, but as Sherber is an independent physician, this factor does not carry the same weight as it might if Sherber had no other source of income. As to the fourth and most important factor, Kaiser had some ability to control Sherber's behavior in that he answered to Smith's primary care-taker, a Kaiser doctor. Finally, as Kaiser provided health care and Sherber was performing health care (albeit negligently)) ***178** ****419** we may safely conclude that Sherber's actions fell within the ambit of Kaiser's regular business. It might be said that because Kaiser had eliminated cardiology from its coverage, the actions of Sherber, a cardiologist, do not fall within Kaiser's regular business offerings, but we think such an argument circumvents the intention of this final factor—to shield an employer from liability for the actions of an employee who was acting outside his field of expertise (for example, a doctor who negligently fixes a car)—and so we consider Sherber's actions to fall within the scope of Kaiser's regular business. Under the *LeGrand* analysis, we thus conclude, liability for Sherber's negligence attaches to Kaiser.

Although the District of Columbia has not explicitly opined on the question of when an independent contractor is an apparent or ostensible agent, we may draw added support from *Haven v. Randolph,* 342 F.Supp. 538, 542 (D.D.C.1972), *aff'd on other grounds,* 494 F.2d 1069 (D.C.Cir.1974), which declared that a "hospital is liable for the acts of a physician only if he is employed by the hospital and/or acts as agent for the hospital." The district court held that sufficient evidence was presented to the jury to support the finding that Kaiser was liable for Sherber's acts under the theory that he was an apparent or ostensible agent. The *Haven* court stated that the doctrine of *respondeat superior* is *not* applied when "a physician ... acts upon his own initiative, and in the exercise of his own judgment and skill, without direction or control of an employer, * * * and [when] there is negligence in the treatment of a patient on the part of a physician who is not the servant or employee of the hospital, and who is pursuing an independent calling." *Id.* (quoting *Smith v. Duke Univ.,* 219 N.C. 628, 14 S.E.2d 643, 647 (1941)). By implication, the *Haven* court would apply *respondeat superior* here, where Sherber acted neither on his own initiative nor independently of the Kaiser physician. To the contrary, Sherber only made recommendations to the Kaiser doctor.

The *Haven* case seems to be the only decision on point applying D.C. law, but there is a sensibly-reasoned Maryland case which supports finding Sherber to be Kaiser's agent. In *Mehlman v. Powell,* 281 Md. 269, 378 A.2d 1121 (1977), the hospital was held to be responsible for its emergency room doctors even though they were independent contractors because patients who came to the emergency room reasonably expected—and were not disabused of the notion—that the doctors in the emergency room were hospital employees. In the instant case, Sherber was brought in by Kaiser to examine Smith who had every reason to believe that Sherber was Kaiser's agent.

Having thus satisfied ourselves of Kaiser's liability for Sherber's negligent treatment of Smith, we need not tarry over Kaiser's contention that no showing was made that it breached its contractual duty of care to Smith. The record is replete with such evidence.

C. *Lost Future Wages*

1. *Employment History*

[3] Appellant challenges the lack of expert testimony presented to the jury for the purpose of calculating the lost-future-wages component of damages. Specifically, Kaiser contends that there was insufficient information presented to the jury on which to assess Smith's past and present earnings (from which future earnings might be extrapolated). Although appellant is correct in stating that the plaintiff does bear the burden of proving "the amount

of ... damages suffered as a result of defendant's conduct," *Manes v. Dowling,* 375 A.2d 221, 224 (D.C.1977), it is incorrect in asserting that such damages must be shown by an expert, and that no evidence of lost future wages was given in the instant case. The record includes testimony by Smith's wife and his employer as to his work history, schooling, job and salary at the time of his death. In addition, there was testimony assessing his skill as an employee which suggested the likelihood of his being promoted. Expert testimony is not required to show this aspect of ***179** ****420** lost future wages. "Not every element of damages warrants the use of expert testimony, and the decision to admit expert testimony lies within the sound discretion of the trial court." *District of Columbia v. Barriteau,* 399 A.2d 563, 568 (D.C.1979) (citing *Hughes v. Pender,* 391 A.2d 259, 262 (D.C.1978)). Due to the ample testimony regarding Smith's employment history and background, we do not find that the district judge abused his discretion in not requiring expert testimony to prove lost future wages.

2. *Life Expectancy*

[4] Neither are we convinced that the district court erred with respect to its instruction concerning Smith's life expectancy. After much debate with counsel, the judge instructed the jury that Smith's life expectancy, according to the Health and Human Services Table of Mortality, was 23.6 years. Kaiser objects to this instruction because Schleier failed to produce a certified copy of the Health and Human Services Table. We note, however, that it was Kaiser that urged this figure before the district court. At trial, Schleier argued that Smith's life expectancy was 25 years. Under these circumstances we see no cause for Kaiser to complain.

3. *Inflation*

[5] However, we are in accord with the appellant that the trial judge should not have told the jury that it may consider inflation, absent sufficient guidance. The District of Columbia Court of Appeals has indicated that it is not necessary that the jury take inflation into consideration in calculating a damage award, but if it does it must do so based on an adequate foundation and not on sheer speculation. "We hold that it is proper for the jury to consider the impact of future inflation in arriving at future loss of income in personal injury cases. We do not suggest by our holding that in all cases the jury should be allowed to consider inflation. *There must be a proper factual predicate in the record to support the jury's consideration of future inflationary projections. ... In short, there must be competent evidence which sets the future rate of inflation within reasonable limits." District of Columbia v. Barriteau,* 399 A.2d at 568 (emphasis added). In the instant case the record evidence does not indicate that the jury was equipped to do anything but speculate with respect to inflation.

4. *Discounting to Present Value*

[6] Appellant contends, and we agree, that in order for the jury to discount lost future wages to their present value, it needed expert guidance. The Court of Appeals for the District of Columbia has held that "when the subject dealt with is so distinctly related to some science, profession, business or occupation as to be beyond the ken of the average layman, its clarification calls for the use of expert testimony." *Barriteau* at 568–69 (quoting *District of Columbia v. Davis,* 386 A.2d 1195, 1200 (D.C.1978)). The formula for discounting lost future income to present value is complicated and not one that a jury would be likely to intuit. Although the judge twice gave the jury a pattern instruction explaining the concept of discounting to present value, the jury was not provided with any comprehensible guidance on how to discount to present value. We believe that discounting to present value falls within the class of tasks which "lend [themselves] to clarification by expert testimony because [they] involve[ ] the use of statistical techniques and require[ ] a broad knowledge of economics." *Barriteau* at 568 (quoting *Hughes v. Pender,* 391 A.2d at 262). D.C. courts have not considered the question which party has the burden of introducing such guidance into the record. We do not reach that issue, but leave it open for consideration by the district court, for we must vacate and remand for a new trial in any event because of the court's inadequate instruction on the income taxation of damages. *Compare Aldridge v. Baltimore & O.R.R.,* 789 F.2d 1061, 1067–68 (4th Cir.1986) (holding that defendant, as party with greatest interest in discounting to present value, has burden of providing jury with guidance), *aff'd,* 814 F.2d 157 (4th Cir.1987) (en banc), *vacated and remanded* ***180** ****421** *sub nom. Chesapeake & O.R.R. v. Aldridge,* 486 U.S. 1049, 108 S.Ct. 2812, 100 L.Ed.2d 913 (1988) (remanding for reconsideration in light of *Monessen S.W. Ry. v. Morgan,* 486 U.S. 330, 108 S.Ct. 1837, 100 L.Ed.2d 349 (1988)), *with DiSabatino v. National R.R. Passenger Corp.,* 724 F.2d 394, 396 (3d Cir.1984) (plaintiff carries burden of presenting such evidence to jury).

D. *Instruction that Damages are not Subject to Income Taxation*

[7] The court declined Kaiser's request that the following instruction be given to the jury:

> Members of the jury, you are instructed that any award in favor of plaintiff which you may make in this action will not be subject to income taxation.

In *Psychiatric Institute of Washington v. Allen,* 509 A.2d 619, 627 (D.C.1986), the District of Columbia Court of Appeals held that "in any case in which trial begins on or after the date of this opinion, the trial court should, upon request, instruct the jury that any damage award will not be subject to income taxation." [3] Having put the trial courts on notice of the propriety of such an instruction, the District of Columbia Court of Appeals, we believe, would overturn a damage award if the trial court refused to submit the proffered instruction. Appellee argues that *Psychiatric Institute* does not control the issue of damages in this case, as it is only D.C. law. Appellee is mistaken. Although the Rules of Decision Act, and hence *Erie Railroad v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), do not strictly apply with respect to D.C. law, we apply D.C.'s substantive law analogously for reasons of uniformity and respect for the D.C. Court of Appeals. *Anchorage–Hynning & Co. v. Moringiello,* 697 F.2d 356, 360–61 (D.C.Cir.1983). Furthermore, although it is a novel question for us, we think it proper to characterize instructing a jury on the question of income taxation of damages as substantive, not procedural; thus, D.C. law governs. In *Nepera Chemical, Inc. v. Sea–Land Service Inc.,* 794 F.2d 688, 698–99 (D.C.Cir.1986), we classified the imposition of punitive damages as "substantive." Similarly, this court in *Schneider v. Lockheed Aircraft Corp.,* 658 F.2d 835 (D.C.Cir.1981), *cert. denied,* 455 U.S. 994, 102 S.Ct. 1622, 71 L.Ed.2d 855 (1982), held that the assessment of prejudgment interest in a tort action was governed by D.C. law. The *Schneider* court relied on local law because "federal courts 'are not free to devise a different measure of damages pursuant to [their] "general equitable powers." ' " *Id.* at 855 (quoting *In re Air Crash Disaster Near Chicago, Ill. on May 25, 1979,* 644 F.2d 633, 637 (7th Cir.1981)). In sum, we are satisfied that *Psychiatric Institute* controls this issue.

[8] Apparently the district judge thought his initial instruction to the jury would suffice. In it he advised the jury that, with respect to Smith's earnings, it "must subtract ... whatever taxes [the deceased] would have been required to pay, and I will instruct you ... [on] the effect of what taxes he would have been required to pay." The instruction given by the district court was a proper one in that it provided the jury with guidance in determining the lost earnings that Smith's estate was entitled to recover. However, this instruction is distinct from the charge required by *Psychiatric Institute.* That District of Columbia Court of Appeals decision requires, if defendant so requests, an additional instruction which informs the jury that the entirety of its award is not subject to taxation as income to the recipient. Accordingly, we believe that the district judge erred in failing to so instruct.

III. CONCLUSION

For the reasons stated, we conclude that the district court judge erred in refusing to instruct the jury that damages awarded to the plaintiff would not be subject to income taxation. In any retrial on damages in this case, an instruction to the jury to consider ***181 **422** inflation, if one is given, must be accompanied by a framework within which the jury may properly account for it. Similarly, the jury will need expert guidance to properly discount the award to present value.

Accordingly, finding no reversible error in the determination of liability, we vacate the judgment only insofar as it sets damages and remand to the district court for a new trial of the amount appropriately awarded to plaintiff.

It is so ordered.

All Citations

876 F.2d 174, 277 U.S.App.D.C. 415

Footnotes

* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1982).

1 The MUGA test measures the heart's contractibility and pumping ability.

2 At trial, Schleier introduced evidence establishing that night sweats may be a symptom of severe coronary artery disease.

3 The trial in the instant case began on October 13, 1987, well after *Psychiatric Institute* was issued.

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73 Md.App. 538
Court of Special Appeals of Maryland.

Harvey L. BAUBLITZ
v.
Michael Patrick HENZ et al.

No. 494, Sept. Term, 1987.
|
Jan. 12, 1988.

Action was brought for personal injuries sustained in rear-end collision, against truck driver and his employer, which owned the truck. Jury awarded compensatory damages against employee and employer and exemplary damages against employer. The Circuit Court for Baltimore City, David Ross, J., granted motion for judgment n.o.v. as to exemplary damages but denied motion for new trial as to compensatory damages, and both sides appealed. The Court of Special Appeals, Pollitt, J., held that: (1) evidence as to size and weight of truck and as to "worn" brakes was sufficient to support finding of ordinary negligence of employer in entrustment of the vehicle but was not sufficient to show such extraordinary and outrageous conduct as to amount to wanton or reckless disregard for human life, warranting punitive damages; (2) in personal injury action, damages award for loss of future earning capacity must be reduced to present value; but (3) it was not error to refuse such an instruction to the jury without some evidence as to its proper application.

Affirmed.

Attorneys and Law Firms

**497 *540 Phillips P. O'Shaughnessy (Dennis C. Whelley, Sandbower, Gabler & O'Shaughnessy, P.A., Baltimore, and Joseph A. Miklasz, Glen Burnie, on the brief), for appellant.

**498 Jeffrey R. DeCaro (Robert J. Farley and O'Malley, Miles & Harrell, on the brief), Upper Marlboro, for appellees.

Argued before WILNER, GARRITY and POLLITT, JJ.

Opinion

POLLITT, Judge.

Harvey L. Baublitz, appellant and cross-appellee, was severely and permanently injured when his motor vehicle was struck in the rear by a truck, owned by 7-Up Bottling *541 Company and driven by Michael Patrick Henz, appellees and cross-appellants. Baublitz sued 7-Up and Henz alleging negligent operation of the truck by Henz, as the agent of 7-Up, and negligent entrustment of the truck by 7-Up to Henz "when it was unsafe to do so due to the defective condition of the vehicle." A jury in the Circuit Court for Baltimore City awarded compensatory damages of one million dollars against both 7-Up and Henz, and exemplary damages of $300,000 against 7-Up. The court (David Ross, J.) granted 7-Up's motion for judgment notwithstanding the verdict (Rule 2-532) as to the exemplary damages, but denied the motion of 7-Up and Henz for a new trial (Rule 2-533) as to the compensatory damages. Both sides appealed. The issues presented are:

I. Whether the evidence supported the award of exemplary damages against 7-Up on the theory of negligent entrustment.

II. Whether the trial court erred in refusing to instruct the jury that any damages for future loss of earnings must be reduced to present value.

III. Whether the trial court erred in allowing argument to the jury as to future loss of earnings.

Facts

There was evidence from which the jury could find that Henz was employed as a truck driver for 7-Up. On June 15, 1984, he was required as a part of his duties to drive a standard size 7-Up delivery truck from Catonsville to the Annapolis area, some 20 miles away. The truck had a gross vehicle weight of 32,000 pounds, with a cargo box some 20 feet long loaded with about 12,000 pounds of cases of bottled beverages.

The truck to be used on that day was parked in an area of the 7-Up service yard set aside for infrequently used vehicles. Henz described the truck as "old" and "not in the best of condition." It differed from a new vehicle in that

"it was harder to shift gears, it was harder to steer, and the brakes were worn." The driver who had used the truck on ***542** the previous day told Henz that the truck was "acting up" and that he should "be careful." Had Henz been given a choice, he would not have used that truck.

Henz reported this information to Tim Forrest, 7-Up's route manager, who acknowledged that the truck "didn't look like it was in the greatest shape," but said "we're only making two stops so go ahead." Forrest accompanied Henz on the trip. Twice during the trip Henz advised Forrest that the truck "was not operating properly."

As they proceeded along Generals Highway toward Annapolis, they crested a small hill. Henz saw the Baublitz vehicle stopped at a traffic light at the bottom of the grade. Henz said:

> As soon as I came over top of the hill and knew that it was a downgrade, I hit the brakes, started pumping the brakes right away. And when I saw that they weren't operable, I down-shifted one gear. I tried the brakes again. I went a little further and saw that they weren't going to work and down-shifted another gear which, you know, that's about when I looked over and said, "Hold on." I mean, by that time I could see that there was ... and said, "yeah, we're going to hit this car so hold on."

The truck collided with the Baublitz vehicle. Henz said he would have had time in which to stop the truck before the collision had the brakes been working properly.

Baublitz testified that, after the collision, he heard Henz say "that they didn't have any brakes," and "he also said that he told his supervisor a ways back or a while back ****499** that something was wrong with the brakes."

Further facts will be supplied as necessary in the discussion of the different issues.

I

EXEMPLARY DAMAGES

The Court of Appeals first considered the question of punitive damages in automobile tort cases in *Davis v. Gordon,* 183 Md. 129, 36 A.2d 699 (1944). Chief Judge Sloan said for the Court that gross and wanton negligence ***543** would not suffice, but that, to entitle one to such damages, there must be shown fraud, malice, evil motive or intent. In *Conklin v. Schillinger,* 255 Md. 50, 71, 257 A.2d 187, 198 (1969), appellant asserted that punitive damages should be allowed "when an automobile driver causes injury by his intentional disregard of his duty of due care for the safety of others." The Court said the issue was not properly before the court and even if it were, and assuming, but without deciding, that appellant's interpretation of the law was correct, the facts were insufficient to justify submission of the issue to the jury. The Court did agree that the law needed further interpretation. *Conklin, supra,* 255 Md. at 76, 257 A.2d at 200-01.

That interpretation came in *Smith v. Gray Concrete Pipe Co.,* 267 Md. 149, 297 A.2d 721 (1972). In answering a question certified to it by the United States District Court for the Eastern District of Virginia, [1] the Court said:

> We regard a "wanton or reckless disregard for human life" in the operation of a motor vehicle, with the known dangers and risks attendant to such conduct, as the legal equivalent of malice. It is a standard which, although stopping just short of wilful or intentional injury, contemplates conduct which is of an extraordinary or outrageous character. Yet, it is both a functional and definitive test which, as we have noted, enjoys the virtue of having been frequently applied in this state. And if, as a test, it has been regarded as adequately stringent to serve as a basis for possible imprisonment, then, surely, there appears to be no valid reason for deeming it too liberal for imposing civil sanctions. We hold that it is the standard by which claims for exemplary damages arising out of motor vehicle operation are to be tested.
> *Gray, supra,* 267 Md. at 168, 297 A.2d at 731-32.

The facts alleged in that case were that Gray, the employer, entrusted a truck to Edwards, an 18-year-old laborer ***544** with no previous experience in driving that or similar vehicles, who possessed no chauffeur's license, and was known to be an untrained, unqualified and incompetent driver. It was further alleged that Gray knew or should have known that the truck was completely uncontrollable at speeds in excess of 50 miles per hour although being operated on an interstate highway with a speed limit of 70 m.p.h.; manifested 15 violations of I.C.C. safety regulations; was loaded illegally overwidth, with the

rearview mirrors obstructed; and that the hood was being held down with two strands of baling wire. The Court said, as to the count for negligent entrustment,

> the conduct alleged here reflects a premeditated decision, deliberately arrived at, by an indifferent employer in possession of facts which should have indicated almost certain harm to others. We cannot imagine a more striking case of "wanton or reckless disregard for human life."

Gray, supra, 267 Md. at 172, 297 A.2d at 734.

The standard adopted in *Gray* is that which had previously been applied to criminal prosecutions for manslaughter by automobile, in most of which intoxication of the driver was an important factor. *See, e.g., Wasileski v. State,* 241 Md. 323, 216 A.2d 551 (1966); *Abe v. State,* 230 Md. 439, 187 A.2d 467 (1963); ****500** *Pierce v. State,* 227 Md. 221, 175 A.2d 743 (1961); *Lilly v. State,* 212 Md. 436, 129 A.2d 839 (1957); *Clay v. State,* 211 Md. 577, 128 A.2d 634 (1957). Appellant cites *Cohen v. Rubin,* 55 Md.App. 83, 460 A.2d 1046, *cert. denied,* 297 Md. 311 (1983), as authority for the proposition that punitive damages are recoverable against an intoxicated driver, and attempts to draw an analogy between driving while intoxicated and driving with bad brakes. His analogy is flawed in several respects. In that case the suit alleged negligence of the driver in the operation of the vehicle and negligence of the driver's father in entrustment of the vehicle, and sought punitive damages against both. As to the driver, the evidence was that he consumed beer and marijuana shortly before the accident, engaged in a race in ***545** which he accelerated his car to 84 miles per hour on Ocean Highway in Ocean City, ignored pleas from a passenger to "slow down," and left over 200 feet of skidmarks before striking and killing a pedestrian. Evidence as to the negligent entrustment was that the father was well aware of his son's driving habits, with actual knowledge of previous citations for speeding, recklessness and leaving the scene of accidents; that, despite this knowledge, he had appeared in court with his son, representing to the court that his son was a careful driver, and pleaded for probation. Two months later the son was involved in the fatal accident, driving a car purchased for him by the father as a graduation present. The jury awarded punitive damages against the driver but did *not* award such damages against the father. One issue raised by the father on appeal was that the punitive damage claim for negligent entrustment should not have been submitted to the jury. Since no such award was made, this Court said:

> Assuming, without deciding, that the issue of punitive damages for negligent entrustment was not warranted on the facts of this case, the error, if any, was harmless.

Cohen, supra, 55 Md.App. at 97, 460 A.2d at 1054.

Medina v. Meilhammer, 62 Md.App. 239, 489 A.2d 35, *cert. denied,* 303 Md. 683, 496 A.2d 683 (1985), although not involving the negligent operation or entrustment of a motor vehicle, discusses the kind of evidence required to support an award of punitive damages in negligence actions. There it was shown that workers dug a hole three feet wide by three feet deep; watched it fill with water having a temperature of approximately 180 degrees Fahrenheit; and left the hole unguarded while going for materials with which to secure it. They were charged with knowledge that children were playing in the area who were not only attracted to the water, but had in fact played in it when it was cooler. Safety procedures were available which had been neither adopted nor implemented. A child was severely injured when he fell in the scalding water. This Court reversed a punitive damage award of $300,000, holding that the negligent ***546** conduct was not so extraordinary or outrageous as to establish a foundation for punitive damages. *Medina, supra,* 62 Md.App. at 251-52, 489 A.2d at 41.

[1] **[2]** **[3]** Baublitz cites numerous pieces of evidence which he asserts demonstrate prior knowledge of Henz, as well as prior knowledge of 7-Up, as to the condition of the truck. Since the jury did not assess punitive damages against Henz it did not find "wanton or reckless disregard for human life," in the operation of the truck. Therefore, 7-Up is not liable for such damages under the theory of respondeat superior. *See Smith v. Gray Concrete Co., supra,* 267 Md. at 171, 297 A.2d at 733. Any conduct justifying such damages must be found in the alleged negligent entrustment. Any knowledge of Henz not communicated to 7-Up is not relevant.[2] The issue is what evidence, taken in the light most favorable to Baublitz, would demonstrate prior knowledge of 7-Up as to the condition of the truck, such as would make 7-Up guilty of wanton or reckless disregard for human life in sending that truck out on the ****501** highway. We agree with Judge Ross that there is none.

First, unlike the employee in *Smith v. Gray Concrete,* there is no suggestion that Henz was an untrained, unqualified and incompetent driver. [3]

Second, there was no evidence from anyone that the brakes on the truck had failed, either on previous days or on the day in question, until the collision with the Baublitz vehicle, even though Henz had been operating the truck for approximately one hour before the accident.

*547 Third, there was no suggestion that any problems with the steering or shifting mechanisms were in any way contributing causes to the collision. Henz's testimony that he "down-shifted" twice immediately before the collision suggests no problems in doing so.

[4] The only testimony of prior knowledge of defective brakes is testimony from Henz that he reported to Forrest a statement of another driver that the brakes were "worn," and the testimony of Baublitz that he heard Henz say "he told his supervisor a ways back or a while back that something was wrong with the brakes." Appellant places great emphasis on the size and weight of the truck. They are important factors in determining questions of negligence, and drivers of large, heavy vehicles owe a duty to take those elements into consideration in the operation thereof. *York Motor Express Co. v. State,* 195 Md. 525, 74 A.2d 12 (1950). The size and weight of the truck, together with the "worn" brakes, are sufficient to support a finding of ordinary negligence in the entrustment and in the operation of the vehicle. We hold, however, that they are not sufficient to show such extraordinary and outrageous conduct as to amount to a wanton or reckless disregard for human life.

II

REDUCTION OF FUTURE LOSS OF EARNINGS TO PRESENT VALUE

In their cross appeal, 7-Up and Henz assert the court erred in refusing to instruct the jury that any award of damages for loss of future earnings must be reduced to present value. The record is clear that Judge Ross did not refuse the instruction because he considered it to be an improper statement of the law. He refused the instruction because there was no evidence to support it.

[5] A litigant is only entitled to have his jury instruction presented to the jury where his instruction is a correct exposition of the law *and* there is testimony in the case to *548 support it. *Levine v. Rendler,* 272 Md. 1, 13, 320 A.2d 258, 265 (1974); *Rubin v. Weissman,* 59 Md.App. 392, 406, 475 A.2d 1235, 1242 (1984).

Dennis v. Blanchfield, 48 Md.App. 325, 428 A.2d 80 (1981), *modified on other grounds sub. nom., Blanchfield v. Dennis,* 292 Md. 319, 438 A.2d 1330 (1982), was the first case to squarely hold that it is reversible error to refuse such an instruction in a personal injury action, not a wrongful death case. [4] Judge Thompson, for this Court, opined that, if the issue were before it, the Court of Appeals would so hold. In a footnote, this Court said, "In the absence of expert testimony, the trial court could, of course, require counsel requesting the instructions to produce appropriate tables before the matter could be judicially noticed." *Dennis v. Blanchfield, supra,* 48 Md.App. at 333, n. 5, 428 A.2d at 85. On *certiorari* on another question, in *Blanchfield v. Dennis,* 292 Md. 319, 438 A.2d 1330 (1982), the Court of Appeals found it unnecessary to decide the question. The Court noted:

> [T]his complex issue is best left to a later date when it is more precisely framed for resolution by this Court. Moreover, we **502 mention, without comment as to its necessity, that respondent did not proffer any evidentiary basis, expert or otherwise, to underpin his requested present value instruction.
> *Blanchfield v. Dennis, supra,* 292 Md. at 322, n. 3., 438 A.2d at 1332.

Although such an instruction is now generally accepted and, when supported by evidence is usually given, (See *Maryland Civil Pattern Jury Instructions,* 2d Ed., § 10.4), we are not aware that it has been specifically addressed by the Court of Appeals.

In *Burke v. United States,* 605 F.Supp. 981 (D.Md.1985), Hon. James R. Miller, Jr., District Judge, states:

> *549 In Maryland, the law presently is that in a personal injury action, as well as in a wrongful death action, any damages awarded for loss of future earning capacity

> must be reduced to present value. *Walston v. Sun Cab Co.*, 267 Md. 559, 574-75, 298 A.2d 391 (1973) (wrongful death action); *Dennis v. Blanchfield*, 48 Md.App. 325, 333, 428 A.2d 80 (1981), *modified on other grounds sub. nom., Blanchfield v. Dennis*, 292 Md. 319, 438 A.2d 1330 (1982) (personal injury action). That rule is applicable here.

Burke, supra, at 990.

As the trier of fact in that non-jury trial, Judge Miller directed the parties to have their respective economist experts make the appropriate calculations and advise the court thereof within two weeks.

[6] **[7]** We believe, as we did in *Dennis v. Blanchfield, supra,* that if the issue were before it, the Court of Appeals would agree that in a personal injury action, as in a wrongful death action, damages awarded for loss of future earning capacity must be reduced to present value. We also note that even without specific recognition of the rule, the Court held evidence regarding the application thereof was properly admitted. *See, e.g., Baltimore Transit Co. v. Worth,* 188 Md. 119, 52 A.2d 249 (1947); *Baltimore & O.R.R. Co. v. Whitacre,* 124 Md. 411, 92 A. 1060 (1915). In *Hutzell v. Boyer,* 252 Md. 227, 237, 249 A.2d 449, 455 (1969), although holding that refusal to grant such an instruction, if error at all, was not prejudicial since the instruction was not customary in Maryland except in wrongful death cases, the Court also observed that "the plaintiff offered no evidence, nor proffered any formula as to how the present value may be estimated."

> We also think it would have been extremely confusing to the jury to ask it to make these economic adjustments without an evidentiary basis or an explanation by experts as to how such calculations could be made. Application ***550** of the principle of present worth (and, likewise, the principle of indexing for inflation) is beyond the understanding and capabilities of most lay persons serving on a jury. [citations omitted] Without evidence of how to adjust for present value or inflation, a jury instructed to make such calculations on its own might well present an award based on sheer speculation.
>
> In the absence of any evidence by which future lost wages could be reduced to present value, we see no error in the district court's failure to grant a mistrial or to instruct the jury to undertake the task by utilizing its own initiative.

Aldridge v. Baltimore & O.R.R. Co., 789 F.2d 1061, 1068 (4th Cir.1986), *aff'd on rehearing en banc* 814 F.2d 157 (4th Cir.1987).

We adopt the reasoning of the *Aldridge* court. We hold it is not error to refuse such instruction to the jury without some evidence as to its proper application.

III

CLOSING ARGUMENT

[8] Finally, cross-appellants aver that the trial judge erred in allowing argument to the jury as to future loss of earning capacity.

In civil cases, closing arguments of counsel need not be recorded unless requested by the judge or a party. Rule 1224 d.2(a). It would appear that closing arguments were not recorded in this case. In any event, they were not included in the joint ****503** record extract furnished this Court. There is nothing before us for review. Rule 1028. *Brown v. Prince George's County,* 47 Md.App. 717, 424 A.2d 1111 (1981).

JUDGMENTS AFFIRMED; COSTS TO BE EQUALLY DIVIDED.

All Citations

73 Md.App. 538, 535 A.2d 497

Footnotes

1 Maryland Code (1973, 1984 Repl. Vol.) § 12-601 of the Courts and Judicial Proceedings Article.

2 Even Henz had no previous knowledge concerning the brakes, except what he had been told by other drivers-that they were "worn." He testified, "Well, I really can't say too much about the brakes because I had never operated the truck before."

3 One allegation in the count charging negligent entrustment was that 7-Up knew or should have known that Henz was not a responsible driver and that 7-Up knew or should have known Henz would operate the vehicle in a negligent manner.

4 In *Rafferty v. Weimer,* 36 Md.App. 98, 373 A.2d 64 (1977), we said it was not error to *give* the instruction on proper request.

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36 Md.App. 82
Court of Special Appeals of Maryland.

LUMBER TERMINALS, INCORPORATED
v.
Edward Alphonse NOWAKOWSKI et al.

No. 874.
|
May 13, 1977.

In a personal injury action by stevedore who was injured when lumber carrier ran over his foot, the Superior Court of Baltimore County, James W. Murphy, J., rendered judgment for plaintiff and defendant appealed. The Court of Special Appeals, Lowe, J., held that (1) evidence supported finding as to liability; (2) instructions were adequate; (3) evidence presented jury question as to disability; (4) evidence of present value of lost future earnings was not necessary to support economist's testimony; (5) evidence of inflationary factor was admissible, and (6) award could be based on plaintiff's gross earnings or earning capacity and not reduced because of income tax savings which might result from fact that damages will be exempt from tax.

Affirmed.

Attorneys and Law Firms

****284** ***83** Donald L. Merriman, Baltimore, with whom were Merriman, Crowther & Mann, Baltimore, on the brief, for appellant.

Eugene V. Chircus, Baltimore, with whom were Fred Ginsberg, Baltimore, and Brice G. Dowell, Cockeysville, on the brief, for appellees.

Before MENCHINE, DAVIDSON and LOWE, JJ.

Opinion

LOWE, Judge.

Chagrined by nearly every ruling made during its negligence trial in the Superior Court of Baltimore City, appellant Lumber Terminals, Incorporated brings us 5 issues with 17 subsidiary questions which it argues are errors sufficient to warrant reversal of the $365,000 judgment against it. Some of these issues relate to the sufficiency of the evidence, and we shall dispose of them summarily by reference to the facts cast in the light most favorable to appellees. Viewed thus, the evidence is sufficient to justify the finding that appellant was negligent, and insufficient for us to conclude that appellant's assignments of error with regard to liability and ***84** instructions to the jury have merit. We base our prerogative in so reviewing these contentions upon the standard for determining a directed verdict, the denial of which is the procedural conveyance for appellant's appeal on the sufficiency issues:

'Negligence is a relative term and must be decided upon the facts of each particular case. Ordinarily it is a question of fact to be determined by the jury, and before it can be determined as a matter of law that one has not been guilty of negligence, the truth of all the credible evidence tending to sustain the claim of negligence must be assumed and all favorable inferences of fact fairly deducible therefrom tending to establish negligence drawn. Kantor v. Ash, 215 Md. 285, 137 A.2d 661. Cf. Suman v. Hoffman, 221 Md. 302, 157 A.2d 276. And Maryland has gone almost as far as any jurisdiction that we know of in holding that meager evidence of negligence is sufficient to carry the case to the jury. The rule has been stated as requiring submission if there be any evidence, however ****285** slight, Legally sufficient as tending to prove negligence, and the weight and value of such evidence will be left to the jury. Ford v. Bradford, 213 Md. 534, 132 A.2d 488. Cf. Bernardi v. Roedel, 225 Md. 17, 21, 168 A.2d 886.' Fowler v. Smith, 240 Md. 240, 246, 213 A.2d 549, 553.

LIABILITY

Edward Alphonse Nowakowski was a stevedore employed as a 'slinger' on a pier, helping to unload lumber from a vessel adjacently berthed. The lumber, bound in bundles, was hoisted out of the ship by a crane from which hung cables parted by an attached spreader. The cables were looped and rehooked to form a double sling. The bundles were deposited upon chocks on the ground. The cables were then slackened so Nowakowski and his partner could slide them from under the bundles. The workers would then walk to the opposite side of the lumber and the crane operator would return his slings for another load. A stilt-like ***85** conveyance called a 'ross carrier', reminiscent of a long-legged beetle, would then come forward, hover over the lumber, pick it up

with blades attached to its undercarriage, and carry it to a storage area located a block away on the pier.

The accident occurred when the cables slackened and about 20 pieces of lumber fell from a bundle. When this happened Nowakowski and partner, following the usual procedure, unhooked each of the cables on the spreader to permit the operator to pull the cables free from the fallen lumber. When free, Nowakowski and partner returned from opposite sides of the draft whence they had repaired awaiting the cable withdrawal, and when the operator relowered the hook, replaced the cables. Nowakowski then walked between the lumber and the waiting carrier to repile the fallen pieces without which the carrier could not have picked up the bundles. This broken bundle procedure occurred about three times a day, and, as was customary, no signals were given to the carrier operator (who was perched high above the carrier) not to approach the bundle. This was presumably not necessary because, as the operator testified, he could see everything around the area where the men were working when he returned from the storage area. Within 30 feet of the bundles he could see everything clearly, and his vision in the area remained clear; but, within 20 feet, his vision to the right became obscured.

[1] In spite of that blocked view, on this occasion the operator had stopped his carrier only 20 feet away from the lumber piles where he sat for a couple of minutes. Then, while Nowakowski was bent over the lumber picking up the fallen pieces, the operator moved the carrier forward. Nowakowski, who was unaware of its forward movement, continued his efforts until the carrier was above him, and his right foot was crushed as the carrier's wheel first ran over it, then backed over it again.

We find that evidence sufficient to justify a jury's finding of negligence on the part of the carrier's operator.

*86 -contributory negligence and assumption of risk-

Our review of the record fails to disclose evidence sufficient to have compelled a finding of contributory negligence or assumption of risk as a matter of law, and no evidence sufficient to require an instruction thereon, although the trial judge did instruct the jury on contributory negligence. We see nothing in the testimony to indicate that Nowakowski was, as a matter of law, guilty of contributory negligence or its counterpart, assumption of risk. Clayborne v. Mueller, 266 Md. 30, 38, 291 A.2d 443. Nowakowski was not compelled to anticipate negligent acts by others, and in the absence of some prominent and decisive act contributing to the accident which could leave no room for a difference of opinion, appellant was not entitled to a directed verdict as a matter of law. Clayborne v. Mueller, supra, 266 Md. at 35-36, 291 A.2d 443; see Menish v. Polinger Company, 277 Md. 553, 563, 356 A.2d 233.

Nor do we find sufficient evidence that Nowakowski voluntarily exposed himself to **286 any danger that was not ordinarily manifest in his job from day to day. One cannot assume a danger of which he is unaware. See Menish v. Polinger Company, supra, 277 Md. at 561, 356 A.2d 233. The evidence, taken most favorably to Nowakowski, shows that he was not aware, and had no reason to be aware, of the approaching danger.

-adequacy of instructions-

[2] **[3]** **[4]** **[5]** Appellant's contentions relative to inadequate instructions are equally without merit. There is no responsibility upon a trial judge to marshall the facts from either parties' view although he may sum up the evidence if he chooses. Md.Rule 554.b. Nor is there evidence in this case of any special duties or standards of care beyond those generally applicable in negligence cases, as instructed by the judge below. The judge need not negate every inapplicable theory, and should not when there is no supportive evidence to justify negative instructions (e. g., inapplicability of 'rules of the road'); and he need not expound precisely that language requested if the appropriate and applicable law is *87 fairly covered in his charge. Md.Rule 554.b.1. We find that to have been true in this case. There was no error in instructing on the liability aspects of the case.

-disability-

[6] Concluding the sufficiency issues, we note our disagreement with appellant that there was insufficient evidence in the record from which the jury could have concluded that Nowakowski was permanently and totally disabled. Since two doctors testified that they did not believe Nowakowski would ever return to work as a stevedore, and a rehabilitation officer testified that Nowakowski was not sufficiently endowed with attributes to be retrained, considering his age and medical

limitations, we are not certain upon what appellant's contention is based. The testimony was relevant and could properly be considered by the jury in assessing the extent of the alleged disability. Richard F. Kline, Inc. v. Grosh, 245 Md. 236, 226 A.2d 147. We are of the opinion that there was sufficient evidence of the permanence of Nowakowski's injuries and of their extent to warrant their submission to the jury. See Ihrie v. Anthony, 205 Md. 296, 107 A.2d 104. Byrum v. Maryott, 26 Md.App. 130, 337 A.2d 142.

DAMAGES

[7] [8] [9] [10] [11] [12] [13] Appellant raises more novel questions in the area of damages. Some of them,[1] relating to the testimony of an ***88** economist, pose issues heretofore unsettled, or at least unarticulated in Maryland.

****287** ***89** Appellant contends it was error to permit the economist to testify because:
(1) 'his values would . . . not be reduced to 'present value'";

(2) 'his figures would include estimates . . . and projections for inflation, wage increases, price increases and other speculative and inflammatory factors';

(3) 'his calculations were made on the basis of gross rather than net wages claimed lost to the date of trial despite the fact that appropriate tax deductions to net wages were easily ascertainable'.

-reduction to present value-

[14] In personal injury cases courts generally, and Maryland particularly, consider among other losses, lost wages and earnings suffered by the injured person not only from the time of injury to the trial, but those reasonably certain to occur in the future. Brooks v. Fairman, 253 Md. 471, 252 A.2d 865. For purposes of judicial simplicity, these awards are generally computed to a bottom line lump sum award. Scott v. James Gibbons Co., 192 Md. 319, 331, 64 A.2d 117.

As a result of this practice, over half century ago the ***90** Supreme Court in reviewing a death claim under the Federal Employees Liability Act stated:
'That where future payments are to be anticipated and capitalized in a verdict the plaintiff is entitled to no more than their present worth, is commonly recognized in the state courts.' Ches. & Ohio Ry. Co. v. Kelly, 241 U.S. 485, 493, 36 S.Ct. 630, 633, 60 L.Ed. 1117.

The Court reasoned that:
****288** 'So far as a verdict is based upon the deprivation of future benefits, it will afford more than compensation if it be made up by aggregating the benefits without taking account of the earning power of the money that is presently to be awarded. It is self-evident that a given sum of money in hand is worth more than the like sum of money payable in the future.' Id. at 489, 36 S.Ct. at 631.

Maryland has recognized this principle in matters of breach of contract at least since the turn of the century, Sherley v. Sherley, 118 Md. 1, 26-27, 84 A. 160; and has recently proclaimed that failure to so instruct a jury-in a wrongful death case-is reversible error. Walston v. Sun Cab Co., 267 Md. 559, 298 A.2d 391, affirming this Court's opinion delivered by Judge Powers in Sun Cab Co. v. Walston, 15 Md.App. 113,[2] 289 A.2d 804.

But in personal injury cases we have not yet been blessed with the Walston lack of equivocation. What little light has been shed on the issue in such cases was provided by Hutzell v. Boyer, 252 Md. 227, 249 A.2d 449, which held that:
'. . . we do not think the lower court's refusal to grant such an instruction, if error at all, was prejudicial error.' Id., at 237, 249 A.2d at 455.

Ironically the Court, which four years later said that 'this Court has not ruled on the issue of present value in wrongful death cases',[3] may have previously labored under the ***91** misapprehension that it had, for it had said in Hutzell v. Boyer, supra:
'However, reduction of damages to present value is not customary in Maryland, except in cases of wrongful death, as is evident from the decision of this Court in Adams v. Benson, 208 Md. 261, 117 A.2d 881 (1955).'[4] Hutzell v. Boyer, supra, 252 Md. at 237-238, 249 A.2d at 455.

[15] Fully recognizing the Hutzell holding, appellant attacks its foundation by alleging that Adams v. Benson 'does not at all stand for the proposition alleged'. Without quibbling over what the proposition was for which Adams was cited, it is perfectly clear that whatever its dicta meant, the holding of Hutzell was that it is not prejudcial error to refuse a requested instruction that the projected earning capacity of an impaired person should be reduced to present value. It obviously follows that testimony of present value is not required as a condition upon which an economist may project future wage loss.

The distinction made between wrongful death and personal injury cases (requiring an instruction in the former but not the latter, that, 'as a matter of law' the jury must reduce the pecuniary benefit, which the wife and children of the deceased might reasonably have expected to receive from him if he had not been killed, to its present value, Walston, supra, 267 Md. at 571, 298 A.2d 391) can not be logically based upon the restricted damages allowed in wrongful death cases, and has no sound basis in principle. The 'pecuniary loss rule' in force at the time of the wrongful death in Walston, supra, (1967) [5] limited the equitable plaintiffs to the value of their ***92** pecuniary interest in the life of the person killed. This included only pecuniary losses already sustained by them and which they may suffer in the future as a result of the death. See generally ****289** Jennings v. United States, D.C., 178 F.Supp. 516. Future earnings, without regard to what the plaintiffs would have received from the deceased, were not recoverable, Smith v. Potomac Ed. Co., D.C., 165 F.Supp. 681; see Reisterstown Tnpk. v. State, 71 Md. 573, 582-583, 18 A. 884; and no award was permitted for grief or sufferings of the relations of the deceased, Balto. Trans. Co. v. Castranda, 194 Md. 421, 436, 71 A.2d 442, or for grief and mental suffering of the deceased before his death, State v. Wooleyhan Transport Co., 192 Md. 686, 693, 65 A.2d 321.

[16] Seldom has the rule been invoked as to an injured person, even if he is permanently injured; however, it is difficult to justify the distinction but for its more difficult application in personal injury cases. As indicated above, the injured party is entitled to prospective wages lost by reason of the accident, see Adams v. Benson, supra, and damages for less discernible intangibles, such as pain and suffering. Gent v. Cole, 38 Md. 110, 114-115; Stockton v. Frey, 4 Gill. 406, 420. In short, the measure of damages, broadly stated, is the amount which will compensate an injured person for all losses he has sustained by reason of the injury. See Rhone v. Fisher, 224 Md. 223, 225, 167 A.2d 773; B. & O. R. R. Co. v. Blocher, 27 Md. 277. This description comprehends for jury consideration such evasive factors as the claimant's state of health before and after the injury, the permanency of the injury and the degree of disability in relation to his pursuits. See, e. g., McMahon v. N.C.R.R. Co., 39 Md. 438; Bannon v. B. & O. R.R. Co., 24 Md. 108.

[17] We hasten to add, however, that evidence of the present value of future lost earnings is not improper per se, and when offered, may be a valid consideration by the jury. It may come in directly through a defendant's expert or upon cross-examination of a plaintiff's expert; and indeed may even be introduced by a plaintiff bending every effort at fair play.

[18] ***93** While the likelihood of the latter is perhaps not great, we mention it because it arose in that manner in the case at bar. The expert testified from a placard of figures prepared for the trial. On the side exposed to the jury were projections of wage loss which included an inflationary factor. On the back, available but never exposed either directly or through questions by the defendant, were the same projections reduced to present value. Appellees' counsel explained that his reluctance to offer these rested upon the equivocal state of the law as he read it in Hutzell, supra. [6] His reluctance was as understandable as his anticipatory preparation was commendable. Appellant can hardly complain that the reduced figures were not before the jury. They were there for the asking.

-the inflationary factor-

Appellant reversed his procedure of inquiry to us on this issue. Instead of asking whether such testimony is a prerequisite for an economist to testify as it did with present value, appellant asks if it is a permissible subject for a testifying economist. As with present value, we will restrict our response to the question asked.

[19] In Walston, supra, 267 Md. at 573, 298 A.2d at 399, speaking of present value in wrongful death cases, the Court of Appeals commented that:

> 'Although some courts do not reduce damages to present value in an attempt to offset inflation and ***94**

> include future wage increases, see, e. g., ****290** Beaulieu v. Elliott, 434 P.2d 665 (Alaska 1967); Leavitt v. Gillaspie, 443 P.2d 61 (Alaska 1968) (Dictum), this approach has been criticized as being too 'speculative' for a jury's consideration. Hampton v. State Highway Commission, 209 Kan. 565, 498 P.2d 236, 254 (1972) (Schroeder, J. dissenting). See also Am.Jur.2d Damages s 96 (1965).'

Appellant contends that this passage indicates that:

> 'The court went on to leave no lingering doubt that Maryland would follow the majority rule requiring reduction of damages to present value and the above quote strongly suggests that the court would feel the minority viewpoint regarding inflation and/or deflation testimony to be speculative and, therefore, improper.'

As already indicated, we do not agree that reduction to present value is required. We now add that neither do we believe that language indicates a direction for us by the Court of Appeals.

By applying the yardstick of past experience (used also to predict present value), we must by now recognize that continued future inflation is regretably more probable than speculative. That being so, we can hardly question the relevance of the dollar's prospective purchasing power, vis a vis the amount of a monetary award.

[20] The admissibility of such testimony has only become an issue recently, and already several states have held it admissible.[7] But numerically more persuasive are those ***95** states which have sidled up to the issue without meeting it head-on. Approximately half the states have sustained awards attacked as excessive, partially but expressly upon the recognition of increased living costs, 12 A.L.R.2d 611, s 8; and several others have taken judicial notice of the diminished dollar value. 12 A.L.R.2d 611, s 13. By no means do we say that the majority of states' courts would, if directly confronted, permit expert testimony of inflationary factors for jury consideration. That remains to be decided. However, there does appear, especially in this decade, a trend recognizing that an award of damages, regardless of its size, has meaning only in regard to what it will purchase. See, e. g., Seaboard Coast Line R. R. Company v. Garrison, Fla.App., 336 So.2d 423. Moreover, a number of the cases which appear to reject consideration of inflationary factors have actually based their decisions on the quality of proof rather than an intrinsically speculative nature of the factor. See, e. g., Hoffman v. Sterling Drug, Inc., 3 Cir., 485 F.2d 132; Magill v. Westinghouse Electric Corporation, 3 Cir., 464 F.2d 294.

In light of the current national obsession with economic indicators, we are simply permitting a jury of citizens who daily read predictions of inflation to have before them one whose qualifications must be approved by the court, to provide not only his predictions, but the foundation upon which they are based. This permits the court to control the quality of information upon which the jury may determine damages. To preclude that testimony would be to ignore the common and popular media-spread knowledge of the economy, which in turn gives far greater opportunity and less foundation for jury speculation than does providing control on the quality of what may be considered on that subject.

If, on the contrary, we were to preclude this controlled expert testimony of inflation, it would necessarily follow that a defendant ****291** would be entitled to an instruction that there can be no consideration of the past or future purchasing power of the dollar. Such an ostrich-like position proclaims that the dollar will remain as sound in the future ***96** as it may now be, and that possibility is far more speculative than basing our forecast on past experience. In balance, such a result would be more dangerous to the plaintiff than permitting expert testimony of future probabilities would be to a defendant.

[21] It seems preferable, however, that consideration of inflationary factors and present value should be considered together. While they may indeed be offsetting in their mutual exclusion, see Sleeman v. Chesapeake and Ohio Railway Company, 6 Cir., 414 F.2d 305, they are consubstantial counterparts, and each may be weighed simultaneously as a counterbalance on the same scale.

-taxes-

Appellant also attacks the economist's testimony because 'his calculations were made on the basis of gross rather than net wages to the date of trial despite the fact that appropriate tax deductions to net wages were easily discernible.' By restricting this contention to lost wages prior to trial, appellant seemingly concedes by silence that future wage loss should not be subject to tax. We are aware of no Maryland case which treats the tax question as to either accrued or prospective loss of earnings. [8]

[22] **[23]** The more general view, supported directly or inferentially by a decided majority of cases, is that in fixing damages for loss of past earnings or for impairment of future earning ***97** capacity because of personal injuries, the income tax consequences of the injury and award should not be taken into consideration. 63 A.L.R.2d 1393, s 4; see also Cincota v. United States, 362 F.Supp. 386, 407-408 (D.C.Md.1973). We think that Maryland should be in accord with the majority view. Without distinguishing whether accrued or prospective, the award of damages should be based upon the plaintiff's gross earnings or earning capacity and should not be reduced because of any income tax savings which may result to the plaintiff from the fact that the damages will be exempt from income tax.

Based upon appellant's argument as to the availability of information about tax consequence, it seems to have concluded that the only persuasive reason for exclusion of tax consequences was that given by some courts, i. e., that the amount of one's future income tax liability is too conjectural or speculative a factor. See, e. g., McWeeney v. New York, N. H. & H. R. Ry. Co., 2 Cir., 282 F.2d 34, 38-39; Stokes v. United States, 2 Cir., 144 F.2d 82, 87. And we agree that future tax liability is conjectural to a large extent; however, far more persuasive to us is the fact that the matter is extraneous to the issues being tried. [9] Taxes ****292** are strictly between plaintiff as taxpayer and the government as collector, and are of no legitimate concern of the defendants. See, e. g. Atlantic Coast Line Railroad Company v. Brown, 93 Ga.App. 805, 92 S.E.2d 874. Although many defendants contend that because such recoveries are not taxable, a windfall is thus provided injured plaintiffs, that argument has a reverse effect. If an award were decreased by estimated taxes, the windfall would be one for the defendant, who has far less claim to it ***98** than the wage earner. The tax exemption was intended by Congress to benefit the injured party, not the wrongdoer. See Huddell v. Levin, D.C., 395 F.Supp. 64, 84-91; Hall v. Chicago & North Western Railway Company, 5 Ill.2d 135, 125 N.E.2d 77.

We find no error in permitting the economist to base his computations on gross wages.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

All Citations

36 Md.App. 82, 373 A.2d 282, 1977 A.M.C. 1365

Footnotes

1 Appellant has interwoven numerous challenges to the sufficiency of the economist's factual foundation with the three substantial legal issues to be reached. With regard to them, it will suffice to say that we have carefully considered them but, in light of our review of the record, we are persuaded by the reasoning of appellees, their factual summarizations, and their legal authority in response to appellant's subissues c, d, e, f, g and j of question III. To discuss our deliberations upon those issues would unduly encumber an already too cumbersome opinion. Expressly we find that:

c. The economist's testimony was based upon contracts properly admitted into evidence and testimony relating these contracts to appellee. A detailed interpretation of all the provisions in the contracts, by an expert or otherwise, was plainly not necessary.

d. The economist's computations with regard to hours Nowakowski worked over the past two years included holiday pay. There is no error in considering what an employee actually receives in addition to the hours actually worked.

e. The economist was not bound by the minimum hours of work guaranteed by contract, but properly used and explained that he used an average of hours actually worked, including hours for which Nowakowski received holiday pay.

f. The economist was justified in assuming that the last two years Nowakowski worked were not extraordinary years, and that they contained an average loss of time for reduction by reason of whether, strikes and seasonal influences. There was no error in using computations based on hours actually worked.

g. It was not improper to project future wage losses on past experience of the economy (see subsequent issues) as applied to Nowakowski when the supporting bases of the projections are before the jury. Cf. State Roads Comm'n v.

Parker, 275 Md. 651, 652 (, 344 A.2d 109); Marshall v. Sellers, 188 Md. 508, 519 (, 53 A.2d 5). Likewise, there was no error in assuming that Nowakowski would have continued to work as a stevedore.

j. It was not improper for the economist to project future lost income upon trends taken from past contracts when the foundation of the conjecture is before the jury. The economist explained that foundation for the jury's consideration:

'MR. MERRIMAN: Now, Your Honor, I would interrupt the doctor at this point to make a special objection. Although no question has been asked, obviously this testimony is geared to a contract which would have expired and the doctor is now projecting this in the future as a certainty. Excuse me, Doctor.

THE WITNESS: Your Honor, may I comment on that?

THE COURT: Yes.

THE WITNESS: Over the last of the contracts in the past, there has been a gradual uptrend in the ratio of employer contributions to fringe benefits per dollar wages paid. For example, in 1971-'72, the fringe benefit contributions by the employer were $1.42 an hour on a wage of five fifteen. That's not quite as large a fraction as $2.84 on a wage of $8.00. So, that the calculation I am using here assumes that the increase which has been observed in the past in fringe benefits per dollar wages will stop at the end of the contract in 1977.

So, in that sense, this thirty-two per cent is conservative as compared with the projection that would calculate a continuing increase in fringe benefits per dollar wages. I did not project a continuation of the past increase in fringe benefits per dollar wages. I predicted that the per dollar wages would stop increasing at the expiration of the contract in 1977.

THE COURT: I understand. Well, is it legitimate to calculate that as a part of his loss of earnings, the loss of the employer's contributions to the fringe benefits.

THE WITNESS: In my opinion, it is, because a person who works until normal retirement under a union contract, which has benefits attached, receives a retirement pensions which are based on the contract he has made during his working life; whereas, those contributions made by the employer are not part of take home pay. They are put into a fund which is administered for the benefit of employees, and when a person stops working before normal retirement, the value of his pension is less.'

As to recovery for fringe benefits, see Plank v. Summers, 203 Md. 552, 562, 102 A.2d 262, where the Court expressly considered a serviceman's hospital benefits as part of his compensation, saying:

'If, by their services, the appellants paid for the medical and hospital expenses, certainly the value of these are proper items for the jury to consider in arriving at the amount of damages to be paid by the appellee.'

It follows, from this and our following discussion of damages, that the trial judge's refusal to grant appellant's motion in limine regarding damages was not error.

2 Judge Powers traced the assimilation of the concept of reduction to present value into the Court of Appeals' case law, but Judge Barnes' proclamation provided the indicia of finality. 267 Md. at 573 and 575, 298 A.2d 391.

3 Walston, supra, 267 Md. at 573, 298 A.2d at 399.

4 This irony was explained by Judge Powers in Sun Cab Co. v. Walston, supra, 15 Md.App. at 124, 289 A.2d at 811:

'Strangely, the principle seems to have crept into the law by common acceptance, for the Court of Appeals has never had occasion to rule squarely upon it.'

5 Laws 1962, ch. 36, s 43, codified as Md.Code, Art. 67, s 4. The current version of the wrongful death statute, Md.Code, Cts. Art., s 3-904, as amended insofar as relevant here by Laws 1969, Ch. 352, no longer provides that the pecuniary loss rule is the sole limit of damages in a suit for the wrongful death of a spouse or minor child.

6 In addition to counsel's explanation to the court, the witness so testified:

'And (appellees' attorney) said to me that he feared that if I were to present my original calculation involving reduction of present value, that it's possible that the Court would overrule it, following a precedent of the preceding case. Therefore, he asked me to make a second calculation without the reduction of present value, and I said that I didn't regard this as valid from the point of view of economics, and if anyone asked me about it I would have to say that, and he said he was perfectly happy about that, but he felt that I should be prepared to do both calculations in case the Court should overrule my calculation involving reduction of present value. Then, the other one would be available to present. And, in fact, the other one is on the back of that piece of paper.'

7 See Alaska: Beaulieu v. Elliott, 434 P.2d 665 (Alaska 1967); Florida: Seaboard Coast Line R. R. Company v. Garrison, Fla.App., 336 So.2d 423 (1976); Indiana: Richmond Gas Corporation v. Reeves, 302 N.E.2d 795 (1973); Iowa: Schnebly v. Baker, 217 N.W.2d 708 (1974); Montana: Resner v. Northern Pacific Railway, 161 Mont. 177, 505 P.2d 86 (1973); New Jersey: Tenore v. Nu Car Carriers, Inc., 67 N.J. 466, 341 A.2d 613 (1975); Oregon: Plourd v. Southern Pacific Transportation Co., 266 Or. 666, 513 P.2d 1140 (1973). See also United States v. English, 521 F.2d 63 (9th Cir. 1975); Feldman v. Allegheny Airlines, Inc., 524 F.2d 384 (2nd Cir. 1975) (interpreting Connecticut law); Weakley v. Fishbach

& Moore, Inc., 515 F.2d 1260 (5th Cir. 1975) (interpreting Texas law); Bach v. Penn Central Transportation Co., 502 F.2d 1117 (6th Cir. 1974).

8 Although Culley v. Pennsylvania Railroad Company, D.C., 244 F.Supp. 710, 715, interpreting Maryland Law, held that: 'Damages which are based upon earnings must be awarded without consideration of the impact of income taxes.', it relied upon Rhone v. Fisher, 224 Md. 223, 225, 167 A.2d 773 because that case purported to set forth 'the standard instruction' in Maryland; but as summarized there, no mention was made of taxes. We can hardly accept Culley's reasoning as sufficient authority. We are, however, more impressed with Judge Thomsen's discussion of whether taxes should be considered in Plant v. Simmons Company, D.C., 321 F.Supp. 735, 739. He relied on another federal case, Jennings v. United States, D.C., 178 F.Supp. 516, to conclude that taxes should not be considered in assessing damages under Maryland law. Jennings did hold that taxes should not be considered, id. at 532, but did so without citation to any Maryland authority.

9 By discussing some of the reasons for excluding considerations of tax we should not be interpreted as disregarding others, such as:

1. the collateral source rule to the effect that compensation from a collateral source will not serve to lessen damages received from the person causing the injury, Huddell v. Levin, D.C., 395 F.Supp. 64, 88;

2. the undue complications for juries to resolve, Id. at 87;

3. that to mitigate the damages by reason of tax exemption would nullify the Congressional intent to give the injured party the benefit of tax-free income. Id. at 87.

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247 Va. 180
Supreme Court of Virginia.

CSX TRANSPORTATION, INC.
v.
Patrick W. CASALE.

Record No. 930275.
|
Feb. 25, 1994.

Worker sued employer under Federal Employers' Liability Act (FELA) for injuries sustained while working on telephone wires, and was awarded damages by jury. The Circuit Court, City of Richmond, T.J. Markow, J., entered judgment on verdict, less ten percent for worker's own negligence, and employer was awarded appeal. The Supreme Court, Compton, J., held that: (1) medical expert's recital of confirming opinion of absent physician was hearsay and constituted reversible error, and (2) defendant bore burden of providing jury with evidence to reduce future wages to reflect present value.

Reversed and remanded.

Attorneys and Law Firms

****213** ***181** John M. Oakey, Jr., Richmond (James L. Sanderlin, Scott C. Oostdyk, McGuire, Woods, Battle & Boothe, on briefs), for appellant.

Raymond H. Strople, Portsmouth (Willard J. Moody, Sr., Joseph J. Perez, Moody, Strople & Kloeppel, on brief), for appellee.

***180** Present: All the Justices.

Opinion

COMPTON, Justice.

In February 1990, plaintiff Patrick W. Casale was working for his employer, defendant CSX Transportation, Inc., as a communications maintainer repairing telephone wires that crossed the Roanoke River ***182** near Weldon, North Carolina. While the plaintiff was at the top of a 60-foot pole helping to secure broken wires, a boat navigating the river unexpectedly snagged two wires hanging just above the water. This caused the pole to whip, injuring the plaintiff.

In May 1991, the plaintiff filed the present action against CSX under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*, seeking recovery in damages for his injuries. After a five-day trial, a jury found in favor of the plaintiff and fixed his damages at $1.3 million. The jury also found that plaintiff's negligence contributed to his injuries to the extent of ten percent. Therefore, the trial court entered judgment on the verdict in the amount of $1.17 million.

We awarded the defendant this appeal, limited to consideration of the following issues: Whether the trial court improperly allowed hearsay testimony; whether the court erred in instructing the jury on loss of future wages; whether plaintiff's counsel engaged in improper closing argument; and whether the verdict was excessive in amount. Because of the view we take of the case, we shall discuss only the hearsay and wage loss questions.

The hearsay issue arose in the following manner. Although there was a dispute over the nature and extent of the plaintiff's accident related injuries, he presented testimony showing that he sustained "a significant soft tissue injury from the whiplash of being up on the pole," a "severe lumbosacral strain," a "chronic strain in his sacroiliac joint" and "bulge" of a lumbar disc, and traumatic arthritis secondary to the joint injury. There was testimony that some of these injuries were permanent and would prevent the plaintiff from performing his duties as a communications maintainer in the future.

[1] The plaintiff was examined and treated by numerous physicians during the period between the accident and the trial, not all of whom testified. One who did not testify was a Dr. Isaacs, a neurologist.

The plaintiff called Dr. Arthur Wardell, an orthopedic surgeon, who testified during direct examination about his diagnosis of plaintiff's injuries. Later during direct examination, Wardell was permitted to testify, over defendant's objection, as follows: "Dr. Isaacs' diagnosis was similar: Thoracic lumbar strain or low back strain. He also ****214** thought that-He also made the diagnosis of a lateral femoral cutaneous nerve injury. That's a nerve which supplies the sensation to a good part of the thigh."

The defendant contends that admission of this testimony was reversible error. We agree.

[2] A medical expert's recital of the confirming opinion of an absent physician is inadmissible hearsay. *McMunn v. Tatum,* 237 Va. 558, 566, 379 S.E.2d 908, 912 (1989). Although Code § 8.01-401.1 ***183** authorizes admission into evidence of an expert's opinion that may be based in whole or in part upon inadmissible hearsay, "the statute does *not* authorize the admission of any hearsay opinion on which the expert's opinion was based." *Todd v. Williams,* 242 Va. 178, 181, 409 S.E.2d 450, 452 (1991). This is because "admission of hearsay expert opinion without the testing safeguard of cross-examination is fraught with overwhelming unfairness to the opposing party. No litigant in our judicial system is required to contend with the opinions of absent 'experts' whose qualifications have not been established to the satisfaction of the court, whose demeanor cannot be observed by the trier of fact, and whose pronouncements are immune from cross-examination." *McMunn,* 237 Va. at 566, 379 S.E.2d at 912.

We reject the plaintiff's contention that admission of the hearsay was harmless error. The plaintiff argues that the Isaacs diagnosis did not prejudice the defendant because it "was similar to other medical testimony already on record" showing that the plaintiff "did have a lumbar strain" and that he "might have a nerve injury." Also, plaintiff says that "the statement of Dr. Wardell that Dr. Isaacs made a diagnosis of a lateral femoral cutaneous nerve injury is of no consequence when the entire record and all the medical evidence is reviewed." We disagree.

There was no other testimony reciting a diagnosis of "lateral femoral cutaneous nerve injury." It is true there was testimony the plaintiff complained of "some numbness in the left thigh area" that "suggested irritation of some of the nerve roots;" testimony the plaintiff "had a little bit of decreased strength in one of the muscle groups in his legs" indicating "severe irritation of one of the nerve roots;" and testimony about the bulging of a lumbar disc. But the medical evidence on the subject of nerve injury was hotly contested. Even the plaintiff's physicians were not in agreement on the issue, one indicating "there is no nerve root involved in his problem."

[3] In order to constitute reversible error, a trial court's ruling "must be material and prejudicial to the interests of the party complaining of it." *Taylor v. Turner,* 205 Va. 828, 831, 140 S.E.2d 641, 643 (1965); Code § 8.01-678. Under the circumstances of this case, admission of the hearsay introducing a new and different diagnosis into the case was material and prejudicial to the railroad's defense on the issue of damages.

Because the foregoing error will require a remand, we shall discuss the wage loss issue, which may arise upon a retrial. The plaintiff presented evidence about his rate of pay at the time of the accident, general wage increases to which he would be entitled, cost of living ***184** increases due him in the future, and his "fringe benefits," including health benefits and retirement pay. In the general instruction on damages, the trial court permitted the jury, in fixing the damages, to consider "any loss of earnings, fringe benefits, and lessening of earning capacity, or either, that [the plaintiff] may reasonably be expected to sustain in the future."

On appeal, the defendant contends that the trial court erred in instructing the jury on future lost wages because the plaintiff "offered no evidence from which the jury could reduce the amount to present value without random speculation." Elaborating, the defendant maintains that the plaintiff had the burden, which he failed to discharge, to present evidence of "projected future interest rates," of "future railroad industry wage rates," or other "economic and wage evidence," to guide the jury in reducing any lump sum award to present value.

[4] [5] The propriety of jury instructions concerning the measure of damages in a FELA action is a matter of federal substantive law. *St. Louis Southwestern Ry. v. Dickerson,* 470 U.S. 409, 411, 105 S.Ct. 1347, 1348, 84 L.Ed.2d 303 (1985). Upon request, ****215** a FELA defendant is entitled to an instruction that "when future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of their present value only." *Chesapeake & Ohio Ry. v. Kelly,* 241 U.S. 485, 491, 36 S.Ct. 630, 632, 60 L.Ed. 1117 (1916).

The jury in the present case was given such an instruction, taken verbatim from *Dickerson,* 470 U.S. at 410, 105 S.Ct. at 1348, as follows:

> "If you find in favor of the plaintiff and decide to make an award for any loss of earnings in the future, you must take into account the fact that

> the money awarded by you is being received all at one time instead of over a period of time extending into the future and that the plaintiff will have the use of this money in a lump sum. You must, therefore, determine the present value or present worth of the money which you award for such future loss."

The reason for such an instruction is that when a verdict is based upon the deprivation of future benefits, it will provide more than reasonable compensation if it is formed by merely aggregating the benefits without taking into account "the earning power of the money that is presently to be awarded. It is self-evident that a given sum of money in hand is worth more than the like sum of money payable in the future." *Kelly,* 241 U.S. at 489, 36 S.Ct. at 632.

[6] Recognizing that the calculation of present value "may be a difficult mathematical computation" for the average juror to make, the ***185** Supreme Court has said that the procedural and evidentiary law of the forum should determine whether "the difficulty should be met by admitting the testimony of expert witnesses, or by receiving in evidence the standard interest and annuity tables in which present values are worked out at various rates of interest and for various periods covering the ordinary expectancies of life." *Id.* at 491, 36 S.Ct. at 632. The Court has stated, however, that the "average accident trial should not be converted into a graduate seminar on economic forecasting." *Monessen Southwestern Ry. v. Morgan,* 486 U.S. 330, 341, 108 S.Ct. 1837, 1845, 100 L.Ed.2d 349 (1988) (quoting *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 548, 103 S.Ct. 2541, 2556, 76 L.Ed.2d 768 (1983)) (internal quotations omitted).

The parties to this appeal agree on the state of the federal law on the basic issue. They disagree, however, on who has the burden of proof in this area. The defendant argues that the burden is upon the plaintiff and, because the plaintiff offered no present value evidence, the trial court erred in permitting the jury to allow any recovery for future wage loss. The plaintiff, conceding that it offered no evidence of present value, maintains that the burden was on the defendant to put on such evidence. The trial court did not specify which party had the burden in this case.

[7] To date, the Supreme Court has not decided the issue, and the federal circuit courts are in conflict on the question. *See, e.g., Gorniak v. National R.R. Passenger Corp.,* 889 F.2d 481, 486 (3rd Cir.1989) ("the law of this circuit places the burden on the plaintiff to produce evidence permitting a rational reduction to present value"); *Alma v. Manufacturers Hanover Trust Co.,* 684 F.2d 622, 626 (9th Cir.1982) (party benefitting from application of particular economic formula has burden to prove it; defendant must establish discount rate; plaintiff must establish inflation rate when plaintiff claims amount to be awarded must be adjusted for price inflation). *See generally* Note, *Future Inflation, Prospective Damages, and the Circuit Courts,* 63 Va.L.Rev. 105 (1977). The Fourth Circuit has not definitively decided the issue. *See Aldridge v. Baltimore & Ohio R.R.,* 789 F.2d 1061, 1067 (4th Cir.1986), *aff'd on reh'g en banc,* 814 F.2d 157 (4th Cir.1987), *vacated and remanded sub nom. Chesapeake & Ohio R.R. v. Aldridge,* 486 U.S. 1049, 108 S.Ct. 2812, 100 L.Ed.2d 913 (1988), *on remand en banc, Aldridge v. Baltimore & Ohio R.R.,* 866 F.2d 111 (4th Cir.1989). Therefore, without the availability of a controlling and explicit federal ruling, we must establish the rule to be applied in state courts in Virginia.

We discern some guidance from the Supreme Court; it has treated the present value question as one in the nature of mitigation ****216** of damages. The Court said in *Kelly,* discussing the present value concept: ***186** "Ordinarily a person seeking to recover damages for the wrongful act of another must do that which a reasonable man would do under the circumstances to limit the amount of the damages." 241 U.S. at 489, 36 S.Ct. at 631. Likewise, this Court has treated the reduction in a claim for damages in an analogous situation as being in the nature of mitigation. In *Lee v. Bell,* 237 Va. 626, 630, 379 S.E.2d 464, 467 (1989), noting that a defendant has the burden of proof upon mitigation of damages, we placed the burden upon a defendant to go forward with evidence that a plaintiff's damages should be reduced when the defendant claimed the plaintiff was receiving a special advantage arising from the defendant's wrongful conduct. Although reduction to present value of a claim for future lost wages is not a pure mitigation of damages issue, it is a comparable idea.

[8] Therefore, we hold that the following rules should apply. Of course, the plaintiff has the ultimate burden of proof upon the quantum of damages. And, a FELA

plaintiff establishes a prima facie case for recovery of future lost wages by presenting evidence of, for example, projected wage loss, fringe benefits to be lost in the future, and life expectancy if there is a permanent injury. But, a defendant seeking reduction to present value of a sum awarded for future lost wages has the burden of going forward with evidence to enable the fact finder to make a rational determination on the issue. Indeed, fairness dictates that a defendant entitled to the benefit of a *Dickerson* instruction, *supra,* should have the burden of presenting evidence to enable it to reap such benefit.

In the present case, because the defendant failed to introduce such evidence, the trial court correctly rejected defendant's effort to eliminate the plaintiff's future lost wage claim.

Consequently, the judgment below will be reversed for admission of the hearsay testimony, the case will be remanded for a new trial limited to the issue of damages only, and whatever verdict the plaintiff may receive at a new trial shall be reduced by ten percent because of the plaintiff's contributory negligence.

Reversed and remanded.

All Citations

247 Va. 180, 441 S.E.2d 212

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Tab 5

669 A.2d 1271
District of Columbia Court of Appeals.

Alphonzo CLEMENTS, Appellant,
v.
UNITED STATES, Appellee.

No. 94–CF–324.
|
Submitted Dec. 5, 1995.
|
Decided Dec. 28, 1995.

Defendant was convicted of assault with intent to kill while armed and various weapons offenses, following jury trial, by the Superior Court of the District of Columbia, A. Franklin Burgess, J. Defendant appealed. The Court of Appeals, Ferren, J., held that: (1) business records hearsay exception applied to entries in hospital admission records concerning victim's alertness; (2) testimony of persons conducting alertness tests was unnecessary; and (3) prosecutor properly attacked methodology used by defense expert to conclude that victim was intoxicated.

Affirmed.

Attorneys and Law Firms

***1272** Mary E. Davis, appointed by the court, Washington, DC, for appellant.

Magdalena A. Bell, Assistant United States Attorney, with whom Eric H. Holder, Jr., United States Attorney, and John R. Fisher, Thomas C. Black, and Robert A. Spelke, Assistant United States Attorneys, Washington, DC, were on the brief, for appellee.

Before FERREN and KING, Associate Judges, and PRYOR, Senior Judge.

Opinion

FERREN, Associate Judge:

A jury found appellant, Alphonzo Clements, Jr., guilty of assault with intent to kill while armed, D.C.Code §§ 22–501, –3202 (1989 Repl.); possession of a firearm during a crime of violence or dangerous offense, *id.* § 22–3204(b) (Supp.1994); carrying a pistol without a license, *id.* § 22–3204(a); possession of an unregistered firearm, *id.* § 6–2311(a); and unlawful possession of ammunition, *id.* § 6–2361(3). Clements contends that (1) the trial court erred in admitting in evidence hospital records indicating the victim's degree of alertness at the time he was admitted to the hospital, and that (2) statements made by the prosecutor in closing argument constituted prosecutorial misconduct requiring reversal. We affirm.

I.

The government's evidence indicated that at approximately 12:00 a.m. on July 23, 1993, Joseph Hackney drove Roderick Stringer to an apartment complex at Douglas Place, S.E. On the way, Stringer purchased two twenty-ounce beers, which he and Hackney consumed. When they reached the complex at Douglas Place, Hackney screeched his tires as he pulled into the parking lot. Clements, who was known to Hackney by the nickname "Bouchey," approached both men as they sat in the car and told Hackney, "don't be coming in my damn neighborhood making that noise with your car." After a brief argument, Clements walked away from the car while Hackney remained inside it with Stringer.

Some time later, as Stringer was about to leave the car, Clements ran up to the driver's side, pulled out a gun, and shot Hackney six times as Hackney attempted to leave the car on the passenger side. When police and rescue personnel arrived on the scene, Hackney informed the police that "Bouchey" was his assailant. He then lost consciousness. After transport to D.C. General Hospital, Hackney was admitted into the intensive care unit with gunshot wounds to his abdomen, left arm, and left leg. Hackney then regained consciousness. As part of the admission process, Hackney was screened for drugs, and a blood test revealed a blood alcohol level of .110. Hospital staff also assessed Hackney's level of awareness and found that he was "alert, oriented X 3," *i.e.*, "alert to person, place and time," and had a Glasgow Coma Scale (GSC) rating of 15, or normal, at the time of his arrival.

Clements' trial began on January 11, 1994. The government presented extensive testimonial evidence to establish that Clements was the gunman who shot Hackney, including the testimonies of Hackney, of residents at Douglas Place, and of law enforcement officers who investigated the crime. [1] In order to show

Clements' specific intent to kill, the government also presented the testimony of Dr. Wendell Perry, the senior resident on call at D.C. General Hospital when Hackney ***1273** was admitted. Dr. Perry discussed the life-threatening nature of Hackney's injuries, and also explained the initial assessments of Hackney's alertness made upon his admission. Finally, the government introduced in evidence hospital records from D.C. General Hospital relating to Hackney's treatment on the night he was shot.

The defense theory was that Clements had argued with Hackney on the night of the shooting but that he was not responsible for shooting Hackney. The defense tried to discredit Hackney's testimony by suggesting, through defense witnesses including Clements, that Hackney's perception of events and his identification of Clements were unreliable because Hackney had been drunk at the time. The defense also presented the expert testimony of a forensic toxicologist, Dr. Nicholas T. Lappas, who opined on the basis of Hackney's weight, height, food and alcohol consumption, blood alcohol level, and behavior on the night of the shooting that Hackney had been intoxicated. Defense counsel had also objected to introduction of the hospital records that noted Hackney was "alert, oriented X 3," as well as the records that reflected Hackney's GSC rating at the time he was admitted to the intensive care unit.

On January 25, 1994, Clements was convicted on all counts for which he had been indicted. He was sentenced on March 22, 1994, to prison terms totaling 9 to 25 years and filed a timely notice of appeal the next day.

II.

[1] Clements contends the trial court erred in admitting under the business records exception to the hearsay rule hospital records reflecting Hackney's level of conscious awareness at the time of his admission. Clements primarily argues that entries describing Hackney as "alert, oriented X 3," as well as the entries indicating Hackney's GSC test results, amounted to medical "opinions" about which competent physicians would differ, *see Durant v. United States,* 551 A.2d 1318, 1323–24 (D.C.1988), and thus fell outside the scope of the business records exception. We conclude that, because both entries reflected "objective medical data recorded by the hospital officials as part of their regular patient work-up," *Sullivan v. United States,* 404 A.2d 153, 158–59 (D.C.1979), rather than "subjective judgment or conjecture," *see Durant,* 551 A.2d at 1324, they were properly admitted under the business records exception.

The business records exception is codified in our jurisdiction in Super.Ct.Civ.R. 43–I (1995), which provides:

> Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

Rule 43–I is applicable to criminal cases in Superior Court. *See* Super.Ct.Cr.R. 57(a).

Because "[h]uman life will often depend on the accuracy of the entry, and it is reasonable to presume that a hospital is staffed with personnel who competently perform their day-to-day tasks," *Smith v. United States,* 337 A.2d 219, 222 (D.C.1975) (quoting *Thomas v. Hogan,* 308 F.2d 355, 361 (4th Cir.1962)), we generally regard most, but not all, hospital entries as particularly trustworthy business records. The natural distinction that we employ is between (1) entries of medical facts, routinely performed procedures, and diagnoses about which competent physicians would agree, and (2) entries reflecting subjective judgment or conjecture about which there would likely be disagreement. *See Adkins v. Morton,* 494 A.2d 652, 662 (D.C.1985); *New York Life Ins. Co. v. Taylor,* 79 U.S.App.D.C. 66, 69, 147 F.2d 297, 300 (1945).

Applying this distinction, we have upheld admission of nursing notes describing a patient's ***1274** behavior and lab reports indicating a patient's PCP in the bloodstream, *see Durant,* 551 A.2d at 1325–26, a diagnosis of physical injuries based upon a patient's physical condition, *see Sullivan,* 404 A.2d at 158, and a diagnosis of cerebral thrombosis and hypertension, *see Christensen v. Gammons,* 197 A.2d 450, 453 (D.C.1964). We have not, however, permitted in evidence "psychological" and "psychiatric" diagnoses, such as a diagnosis of PCP intoxication intertwined with a secondary diagnosis of an underlying mental disorder, *see Durant,* 551 A.2d at 1324, and a diagnosis of "psychoneurosis, hysteria, conversion type," *see New York Life,* 79 U.S.App.D.C. at 69, 147 F.2d at 300, or an entry containing a doctor's speculation that thrombosis was the cause of a patient's injury, *see Adkins,* 494 A.2d at 661.

We have no problem deciding that the entries involved in the present case fit within the first group of admissible entries and not the second. Both entries—the notation "alert, oriented X 3" and Hackney's GSC test results —were "[r]egularly recorded facts as to the patient's condition," *id.* at 662 (quoting, *New York Life,* 79 U.S.App.D.C. at 72, 147 F.2d at 303), and not speculative or conjectural diagnoses. Evaluating a patient's degree of conscious awareness is part of the standard neurological work-up of a trauma patient, along with evaluations of the patient's blood pressure, vital signs, and respiratory system. *See* RAYMOND D. ADAMS, MAURICE VICTOR, PRINCIPLES OF NEUROLOGY 281–82, 713–14 4th ed. 1989); TRAUMA 49, 820–21 (Ernest E. Moore et al. eds., 2nd ed.1991). As explained at trial, the notation that Hackney was "alert, oriented X 3" meant that he was alert to "person, place, and time." Hackney's GSC rating, a coma scale rating a person between a high of 15 and a low of 3, provided a second, more formalized, measurement of his degree of alertness. Both are useful standardizations of a patient's neurological condition arrived at on the basis of examining the physical condition of the patient. *Id.*

The conclusion we arrived at in *Sullivan* bears repeating here:

> [I]t is obvious that medical entries as to complainant's condition—his [or her] appearance, physical signs such as pulse, respiration, etc., and the resulting diagnosis—constitute a record admissible under Rule 43–I(a).

Sullivan, 404 A.2d at 158. Hackney's level of conscious alertness, like his pulse and respiration, was yet another sign indicative of his condition when he arrived at D.C. General Hospital. The trial court therefore did not err in admitting the two categories of hospital entries under the business records exception. [2]

[2] Clements also contends that the government failed to provide a sufficient explanation for the notation "alert, oriented X 3" and for the GSC rating, and in any event that the explanation of the GSC rating should have been given by the individual who conducted the test. A review of the record reveals that Dr. Perry specifically explained each reference in a way that would be understandable to the jury. Moreover, because we conclude that the medical entries referring to Hackney's alertness qualify under the business records exception, they were admissible without the accompanying testimony of the individuals who conducted the actual tests. *See* Super.Ct.Civ.R. 43–I(a); 5 JOHN H. WIGMORE, EVIDENCE § 1530 at 451–52 (Chadbourn rev.1974); JACK B. WEINSTEIN ET AL., 4 WEINSTEIN'S EVIDENCE ¶ 803(6)[02] (1995).

III.

[3] We can summarily address Clements' second contention: that statements made by the prosecutor in closing argument constituted prosecutorial misconduct requiring reversal. Clements objects to a statement that "[t]here's not one stitch of evidence that suggests ***1275** to you ... that blood wasn't drawn before that IV was put in Mr. Hackney," and to statements made by the prosecutor referring to Dr. Lappas, the defense expert. [3] In reviewing a claim of prosecutorial impropriety, we first must determine whether any of the challenged comments by the prosecutor was improper. *See McGrier v. United States,* 597 A.2d 36, 41 (D.C.1991). "Even if we conclude a statement was improper, we will nevertheless affirm the conviction unless the defendant suffered substantial prejudice as a result." *Id.* (quoting *Williams v. United States,* 483 A.2d 292, 297 (D.C.1984), *cert. denied,* 474 U.S. 906, 106 S.Ct. 275, 88 L.Ed.2d 236 (1985)).

[4] The statements at issue here were not improper, let alone substantially prejudicial to Clements. The

prosecutor's comment that there was no evidence to indicate that blood had not been drawn from Hackney before he was given an IV was intended to challenge Dr. Lappas' testimony that the administration of IVs would have diluted Hackney's blood alcohol level. Despite Clements' contentions on appeal that the statement contradicted an "ambulance report," no records of ambulance personnel were ever admitted in evidence, and it was never established that blood was not drawn from Hackney before he received an IV. The statement was therefore not improper.

[5] As for the prosecutor's statements that "that's not the way it works" and "that was not the way it's done," referring to Dr. Lappas' conclusions and methodology, the rule prohibiting lawyers from expressing personal opinions on the veracity of a witness "does not prevent a lawyer from arguing that the testimony of a particular witness should not be believed when the jury could reasonably draw that inference from contradictory evidence in the record." *McGrier,* 597 A.2d at 43.[4] Here, Dr. Lappas' opinion as to Hackney's degree of intoxication was at odds with the testimonies of Dr. Perry, Officer DeFrance, and Officer Woodburn, all of whom testified that Hackney did not appear intoxicated the night he was shot. Finally, the prosecutor's alleged personal attacks on the defense expert came in the context of a general attack on the expert's methodology, and was within the "general nature of argument," *id.* (citations omitted), intended to demonstrate the implausibility of Dr. Lappas' opinion.

Affirmed.

All Citations

669 A.2d 1271

Footnotes

1 Hackney testified as to the events that took place and identified Clements as his attacker. Selena Mitchell, a resident at Douglas Place, testified that she had seen Clements arguing with Hackney at approximately 2:15 a.m. on the night of the shooting. Tonia Williams testified that she had received a telephone call from Clements shortly after the shooting in which Clements inquired whether Hackney had died and whether the police knew who was responsible. Metropolitan Police officers August DeFrance, Peter Woodburn, Richard Brown, and Timothy Curtis, and FBI agent Jerrold Bamel, also appeared at trial. DeFrance and Woodburn testified that Hackney had identified Clements at the scene and had not smelled of alcohol or slurred his speech. Curtis and Brown discussed the physical evidence found at the scene. Bamel testified that he had visited Hackney at D.C. General Hospital, that Hackney had told Bamel that "Bouchey" had shot him, and that Hackney had made a positive photo identification of Clements.

2 We also note that the court in *New York Life* expressly stated that a diagnosis of alcohol intoxication was the type of diagnosis based upon the readily observable condition of the patient that should be admitted in evidence. *See New York Life,* 79 U.S.App.D.C. at 72–73, 147 F.2d at 303–304. While the entries here did not "diagnose" Hackney's sobriety, they did reflect observations about Hackney's condition substantially related to such a diagnosis. The fact that the entries were merely observations, and not diagnoses, only enhanced their reliability, and thus their admissibility under the business records exception.

3 Clements refers to unspecified comments made by the prosecutor criticizing Dr. Lappas' methodology used to reach the conclusion that Hackney had been intoxicated and also to the prosecutor's statement, "that's not the way it works." No objections were made to these statements at trial. Clements also points to the statement, "Is that not the height of arrogance?", which the prosecutor made after reminding the jury that Dr. Lappas had testified that he was aware of Hackney's percentage of body fat although he had never personally seen Hackney.

4 We also note that Clements failed to object to these statements at trial. Where no objection has been made at trial to a prosecutor's remarks, we will not reverse absent a showing of plain error, *i.e.,* error "so clearly prejudicial to substantial rights as to jeopardize the very fairness and integrity of the trial." *Watts v. United States,* 362 A.2d 706, 709 (D.C.1976) (en banc).

537 A.2d 563
District of Columbia Court of Appeals.

Ernestine J. ROTAN, et al., Appellants,
v.
Diane J. EGAN, et al., Appellees.

Nos. 81–1036, 84–1507.
|
Argued Nov. 5, 1986.
|
Decided Feb. 11, 1988.

Patient and her husband brought medical malpractice action, alleging that doctors were negligent in failing to detect bacterial growth on heart valve which ultimately led to its replacement with a prosthesis. The Superior Court, John F. Doyle, J., entered judgment on a jury verdict in favor of defendants, and plaintiffs appealed. The Court of Appeals, Mack, J., held that: (1) although doctor's statement regarding prior condition of heart valve was erroneously admitted under business records exception to the hearsay rule, admission was harmless; (2) admission of certain expert testimony for the defense was not reversible error, despite claim by plaintiffs that the testimony was not sufficiently identified in defendants' response to their discovery request; and (3) trial court did not abuse its discretion in admitting other testimony of experts for the defense over objection of lack of qualification.

Affirmed.

Attorneys and Law Firms

***564** Barry J. Nace, with whom Lynn Suzanne Spradley was on the brief, for appellants. Richard S. Paulson also entered an appearance for appellants.

Steven A. Hamilton, with whom Benjamin S. Vaughn was on the brief, for appellees. William A. Ehrmantraut and William F. Causey also entered an appearance for appellees.

Before MACK, BELSON,* and ROGERS, Associate Judges.

Opinion

MACK, Associate Judge:

This is an appeal from a jury verdict in favor of appellee physicians against Ernestine J. Rotan and her husband, Bernie Rotan, in a medical malpractice suit. The suit alleged that Mrs. Rotan developed a bacterial growth on her heart valve which ultimately required replacement of the valve as a result of appellees' negligent care, diagnosis, and treatment. Appellants claim that several of the trial court's evidentiary rulings are in error. [1] None of the issues raised warrant reversal.

I

Ernestine J. Rotan became a patient of the appellee obstetrics/gynecology medical group of Diane J. Egan, M.D., Raymon J. Parisi, M.D., and Arthur E. Kane, M.D., when she suspected she was pregnant. On her initial visit in September 1976, she was examined by Dr. Kane and told him she had a heart murmur that had been diagnosed in 1959. In relation to this heart murmur, Mrs. Rotan had never experienced any symptoms or pain, had never been hospitalized, was taking no medication, had never suffered any injury, disease, or illness to her heart, and had not been required to restrict her physical activities or diet.

Mrs. Rotan was expected to deliver her child in late May 1977, but she had a premature rupture of the membranes on April 2, 1977. She was given a cortisone medication by Dr. Parisi to decrease the possibility of lung problems for the baby since a premature birth was expected. The baby was born April 5, 1977 (delivered by Dr. Egan). A uterine culture of the mother and a culture of the suction material taken from the baby showed a "moderate growth" of group D streptococcus (enterococcus). Mrs. Rotan was given no antibiotic therapy when she ruptured the membrane or after the culture. [2]

***565** Mrs. Rotan was discharged from the hospital on April 8, 1977. From that time on she had symptoms such as swelling in her feet, weakness, fever, pus draining from the nipples of both breasts, shortness of breath and incontinence of the bowels. She was examined by Dr. Egan on April 15. The lab report on the drainage

from Mrs. Rotan's breasts showed a bacterial infection resembling a pathogenic bacterial growth. The lab report said that no antibiotic sensitivity test was done because the organism cultured out of the pus died. Mrs. Rotan was given a prescription for tetracycline but the symptoms worsened. She went to see the doctor again and this time was examined by Dr. Parisi. He told her to continue on tetracycline. Her condition became worse; by the time she went to Dr. Parisi again (two weeks later) she was experiencing clubbing of her nails. Dr. Parisi referred her to a neurologist (Dr. Restak). According to Mrs. Rotan, the neurologist only had a discussion with her, and did not examine her.

Mrs. Rotan's condition continued to worsen but when she returned to the doctor's office two weeks later (May 20, 1977) and was examined by Dr. Egan, she was told the doctor could find nothing wrong, and was prescribed no medication. Dr. Egan did, however, give her the names of three specialists. That same evening, Mrs. Rotan's temperature went up to 105 degrees, and she went to the emergency room at Greater Southeast Community Hospital. The emergency room physician (Dr. Nwaneri) took blood, urine, and breast fluid samples and told Mrs. Rotan she had a urinary tract infection and mastitis. He prescribed ampicillin. Upon experiencing no relief, on June 1, 1977, Mrs. Rotan went to the walk-in clinic at Johns Hopkins Hospital. The physician on duty immediately concluded she had bacterial endocarditis, or inflammation of the heart valve due to infection. She was hospitalized from June 1 to July 11, 1977. After her discharge, her condition worsened and she finally had to undergo open heart surgery to replace her diseased and damaged aortic valve.

Mrs. Rotan and her husband filed this medical malpractice action on April 10, 1979, alleging that appellee doctors were negligent in their care, diagnosis, and treatment of Mrs. Rotan by failing to detect the infectious process in her bloodstream. Specifically, appellants contended at trial that Mrs. Rotan's congenital heart abnormality in combination with the ruptured membranes should have led appellee physicians to conduct a more thorough heart examination or administer prophylactic antibiotics. Appellants maintained that this negligence ultimately caused the bacterial growth on the heart valve which resulted in damage to the aortic valve such that it had to be replaced with a prosthesis in open heart surgery. The jury rejected these contentions and appellants seek review of the judgment and the order of the trial court denying a motion for a new trial.

II

In this court appellants contend that the trial court improperly received into evidence outpatient records containing an opinion by a doctor not presented as a witness. They are concerned only with the improper introduction of one sentence contained in the five-week post-operative notes of Dr. Chandra of Johns Hopkins Hospital: "Her [Mrs. Rotan's] underlying problem had been subacute bacterial endocarditis *on a previously normal healthy valve.*"

The condition of the valve prior to the bacterial infection is significant because a critical question at trial was whether appellee physicians gave Mrs. Rotan "reasonable care" in light of her condition prior to being treated. If the valve was previously healthy, the doctors' treatment would presumably be found to meet the standard of reasonable care. If, however, the valve was damaged, arguably certain steps should have been taken by the doctors which were not (*e.g.*, administering prophylactic antibiotics). The parties offered conflicting ***566** testimony with regard to the condition of the patient prior to being treated by appellee physicians. There is no dispute as to whether Mrs. Rotan told the doctors she had a heart murmur. The question is whether the doctors should have been alerted that it was not an innocent murmur. An innocent murmur is one which implies no valve damage, and would not suggest the need for prophylactic antibiotics.

Appellee physicians answer that the parties agreed to admit Johns Hopkins hospital records with no need for witness verification of the records. From notes scribbled by appellants' trial counsel in the margin of his motion for a new trial, it would appear that the agreement relied upon went specifically to out-patient records for certain dates and in-patient records for another set of dates. These notes do not indicate an agreement with respect to the date of the out-patient record involved here (September 25, 1977). Trial counsel for appellants is now deceased, and the court record throws no light on the question as to whether there was a separate agreement. With nothing further offered by appellees to demonstrate that the challenged statement comes within the ambit of this agreement, we conclude that appellees have failed to carry their burden of showing

that it was properly received in evidence pursuant to an agreement.

[1] Alternatively, appellees maintain that the statement was properly admitted under the business records exception to the hearsay rule. We disagree. The principle behind allowing exceptions to the hearsay rule for certain business records is that entries made in the regular course of business, that are the "routine reflections of day-to-day operations," or "the routine product of an efficient clerical system," *New York Life Insurance Co. v. Taylor,* 79 U.S.App.D.C. 66, 69, 147 F.2d 297, 300 (1944), are inherently trustworthy. The court in *New York Life* found a psychiatric diagnosis to be inadmissible under the rule, pointing out the danger that the right to cross-examination would be destroyed if the untested, very subjective observations of persons whose credibility was not before the jury were accepted.

Appellee physicians argue, however, that the diagnosis of Mrs. Rotan's heart valve more closely resembles the facts in *Washington Coca–Cola Bottling Works v. Tawney,* 98 U.S.App.D.C. 151, 233 F.2d 353 (1956), where the record at issue was an observation of glass fragments and fissures in the patient's rectum. *Tawney* was distinguished from *New York Life* on the basis that it required only the ability to observe something "as plain to the trained eye as a compound fracture, and upon which competent physicians would not be likely to disagree." *Tawney, supra,* 98 U.S.App.D.C. at 152, 233 F.2d at 354 (footnote omitted). *See also Smith v. United States,* 337 A.2d 219 (D.C.1975) (lab report showing the presence of sperm in the patient's vagina deemed to be the type of record which was reliable and objective enough to be admissible).

We disagree. It simply cannot be said that ascertaining the *prior condition* of a heart valve after it has become so severely damaged that it had to be replaced constitutes a simple, routine observation comparable to the observation of glass fragments (*Tawney*) or sperm (*Smith*). There was disagreement between competent physicians on this issue, and even on whether such a determination could be made after the operation, since Dr. Donahoo, the cardiac surgeon who operated, testified that the valve had no damage prior to the infection, while Dr. Russo, a specialist in cardio-vascular diseases who followed Mrs. Rotan post-operatively, testified that infection had destroyed the valve and made it impossible to determine the state of the valve before the infection. Appellees also urge our reliance upon *Christensen v. Gammons,* 197 A.2d 450 (D.C.1964), which found that under the circumstances a diagnosis of cerebral thrombosis was sufficiently nonconjectural and non-complex that cross-examination of the doctor was not necessary. However, that court distinguished cases where doctors can and do come to disagreements over their opinions as to diagnosis. Indeed, it was on that basis that we distinguished *Christensen* in ***567** *Adkins v. Morton,* 494 A.2d 652, 662 (D.C.1985), noting that under the circumstances in *Adkins* there was disagreement over the etiology of the patient's condition even among the experts called by the party offering the record in evidence.

In the instant case, there was not only disagreement among the witnesses concerning the prior condition of Mrs. Rotan's heart, but, as noted, the statement at issue was a difficult diagnostic judgment of great complexity. Even more important, however, is the fact that the statement which appellants contend was improperly admitted here embodies a conclusion that Dr. Chandra could not possibly have come to as a result of personal observation. Dr. Chandra was viewing the patient some five weeks after the open heart surgery during which time the artificial valve was put in place. She did not ever see the valve, and there was really no basis for her judgment that the valve was "previously healthy"; apparently, her conclusion was gleaned from another source.

[2] Although we find the trial court erred in admitting Dr. Chandra's statement as to the prior condition of Mrs. Rotan's heart valve under the business records exception to the hearsay rule, we conclude that the admission was harmless. Prejudice arising from the improper receipt of evidence may be mitigated when the same information, or very nearly the same information, has been properly placed before the jury through another witness or in a different form. *See Boyle v. Smith,* 64 A.2d 428, 431 (D.C.1949). Dr. Chandra's hearsay statement was merely cumulative evidence. Earlier at trial, Dr. Donahoo testified to the condition of Mrs. Rotan's heart valve before the bacterial infection had set in. He stated that it was previously a normal, healthy valve. Dr. Donahoo was subject to full cross-examination. Dr. Chandra's report said nothing new, nor did it buttress Dr. Donahoo's testimony in any significant way, especially given that Dr. Chandra could have no personal knowledge whatsoever of the condition of Mrs. Rotan's heart valve prior to the onset of infection.

III

Appellants challenge various rulings by the trial court concerning the admission of expert testimony. Appellants first claim that two of appellees' expert witnesses failed to state their opinions with sufficient certainty, contending that this testimony, along with references to it in closing argument, allowed the "spectre of contributory negligence" to enter the case.

The trial court agreed with appellants' characterization of the testimony as "speculative," and found it did not constitute sufficient evidence to make out the affirmative defense of contributory negligence.[3] The court thus refused appellee physicians' request for an instruction on contributory negligence, and indicated the theory was not to be argued to the jury. Appellants argue however, that because there were several questions directed toward the experts, as well as Mrs. Rotan, on the subject of why she did not contact the doctors to whom she had been referred by appellees and because appellees' closing argument raised the question, the issue was before the jury, albeit indirectly.

We share appellants' concern that the more limited abilities of patients not be pitted against the knowledge and skill of physicians in these situations. As this court stated in *Morrison v. MacNamara,* 407 A.2d 555, 567–68 (D.C.1979):

> In the context of medical malpractice, the superior knowledge of the doctor with his expertise in medical matters and the generally limited ability of the patient to ascertain the existence of certain risks and dangers that inhere in certain medical treatments, negates the critical elements of the defense, *i.e.,* knowledge and appreciation of the risk. Thus, save for exceptional circumstances, a patient cannot assume the risk of negligent treatment.

***568** The court adds, "These same principles are equally valid with respect to the defense of contributory negligence in medical malpractice." *Id.* at 568, n. 11. *See also Martineau v. Nelson,* 311 Minn. 92, 247 N.W.2d 409, 415 (1976) ("Both courts and text writers have emphasized, however, that the availability of a contributory negligence defense in a malpractice case is limited because of the disparity in medical knowledge between the patient and his doctor and because of the patient's right to rely on the doctor's knowledge and skill in the course of medical treatment").

Here, however, we find that appellants have failed to demonstrate any actual prejudice accruing from the admission of this testimony and appellees' remarks in closing argument. Not only was there no instruction on contributory negligence but the testimony at issue here, as appellee readily admits, was quite vulnerable to attack.[4] ***569** The cliche "damning with faint praise" is not inapposite. In rendering their opinions in such tenuous terms, the experts may have done the doctors' defense more harm than good. By falling short of stating their opinions within a reasonable degree of medical certainty, the witnesses afforded appellants' counsel the opportunity to establish through cross-examination that the doctor, in fact, did not even have an opinion in this regard, or simply to make that argument to the jury, which appellants' counsel did.[5]

IV

Appellants further allege that the trial court erred in allowing appellees' experts, Drs. Donahoo and Nachnani, to testify on matters that were not contained in their answers filed pursuant to Super.Ct.Civ.R. 26(b)(4). Appellees had filed a Supplemental 26(b) statement which said Dr. Donahoo would be testifying as to his review of the records and observations and as to his conclusion that, at the time of the surgery, there were no congenital valve abnormalities. At trial, however, Dr. Donahoo responded to several questions concerning Mrs. Rotan's symptoms of "cerebral dysfunction."[6] Appellants argue that this testimony exceeded the scope of what the 26(b)(4) statement indicated Dr. Donahoo would testify to.

We need not decide this question. The testimony of which appellants complain was relevant only with regard to damages. Appellees produced the evidence on "cerebral dysfunction" only to counter Mrs. Rotan's attempt to

prove aggravated injuries. Such evidence, bearing solely on damages, has nothing to do with liability. Since the jury never reached the issue of damages, but decided there was no negligence, and thus no liability, the admission of the evidence, if error, was harmless.

[3] Without identifying any specific testimony which they claim was erroneously admitted, appellants also complain that the admission of certain testimony of Dr. Nachnani was reversible error. Appellants argue that Dr. Nachnani's testimony was not sufficiently identified in the appellees' response to appellants' discovery request, and that appellants were forced to take Dr. Nachnani's deposition the night before his appearance at trial. However, appellees had named Dr. Nachnani as a witness in their Supplemental Answers to Interrogatories more than a full year prior to trial, and again on May 21, 1980, in their Pretrial Statement. Appellants filed no pretrial motions demanding further discovery or noting any complaints concerning the sufficiency of appellants' response at that time (appellees had stated that Dr. Nachnani, as well as all other named experts, would give testimony concerning standard of care and causation), and registered no objection before the doctor testified at trial. Under these circumstances, we cannot find that ***570** admission of the testimony constituted reversible error.

[4] Appellants also challenge the court's acceptance of two of appellees' witnesses as qualified experts. The decision to admit expert testimony lies within the sound discretion of the trial court, whose ruling will be sustained unless clear abuse of discretion is shown. *Payne v. Soft Sheen Products, Inc.*, 486 A.2d 712 (D.C.1985) (testimony of industrial psychologist excluded since jury capable of making commonsense determination). We cannot conclude the trial court abused its discretion in admitting the testimony of Drs. Crane and Nachnani. Appellants complain that Dr. Crane testified as to infectious diseases, when only ten percent of his present practice is devoted to infectious disease. They neglect to note, however, that the expert had extensive past experience in the field, that the witness had a residency in the specialty and that he had been an instructor in the field. Similarly, Dr. Nachnani was offered and qualified as an expert in internal medicine and cardiology. However, he testified that obstetricians and gynecologists referred their patients to him on a regular basis, and his testimony concerned what would be required of obstetricians and gynecologists to treat only certain conditions (the symptoms of which would certainly fall within the specialities of internal medicine and cardiology, such as in the present case). [7]

V

Finally, appellants challenge the propriety of the trial court's action in invoking a statutory privilege from Maryland on behalf of a witness testifying in the Superior Court of the District of Columbia. A Dr. William Cooper was called by appellees, defendants below, to give expert testimony in the field of obstetrics and gynecology. Appellants (plaintiffs below) sought to cross-examine the doctor with respect to a meeting to discuss Mrs. Rotan's medical case which was attended by several of appellees'/defendants' experts. Appellees' counsel objected, invoking a medical review panel privilege available under Maryland law, Article 43, Section 123A, Annotated Code of Maryland (1980). The trial judge sustained appellees' objection upon authority of the Maryland statutory privilege.

Appellants submit that the trial judge committed error by invoking a rule of procedure from a foreign jurisdiction. We need not decide this question; by their own admission, appellants "never intended to elicit more than the facts of the occurrence of the meeting, that defendants' experts were in attendance, and that Mrs. Rotan's case was discussed." Appellants concede that the testimony they sought at trial from Dr. Cooper "might have been only attributable to the weight to be accorded any of defendants' experts testimony." Under these circumstances, we think that the trial court's invocation of the Maryland statute, if error at all, was not reversible.

Affirmed.

All Citations

537 A.2d 563

Footnotes

* Associate Judge Belson has been drawn to replace Senior Judge Pair as a member of the division assigned to consider this appeal.

1 Appellants further argue that the trial judge abused his discretion when he denied appellants' motion for a new trial based on inadequacy of the record. The transcript does contain a multitude of errors by the stenographer. But appellant cannot identify material inaccuracies such that we can conclude the trial court abused its discretion in refusing to grant a new trial based on insufficiency of the record. The cases cited by appellants, *Fickett v. Rauch,* 31 Cal.2d 110, 187 P.2d 402 (1947) and *Weisbecker v. Weisbecker,* 71 Cal.App.2d 41, 161 P.2d 990 (1945), both concern situations in which no transcript existed. In contrast, appellants rely heavily on the transcript in the instant case, inaccurate though it may be.

2 Appellee physicians presented expert testimony that Mrs. Rotan revealed no indications of infection either before or during the delivery of her child that would require treatment by prophylactic antibiotics. Experts also detailed the undesirable side effects which administration of such antibiotics might have, including the effect of masking symptoms such that other dangerous conditions would go undetected.

3 Appellee doctors wanted to show that Mrs. Rotan caused or contributed to the progress of the bacterial infection attacking her heart because she failed to see a neurologist or internist per appellees' referral.

4 Consider the speculative nature of the responses in the following colloquies:

> [DEFENSE ATTORNEY]: Doctor, based upon your review of the office records of Doctors Parisi, Kane, and Egan in relationship to their care and treatment of Mrs. Ernestine Rotan, and based upon Mrs. Rotan's referral to Doctor Restak, neurologist, and assuming that for whatever reason no examination was ever conducted by Dr. Restak; and also assuming that Mrs. Rotan was given the names of three internists on May 20th, 1977, to see for complaints that she had; and further assuming that Mrs. Rotan did not contact Dr. Yosef, a physician referred to her by the emergency room physician whom she saw on the evening of May 20th, 1977; do you have an opinion within a reasonable degree of medical certainty as to whether or not her seeing these other physicians caused or contributed to the cause of the delay and diagnosis in the condition of sub-acute bacterial endocarditis by any or all of the physicians?
>
> [PLAINTIFFS' ATTORNEY]: Objection.
>
> THE COURT: Overruled, go ahead, Doctor.
>
> THE WITNESS: In reading the records on Mrs. Rotan I find far back in February she seemed to be quite hostile to the doctors. And this seemed to have been done through much of the records, although, why she was hostile never anything brought out about that.
>
> I think Doctor Parisi asked her in February at the time she was having a lot of emotions why are you angry and hostile? And when he sent her to the neurologist, you are asking in medicine help from anyone. I think it is unfortunate and I feel sorry, if she had gone someone might have picked up an answer. I have seen this happen with even internists, somebody gives us the right answer. I don't know why and particularly the internist may have something, may have some bolts of these conversations, I don't know; I will never know. I wish she had gone and seen some of them. I think it might have helped her.
>
> [PLAINTIFFS' ATTORNEY]: I object to the answer and move that it be stricken as not responsive.
>
> THE COURT: No, I am going to let the answer stand. Go ahead.
>
> [PLAINTIFFS' ATTORNEY]: Do you have an opinion that her failure to see these physicians contributed to the inability of these physicians to diagnose her condition of sub-acute bacterial endocarditis prior to June 1, 1977?
>
> [WITNESS]: I can't answer that because actually we don't know, the answer might have come from these persons, but one of them might have helped. I used all of the consultations I can get. Fortunately I have been in the building where there is a cardiologist and I send people real quickly. I think you can get help from anyone along this line, this is what they were trying and she shouldn't have stepped in to interfere with these—
>
> [PLAINTIFFS' ATTORNEY]: I will object and ask that the answer be stricken.
>
> THE COURT: I will strike the last portion of the answer, what she shouldn't have done.

> [DEFENSE ATTORNEY]: Do you have an opinion within a reasonable degree of medical certainty as to whether or not based upon the symptoms Mrs. Rotan presented as to whether or not these Doctors should have considered sub-acute bacterial endocarditis in a differentiating diagnosis based upon the symptoms that she presented?
>
> [WITNESS]: From everything I have read in this case there is absolutely no reason that would have been considered as a differential diagnosis.
>
> [DEFENSE ATTORNEY]: Doctor, at this time I would like you to assume in addition to assuming that she was referred to Doctor Restak, a neurologist, and the three interns. I would like you to further assume that she was given the name of another physician at the emergency room on the evening of May 20th, 1977.

> I want you to further assume that she at no time contacted either of the internists nor the physician whose name was given to her on the night of May 20th.
>
> Sir, do you have an opinion based upon a reasonable degree of medical certainty as to whether or not her not seeking any of these physicians caused or contributed to the delay in diagnosing the condition of sub-acute endocarditis?
>
> [THE WITNESS]: It most certainly is conceivable if she had seen one of the three internists to whom she was referred that perhaps earlier symptoms, or an early indication of sub-acute bacterial endocarditis might have been picked up by the internists.
>
> [PLAINTIFFS' ATTORNEY]: Your Honor, I must object to that. The question is highly speculative and anything might be conceivable or might be possible. And I would move to strike the testimony and ask for an instruction to the jury.

5 Appellants suggest that the trial court had a duty to strike the offending testimony or give a limiting instruction to the jury. We do not find the trial court was required to adopt this solution. Instead, its warning that the actions of Mrs. Rotan were to be argued only with regard to causation and not in terms of contributory negligence was sufficient to prevent prejudice:

> [DEFENSE COUNSEL]: Now, one final question I had concerning argument. The court denied my instruction concerning contributory negligence, but I assume that does not foreclose me from arguing to the jury her actions in regard to this?
>
> THE COURT: I have no problem about her actions. I think her actions could well be argued as being on the doctors' liability as far as their own fault.... I don't want contributory negligence. I don't want voluntary assuming of risk or legal concept argument. I have no problem with you arguing the facts that she did interfere with materially a course of conduct taken by the doctors which was one of the standards.

6 In order to prove further damages, appellants attempted to show at trial that, after installation of the new heart valve, Mrs. Rotan experienced symptoms of reduced blood flow to the brain as a result of cerebral dysfunction.

7 Appellants also allege that portions of Dr. Nwaneri's deposition should not have been admitted because of his reference to his "usual instruction" to patients to consult a private physician; accordingly; the "usual instruction" resulted in Mrs. Rotan's consultation with Dr. Yusef. Appellants complain too of a reference to the doctor's own notations in the emergency room records.

Even if the admission of these portions of Dr. Nwaneri's deposition was error, appellants were not prejudiced thereby. Mrs. Rotan herself testified that Dr. Nwaneri's referred her to a Dr. Yusef. As to the second admission, counsel conceded that the testimony was in evidence already and in fact added nothing.

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147 F.2d 297
United States Court of Appeals District of Columbia.

NEW YORK LIFE INS. CO.
v.
TAYLOR.

No. 8488.
|
Argued March 14, 1944.
|
Decided May 8, 1944.
|
Argued on Rehearing Oct. 3, 1944.
|
Decided Jan. 10, 1945.

Appeal from the District Court of the United States for the District of Columbia.

Action by Ruth V. Taylor against New York Life Insurance Company on a life insurance policy to recover double indemnity. Judgment for plaintiff, and defendant appeals.

Reversed and remanded.

Attorneys and Law Firms

***298** ****67** Mr. R. Aubrey Bogley, of Washington, D.C., with whom Messrs. Frederic D. McKenney, John Spalding Flannery, G. Bowdoin Craighill, and John R. Wall, all of Washington, D.C., were on the brief, for appellant.

Mr. Lowry N. Coe, of Washington, D.C., for appellee.

Before GRONER, Chief Justice, and EDGERTON and ARNOLD, Associate Justices.

Opinion

ARNOLD, Associate Justice.

This is an action brought on a life insurance policy to recover double indemnity under a provision making such double indemnity payable if the death of the insured resulted from 'bodily injury effected solely through external, violent and accidental causes.' [1]

The insured was killed while a patient at Walter Reed General Hospital in Washington, ***299** ****68** D.C., by a fall down a stair well which was protected by a railing. The fall occurred at night and there were no witnesses. The circumstances indicated possible suicide. The jury gave a verdict for double indemnity under the policy. Defendant appeals from a judgment on that verdict.

The first error claimed is that the trial court excluded the statement of a physician which was part of the proofs of death required to be furnished by the beneficiary. The statement contained the opinion that the insured committed suicide.

The trial court excluded the statement of opinion as to suicide after concluding from the record that the beneficiary had not authorized the submission of such a statement to the insurance company. It appeared that the insurance company had sent the physician (who was also the coroner) the form, which he had filled in. This was at the request of the beneficiary. But the court concluded that the beneficiary had not seen the physician's statement before it was transmitted to the company. It appeared that representatives of the company had assisted the beneficiary in completing the proofs of death, and had not called her attention to the fact that the physician's opinion as to suicide was inconsistent with her own statement that the death was accidental. It also appeared that the physician who made the statement had no personal knowledge of the cause of death. While the record as to all these circumstances is not clear, counsel for appellant failed to deny any of the court's conclusions of fact during the argument on the admissibility of the evidence.

[1] **[2]** On the basis of its conclusions of fact the court's ruling was correct. Ordinarily a statement by a physician submitted by the beneficiary of a policy as part of the proofs of death is admissible to show the manner of death. [2] Its admissibility is based on the fact that the beneficiary whose duty it is to furnish the proofs of death must be presumed to have authorized the statements made in those proofs. If later at the trial she takes a position inconsistent with the proofs of death which she has submitted those statements are admissible as her representatives. As the Supreme Court said in the case of Mutual Life Ins. Co. of Newark, N.J. v. Newton, [3] :

' * * * the proofs presented were admissible as representations on the part of the party for whose benefit

the policies were taken, as to the death and the manner of the death of the insured. They were presented to the company in compliance with the condition of the policy requiring notice and proof of the death of the insured as preliminary to the payment of the insurance money. They were intended for the action of the company, and upon their truth the company had a right to rely. Unless corrected for mistake, the insured was bound by them. Good faith and fair dealing required that she should be held to representations deliberately made until it was shown that they were made under a misapprehension of the facts, or in ignorance of material matters subsequently ascertained.'

[3] [4] [5] It is apparent from the above opinion that proofs of death are competent evidence of the cause of death only where the relevant statements contained therein are authorized by the beneficiary.[4] The fact that the beneficiary submitted the proofs to the insurance company creates a presumption that the statements were authorized. But here the evidence on the voir dire rebuts that presumption. The statements of the physician, who had no personal knowledge of the accident, were inconsistent with the statement of the beneficiary, so that there is a normal inference that they were not called to her attention. Insurance companies engaging in the laudable practice of assisting beneficiaries in making out proofs of death should call attention to inconsistencies in the proofs if they expect later to use them against the person they are assisting on the theory that she was consciously adopted or authorizing a statement that contradicted her own report.

[6] Appellant contends that the court erred in permitting plaintiff to introduce the claimant's statement and the friend's statement, which were part of the proofs of death, without offering the physician's statement. This was error because the proofs of death, if admitted at all, should have gone in as a whole. But the error *300 **69 was not prejudicial because the admitted proofs of death contained nothing which added to the testimony beyond the fact that the plaintiff had not changed her position. It is hardly possible that this affected the verdict.

The second ground of error is the refusal of the trial court to admit in evidence the original records of Walter Reed General Hospital relating to the cause of the death of the insured. These records consisted of the following documents: (1) A history of the insured's admission to the hospital giving an account of his illness and his state of mind; (2) A diagnosis of insured's condition when he was admitted; (3) Reports on three operations performed in the hospital; (4) Reports of conversations with the insured indicating that he had attempted suicide; (5) Report of consultation with a psychiatrist containing statements by the insured that he wished to die; (6) Report of a psychiatrist showing a diagnosis of 'psychoneurosis, hysteria, conversion type'; (7) Transcript of the proceedings and findings of the Board of Officers of Walter Reed General Hospital to determine the cause of the death of the insured.

[7] The policy contained a waiver[5] of any privilege[6] against the disclosure of information acquired through confidential treatment by physicians. We believe that it was a sufficient waiver of the privilege provided in Section 14- 308 of the District of Columbia Code. Therefore, these records, or at least a large portion of them, would have been admissible in connection with the testimony of the witnesses to the events or opinions contained in the reports. However, had such witnesses been called they would have been subject to cross-examination. The question here is whether these records are admissible in the absence of direct testimony, under the so-called Federal Shop Book Rule,[7] which reads as follows:

'In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. * * * '

[8] A literal reading of the above statute would make the records in this case admissible on the theory that the business of operating a hospital requires records of the histories of patients, reports of unusual conduct and also diagnosis by physicians. But the Supreme Court in Palmer v. Hoffman,[8] has, we believe, limited the admission of records under the Federal Shop Book Rule statute to those which are trustworthy because they represent routine reflections of day-to-day operations. The opinion in that case holds that the statute is not one 'which opens wide the door to avoidance of cross-examination.'

[9] In this case the records are not offered to prove routine facts such as the date of admission to the hospital, the names of the attending physicians, etc. They are offered to prove the truth of accounts of events and of complicated medical and psychiatric diagnosis. The accuracy of such accounts is affected by bias, judgment, any memory; they are not the routine product of an efficient clerical system. There is here lacking any internal check on the reliability of the records in this respect, such as that provided for 'payrolls, accounts receivable, accounts payable, bills of lading and the like.' The Supreme Court has stated that the test of admissibility must be 'the character of the records and their earmarks of reliability * * * acquired from their source and origin and *301 **70 the nature of their compilation.'[9] To admit a narrative report of an event, or a conversation, or a diagnosis, as a substitute for oral testimony, is to give any large organization the right to use self-serving statements without the important test of cross-examination. Cross-examination is unimportant in a case of systematic routine entries made by a large organization where skill of observation or judgment is not a factor. We believe that Palmer v. Hoffman restricts the application of the Federal Shop Book Rule statute to that type of business entries.

In Palmer v. Hoffman the record sought to be introduced was a report of a railway accident which was required by the rules of the railroad. Its exclusion was affirmed. While the case may be technically distinguished we think it stands for the general principle we have outlined above and that the rule of the court in excluding these hospital records is correct.

[10] [11] The final assignment of error is based on the instructions of the court as to the burden of proof. According to the terms of the policy the plaintiff had the burden of establishing that death was accidental in order to recover double indemnity. The evidence was such that the jury might have drawn the inference of suicide from all the circumstances. But the court adopted the theory that the presumption against suicide, based on the instinct of self-preservation, changed the burden of proof. It, therefore, instructed the jury that the burden was on the defendant to show by a preponderance of the evidence that the death of the insured was not the result of accident. An instruction placing the burden of proving accidental death on the plaintiff was refused.

This was error. The principle that a presumption such as the one against suicide shifts only the burden of going forward with the evidence, and does not change the ultimate burden of proof, is so well settled that it scarcely needs a citation of authority. The Supreme Court has specifically applied that principle to a suit to recover double indemnity on a life insurance policy where the issue was whether the insured committed suicide.[10] It cannot be contended in this case that the erroneous instruction was not prejudicial, because the evidence was such that the result might well have depended on where the ultimate burden of proof lay.

Reversed and remanded.

EDGERTON, Associate Justice.

I think hospital records are admissible under the federal shop-book rule.[1] The Second Circuit expressly reasserted that proposition in its opinion in Hoffman v. Palmer,[2] and I think the Supreme Court, in its opinion affirming Hoffman v. Palmer, asserted it by clear implication. The basis of the Supreme Court's decision in Palmer v. Hoffman, as I understand it, is that a railroad engineer's accident reports 'are not for the systematic conduct of the enterprise as a railroad business. * * * Their primary utility is in litigating, not in railroading.'[3] 'Regular course' of business,' the Court said, 'must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business.'[4] The business of hospitals is caring for patients. The methods systematically employed for the conduct of that business include the making of such records as appellant offered in this case. Proper care of patients would be impossible without such records. Their primary utility is not in litigating. In my opinion, therefore, the decision in the Palmer case does not exclude them and the argument in that case, as well as the statute, admits them.

In other respects I concur in the opinion of the court.

On Rehearing.

ARNOLD, Associate Justice.

The insured was found dead at the foot of the stairwell in Walter Reed Hospital. *302 **71 The question is

whether he died as a result of suicide or of an accident. As evidence of suicide the defense offered a number of authenticated hospital records to prove that the insured's state of mind was one which indicated the probability of suicide. These hospital records were kept in the regular course of business according to the colloquial use of these words. The issue here is whether they were 'in the regular course of business' within the technical meaning of that phrase as used in the Federal Shop Book Statute. [1]

The trial court rejected all these hospital records and though we reversed on another ground we upheld that ruling. Thereafter, this rehearing was granted confined to the questions of whether the hospital records offered, or any part of them, were properly rejected. The records which seem to be most relevant to show a state of mind of the insured which might indicate suicide consist of two reports of a neuropsychiatric consultant and one report of an attending physician, based on information obtained from a nurse, that the insured took an overdose of medicine because he wanted to die. We will briefly analyze the contents of these records.

One of the psychiatric reports gives a history of what are termed 'vague hypochondriacal complaints' over a period of twelve years. It recites the patient's inability to work the fact that he had been only getting $37.50 a month, that he said he wanted to die because he had been suffering so much, that he had consulted twenty-five different doctors and had been in five hospitals prior to coming to Walter Reed, that he had hypochondriacal discomfort prior to the severe itching of the rectum which started in May, 1938. It closes with the following words: 'Diagnosis: Psychoneurosis, hypochondriasis.' This report was made after the patient had been in the hospital six months without responding to ordinary treatment.

Another report by the same neuropsychiatric consultant begins in reciting an experience told by the patient in the course of a psychiatric examination which might have contributed to a neurosis. It discloses that a year before the patient came to the hospital he had been given doped whiskey by a hitchhiker and indecently assaulted. Two weeks afterwards he noticed itching in the rectal area. This report closes with the following diagnosis:

'Neurological examination shows deep superficial reflexes normal and equal; cranial nerves intact; no disturbance in sensation other than the above described pruritus ani. At present patient shows no depression and no suicidal ideas. Appears cheerful, smiling and friendly. Has been seen by four or five psychiatrists previous to this hospitalization who said that all his troubles was in his imagination.

'Diagnostic impression: psychoneurosis, hysteria, conversion type.' No mention was made of the necessity for any special measures to prevent suicide.

[12] We believe that the court properly rejected these hospital reports. For the purpose of proving suicidal intent they do not come within the Federal Shop Book Statute. It is clear from the legislative history of the Federal Shop Book Statute that it was intended to make it unnecessary to call as witnesses the parties who made the entries rather than to make a fundamental change in the established principles of the Shop Book exception to the hearsay rule. The report of the Senate Judiciary Committee incorporates the recommendation of the Attorney General, which reads in part as follows:

'The old common-law rule requires that every book entry be identified by the person making it. This is exceedingly difficult, if not impossible, in the case of an institution employing a large bookkeeping staff, particularly when the entries are made by machine. In a recent criminal case the Government was prevented from making out a prima-facie case by a ruling that entries in the books of a bank, made in the regular course of business, were not admissible in evidence unless the specific bookkeeper who made the entry could identify it. Since the bank employed 18 bookkeepers, and the entries were made by bookkeeping machines, this was impossible.' S.Rep.No.1965, 74th Cong., 2d Sess., pp. 1, 2.

The report of the House Judiciary Committee is to the same effect. It sets out the recommendation of the Attorney General with the following introductory statement:

***303** ****72** 'This bill was introduced by the chairman of the committee at the request of the Attorney General. The committee concur in the opinion of the Attorney General that the proposed legislation should be enacted into law for the reasons set out in his communication and its accompanying memorandum, which are made a part of this report.' H.Rep.No.2357, 74th Cong., 2d Sess., p. 1.

The remarks of members of the House Judiciary Committee explaining the bill show the same clear intent. Chairman Sumners said:

'The circuit court, sitting as a trial judge, held that record books kept in the ordinary course, would not be admissible unless the Government produced the individual who had made the entry, who could testify with reference to the making of the entry, and so forth. Of course, according to the manner that books are now kept, many times entries are made by machines. It may be that a dozen or a half a dozen people will make entries in a set of books and nobody will be able to swear that he made a given record.

'Personally, I am ashamed to ask the House to pass this bill. This holding by the judge is ridiculous. It is more than that, but that is the situation that has developed up there. I do not understand how any judge can hold, in view of what is generally accepted, that one must bring the identical person who made the identical entry, before that entry can be introduced in evidence where the books kept are regularly and properly kept in the ordinary course of business. But he has held it, and this bill has been introduced for the purpose of curing that situation.' (V. 80, 5733. Apr. 20, 1936.

Congressman Duffy of the Committee made the following comment:

' * * * Section 1 which enlarges the exception to the hearsay rule relating to the admissibility of business records. That section removes the obsolete common-law requirement that business entries be identified by the persons who made them. * * ' Vol. 80, 9647.

[13] The records offered here are not the kind of entries which are admissible under the established principles of the Shop Book exception to the hearsay rule. Such records must be those which are a product of routine procedure and whose accuracy is substantially guaranteed by the fact that the record is an automatic reflection of observations.[2] This obviously excludes those which depend on opinion or conjecture. The Internal check on the reliability of admissible records comes from two sources: (1) an efficient clerical system, and (2) the fact that they are kind of observations on which competent men would not differ. As the Supreme Court recently pointed out, the test of admissibility is 'the character of the records and their earmarks of reliability * * * acquired from their source and origin and the nature of their compilation.'[3] Typical of such records are 'payrolls, accounts receivable, accounts payable, bills of lading and the like.' The Supreme Court further observed that the Federal Shop Book statute is not one 'which opens wide the door to avoidance of cross-examination * * * .'[4]

[14] **[15]** Hospital records are no different from any other kind of records kept in the regular course of business. They must be subjected to the same test as to subject matter. Regularly recorded facts as to the patient's condition or treatment on which the observations of competent physicians would not differ are of the same character as records of sales or payrolls. Thus, a routine examination of a patient on admission to a hospital stating that he had no external injuries is admissible.[5] An observation that there was a deviation of the nasal septum is admissible.[6] Likewise, an observation that the patient was well under ***304** ****73** the influence of alcohol.[7] But the records before us here are not of that character. The diagnosis of a psychoneurotic state involves conjecture and opinion.[8] It must, therefore, be subjected to the safeguard of cross-examination of the physician who makes it. And accounts of selected items from interviews with patients must be subject to the same safeguard.[9]

If this were not true, a newspaper reporter's notes on an interview or observation of an accident would be admitted in evidence without calling the reporter himself. Certainly they are made in the regular course of business of running a newspaper, as that phase is colloquially used, since they are the basis of the accounts which are afterwards printed. Newspaper reporters are certainly as skilled in observation as any other group and ordinarily have no motive to misrepresent. Corporations today keep a vast mass of records, all of which are used as the basis for management action. All such records would be admissible in evidence if the kind of psychiatric diagnosis and hearsay accounts offered were ruled admissible. A few hypothetical cases will illustrate the distortion of the common law rule which would occur if the contentions of appellant regarding the admissibility of the above described psychiatric diagnosis and report of conversations were upheld.

A corporation is engaged in taking a nationwide poll as to the number of members of the Communist party. In the regular course of that business its employee interviews X, Y and Z. The interviewer reports that X, Y and Z are Communists, giving excerpts from the conversations to support this opinion. The report would be admissible in

subsequent litigation to make a prima facie case that X, Y and Z are Communist. [10]

(2) A research foundation is engaged in determining the amount of insanity in Washington, D.C. A trained psychiatrist sends in a record that John Doe is insane. Since this record was made in the regular course of the business of the research foundation it would be admissible without calling the interviewer in order to make a prima facie case in a subsequent contest of John Doe's will.

A large corporation employs a firm of efficiency engineers to investigate § its personnel. In the regular course of that investigation the report is made that employee X is willfully insubordinate, supported by excerpts from his conversation. The efficiency firm has no interest in or probable cause for litigation with X. The report, therefore, would be admissible against X in a suit for breach of his employment contract without calling the man who made it.

These are extreme cases but there seems no logical escape from the above results if the conjectures and conversations contained in the hospital records which I have described above are held admissible.

It is no reflection upon the profession of psychiatry to say that it necessarily deals in a field of conjecture. Even in the diagnosis of actual insanity, cases are rare in which trained psychiatric witnesses do not come to opposite conclusions. The opinions here relate to neurosis, a condition short of insanity, on which there are countless theories and infinite diagnosis possibilities. It is difficult to conceive of records in which the right of cross-examination is more important than the conjectures ***305** ****74** of a psychiatrist on a psychoneurotic condition. [11]

The drastic impairment of the right of cross-examination resulting from the admission of this type of unsworn observation and opinion evidence will be recognized by anyone familiar with the psychology of a jury trial. The unsworn psychiatric diagnosis would be introduced, with appropriate fanfare as to the distinguished character of the alienist who made it, but who is not called as a witness. The opposing party might have plenty of data to shake this testimony on cross-examination, yet he would have to remain silent while a strong prima facie case is made against him. The risk of perjury would be neatly avoided because the real witness is not sworn.

It is true that after the party who introduced such opinions has closed his case the opposing party would have a chance to rebut them. But the disadvantageous position in which the denial of his right of cross-examination would place him is obvious to any trial lawyer. A period of time has gone by; an impression of the jury has been made. The expensive and sometimes impossible burden of hunting out and producing the psychiatrist who gave the opinion is unjustly shifted to the party against whom the opinion is used. And after he catches and produces the psychiatrist he must offer him as his own witness- a disadvantage only slightly limited by the fact that the trial court may in its discretion allow him to impeach his own witness. Only a lawyer without trial experience would suggest that the limited right to impeach one's own witness is the equivalent of that right to immediate cross-examination which has always been regarded as the greatest safeguard of American trial procedure.

[16] These considerations apply with equal force to the hospital records offered below which disclose that the patient said he took an overdose of codeine and aspirin because he wanted to die. This remark was retold by the nurse to the attending physician and recorded by him. It is contradicted by another conversation with the same physician, also part of the record, in which the patient said he only wanted to get relief from itching. The record that the patient took an overdose was a routine entry of a fact on which observers would not differ. But the excerpts from the patient's conversation reported by a nurse are no different from a newspaper reporter's account of an interview. They are made in the regular course of business in the colloquial sense but not as that term is intended for use by statute. The consequences of the position taken by Judge Edgerton would be that the mere absence of an apparent motive to misrepresent makes admissible any and all business records which are regularly kept regardless of their character. This, we believe, is a legislative change in the Shop Book Rule which is not permitted by the statute. Of course it is true that in an occasional case the presence of an unusually strong motive to misrepresent may exclude an entry otherwise admissible under the rule. [12] But this limitation on the application of the rule does not mean that the absence of motive to ***306** ****75** misrepresent is the basis for admissibility. [13] For example, it would scarcely be argued that a bank ledger, kept in the regular course of business, would become inadmissible to show the state of a customer's account because he was engaged in a dispute with the

bank as to the amount of his balance. Books of account are ordinarily kept for the very purpose of having proof in case litigation develops. To introduce the absence of motive to misrepresent, as a test of admissibility, would be to completely change the rationale of the Shop Book Rule. For example, an entry of a credit manager that he had learned from conversation with a customer that he owed $10,000 would go in if the manager had no motive to misrepresent.

[17] **[18]** In other words, it is not the absence of a motive to misrepresent which is the basis of the Shop Book exceptions to the hearsay rule. Purely clerical entries come within the rule regardless of the fact that the party making them has an interest in what they may be used to prove. Conversely where the accuracy of the entries depends on opinion, conjecture or judgment in selecting the particular entries from a larger mass of data which some other observer might consider equally relevant, the entries are not within the Rule regardless of motive.

The reasons for the Shop Book Rule are well stated by Wigmore [14] to be (1) that the influence of habit may be relied on, by very inertia to prevent casual inaccuracies; (2) that errors or misstatements in a regular course of business transactions are easily detected and misstatements cannot safely be made if at all except by a systematic and comprehensive plan of falsification; (3) that the entrant is under a duty to an employer or other superior there is a risk of censure or disgrace from the superior in case of inaccuracy. The records of opinion and hearsay accounts of conversation involved in this case fail to satisfy any one of these tests. Nothing in the words of the Shop Book Statute itself or its legislative history justifies overturning these established principles of evidence. It is true that in Palmer v. Hoffman, supra, the Supreme Court spoke of the opportunity for manufacturing evidence which would exist if an engineer's statement, made in the course of a company investigation of an accident, was held admissible in a suit based on that accident. But this was not the sole ground for the decision. The Court's rule as to admissibility is clearly based upon the subject matter of the entries, their routine character, and their similarity to payrolls and the like. The opinion is not intended to 'open the door to avoidance of cross-examination' on the mass of opinion, conjecture and observation now regularly reported in the course of modern business.

Today every great corporation is making thousands of records. obtaining credit information, making psychological examinations of its employees, hiring efficiency experts and recording the activities of its personnel. To admit this potpourri on the sole tests of regular recording and absence of motive to misrepresent would be a drastic impairment of the right of cross-examination. In a criminal case it is doubtful whether such a deprivation of the right of the accused to be confronted with the witnesses against him would be constitutional.

The entire hospital records offered in this case are not before us. It may be that some of the entries are admissible. The test should be whether they are records of a readily observable condition of the patient or of his treatment. There is no magic in the word diagnosis which makes everything which can be included in that term admissible. Some diagnosis are a matter of observation, others are a matter of judgment, still others a matter of pure conjecture. The admissibility of records of such diagnosis must depend upon their character. Certainly the hearsay accounts and the psychoneurotic conjectures contained in these records cannot be received without cross-examination as proof of a tendency to commit suicide.

Reversed and remanded.

EDGERTON, Associate Justice (dissenting in part).

The insurance company offered the following hospital records, with proof that ***307** ****76** they were made in the regular course of business: [1] (1) A statement of history, etc., taken by an attending physician from the insured when he was admitted to the hospital; (2) a diagnosis of his condition at that time; (3) reports of operations which he underwent and other treatment which he received in the hospital; (4) reports of consultations in which he discussed his history and his depressed state of mind and gave conflicting explanations, one of them suicidal, of his taking a large does of codeine and aspirin; (5) reports of psychiatric examination, one of which included a diagnosis of 'psychoneurosis, hypochondriasis'; and (6) the proceedings and findings of the Board of Officers of the hospital concerning the cause of death. The trial court rejected all of these records. The beneficiary recovered double indemnity on the theory that death was accidental.

Appellant, the insurance company, now concedes that the rejection of the sixth item was correct. That question, therefore, is not before us. Some of the disputed items are quoted in the transcript; others are merely described. In my opinion the quoted items should have been admitted. So far as the character of the others can be judged from their descriptions, I think they also should have been admitted.

The federal Shop Book Rule, an Act of Congress, provides: 'In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any fact, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business shall include business, profession, occupation, and calling of every kind.'[2]

The Shop Book Rule is an exception to the hearsay rule. Its purpose is to avoid the necessity of identifying, locating and calling numerous witnesses. Its chief drawback is that it prevents the opposing party from cross-examining them. The Supreme Court has recently stated it purpose and its principle. An enterprise, the Court said in Palmer v. Hoffman, commonly 'entails the keeping of numerous books and records essential to its conduct or useful in its efficient operation. Though such books and records were considered reliable and trustworthy for major decisions in the industrial and business world, their use in litigation was greatly circumscribed or hedged about the hearsay rule-restrictions which greatly increased the time and cost of making the proof where those who made the records were numerous. * * * It was that problem which started the movement towards adoption of legislation embodying the principles of the present Act. * * * And the legislative history of the Act indicates the same purpose.' The basis of the Rule is 'the probability of trustworthiness of records because they were routine reflections of the day to day operations of a business. * * * 'Regular course' of business must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business.'[3]

The routine records of hospitals are within the literal meaning of the Rule. That they are within the intent of Congress is shown by the fact that two of the cases cited in the committee reports involve such records.[4] They are also within the principle ***308** ****77** and purpose of the Rule as explained by the Supreme Court in the Palmer case. The business of hospitals is caring for patients. By its 'inherent nature' this business 'entails the keeping of numerous books and records essential to its conduct or useful in its efficient operation.' 'The methods systematically employed' for its conduct include the making and keeping of records of histories, diagnosis and treatment. These are 'routine reflections of the day to day operations' of the hospital's business. And, as Wigmore points out, some of the reasons for the admission of records in evidence apply with special force to the records of hospitals. 'The calling of all the individual attendant physicians and nurses who have cooperated to make the record even of a single patient would be a serious interference with convenience of hospital management. There is a Circumstantial Guarantee of Trustworthiness * * * ; for the records are made and relied upon in affairs of life and death.' It may be added that the members of a hospital staff are persons of more then average responsibility; and that they have two strong motives, one humanitarian and the other professional, for correctness, and usually no motive for fabrication. Dean Wigmore continues: 'Moreover, amidst the day-to-day details of scores of hospital cases, the physicians and nurses can ordinarily recall from actual memory few or none of the specific data entered; they themselves rely upon the record of their own action; hence, to call them to the stand would ordinarily add litte or nothing to the information furnished by the record alone. The occasional errors and omissions, occurring in the routine work of a large staff, are no more an obstacle to the general trustworthiness of such records than are the errors of witnesses on the stand.' Statutes in a number of states have specifically authorized the admission of hospital records.[5]

The Courts of Appeals of both the Second and Third Circuits have held that hospital records are admissible under the federal Shop Book Rule.[6] In the Seventh Circuit, and in this jurisdiction, they have been admitted without objection.[7] Moreover, the Rule was copied

almost verbatim from a so-called model act, [8] and states which have adopted that act have repeatedly applied it to hospital records. [9]

The Rule covers records of an 'act, transaction, occurrence, or event.' Any development in, and any manifestation of, the patient's mental or physical condition is an occurrence or event. Observation, diagnosis, and treatment also are acts, occurrences, or events. Accordingly records of condition, diagnosis and treatment, made in the regular course of business, when the regular course requires them to be made within a reasonable time after the event, are admissible under the Rule so far as they are relevant. Usually, and in the present case, diagnosis involves opinion. But even before the Shop Book Rule was enacted this court had held that records of the 'opinions' as well as the 'observations' of medical officers were admissible. [10] More recently, hospital records of diagnosis have been admitted without objection. [11] The ***309** ****78** opinion of a physician or other expert may be given on the witness stand when it is helpful to a jury's understanding of technical facts. I think the Shop Book Rule makes a physician's recorded diagnosis similarly admissible. The broad language of the Rule requires this result; so does the convenience of hospitals and of litigants; and the fact that recorded diagnosis are 'systematically employed for the conduct of the business' [12] and 'relied upon in affairs of life and death' establishes their relative trustworthiness. Relative trustworthiness is as much as the Rule contemplates or any human testimony possesses. Most of the cases which we have cited involved diagnosis; some of them involved psychiatric diagnosis. [13]

It is of course true that psychiatric diagnosis is subject to error, that cross-examination is an invaluable aid in exposing error, and that the Shop Book Rule avoids cross-examination. But the argument that records of psychiatric diagnosis should therefore be excluded from the operation of the Rule proves too much. For records of the simplest observations of the most objective facts, which are conceded to be admissible under the Rule, are also subject to errors which cross-examination, if it were available, might expose. The alleged observer may have had no opportunity, or no adequate opportunity, to observe, or he may have made no effort to observe, or he may have made only a casual and ineffective effort. He may have been either permanently or temporarily incapable of accurate observation. He may have observed one thing and either carelessly or intentionally recorded a different thing. None of these circumstances is likely to appear upon the record. Any of them might be disclosed by cross-examination. The Shop Book Rule, by denying opportunity for cross-examination, imposes no greater disadvantage on the litigant who is adversely affected by a record of a psychiatric diagnosis than upon a litigant who is adversely affected by a record of the contents of a freight car. Rather, the disadvantage is likely to be less, for counsel are commonly less competent to attack expert testimony than lay testimony, and the expert witness is commonly more competent than the layman to defend himself.

When the Rule admits in evidence the record of an 'act, transaction, occurrence, or event' it does not do so for every purpose. It admits the record 'as evidence of said act, transaction, occurrence, or event.' Since the making of a statement is an act or event, a record that the patient made a certain statement is admissible as proof that he did so if his doing so is relevant, if the record is made in regular course, and if the regular course requires the record to be made within a reasonable time. The mere making of any statement which tends to indicate a depressed frame of mind is relevant to the issue of suicide. Whether a record of a patient's statements may be used not only as proof that he made them but also as proof that they are true [14] is a complex question. The Rule permits proof of an event, etc., by its record only when the regular course of business requires the record to be made within a reasonable time after the event. It may be the regular course of the hospital's business to record certain types of statements within a reasonable time after the patient makes them but, with the exception of events which occur after he enters the hospital, it can hardly be the regular course of business to record the facts which he states within a reasonable time after they occur. Thus it may be the regular course to ask a disabled man what caused his disability, and to record his answer, at the earliest opportunity, but the time of the recording depends upon the time of the statement and not upon the time of the injury. That may be recent or it may be very remote. It follows that the Rule does not, by itself, permit use of the record of the patient's statement of what occurred before he entered the hospital to prove the facts which he stated. But the Rule does permit use of the record to prove ***310** ****79** that he made a statement; and the statement should be accepted for what it may be worth in proof of relevant

facts stated if either (1) they occurred after he entered the hospital, or (2) by virtue of some independent exception to the hearsay rule, such as statements of family history or of mental or physical condition, [15] oral testimony that the patient made the same statement would be admissible in proof of the same facts. [16] With respect to his pre-hospital history the Rule alone does no more, but also no less, than make the authenticated record an acceptable form of testimony that the patient's statement was made.

Before any writing is admitted in evidence under the Shop Book Rule there are three preliminary questions of fact to be decided. (1) Was the writing 'made as a memorandum or record of any act, transaction, occurrence or event'? (2) Was it 'made in the regular course of any business'? (3) Was it the regular course to make the record 'within a reasonable time'? Like other preliminary questions of fact upon which the admissibility of evidence depends, these are questions for the judge. In interpreting and deciding them he has a considerable power to prevent abuse of the Rule. The recent case of Palmer v. Hoffman illustrates this. There the Supreme Court found that the Rule did not admit a railroad engineer's reports of accidents, because such reports 'are not for the systematic conduct of the enterprise as a railroad business. * * * Their primary utility is in litigating, not in railroading.' [17] Since they are primarily intended for external and defensive use, they are less trustworthy than reports which are primarily intended to be relied upon as the basis of action in the internal business of the enterprise. Possibly something of the same sort might be said of the records of the Board of Officers, which are not in issue, in the present case. But nothing of the sort could be said of the records of history, diagnosis and treatment, the admissibility of which is the only question before us. These records were not made for external or defensive use. They were made to be relied upon in the treatment of a patient.

It is true that in declining, in the Palmer case, to admit a report which was made for defensive purposes the Supreme Court said: 'Such a major change which opens wide the door to avoidance of cross-examination should not be left to implication.' [18] But that language is irrelevant here, both because the records here in dispute were not made for defensive purposes and because the admission of these records does not depend on implication. They are (1) within the express language of the Shop Book Rule since they were made in the regular course of the hospital's business, in the strictest sense, and it was the regular course to make them within a reasonable time. [19] They are (2) within the Rule as interpreted in the Palmer case, since they are routine records of day to day operations and made to be relied upon in the internal conduct of the enterprise. They are to the business of a hospital what 'bills of lading and the like' [20] are to the business of a railroad. They are (3) within the principle and purpose of the Rule since they are trustworthy and since their admission avoids the necessity of calling many witnesses. They are (4) within the established judicial interpretation of the Rule and of the model act on which it is based. We need not concern ourselves with hypothetical records which might meet some of these tests but would fail to meet others. We need not consider whether Congress had any intention of admitting the records which are made by newspaper men, credit men, or investigators for the ultimate purpose of selling news or views to persons outside the business organizations to which the men belong. [21] It might well be contended that the Rule admits only writings which are incidental to the internal operation of a business and does not admit writings which are the very subject-matter of a business. In the light of the Palmer case, particularly, it might well be contended that ***311 **80** the Rule extends practically all records which are ultimately intended for external use. But records which meet all possible tests are not to be excluded, in the teeth of the statute, in order to preserve intact the right of cross-examination as it existed at common law. To preserve that right intact would repeal the statute; for any application of the Shop Book Rule, as of any other exception to the hearsay rule, by admitting hearsay necessarily avoids cross-examination.

All Citations

147 F.2d 297, 79 U.S.App.D.C. 66

Footnotes

1 The double indemnity amounted to only $2,000 but this suit was brought prior to the act conferring exclusive jurisdiction on the Municipal Court where the amount involved is less than $3,000.

2 Wertheimer v. Travelers' Protective Ass'n, 10 Cir., 1933, 64 F.2d 435.

3 1875, 22 Wall. 32, 35, 22 L.Ed. 793.

4 'Where the beneficiary in an insurance policy files as a part of the proofs of death such a certificate as this, under the circumstances of this case it amounts to an approval by him of the statements in it as correct and should be received in evidence against him as an admission by adoption. 2. Wigmore, Evidence, 2d Ed., Sec. 1073, p. 570.' Russo v. Metropolitan Life Ins. Co., 1939, 125 Conn. 132, 3 A.2d 844, 846.

5 'Waiver Provision of the Policy. I expressly waive, on behalf * * * of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician * * * who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby acquired.'

6 For cases applying the privilege statute to hospital records see Kaplan v. Manhattan Life Ins. Co., 1939, 71 App.D.C. 250, 109 F.2d 463; Eureka-Maryland Assur. Co. v. Gray, 1941, 74 App.D.C. 191, 121 F.2d 104; Carmody v. Capital Traction Company, 1915, 43 App.D.C. 245, Ann.Cas.1916D, 706.

7 Act of June 20, 1936, c. 640, § 1, 49 Stat. 1561, 28 U.S.C.A. § 695.

8 1943, 318 U.S. 109, 63 S.Ct. 477, 481, 87 L.Ed. 645, 144 A.L.R. 719.

9 Id., 318 U.S. page 114, 63 S.Ct. page 480, 87 L.Ed. 645, 14 A.L.R. 719.

10 New York Life Ins. Co. v. Gamer, 1938, 303 U.S. 161, 58 S.Ct. 500, 82 L.Ed. 726, 114 A.L.R. 1218; see also Jefferson Standard Life Ins. Co. v. Clemmer, 4 Cir., 1935, 79 F.2d 724, 103 A.L.R. 171; Scales v. Prudential Life Ins. Co., 5 Cir., 1940, 109 F.2d 119.

1 Ulm v. Moore-McCormack Lines, Inc., 2 Cir., 115 F.2d 492; Id., 2 Cir., 117 F.2d 222; Reed v. Order of United Commercial Travelers of America, 2 Cir., 123 F.2d 252.

2 129 F.2d 976. 992.

3 318 U.S. 109, 114, 63 S.Ct. 477, 481, 87 L.Ed. 645, 144 A.L.R. 719.

4 318 U.S. 109, 115, 63 S.Ct. 477, 481, 87 L.Ed. 645, 144 A.L.R. 719.

1 Act June 20, 1936, 49 Stat. 1561, 28 U.S.C.A. § 695.

2 5 Wigmore on Evidence (3rd Ed., 1940) Sec. 1522.

3 Palmer v. Hoffman, 1943, 318 U.S. 109, 114, 63 S.Ct. 477, 480, 87 L.Ed. 645, 144 A.L.R. 719.

4 Ibid.

5 Ulm v. Moore-McCormack Lines, Inc., 2 Cir., 1940, 115 F.2d 492, certiorari denied 313 U.S. 567, 61 S.Ct. 941, 85 L.Ed. 1525; Wickman v. Bohle, 1938, 173 Md. 694, 196 A. 326 (record stating that the patient had 'a fractured right clavicle').

6 Ulm v. Moore-McCormack Lines, Inc., supra note 5; Borucki v. MacKenzie Bros. Co., 1938, 125 Conn. 92, 3 A.2d 224 (record from the laboratory giving the analysis of food from the eating of which plaintiff was made ill); Grossman v. Delaware Elect. Power Co., 1929, 4 W.W.Harr. 521, 34 Del. 521, 155 A. 806 (laboratory tests and history sheet).

7 Reed v. Order of United Commercial Travelers of America, 2 Cir., 1941, 123 F.2d 252; Sadjak v. Parker-Wolverine Co., 1937, 281 Mich. 84, 274 N.W. 719; Adler v. N.Y. Life Ins. Co., 8 Cir., 1929, 33 F.2d 827 (record admitted to show that at the time of filing application plaintiff had ulcer, chronic prostatis and seminal vesicultis); Prudential Ins. Co. of America v. Saxe, 1943, 77 U.S.App.D.C. 144, 134 F.2d 16, certiorari denied 1943, 319 U.S. 745, 63 S.Ct. 1033, 87 L.Ed. 1701.

8 Ulm v. Moore-McCormack Lines, Inc., supra note 5, 115 F.2d at page 495: 'But whatever should be the judicial attitude toward this statute, we do not think the cited New York cases are in point on the immediate issue here. They did not involve the problem of identification, but only whether or not opinion statements of a doctor and of a policeman contained in official or business records were admissible. Here the records were claimed primarily to show direct observations made by attending physicians, not entries of opinion.'

9 Cf. Cottrell v. Prudential Ins. Co. of America, 1940, 260 App.Div. 986, 23 N.Y.S.2d 335.

10 Such evidence might be used in a proceeding for the cancellation of a naturalization certificate. See Schneiderman v. United States, 1943, 320 U.S. 118, 63 S.Ct. 1333, 87 L.Ed. 1796.

11 Of course if the fact that a patient had been treated for a psychoneurotic condition became relevant to prove some issue in the case other than the truth of the diagnosis the record would be admissible to show that such treatment had taken place. For example, in the recent case of Becker v. United States, 7 Cir., 1944, 145 F.2d 171, the issue was whether a finding of permanent and total disability caused by insanity was supported by the evidence. Nearly all the evidence of disability was direct testimony of physicians. To corroborate that direct testimony hospital record were introduced to show that the insured had been discharged from an evacuation hospital with a diagnosis of acute rheumatism; that the next month the insured was hospitalized again because of his mental condition; that he was shipped back to the United States in a cage with other mental patients and a tag placed upon him which read 'Mental Case'; that on his return to this country his condition was diagnosed as 'Psychoneurosis, Hysteria'. It is apparent that these records are relevant

to show that the insured was disabled during the period of confinement regardless of the accuracy of the diagnosis. These records corroborate the direct testimony of the physicians that he continued to be under the disability after his discharge from the hospital. But the case is hardly an authority for admitting a psychiatric diagnosis as a substitute for direct testimony as to the character of the insanity in inducing a tendency to suicide. See also People v. Kohlmeyer, 1940, 284 N.Y. 366, 31 N.E.2d 490.

12 Cf. Estate of William Buckminster v. Com'r of Internal Revenue, 2 Cir., 147 F.2d 331.

13 Wigmore, op. cite. supra note 2, 1 1527: 'It is often added that there must have been no motive to misrepresent. This does not mean that the offeror must show an absence of all such motives; but merely that if the existence of a fairly positive counter-motive to misrepresent is made to appear in a particular instance the entry would be excluded. This limitation is a fair one, provided it be not interpreted with over-strictness.'

14 Wigmore, op. cite. supra note 2.

1 There was no contrary testimony. No question was raised regarding the time within which the regular course of business required the entries to be made. In view of the custom of hospitals, the standing of Walter Reed Hospital, and the absence of any suggestion to the contrary, we may infer that the regular course required the entries to be made within a reasonable time.

2 49 Stat. 1561, 28 U.S.C.A. § 695.

3 Palmers v. Hoffman, 318 U.S. 109, 111-115, 63 S.Ct. 477, 479, 87 L.Ed. 645, 144 A.L.R. 719.

4 74th Cong., 2nd session, S. R. No. 1965; 74th Cong., 2nd session, H. R. No. 2357. The cases referred to are Grossman v. Delaware Electric Co., 4 W.W.Harr. 521, 34 Del. 521, 155 A. 806, and St. Louis v. Boston & Maine R. R., 83 N.H. 538, 145 A. 263.

5 Wigmore on Evidence, 3d ed., § 1707. Cf. §§ 1520, 1530, 1530a, 1639. The Maryland statute e. g., provides that, in civil cases, transcripts of the records of the Maryland Tuberculosis Sanitarium or any of its branches 'shall be competent evidence of the medical history of any individual who heretofore has been, or hereafter may be, a patient therein.' Ann.Code Md., 1939, art. 35, § 13.

6 Ulm v. Moore-McCormack Lines, Inc., 2 Cir., 115 F.2d 492; Id., 2 Cir., 117 F.2d 222 ('clinical records' etc.); Reed v. Order of United States Commercial Travelers of America, 2 Cir., 123 F.2d 252, 253 ('well under influence of alcohol'); Pollack v. Metropolitan Life Ins. Co., 3 Cir., 138 F.2d 123 (patient's statement of age); Estate of William Buckminster v. Com'r of Internal Revenue, 2 Cir., 147 F.2d 331 ('cerebral hemorrhage'); Norwood v. Great American Indemnity Co., 3 Cir., 146 F.2d 797 ('conflicting' autopsy reports).

7 Becker v. United States, 7 Cir., 145 F.2d 171 ('Psychoneurosis Hysteria'); Prudential Insurance Co. v. Saxe, 77 U.S.App.D.C. 144, 134 F.2d 16.

8 5 Wigmore on Evidence, Sec. 1520.

9 Borucki v. MacKenzie Bros., 125 Conn. 92, 3 A.2d 224 (treatment, * * * condition' etc.); Wickman v. Bohle, 173 Md. 694, 196 A. 326, 329 ('fractured right clavicle'); Gile v. Hudnutt, 279 Mich. 358, 272 N.W. 706; People v. Kohlmeyer, 284 N.Y. 366, 31 N.E.2d 490, 491 ('included diagnosis of manic depressive insanity'); Colon v. John Hancock Mutual Life Ins., 56 R.I. 88, 183 A. 850, 851, ('moderately advanced tuberculosis').

10 United States v. Balance, 61 App.D.C. 226, 59 F.2d 1040, 1042.

11 Prudential Insurance Co. v. Saxe, 77 U.S.App.D.C. 144, 134 F.2d 16.

12 Palmer v. Hoffman, 318 U.S. 109, 115, 63 S.Ct. 477, 481, 87 L.Ed. 645, 144 A.L.R. 719.

13 Notes 6, 7 and 9 supra. Contra, Lykes Bros. S. S. Co. v. Grubaugh, 5 Cir., 128 F.2d 387.
I think this court is in error in citing Wigmore, § 1522, as supporting its view that the Shop Book Rule admits only 'observations which do not depend on opinion * * * .'

14 Pollack v. Metropolitan Life Ins. Co., 3 Cir., 138 F.2d 123, 128; Wickman v. Bohle, 173 Md. 694, 196 A. 326. Cf. Hunter v. Derby Foods, Inc., 2 Cir., 110 F.2d 970, 133 A.L.R. 255; Contra, Sadjak v. Parker-Wolverine Co., 281 Mich. 84, 274 N.W. 719; Harrison v. Lorenz, 303 Mich. 382, 6 N.W.2d 554; Geroeami v. Fancy Fruit & Produce Co., 249 App.Div. 221, 291 N.Y.S. 837.

15 Cf. Meaney v. United States, 2 Cir., 112 F.2d 538, 130 A.L.R. 973; Wigmore, Evidence, 3d ed., § 1714.

16 Cf. Magruder, J., concurring in Pollack v. Metropolitan Life Ins. Co., supra; Hale, Hospital Records as Evidence, 14 So.Cal.L.R. 99, 106.

17 318 U.S. 109, 114, 63 S.Ct. 477, 481, 87 L.Ed. 645, 144 A.L.R. 719.

18 318 U.S. 109, 114, 63 S.Ct. 477, 481, 87 L.Ed. 645, 144 A.L.R. 719.

19 Note 1 supra.

20 Palmer v. Hoffman, 318 U.S. 109, 114, 63 S.Ct. 477, 481, 87 L.Ed. 645, 144 A.L.R. 719.

21 The reports of the committees of Congress cite no cases of any such character.

End of Document

19 Md.App. 619
Court of Special Appeals of Maryland.

Lucille MARLOW, Incompetent, etc., et al.
v.
Michele CERINO et al.

No. 270.
|
Jan. 4, 1974.
|
Certiorari Denied Apr. 11, 1974.

A malpractice action was brought against doctors and a hospital. A jury in the Circuit Court, Montgomery County, Ralph G. Shure, C. J., rendered a verdict in favor of all the defendants. The incompetent patient, by her guardian, and the patient's husband appealed. The Court of Special Appeals, Gilbert, J., held that instructions which included statement that plaintiff's burden had not been met if she suffered ultimate injury by reason of her own default in seeking medical attention was not erroneous but, in any event, a subsequent instruction relative to proximate cause cured any possible misapprehension, and, the question of contributory negligence being not in issue, the court did not err in refusing to give an instruction concerning her lack of contributory negligence. Certain instructions were held to be not objectionable as repetitive and requested instructions were held to have been properly refused. Certain hospital records, though they contained expressions of opinion, were ruled admissible.

Affirmed.

Attorneys and Law Firms

***620** ****506** Jerome J. Seidenman, Baltimore, and Martin H. Freeman, Upper Marlboro, for appellant.

David L. Bowers, Baltimore, with whom were Miles & Stockbridge, Baltimore, on the brief for appellee Michele Cerino.

John F. King, Baltimore, with whom were Anderson Coe & King, Baltimore, on the brief for appellee Cenap S. Dorkan.

Wilbur D. Preston, Jr., Baltimore, with whom were Benjamin F. Davis and Whiteford, Taylor, Preston, Trimble & Johnson, Baltimore, on the brief for appellee South Baltimore General Hospital.

Argued before MORTON, MOYLAN and GILBERT, JJ.

Opinion

GILBERT, Judge.

Lucille Marlow, (Mrs. Marlow), one of the appellants, is a tragic person. She is currently a patient in the Baltimore City Hospital because she is cortically blind and totally and permanently incompetent. Through her guardian Mrs. Marlow filed a suit against Dr. Cenap S. Dorkan (Dr. Dorkan), Dr. Michele Cerino (Dr. Cerino) and South Baltimore General Hospital (S.B.G.H.) ****507** in which she alleged that her current condition is a direct result of the negligence of Dr. Dorkan, Dr. Cerino and S.B.G.H. individually or any ***621** combination thereof. Mrs. Marlow's husband joined in the suit in order to recover for the medical expenses incurred in behalf of his wife [1] and for damages to the marital relationship. The matter was removed from the Superior Court of Baltimore City to the Circuit Court for Montgomery County. There, a jury presided over by Judge Ralph G. Shure rendered a verdict in favor of all of the defendants-appellees.

Displeased with the jury's verdict the plaintiffs-appellants have presented for our review a multitude of alleged errors committed by the trial judge. Some of the appellants' contentions are concerned with the jury instructions. Others deal with the trial judge's rulings on the evidence.

THE FACTS

Mrs. Marlow was admitted to the North Arundel Hospital in Anne Arundel County, Maryland, on the afternoon of January 8, 1969. At that time she was seen in the emergency room by Dr. Dorkan. Dr. Dorkan diagnosed her condition as 'pleural effusion, pneumonia, dehydration and empyema [2] possible.' Dr. Dorkan determined that Mrs. Marlow should be admitted to the hospital because of her condition. Because there were no beds at North Arundel Hospital Mrs. Marlow was transferred to S.B.G.H. When she arrived at S.B.G.H. by an ambulance, she was immediately admitted. At one

point in the testimony it is indicated that Mrs. Marlow was admitted to S.B.G.H. at 7:40 P.M. and that Dr. Dorkan had followed the ambulance to S.B.G.H. There is no great dispute as to when Mrs. Marlow arrived at North Arundel Hospital although there was conflicting evidence as to the time when Dr. Dorkan first saw her. According to Mrs. Marlow's husband the illness which necessitated his taking her to North Arundel Hospital had its onset several days earlier. ***622** Mr. Marlow stated that his wife communicated with both the personnel at North Arundel Hospital, and Dr. Dorkan. Dr. Dorkan, on the other hand, testified that Mrs. Marlow was unable to communicate clearly. Dr. Aristedes Mavrides, a resident at S.B.G.H., testified that when Mrs. Marlow arrived at S.B.G.H. he 'couldn't get some specific answers from the lady.' After antibiotics were administered to Mrs. Marlow, a needle was inserted into the pleural cavity and a sampling of a fluid consisting of blood and pus was extracted. It was determined by Dr. Dorkan and Dr. Mavrides that it was necessary for Mrs. Marlow to be given a thoracostomy.[3] According to Dr. Dorkan and Dr. Mavrides the problem that then confronted them was twofold. First, they had trouble obtaining a thoracic surgeon at that time to examine Mrs. Marlow and second, her condition was such that, in the words of Dr. Dorkan, 'no surgeon would have touched her.' Mrs. Marlow's condition, despite the autibiotics, continued to worsen. The next day, although still very sick, she had, nevertheless, stabilized. Dr. Cerino was called to examine the patient. It was determined that Mrs. Marlow was 'gravely ill' and that immediate surgery was necessary because time was running out for her, and that if the operation were going to do any good at all, it had to occur immediately. Mrs. Marlow was taken to the operating room where the thoracostomy was performed through the use of a local anesthesia. No anesthesiologist was present in the operating room. An incision of approximately one inch in length ****508** was made in her back. Dr. Gerino testified that the operation was actually performed by Dr. Samadi under the direction of Dr. Cerino. During the operation, which the record reveals was supposed to last but a short time, Dr. Cerino monitored Mrs. Marlow's heart by watching it beat against the chest wall. When he observed that Mrs. Marlow was no longer breathing he announced that fact and had her turned over onto her back. He commenced closed chest massage while Dr. Samadi simultaneously performed mouth-to-mouth resuscitation. A call was put out over the hospital inter-communication ***623** system for a CPR team[4], and it arrived forthwith. Mrs. Marlow recovered from the empyema and pneumonia.

Approximately three weeks after the operation, Mrs. Marlow was transferred to the United States Public Health Service Hospital where she remained until her subsequent removal to the Baltimore City Hospital.

The issue presented to the jury was whether Mrs. Marlow's cardiac arrest and brain damage was caused by:
a. the failure on the part of Dr. Dorkan to treat Mrs. Marlow properly during the pre and postoperative phases of her hospitalization;

b. the failure of Dr. Cerino to exercise the requisite standard of care both prior to and during the operative procedure;

c. the failure of S.B.G.H. to afford the proper standard of care to Mrs. Marlow both before and during the operation;

d. the prior toxic affect of the 'little diseases' from which Mrs. Marlow suffered at the time she first came under Dr. Dorkan's care;

e. any combination of a, b, c and d.

At the trial, the plaintiffs-appellants sought to demonstrate to the jury that Dr. Dorkan had 'abandoned' Mrs. Marlow once he had caused her to be taken to S.B.G.H. This evidence was disputed by Dr. Dorkan. A battle of experts concerning the standard of medical care employed by Dr. Dorkan as a general practitioner, Dr. Cerino as a thoracic surgeon and S.B.G.H. as a hospital took place. It is clear from the verdict that the jury believed that the standard of care afforded to Mrs. Marlow by the defendants-appellees equalled the standard required.

JURY INSTRUCTIONS

The main thrust of the appellants is that the trial court ***624** erroneously instructed the jury on 'contributory negligence' and compounded its error by an unduly repetitious instruction. Judge Shure said to the jury:
'You cannot conclude that merely because the plaintiff suffered a cardiac arrest which resulted in brain damage, that the injury was a result of the treatment or lack of care rendered by Dr. Cerino, as the mere occurrence of such a

collapse does not create a presumption of negligence, as I have previously indicated to you. Also, however, I tell you that you take a patient as you find her and you treat him or her for the condition that is presented to you, but you are entitled to consider how long a condition has been present or developing when first seen by the doctor, and even though the result may have been contributed to by the negligence of other doctors or the hospital, if you conclude that Mrs. Marlow suffered the ultimate injury by reason of her own default in seeking medical attention which caused the empyema which ultimately resulted in brain damage, the burden has not been met and such findings would require a verdict for the defendant, Dr. Cerino.' (Emphasis supplied).

****509** Similar language was employed in the instructions pertaining to Dr. Dorkan and S.B.G.H. The appellants take umbrage with the charge, as well as with Judge Shure's refusal to inform the jury that Mrs. Marlow was not, as a matter of law, guilty of contributory negligence. The part of the instruction which the appellants find most odious is the phrase, 'by reason of her own default.' Appellants argue that these words placed a burden upon the appellants to disprove contributory negligence and were 'tantamount to directed verdicts against them.' We do not see it that way. The word default is defined in Webster's Third New International Dictionary of the English Language (unabr. ed. 1967), as 'the absence of something needed. Lack: want.'

As we read Judge Shure's instruction, the message comes through loud and clear that the jury was advised that if they ***625** should find the proximate cause of Mrs. Marlow's injuries to be the result of negligence on the part of the appellees, or any of them, that the jury should find for Mrs. Marlow. If, on the other hand, the jury should find the proximate cause of Mrs. Marlow's injuries to have been her delay in seeking medical care so that her condition was such that she would have suffered the injuries complained of, notwithstanding the presence of due care on the part of the appellees, then the jury should find against Mrs. Marlow.

[1] There was evidence in the case that Mrs. Marlow was suffering from a series of 'little diseases' which in and of themselves made her condition moribund. Under the circumstances, the jury was entitled to consider whether or not Mrs. Marlow's prior physical condition was a significant factor in, or the sole cause, of the brain damage and blindness that she ultimately sustained.

[2] When exception was taken by the appellants to the jury charge, Judge Shure gave additional instructions in which he said:

> 'With respect to Mrs. Marlow's prior condition about which we have heard much testimony and about which there is no conflict. I say there is no conflict to the extent that she had been ill for serveral days before she came to the hospital to see Dr. Dorkan. If this physical condition of Mrs. Marlow was the proximate cause of the damage she suffered thereafter, then your decision must be for the defendants, but if the care of the defendants or the lack of it is negligent, as I have described it to you, and this was the proximate cause of her damage, then your decision must be for the plaintiffs.'

For the reasons heretofore stated we think that the original instruction was not in error, but even if it were, the judge's subsequent instruction relative to proximate cause cured any possible misapprehension on the part of the jurors. We perceive no error in the court's refusal to given an instruction concerning Mrs. Marlow's lack of contributory negligence. In ***626** Batten v. Michel, 15 Md.App. 646, 292 A.2d 707 (1972), we said, at 653, 292 A.2d at 712:

> 'Unless there be some evidence of negligence of the plaintiff contributing to the happening of the accident beyond a mere scintilla, or evidence from which negligence may be legally inferred by reasonable persons, there is nothing which justifies the submission of the plaintiff's negligence to the jury. Gutterman v. Biggs, 249 Md. 421, 240 A.2d 260 ((1968)); see Rice v. Norris, 249 Md. 563, 566, 241 A.2d 411 ((1968)).'

In the case before us we do not find even an iota of evidence that the appellees either alleged or attempted to prove contributory negligence on the part

of Mrs. Marlow. Hence, the question of her contributory negligence was not at issue.

[3] Furthermore, there is no merit in the appellants' contention that the instructions were repetitive. The allegation of repetitiveness is directed to the fact that **510 Judge Shure gave, as we have previously observed, a similar instruction as to each of the three appellees. The Court of Appeals, addressing itself to the subject of repetition of jury instructions said in Ager v. Baltimore Transit Co., 213 Md. 414, 132 A.2d 469 (1957), at 423, 132 A.2d at 474:

> 'While undue repetition, in an instruction, of any of the points contained therein is not to be recommended, a violation of this rule is not reversible error, unless it reasonably appears that the jury has been misled. 3 Am.Jur., Appeal and Error, sec. 1118.'

In the instant case there is nothing to indicate that the jury was misled or confused by repetitive instructions.

[4] The appellants requested three prayers concerning the professional responsibility owed by Dr. Dorkan to Mrs. Marlow. In essence, the prayers sought to have the jury instructed that it was Dr. Dorkan's duty to arrange for and administer antibiotics to Mrs. Marlow, to arrange for the drainage of the empyema and that Dr. Dorkan's physical *627 presence was required to make informed, professional judgments rather than to rely upon the judgment of others. Judge Shure in his instruction said of Dr. Dorkan:

'The charges against him are that he failed to promptly obtain a thoracic surgeon for assistance, that he failed to treat or failed to treat properly Mrs. Marlow, and that he abandoned her as a patient.

'In evaluating the testimony in this claim, you consider all of the evidence presented from the time that Dr. Dorkan came into the picture at North Arundel Hospital and his actions thereafter, including his medicines prescribed, the instructions to Dr. Mavrides, the hospital charts, his contact with employees of the hospital, thoracic surgeon, his return to Severna Park, and his actions thereafter, including specifically instructions and what you consider attention or lack of attention after he left the hospital and from then until the end result in Mrs. Marlow.'

To support their position that the instruction is erroneous, the appellants point to the testimony of one of their experts, Dr. Reap, who stated that Dr. Dorkan should have stayed with Mrs. Marlow until her condition had stabilized and that she should have been admitted into the intensive care unit from the time she arrived at S.B.G.H. Plaintiffs rely heavily upon Thomas v. Corso, 265 Md. 84, 288 A.2d 379 (1972). In that case a doctor who lived approximately ten minutes from the hospital was called to attend and individual who had been struck by a motor vehicle. The doctor who had been telephoned at 11:25 P.M. arrived at the hospital at 2:30 A.M., just in time to pronounce the patient dead. The Court of Appeals, speaking through Judge Barnes, said at 98, 288 A.2d at 388:

'In 1 Louisell and Williams, Medical Malpractice, s 8.05, pp. 206-07, it is stated:

'The duty to attend the patient after a *628 physician-patient relationship has been established is a clearly defined specific duty within the general duty of due care. A physician cannot properly withdraw from a case under diagnosis or treatment without giving reasonable notice. How much attention a particular case may require in order to satisfy the standard of reasonable care, often is a matter for expert evidence. It requires no expert evidence, however, to show that failure altogether to attend a patient, when common sense indicates that without attention the consequences may be serious, is not reasonable care.' (Emphasis supplied.)'

Thomas v. Corso, supra, is not apposite to the instant case. We are not here concerned with the question of the doctor's failure to attend a patient. The issue is whether having once undertaken to attend **511 the patient, Dr. Dorkan fulfilled his duty. The testimony of Dr. Dorkan and his expert witnesses was that Dr. Dorkan had done all that could be expected of him and that his services met the degree of professional responsibility required. The requested instructions completely ignore the evidence presented by Dr. Dorkan and were almost the equivalent of a motion for a directed verdict in favor of the appellants.

Dr. Cerino related to the jury that when he first saw Mrs. Marlow she was moribund (dying; at the point of death). The doctor said 'she was going to die because of the multiplicity of the little diseases she was suffering from.' She was in 'septic shock which carries a mortality rating of ninety per cent on people with no additional diseases. This lady was suffering from uncontrolled diabetes and you know I don't have to tell you that people with diabetes are prone to infections and do not heal as well.'

There was evidence that Mrs. Marlow had a history of chronic alcoholism for which she had been treated over a period of years. The last 'treatment' was in 1963, but there was an entry on the Taylor Manor hospital records that Mrs. Marlow's husband had called Taylor Manor in 1967 and told ***629** them that his wife was having a relapse. Moreover, the 'history' entered in the records of the United States Public Health Service Hospital, to which Mrs Marlow was taken following her discharge from S.B.G.H., reveals that:

> 'The past history is significant in that Mrs. Marlow had formerly, on several occasions, been schizophrenic. In 1963, she was hospitalized for six months at Taylor Manor. She denied smoking; however, her husband did note that she had been drinking quite heavily over the past few weeks prior to admission to South Baltimore General Hospital.'

There is an additional note: 'drink-whiskey-on weekends-increasing for three or four months.'

[5] The importance of the history of alcoholism was pointed up in the testimony of Dr. Cerino who said:

> 'And chronic alcoholics (sic) creates many changes in the brain, liver and other organs that make a patient more susceptible to infection and more difficult to treat. She had her chest full of pus. Not only that but the right lung was completely involved by pneumonia. At the time I saw her she was incoherent and unable to speak, telling me that the germs or the toxins in the blood stream already affected her brain.'

In the light of the testimony as above recounted, Judge Shure properly refused the appellants' prayer:

> '. . . that, as a matter of law, there is no evidence legally sufficient to justify an inference that plaintiff's pneumonia or empyema was caused by a prior alcoholic condition, and you are not to speculate as such in your deliberations.'

In addition to Dr. Cerino's evidence, there was testimony from an expert that:

> '. . . (P)atients with diabetes, cancer, alcoholism . . . are more likely to develop these kinds of complications, particularly empyema.'

***630** The requested instruction, had it been given, would have been directly contrary to the evidence. The trial judge was not in error.

Appellants next assert that the court erred in refusing to instruct the jury that there was no legally sufficient evidence to justify an inference that 'the cardiac arrest or cardiovascular collapse suffered by plaintiff, Lucille Marlow, was caused by a prior alcoholic condition, or that the widespread cortical destruction, permanent brain damage, blindness and incompetence suffered by plaintiff, Lucille Marlow, was caused by a prior alcoholic condition . . ..' The requested prayer also ignores the evidence. Dr. Cerino testified ****512** that 'in the case of Mrs. Marlow . . . (the) profound cardiac respiratory collapse . . . was the end result of her multiple diseases,' the diseases, as we have previously observed, included alcoholism. We perceive no error.

While it is difficult to follow the appellants' argument concerned with the trial judge's failure to grant the appellants' 19th prayer, the thread running through the appellants' contention seems to be that the trial court's instructions on proximate causation were erroneous. The Court of Appeals, speaking through the late Judge Finan in Johns Hopkins Hospital v. Genda, 255 Md. 616, 258 A.2d 595 (1969), quoted with approval State, Use of Janney v. Housekeeper, 70 Md. 162, 16 A. 382 (1889).

The Court in Housekeeper, supra at 172, 16 A. at 384, approved a prayer in which the jury was told:

> '. . . (that) the degree of care and skill required (of treating physicians and surgeons) is that reasonable degree of care and skill which physicians and surgeons ordinarily exercise in the treatment of their patients, and that the burden of proof is on the plaintiff to establish the want of such skill and care in the performance of the operation and attendance on the deceased while under treatment.'

Judge Shure instructed the jury that:
'. . . to be liable under the law, you must find ***631** that they did not use the requisite skill and judgment insofar as this plaintiff, Lucille Marlow, is concerned. That is that care and skill in judgment which is ordinarily exercised by others in the profession generally in the Baltimore area or in a similar metropolitan area.

The lack of skill and judgment, additionally, must be the proximate cause of the condition which in this case, as you will recall, is brain damage which has caused the blindness and incompetency.

Proximate cause is the cause which in the natural and continuous sequence, unbroken by any efficient intervening cause, produces a condition that is in this case the condition without which the results would not have occurred. It need not be the only cause but it must be a proximate cause which is the efficient cause; namely, the one that necessarily sets in operation the factors that accomplished the results.

Now, as I have indicated, the plaintiff has the burden to establishing every fact necessary to constitute malpractice, which includes the lack of requisite knowledge and skill for the performance of services generally, and particularly in this case either rendered or failed to have been rendered to Lucille Marlow and that such services or the failure to render was the proximate cause of the plaintiff's complaints.

A physician and/or surgeon and those employees in a hospital are not required to exercise the highest degree of skill and care in the profession but rather the degree of skill and care ordinarily possessed and exercised by others of their fellow doctors, nurses and other hospital employees in the profession generally. Errors in judgment, for instance, alone, are not sufficient to constitute malpractice. Failure to produce the desired results of itself is not sufficient to constitute malpractice; however, if a physician and/or a surgeon does not possess or does not exercise or practice that degree of learning and ***632** skill required of him by law, that is a standard I have given to you, he cannot be excused from recovery by merely saying that he did the best that he could. When you hold yourselves out to the public as a professional doctor, you must perform, as I have indicated, up to these professional standards.'

In our view Judge Shire's instructions were in keeping with Housekeeper, supra, as approved by ****513** Johns Hopkins, Hospital v. Genda, supra. See also State, Use of Solomon v. Fishel, 228 Md. 189, 179 A.2d 349 (1962); State v. Washington Hospital, 223 Md. 554, 165 A.2d 764 (1960); Bettigole v. Diener, 210 Md. 537, 124 A.2d 265 (1956); State v. Eye, Ear, Etc., Hospital, 177 Md. 517, 10 A.2d 612 (1940); Miller v. Leib, 109 Md. 414, 72 A. 466 (1909); Dashiell v. Griffith, 84 Md. 363, 35 A. 1094 (1896). Intertwined in the appellants' argument on this issue is an 'instant replay' of the assertion made relative to 'contributory negligence'. Having journeyed through the applicable law concerning that contention, we see no reason to repeat the trip.

[6] Appellants next argue that there can be more than one proximate cause of an injury. The statement is correct. See Yellow Cab Co. v. Bonds, 245 Md. 86, 225 A.2d 41 (1966); Yellow Cab Co. v. Hicks, 224 Md. 563, 168 A.2d 501 (1961); Armiger v. Balto. Transit Co., 173 Md. 416, 196 A. 111 (1938). In the original instructions Judge Shire, as we have already noted, stated:

> 'Proximate cause is the cause which in the natural and continuous sequence, unbroken by any efficient intervening cause, produces a condition that is in this case the condition without which the results would not have occurred. It need not be the only cause but it must be a proximate cause which is the efficient cause; namely, the one that necessarily sets in operation the factors that accomplished the results.'

The supplemental instructions provided,
'If this physical condition of Mrs. Marlow was ***633** the proximate cause of the damage she suffered thereafter, then your decision must be for the defendants, but if the care of the defendants or the lack of it is negligent, as I have described it to you, and this was the proximate cause of her damage, then your decision must be for the plaintiffs.

Proximate cause I described to you and it need not be the only cause but must be a necessary cause for the damages to have been sustained.'

We believe Judge Shure's instructions make it perspicuous that there can be more than on proximate cause, and we think that the trial judge's instructions were adequate.

As we said in Beckner v. Chalkley, 19 Md.App. 239, 310 A.2d 569, 574 (1973):
'The Court of Appeals and this Court have consistently held that if jury instructions, when read as a whole, clearly set forth the applicable law, there is no reversible error. Nizer v. Phelps, (252 Md. 185, 249 A.2d 112 (1969)); Alston v. Forsythe, 226 Md. 121, 172 A.2d 474 (1961); Lemons v. Chicken Processors, 223 Md. 362, 164 A.2d 703 (1960); Kable v. State, 17 Md.App. 16, 299 A.2d 493 (1973); Shotkosky v. State, 8 Md.App. 492, 261 A.2d 171 (1970). One of the reasons for such a rule is that sometimes a trial court will err in some of the legal propositions announced to the jury, but the errors are harmless. 'Wrong directions which do not put the traveler out of his way, furnish no reason for repeating the journey.' Cherry v. Davis, 59 Ga. 454, 456 (1877).'

Our perusal of Judge Shure's instructions to the jury convinces us that he adequately informed them as to the Maryland law.

EVIDENTIARY RULINGS

[7] **[8]** The appellants attack a series of evidentiary rulings made during the trial. Appellants' main assault, however, is on ***634** the admission into evidence of the records of Crownsville State Hospital, Taylor Manor Hospital and the United States Public Health Service Hospital. The reason for the appellants' assault upon those three rulings in particular appears to be that if they were excluded from the record, there would be little or no evidence concerning the history of Mrs. Marlow's alcoholism. Thus, the debilitating effect upon the body of Mrs. Marlow resulting ****514** from alcoholism would not be an issue in the case, and the jury would have no access to knowledge concerning it. To support their argument that the hospital reports and most particularly the 'psychiatric opinions' stated therein were not admissible, the appellants rely principally upon three cases: West v. Fidelity-Balto. Bank, 219 Md. 258, 147 A.2d 859 (1959); Sarrio v. Reliable Contract Co., 14 Md.App. 99, 286 A.2d 183 (1972) and New York Life Ins. Co. v. Taylor, 79 U.S.App.D.C. 66, 147 F.2d 297 (1944).

In Sarrio we considered and held properly admitted an intern's entry in a hospital record that Sarrio was 'drunk and had been drinking.' We said 14 Md.App., at 101, 286 A.2d at 185:
'It is well established in this State that proper hospital records are admissible into evidence as records made in the regular course of business. Md.Code, Art. 35, s 59; Yellow Cab Co. v. Hicks, 224 Md. 563, 168 A.2d 501 ((1961)); Old v. Cooney Detective Agency, 215 Md. 517, 138 A.2d 889 ((1958)); Bethlehem-Sparrows Point Shipyard v. Scherpenisse, 187 Md. 375, 50 A.2d 256 ((1946)). See also Powell, Hospital Records in Evidence, 21 Md.L.R. 22. However, it does not follow that the record as a whole is invariably admissible. As stated by the Court of Appeals in Yellow Cab Co., 224 Md. at 570, 168 A.2d (501) at 504: 'This Court has adhered to the rule that statements in a hospital record must be 'pathologically germane' to the physical condition which caused the patient to go to the hospital in the first place. Lee v. Housing Authority of Baltimore City, 1954, 203 Md. 453, 101 A.2d 832; Shirks Motor Express v. Oxenham, 1954, 204 Md. 626, 106 A.2d 46. A 'pathologically ***635** germane' statement 'must fall within the broad range of facts which under hospital practice are considered relevant to the diagnosis or treatment of the patient's condition'. McCormick, Evidence, Ch. 32, s 290."

Appellants assert that the hospital reports were not 'pathologically germane'. We think appellants read more into the term 'pathologically germane' than it means. As we construe the term it means having significant bearing upon and relation to the disease or injury from which one suffers. The entries in the records of Crownsville

were 'pathologically germane' to the particular illness that caused Mrs. Marlow's admission to Crownsville. The answer to the appellants' argument relative to their inability to 'cross examine' the 'psychiatric opinions' expressed in the records of Taylor Manor and Crownsville is found in McCormick, Handbook of the Law of Evidence, ch. 32, s 290 (1954), which states at 612:

'As in the case of expert opinions given on the witness stand, the qualifications of the declarant should appear, but it would seem that if it is proven or judicially noticed that the hospital from which the records come is a reputable institution of high standards this would justify the inference that what purport to be diagnoses made by physicians are made by doctors duly qualified to give such opinions. The admissibility of ordinary diagnostic findings customarily based on objective data and not usually presenting more than average difficulty of interpretation, is generally conceded. Even when the diagnosis embodies a conclusion which must be based upon data unusually difficult of interpretation, or upon 'subjective' symptoms, as in the case of some psychiatric diagnoses, most courts will still receive the findings in evidence.' (Footnotes omitted). (Emphasis supplied).

West v. Fidelity-Balto. Bank supra, is inapposite. West dealt with the testamentary capacity to make a will. In that ***636** case the caveators sought to offer the testimony of nurses as to entries they had made in nursing charts about the mental capacity of the testator as distinguished from his physical condition. The Court said, 219 Md. at 265, 147 A.2d at 863.

****515** 'While the charts would have been admissible as entries made in the regular course of business under Code (1957), Art. 35, ss 59, 60, it does not follow that everything in them was competent evidence. We think it is clear that the statute did not modify or alter the rule which forbids an expression of opinion by a person who is not competent to express an opinion.' (Emphasis supplied).

The Court said that the nurses were obviously not qualified to express a medical opinion as to competency, and their testimony was properly excluded.

Where, however, it appears from the hospital record that the opinion is expressed by a qualified person, such an expression is admissible.

The case of New York Life Ins. Co. v. Taylor, supra, rejected the admission of hospital records under the 'Federal Shop-Book Rule', now codified as 28 U.S.C., s 1732, on the theory that the federal statute does not open 'wide the door to the avoidance of cross-examination.' The application of the federal statute was, in the view of the Taylor court, limited to 'routine reflections of day-to-day operations.' The majority felt that 'conjectural conclusions' contained in a hospital report were likely to be over-valued by a jury in a case where the declarant is not presented for purposes of cross-examination. We observe that New York Life Ins. Co. v. Taylor, supra, involves the interpretation of the federal statute, and we are unpersuaded by its rationale. We think the sounder rule to be found in McCormick, Handbook of the Law of Evidence, ch. 32, s 290 (1954) wherein it is said, at 613:

> '. . . (I)t is believed that, even as to these controversial diagnoses, the majority view favoring admission is the more expedient one. It works for ***637** simplicity by making it unnecessary to draw a difficult line, itself provocative of doubt and dispute; it serves the modern policy of the free use of organizational records; and is not too burdensome on the adversary who may himself call the declarant and thus bring out, if he can, any weaknesses of the diagnosis.'

In short, the majority view is that opinions in a hospital report are admissible in evidence, and it is incumbent upon the person seeking to attack those opinions to call the declarant as a witness and examine him for weakness or error. See also 5 Wigmore, Evidence, ss 1517-1561 (3rd ed. 1940), 6 Wigmore, supra, at s 1707.

[9] The testimony concerning Mrs. Marlow's alcoholism and schizophrenia was relevant for two reasons. First, it demonstrated her long history of alcoholism and the effect of the illness upon her physical condition; second, her husband claimed loss of consortium. The husband testified with regard to the loss of his wife's society, affection and companionship. Loss of consortium by a husband has been recognized by this State, and monetary damages may be awarded for '. . . the loss of service, the loss of consortium of him with his wife, which includes the loss of her assistance and her society as

well as the loss of sexual relations . . ..' Nicholson v. Blanchette, 239 Md. 168, 180, 210 A.2d 732 (1965). Deems v. Western Maryland Ry., 247 Md. 95, 231 A.2d 514 (1967). Consortium includes the '(c)onjugal fellowship of husband and wife, and the right of each to the company, co-operation, affection, and aid of the other in every conjugal relation.' Black's Law Dictionary, 382 (rev. 4th ed. 1968). See also Kurdle v. Brookmeyer, 172 Md. 246, 191 A. 416 (1937). The claim for loss of consortium by Mr. Marlow placed squarely in issue the nature and details of the relationship existing between Mrs. Marlow and her husband. Her alcoholism, schizophrenia and hospitalization at Crownsville State Hospital and Taylor Manor take on significant relevance in ascertaining the extent of the damages suffered by Mr. Marlow.

[10] Appellants next argue that it was reversible error not to ***638** permit a certain ****516** medical witness to testify in rebuttal. The essence of appellants' contention is stated in their proffer to the trial court that the expert would 'testify to (a) reasonable medical certainty that had there been an anesthesiologist there (in the operating room) providing what Dr. Gold (another expert) has already testified to, that the result would have been different and she (Mrs. Marlow) would not have had the permanent brain damage.' Judge Shure determined that the proffered testimony was cumulative and thus not proper rebuttal. The record reveals that in their case in chief the appellants, through another expert, had supplied substantially the same testimony.

The general rule concerning rebuttal evidence is found in 2 Poe, Pleading and Practice, s 287 (Tiffany's ed. 1925). There it is stated, at 249:

'When the defendant has concluded his testimony, the plaintiff, in those cases where the burden of proof rests on him, and where, in chief, he has accordingly gone into his whole case, is entitled to introduce what is called rebutting evidence-that is to say, evidence in regard to such new points and questions as were first opened by the defendant's evidence. The rule is that the plaintiff will be required to go fully into his own case-in-chief on these issues as to which he holds the substantial affimative, and where, therefore, the burden of proof rests on him; and hence, in reply to the case made by the defendant, he will ordinarily by limited to what is strictly rebutting evidence. Still, it is not always easy to draw the line between what is rebutting evidence and what is evidence properly adducible in chief. The subject is one which is addressed to the sound discretion of the court; and the appellate court will not reverse for an error on this point, unless the ruling of the court below was both manifestly wrong and substantially injurious. Indeed, as a general rule, in such cases no appeal will lie.' (Footnotes omitted).

***639** See Kaefer v. State, 143 Md. 151, 122 A. 30 (1923); Snowden v. State, 133 Md. 624, 106 A. 5 (1919); Jones v. State, 132 Md. 142, 103 A. 459 (1918); Bannon v. Warfield, 42 Md. 22 (1875); Jenkins v. State, 14 Md.App. 1, 284 A.2d 667 (1971); Felder v. State, 6 Md.App. 212, 250 A.2d 666 (1969).

We think that the testimony sought to be offered by the appellants should have been offered in their case in chief. We share Judge Shure's view that the testimony was cumulative, and we perceive no abuse of discretion on the part of the trial judge in refusing to allow the testimony as rebuttal evidence.

The appellants also maintain that other errors were committed by the trial judge in his rulings on the evidence. Those alleged errors include receipt into evidence of a letter from the director of the S.B.G.H., a hypothetical question, the refusal to permit Dr. Gold to state whether or not in his opinion Mrs. Marlow was in cardiac arrest before that cardiac arrest was observed by Dr. Cerino, and refusal to strike the testimony of an appellee's medical expert. We have reviewed the record as to each of the contentions and find no error. Even if we were to assume error, nevertheless, such error would be harmless under the totality of the circumstances of this case.

Judgment affirmed.

Costs to be paid by appellants.

All Citations

19 Md.App. 619, 313 A.2d 505

Footnotes

1 By amendment to the declaration the United States of America was added as a 'use plaintiff' in order that it might recover monies expended on behalf of Mrs. Marlow under an insurance program.

2 According to Stedman's Medical Dictionary, Third Unabridged Lawyers' Edition (1972), empyema is defined as 'pus in a body cavity; when used without aualification, refers to pyothorax (pus in the pleural cavity).'

3 An opening in the chest wall for the draining of empyema from the pleural cavity.

4 CPR-cardio pulmonary resuscitation. Hence a team of individuals skilled in reviving a person who suffers a cardiovascular collapse.

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765 A.2d 986
District of Columbia Court of Appeals.

THEATRE MANAGEMENT GROUP, INC.
And LRW Theatre Group, both d/b/a Warner Theatre Operating Group, J.V., Appellants,
v.
John F. DALGLIESH, Jr., Appellee.

No. 99–CV–867.
|
Argued Nov. 28, 2000.
|
Decided Jan. 18, 2001.

Disabled patron brought personal injury action against theater seeking damages for injuries sustained in fall on ramp. The Superior Court, Reggie B. Walton, J., entered judgment on jury verdict for patron. Theater appealed. The Court of Appeals, Farrell, J., held that: (1) ADA standard for slope of ramps constituted evidence of standard of care; (2) question of whether negligence of theater caused patron's injury was for jury; and (3) nurse was qualified to give expert testimony about wheelchair-related items, in-home aide, physical therapy, counseling, and medications that patron would need.

Affirmed.

Attorneys and Law Firms

***987** Melissa A. Murphy–Petros, Chicago, IL, with whom James T. Ferrini and William H. Schladt, Gaithersburg, MD, were on the brief, for appellants.

James E. Colleran, Jr., Philadelphia, PA, with whom Nikolaus F. Schandlbauer, Washington, DC, was on the brief, for appellee.

Before FARRELL, RUIZ, and REID, Associate Judges.

Opinion

Farrell, Associate Judge:

Plaintiff-appellee Dalgliesh, a partially disabled person, was injured when he fell as he began walking down an aisle ramp leading to his seat in the Warner Theatre. In his ensuing action for negligence against appellants Theatre Management Group, Inc. and LRW Theatre Group (both doing business as Warner Theatre Operating Group, J.V.), the jury awarded him $983,177.00 in damages. On appeal, the primary issue is whether the trial judge erred in allowing the jury to consider, as evidence of the standard of care, the fact that under the Americans With Disabilities Act (ADA)[1] and related regulations an interior ramp may not have a slope exceeding a ratio of 1:12, or one unit of rise for every twelve units of distance. Appellants contend that the decisional law of this jurisdiction prohibits use of such statutes and regulations to prove negligence unless they are laws designed to protect "public safety," and that the ADA, as an anti-discrimination law, does not meet that description. We conclude both that our decisional law is not so inflexible in this regard as appellants make it out to be and that, in any event, the ADA has an obvious safety component to the ends it is designed to serve. We therefore sustain the trial judge's admission of the ADA standard as evidence of the care required in the circumstances. We reject appellants' additional claim that the trial court erroneously failed to order a remittitur, and therefore affirm.

I.

Dalgliesh suffers from Charcot Marie Tooth Syndrome (CMT), a rare neurological disorder that causes the myelin —the coating of the nerves—in the arms and ***988** legs to deteriorate over time. As the myelin is lost, electric conduction through the nerves to the attached muscles slows down, generally resulting in progressive neurological impairment. Dalgliesh was diagnosed with CMT at the age of twenty, and at the age of thirty-five was fitted with MAFO braces for both legs.[2] The braces supported his feet and legs but prevented all movement in his ankles. By the time he was age forty-three, he was using a cane in addition to the braces. The immobility of his feet, combined with sensory problems in the feet, the MAFO braces, and the cane all made it difficult for him to negotiate uneven surfaces.

Viewing the evidence in the light most favorable to Dalgliesh, on March 18, 1994, he came to the Warner Theatre with four friends to attend a show. Entering the theatre some forty-five minutes before showtime, he and a companion, Bill Tucci, were directed to the far end of the lobby where they were met by a female usher named

Heidi. Dalgliesh told her that he had a muscular disorder and would need assistance getting to his seat because he walked with a cane and wore MAFO braces. After Heidi left briefly and returned, he again told her it was important that he get help to his seat "because when I'm in crowds and ... there are surfaces ... I'm unsure of, I really like to have assistance." Heidi replied, "No problem. I'll take care of that."

Dalgliesh, Tucci, and Heidi waited in the lobby for Dalgliesh's other friends to park the car and join them. They talked about Dalgliesh's CMT, and at one point he showed Heidi the MAFO braces. When she asked what kind of help he wanted he replied, "I could have [Tucci] on one arm and you or someone else on the other arm as long as I have support on each side. Or, if you have a wheelchair of some sort ..." Heidi said "No problem." By this time, according to Dalgliesh's testimony, he had asked Heidi for assistance three or four times and was confident she would provide it.

When the others arrived Dalgliesh beckoned to Heidi, who told the group to follow her into the auditorium, which by now was very crowded. As they entered the theatre Heidi turned and took the tickets from Tucci, then went down the center aisle and, after finding the seats, summoned the group to follow her. Since the house lights had begun to blink, Dalgliesh was anxious: "people were all around me. I didn't see any help. And I was concerned ... I had asked for help. I had been told I was going to get it." He took a step forward on the aisle ramp and fell, landing on his right leg. He could feel the bone in his leg snap, experiencing pain more excruciating than he had ever felt. As he was carried out of the auditorium by paramedics, Heidi apologized to him saying, "I'm so sorry I didn't get you the help ... I should have done more. I should have gotten you a wheelchair or something." Dalgliesh suffered a leg fracture from the fall that was very slow to heal and, in combination with the underlying CMT, resulted in his being permanently confined to a wheelchair.

II.

A.

At trial Dalgliesh presented expert testimony by an architect, Robert D. Lynch, that the slope at the top of the aisle ramp (where Dalgliesh fell) was 13.5 percent or a ratio of one unit of rise (or "vertical distance") to 4 units of "run" or level distance.[3] Lynch testified that uniform architectural ***989** standards for ramps going back to 1961 ("probably the oldest unchanged ... accessibility standards" [Tr. 195]) establish "a run of 12 units [a ratio of one to twelve] as [the] maximum slope for a ramp." [*Id.*] Most recently, he stated, the Accessibility Guidelines for Buildings and Facilities promulgated under the ADA specify a "one in 12 slope" as the "maximum allowable [ratio]" for ramps [Tr. 196, 199]. In Lynch's opinion, the ramp at the point where Dalgliesh fell "significantly" exceeded "maximum ramp slopes ... contained within the [ADA] and/or the architectural guidelines which supplement and apply to [it]." [Tr. 236] Although Lynch recognized that "the basic nature of the geometry of the theatre" meant that the ramp slope could not be altered [Tr. 238],[4] he testified to specific steps—installation of handrails, warning signs, or an alternative entry route into the auditorium—that in his view appellants could reasonably have taken to provide safe access for someone with Dalgliesh's condition.

B.

Appellants objected to any evidence about the ADA and its accessibility standards on the ground that the ADA is not a "public safety" statute and thus its specifications could not provide evidence of the standard of care in what they term this "garden variety" negligence action. The trial judge disagreed. Besides instructing the jury on a landowner's common law duty of care in the circumstances to keep premises safe and warn invitees of hazardous conditions, he instructed it that the ADA and its accompanying regulations "set [ ] forth a standard of conduct" which it could consider in deciding whether appellants were negligent. On appeal, appellants renew the argument that in this jurisdiction only public safety laws can furnish proof of the standard of care in a negligence suit, and that the ADA does not fit that description.[5]

Dalgliesh makes no claim that the trial judge erred in refusing to instruct that violation of the ADA would amount to negligence *per se* on appellants' part. *See, e.g., Ceco Corp. v. Coleman,* 441 A.2d 940, 945 (D.C.1982).[6] Rather, in defending admission of the ADA evidence, his primary argument is that this court has never tied evidentiary *use* of a statute or regulation—as distinct from

per se liability based on violation of it—to the "public safety" nature of the enactment. He points particularly to *Rong Yao Zhou v. Jennifer Mall Restaurant, Inc.*, 534 A.2d 1268 (D.C.1987), where we canvassed the law on the relation between negligence and a regulatory standard and stated that, "even where the court does not perceive a public safety purpose in the legislative enactment, the statutory violation may be admitted as evidence of negligence, although it does not constitute negligence *per se.*" *Id.* at 1274.

Appellants respond that this statement in *Rong Yao Zhou* was dictum (we held there that the statute in question "has a public safety purpose" whose unexcused violation would constitute negligence *per se, id.* at 1275), and that our decisions and binding decisions of the United States Court of Appeals for the District of Columbia Circuit [7] recognizing evidentiary use of ***990** a law to prove negligence have all done so in cases where the statutory purpose was protection of the safety of the public or a subpart thereof.

Appellants may be correct on both points, but, as we explain shortly, that does not avail them. It is true that the trial judge cited only one District of Columbia case as actually holding that a non-public-safety regulation could be properly submitted to the jury as evidence of the standard of care. (Dalgliesh in his brief cites none). And curiously that decision, *Peigh v. Baltimore & O.R. Co.*, 92 U.S.App. D.C. 198, 204 F.2d 391 (1953), does not support the proposition, although it has repeatedly been cited for it. [8] Thus, in *Whetzel v. Jess Fisher Management Co.*, 108 U.S.App. D.C. 385, 282 F.2d 943 (1960), the court stated that in *Peigh*

> [w]e held the doctrine of negligence *per se* inapplicable to the defendant's illegal conduct ... because the prime purpose of the regulation was, in our view, to expedite traffic and commerce and not to protect passing motorists. Such violation was, however, admissible as evidence of negligence.

Id. at 389, 282 F.2d at 947 (footnote omitted). So too, in *Stevens v. Hall,* 391 A.2d 792 (D.C.1978), this court read *Peigh* as holding that "the per se rule should not be applied for the plaintiff's benefit. Because the purpose of the railroad regulation was to expedite traffic and encourage commerce, not to protect approaching motorists, the alleged violation, if proved, could at most be evidence of negligence, not negligence per se." *Id.* at 795–96. *See also Rong Yao Zhou,* 534 A.2d at 1274 (citing *Peigh* for principle that non-safety enactment "may be admitted as evidence of negligence").

These statements, although grounded shakily in *Peigh,* provide substantial indication of how this court would resolve the question of evidentiary use of a regulation not strictly safety in nature. Indeed, in our most recent statement on the subject, *Jimenez v. Hawk,* 683 A.2d 457 (D.C.1996), we summarized the law as being that "code violations, *especially* [of] those [enactments] with the public safety as an objective, are evidence of negligence," *id.* at 461 (emphasis added), implying that statutes without that objective but setting forth an arguable standard of care are admissible to prove negligence. Also, the distinction between public safety enactments and others has been partly erased by our decisions allowing evidentiary use of the former even when the statute was not designed to protect persons in the plaintiff's class. *See, e.g., Thoma v. Kettler Bros., Inc.,* 632 A.2d 725, 730 (D.C.1993) (upholding admission of OSHA workplace safety regulations designed to protect employees, in suit brought by non-employee visitor to work site); *Jeffries v. Potomac Development Corp.,* 261 U.S.App. D.C. 355, 361–62, 822 F.2d 87, 93–94 (1987) (citations omitted). In this case, it is conceded that the Warner Theatre is a place covered by the ADA and that Dalgliesh is a member of the class protected by the statute, however that protection is defined.

***991** **[1]** **[2]** Ultimately, however, this case does not compel us to resolve the issue of evidentiary use of statutes having no public safety objective, because it is evident to us that the ADA—and specifically the physical accessibility guidelines promulgated under it—possess such an aim. Title III of the ADA provides that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). Discrimination includes the "failure to remove architectural barriers ... that are structural in nature ... where such removal is readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv); *see also* 28 C.F.R. § 36.304. If removal of a barrier is not readily achievable, discrimination may yet be shown by the "failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods

if such methods are readily achievable." 42 U.S.C. § 12182(b)(2)(A)(v); *see also* 28 C.F.R. § 36.305. As mentioned earlier, Department of Justice (DOJ) standards issued under the ADA include the ADA Accessibility Guidelines for Buildings and Facilities (see 28 C.F.R. Part 36, App. A), which are "legally binding regulation." *Independent Living Resources v. Oregon Arena Corp.*, 1 F.Supp.2d 1124, 1130 n. 2 (D.Or.1998). The DOJ considers any element of a facility that does not meet or exceed the Guidelines to be a barrier to access. *See Parr v. L & L Drive Inn–Restaurant,* 96 F.Supp.2d 1065, 1086 (D.Hawai'i 2000). And, as the jury learned in this case, under the Guidelines the maximum slope of an interior ramp in an existing facility shall generally be a ratio of 1:12, or one unit of rise for every twelve units of run. *See* 36 C.F.R. Pt. 1191, App. A, § 4.82 (1999).

[3] **[4]** What seems to us to be the obvious relationship between the ADA's barrier removal requirement and the safety of a particular sub-portion of the public was well-stated by the trial judge in this case:

> Obviously, if a handicapped person cannot safely use a facility or accommodation, access to the facility or accommodation is seriously compromised. This reality is closely akin to the actual denial of access, because if a person cannot safely use a building, then access to the building is significantly restricted. And restricted access can amount to discrimination.

Since, as we conclude, the ADA standard governing ramps embodies a public safety objective, it satisfied any admissibility requirement of such purpose that can be gleaned from our decisions.

[5] **[6]** Appellants contend, alternatively, that the evidence was unrebutted that they complied with the ADA's requirement of barrier removal by providing alternative means of access to seating, [9] *i.e.*, a wheelchair available on request and a special seating area in the rear of the theatre. It needs reminding, however, that the issue before the jury was not whether appellants in fact violated the ADA or any other statute (that would have been so if the case were tried on a theory of negligence *per se*), but whether they breached their duty to the plaintiff in the circumstances, and whether that breach caused his injuries. The ADA standard constituted evidence of the standard of care, no more. [10] *See Thoma,* 632 A.2d at 730 (quoting *Curtis v. District of Columbia,* 124 U.S.App. D.C. 241, 243, 363 F.2d 973, 975 (1966)) (regulations [in *Curtis*] were " 'competent [and admissible] not in and of themselves as evidence of negligence, but as evidence of a standard of care by which the jury must measure the conduct of the defendants ***992** in determining whether they exercised that due care required in the situation' "). [11] The jury had ample evidence before it from which to find that appellants had been negligent. Besides the deviation from the norm in the slope ratio of the ramp, [12] the jury had the opinion of the plaintiff's expert that a warning sign could have been posted or hand railings installed at the uppermost point of the ramp, or an alternative entrance to the auditorium constructed for disabled persons at relatively modest cost. Moreover, Dalgliesh and his lay witnesses testified that the usher (who appellants concede was their employee-agent) disregarded his repeated requests for a wheelchair or other assistance in light of his condition, leaving him essentially to fend for himself as the theater lights began to dim. We find no basis on which to disturb the trial court's submission of liability to the jury.

III.

[7] The jury awarded Dalgliesh a total of $983,177 in damages, $296,677 of which was for future medical expenses. Appellants argue that the trial judge erred in not granting a remittitur of the entire amount for future medical expenses because Dalgliesh's primary witness on that issue, Betsy Bates, was a nurse and a "life care planner," not a doctor, and therefore not qualified to render an opinion on what Dalgliesh's future medical needs would be. [13]

[8] **[9]** We start by noting that, although Bates testified that in the aggregate Dalgliesh's future medical costs would be $741,694, the jury awarded him only forty percent of that amount. Since appellants' argument is not that the award was "excessive," however, but rather that Bates was not qualified to give *any* estimate of future medical needs, we must examine their argument. We do so recognizing that the trial court's determination whether an expert witness is qualified to give an opinion on a subject

is reviewed only for abuse of discretion. *See In re Melton,* 597 A.2d 892, 901 (D.C.1991) (en banc).

As the trial court found, Bates was an experienced nurse who had practiced "rehab nurs[ing]," working with patients who had experienced catastrophic injury or chronic illness and needed therapy. She had also worked as a "life care planner," someone who "prepares a report called a life care plan [which] projects the treatments and services and costs of what clients will need in the future depending on what their diagnosis is." The trial judge, concerned about Bates's qualification to project the kinds and duration of medical treatment Dalgliesh would need (as distinct from her competency to *price* those services), painstakingly examined each component of the projections she proffered. Only two give us any hesitation.

[10] Most of the standard medical care, equipment, and supplies Bates said Dalgliesh would need stemmed from his permanent confinement to a wheelchair as a result of the accident. The trial judge could permissibly find that a nurse specializing in rehabilitation, as Bates did, had sufficient knowledge about wheelchair-related infirmities to offer an opinion on these items. The same is true of her ***993** opinion that he would need an in-home aide to assist him with basic living needs such as cleaning, washing, and dressing. And her projection of need for physical therapy was based not solely on her own experience, but on the recommendation of Dr. Cavanaugh, Dalgliesh's treating physician. Bates also forecast, however, that Dalgliesh would need psychological counseling and particular medications, and appellants legitimately question her expertise to opine on his future needs in these specialized areas. But Dalgliesh testified that he had been treated by a psychologist for depression and encouraged by others to seek psychiatric care since the accident, and the trial judge restricted Bates to opining that Dalgliesh would benefit from short-term psychological counseling of one session a week for a six-month period. In permitting limited testimony by her on that subject, he did not abuse his discretion. Similarly, the medications for which Bates projected need were chiefly those Dalgliesh was already taking for conditions such as pain control, sleeplessness, and anxiety documented in his medical reports. Although Bates's qualification to predict that he would need those medications permanently was problematic, we will not disturb the judge's call on that particular sub-part of his careful exercise of discretion. *See Johnson v. United States,* 398 A.2d 354, 362 (D.C.1979).

Affirmed.

All Citations

765 A.2d 986

Footnotes

1 42 U.S.C. § 12101 *et seq.*

2 A MAFO brace is a "molded ankle foot orthosis" designed to support the leg while the wearer is walking.

3 "The ... area up at ... the back of the theatre is almost perfectly level and as soon as you get to the edge of the ramp it drops off.... It's ... 13 and-a-half percent right after you get past the edge of the slope." [Tr. 189]

4 The Warner Theatre was built in 1924. A historic renovation, including restoration and modernization of the interior theatre space, was begun in 1988–89 and completed in 1992.

5 Dalgliesh makes what amounts to an alternative harmless error argument based on the evidence before the jury-independent of the ADA-that appellants breached their common law duty to provide him reasonably safe access to his seat once he warned them of the danger he faced as a result of his condition. In view of our disposition of the case, we need not pass on that contention, although the prominence of the ADA standard in the testimony and the judge's instructions tend to make it a weak one.

6 Dalgliesh advanced that theory below but the trial judge rejected it. The issue is not before us on appeal.

7 *See M.A.P. v. Ryan,* 285 A.2d 310 (D.C.1971).

8 *Peigh* arose from injuries to the plaintiffs when their car struck a boxcar standing on the defendant-railroad's train tracks that ran along K Street, N.W. The primary issue was whether the trial judge properly directed a verdict for the defendant. The court of appeals first agreed with the judge's rejection of the plaintiffs' theory of negligence *per se* based on asserted violation of a police regulation that prohibited parking or storage of railroad cars on streets "for an unreasonable time." The regulation had been promulgated as a means of "expediting traffic and encouraging commerce in the city," not to promote "[t]he safety of passing motorists," "at least [not] in any sense which would make applicable the doctrine of

negligence *per se*." 92 U.S.App. D.C. at 200, 204 F.2d at 394. The court nonetheless concluded, applying common law principles of negligence, that a jury issue was presented as to whether the protruding "rear of the boxcar was so lighted as to give sufficient warning to motorists." *Id.* at 201, 204 F.2d at 394. The court nowhere stated or implied that the police regulation would be admissible as evidence of the standard of care on the warning issue.

9 As stated earlier, the slope of the ramp concededly could not be altered.

10 To the extent the trial court's instructions more broadly asked the jury to consider whether the ADA itself had been violated, appellants never objected to the instruction on that ground.

11 *See also Klein v. District of Columbia,* 133 U.S.App. D.C. 129, 131–32, 409 F.2d 164, 166–67 (1969):

> [T]he building code was an important piece of evidence as a reasonable standard of care in maintaining sidewalks in a safe condition. It should have been admitted with an explanation to the jury that they were to consider, not its violation, but rather its embodiment in the building code as indicating the requirements for a safe sidewalk.

12 As explained earlier, the jury heard testimony that the ramp slope exceeded not only the ADA standard but uniform architectural standards going back to 1961.

13 At trial appellants did not object to Nurse Bates's qualifications as a "life care planner," but rather to whether these qualified her to project Dalgliesh's future medical needs. [R. 373]

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291 A.2d 184
District of Columbia Court of Appeals.

Cheryl D. SIMMS, a minor, by her mother and next friend, Dorcas G. Simms and Dorcas G. Simms, Appellants,
v.
Herbert C. DIXON and American Liberty Insurance Company, Appellees.

No. 6148.
|
Submitted April 12, 1972.
|
Decided May 22, 1972.
|
Rehearing and Rehearing En Banc Denied July 5, 1972.

Action for damages arising out of automobile accident. The Superior Court, District of Columbia, George H. Goodrich, J., rendered judgment for defendants and appeal was taken. The Court of Appeals, Fickling, J., held that in absence of finding that **photographs** offered by plaintiff did not accurately represent plaintiff's automobile immediately following the accident and in view of conflicting evidence as to where impact occurred to plaintiff's automobile, denial of **admission** of **photographs** unless photographer testified was reversible error.

Reversed and remanded for a new trial.

West Headnotes (3)

[1] Evidence
Determination of Question of Admissibility

Admissibility of **photographs** is within discretion of trial judge because he is in best position to determine their relevance and accuracy.

4 Cases that cite this headnote

[2] Evidence
Photographs in General

The test for **admissibility** of **photographs** is whether the **photographs** accurately represent the facts allegedly portrayed in them.

7 Cases that cite this headnote

[3] Appeal and Error
Automobiles;Highways

Evidence
Photographs and Other Pictures; Sound Records and Pictures

In absence of finding that **photographs** offered by plaintiff did not accurately represent plaintiff's automobile immediately following the accident and in view of conflicting evidence as to where impact occurred to plaintiff's automobile, denial of **admission** of **photographs** because photographer had not testified was reversible error.

6 Cases that cite this headnote

Attorneys and Law Firms

*185 Edward J. Lopata and William H. Seckinger, Washington, D. C., for appellants.

John Llewellyn Hone, Washington, D. C., for appellee Dixon.

Charles B. Sullivan, Jr., Washington, D. C., for appellee American Liberty Ins. Co., adopting the brief of appellee Dixon.

Before KELLY, FICKLING and PAIR, Associate Judges.

Opinion

FICKLING, Associate Judge.

This case arises from a collision between automobiles driven by appellant Cheryl Simms and appellee Herbert Dixon. Appellant contends that the trial judge erred in refusing to **admit** into evidence six **photographs** of appellant's automobile taken after the collision. We agree, and, therefore, reverse.

During the trial there was an irreconcilable conflict between the testimony of appellant and appellee. Appellee testified that the collision occurred when appellant, suddenly and without warning, turned her vehicle into and across the path of his automobile. He specifically testified that his automobile struck appellant's automobile on the right hand side of her vehicle, '(r)ight in the center. It was a four-door car, with the posts coming up through the center, and right in about where the posts come up, in the center.'[1] Appellant testified, however, that after having properly signaled her intention to turn right from the curb lane and while entering the turn, her vehicle was struck in the rear of the right side by appellee's automobile.

During direct examination of appellant, her counsel attempted to introduce six photographs of appellant's vehicle taken after the collision. Counsel informed the trial court that his reason for introducing the photographs was to show where the impact occurred to appellant's vehicle and that he could lay the proper foundation through the appellant. The trial court refused to consider the admissibility of the photographs unless the person who actually took them first testified as to how the photographs were taken and opposing counsel was given an opportunity to cross-examine the photographer. HoweverThe photographer could not be located and the trial court repeated its ruling that appellant's testimony would not be sufficient to lay a proper foundation for the admission of the photographs. In his order denying appellant's motion for a new trial, the trial judge stated that he believed he had acted within his proper discretion in excluding the photographs because:

> This Court viewed the pictures and believes it is within its discretion to admit *186 them or bar them where it felt further clarification would be necessary. See Jones Evidence, Volume 3, 5th Edition s 627, p. 1194, which indicates that where dimensons and perspective were critical, for example: establishing an exact point of impact, and not damage, a high degree of authentication is required. . . . (R. at 107.)

We hold that judicial discretion was improperly exercised in this case.

[1] [2] Of course, the determination of whether to admit photographs is within the discretion of the trial judge because he is in the best position to determine their relevance and accuracy. Richardson v. Gregory, 108 U.S.App.D.C. 263, 267, 281 F.2d 626, 630 (1960); Mann v. Robert C. Marshall, Ltd., D.C.App., 227 A.2d 769, 771 (1967). However, Professor McCormick has stated the guidelines for determining admissibility as follows:

> (T)he prime condition on admissibility is that the photograph be identified by a witness as a portrayal of certain facts relevant to the issue, and verified by such a witness on personal knowledge as a correct representation of these facts. The witness who thus lays the foundation need not be the photographer nor need the witness know anything of the time or conditions of the taking. It is the facts represented, the scene or the object, that he must know about, and when this knowledge is shown, he can say whether the photograph correctly portrays these facts. . . . (C. McCormick, Evidence s 181, at 387 (1954).) (Emphasis added; footnotes omitted.)

Other authorities agree that the photographer is not necessary to lay a proper foundation for the admissibility of the proffered photographs. The essential test is whether the photographs accurately represent the facts allegedly portrayed in them. United States v. Hobbs, 403 F.2d 977, 978 (6th Cir. 1968); State v. Foster, 82 N.M. 573, 484 P.2d 1283, 1285 (1971); Mann v. Robert C. Marshall, Ltd., supra; People v. Herrell, 1 Mich.App. 666, 137 N.W.2d 755, 756 (1965); 3 Wigmore, Evidence s 794(3) (Chadbourn Rev.1970); 2 C. Scott, Photographic Evidence s 1141, at 608-15 (2d ed. 1969). Our examination indicates that Jones on Evidence, relied upon by the trial court, follows the foregoing authorities and does not require the testimony of the photographer to lay a foundation for the admission of a photograph to show damage to an automobile resulting from an accident.

[3] In the case at bar, the trial court examined the photographs but made no finding that they did not accurately represent the relevant facts or that he had some

question as to their accuracy. Rather, apparently out of a sense of caution because of the obvious importance of the photographs in determining whether the vehicle was struck on the right rear or in the center of the right side, the court simply required that the photographer testify. Dimensions and perspective were not critical to the admissibility of these photographs. In the absence of a finding that the proffered foundation by appellant was not an accurate representation of the vehicle immediately following the accident, it was reversible error to deny admission of the photographs.

In the circumstances of this case we find no abuse of discretion in the trial court's decision to exclude the testimony of a witness whose name was not contained in the pre-trial statements.

Reversed and remended for a new trial.

All Citations

291 A.2d 184

Footnotes

1 Tr. at 69.

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202 A.2d 783
District of Columbia Court of Appeals.

GIANT FOOD STORES, INC.,
a corporation, Appellant,
v.
Louise BOWLING, Appellee.

No. 3455.
|
Argued April 6, 1964.
|
Decided July 31, 1964.

Defendant storekeeper appealed from a judgment entered in the District of Columbia Court of General Sessions, John J. Malloy, J., for personal injuries suffered by plaintiff customer when she slipped and fell at entrance of store. The District of Columbia Court of Appeals, Hood, C. J., held that the evidence justified finding storekeeper negligent and that the admission into evidence of medical **bills** incurred in absence of testimony, other than plaintiff customer's, that they were **reasonable** and necessary was within the discretion of the trial court.

Judgment affirmed.

West Headnotes (3)

[1] **Negligence**
Buildings and Other Structures

Evidence sustained finding that defendant storekeeper was negligent in allowing unnecessarily large amounts of slush and water to accumulate on metal strip in entranceway as a result of which plaintiff customer slipped and fell.

Cases that cite this headnote

[2] **Negligence**
Care Required of Store and Business Proprietors

A storekeeper is not an insurer of its customers but does owe them the duty of using **reasonable** care for their safety.

1 Cases that cite this headnote

[3] **Damages**
Expenses

Admission into evidence of medical **bills** incurred by plaintiff for injuries, in absence of testimony, other than hers, that these **bills** were **reasonable** and necessary was within discretion of trial court, although certain **bills** covered services rendered a considerable time after the injury.

8 Cases that cite this headnote

Attorneys and Law Firms

*784 William T. Clague, Washington, D. C., with whom William A. Mann, Washington, D. C., was on the brief, for appellant.

Charles B. Sullivan, Jr., Washington, D. C., for appellee.

Before HOOD, Chief Judge, and QUINN and MYERS, Associate Judges.

Opinion

HOOD, Chief Judge.

This appeal is from a judgment for personal injuries suffered by appellee when she slipped and fell at the entrance of one of appellant's stores. She claimed that her fall was due to an unusual and unnecessarily large accumulation of slush and water on the metal strip in the entranceway.

[1] [2] Appellant first contends that the evidence did not justify a finding of negligence on its part. We do not agree. A storekeeper is not an insurer of its customers but does owe them the duty of using **reasonable** care for their safety. The evidence here presented a question for the jury whether under the circumstances appellant had failed in that duty.

[3] Appellant also contends that the trial court erroneously admitted in evidence medical **bills** incurred by appellee in the absence of testimony, other than hers, that those **bills** were **reasonable** and necessary. In Nunan

v. Timberlake, 66 App.D.C. 150, 153, 85 F.2d 407, 410 (1936), it was said:

> 'We think the better view is that in a suit in tort for personal injury the plaintiff makes a *prima facie* case by proving the professional services rendered and the amount of the bill paid or incurred.'

Appellant argues that this rule applies to bills incurred immediately following the injury and that certain of the bills here covered services rendered a considerable length of time after the injury. We think the admission of the bills, in the absence of suspicious circumstances, was within the discretion of the trial court.

Affirmed.

All Citations

202 A.2d 783

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147 A.3d 751
District of Columbia Court of Appeals.

Motorola Inc., et al., Appellants,
v.
Michael Patrick Murray, et al., Appellees.

No. 14-CV-1350
|
Argued En Banc November 24, 2015
|
October 20, 2016

Synopsis

Background: Action was brought against cell phone manufacturers, service providers, and trade associations, alleging that long-term exposure to cell phone radiation caused brain tumors. The Superior Court, Frederick H. Weisberg, J., 2014 WL 5817891 and 2014 WL 5817890, held evidentiary hearings on admissibility of plaintiffs' proffered expert testimony, concluded that some, but not all, of the testimony on general causation was admissible under Dyas/*Frye* evidentiary standard but most, if not all, of experts would probably be excluded under *Daubert* standard, and certified question of whether *Daubert* standard should be adopted.

[Holding:] The Court of Appeals, Fisher, J., held that *Daubert* standard, rather than Dyas/*Frye* standard, governed the admission of expert testimony in civil and criminal cases.

Question answered and cases remanded for further proceedings.

Easterly, J., filed concurring opinion.

Appeal from the Superior Court of the District of Columbia, (CAB-8479-01), (Hon. Frederick H. Weisberg, Trial Judge)

Attorneys and Law Firms

Terrence J. Dee argued for appellants.

James F. Green and Jeffrey B. Morganroth argued for appellees.

Many additional counsel were on the briefs for the parties or filed briefs amicus curiae. Their names are listed in an appendix to this opinion.

Before Washington, Chief Judge; and Glickman, Fisher, Blackburne-Rigsby, Thompson, Beckwith, and Easterly, Associate Judges.

Opinion

Concurring opinion by Associate Judge EASTERLY at page 759.

***752** Fisher, Associate Judge:

[1] For decades this court has used the *Dyas/Frye* test [1] to govern the admissibility of expert testimony. We now are sitting en banc to consider whether we should abandon that test in favor of the standards embodied in Rule 702 of the Federal Rules of Evidence. For the reasons explained below, we adopt Rule 702. [2]

I. The Factual and Procedural Background

The plaintiffs in these thirteen cases have sued numerous cell phone manufacturers, service providers, and trade associations, alleging that long-term exposure to cell-phone radiation causes brain tumors. Judge Frederick H. Weisberg held four weeks of evidentiary hearings on the admissibility of the expert testimony offered by the plaintiffs. [3] He concluded that, based on the present record, "some, but not all, of Plaintiffs' proffered expert testimony on general causation is admissible under the *Frye/Dyas* evidentiary standard," but "most, if not all, of Plaintiffs' experts would probably be excluded under the Rule 702/*Daubert* standard ...." [4] Judge Weisberg then certified the following question of law for interlocutory appeal: "whether the District of Columbia should adopt Federal Rule of Evidence 702 (or a revised *Frye* standard) for the admissibility of expert evidence." *See* D.C. Code § 11–721 (d) (2012 Repl.). We granted appellants' motion for interlocutory review. [5]

II. Legal Analysis

Our role at this stage of the proceedings is limited, but consequential. It is not our task to affirm or reverse Judge Weisberg's ruling. [6] For this reason, we will not attempt to duplicate his learned discussion of the underlying science or his extended summary of the testimony he heard. Instead, we must decide whether to change the legal standard that governs the admission of expert testimony.

A. The *Dyas/Frye* Test

In this jurisdiction, the admission of expert testimony has been governed by the legal principles set forth in *Frye v. United States* and *Dyas v. United States.* In the seminal case of *Frye*, the trial court excluded evidence that the defendant had ***753** taken and passed an early form of a lie-detector test. 293 F. 1013. Upholding the ensuing murder conviction, the Court of Appeals of the District of Columbia articulated a test for admitting expert testimony. That test was thereafter widely adopted in federal and state courts:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Id. at 1014.

Later, in *Dyas*, we expanded upon *Frye* and adopted a three-part test for determining whether to admit expert testimony:

> (1) the subject matter "must be so distinctively related to some science, profession, business or occupation *as to be beyond the ken of the average layman*"; (2) "the witness must have sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference *will probably aid the trier in his search for truth*"; and (3) expert testimony is inadmissible if "the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert."

376 A.2d at 832 (quoting *McCormick on Evidence*, § 13 at 29-31 (E. Cleary, 2d ed. 1972)). "The third criterion [of *Dyas*] incorporates the ... *Frye* test, under which scientific testimony is admissible only if the theory or methodology on which it is based has gained general acceptance in the relevant scientific community." (*John*) *Jones v. United States*, 990 A.2d 970, 977 (D.C. 2010).

[2] "[B]ecause expert or scientific testimony possesses an aura of special reliability and trustworthiness, the proffer of such testimony must be carefully scrutinized." *Ibn–Tamas v. United States*, 407 A.2d 626, 632 (D.C. 1979) (internal quotation marks and citation omitted). However, under *Dyas/ Frye*, this inquiry "begins—and ends—with a determination of whether there is general acceptance of a particular scientific methodology, not an acceptance, beyond that, of particular study results based on that methodology." *Id.* at 638; *see also President and Directors of Georgetown College v. Wheeler*, 75 A.3d 280, 291 (D.C. 2013) ("The third *Dyas* requirement focuses not on the acceptance of a particular conclusion derived from the methodology, but rather on the acceptance of the methodology itself." (ellipsis, brackets, and internal quotation marks omitted)).

"General acceptance means just that; the answer cannot vary from case to case." (*Nathaniel*) *Jones v. United States*, 548 A.2d 35, 40 (D.C. 1988). "If the technique has gained such general acceptance, we will accept it as presumptively reliable and thus generally admissible into evidence." *Id.* at 39. As Judge Weisberg explained, under the *Dyas/Frye* test "the question of whether an expert used a particular generally accepted methodology correctly is not at issue when determining the ... admissibility" of the expert's testimony. *See, e.g.*, *United States v. Porter*, 618 A.2d 629, 636 (D.C. 1992) ("Any failure by the scientists to adhere to the appropriate procedure is, of course, a proper subject

of inquiry, but does not raise an issue which implicates *Frye*.").

B. The *Daubert* Trilogy

In 1993 the Supreme Court held that the "general acceptance" test had been superseded *754 by the Federal Rules of Evidence, which were enacted half a century after *Frye* was decided. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Accordingly, "[t]hat austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials." *Id.* at 589, 113 S.Ct. 2786. Interpreting Rule 702, the "specific" rule governing expert testimony, the decision in *Daubert* in some respects relaxed traditional barriers to opinion testimony. *Id.* at 588, 113 S.Ct. 2786 ("[A] rigid general acceptance requirement would be at odds with the liberal thrust of the Federal Rules and their general approach of relaxing the traditional barriers to opinion testimony." (internal quotation marks omitted)). The Court emphasized, however, that "the trial judge must [still] ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589, 113 S.Ct. 2786. Here, of course, the Court was referring "to *evidentiary* reliability—that is, trustworthiness." *Id.* at 590, 113 S.Ct. 2786 n.9.

Therefore, when a party proffers expert scientific testimony, the trial court must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." 509 U.S. at 592-93, 113 S.Ct. 2786. Although it eschewed "a definitive checklist or test," *id.* at 593, 113 S.Ct. 2786, the Court in *Daubert* did suggest factors to be considered, including whether the theory or technique has been tested, whether it "has been subjected to peer review and publication," "the known or potential rate of error," and "the existence and maintenance of standards controlling the technique's operation." *Id.* at 593–94, 113 S.Ct. 2786. "Finally, 'general acceptance' can yet have a bearing on the inquiry." *Id.* at 594, 113 S.Ct. 2786. Nevertheless, the Court cautioned, the inquiry is "a flexible one." *Id.* "The focus ... must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 595, 113 S.Ct. 2786.

The Court made clear that it did not intend for the trial judge's more refined gatekeeping role to displace the normal tools of the adversary system. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 596, 113 S.Ct. 2786. "[I]n practice," however, "a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations." *Id.* at 597, 113 S.Ct. 2786.

The Court also pointed out that Rule 702 does not operate in isolation. To perform the gatekeeping function, the trial court normally will apply Rule 104 (a) (preliminary questions, such as whether a witness is qualified or evidence is admissible); Rule 703 (the bases of an expert's opinion); and Rule 403 (permitting the exclusion of relevant evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence").[7] 509 U.S. at 592–95, 113 S.Ct. 2786. When discussing Rule 403, the Court endorsed *755 this explanation: "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." 509 U.S. at 595, 113 S.Ct. 2786 (quoting Hon. Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)).

Expressing confidence "that federal judges possess the capacity to undertake this review [of expert testimony for evidentiary reliability]," 509 U.S. at 593, 113 S.Ct. 2786, the Court summarized:

> "General acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence —especially Rule 702—do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at

> hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.

Id. at 597, 113 S.Ct. 2786.

In two subsequent decisions, the Supreme Court refined its analysis in *Daubert*, now acknowledging that "conclusions and methodology are not entirely distinct from one another." *General Electric Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997). "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Id.* Thus, "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Id.* The abuse of discretion standard of review applies, regardless of whether the trial court decided "to admit or exclude scientific evidence." *Id.*

[3] **[4]** "*Daubert*'s general holding—setting forth the trial judge's general 'gatekeeping' obligation—applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (quoting Fed. R. Evid. 702). Moreover,

> the test of reliability is "flexible," and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination.

Id. at 141–42, 119 S.Ct. 1167. In other words, "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Id.* at 152, 119 S.Ct. 1167. The objective of the gatekeeping requirement "is to make certain that an expert ... employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.*

Daubert and its progeny thus focus not only on methodology, as *Frye* and *Dyas* do, but also on the application of that methodology in a particular case. As the Court explained in *Kumho Tire*, "Rule 702 grants the district judge the discretionary authority, reviewable for its abuse, to determine reliability in light of the particular facts and circumstances of the particular case." 526 U.S. at 158, 119 S.Ct. 1167. Applying this principle, the Court concluded in both *Joiner* and *Kumho Tire* that the trial court had not abused its discretion by excluding the proffered expert testimony. *See Joiner*, 522 U.S. at 146-47, 118 S.Ct. 512; ***756** *Kumho Tire*, 526 U.S. at 158, 119 S.Ct. 1167. It is thus fair to say that the impact of the *Daubert* trilogy has been mixed: These cases relax the initial barriers to the admission of expert testimony, but at the same time emphasize the trial judge's robust gatekeeping function.

C. Rule 702, Amended

Although the *Daubert* trilogy represented the Supreme Court's construction of Rule 702, that rule and its commentary were in turn amended (in 2000) to reflect the Supreme Court's guidance. Rule 702 (as amended stylistically in 2011) now provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. In making our decision, we will focus on this articulation of the governing principles.

D. Why We Adopt Rule 702

[5] The parties and *amici* have recommended three options for our consideration: (1) retain the *Dyas/Frye* test, by which we currently abide; (2) adopt Federal Rule 702, as amended to reflect the *Daubert* trilogy; or

(3) craft a revised version of the *Dyas/Frye* test. There are many criticisms of the first two tests. On the one hand, critics of *Dyas/ Frye* claim that it is antiquated and out-of-step with modern science. It avoids, even forbids, looking at the crucial question of whether the testimony offered in a particular case is reliable. Some say that *Frye* forces unqualified jurors to decide which scientific theories should be applied to the particular case. One court has concluded that *Frye* "is both unduly restrictive and unduly permissive." *State v. Coon*, 974 P.2d 386, 394 (Alaska 1999). "[I]t excludes scientifically reliable evidence which is not yet generally accepted, and admits scientifically unreliable evidence which although generally accepted, cannot meet rigorous scientific scrutiny." *Id.* at 393–94. Judge Weisberg also concluded that *Frye* "is not a good gatekeeper for inductive sciences such as epidemiology or psychology."

On the other hand, Rule 702 and *Daubert* are faulted for producing inconsistent results, for making unqualified judges evaluate the work of scientists, and for invading the province of the jury. We acknowledge that following a uniform rule does not ensure uniform results. There are many trial judges and many types of science. Moreover, the criteria for determining reliability are flexible, and the decisions of trial judges are reviewed only for abuse of discretion. Some inconsistency is inevitable.

Having studied the matter at great length, Judge Weisberg expressed his own conclusion: "[A]t the risk of over-simplification[,] if a reliable, but not yet generally accepted, methodology produces 'good science,' *Daubert* will let it in, and if an accepted methodology produces 'bad science,' *Daubert* will keep it out; conversely, under *Frye*, as applied in this jurisdiction, even if a new methodology produces 'good science,' it will usually be excluded, but if an accepted methodology produces 'bad science,' it is likely to be admitted."

Our choice boils down to this: Like the "general acceptance" test, Rule 702 is concerned with the reliability of the "principles ***757** and methods" applied by the expert. Fed. R. Evid. 702 (c). But Rule 702 (d) goes further and expressly requires the court to determine whether "the expert has reliably applied the principles and methods to the facts of the case." We conclude that Rule 702, with its expanded focus on whether reliable principles and methods have been reliably applied, states a rule that is preferable to the *Dyas/Frye* test.[8] The ability to focus on the reliability of principles and methods, and their application, is a decided advantage that will lead to better decision-making by juries and trial judges alike.

We have considered revising the *Frye* test, as some jurisdictions have done,[9] but there are substantial benefits to be gained from adopting a test that is widely used. *See Johnson v. United States*, 683 A.2d 1087, 1100 (D.C. 1996) (en banc) (noting "the advantage that uniformity with the federal rule and the vast majority of state rules affords for interpretation and application"). We can learn from the decisions of other courts which apply Rule 702 or its state counterparts. Nevertheless, we are not proceeding with any illusions that the cases are uniform or even consistent. Nor will the transition be easy. But we are not the first jurisdiction to make this change, and the Advisory Committee Notes to Rule 702 provide helpful guidance for applying the rule. Echoing sentiments from *Daubert*, 509 U.S. at 593, 113 S.Ct. 2786, we are confident that judges of the Superior Court, like their Article III counterparts, are fully capable of performing the gatekeeping function.

E. Applying Rule 702

Properly performing the gatekeeping function will require a delicate touch. "[T]he trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." Fed. R. Evid. 702 advisory committee's notes to 2000 amendments (quoting *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996)). But, as *Joiner* and *Kumho Tire* clearly demonstrate, the trial court will have the discretion (informed by careful inquiry) to exclude some expert testimony. The goal is to deny admission to expert testimony that is not reliable, but to admit competing theories if they are derived from reliable principles that have been reliably applied.

"When a trial court, applying [Rule 702], rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. [Rule 702] is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise." Fed. R. Evid. 702 advisory committee's notes to 2000 amendments. Indeed, we expect that many cases will feature expert witnesses espousing different

views of the evidence. Their testimony will be tested by the adversary process and evaluated by the jury.

What about cases in which the experts on one side are in a distinct minority? That ***758** may well raise a red flag, for "[w]hen a scientist claims to rely on a method practiced by most scientists, yet presents conclusions that are shared by no other scientist, the [trial] court should be wary that the method has not been faithfully applied." *Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 598 (9th Cir. 1996) (cited in Fed. R. Evid. 702 advisory committee's notes to 2000 amendments). But minority status is not a proxy for unreliability. The trial court still will need to determine whether the opinion "is the product of reliable principles and methods[,] ... reliably applied." Fed. R. Evid. 702 (c), (d).

One considerable cost of adopting Rule 702 is that judges and lawyers will have to adjust to new rules. There will also be the question of what to do about types of expert testimony that have been commonly admitted under *Dyas/Frye*. Must this jurisdiction revisit the admissibility of every form of expert testimony? Both *Daubert* and the Advisory Committee Notes to Rule 702 provide some useful guidance.

There is no "grandfathering" provision in Rule 702. However, *Daubert* commented that " 'general acceptance' can ... have a bearing on the [reliability] inquiry." 509 U.S. at 594, 113 S.Ct. 2786. "Widespread acceptance can be an important factor in ruling particular evidence admissible, and a known technique which has been able to attract only minimal support within the community may properly be viewed with skepticism." *Id.* (internal quotation marks and citation omitted). Moreover, "the trial judge has the discretion 'both to avoid unnecessary "reliability" proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.' " Fed. R. Evid. 702 advisory committee's notes to 2000 amendments (quoting *Kumho Tire*, 526 U.S. at 152, 119 S.Ct. 1167). What the court may not do is reflexively admit expert testimony because it has become accustomed to doing so under the *Dyas/Frye* test.

Plaintiffs lament the enormous amounts of time and money that have been spent on discovery and pretrial litigation, and they fault defendants for agreeing to use the *Dyas/Frye* test in these cases. But the defendants could not have done otherwise because *Dyas* and *Frye* are binding precedent until revisited by this court sitting en banc. *See M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971). It is also highly doubtful that we would have accepted an interlocutory appeal until we were presented with a developed record. See note 5, above.

Plaintiffs also argue that any new rule we adopt should not apply to these cases, but such an outcome would be inconsistent with the very purpose for entertaining an interlocutory appeal. See note 5, above. Judge Weisberg explained that if this court adopted a new rule governing the admissibility of expert testimony, he "could then allow whatever additional discovery might be necessary to place Plaintiffs in a fair position to litigate that issue."

III. Conclusion

We adopt Rule 702 to apply to the trial of this case and to any civil or criminal case [10] in which the trial begins after the ***759** date of this opinion. We will consider at a later time, when the issue is properly presented, whether the standard applies to cases that have already been tried but are not yet final on direct appeal. *See generally Davis v. Moore*, 772 A.2d 204 (D.C. 2001) (en banc). These cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Easterly, Associate Judge, concurring:
I join the opinion of the court adopting Federal Rule of Evidence 702 as the rule for the admission of expert testimony in criminal and civil cases. With this decision, trial courts will be called upon to scrutinize an array of forensic expert testimony under new, more scientifically demanding standards. As the opinion of the court states, "[t]here is no 'grandfathering' provision in Rule 702," and, under the new rule we adopt, courts may not "reflexively admit expert testimony because it has become accustomed to doing so under the *Dyas/Frye* test." *Ante*, at 758.

Fortunately, in assessing the admissibility of forensic expert testimony, courts will have the aid of landmark reports that examine the scientific underpinnings of

certain forensic disciplines routinely admitted under *Dyas/Frye*, most prominently, the National Research Council's congressionally-mandated 2009 report *Strengthening Forensic Science in the United States: A Path Forward*,[1] and the President's Council of Advisors on Science and Technology's (PCAST) 2016 report *Forensic Science in the Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* [hereinafter PCAST Report].[2] These reports provide information about best practices for scientific testing, an objective yardstick against which proffered forensic evidence can be measured, as well as critiques of particular types of forensic evidence. In addition, the PCAST Report contains recommendations for trial judges performing their gatekeeping role under Rule 702:

> (A) When deciding the admissibility of [forensic] expert testimony, ... judges should take into account the appropriate scientific criteria for assessing scientific validity including: (i) foundational validity,[3] with respect to the requirement under Rule 702(c) that testimony is the product of reliable principles and methods; and (ii) validity as applied,[4] with respect to [the] requirement under Rule 702(d) that an expert has reliably applied the principles and methods to the facts of the case.
>
> (B) ... [J]udges, when permitting an expert to testify about a foundationally valid feature-comparison method, should ensure that testimony about the accuracy of the method and the probative value of proposed identifications is scientifically valid in that it is limited to what the empirical evidence supports. Statements ***760** suggesting or implying greater certainty are not scientifically valid and should not be permitted. In particular, courts should never permit scientifically indefensible claims such as: "zero," "vanishingly small," "essentially zero," "negligible," "minimal," or "microscopic" error rates; "100 percent certainty" or proof "to a reasonable degree of scientific certainty;" identification "to the exclusion of all other sources;" or a chance of error so remote as to be a "practical impossibility."

PCAST Report, *supra*, at 19; *see also id.* at 142–45; *Gardner v. United States*, 140 A.3d 1172, 1184 (D.C. 2016) (imposing limits on experts' statements of certainty).

As the opinion of the court explains, the ultimate concern of the courts is with evidentiary reliability. *Ante*, at 7. But, "[i]n a case involving scientific evidence"—or evidence held out as scientific evidence—"*evidentiary reliability* will be based on *scientific validity*." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 n.9, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *see also* PCAST Report, *supra*, at 19 (explaining that "scientific validity" encompasses both "foundational validity" and "validity as applied").

APPENDIX

LIST OF COUNSEL

Terrence J. Dee argued for appellants. The following were on the brief: *Laura Sierra*, *Scott A. Elder* (pro hac vice pending), and *David Venderbush* (admitted pro hac vice) for appellant Cellco Partnership d/b/a Verizon Wireless, Bell Atlantic Mobile, Inc., and Verizon Wireless Inc.; *Jennifer G. Levy*, *Terrence J. Dee* (admitted pro hac vice), and *Michael B. Slade* (admitted pro hac vice) for appellant Motorola, Inc.; *Thomas Watson*, *Curtis S. Renner*, and *Lauren Boucher* for appellants AT&T Inc., AT&T Wireless Services Inc., Cingular Wireless LLC, and related entities; *Paul Scrudato* (pro hac vice pending) and *Thomas M. Crispi* (pro hac vice pending) for appellant Apple Inc., a defendant in other related cases Nos. 2012 CA 008537 B, 2013 CA 007805 B, 2013 CA 007620 B, and 2014 CA 0004171 B; *Seamus C. Duffy* (pro hac vice pending) and *Michael Daly* (pro hac vice pending) for appellants AT&T Inc., AT&T Wireless Services Inc., Cingular Wireless LLC, and related entities; *Howard N. Feldman* for appellant Audiovox Communications Corporation; *Howard D. Scher*, *Patrick T. Casey*, and *John Korns* for appellant Cellular One Group; *Michael D. McNeely* and *Vicki L. Dexter* for appellant Cellular Telecommunications & Internet Association; *Paul Farquharson* and *Scott Phillips* for appellant Cricket; *Ralph A. Taylor, Jr.*, and *Rosemarie Ring* (admitted pro hac vice in D.C. Superior Court only) for appellant HTC America, Inc., a defendant in other related cases Nos. 2012 CA 008533 and 2014 CA 002797; *Sean Reilly* for appellant LG Electronics MobileComm U.S.A., Inc., a defendant in other related cases Nos. 2014 CA 002521, 2012 CA 003241, 2012 CA 004068, 2013 CA 007620, 2013 CA 008192, 2014 CA 001425, and 2014 CA 002797; *Steven M. Zager*, *Amanda R. Johnson*, *Stanley E. Woodward Jr.*, and *Richard W. Stimson* (admitted pro

hac vice) for appellant Microsoft Mobile Oy; *Francis A. Citera* (pro hac vice pending), *Matthew A.C. Zapf* (pro hac vice pending), and *Precious Murchison* for appellants Qualcomm Inc. and Sony Electronics Inc.; *John B. Isbister* and *Jaime W. Luse* for appellant Samsung Telecommunications America, LLC; *J. Stan Sexton* (pro hac vice pending), *Patrick N. Fanning* (pro hac vice pending), and *John A. Turner, III*, for appellants Sprint Nextel Corporation f/k/a Nextel Communications and Sprint Spectrum, L.P. d/b/a Sprint PCS; ***761** *Paul H. Vishny*, *Paul E. Freehling* (admitted pro hac vice), and *Rhett E. Petcher* for appellant Telecommunications Industry Association; *Michael Scoville* and *Mary Rose Hughes* for appellant T-Mobile USA, Inc.; and *Eugene A. Schoon* (admitted pro hac vice) and *Tamar B. Kelber* for appellant United States Cellular Corporation.

James F. Green and *Jeffrey B. Morganroth* argued for appellees. The following were on the brief: *James F. Green* and *Michelle A. Parfitt* co-counsel for appellees Prischman, Kidd, Solomon, Brown, and Noroski; *Jeffrey B. Morganroth*, *Mayer Morganroth*, and *Jill A. Gurfinkel* lead counsel for appellees Murray, Cochran, Agro, Keller, Schwamb, Schofield, and Bocook, and co-counsel for Marks; *Hunter Lundy*, *Rudie R. Soileau Jr.*, and *Kristie Hightower* lead counsel for appellees Prischman, Kidd, Solomon, and Brown, and co-counsel for Marks; *Victor H. Pribanic* and *Matthew Doebler* lead counsel for appellee Noroski; *Jeffrey S. Grand* co-counsel for appellee Solomon; *Laura Bishop Knoll*, *Jerold Edward Knoll*, *Jerold Edward Knoll, Jr.*, and *Edmond H. Knoll* co-counsel for appellees; and *Steven R. Hickman* co-counsel for appellees.

Brief of *amicus curiae* Business and Medical Coalition in support of appellants was filed by *Steven P. Lehotsky* and *Sheldon Gilbert* for Chamber of Commerce of the United States of America, *Amar D. Sarwal* for Association of Corporate Counsel, and *Joe G. Hollingsworth* and *Eric G. Lasker* for all amici.

Brief of *amici curiae* D.C. Defense Lawyers' Association and DRI in support of appellants, reversal, and the adoption of Rule 702 and *Daubert* to modernize the standard for admission of expert opinions was filed by *Kelly Hughes Iverson*, *Kamil Ismail*, *Craig S. Brodsky*, *Erin Christen Miller*, and *Meghan Hatfield Yanacek* for D.C. Defense Lawyers' Association; and *John Parker Sweeney* for DRI—The Voice of the Defense Bar.

Brief of amicus curiae Product Liability Advisory Council, Inc., in support of appellants' request for reversal of order admitting expert testimony was filed by *Terri S. Reiskin*, *Marilyn S. Chappell*, *L. Michael Brooks, Jr.*, *Mary A. Wells*, and *Hugh F. Young, Jr.*

Brief of *amicus curiae* Public Defender Service in support of appellants was filed by *James Klein*, *Alice Wang*, *Jason Tulley*, and *Emily Voshell*, Public Defender Service.

Brief of *amicus curiae* Trial Lawyers Association of Metropolitan Washington, D.C., in support of appellees and affirmance was filed by *John Vail.*

Joint Brief of *amici curiae* United States of America and the District of Columbia in support of appellants was filed by *Ronald C. Machen Jr.*, United States Attorney at the time the brief was filed, and *Elizabeth Trosman* and *John P. Mannarino*, Assistant United States Attorneys; and *Karl A. Racine*, Attorney General for the District of Columbia, *Todd S. Kim*, Solicitor General, and *Loren L. AliKhan*, Deputy Solicitor General.

All Citations

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Footnotes

1 *See Dyas v. United States*, 376 A.2d 827 (D.C. 1977); *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

2 In the absence of legislation prescribing rules of evidence, "this court is the final authority for establishing the evidentiary rules for the Superior Court of the District of Columbia." *Laumer v. United States*, 409 A.2d 190, 195 n.7 (D.C. 1979) (en banc).

3 Judge Weisberg heard "testimony from plaintiffs' eight experts and defendants' four rebuttal experts, received approximately 280 exhibits containing thousands of pages of documents, and reviewed hundreds of pages of legal briefing both before and after the hearing."

4 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

5 The statute governing our jurisdiction permits an interlocutory appeal in a civil case when a judge of the Superior Court states in writing his or her opinion "that the ruling or order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that an immediate appeal from the ruling or order may materially advance the ultimate termination of the litigation or case." D.C. Code § 11–721 (d). This court may, in its discretion, permit the appeal to be taken. *Id.*; *see also In re J.A.P.*, 749 A.2d 715, 717 (D.C. 2000).

6 Appellants note that their appeal "does not challenge any specific findings related to a particular expert." Brief for Appellants at 8.

7 This court has adopted Rule 703 (*In re Melton*, 597 A.2d 892, 901 & n.10 (D.C. 1991) (en banc)), and Rule 403 (*Johnson v. United States*, 683 A.2d 1087, 1100 (D.C. 1996) (en banc)). Although we have not formally adopted Rule 104, "it accurately states the rule of evidence we generally follow." *Jenkins v. United States*, 80 A.3d 978, 991 (D.C. 2013).

8 Our decision to adopt Rule 702 means, among other things, that we will no longer ask whether the subject matter is "beyond the ken of the average layman." *Dyas*, 376 A.2d at 832. The proper inquiry is whether "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702 (a).

9 *See, e.g.*, *Blackwell v. Wyeth*, 408 Md. 575, 971 A.2d 235, 241–43, 250–56 (2009); *Cornell v. 360 West 51st St. Realty, LLC*, 22 N.Y.3d 762, 986 N.Y.S.2d 389, 9 N.E.3d 884, 896–97 (2014); *Betz v. Pneumo Abex LLC*, 615 Pa. 504, 44 A.3d 27, 58 (2012).

10 The United States Attorney's Office and the Office of the Attorney General for the District of Columbia prosecute the criminal cases that are heard in the Superior Court. The Public Defender Service represents the defendants in many of those cases. All three offices have filed briefs *amicus curiae* urging us to adopt Rule 702. No party or *amicus* has asked us to adopt a different rule for criminal cases.

1 Available at https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf.

2 Available at https://www.whitehouse.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf.

3 "Foundational validity for a forensic-science method requires that it be shown, based on empirical studies, to be *repeatable*, *reproducible*, and *accurate*, at levels that have been measured and are appropriate to the intended application." PCAST Report, *supra*, at 4. If a method has foundational validity it "can, *in principle*, be reliable." *Id.* at 4–5.

4 "Validity as applied means that the method has been reliably applied *in practice*." *Id.* at 5. It means that the expert has "reliably applied ... [foundationally valid] principles and methods to the facts of the case." *Id.*

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Tab 6

818 A.2d 974
District of Columbia Court of Appeals.

Robert HARDI, M.D., and Robert Hardi, M.D., P.C., Appellants,
v.
Genevieve D. MEZZANOTTE, Appellee.

No. 99–CV–1386, 99–CV–1540.
|
Argued May 8, 2001.
|
Decided March 20, 2003.

Patient brought medical malpractice action against physician, alleging negligence in failing to diagnose her with diverticulitis, an infectious process affecting the colon. The Superior Court, District of Columbia, Judith Retchin, J., and Steffen W. Graae, J., entered summary judgment for patient and awarded damages. Physician appealed. The Court of Appeals, Wagner, C.J., held that: (1) cause of action for medical malpractice accrued, and three-year limitations period began to run, when it was determined surgically that patient's illness was a result of diverticulitis and a ruptured diverticular abscess; (2) substantial evidence supported trial court's finding that physician's failure to diagnose patient with diverticulitis and prescribe antibiotics was the proximate cause of patient's injuries; and (3) as a matter of first impression, collateral source rule did not preclude patient from recovering unpaid and written-off medical expenses as part of compensatory damages.

Affirmed.

Attorneys and Law Firms

*976 Lee T. Ellis, Jr., with whom Ralph G. Blasey, III, and Elizabeth A. Scully were on the brief, Washington, DC, for appellants.

Henry M. Lloyd, Washington, DC, with whom William C. Casano was on the brief, for appellee.

Before WAGNER, Chief Judge, and STEADMAN and GLICKMAN, Associate Judges.

Opinion

WAGNER, Chief Judge:

This appeal arises out of a claim for medical malpractice filed originally by appellee, Genevieve D. Mezzanotte, against appellants, Robert Hardi, M.D., his professional corporation, Robert Hardi, M.D., P.C. (sometimes collectively referred to as Dr. Hardi), and another physician, Dr. Joel *977 Match. After a bench trial, based upon the record of evidence adduced at an earlier trial, which resulted in a verdict for Dr. Match and a hung jury on appellee's claim against appellants, the trial court entered judgment for appellee and awarded costs. Appellants argue that the trial court erred in: (1) granting summary judgment and striking their statute of limitations defense; (2) finding that proximate cause was established without adequate evidentiary support; (3) including in the damages award medical bills written-off by appellee's health care providers in violation of the collateral source rule; and (4) awarding costs which are not recoverable, including those resulting from the earlier mistrial. We affirm.

I.

A. *Factual Background*

According to the evidence, appellee was treated by Dr. John O'Connor in 1990 for diverticulitis, an infectious process affecting the colon. In January and February of 1994, she experienced symptoms which she believed to be a recurrence of that illness. After trying without success to reach Dr. O'Connor, she saw Dr. Hardi, a Board-certified gastroenterologist, on February 3, 1994, and informed him of her suspicions and provided him with a copy of an x-ray report that Dr. O'Connor ordered after he treated her for diverticulitis. The doctor took appellee's history and noted on her chart that Dr. O'Connor had treated her previously with antibiotics for diverticulitis. During his physical examination of appellee, Dr. Hardi felt a mass which he thought to be of gynecological origin. However, he also understood that the mass could be caused by a recurrence of diverticulitis. His medical chart does not show alternate likely causes of appellee's condition or specify diverticulitis as one such cause. Dr. Hardi did not order a CAT–Scan, a test typically ordered

when diverticulitis may be present, or initiate a course of antibiotic therapy. He informed appellee that her problems were gynecological in nature and referred her to Dr. Joel Match, a gynecologist, for a work-up with respect to the mass.

On February 8, 1994, Dr. Match saw appellee. He ordered a CA–125 blood test, which he testified is 80% reliable in predicting the existence of gynecological cancer. The test was negative for the disease. The report from the ultrasound examination, which Dr. Match ordered, revealed that there was a mass in the left lower quadrant of appellee's abdomen, but it could not be determined whether it was diverticular or gynecological in origin. Therefore, the radiologist recommended a "close clinical and sonographic follow-up." Notwithstanding the results of the tests, Dr. Match concluded that appellee had ovarian cancer and scheduled a complete hysterectomy (the surgical removal of her uterus, fallopian tubes and ovaries) for March 1994. Dr. Match informed Dr. Hardi of the test results. Although the blood test did not reveal cancer, and the ultrasound exam did not reveal an enlarged uterus, Dr. Hardi "cleared" the performance of gynecological surgery. Dr. Match requested that Dr. Hardi undertake further testing within his specialty in order to rule out the possibility that appellee was suffering from any gastrointestinal diseases.

On February 21, 1994, Dr. Hardi performed a sigmoidoscopy on appellee, which entailed the introduction of an endoscope into her sigmoid colon for purposes of observation. He was unable to complete the procedure after multiple attempts because of an apparent obstruction of the colon caused by the diverticulitis. Appellee's expert witness, Dr. Robert Shapiro, explained that such an obstruction is a "red flag," telling the doctor "there is ***978** something wrong with the bowel." Dr. Hardi scheduled a more intrusive procedure, a colonoscopy, performed under general anesthesia, for March 2, 1994. He attempted the procedure multiple times, without success, due to the obstruction, and desisted finally because of "fear of perforation." He ordered Dr. Odenwald, a Sibley Hospital radiologist, to perform a third exploratory procedure, a barium enema of the sigmoid colon, but it could not be completed due to the same obstruction. Dr. Odenwald discussed with Dr. Hardi the possibility that the obstruction resulted from a gastrointestinal disease rather than gynecological cancer.

Immediately following the exploratory procedures on March 2, 1994, appellee's condition deteriorated markedly. These procedures had exerted pressure on her sigmoid colon and caused the spread of her diverticular infection. Appellee was admitted as an emergency patient to Columbia Hospital for Women on March 7, 1994. By then, her diverticular abscess had ruptured, resulting in peritonitis (*i.e.,* infection of the abdomen). Dr. Match ordered a CAT–Scan on March 7, 1994. However, appellee's condition precluded the use of contrast media. Dr. Match also ordered an ultrasound that day, which proved to be non-diagnostic. On March 8, 1994, appellee had surgery which involved removal of her noncancerous reproductive organs. During surgery, multiple infectious abscesses and pus were encountered. Dr. Hafner, the general surgeon who performed the operation, removed the infectious matter from the patient's abdomen, excised the affected portion of her bowel, and performed a colostomy. After surgery, Dr. Hafner informed appellee's husband that she had diverticulitis, not gynecological cancer. Appellee had a slow recovery due to peritonitis and associated complications, and ultimately, she was required to undergo four additional surgical procedures, involving a "take-down" of her colostomy and the correction of hernias caused by the related weakening of her abdominal wall. These surgical procedures extended into March 1996. Appellee spent a total of eighty-three days as an in-patient at Columbia Hospital for Women and George Washington University Hospital, and a nursing home.

B. *Procedural History*

On March 6, 1997, appellee filed suit in Superior Court against appellants and Dr. Match. Appellants and appellee filed cross-motions for summary judgment related to the statute of limitations defense. The trial court (Judge Retchin) denied appellants' motion and granted appellee's motion to strike the statute of limitations defense, concluding that the suit was filed prior to the third anniversary of the March 8, 1994 surgery, the first date on which the court found that the patient could have "known" that she had diverticulitis. The case was tried before a jury which found for Dr. Match on liability. The jury could not reach a verdict in the claim against appellants, thereby necessitating a new trial.

The parties agreed to a bench trial based on the record from the first trial and supplemental briefing. In a

Memorandum Opinion, the trial court (Judge Graae) found in favor of appellee and awarded her $909,259.82 in damages, consisting of $209,259.82 in medical bills and $700,000.00 as other damages associated with Dr. Hardi's failure to diagnose and treat her diverticulitis. Subsequently, the court awarded appellee $14,903.92 as taxable costs. Appellants appeal both decisions. [1]

*979 II.

Appellants argue that the trial court erred in granting appellee's motion for partial summary judgment and striking their statute of limitations defense. They contend that the three-year statute of limitations bars the claim because more than three years before appellee filed her complaint: (1) she knew or could have known the doctor's failure to diagnose and treat her for diverticulitis, and (2) she had her last treatment with him. In response, appellee argues that the trial court, applying the discovery rule, properly concluded that the statute of limitations did not bar the claim. She contends that it was not until March 8, 1994, when it was determined surgically that her illness was a result of diverticulitis and a ruptured diverticular abscess, that she knew or could have known that Dr. Hardi failed to diagnose her condition and treat it as required.

[1] [2] [3] [4] In this jurisdiction, an action for medical negligence must be filed within three years from the time the right to maintain the action accrues. *See* D.C.Code § 12–301(8) (2002). "Where the fact of an injury can be readily determined, a claim accrues at the time that the plaintiff suffers the alleged injury." *Hendel v. World Plan Executive Council,* 705 A.2d 656, 660 (D.C.1997) (citing *Colbert v. Georgetown Univ.,* 641 A.2d 469, 473 (D.C.1994) (en banc)). However, where the fact of the alleged tortious conduct and resulting injury are not readily apparent, we apply the discovery rule to determine the date on which the statute of limitations commences to run. *Id.* (citing *Bussineau v. President & Dirs. of Georgetown College,* 518 A.2d 423, 425 (D.C.1986)). Under the discovery rule, "a medical malpractice claim does not accrue until the patient has 'discovered or reasonably should have discovered all of the essential elements of her possible cause of action, *i.e.,* duty, breach, causation and damages." ' *Colbert,* 641 A.2d at 473 (citing *Bussineau,* 518 A.2d at 434) (quoting *Ohler v. Tacoma Gen. Hosp.,* 92 Wash.2d 507, 598 P.2d 1358, 1360 (1979) (en banc) (other citation omitted)). This means that, under the discovery rule, a cause of action accrues for limitation purposes once the plaintiff: (1) has some knowledge of the injury, (2) its cause in fact, and (3) some evidence of wrongdoing on the part of the person responsible. *Morton v. National Med. Enterprises, Inc.,* 725 A.2d 462, 468 (D.C.1999) (citing *Bussineau,* 518 A.2d at 435).

Appellants argue that appellee had actual knowledge of her injury, its cause and evidence of Dr. Hardi's negligence on her first visit to him on February 3, 1994, more than three years before she filed the complaint in this case. The basis for this argument is that appellee went to see Dr. Hardi because she suspected that she was having a recurrence of diverticulitis, informed him of her suspicion and prior history, and knew that he did not treat her that for that condition. It is undisputed that having found a pelvic mass in appellee, Dr. Hardi diagnosed a gynecological condition and referred appellee for treatment to a gynecologist, Dr. Match.

A major flaw in appellants' argument is that they seek to charge appellee with knowledge and an understanding of her medical condition that Dr. Hardi, a specialist in gastrointestinal disorders, did not diagnose even after examining her and the medical records she gave him. Following Dr. Hardi's advice, appellee saw Dr. Match, who in turn informed her that there was a 98% chance that she had ovarian cancer, and after receiving the results of a sonogram, advised her to have a complete hysterectomy. She consulted a third physician, Dr. Meilhauser, who also advised her that her problems were gynecological. Apparently relying on these physicians' opinions, appellee agreed to ***980** have a complete hysterectomy. However, her colon ruptured, and she had to undergo an emergency operation during which it was determined that she had diverticulitis. [2] On these facts, it cannot be said that appellee knew or should have known after her first visit to Dr. Hardi that she had a condition which he failed to diagnose and treat and that she sustained harm as a result of his failure and medical advice.

[5] [6] [7] [8] "[T]he disparity in knowledge between professionals and their clientele generally precludes recipients of professional services from knowing whether the professional's conduct is in fact negligent." *Morrison v. MacNamara,* 407 A.2d 555, 567 (D.C.1979) (citations omitted). The nature of the physician-patient relationship

requires the patient to rely on the knowledge and skill of the doctor. At the stage where the physician is providing a diagnosis and advice for the patient's medical care, the patient can not be expected to know that the doctor's actions might be negligent and result in harm or to question them. *See Anderson v. George,* 717 A.2d 876, 878 (D.C.1998) (citation omitted). "[I]t is only when [s]he is acquainted with the problem that in fact exists, by [the physician] or by untoward developments that alert any diligent patient, that his cause of action accrues." *Jones v. Rogers Mem'l Hosp.,* 143 U.S.App. D.C. 51, 442 F.2d 773, 775 (D.C.Cir.1971) (citing *Burke v. Washington Hosp. Ctr.,* 293 F.Supp. 1328 (D.D.C.1968)). In another context involving the applicability of the assumption of the risk defense in a medical malpractice case, we have said that

> the superior knowledge of the doctor with his expertise in medical matters and the generally limited ability of the patient to ascertain the existence of certain risks and dangers that inhere in certain medical treatments, negates the critical elements of the defense, *i.e. knowledge* and appreciation of the risk.

Morrison, 407 A.2d at 567–68 (emphasis added). Similarly, proof of the injured party's knowledge of some wrongdoing on the part of the physician is required before it can be said that the period of limitations commenced on his or her cause of action for medical malpractice. *See Morton, supra,* 725 A.2d at 468 (citing *Colbert, supra,* 641 A.2d at 473).

[9] **[10]** Here, appellee could not be expected to know on her initial visit to Dr. Hardi her actual condition or that he failed to diagnose and treat it. Patients who seek medical care are not responsible for diagnosing their own condition, but must rely on the physician's expertise to determine the cause of the problem and provide treatment. *Morrison, supra,* 407 A.2d at 568 (quoting *O'Neil v. State,* 66 Misc.2d 936, 323 N.Y.S.2d 56, 61 (1971)). There is no evidence in the record that appellee had expertise that might cause her to question her physician's medical opinion. Even considered in the light most favorable to appellants, the record shows that appellee was not placed on notice as to her right of action as of the date of her initial visit to Dr. Hardi. Appellants have shown no genuine issue of material fact which would preclude summary judgment on this issue. *See Anderson v. Ford Motor Co.,* 682 A.2d 651, 652 (D.C.1996) (citations omitted) (Summary judgment is appropriate if the record on file shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law).

Dr. Hardi argues that any alleged misdiagnosis could have occurred only up to March 2, 1994, the date of appellee's last pre-surgical treatment with him. Therefore, ***981** he contends, the suit is time barred because this date is also more than three years before the suit was filed on March 6, 1997. However, the record is devoid of evidence that appellee knew or should have known before the date of her emergency surgery, on March 8, 1994, that diverticulitis and the adverse consequences she experienced were related to some failure on the part of Dr. Hardi. Only after the surgery did any physician inform appellee of the nature of her condition and that the pre-operative procedures performed by Dr. Hardi were contra-indicated. The circumstances show that the wrong was not readily ascertainable before March 8th. Under the discovery rule, the cause of action does not accrue until the plaintiff knows or by the exercise of reasonable diligence should know of the injury, its cause in fact and some evidence of wrongdoing. *Morton, supra,* 725 A.2d at 468 (citation omitted). We agree with the trial court that, on the record presented, the time when appellee can be charged with such knowledge occurred on or after March 8th. Therefore, the trial court properly granted partial summary judgment in her favor on this issue.

III.

Appellants argue that the trial court's finding of proximate cause lacks evidentiary support. They contend that: (1) the trial court did not find, to a reasonable degree of medical certainty, that Dr. Hardi's actions were the proximate cause of appellee's injuries; and (2) the evidence was insufficient to establish that his failure to diagnose diverticulitis and prescribe antibiotics caused appellee to have to undergo surgery. Appellants argue that the evidence shows that surgery was medically necessary to remove the mass and that the antibiotic (amoxicillin) prescribed by Dr. Match did not resolve the mass. Appellee contends that the trial court's finding of proximate causation is supported by the record. She contends that the trial court properly found, based upon the evidence, that Dr. Hardi's failure to place diverticulitis

at the top of the list proximately resulted in his failure to test properly and promptly and provide treatment which would have resolved the infection and avoided the emergency surgery.

[11] **[12]** "To establish proximate cause, the plaintiff must present evidence from which a reasonable juror could find that there was a direct and substantial causal relationship between the defendant's breach of the standard of care and the plaintiff's injuries *and* that the injuries were foreseeable." *Psychiatric Inst. of Wash. v. Allen,* 509 A.2d 619, 624 (D.C.1986) (emphasis in original) (citing *District of Columbia v. Freeman,* 477 A.2d 713, 716 (D.C.1984); *Lacy v. District of Columbia,* 424 A.2d 317, 320 (D.C.1980)). When the trial court's findings of fact lack evidentiary support, this Court must set aside the ruling. *See Byrd v. United States,* 614 A.2d 25, 30 (D.C.1992).

The trial court found that there was "little doubt that prompt treatment with antibiotics (intravenously, if necessary) would likely have resolved the infection, thereby obviating the necessity for surgery." This factual finding is supported by the record. Dr. Robert Shapiro, a gastroenterologist, testified that if appropriate antibiotics had been administered, the patient would likely have avoided the March 8, 1994 surgery. He further testified, and the trial court found, that the immediate and direct cause of the "emergency surgery" on March 8th was Dr. Hardi's exploratory procedures several days earlier, which ruptured her diverticular abscess and caused life-threatening peritonitis. According to the evidence, these procedures were contra-indicated, given the patient's condition. There was evidence that the rupture of her diverticular abscess created ***982** the necessity for emergency surgery and subsequent medical problems and hospitalizations. Dr. Shapiro testified that appropriate antibiotic therapy should have been started within twenty-four to forty-eight hours of the patient's first visit to Dr. Hardi, and that the sooner started, the better the patient does. He testified that it was his opinion that "more likely than not, if appropriate antibiotics had been administered appellee would have avoided [the March 8th] surgery."

[13] Appellants argue that the trial court observed that whether appellee ultimately would have required surgery was an "open question." A closer reading of the court's Memorandum Opinion, however, shows that the trial court found that there was an "open question" about the "possibility" of an *elective* surgery to address appellee's diverticulitis at some unspecified time in the future. According to Dr. Shapiro's testimony, it was only a possibility that "one might at some time in the future have recommended surgery to prevent further attacks of diverticulitis, but that would be *elective* surgery." (Emphasis added.) [3]

IV.

Appellants contend that the trial court included in its award of damages an allocation of $209,259.82 for medical bills of which $107,560.05 has been written-off by appellee's health care providers, and therefore, never paid by her. He argues that the amounts written-off should not be included as damages. Appellee argues that the collateral source rule prohibits the reduction of damages by the amounts written-off and that the issue is not preserved for appeal.

A. *Preservation of the Damages Issue for Appeal*

Taking first appellee's procedural challenge, we conclude that the issue is preserved. In support of her position, appellee argues that evidence of the amount of any write-offs was never presented. To address this argument, we review briefly the procedural background of the issue. This appeal is from a bench trial based on the record of the prior jury trial. At the first trial, the parties agreed that the issue concerning medical expense write-offs would be preserved for post-trial consideration. The full amount of the medical expenses were submitted to the jury. It was intended that the jury would separate out the amount awarded in a verdict form. The trial court was to determine as a matter of law whether the write-off amounts could be included in the damages award, and if not, the amount of any write-off was to be determined and deducted from the verdict. Although counsel for Dr. Match made a proffer that the written-off amount was $107,560.05, the parties agreed, with the approval of the court, that the amount of any write-offs would be subject to proof in post-trial proceedings. However, the jury verdict went in favor of Dr. Match, and the jury could not reach a verdict with respect to Dr. Hardi. Therefore, there were no post-trial proceedings on this issue.

[14] *983 By agreement, the second trial was based upon the evidentiary record from the first trial, the parties' briefs, and oral arguments. Prior to the date scheduled for oral argument, appellants submitted proposed findings of fact and conclusions of law which included the argument that appellee was entitled to only medical expenses actually paid ($101,699.77) and not to amounts written-off and never paid ($107,560.05). Appellee filed a response, arguing points of law supporting her position that the full amount was recoverable. The trial court ruled on the issue in its written opinion, concluding that the collateral source rule applied, and therefore, appellee was entitled to any discounts her carrier negotiated. In light of the trial court's ruling, it had no reason to consider the actual amount of the write-offs or to provide Dr. Hardi with the opportunity to present evidence to challenge the amount of recoverable medical expenses, as previously requested. This record shows that the damages question raised by appellants was preserved for review on appeal.

B. *Collateral Source Issue*

Whether unpaid and "written-off" medical expenses can be recovered by a plaintiff as compensatory damages is an issue of first impression in the District of Columbia. In support of their argument in the trial court, appellants rely here, as they did in the trial court, primarily upon two cases applying Virginia law, *State Farm Mut. Auto. Ins. Co. v. Bowers,* 255 Va. 581, 500 S.E.2d 212 (Va.1998) and *McAmis v. Wallace,* 980 F.Supp. 181, 185 (W.D.Va.1997). *Bowers* involved a suit by an automobile insurance carrier against its insured for overpayments under a medical payments provision. 255 Va. at 583–84, 500 S.E.2d at 212–13. Bowers' policy provided for payment of reasonable and necessary expenses incurred. *Id.* at 583, 500 S.E.2d at 212. The Supreme Court of Virginia, interpreting the language of the policy under the case law of Virginia, concluded that the term "incurred" referred to those amounts that the health care providers accepted as full payment for their services, and not amounts written-off by the providers. *Id.* at 585–86, 500 S.E.2d at 214. In *McAmis,* a federal court held that the collateral source rule does not permit a plaintiff to recover medical expenses written-off by her health care providers pursuant to a contract with Medicaid, since she did not incur the written-off amounts. 980 F.Supp. at 185–86. The court reasoned that under Virginia law before the collateral source rule applies, the injured party must "establish personal liability, at some time, for that amount." *Id.* at 185. Compensatory damages are intended to make a plaintiff whole under Virginia law, and for that to occur, "[p]laintiff, need only receive the actual costs of medical care borne by Medicaid." *Id.* at 185. In *McAmis,* the court also rejected plaintiff's argument that she was entitled to recover the write-off as a benefit of paying taxes into the Medicaid system. *Id.* In making this ruling, the court recognized that Medicaid benefits do not derive from contract, but are dispersed under a social benefits program. *Id.*

Subsequently, the Virginia Supreme Court, distinguishing its earlier holding in *Bowers, supra,* held that the full amount of reasonable medical expenses may be recovered from a tortfeasor without reduction for amounts written-off by health care providers. *See Acuar v. Letourneau,* 260 Va. 180, 531 S.E.2d 316, 321, 323 (Va.2000). In *Acuar,* the appellant, who admitted liability, sought to exclude from damages medical bills written-off by the injured party's health care providers. *Id.* at 317. The court held that the collateral source rule applied and that the amount of damages could not be reduced. *Id.* at 322–23. The court reasoned that:

> *984 the focal point of the collateral source rule is not whether an injured party has "incurred" certain medical expenses. Rather, it is whether a tort victim has received benefits from a collateral source that cannot be used to reduce the amount of damages owed by a tortfeasor....
>
> Those amounts written off are as much of a benefit for which [the injured party] paid consideration as are the actual cash payments made by his health insurance carrier to the health care providers. The portions of medical expenses that health care providers write off constitute "compensation or indemnity received by a tort victim from a source collateral to the tortfeasor."

Id. at 322 (quoting *Schickling v. Aspinall,* 235 Va. 472, 474, 369 S.E.2d 172, 174 (1988)). The court distinguished *Bowers, supra,* as a case in which it construed the specific terms of an insurance contract and where "neither the tort policy of this Commonwealth nor the collateral source rule was implicated." *Id.* at 321.

In the case now before the court, the tort policy of the District of Columbia and the collateral source rule are implicated. The trial court was persuaded that the collateral source rule applies, and where the party pays the premium for insurance, she is entitled to the benefit

of the bargain contracted for including any reduction in payments that the insurance carrier was able to negotiate. We agree. In reaching this decision, we are persuaded by our own longstanding collateral source doctrine and the sound reasoning of the Virginia Supreme Court in *Acuar.*

[15] **[16]** **[17]** Under the collateral source rule, payments to the injured party from a collateral source are not allowed to diminish damages recoverable from the wrongdoer. *District of Columbia v. Jackson,* 451 A.2d 867, 870 (D.C.1982) (citing *Hudson v. Lazarus,* 95 U.S.App. D.C. 16, 18, 217 F.2d 344, 346 (1954) (citation omitted)); *Reid v. District of Columbia,* 391 A.2d 776, 778 (D.C.1978). The rule is applicable when either: (1) a payment to the injured party came from a source wholly independent of the tortfeasor, or (2) " 'when the plaintiff may be said to have contracted for the prospect of a double recovery." ' *Jackson,* 451 A.2d at 873 (quoting *Overton v. United States,* 619 F.2d 1299, 1307 (8th Cir.1980)). A reason for the rule is that a party should receive the benefit of a bargain for which he or she has contracted. *Jackson,* 451 A.2d at 871–73.

This case is one in which the payments qualify as a collateral source under both of the above-mentioned criteria.[4] Appellee paid a private carrier to insure her for medical expenses. That contractual arrangement was totally independent of Dr. Hardi. Appellee contracted for them independently of Dr. Hardi, and therefore, Dr. Hardi is not entitled to a credit for those write-offs. *See Jackson, supra,* 451 A.2d at 872. These amounts are a benefit of appellee's agreement with her health insurance carrier, and constitute a collateral source to the tortfeasor. *Acuar, supra,* 531 S.E.2d at 322–23 (citation omitted).

Dr. Hardi concedes that appellee is entitled to recover amounts actually paid by her or her insurance carrier, but argues that she should not be able to recover ***985** amounts not paid by anyone (*i.e.,* written-off amounts). In support of its argument, Dr. Hardi cites *Reid, supra,* 391 A.2d at 777 and *Moorhead v. Crozer Chester Med. Ctr.,* 564 Pa. 156, 765 A.2d 786 (2001). *Reid,* as amended, does not address the issue now before us. *See Reid,* 391 A.2d at 777–81, as amended in *Reid v. District of Columbia,* 399 A.2d 1293 (D.C.1978). Regardless of any broad language in the opinion in *Moorhead,* that case involved medical services provided by the tortfeasor itself so that an application of the collateral source rule would have required, in effect, double payment. *See* 765 A.2d at 788. In *Moorhead,* the plaintiff sued the medical facility which had treated her for her injuries. *Id.* at 787. The medical facility was a voluntary participant in the Medicare program and had a contractual obligation under it to accept a limited amount for its services. *Id.* at 788, 790. The court held that "[g]iven [the medical facility's] contractual obligations, the trial court did not err in determining that [plaintiff] was limited to recovering ... the amount that was paid and accepted as payment in full for past medical expenses." *Id.* at 790. *Moorhead* is not persuasive because there, it was the tortfeasor who provided medical services at a reduced cost pursuant to its own contract, as opposed to plaintiff's. Since the court allowed plaintiff's damages for the amount actually paid to the medical facility, and the facility itself provided services in the greater amount, it is fair to say that the medical facility actually made plaintiff whole for the full amount of the claimed medical expenses. It was the tortfeasor's contract that accounted for this result, not the plaintiff's, as far as we can tell.[5]

[18] Here, a private insurance carrier paid appellee's medical expenses. That source is wholly independent of appellants. Because any write-offs conferred would have been a byproduct of the insurance contract secured by appellee, even those amounts should be counted as damages. *See Jackson, supra* note 5, 451 A.2d at 871–73. Therefore, because any write-offs enjoyed by appellee were negotiated by her private insurance company, a source independent of appellants, they should be included in her damages. Under the collateral source rule, she is entitled to all benefits resulting from her contract.

IV.

Appellants argue that the trial court awarded costs to appellee which are not recoverable. Specifically, they contend that the costs related to the earlier mistrial are not taxable against them in the second trial. Alternatively, they challenge specific costs, including certain witness fees, deposition transcripts, copying costs, and medical records. Appellee responds that some of appellants' arguments are moot, as the trial court reduced the amount she requested originally, excluding some of their requested costs. Further, she contends that costs associated with the first trial were awarded properly, as the second trial was based upon the testimony and exhibits from the first.

[19] **[20]** **[21]** Pursuant to Super. Ct. Civ. R. 54(d), costs may be awarded to the prevailing party. *Harris v. Sears Roebuck & Co.*, 695 A.2d 108, 109 (D.C.1997) (citing Super. Ct. Civ. R. 54(d)(1)) (other citations omitted). The rule provides that "costs other than attorneys' fees shall be ***986** allowed as of course to the prevailing party unless the Court otherwise directs ...." Super. Ct. Civ. R. 54(d)(1). "The authority of a court to assess a particular item as costs is partly a matter of statute (or court rule), and partly a matter of custom, practice, and usage." *Robinson v. Howard Univ.*, 455 A.2d 1363, 1368–69 (D.C.1983) (citing *Newton v. Consolidated Gas Co.*, 265 U.S. 78, 44 S.Ct. 481, 68 L.Ed. 909 (1924) (annotation and other citation omitted)). Under Super. Ct. Civ. R. 54–I(b), the costs of depositions and transcripts may be taxed as costs, in the trial court's discretion. Witness fees are recoverable as costs upon compliance with certain technical requirements of Super. Ct. Civ. R. 54–I(a). Whether to award costs is committed to the trial court's discretion, and, upon review, it is not for the appellate court to substitute its discretion for that of the trial court. *Harris,* 695 A.2d at 110; *Robinson,* 455 A.2d at 1369 (citations omitted). With these general principles in mind, we consider the trial court's order awarding costs and appellants' challenges to it.

The trial court awarded costs to appellee in the amount of $14,903.92.[6] Appellants contend that there was included improperly in this amount costs incurred in the first jury trial associated with the claim against Dr. Match and the mistrial. They contend that it was error to award these costs because appellee was not the prevailing party on either claim in the first trial. Further, they contend that the only costs necessary for the retrial of appellee's claims were for trial transcripts, which totaled $1,773.00.

In support of their argument that costs related to the mistrial are not taxable, appellants cite *United States v. Deas,* 413 F.2d 1371 (5th Cir.1969). *Deas* concerned whether costs of a mistrial could be taxed under a federal statute, 28 U.S.C.A. § 1918(b), to a criminal defendant convicted in a subsequent trial. *Id.* at 1372–73. The statute permitted an assessment of costs upon conviction.[7] The court held that where the previous mistrial was "due solely to the jury's failure to agree upon a verdict," separate court costs were not encompassed within the provisions of the statute. *Id.* In reaching this conclusion, the court considered that: (1) levying such costs upon a criminal defendant "is a deprivation of property that may be imposed only in accordance with reasonable and narrowly defined standards;" (2) it would have the effect of penalizing a defendant for the government's failure of proof in the first case; and (3) it might have a deterrent effect on the right of the accused to plead not guilty and go to trial the second time. *Id.* at 1372. No similar statute or considerations are present here.

[22] **[23]** Moreover, in this case, there was no new presentation of the evidence, since the parties agreed to a second trial by the court based on the record of the testimony and evidence adduced at the first trial. Thus, the costs incurred for the first trial essentially were used to produce the evidence used again in the second ***987** trial. Appellee had not previously recovered the costs of the presentation upon which she later prevailed. Under these circumstances, the trial court could properly exercise its discretion to award these costs, which were necessary for the presentation of appellee's case.[8] "An appellant contesting an award of costs 'bears the burden of convincing this court on appeal that the trial court erred .... [and] the burden is even greater when the standard of review is abuse of discretion. " ' *Talley v. Varma,* 689 A.2d 547, 555 (D.C.1997) (quoting *Robinson, supra,* 455 A.2d at 1370). Appellants filed in the trial court an opposition in response to appellee's bill of costs in which it attempted to meet this burden, and appellee filed a reply. With all this information before it, the trial court, with a full knowledge of the issues and arguments, rejected appellants' argument that the costs it awarded were not necessary to the presentation of appellee's medical malpractice action. Having reviewed the record related to the costs awarded, we conclude that appellants have failed to demonstrate that the trial court abused its discretion in this regard.

For the foregoing reasons, the judgement of the trial court hereby is

Affirmed.

All Citations

818 A.2d 974

Footnotes

1 Appeal No. 99–CV–1386 relates to the merits, and Appeal No. 99–CV–1540 relates to costs. The appeals were consolidated.

2 The post-operative diagnosis is described as "probable tubo-ovarian abscess and diverticular abscess secondary to ruptured diverticular disease."

3 Appellants argue that there was evidence from the CAT–Scan results which was contrary to the opinion of appellee's medical expert. He also contends that his medical expert agreed with Dr. Match that surgery was medically necessary, given the presence of the mass. Inconsistencies are properly for resolution by the finder of fact. *Hubbard v. Chidel,* 790 A.2d 558, 568 n. 9 (D.C.2002) (citing *Peterson v. United States,* 657 A.2d 756, 760 (D.C.1995); *Streater v. United States,* 478 A.2d 1055, 1058 n. 4 (D.C.1984)). That the trial court accepted the testimony of appellee's experts over that of Dr. Hardi is within its province as factfinder in a bench trial. *Id.* We find no basis to disturb its factual findings.

4 We take this appeal as it comes to us. Appellants do not challenge the reasonableness of the full fees set forth in the medical bills and claimed by the appellee, nor do appellants attempt to establish that the "discounted" or "written-off" amounts actually paid to the medical providers constituted in themselves reasonable fees. No record is made as to the basis on which the discounted fees were determined nor the details of the arrangements with the medical providers. Therefore, we leave for another day what the outcome could be in such circumstances.

5 It is worth noting again here that in this jurisdiction, the collateral source rule is applicable when payment comes from a source wholly independent of the tortfeasor or when *plaintiff* "contract[s] for the prospect of double recovery." *District of Columbia v. Jackson,* 451 A.2d 867, 873 (1982). It does not appear that the facts in *Moorhead* would meet these tests. Our review of the record in this case suggests that the standard is met here.

6 Appellee requested $15,982.87 as costs. In response to appellants' opposition, she conceded to the elimination of $943.95 ($18.80 for untimely copying costs and deposition costs for Dr. Borow ($480.40) and Dr. Bergin ($444.75)). Appellee contends that the remaining amount not approved by the trial court, $135.00, was for witness fees paid to doctors who appeared at depositions pursuant to subpoenas. Appellee argued before the trial court that such costs are a matter for the trial court's discretion, since not authorized by statute.

7 The statute, 28 U.S.C.A. § 1918(b), provided: "Whenever any conviction for any offense not capital is obtained in a district court, the court may order that the defendant pay the costs of prosecution." *See Deas,* 413 F.2d at 1372 n. 2.

8 Appellants did not show that any of the costs awarded to appellee were solely related to the claim against Dr. Match. This is a case in which Dr. Hardi referred appellee to Dr. Match and consulted with him about her care, and appellee sued both of them jointly and severally. We find no basis to overturn the trial court's decision in this regard.

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217 F.2d 344
United States Court of Appeals
District of Columbia Circuit.

Ora Greene HUDSON, Administratrix of the Estate of Garland Hudson, deceased, Appellant,
v.
David LAZARUS, Samuel juster and Calvin Juster, Appellees.

No. 11870.
|
Argued Dec. 9, 1953.
|
Decided Nov. 24, 1954.
|
Petition for Rehearing Denied Dec. 15, 1954.

Action for personal injuries sustained in automobile collision. Upon plaintiff's death, the plaintiff's widow was appointed administratrix and duly substituted as plaintiff. From an insufficient judgment entered in the United States District Court for the District of Columbia, Jennings Bailey, J., the plaintiff appealed. The Court of Appeals, Edgerton, Circuit Judge, held, inter alia, that value of all reasonably necessary medical and hospital services furnished plaintiff's decedent without charge by naval hospital because decedent was veteran should have been included in determining amount of damages.

Judgment affirmed in part and in part remanded.

Attorneys and Law Firms

*345 **17 Mr. David F. Smith, Washington, D.C., with whom Messrs. Dorsey K. Offutt and Jacob Stein, Washington, D.C., were on the brief, for appellant.

Mr. Robert E. Anderson, Washington, D.C., with whom Mr. Charles C. Collins, Washington, D.C., was on the brief, for appellees Samuel Juster and Calvin Juster.

Mr. Leroy S. Merrifield, Washington, D.C., a member of the bar of the Supreme Court of Minnesota, amicus curiae, appointed by this court. *

*Because the appeal against Lazarus is undefended and involves important questions, we appointed Professor Merrifield of the George Washington, University Law School as amicus curiae. His scholarly report has been of great value to the court.

Before EDGERTON, WASHINGTON, and DANAHER, Circuit Judges.

Opinion

EDGERTON, Circuit Judge.

On May 3, 1949 Garland Hudson was seriously injured by an automobile owned by appellees Juster and driven by Harris, an employee of appellee Lazarus's service station.

Calvin Juster, one of the appellees, was a customer of the station. On the morning of the accident he stopped there in the Juster car and asked Sorentino, who was in charge, to have someone drive him to work and bring the car back to be washed. Though Harris's permit to drive a car had been suspended, and Sorentino knew this, he directed Harris to make the trip. Harris asked Sorentino 'Could I stop and get a sandwich?' and added 'I haven't had any breakfast.' Sorentino said 'But make it snappy.'

Juster drove the car, with Harris in it, less than half a mile and then left it in Harris's possession. Instead of returning to or even starting toward the service station, Harris drove off in a different direction. He was more than a mile from the station, and still going away from it, when he collided with Hudson. At the trial Harris explained that he was on his way to breakfast and there was no place near the service station where he could get breakfast.

**18 Hudson was taken to Casualty Hospital and afterwards, because he was a veteran, to Bethesda Naval Hospital. There he was cared for without charge. On November 2, 1950 he filed this suit against the present appellees. He died April 7, 1951, leaving a widow and two sons. The widow was appointed administratrix and duly substituted as plaintiff. She is the present appellant.

[1] October 31, 1952 the appellant sought to amend her complaint by adding a claim for wrongful death. Since suits for wrongful death must be brought within one year, D.C.Code 1951, § 16-1202, 31 Stat. 1394, the court rightly dismissed this claim. Pendency of an action for personal injuries does not toll the statute of limitations on a death claim. [1]

[2] [3] [4] The court directed a verdict in favor of the Justers. We think this was right. There was no evidence tending to show that Juster was negligent in entrusting

the car to Harris. The Financial Responsibility Act does not cover the *346 case. The Act provides that one who drives a motor vehicle with the owner's express or implied consent 'shall, in case of accident, be deemed to be the agent of the owner of such motor vehicle, and the proof of the ownership of said motor vehicle shall be prima facie evidence that such person operated said motor vehicle with the consent of the owner.' D.C.Code 1951, § 40-403, 49 Stat. 168. But the presumption continues only 'until there is credible evidence to the contrary, and ceases when there is uncontradicted proof that the automobile was not at the time being used with the owner's permission.' Rosenberg v. Murray, 1940, 73 App.D.C. 67, 68, 116 F.2d 552, 553. Harris testified without contradiction that nothing was said between him and Juster about his getting breakfast. Juster testified without contradiction that he heard no conversation between Harris and Sorentino about getting breakfast. There was, then, uncontradicted proof that Juster consented only to Harris's driving the car back to the service station and did not consent to his going, or even stopping, for breakfast. Juster's consent perhaps extended, by implication, to driving back to the station by a more or less circuitous route. But when Harris collided with Hudson, he was not driving back to the station by any route. He was driving away from it. We agree with the District Court that he was clearly not driving with Juster's consent. [2]

The court limited appellant's verdict against Lazarus to the 'pecuniary loss' Garland Hudson suffered in his lifetime. [3] In our opinion damages should have included in addition (1) the value of all reasonably necessary medical and hospital services furnished without charge by Bethesda Naval Hospital; (2) an allowance for Hudson's disabilities caused by the accident; and (3) his probable future earnings during his life expectancy, discounted to present worth.

[5] **[6]** (1) In general the law seeks to award compensation, and no more, for personal injuries negligently inflicted. Yet an injured person may usually recover in full from a wrongdoer regardless of anything he may get from a 'collateral source' unconnected with the **19 wrongdoer. [4] Usually the collateral contribution necessarily benefits either the injured person or the wrongdoer. Whether it is a gift or the product of a contract of employment or of insurance, the purposes of the parties to it are obviously better served and the interests of society are likely to be better served if the injured person is benefitted than if the wrongdoer is benefitted. Legal 'compensation' for personal injuries does not actually compensate. Not many people would sell an arm for the average or even the maximum amount that juries award for loss of an arm. Moreover the injured person seldom gets the compensation he 'recovers', for a substantial attorney's fee usually comes out of it. There is a limit to what a negligent wrongdoer can fairly, i.e., consistently with the balance of individual and social interests, be required to pay. But it is not necessarily reduced by the injured person's getting money or care from a collateral source. [5]

*347 However it be rationalized, the 'collateral source' principle has been applied in various situations. Receipt of money on an accident insurance policy does not reduce the damages the injured person may recover. [6] The same has been held with regard to hospitalization insurance. [7] And when medical and hospital services have been rendered gratuitously, or paid for by a third person as a gift to the injured person, he has usually been allowed to recover their value from the wrongdoer. [8]

The Maryland Court of Appeals recently held that an injured member of the Navy may recover from a negligent defendant the value of medical and hospital services rendered without charge by a naval hospital. The court said: 'the majority of the cases hold that where hospital and medical services are furnished gratuitously to the injured party, he can recover the value of those services from the tort feasor. This seems to be the modern rule. Here also it might well be considered that medical and hospital services supplied by the Government to these members of the United States Navy were part of the compensation to them for services rendered, and therefore that by their service in the Navy they had paid for these.' Plank v. Summers, 1954, 203 Md. 552, 102 A.2d 262, 266-267. The Court of Appeals for the Fourth Circuit has held that a claim adjuster's statement to a member of the Navy that, because he would get hospital care without charge, he could recover damages only for pain and suffering, was fraud justifying rescission of a release: 'It is generally well settled that the fact that the plaintiff may receive compensation from a collateral source (or free medical care) is no defense to an action for damages against the person causing the injury.' Sainsbury v. Pennsylvania Greyhound Lines, 4 Cir., 1950, 183 F.2d 548, 550, 21 A.L.R.2d 266. [9]

We think the 'collateral source' principle applies here. We see no reason to distinguish services rendered by a naval ****20** hospital to the veteran Hudson from services rendered by a naval hospital to a man still in the Navy. They are neither more nor less gratuitous, [10] and neither more nor less a part of the injured man's compensation for his service in the Navy, [11] in the one case than in the other.

***348** **[7]** (2) The Survival Act of the District of Columbia provides: 'On the death of any person in whose favor or against whom a right of action may have accrued for any cause prior to his death, said right of action shall survive in favor of or against the legal representative of the deceased: Provided, however, That in tort actions, the said right of action shall be limited to damages for physical injury except for pain and suffering resulting therefrom.' D.C.Code 1951, § 12-101, 62 Stat. 487. (Emphasis added.)

It is not clear why the fact that the injured person is dead and the plaintiff is his legal representative should absolve the defendant from responsibility for the pain and suffering he inflicted on the deceased. When the sufferer himself is the plaintiff, it seems most unjust to restrict his compensation merely because the wrongdoer is dead and the defendant is his legal representative. But we must take the Act as we find it. It excepts 'pain and suffering' in both cases.

Before the accident Hudson worked as a laborer, was in good health, and had no disabilities. After the accident he was stone deaf and could not walk without crutches. A man who cannot hear or walk because of an accident has a physical injury. Unless such disabilities are 'pain and suffering', the Survival Act does not except them from the physical injury for which damages may be recovered by the legal representative of the injured person.

We think a disability is not, in itself, 'pain and suffering'. It is not within the ordinary meaning of those words and we see no reason to think Congress used the words in a special sense. A disabled man may or may not suffer pain. Even if he does, after his death his administrator cannot recover for his pain and suffering. But in our opinion his administrator may recover for his disabilities.

[8] (3) Permanent loss of earning power is usually the chief economic harm caused by a permanent injury. If Hudson in his lifetime had recovered judgment in this action, his damages would have included an allowance for prospective loss of earnings during his normal life expectancy, [12] discounted to present worth, [13] and with such other adjustments as the facts may require. [14] When he died ****21** his right to these damages passed under the Survival Act to his administratrix, the present appellant, for the Act provides that the injured person's right of action for physical injury 'shall survive * * * except for pain and suffering'.

The Wrongful Death Act of the District of Columbia creates no pertinent exception to the broad terms of the Survival Act. Under the Wrongful Death Act damages are 'assessed with reference to the injury resulting * * * to the spouse and next of kin' of the deceased and 'shall not be appropriated to the payment of the debts or liabilities of such deceased person, but shall inure to the benefit of his or her family and be distributed to the spouse and next of kin * * *.' D.C.Code 1951, § 16-1201, 16-1203, 31 Stat. 1394, 1395. Section 16-1201 contains a proviso 'That no action shall be maintained under this chapter in any case when the party injured by such wrongful act, neglect, or default has recovered damages therefor during the life of such party.' We need not consider whether some sort of converse implication might perhaps be derived from this proviso, or from the Wrongful Death Act as a whole, limiting damages under the Survival Act when there has been a recovery under the Wrongful Death Act. In the present case no action has been or can be maintained under the Wrongful ***349** Death Act. We find no basis for an inference that Congress intended us, in these circumstances, to give less than full effect to the terms of the Survival Act. Double recovery for the same elements of damage should of course be avoided. But there is no possibility of double recovery in the present case. [15]

Decisions under the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51, 59, are not applicable. Like the Wrongful Death Act, the Employers' Liability Act creates a new right of action, upon the death of the injured person, for the benefit of his next of kin; and like the Survival Act, it permits the injured person's own claim to be enforced after his death by his legal representative. But unlike the Survival Act, the Employers' Liability Act creates the injured person's claim. As interpreted by the Supreme Court, this claim 'is confined to his personal loss and suffering before he died'. [16] Since the injured person has no broader claim, no broader claim on his behalf survives. [17] But the District of Columbia Code does not create the injured person's claim. His claim, which (except

for 'pain and suffering') survives, is the broad common-law claim for physical injury.

The case will be remanded so that the elements of damage we have discussed may be added to the present judgment of $6,050. [18] In other respects the judgment is affirmed.

Remanded.

All Citations

217 F.2d 344, 95 U.S.App.D.C. 16

Footnotes

1 Baltimore & Ohio S.W.R. Co. v. Carroll, 280 U.S. 491, 50 S.Ct. 182, 74 L.Ed. 566.

2 When the court directed the verdict Calvin Juster had not yet testified. Until he testified, there was no positive proof that he did not overhear the conversation between Harris and Sorentino. But we need not consider whether it was error to direct a verdict in the absence of such testimony. The error, if any, became harmless when Calvin Juster testified, for the Justers were then, if not before, entitled to a directed verdict.

3 Counsel thereupon agreed on $5,909.40 for loss of pay from the date of the accident until death, $69.10 for Casualty Hospital, $15.00 for transportation to and from the hospital, $10.00 for medical supplies, and $46.50 for ruined clothes. The court instructed the jury to award the total, $6,050, if they awarded anything. The verdict and judgment were for that amount.

4 Restatement, Torts (1939) § 920, Comment (e); McCormick, Damages § 90, pp. 323-4 (1935); Sedgwick, Measure of Damages § 67 (9th ed. 1920).

5 For a different view see James, Social Insurance and Tort Liability, 27 N.Y.U.L.Rev. 537, 544 et seq.

6 Bradburn v. Great Western Ry. Co., L.R. 10 Exch. 1 (1874); Dempsey v. Baltimore & O.R.Co., D.C.E.D.Pa.1915, 219 F. 619; Campbell v. Sutliff, 1927, 193 Wis. 370, 214 N.W. 374, 53 A.L.R. 771; cases collected in 18 A.L.R. 683, 95 A.L.R. 577.

7 Gersick v. Shilling, 1950, 97 Cal.App.2d 641, 218 P.2d 583; and cases collected in 13 A.L.R.2d 355. Contra, Sedlock v. Trosper, 1948, 307 Ky. 369, 211 S.W.2d 147, 13 A.L.R.2d 349.

8 Denver & R.G.R. Co. v. Lorentzen, 8 Cir., 1897, 79 F. 291; Roth v. Chatlos, 1922, 97 Conn, 282, 116 A. 332, 22 A.L.R. 1554; Clark v. Berry Seed Co., 1938, 225 Iowa 262, 280 N.W. 505; and cases collected in 128 A.L.R. 686. Contra, Daniels v. Celeste, 1939, 303 Mass. 148, 21 N.E.2d 1, 128 A.L.R. 682.

9 Cf. Standard Oil Co. of California v. United States, 9 Cir., 1946, 153 F.2d 958, 963, affirmed, 1947, 332 U.S. 301, 67 S.Ct. 1604, 91 L.Ed. 2067.

10 Restatement, Torts § 924, Comment f, says 'there can be no recovery for the value of services rendered gratuitously by a state-supported or other public charity'. City of Englewood v. Bryant, 1937, 100 Colo. 552, 68 P.2d 913, and Di Leo v. Dolinsky, 1942, 129 Conn. 203, 27 A.2d 126, are to that effect.

11 A Veterans' Administration Regulation, 38 C.F.R., 1952 Supp., § 17.48(d), provides in effect that a veteran who may have a claim against a third person for negligent injury will not be treated without charge, to the extent of the third person's liability, and 'will be requested to execute appropriate assignment' to enable the government to collect from the third person for the veteran's hospital care. Apparently the regulation was issued in reliance on 38 U.S.C.A. § 706 which provides that, under such limitations as the Administrator of Veteran's Affairs may prescribe, hospitalization and care for a non-service-connected injury are to be furnished to a veteran who 'is unable to defray the necessary expenses therefor'. Whatever effect, if any, the regulation might otherwise have here, it is irrelevant because it was not adopted until November 30, 1951, 38 C.F.R., 1952 Supp., § 17.48(d). This was after Hudson's death. The record does not show that he executed an assignment. The United States has presented no claim against the appellant administratrix and made no effort to intervene in this suit.

12 I.e., life expectancy in the absence of the accident.

13 Vicksburg & Meridian Railroad Co. v. Putnam, 118 U.S. 545, 554, 7 S.Ct. 1, 30 L.Ed. 257.

14 Cf. Chesapeake & Ohio R. Co. v. Kelly, 241 U.S. 485, 489-491, 36 S.Ct. 630, 60 L.Ed. 1117.

15 The inter-relation of Wrongful Death Acts and Survival Acts is discussed in McCormick, Damages (1935) p. 337. Cf. Murray v. Philadelphia Transportation Co., 1948, 359 Pa. 69, 58 A.2d 323; First Nat. Bank in Greensburg v. M. & G. Convoy, Inc., D.C.W.D.Pa.1952, 106 F.Supp. 261.

16 St. Louis, I.M. & S.R. Co. v. Craft, 237 U.S. 648, 658, 35 S.Ct. 704, 706, 59 L.Ed. 1160.
'For an injury resulting in death, the act gives two distinct causes of action. One is to compensate the injured person for his loss and suffering while he lives. * * * The second cause of action is to compensate persons other than the injured

employee for pecuniary loss suffered by them through the employee's death.' Chicago, B. & Q.R. Co. v. Wells-Dickey Trust Co., 275 U.S. 161, 162-163, 48 S.Ct. 73, 72 L.Ed. 216. Baltimore & Ohio S.W.R. Co. v. Carroll, 280 U.S. 491, 494, 50 S.Ct. 182, 74 L.Ed. 566.

17 Great Northern R. Co. v. Capital Trust Co., 242 U.S. 144, 37 S.Ct. 41, 61 L.Ed. 208.

18 Cf. Washington Gas Light Co. v. Connolly, 94 U.S.App.D.C. , 214 F.2d 254; Plank v. Summers, supra, 1954, 203 Md. 552, 102 A.2d 262, 267.

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219 A.2d 567
District of Columbia Court of Appeals.

Roberta ALBANO and Vincent
Albano, Jr., Appellants,
v.
Irene YEE, Appellee.

No. 3814.
|
Argued Feb. 1, 1966.
|
Decided May 12, 1966.

Action for pain and suffering and medical expenses and loss of consortium resulting when not of scalding tea fell from tray of defendant's waitress into plaintiff wife's lap burning her thigh and abdomen. The District of Columbia Court of General Sessions, Catherine B. Kelly, J., entered judgment and plaintiffs appealed claiming that jury was erroneously instructed with respect to allowable damages. The District of Columbia Court of Appeals, Hood, C. J., held that, although physician, a cousin of plaintiff husband, did not charge for services rendered to plaintiff wife, inasmuch as he testified as to total amount of his bill and how it was determined, submission of value of his services as item of damages was justified, even though he did not testify that his charges were reasonable.

Judgment in favor of wife affirmed and judgment in favor of husband reversed for new trial.

Attorneys and Law Firms

***567** Jacob A. Stein, Washington, D. C., for appellants.

Laurence T. Scott, Washington, D. C., for appellee.

Before HOOD, Chief Judge, and QUINN and MYERS, Associate Judges.

Opinion

HOOD, Chief Judge.

Mrs. Albano was dining at the China Inn Restaurant when a pot of scalding tea fell from a waitress' tray into her lap, burning her thigh and abdomen. She and her husband, appellants here, sued the restaurant owner, Irene Yee, for damages resulting from the negligence of the waitress. Mrs. Albano sought compensation for pain and ***568** suffering and for medical expenses. Mr. Albano sought compensation for loss of consortium. A jury awarded $400 to her and $300 to him. They have appealed, claiming that the jury was erroneously instructed with respect to allowable damages.

At trial there was received in evidence the deposition of Dr. Frank Albano, a cousin of the male plaintiff, who had treated the female plaintiff after she had returned from Washington to her home in New Jersey. He testified concerning his treatment, and stated that his bill was: 'for the house calls, twenty six, $400, and the office calls, fourteen was $125.' However, it was agreed at trial that the doctor, because of his relationship, was not going to charge for his services.

The trial court instructed the jury that the collateral source doctrine did not apply to Dr. Albano's bill and that it should not be considered as an item of damages. Appellants claim this was error.

In Hudson v. Lazarus, 95 U.S.App.D.C. 16, 19, 217 F.2d 344, 347 (1954), it was held that plaintiff's damages should include the value of all reasonably necessary medical and hospital services furnished without charge by Bethesda Naval Hospital, and that it was error to limit recovery to the actual pecuniary loss. After stating the rationale of the collateral source principle, the court said:

> And when medical and hospital services have been rendered gratuitously, or paid for by a third person as a gift to the injured person, he has usually been allowed to recover their value from the wrongdoer.

[1] It was error to exclude from the jury's consideration the bill of Dr. Albano. Appellee argues, however, that even if the services rendered by Dr. Albano came within the collateral source doctrine, there was no competent evidence of the reasonable value of these services. The record does not support this contention. The doctor testified as to the total amount of his bill, and how it was divided between house calls and officer visits, and explained that his charges for house visits varied in amounts, depending upon whether 'I have to do dressing or surgery, as I did in this case.' He also explained what he was required to do when changing the dressing.

Appellee's complaint apparently is that the doctor, after describing his services and stating his charges, did not testify that his charges for the services were reasonable charges.[1] In Giant Food Stores, Inc. v. Bowling, D.C.App., 202 A.2d 783, we held it was proper to admit in evidence medical bills incurred by appellee in the absence of testimony, other than hers, that the bills were reasonable and necessary, citing Nunan v. Timberlake, 66 App.D.C. 150, 85 F.2d 407 (1936). Under the rule there stated the doctor's testimony here justified submission of the value of his services as an item of damages.

[2] Although the complaint alleged that the wife, in addition to pain and suffering 'has incurred and will in the future incur medical expenses,' and alleged that the husband 'makes claim for loss of consortium,' the trial court instructed the jury, without objection, that the wife's claim was for pain and suffering and the husband's claim was for medical bills and loss of consortium. We assume that the jury followed the instructions and that the award to the wife was limited to damages for pain and suffering. Consequently there is no occasion for disturbing the judgment in her favor. Such judgment will be affirmed. The judgment in favor of the husband will be reversed for a new trial, restricted to the issue of the amount of his damages.

Judgment in favor of Roberta Albano affirmed.

Judgment in favor of Vincent Albano, Jr., reversed for new trial in accordance with this opinion.

All Citations

219 A.2d 567

Footnotes

1 We doubt that this doctor or any other professional man would admit that his charges were anything but reasonable.

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837 A.2d 49
District of Columbia Court of Appeals.

Thomas L. BUSHONG, Appellant,
v.
Byung Kyu PARK, et al., Appellees.

No. 02–CV–633.
|
Argued May 20, 2003.
|
Decided Dec. 4, 2003.

Synopsis

Background: Motorist brought action against driver of vehicle that allegedly rear-ended him. The Superior Court, District of Columbia, Zoe A. Bush, J., entered judgment on a jury verdict against driver. Driver appealed.

Holdings: The Court of Appeals, Terry, J., held that:

[1] question of whether driver's conduct was proximate cause of injuries sustained by motorist was for jury;

[2] fact that pretrial document outlining expected testimony of motorist's expert did not include the word "causation" or "cause" did not prevent witness from testifying how motorist might have sustained his injuries; and

[3] trial court did not abuse its discretion by not allowing counsel for driver to cross-examine witness concerning fact that witness had previously been employed by insurance company that was workers' compensation carrier for motorist's employer and prepared a life-care plan for motorist.

Affirmed.

Attorneys and Law Firms

*51 David F. Grimaldi, Washington, DC, for appellant.

David Rosenblum, with whom Allen M. Hutter was on the brief, for appellees Byung Kyu Park and Ok Hee Park.

William T. Kennard for appellee Hartford Insurance Company.

Before TERRY, SCHWELB, and REID, Associate Judges.

Opinion

TERRY, Associate Judge:

Byung Kyu Park was paralyzed from the neck down after his car was hit from behind by a car driven by appellant Bushong. A jury found that appellant's negligent conduct was the proximate cause of Mr. Park's injuries and awarded Mr. Park $1.5 million in damages. Appellant filed a motion for new trial or, in the alternative, for judgment notwithstanding the verdict, but that motion was denied. Before this court appellant maintains that the trial court erred in denying his post-trial motion and in allowing an expert witness to testify, and that the court abused its discretion by limiting the cross-examination of two other witnesses. We find no reversible error, and hence we affirm the judgment in all respects.

I

During the morning rush hour on August 12, 1997, Kyeong Yi, a non-party in this appeal, was driving southbound on 16th Street, N.W. As she came to a stop behind several cars near the intersection of 16th Street and Whittier Place, her car was rear-ended by Mr. Park's car. As soon as she realized that she had been hit, Ms. Yi looked in her rear view mirror and saw Mr. Park's face, noting that its expression was one of surprise. Ms. Yi then put her car in park, removed her seat belt, and started to get out of her car to assess what had happened. Before she was able to open her car door, however, she felt the impact of another collision. Ms. Yi again looked in her rear view mirror, but this time she was unable to see Mr. Park. According to Ms. Yi, the impact from the second collision was more severe because it caused her car to jolt forward and hit the van that was stopped about six feet ahead of her, which had not happened after the first collision. After the second *52 impact, Ms. Yi alighted from her car and found Mr. Park conscious, but slouched across the passenger seat of his car, apparently immobile.

Mr. Park testified that he accidentally struck the rear of Ms. Yi's car while running errands for his employer, Crystal Press. After colliding with Ms. Yi's car, Mr. Park put his car's gearshift in park and removed the shoulder portion of his seat belt. As he was unfastening the waist portion of the seat belt, [1] his car was hit by appellant's car. Mr. Park, like Ms. Yi, described this second collision as more violent than the first one. As a result of the second impact, he testified, he was unable to move and fell over onto the adjacent passenger seat.

Appellant testified that he too was driving to work that morning and came to a stop behind Mr. Park's car at the red light near 16th Street and Whittier Place. Then, appellant said, he saw Mr. Park's car collide with Ms. Yi's, bounce backward, and hit her car a second time. [2] After the second collision, according to appellant, Mr. Park's car drifted backward and nudged against his car. Appellant also stated that Mr. Park fell over after the first collision between Mr. Park's car and Ms. Yi's car, not after the second collision.

Amit Reizes testified for the plaintiff, Mr. Park, as an expert in accident reconstruction. Mr. Reizes concluded that, given the comparative weight of Mr. Park's and Ms. Yi's cars, it would have been impossible for Mr. Park's car to bounce back after colliding with hers because his car was much heavier. Mr. Reizes also stated that he measured the incline of the road at the scene of the accident and found that it was 1.1 degrees downhill. He then placed a car of the same type as that driven by Mr. Park at the site and found that, when in neutral, the car remained stationary, thus casting doubt on appellant's testimony that Mr. Park's car drifted backwards after the second collision. Mr. Reizes also examined and photographed all the vehicles involved in the accident, and in the course of that examination he found that appellant's front bumper was damaged and that there was paint from appellant's car on the rear bumper of Mr. Park's car. [3]

Dr. Edward Aulisi, the neurosurgeon who treated Mr. Park later that day, testified that as a result of the accident one of Mr. Park's cervical disks ruptured through the surrounding ligaments and pushed against his spinal cord. The resulting condition, known as flaccid paralysis, left Mr. Park paralyzed from the neck down. Dr. Aulisi testified that, because of this condition, Mr. Park would be unable to move and that in all likelihood he could not hold himself erect. He also said that Mr. Park would have slumped over almost immediately after suffering the injury to his spinal cord. When asked hypothetically "which of the two impacts was the most likely and probable cause for [Mr. Park's] injuries," Dr. Aulisi replied, "I would say the second impact," *i.e.*, the collision between appellant's car and Mr. Park's car. On cross-examination, Dr. Aulisi stated that Mr. Park suffered from a pre-existing condition known as spinal stenosis, which ***53** made him more susceptible to spinal injury. [4]

At the close of all the evidence, appellant moved for a directed verdict, but his motion was denied. His post-trial motion for a new trial or, alternatively, a judgment n.o.v. was also denied.

II

Appellant argues that the trial court erred in allowing the case to go to the jury because Mr. Park failed to prove that appellant's conduct was the proximate cause of his injury, and that he was therefore entitled to judgment as a matter of law. [5] Specifically, appellant maintains that because the only evidence concerning proximate cause was the testimony of the treating physician, Dr. Aulisi, Mr. Park failed to prove a *prima facie* case of negligence. [6] For the reasons that follow, appellant's argument is without merit.

[1] **[2]** "[W]hen there is some evidence from which jurors could find the requisite elements of negligence, or when the case turns on disputed facts and the credibility of witnesses, the case must be submitted to the jury for determination." *Lyons v. Barrazotto,* 667 A.2d 314, 320 (D.C.1995) (citation omitted). A case may not be taken away from the jury on motion of the defendant if an impartial juror, considering all the evidence, could reasonably find in favor of the plaintiff. See, e.g., *Finkelstein v. District of Columbia,* 593 A.2d 591, 594 (D.C.1991) (en banc).

[3] **[4]** In determining whether judgment should be entered as a matter of law for the defendant, the court must view the evidence in the light most favorable to the plaintiff, giving him the benefit of all reasonable inferences. *E.g., Osbourne v. Capital City Mortgage Corp.,* 727 A.2d 322, 324 (D.C.1999). Under this standard, issues

of negligence and proximate cause can be taken from the jury and decided by the court only if "no reasonable person, viewing the evidence in the light most favorable to the prevailing party, could reach a verdict in favor of that party." *Oxendine v. Merrell Dow Pharmaceuticals, Inc.*, 506 A.2d 1100, 1103 (D.C.1986) (citations omitted); *accord, e.g., District of Columbia v. Wilson,* 721 A.2d 591, 596 (D.C.1998); *Lyons,* 667 A.2d at 320; *Corley v. BP Oil Corp.*, 402 A.2d 1258, 1263 (D.C.1979) ("Motions for a directed verdict deprive plaintiff of a determination of the facts by a jury and should, therefore, be granted sparingly" (citation omitted)). Such cases are very rare, and this is not one of them.

[5] As we have said, judgment as a matter of law is proper only when the material facts are undisputed and when reasonable jurors could reach only one possible conclusion based on those facts. *See generally* ***54** *Goldsmith v. Tapper,* 748 A.2d 416, 419 (D.C.2000). This was clearly not the case here. The parties presented two distinct versions of the relevant events, and the jury was free to believe either one. *See, e.g., Abebe v. Benitez,* 667 A.2d 834, 836 (D.C.1995) ("Irrespective of which conclusion a jury might reach, the fact that more than one conclusion, material to the outcome of the case, might reasonably be drawn from the evidence demonstrates that a [judgment as a matter of law] should not [be] granted"). Mr. Park and Ms. Yi testified that they were initially involved in a minor accident and that, a few seconds later, appellant's car struck Mr. Park's car from the rear. From their testimony—irrespective of what the doctor said—a jury could reasonably find that the second collision was more violent and forceful than the first. Appellant testified, on the other hand, that he came to a complete stop and saw Mr. Park's car hit Ms. Yi's car twice, and then roll backward and nudge his car. This was a different version of the facts, and the jury was free to reject it.

[6] In addition to these contradicting versions of the accident itself, the parties also disagreed over how Mr. Park sustained his injuries. Mr. Park claimed that his paralysis occurred after appellant's car crashed into his, but appellant asserted that it occurred immediately after the first crash between Mr. Park and Ms. Yi. With these divergent views of the facts, it would not have been proper or permissible for the court to enter judgment as a matter of law. "If there is room for a difference of opinion, the wise course is for the trial judge to allow the case to go to the jury." *Corley,* 402 A.2d at 1263 (citation omitted).

Viewing the evidence in the light most favorable to Mr. Park, we hold that a reasonable jury could have concluded that his injuries were the result of the second collision, basing that conclusion on the testimony of not only Dr. Aulisi, but also Ms. Yi and Mr. Park. *See Abebe,* 667 A.2d at 836. Furthermore, because the case turned on witness credibility and disputed facts, a judgment as a matter of law would have been improper and legally erroneous. *See Lyons,* 667 A.2d at 320. The trial court committed no error when it denied both appellant's motion for a directed verdict and his motion for judgment notwithstanding the verdict.

III

Appellant contends that Mr. Park's designation of Dr. Aulisi as an expert witness, pursuant to Super. Ct. Civ. R. 26(b)(4), was inadequate because the pretrial document outlining his expected testimony did not include the word "causation" or "cause" and therefore did not allow him to offer an opinion on how Mr. Park sustained his injuries. [7] Because of this omission, appellant maintains that Mr. Park never properly designated an expert on the issue of causation, and that Dr. Aulisi's testimony concerning Mr. Park's injuries was erroneously admitted.

[7] Appellant's argument misses the mark. Regardless of what the pretrial statement might or might not say about the expected testimony of an expert witness, this court has held that the witness' testimony is properly admitted, notwithstanding any failure to mention certain words in the pretrial documents, if the actual testimony does not surprise the opposing party. *See, e.g., Kling v. Peters,* 564 A.2d 708, 714 (D.C.1989) (holding that a doctor could still testify to the cause of ***55** the plaintiff's injury despite not having referred to causation in a Rule 26(b)(4) pretrial statement). Since Mr. Park's designation, *supra* note 7, put appellant on notice about the subject of Dr. Aulisi's testimony, allowing him to answer a hypothetical question about how Mr. Park might have sustained his injuries was not improper. *See Kling,* 564 A.2d at 714; *see also United States v. Watson,* 335 U.S.App. D.C. 232, 240, 171 F.3d 695, 703 (1999) (expert witness may respond to hypothetical questions that mirror facts already in evidence). Furthermore, even without Dr. Aulisi's specific testimony, the jury could reasonably have inferred causation from the testimony of other witnesses,

given the very close proximity in time between the second collision and the injury.[8] *See Bahura v. S.E.W. Investors,* 754 A.2d 928, 942 (D.C.2000); *Otis Elevator Co. v. Tuerr,* 616 A.2d 1254, 1260 (D.C.1992).

Moreover, and contrary to appellant's argument, expert medical testimony on the issue of causation was not even necessary (although it was certainly helpful) because Mr. Park's case did not involve a complex medical question that required expert testimony. The issue before the jury was not one of medical causation[9] but, rather, which of the two collisions was the proximate cause of the injury. "Where laymen can say, as a matter of common knowledge and observation, that the type of harm would not ordinarily occur in the absence of negligence, the jury is allowed to infer negligence without expert testimony being presented." *Harris v. Cafritz Memorial Hospital,* 364 A.2d 135, 137 (D.C.1976) (citation omitted), *cert. denied,* 430 U.S. 968, 97 S.Ct. 1650, 52 L.Ed.2d 359 (1977); *accord, e.g., Washington Hospital Center v. Martin,* 454 A.2d 306, 308–309 (D.C.1982) (expert medical testimony not necessary when claim was based on negligence of hospital staff in allowing elderly patient to fall out of bed, which did not involve issues of medical judgment and skill).

[8] Finally, appellant maintains that his liability for Mr. Park's injuries should be limited because Park's pre-existing spinal stenosis made him more susceptible to injury. However, it is a firmly established principle of tort law that a tortfeasor takes his victim as he finds him. Under this principle, sometimes known as the "thin skull" or "eggshell skull" doctrine, a negligent defendant is liable for harm resulting from his own negligent conduct even though the harm was aggravated by the particular plaintiff's condition at the time of that negligent conduct. *See, e.g., John Hancock Mutual Life Insurance Co. v. Serio,* 176 A.2d 874, 876 (D.C.1962); *Vosburg v. Putney,* 80 Wis. 523, 50 N.W. 403 (1891). Mr. Park's pre-existing condition cannot relieve appellant of liability.

IV

Appellant contends that the trial court abused its discretion when it precluded him from cross-examining the accident reconstruction expert, Amit Reizes, about his qualifications and experience. Appellees respond that because appellant had an opportunity to question Mr. Reizes concerning his background when he was initially tendered as an expert, but failed to do so, we should hold that he waived this claim of error.

At the time Mr. Reizes was offered as an expert, the following discussion took place between counsel and the court:

> ***56** [PLAINTIFFS' COUNSEL]: At this time I would offer his curriculum vitae, No. 23, as an exhibit and offer Mr. Reizes as an expert in accident reconstruction.
>
> THE COURT: Is there any voir dire?
>
> [DEFENDANTS' COUNSEL]: No voir dire, your honor.
>
> THE COURT: Is there any objection?
>
> [DEFENDANTS' COUNSEL]: No objection.
>
> THE COURT: So admitted and so qualified.

Despite his failure to object or to conduct any voir dire, appellant's counsel later attempted to challenge Mr. Reizes' credentials on cross-examination by asking him how long he had considered himself an expert in the area of accident reconstruction. Mr. Park's counsel objected, claiming that the opportunity to cross-examine Mr. Reizes about his qualifications had been waived. The court agreed and said to appellant's counsel, "If you want to test his conclusions, or test his procedures or test the materials that he relied on, that's fine, but we're not going back behind his CV when I already asked you about [*sic*] because you waived your right to ask him that ...."

In his brief before this court, appellant highlights several facts which, he asserts, would diminish Mr. Reizes' qualifications as an expert. Appellees contend that this assertion comes too late: that appellant had ample opportunity to explore Mr. Reizes' alleged lack of expertise before the court accepted him as an expert, but failed to do so then at his own peril. Appellant counters that he was not seeking to establish that the expert was not qualified to testify at all, but only to show that his qualifications were not as strong as they might appear to be. In other words, as we understand appellant's argument, he was trying to challenge "the degree of the ... expert's qualifications," which goes only to the weight of his testimony, not to its competency or admissibility. *See Benjamin v. Hot Shoppes, Inc.,* 185 A.2d 512, 515 n. 2 (D.C.1962).

[9] We need not decide whether the trial court erred in refusing to allow counsel to cross-examine Mr. Reizes in front of the jury about his qualifications, because we are satisfied that if there was any error, it was surely harmless. Mr. Reizes added relatively little to the plaintiffs' case. As we said earlier, the main issue—indeed, the only real issue —before the jury was which of the two collisions caused Mr. Park's injury. Mr. Reizes' testimony, which consisted primarily of what Mr. Park in his brief characterizes as "basic physics," merely corroborated that given by Mr. Park, Ms. Yi, and Dr. Aulisi on the issue of proximate cause. The testimony of those three witnesses constituted the heart of the plaintiffs' case, because it focused on the critical issue of chronology. Officer Poole also gave useful testimony about the condition of the vehicles after the two collisions. Even if Mr. Reizes had not testified at all, we can "say, with fair assurance," that the jury's verdict would not have been any different. *Kotteakos v. United States,* 328 U.S. 750, 765, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946); *see R. & G. Orthopedic Appliances, Inc. v. Curtin,* 596 A.2d 530, 538–540 (D.C.1991) (applying *Kotteakos* standard in a civil case). [10] We hold accordingly that if the trial court ***57** erred—which we do not decide—its error was harmless.

V

Finally, appellant contends that the trial court erred in failing to make an exception to the collateral source rule so as to permit more extensive cross-examination of Mr. Park's life-care planner, Patricia Bonner.

Because Mr. Park was injured within the scope of his employment, the cost of his medical treatment and rehabilitation was covered in part by his employer's workers' compensation carrier, Hartford Insurance Company. In November 1998 Hartford hired Ms. Bonner, a registered nurse, to work as Mr. Park's case manager and to prepare a life-care plan detailing the costs associated with Mr. Park's ongoing medical needs. [11] Later in the course of this litigation, in February 2001, Ms. Bonner was hired again by Mr. Park's attorneys to prepare another life-care plan. The costs estimated in these two plans were different: $1,200 per year in 1998 and $10,000 per year in 2001.

During his cross-examination of Ms. Bonner, counsel for appellant sought to ask for whom she was working when she created the first life-care plan in 1998. Counsel claimed that effective cross-examination would be hindered without identifying to the jury how and why Ms. Bonner originally came into the case as a life-care planner with Hartford. After considerable discussion outside the presence of the jury, the court ruled that Ms. Bonner could be cross-examined about why there was such a large discrepancy between the figures in the two plans and why she ceased caring for Mr. Park in 1998, but that she could not be asked questions that would elicit a response referring to Hartford or to workers' compensation. [12] We find no legal error and no abuse of discretion in this ruling.

[10] The collateral source rule provides, as a general proposition, that an injured party may recover full compensatory damages from a tortfeasor regardless of the payment of any amount of those damages by an independent party (a "collateral source"), such as an insurance carrier. *See* 3 JEROME H. NATES, *et al.,* DAMAGES IN TORT ACTIONS § 17.00 (rev. ed.2003) (hereafter "NATES"); *see also* RESTATEMENT (SECOND) OF TORTS § 920A (1977) (collateral benefits are not subtracted from a plaintiff's damage award even if insurance coverage helps to pay for the treatment of injuries); *Jacobs v. H.L. Rust Co.,* 353 A.2d 6, 7 (D.C.1976) (when plaintiff is reimbursed for his injuries "by a third party who is independent of the wrongdoer, the plaintiff may still seek full compensation from the tortfeasor even though the effect may be a double recovery" (citation omitted)). In addition, the rule prevents the admission of evidence showing that benefits were paid by a collateral source, except when that evidence clearly has probative value on an issue unrelated to damages. *See* 3 NATES § 17.00.

[11] Appellant claims that the trial court should have made an exception to ***58** this rule and allowed him to let the jury know that Ms. Bonner was employed by a workers' compensation carrier in 1998. We disagree. Because evidence that Ms. Bonner worked for Hartford (or any other insurance carrier) would have been of little or no relevance and could well have led the jury down a path where it should not go, it was properly excluded as a topic for cross-examination. *See Jacobs,* 353 A.2d at 7; *see also Williams v. United States,* 805 A.2d 919, 927 (D.C.2002) (cross-examination is subject to reasonable

limits, imposed at the discretion of the trial judge, "to prevent inquiry into matters having little relevance or probative value").

It is true that counsel for appellant told the court that the reason he sought to inquire about the two different figures in the life-care plans was to explore the possibility that Ms. Bonner might have been minimizing costs when she was working for Hartford and maximizing them when asked to prepare a plan in connection with Mr. Park's negligence action against appellant. Such an inquiry into a witness' potential bias has always been a proper subject of cross-examination. *See, e.g., Joyner v. United States,* 804 A.2d 342, 348 (D.C.2002). But to go further and inquire who her employer was would stretch the boundaries of cross-examination beyond permissible limits. The notion that the jury needed to know why Ms. Bonner created a life-care plan in 1998 was irrelevant to the issues before the jury—namely, whether or not appellant was liable for Mr. Park's injuries and, if so, what was the proper measure of damages. Counsel's claim that the jury ought to know the identity of Ms. Bonner's employer when she drafted the first life-care plan in 1998 was a creative but impermissible attempt to put before the jury evidence that was not only irrelevant, but also prejudicial. Its exclusion was not an abuse of discretion, nor was there any legal error in the court's ruling.

VI

For the foregoing reasons, the judgment is

Affirmed.

All Citations

837 A.2d 49

Footnotes

1 The car that Mr. Park was driving had a two-part seat belt. The shoulder portion automatically moved across the driver's or passenger's torso as the car door was closed, but the waist portion had to be manually fastened.

2 Both Mr. Park and Ms. Yi specifically testified, however, that Mr. Park's car did not bounce back and forth after the first collision.

3 Metropolitan Police Officer Charles Poole, who responded to the accident, also testified that appellant's car had minor damage to the left front bumper and fender.

4 During his testimony, Mr. Park said he was in good health before the accident in 1997. There was no evidence that Mr. Park's spinal stenosis was diagnosed at any time prior to the date of the accident.

5 Appellant challenges both the denial of his motion for a directed verdict and his subsequent motion for a judgment notwithstanding the verdict. Because the standard of review and the facts underlying each motion are identical, we consider whether appellant was entitled to a judgment as a matter of law under Super. Ct. Civ. R. 50(a). That rule permits the granting of such a motion only if there is "no legally sufficient evidentiary basis for a reasonable jury to find" for the non-moving party.

6 "The elements of a cause of action for negligence are a duty of care owed by the defendant to the plaintiff, a breach of that duty by the defendant, and damage to the interests of the plaintiff, proximately caused by the breach." *Taylor v. District of Columbia,* 776 A.2d 1208, 1214 (D.C.2001) (citation omitted).

7 Mr. Park's Rule 26(b)(4) designation for Dr. Aulisi stated: "As a direct result of his low speed motor collision of 8/12/97, Plaintiff [Mr. Park] suffered a C3–4 HNP, ligamentous disruption of the spinal canal compression and instability and quadriparesis."

8 Appellant was also free to ask Dr. Aulisi a reverse hypothetical about other potential causes of the injury, but he never did so.

9 It was essentially undisputed that the trauma to Mr. Park's spinal cord caused his paralysis.

10 Mr. Reizes did testify that, given the relative sizes of the vehicles involved, appellant's version of the accident was not plausible. We do not think that this testimony, even though it undermined to some extent appellant's version of what happened, made any significant difference in the outcome of the trial.

11 Although the record is not entirely clear on this point, Hartford apparently sought preparation of the life-care plan in order to estimate the amount needed for the final settlement of its medical lien.

12 When appellant's counsel later asked Ms. Bonner about the discrepancy, she explained that at the time of the 1998 plan, Mr. Park was being cared for at home by a family physician. The 2001 plan, however, reflected the fact that Mr. Park's

condition had deteriorated in the intervening years and included the costs of other items, such as a more aggressive rehabilitation program and additional medications.

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Tuesday, March 18, 2014

D.C. Superior Court

MEDICAL MALPRACTICE
COLLATERAL SOURCE RULE / MEDICARE

The collateral source rule permits a plaintiff to seek damages for the full amount of medical expenses, including the amount written off by the hospital pursuant to the Medicare reimbursement formula. When a person pays into the Medicare system she has bargained for that benefit and under the collateral source rule she should receive the benefit of that bargain. Defendant's motion in limine to exclude evidence of non-compensable hospital charges written off under federal Medicare program is denied.

ALLEAN SHELL v. ROCK CREEK NURSING CENTER, INC., et al.

D.C.Super.Ct. No. 12 CA 8632. Decided on February 6, 2014. (Neal E. Kravitz, J.). *W. Charles Meltmar,* Esq., for Plaintiff. *Andrew J. Marcus,* Esq., for Defendant. **Cite as *Shell vs. Rock Creek Nursing Center* 142 *Daily Wash. Law Rep.* 541 (Feb. 6, 2014)(Judge Kravitz).**

MEMORANDUM OPINION AND ORDER

KRAVITZ, *Judge*: The plaintiff in this medical malpractice/survival action is the personal representative of the Estate of Elfair Wash. At all times relevant to the complaint, Ms. Wash was a resident of Rock Creek Manor, a long-term care facility owned and operated by defendants Rock Creek Nursing Center, Inc. and Mar-Salle Center Associates, LP. The plaintiff alleges that on or about August 17, 2011 Ms. Wash, then 86 years old, suffered an inter-cranial subdural hematoma and a hemorrhage in the area of her left eye due to the negligence of one or more of the defendants' employees at Rock Creek Manor. Ms. Wash spent eight days in George Washington University Hospital receiving treatment for her injuries, and she amassed medical bills totaling $57,481.50 in the course of her stay. Ms. Wash was a participant in the Medicare program, however, and the hospital, operating under the applicable Medicare reimbursement formula, *see* 42 C.F.R. §412.1 *et seq.*, accepted $10,004.36 from Medicare as full payment of the bills and "wrote off" the remaining $47,477.14.

The case is now before the court on the defendants' motion *in limine* to preclude the plaintiff from seeking damages for the full amount initially billed by the hospital. The defendants argue that the collateral source rule does not extend to a situation in which neither the party seeking damages for medical expenses nor any third party was ever obligated to pay the expenses. The defendants thus contend that the plaintiff's damages claim for medical expenses should be limited to the $10,004.36 the hospital accepted from Medicare as full payment

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D.C. Court of Appeals

CRIMINAL LAW
FAILURE TO RECORD ALL PROCEEDINGS VERBATIM / IMPROPERLY COERCED JURY VERDICT

Failure to bring a court reporter into the jury room Superior Court Criminal Rule of Procedure 36-I (a) where the judge, with counsel present, read civility instructions to a deadlocked jury was not prejudicial as it is highly improbable that any specific error was unrecorded. Neither counsel objected to the summation nor the procedure and Appellant does not allege that a specific error occurred during the unrecorded interaction but that he is precluded from mounting an effective appeal because there might have been an error. Errors in the court's civility statement to the jury were not prejudicial. Trial court erred telling jurors their purpose was to reach a verdict and when it omitted language reminding them not to surrender their honest convictions to reach an agreement, however Appellant has not shown the instruction prejudiced him. The verdict itself does not evidence coercion. Affirmed.

CHARLES A. GRANT v. UNITED STATES

D.C.C.A. No. 11-CM-1134. Decided on February 20, 2014. Before Blackburne-Rigsby and Easterly, J.J., and King, Sr.J., with Judge King writing for the Court. (Hon. Herbert B. Dixon, Jr., Trial Judge). *Anna B. Scanlon,* Esq., for Appellant. *Nebiyu Feleke,* Asst. U.S. Atty., for Appellee with *Ronald C. Machen Jr.*, U.S. Atty., *Elizabeth Trosman*, Asst. U.S. Atty., and *Chrisellen R. Kolb*, Asst. U.S. Atty., on the brief.

KING, *Senior Judge*: On July 12, 2011, appellant Charles A. Grant was convicted by a jury of bias-related threats, and acquitted of bias-related assault (with a bottle), and two counts of possession of a prohibited weapon (a bottle and a knife). On appeal, he contends that his conviction should be reversed because there was a substantial risk that the jury verdict was coerced by the trial court's response to a jury note regarding a "difficult" environment in the jury room, and the trial court violated Superior Court Criminal Procedure Rule 36-1 by reading a juror's

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of its bills. The plaintiff argues in opposition that the collateral source rule is fully applicable in these circumstances and that she must be permitted to seek damages based on the entire amount of the hospital's initial bills.

Discussion

Under the common law collateral source rule, "[a]n injured person may usually recover in full from a wrongdoer regardless of anything [the injured person] may get from a 'collateral source' unconnected with the wrongdoer." *District of Columbia v. Jackson*, 451 A.2d 867, 870 (D.C. 1982) (quotation omitted). Although the rule sometimes results in a windfall for the tort victim, our Court of Appeals has determined that "it is more just that the windfall should inure to the benefit of the injured party than that it should accrue to the tortfeasor." *Id.* (quotation omitted). The collateral source rule thus applies in the District of Columbia whenever (1) "a payment to the injured party came from a source wholly independent of the tortfeasor"; or (2) "the plaintiff may be said to have contracted for the prospect of a double recovery[,]"... because "a party should receive the benefit of a bargain for which he or she contracted." *Hardi v. Mezzanotte*, 818 A.2d 974, 984 (D.C. 2003) (quotation omitted).

Hardi was a medical malpractice case in which the plaintiff incurred $209,259.82 in medical bills due to the defendant's negligence. The trial court awarded the plaintiff the full amount of the medical bills as special damages, even though the plaintiff's private health insurance company negotiated a discount with the plaintiff's medical providers under which $107,560.05 of the amount billed was written off. The trial court explained that "where the party pays the premium for insurance, she is entitled [under the collateral source rule] to the benefit of the bargain contracted for[,] including any reduction in payments that the insurance carrier was able to negotiate." 818 A.2d at 984. The Court of Appeals affirmed the trial court's ruling on appeal, expressly agreeing with the trial court's reasoning. *Id.* At least with respect to write-offs negotiated by private health insurance companies, *Hardi* therefore refutes the defendants' argument that the collateral source rule precludes tort victims from seeking damages for the full amounts billed.

Ms. Wash, of course, was covered by Medicare, not by private health insurance. The court thus must consider whether *Hardi* is properly extended to the Medicare context and, in particular, whether the collateral source rule permits a tort victim in Ms. Wash's situation to seek damages for medical expenses that have been written off by her medical provider pursuant to a Medicare reimbursement formula. In the circumstances, the court answers yes to both questions.

First, the Medicare program is administered by the federal government and is wholly independent of the defendants in this case. The defendants are private entities that are neither instrumentalities of nor funded by the federal government. Any benefits received by Ms. Wash due to her participation in Medicare were therefore entirely "collateral" to the defendants.

Second, it is a near certainty that Ms. Wash received Medicare hospital benefits in 2011 as a result of financial contributions she (or her spouse, if she had one) made to the Medicare program. With a few narrow exceptions, Medicare covers an enrollee's hospital expenses only if the person or his or her spouse has paid into the system through payroll taxes or via premiums supporting enrollment in Medicare Part A. *See* 42 U.S.C. §§1395c, 1395i-2. The exceptions include certain disabled persons who are eligible for benefits under the Social Security Disability Insurance and Railroad Retirement programs, as well as others who have Amyotrophic Lateral Sclerosis (ALS) or end-stage renal disease. *See* 42 U.S.C. §1395c. Because the record reflects that Ms. Wash suffered from dementia and contains no mention of ALS, kidney failure, or any other disease or disability, the court finds that Ms. Wash qualified for Medicare hospital benefits not because she was disabled or suffered from ALS or end-stage renal disease but because she paid Medicare payroll taxes during her working life or subsequently paid premiums for hospital coverage as an enrollee in Medicare Part A. Either way, Ms. Wash made financial contributions to the Medicare system and thereby secured the right to claim all of the benefits of her bargain, just as a person covered by private health insurance earns the right, through the payment of premiums, to receive all of the benefits of her policy, including write-offs negotiated by the insurance company. For a Medicare participant like Ms. Wash, who paid into the system, there is simply no legitimate basis on which to distinguish her situation from that of a participant in a private health insurance program. *See Wills v. Foster*, 892 N.E.2d 1018, 1026 (Ill. 2008) (discussing cases from other "benefit of the bargain" jurisdictions that apply the collateral source rule more generously for Medicare recipients who have made financial contributions in return for their benefits than for Medicaid recipients who have not).

The court therefore concludes that the collateral source rule permits the plaintiff to seek damages for the full amount billed by George Washington University Hospital, including the amount written

off by the hospital pursuant to the Medicare reimbursement formula. Ms. Wash bargained for that important benefit by paying into the Medicare system, and under the collateral source rule, as it has developed at common law in the District of Columbia, she "should receive the benefit of [her] bargain." *Hardi*, 818 A.2d at 984.

Accordingly, it is this 6th day of February 2014

ORDERED that the "defendants' amended motion *in limine* to exclude evidence of noncompensable hospital charges written off under federal Medicare program," filed on January 3, 2014, is denied.[1]

FOOTNOTES:

[1] The court states no view concerning the related evidentiary question of whether the defendants will be permitted to challenge the fairness and reasonableness of the initial bills through the presentation of evidence of the actual amount accepted by the hospital as payment in full. If the defendants wish to present such evidence, they should file a motion *in limine* in advance of the pretrial conference seeking permission to do so. *See* Super. Ct. Civ. R. 16(d).

Cite as *Shell v. Rock Creek Nursing Center* 142 Daily Wash. Law Rep. 541 (Feb. 6, 2014) (Judge Kravitz)

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note to the jury the court reporter's presence. We affirm.

I.

On March 18, 2011, at approximately 3:50 a.m., Ryan Barrett was walking home on Georgia Avenue, Northwest, with his two friends, Christopher Fenwick-Williams and Rufus Lofty. The streets were empty, except for Grant, who walked ahead of the group. Grant stopped walking, and as Barrett and his friends walked by, he said "Shut the fuck up, you faggots." Barrett noticed that Grant "smelled of alcohol, . . . was staggering, and his voice was breaking." Barrett and Grant

D.C. Bar Nominations Committee Announces Candidates for Bar Office

The D.C. Bar Nominations Committee has selected **Stephen I. Glover** of Gibson, Dunn& Crutcher LLP and **Timothy K. Webster** of Sidley Austin LLP as candidates for D.C. Bar president-elect for the 2014–2015 term. The president-elect serves for one year before becoming president and continues in office a third year as immediate past president.

Glover serves as a member of the D.C. Bar Board of Governors and formerly served as cochair of the Bar's Corporation, Finance and Securities Law Section; chaired the Community Economic Development Pro Bono Project Advisory Committee; served on the Bar's Strategic Planning Committee; and received the Bar's 2004 Pro Bono Lawyer of the Year Award. A graduate of Amherst College and Harvard Law School, he cochairs his firm's mergers and acquisitions practice group and has an extensive practice representing public and private companies in complex mergers and acquisitions, joint ventures, equity and debt offerings, and corporate governance matters.

Webster served three terms as the D.C. Bar's general counsel, providing legal advice to the Bar on a wide variety of business matters and defending the Bar and its employees in litigation related to the Bar's core mission. He also is active in the American Bar Association where he serves as newsletter vice chair of the Environmental Enforcement and Crimes Committee of the Section of Environment, Energy and Resources. A graduate of Carleton College and the University of Virginia School of Law, Webster's practice includes both civil and criminal environmental matters, including challenges to government action and defense of enforcement matters as well as regulatory advocacy and related compliance counseling.

The Nominations Committee also announced the selection of candidates for other Bar positions. Nominated for secretary are Matthew G. Kaiser of The Kaiser Law Firm PLLC and Christopher P. Zubowicz of the U.S. Department of Justice, and for treasurer are Sarah Shyr of Eckert Seamans Cherin & Mellott, LLC and Laura Sierra of Alston & Bird LLP.

The following are candidates for five vacancies on the Bar's Board of Governors for three-year terms: Steven N. Berk of Berk Law PLLC; Susan Kovarovics of Bryan Cave LLP; Sara Kropf of the Law Office of Sara Kropf PLLC; Ariel Levinson-Waldman of the District of Columbia Office of the Attorney General; Sadina M. Montani of Vedder Price P.C.; Sergio F. Oehninger of Hunton & Williams LLP; Mark A. Salzberg of Patton Boggs LLP; Annamaria Steward of the University of the District of Columbia David A. Clarke School of Law; Keiko K. Takagi of Sughrue Mion, PLLC; and Benjamin F. Wilson of Beveridge & Diamond, P.C.

The Nominations Committee also announced the following candidates for three open seats in the American Bar Association House of Delegates: Jack C. Keeney Jr. of the Legal Aid Society of the District of Columbia, Beth L. Law of the Consumer Specialty Products Association, Laura A. Possessky of Gura & Possessky, Lucy L. Thomson of Livingston PLLC, and Robert N. Weiner of Arnold & Porter LLP.

Other D.C. Bar members who wish to run for office may secure a spot on the ballot for any position other than president-elect by filing petitions bearing the signatures of at least 366 active D.C. Bar members, that figure representing at least one-half of 1 percent of the Bar's active membership as of the first business day of 2014. Petitions must be obtained by contacting Ngoc Huynh in the Bar's Executive Office at 202-737-4700, ext. 3221, or by e-mail at NgocHuynh@dcbar.org, and must be filed by 5 p.m. on March 20. The candidates for president-elect will speak, and all other candidates will be introduced, at a forum on April 23, from 12 to 12:30 p.m., at the D.C. Bar Board Room, 1101 K Street NW, second floor.

Ballots and instructions for voting, by mail or online, will be distributed to all active Bar members on April 29. The deadline to vote is May 23.

engaged in a verbal altercation, and as Barrett and his friends continued to walk down the street, Grant yelled "Fuck you, faggot, I'll kill a faggot out here. Y'all faggots don't mean nothing to me."

The three men continued to walk away, at which point Barrett was hit in the right elbow with a glass bottle. Barrett did not see Grant throw the bottle, but when he turned around there was no one else in the area. Barrett told Grant that he "would fuck [him] up" and Grant continued to "briskly" follow Barrett and his friends saying, "What? What? You'll do what?", until they entered a nearby McDonald's to call the police. Barrett described Grant to the 911 operator as "a light-skinned black male, standing about 5'9," with a thick build and full facial hair, wearing a black leather jacket and some dark jeans."

Barrett said that Fenwick-Williams told him that Grant had a knife, which Barrett himself did not see. Fenwick-Williams testified that he saw Grant holding something black in his hand, and that he ran toward them saying "he was going to stab [them]." Metropolitan Police Department (MPD) Detective Kristal Boyd, who responded to the 911 call, testified that when interviewed after the incident, Barrett and his friends mentioned that Grant "appeared to have . . . reached in his pocket as if he had something or was trying to pull something out," but they never mentioned a weapon, or a knife.

MPD officers responded to the area, and about five minutes after the call spotted Grant, who matched the lookout description. MPD Officer Von Galery testified that when they made a U-turn to stop and question Grant, he "made a gesture, throwing a hard object to the ground that made a clinging sound of steel, hitting a steel trashcan." Once out of the police vehicle, Officer Galery "noticed that there was a knife that was on the ground." The officers conducted a show-up procedure and both Barrett and Fenwick-Williams separately identified Grant, stating that he was the individual that threw a bottle at Barrett.

II.

The jury began deliberations at approximately noon on Friday, July 8, 2011. At 3:45 p.m. the jury sent the court a note that read: "We, the jury, can't come to agreement of the identity of the assailant beyond a reasonable doubt. We need further instructions." Grant requested that the court re-read the identification instruction to the jury and give an anti-deadlock instruction, and the government suggested that it was premature for an anti-deadlock instruction. The court responded as follows:

> Members of the jury, thank you for your note regarding the status of the jury's discussions. I'm directing that you deliberate further in the case and that you keep an open mind about the case, with a view to listening to others and expressing your own point of view to see whether you can reach a unanimous decision. Please continue with your deliberations.

After being dismissed for the weekend, the jury resumed deliberations on Monday, July 11, and sent a note at 12:30 p.m. reading: "We as a jury are hung." Both parties requested that the court read the *Winters* anti-deadlock instruction, *Winters v. United States*, 317 A.2d 530, 534 (D.C. 1974) (en banc), but the court proposed its own anti-deadlock instruction. Grant's counsel objected to the first sentence of the proposed instruction, but the judge included that sentence in its instruction. The court then read the following (the "anti-deadlock" instruction) to the jury, after which the jurors were dismissed to continue deliberations:

> In many cases, absolute certainty cannot be attained or expected. Although the verdict must be the verdict of each juror and not a mere acquiescence in the conclusion of the other jurors, you should examine the questions submitted to you with candor and with proper regard and deference to the opinions of each other.
>
> You should consider that it is desirable that the case be decided, that you are selected in the same manner and from the same source from which any future jury must be selected, and there is no reason to suppose that the case will ever be submitted to twelve persons more intelligent, more impartial or more competent to decide it, or that more or clearer evidence will be produced on one side or the other.
>
> And with this view, it is your duty to decide the case, if you can conscientiously do so. You should listen to each other's arguments with a disposition to be convinced. Thus, where there is disagreement, jurors for acquittal should consider whether their doubt is a reasonable one, which makes no impression upon the minds of others equally honest, equally intelligent with themselves, and who have heard the same evidence with the same attention and with an equal desire to arrive at a fair verdict and under the sanction of the same oath.
>
> And on the other hand, jurors for conviction ought seriously to ask themselves whether they might not reasonably doubt the correctness of a judgment which is not concurred in by others with whom they are associated and whether they should distress the weight or sufficiency of that evidence which fails to carry a conviction in the minds of their fellow jurors.
>
> The verdict must represent the considered judgment of each juror. In order to return a verdict, each juror must agree to that verdict. Your verdict, with respect to any charge that you're considering, must in and of itself be a unanimous verdict. So it is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without sacrificing your individual judgment. Each of you must decide the case for yourself, but you do so only after an impartial consideration of the evidence with your fellow jurors.
>
> In the course of your deliberations, do not hesitate to re-examine your own views and the reasons for your views and to change your opinion if you're convinced it is wrong. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors only for the purpose of returning a verdict. Remember, you are not partisans or advocates for either side; you are judges, neutral judges of the facts.

At 3:50 p.m., the court received a note from a juror other than the foreman, which read: "The environment in our jury room has become very difficult. Our ability to incorporate your most recent directions into our deliberations has become almost impossible. Please advise us of our options." In different handwriting, the note also read: "Jury members have been personally 'targeted' by juror members as doing 'a piss poor job.'" As the trial judge was in the middle of selecting a jury for another trial, he proposed to the parties that he and the parties' lawyers enter the jury room, in order to excuse the jury until the following morning. Neither party objected to the procedure.

Before addressing the jury the trial judge indicated he would read the note to the jury, to which counsel for Grant objected arguing that because of the underlying "hostility" it may "offend" a group of the jurors. The government argued that the court should

read the note to the jury because "it would be better if they [knew] what it said and they had time in the evening to digest it . . . [and] have a cooling-off period." The court determined that it would read the note and tell them it would "look into and talk to them about" it the next day.

The following morning, the judge stated that he had taken "both counsel with me to the door of the jury room and read the note." The government proposed "allowing the jurors to continue their deliberations . . . to see if they've had time to calm down, and can work together to reach some sort of verdict in this case." Counsel for Grant argued that a mistrial was appropriate because "the individual who was the foreman looked clearly upset" and it was unclear if "what [had] been said in the note can be undone." Counsel also argued that it would be prejudicial "to require the jurors after such a note to continue to deliberate when they have expressed that their disagreement is such that it's reaching a hostile point." The court denied the motion for a mistrial. When the jurors returned to the courtroom, the judge read the note to the jury again, without revealing the identity or the number of the jurors who signed the note. Then the court instructed the jury as follows to continue deliberations civilly (the "civility" instruction):

> As you know, I have not spoken to any of you about this note. The note concerned me because it's important whether the note represents the opinion of one juror, or whether the note represents the opinion of a majority of jurors – it doesn't matter – it's an important note. Whether it's just one person's opinion or whether it's a majority's opinion on the jury it's very important because it affects the ability of the jury to proceed with its deliberations.
>
> One of the instructions that I gave to you originally concerned the selection of a foreperson. But it's not the selection of the foreperson that I'm referring to, it's the other aspects of that particular instruction.
>
> The instruction talked about the need for discussions to be civil. The instruction talked about the need for jurors to be able to express their views.
>
> And whether a juror agrees with what has been said, or whether a juror disagrees with what has been said, that juror has the right to express their views, and they have the right to express those views without being the subject of a personal attack by any other juror, or to feel that they are the subject of a personal attack.
>
> Jurors disagree in jury deliberations all the time – that's a part of the process. But you can disagree and have discussions about your different views without being disagreeable.
>
> It is important for everyone to speak up regarding their own views with respect to the evidence in the case. It is important for everyone to act civilly on the jury towards the other, and it is important that each juror feel that – should feel that they have the right to speak up regarding their individual views, whether those views are in agreement with the majority or whether or not those juror's views are different from the majority – it is extremely, extremely important.
>
> Now, once again, I repeat where I started. I don't know whether this note represents the opinion of one juror, or whether this note represents the opinion of a majority of the jurors – even more or less than that – but it's an important note because it affects the ability of a jury to have full, fair, frank discussions in a civil manner, to discuss their disagreements, to attempt to persuade the other, to listen to the other, all with the purpose in mind of resulting in a fair and impartial, and justified verdict in the case.
>
> So once again, I repeat, I've not spoken to any of you about why this note was written, I have no idea if it's just one person's feelings or if it's a majority – more or less – but it's important because it affects the atmosphere in the jury room to have those full, frank, civil discussions without being disagreeable.

Defense counsel objected to the fact that the court never mentioned that "one person, or a group of people are being sensitive," and again moved for a mistrial, which the court denied. Although Grant now offers specific objections to other aspects of the language of the civility instruction, he presented no other objections to the phrasing of the instruction at trial. The jury continued deliberating and at 12:00 p.m. the jury submitted a note reading, "We are done. We have made a decision on all counts." After the foreperson read the verdict, the court polled the jury and all jurors expressed their agreement.

III.

On appeal, Grant argues that the violation of Superior Court Criminal Rule of Procedure 36-I, which requires all proceedings to be recorded verbatim, makes it impossible to determine whether the trial court's actions in the jury room further exacerbated the inherently coercive situation. He also argues that the verdict must be reversed because there is a substantial risk that it was coerced. He contends that there were several coercive factors present in the court's "civility" instruction that it read to the jury in response to the third note, including that the note was sent after the court gave a strong anti-deadlock instruction. He also argues that the trial judge exacerbated the inherently coercive situation and created a substantial risk of a coerced verdict by reading the note in the jury room. In addition, Grant argues, for the first time, that the specific language of the trial judge's "civility" instruction was coercive. In that regard Grant emphasizes both the trial court's explicit statement that the "purpose" of continued deliberations was to reach a verdict, and its failure to remind jurors that they should not "abandon their honest convictions in continued deliberations."

The government responds that Grant forfeited any objection to the trial judge's responding to the jury note without the presence of a court reporter. In the alternative, the government argues that Grant was not prejudiced by any error. Additionally, the government responds that at the time of Grant's motion for a mistrial, the jury faced a "difficult" environment, but it did not rise to the level of inherently coercive. Furthermore, the government argues that the trial court properly denied the motion for a mistrial because the court took actions to "effectively temper the potential for coercion." In conclusion, the government argues that the jury reached its verdict "freely and fairly" as demonstrated by the jury poll which revealed no dissent, and the fact that the jury acquitted Grant of three of the charges, including the two most serious charges, while convicting him of only one charge.

IV.

We first address whether the court erred by entering the jury room with counsel for both parties, but without a court reporter, reading the note to the jury, and dismissing them for the evening. This court has held "that the reporting requirements of Rule 36-I (a) are mandatory, and exceptions will be narrowly construed." *(Robert) Williams v. United States*, 927 A.2d 1064, 1067 (D.C. 2007) (quoting *Lucas v. United States*, 476 A.2d

1140, 1142 (D.C. 1984)) (internal quotation marks omitted). However, "[t]he absence of a complete transcript of the trial does not automatically mandate reversal . . . even if it makes appellate review more difficult." *Egbuka v. United States*, 968 A.2d 511, 516 (D.C. 2009) (citations omitted). Instead, "we ask whether the particular omission from the transcript prejudices the defendant's right to appeal, either (1) by making it impossible for this court to determine whether a specific error raised by the appellant occurred, or (2) by preventing new appellate counsel from searching the record to determine whether error occurred." *Euceda v. United States*, 66 A.3d 994, 1002-03 (D.C. 2013) (internal quotation marks and citations omitted) (emphasis in original).

Grant argues that because of the omission from the transcript, the record does not indicate whether the identities of the jurors who wrote the note were revealed to the jury in its entirety, and does not reflect how the court introduced the note, or what was said after reading the note. "Appellant does not allege that a specific error occurred during the part of the proceeding that was not recorded .... Appellant argues instead that he is precluded from mounting an effective appeal because there might have been some error that would have been captured" had the court reporter been present in the jury room. *David v. United States*, 957 A.2d 4, 7 (D.C. 2008). From the court's discussion with counsel before entering the jury room, and from the court's summary the following morning regarding what had happened in the jury room, "we think that is highly improbable," *id.*, that any specific error was not recorded.

Before entering the jury room, the judge held a discussion with both counsel as to what he would say to the jury, in which the judge never expressed the intent to name the individual jurors who wrote the note, or to state how many jurors signed the note. The judge told counsel that: "I'm just reading the note that I received and telling them it's something I've got to look into and talk to them about, and I don't have time right now." The following morning, the court summarized its discussion with the jury and stated that it "took both counsel with me to the door of the jury room and read the note." Neither counsel objected to the summation or the procedure, other than defense counsel objecting to reading the note at all.

After the court summarized its discussion in the jury room, Grant moved for a mistrial, arguing that "it's prejudicial . . . to require the jurors after such a note to continue to deliberate when they have expressed that their disagreement is such that it's reaching a hostile point." Defense counsel was unsure if "what has been said in the note can be undone." However, counsel did not further object to the court's proceedings in the jury room, nor did he argue that the judge made statements in the jury room that exacerbated the situation. Grant filed a post-trial motion to include a statement summarizing the interaction in the jury room. The court denied the motion because it "merely recasts information already provided in the transcript of the proceedings without offering any new or additional information about the underlying proceedings." For these reasons, we hold that the court's violation of Rule 36-I (a) is non-prejudicial.

V.

Grant also argues that the trial court improperly coerced a verdict by giving the "civility" instruction after the jury had returned two notes reflecting their inability to make a decision, and one note reflecting a difficult environment in the jury room. He contends that any re-instruction at that point was coercive, and the court should have declared a mistrial. We conclude that a mistrial was not required under the circumstances, because the court has discretion to determine how to instruct a jury that is having a difficult time deliberating. *See (Jerome) Jones v. United States*, 999 A.2d 917, 929 (D.C. 2010).

The standard for determining whether there is a substantial risk of juror coercion is well-settled:

> We assess that risk by weighing the 'inherent coercive potential' of the entire situation before the trial court and the ameliorative or exacerbating impact of the judge's actions in response to that situation. We examine the question of coercion from the jurors' perspective. Coercion of a verdict 'does not mean simple pressure to agree.' Rather, pressure to agree is impermissibly coercive when it is likely to force a juror 'to abandon his [or her] honest conviction as a pure accommodation to the majority of jurors or the court.' The question is one of 'probabilities, not certainties'; from our review of the record, we must be able to 'say with assurance' that the jury has arrived at its verdict 'freely and fairly.'

Hankins v. United States, 3 A.3d 356, 361-62 (D.C. 2010) (citations omitted). Thus we first consider the inherent coercive potential of the situation from the jurors' perspective, and then we ask how the court responded to that situation. *Id.*; *see also Harris v. United States*, 622 A.2d 697, 701 (D.C. 1993). Generally, we consider several factors enumerated in *Harris*.

> Did the judge make affirmative efforts to dispel any coercive potential? Did the judge take a middle course and act (or refrain from acting) in a reasonable and neutral way? Did the judge perhaps compound the problem by actions effectively adding to juror pressure? Did the judge independently create a situation

of coercive potential?

Harris, 622 A.2d at 705.

But in this case we determine there is no need to consider these questions at great length because the crux of Grant's coercion argument is one that was not made at trial and Grant cannot show the requisite prejudice to satisfy our test for plain error.

A jury in these circumstances is particularly vulnerable to pressure to reach a verdict. This is the reason a trial judge may not give a second anti-deadlock instruction. *(Jerome) Jones*, 999 A.2d at 927. The trial judge may re-instruct the jury in other ways, but any subsequent instruction must be carefully drawn to ensure that it does not contain the key components of an anti-deadlock instruction. We agree with Grant's position on appeal that certain aspects of the language in the "civility" instruction were problematic. As these objections raise new concerns about how the exact wording would affect the jury, they are unpreserved. *See Green v. United States*, 718 A.2d 1042, 1056 (D.C. 1998) ("[O]bjections to jury instructions must be specific enough to direct the judge's attention to the correct rule of law; a party's request for jury instructions must be made with sufficient precision to indicate distinctly the party's thesis." (quoting *Russell v. United States*, 698 A.2d 1007, 1012 (D.C. 1997) (internal quotation marks omitted))). We therefore review them for plain error. *United States v. Olano*, 507 U.S. 725, 732 (1993); *(Marcus) Jones v. United States*, 946 A.2d 970, 975 (D.C. 2008).

First, Grant objects to the court's statement that the jury should continue deliberations with the "purpose in mind" of reaching a "fair and impartial, and justified verdict in this case." Second, Grant objects that the instruction did not remind the jurors that they must not surrender their honest convictions simply to reach an agreement. He urges that these were errors of commission and omission because they jointly presented a serious risk of verdict coercion. That risk was particularly strong here, he contends, because the jury had just announced, for the third time, that it was having a hard time reaching agreement.

Under plain error review, we reverse only if (1) the trial court erred in including (and omitting) this language from the "civility" instruction, (2) the error was plain, (3) it affected Grant's "substantial rights," and (4) it caused a "miscarriage of justice or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *(Marcus) Jones*, 946 A.2d at 975 (citing *Olano*, 507 U.S. at 732). We conclude that both the omission and the commission were error, but we do not decide whether they were plain, as we conclude that the errors in any event did not prejudice Grant.

There is much to admire in the court's third instruction, particularly its central message that deliberations must be civil. The instruction was a reasonable attempt to avoid declaring a mistrial where the jury's inability to reach agreement may have been due to a difficult environment in the jury room rather than an intractable conflict in jurors' honest convictions.

However, the court erred in telling the jury its "purpose" was to reach a "fair and impartial, and a justified verdict." Defendants are "entitled to the benefit of a disagreement by the jury," so judges should avoid telling jurors that consensus is preferred over agreement. *Winters*, 317 A.2d at 539 n.10 (Gallagher, J., concurring); *see also Epperson v. United States*, 495 A.2d 1170, 1174 (D.C. 1985). Trial courts err when they instruct jurors, even in predeliberation, that their purpose is to reach a verdict. *(Marcus) Jones*, 946 A.2d at 974. Here, the instruction came after the jury had announced, for the third time, that it was having a hard time reaching a verdict, and after the court had already given an anti-deadlock instruction. This makes the instruction, because of the "purpose to reach a verdict" language, perilously close to a second anti-deadlock instruction, which we have repeatedly held to be error. *Fortune v. United States*, 65 A.3d 75, 86 (D.C. 2013); *Epperson*, 495 A.2d at 1176. When a jury has announced that it is having a hard time reaching agreement, whatever the reason, the court may not instruct them that their purpose is to reach a verdict. That specific language remains error even when couched in an instruction whose core message is that discussions must be civil, that each juror has a right to express his or her views, and that disagreements between jurors are "part of the process."

The court also erred when it omitted language reminding jurors that they should not surrender their honest convictions to secure agreement. *(Marcus) Jones*, 946 A.2d at 974 ("Equally problematical . . . is what the instruction did not include, which was language balanced against the desirability of agreement that reminded jurors not to surrender their honestly held convictions, even if that prevented agreement."). Any instruction to an admittedly divided jury to keep deliberating risks coercing some jurors to "abandon [their] honest conviction[s] as a pure accommodation to a majority of jurors on the court." *Hankins*, 3 A.3d at 361-62 (quoting *Winters*, 317 A.2d at 532). The court should not tell the jury that agreement is desirable or that its job is to reach a verdict, and it must temper any such message it does convey to that effect with a clear indication that any verdict they reach must not come at the expense of any juror's honest convictions.

We need not decide, however, if these errors were plain. Even if they had been, we are not persuaded that Grant can show that the court's civility instruction prejudiced him. For example, we disagree with Grant that "the verdict itself evidences coercion." As previously discussed, *supra* note 7, the jurors ultimately returned verdicts of not guilty on the assault and weapons charges, where the evidence was weak, but guilty on the threats charge. Grant argues that "[i]t is highly likely that such a compromise verdict was achieved so that the jurors could leave the room after being sent back to deliberate even after the final alarming note." We agree with the government's response to that argument, however, and think that it is likely that the jury unanimously concluded, without coercion, that the "government proved only the threats charge beyond a reasonable doubt," for which there was strong evidence in support. Both government witnesses identified appellant as the man who threatened them, but neither actually saw Grant throw the bottle at Mr. Barrett. Also, Detective Boyd testified that neither witness mentioned seeing appellant with a knife when she interviewed them.

Grant has not shown a "reasonable probability that, but for [the unobjected-to instruction], the result of the proceeding would have been different." *(Marcus) Jones*, 946 A.2d at 976 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004)). For the foregoing reasons we are satisfied that Grant has failed to show he was prejudiced by the "civility" instruction.

Accordingly, the trial court's judgment is

Affirmed.

Tab 7

761 A.2d 15
District of Columbia Court of Appeals.

HECHINGER COMPANY, Appellant,
v.
James W. JOHNSON, Appellee.

No. 97–CV–71.
|
Argued May 11, 1999.
|
Decided Oct. 26, 2000.

Patron brought suit against corporation, alleging that he sustained serious brain injury from assault by employee in one of corporations retail stores. The Superior Court, Ellen S. Huvelle, J., entered jury verdict for patron. Store appealed. The Court of Appeals, Wagner, C.J., held that: (1) corporation did not show compelling reasons affecting public or private interest considerations to warrant disturbing tort victim's choice of forum; (2) closing jury argument by patron's attorney was not improper; (3) medical report noting that patron had been hit in the head at retail store was admissible as out-of-court statement; (4) evidence was sufficient to prove that store was vicariously liable for its employee's assault on patron; and (5) evidence was sufficient to support jury award of damages in amount of $2,000,000 on basis of patron's significant brain damage.

Affirmed.

Attorneys and Law Firms

***18** Jeffrey R. DeCaro, Lanham, MD, for appellant.

Marc Fiedler, with whom William P. Lightfoot, Washington, DC, was on the brief, for appellee.

Before WAGNER, Chief Judge, and STEADMAN and RUIZ, Associate Judges.

Opinion

WAGNER, Chief Judge:

Appellant, Hechinger Company, appeals from a judgment entered following a jury verdict of $2,000,000 for appellee, James W. Johnson. The case arose out of Johnson's claim for damages for injuries he sustained as the result of an assault upon him by Hechinger's employee while Johnson was a patron at one of Hechinger's retail stores. Hechinger makes numerous arguments on appeal. Finding no error requiring reversal, we affirm.

I. *Factual Background*

Johnson testified that on Saturday, February 12, 1994, he went to a Hechinger store in Langley Park, Maryland to purchase lumber. While waiting to have the wood cut, he noticed a group of people who were having lumber cut place the scrap pieces in a nearby dumpster. Johnson and others asked the people for the unused scraps, and they gave Johnson about five pieces. When Johnson went to the cashier to pay for his own purchases, the cashier asked the price of the scraps of wood. Johnson responded that the other customers had given them to him, and the cashier stated that Hechinger did not give away wood. The cashier then telephoned a supervisor or someone in charge. According to Johnson, a man approached who was in his thirties and wearing a blue smock or shirt with Hechinger lettering on the pocket and a badge identifying himself as a Hechinger employee. The cashier explained the problem, and the man asked Johnson how he had obtained the wood. Johnson told him about the other customers giving him their scraps of wood, and the man informed Johnson that Hechinger did not give away wood. After the two had further discussion about how Johnson acquired the scraps, the employee struck Johnson in the chest. Johnson fell backward, and his head slammed into the counter. Johnson managed to pull himself up. He saw the store manager, John A. Brown, running and yelling to the man, to "get away from him." While Johnson and Brown were discussing what had transpired, the employee who had cut the wood and the customers who had given him the scraps arrived at the counter and confirmed Johnson's account about how he acquired the wood scraps. William Beims, an acquaintance of Johnson's, was walking past the front of the store. He testified that he saw the man push Johnson down and then saw another man run in between them.

Johnson testified that when he left the store, he felt a sharp pain near his left temple. He became dizzy and lightheaded, and he was trembling and sweating profusely. He pulled his car in front of the store to load the wood he had purchased and lost consciousness for some period of

time. When he regained consciousness, Johnson finished loading the wood and drove away.

During the damages phase of this bifurcated trial, Dr. Michael Batipps, a neurologist, testified that upon admission to the hospital, Johnson was given a computerized ***19** axial tomography scan (CAT scan) which revealed a subdural hematoma in the left side of Johnson's head. [1] Dr. Joel Falik, a neurosurgeon, gave an opinion that the head trauma that Johnson experienced at the Hechinger store caused Johnson's condition.

There was medical evidence that Johnson's brain was effectively pushed out of alignment, which combined with swelling, compressed his brain structures enough to be life-threatening. A neurosurgeon performed an emergency craniotomy, which involved cutting a piece out of Johnson's skull and opening up the membrane covering his brain, draining off liquid, and removing the clotted portions by irrigating the brain's surface with a saline solution which was suctioned out. Johnson's brain did not fully shift back into its proper position. Dr. Batipps opined to a reasonable degree of medical certainty that Johnson's brain injury was permanent. The brain injury impaired Johnson's mental functioning to the left hemisphere of his brain, which controls speech, memory, writing, mathematical and mechanical skills and most daily thought processes. Johnson scored in the impaired range on tests of speech-sound perception, memory, auditory attention, and verbal information-learning as a result of his injuries. His IQ fell from over 130 to 109. He experienced severe headaches and incontinence, depression, anxiety, and insomnia, all attributed to the injury. His personal and professional life as a practicing attorney since 1975 also suffered. Other facts relevant to disposition of the appeal are set forth in the discussion of the issues which follows.

II. *Forum Non Conveniens*

Hechinger argues that the trial court erred in the denying its motion to dismiss on the ground of *forum non conveniens.* It contends that Maryland is the more appropriate forum because the alleged incident occurred there, Maryland law applied, and Johnson resided in Maryland. Hechinger further contends that the trial court denied its motion under the mistaken belief that Johnson resided in the District of Columbia, a factor which, in any event, it contends is not controlling. Johnson argues that the record shows that he was a resident in the District at the time relevant to this issue and that the trial court did not abuse its discretion in denying the motion. Johnson contends that, in any event, dismissal at this stage of the proceedings is unjustified under the doctrine.

[1] [2] [3] [4] We start with the familiar standard applicable here that the decision of the trial court granting or denying a motion to dismiss on the grounds of *forum non conveniens* will not be disturbed on appeal absent a clear showing that it abused its broad discretion. *Cresta v. Neurology Ctr., P.A.,* 557 A.2d 156, 159 (D.C.1989); *Carr v. Bio–Medical Applications of Wash., Inc.,* 366 A.2d 1089, 1091–92 (D.C.1976) (citations omitted). In exercising its discretion, the trial court must apply the doctrine in light of well-established criteria against which this court will review its action. *Id.* at 1092. Specifically, the court must consider both private and public interest factors. *Id.* As to the former, these relate to the relative ease, expedition, and expense of the trial, including, for example: "relative ease of access to proof; availability and cost of compulsory process; the enforceability of a judgment once obtained; evidence of an attempt by the plaintiff to vex or harass the defendant by his choice of forum; and other obstacles to a fair trial." *Id.* (citing *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)). Public interest factors include "administrative difficulties caused by local court dockets congested with foreign litigation; the imposition of jury duty on a community having no relationship to the litigation; and the ***20** inappropriateness of requiring local courts to interpret the laws of another jurisdiction." *Id.* (citing *Gulf Oil,* 330 U.S. at 508–09, 67 S.Ct. 839). Upon review, this court will make an independent evaluation of the issue in light of these public and private interest factors. *Cresta,* 557 A.2d at 159 (citations omitted).

[5] Against these factors, we find no clear abuse of discretion in the trial court's ruling. Observing that a plaintiff's choice of forum is entitled to some deference, the trial court denied the motion because Johnson "is a District resident and [Hechinger] maintains a significant presence in this jurisdiction." Although the events out of which this case arose occurred in nearby Maryland, Hechinger does not dispute that it conducted a substantial business within the District, as the trial court determined. Indeed, Hechinger does not contend that trial in this neighboring jurisdiction created impediments to a fair trial

or that Johnson filed the case in the District to harass it. *See Carr, supra,* 366 A.2d at 1092. Thus, Hechinger has failed to identify any significant factors which support weighing in its favor the private interest concerns which guide our analysis. *See id.*

[6] **[7]** Hechinger relies exclusively upon its claim that Johnson is not a resident of the District, a claim it made in its motion in the trial court. Johnson responded then, and contends now, that at the time relevant to the *forum non conveniens* issue, he resided in the District with his aunt on Meade Street, N.E. After denying the motion to dismiss, the trial court received Hechinger's reply "rais[ing] a substantial question regarding [Johnson's] residence," and therefore, amended its initial order denying the motion to dismiss to make it without prejudice to Hechinger resubmitting the motion after discovery concerning Johnson's address. In its order, the court stated, "[s]hould it be determined that the Court's prior Order was based on a misunderstanding of the facts regarding plaintiff's residency, the Court would be willing to reconsider its Order date[d] April 7, 1995." The record on appeal does not show that Hechinger ever filed a motion in response to this order. Hechinger's failure to pursue the issue consistent with the trial court's ruling precludes it from raising the issue now. In any event, in spite of Hechinger's claim that Johnson was a non-resident, there is evidence of record that he resided in the District at least from the time of the assault through the pre-trial proceedings. A suit filed in this jurisdiction by a resident against a corporation which maintains a significant presence in the District may be a matter of sufficient local interest to defeat dismissal on *forum non conveniens* grounds. *See Washington v. May Dep't Stores,* 388 A.2d 484, 487 (D.C.1978). Relying on appeal only upon the residency issue, which fails, Hechinger has not shown compelling reasons affecting public or private interest considerations which suggest that Johnson's choice of forum should be disturbed. *See Gulf Oil, supra,* 330 U.S. at 508, 67 S.Ct. 839 (unless the balance of concerns strongly favor the defendant, "the plaintiff's choice of forum should rarely be disturbed.")

[8] Another reason compels rejection of Hechinger's argument. "The 'purpose of the doctrine of *forum non conveniens* ... is to avoid litigation in a *seriously inconvenient forum,* rather than to ensure litigation in the most convenient forum.' " *Cresta, supra,* 557 A.2d at 161 (quoting Casad, Robert C., JURISDICTION IN CIVIL ACTIONS, ¶ 1.04 at 1–20). After months of pre-trial preparation and full trial, the inconvenience which the doctrine seeks to avoid has already occurred. At this stage, the parties have incurred the expenses and inconvenience of trial, and the burdens on the court's docket have already been imposed. Hechinger could have filed an interlocutory appeal of the denial of its motion but chose not to. *See Frost v. Peoples Drug Store, Inc.,* 327 A.2d 810, 811 (D.C.1974). That consideration weighs heavily in favor of continuing jurisdiction in the ***21** District. *See Jimmerson v. Kaiser Found.,* 663 A.2d 540, 545 (D.C.1995); *Wilburn v. Wilburn,* 192 A.2d 797, 801 (D.C.1963).

III. *Mention of Dollar Figure in Closing Argument*

Hechinger argues that the trial court erred in permitting Johnson's counsel to argue to the jury that Johnson's injuries were worth in excess of $1,000,000 and suggesting figures of $1,000,000, $2,000,000 and $3,000,000. Hechinger contends that Johnson's counsel made this improper argument to subvert the trial court's rulings precluding the jury from awarding monetary damages for future medical expenses and future loss of income. Hechinger contends that the jury was swayed by counsel's improper argument as evidenced by its verdict which was at the midpoint of the figures suggested by Johnson's counsel and that, as a result, the jury included compensation for future medical expenses and income losses prohibited under the court's rulings and instructions to the jury. Johnson argues that his counsel's closing argument closely tracked those held by this court not to be improper in *District of Columbia v. Colston,* 468 A.2d 954 (D.C.1983). He contends that he did not suggest that the jury award a specific amount and that he emphasized that it was for the jury to decide what Johnson's injuries were worth. Further, he contends that the court's instructions to the jury prevented any possible prejudice.

[9] **[10]** **[11]** In this jurisdiction, it is improper for counsel to suggest to the jury that it award a specific dollar amount. *See Colston, supra,* 468 A.2d at 957 (citing *Purpura v. Public Serv. Elec. and Gas Co.,* 53 N.J.Super. 475, 147 A.2d 591 (1959)). The assessment of the amount of damages is a matter exclusively within the jury's province. However, counsel is permitted to stress those aspects of the case which make the client's claim substantial or serious. *Id.* at 957–58 (citing *Borger v. Conner,* 210 A.2d 546 (D.C.1965)).

Johnson's counsel alerted the trial court to his intention to make an argument about damages consistent with that in *Colston* which was determined not to transgress the rule prohibiting mention of a dollar amount. In *Colston,* the plaintiff was seeking damages for the loss of an eye, and his counsel made the following argument to the jury:

> Consider that loss of that eye as the major element of damages. How much is an eye worth? How much is a healthy eye worth? You cannot restore his vision but you can compensate him for the loss. *Is an eye worth five hundred thousand? Eight hundred thousand? A million? That is for you to say. That is for you to decide.* But, ask yourself this question. If Johnny Colston on February the fifth had been offered one million dollars for his healthy eye, you ask yourself if he would have accepted? You decide what that eye is worth. (Emphasis added)
>
> * * * *
>
> We can imagine what it is like to lose an eye. You can close one eye. Put your hand on it and walk around for a few minutes or few seconds. But, you think of doing that for all day for all week. Think of doing for forty five and a half years for the rest of his life.

Colston, 468 A.2d at 956. Although recognizing that the language was similar to that condemned in *Delaware Olds, Inc. v. Dixon,* 367 A.2d 178 (Del.1976), this Court determined that the argument was not improper. In relevant part, the following explanation was given:

> [C]ounsel here did not ... continually ask the jurors to place themselves in Colston's position. Moreover, appellee's counsel did not ask the jury to award a specific dollar amount; he asked only for a "substantial" amount. Neither did he ask the jurors to award the amount of money they would want if they had lost an eye. Indeed, he stressed that it ***22** was up to the jury to decide what the loss of an eye was worth. Finally, ... the trial judge adequately instructed the jury that it was to avoid allowing passion, prejudice, or sympathy to influence its decision.

Colston, 468 A.2d at 958.

[12] **[13]** Counsel for Johnson obviously carefully crafted his argument in this case after the argument in *Colston.* His argument went this way:

> Mr. Johnson is here today seeking full and fair compensation for his injuries. And he has a substantial injury, substantial losses. You have heard testimony from his psychologist, from his neuro surgeon.
>
> The question is, how do you measure damages to the brain? ... He is brain damaged. It is without dispute. Your job is to figure out how to compensate him for this. How do you measure his losses?
>
> I can't tell you what his injuries are worth. That's up to you to determine how much he is to receive. *I can't tell you if it is a million dollars, if it is two million dollars, or if it is three million dollars. That is for you to decide.* (Emphasis added).
>
> What I can do, though, is go through how you should appropriately measure those damages. And you are going to have in the jury room the jury instructions on damages. And this is one of them. You look to the extent and duration of any bodily injuries sustained. What's the extent of it? It is permanent.

There is no material difference between the dollar figure argument sanctioned in *Colston* and the one that Johnson's counsel made in this case. Neither counsel asked the jury to award a specific dollar amount, and both told the jury that it was for them to decide the proper measure of damages. Here, Johnson's counsel referred the jury to the instructions on damages which the trial court would give and which they would have in the jury room. Similar to *Colston,* the trial court instructed the jury that it must base its decision on the evidence, without sympathy, prejudice or passion, and that the statements of counsel are not evidence. The jury is presumed to follow the court's instruction. *Brock v. United States,* 404 A.2d 955, 959 (D.C.1979) (citation omitted). Assessing counsel's argument in context, and in light of the *Colston* decision, counsel's argument was not improper. [2]

IV. *Evidentiary Challenges*

A. *Denial of Motion to Exclude Witness' Testimony*

Hechinger argues that the trial court erred in allowing Johnson's witness, William Beims, to testify because he was not identified as a corroborating witness until ten days prior to trial. It contends that Johnson knew that Beims was a potential witness as early as several months after the incident, but did not identify him on any witness list, pre-trial statement, answers to interrogatories or in deposition testimony, to the prejudice of Hechinger. Hechinger contends that Johnson was required by Super. Ct. Civ. R. 16(b)(2) to identify the witness or be precluded from calling the witness. [3]

[14] **[15]** **[16]** ***23** As Hechinger acknowledges, the rules permit the trial court to modify a pre-trial order in its discretion, for good cause shown. *See* Super. Ct. Civ. R. 16(g); *Taylor v. Washington Hosp. Ctr.*, 407 A.2d 585, 592 (D.C.1979), *cert. denied,* 446 U.S. 921, 100 S.Ct. 1857, 64 L.Ed.2d 275 (1980). The decision whether to allow a lay witness to testify who has not been identified as a witness in a pretrial order is within the sound discretion of the trial court, and its decision will not be disturbed absent an abuse of discretion. *See Taylor*, 407 A.2d at 592. In this case, the trial court found that Johnson's mental deficiencies contributed to the delay in disclosing the witness and that neither Johnson nor his counsel acted in bad faith in identifying the witness late. Further, the court considered that Hechinger had the opportunity to depose the witness about a week prior to trial. Neither side requested a continuance. The court factored in potential prejudice to both sides, but found on balance that the evidence should be admitted. The trial court properly balanced considerations relevant to its discretionary ruling. *See, e.g., Weiner v. Kneller,* 557 A.2d 1306, 1311–12 (D.C.1989). [4] We conclude that the trial court did not abuse its discretion in allowing Beims, an essential corroborating witness to the assault, to testify.

B. *Admissibility of Statement for Medical Diagnosis and Treatment*

[17] Hechinger challenges the admission of Johnson's statement to his treating physician, Dr. Joel Falik, recorded in a medical report. The statement involved Johnson telling his doctor that he had been hit in the head at a Hechinger store. Over Hechinger's objection, the report was admitted under an exception to the hearsay rule for out-of-court statements made for purposes of medical diagnosis or treatment. "Under the medical diagnosis exception to the hearsay rule, statements made by a patient for purposes of obtaining medical treatment are admissible for their truth because the law is willing to assume that a declarant seeking medical help will speak truthfully to medical personnel." *Galindo v. United States,* 630 A.2d 202, 210 (D.C.1993). Statements about the cause of the patient's injuries come within the exception "because explaining the cause of injuries may facilitate treatment." *Id.* (citing *Sullivan v. United States,* 404 A.2d 153, 158 (D.C.1979)). Hechinger does not claim that the statement was not made in the course of medical diagnosis and treatment. It argues that the statement should not have been admitted in the liability phase of this bifurcated trial because treatment issues were not then before the jury. We disagree. How Johnson came to be injured is clearly relevant to the liability phase of the trial. Complaints of assault are admissible under the exception for statements made to treating physicians. *See id.* at 210–11; *Sullivan,* 404 A.2d at 158–59.

[18] Hechinger seems to object implicitly to statements implicating it in the incident. ***24** Statements of fault are generally excluded from the medical diagnosis exception. *Id.* (citing *Sullivan, supra,* 404 A.2d at 159 & n. 11). Assuming that the statement contained an impermissible statement of fault, any error in its admission was harmless. *See Kotteakos v. United States,* 328 U.S. 750, 764–65, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). Johnson testified at trial concerning where and how the assault occurred. His testimony was corroborated by Beims. Thus, the evidence from the medical report that Johnson reported an assault at Hechinger's establishment to his doctor was cumulative.

V. *Sufficiency of Scope of Employment Evidence*

Hechinger argues that the trial court erred in denying its motion and renewed motion for judgment as a matter of law because Johnson failed to provide sufficient evidence that the conduct of the Hechinger employee who struck him was a direct outgrowth of his instructions or job assignment. Johnson contends that there was sufficient

evidence for the jury to find Hechinger vicariously liable for its employee's tortious assault.

[19] [20] [21] The court may enter judgment as a matter of law only where, viewing the evidence in the light most favorable to the non-moving party, "the probative facts are undisputed and where reasonable minds can draw but one inference from them." *Johnson v. Weinberg,* 434 A.2d 404, 407 (D.C.1981) (citations omitted) (*Johnson I*). Applying that standard, it is " 'only when the evidence is so clear that reasonable men could reach but one conclusion' " that the motion should be granted. *Id.* (citing *Bauman v. Sragow,* 308 A.2d 243, 244 (D.C.1973)). Likewise, "[a] judgment notwithstanding the verdict is proper only in cases 'in which no reasonable person, viewing the evidence in the light most favorable to the prevailing party, could reach a verdict in favor of that party.' " *Finkelstein v. District of Columbia,* 593 A.2d 591, 594 (D.C.1991) (en banc) (quoting *Oxendine v. Merrell Dow Pharmaceuticals, Inc.,* 506 A.2d 1100, 1103 (D.C.1986)). Against that standard, there was adequate evidence to prove that Hechinger's employee assaulted Johnson within the scope of his employment.

[22] [23] [24] "[R]espondeat *superior* is a doctrine of vicarious liability which imposes liability on employers for the torts committed by their employees within the scope of their employment." [5] *Weinberg v. Johnson,* 518 A.2d 985, 988 (D.C.1986) (*Johnson II*) (citations omitted). Under the doctrine, an employer is subjected to liability for acts of his employee because of his employment and in furtherance of the employer's interests. *See id.* (citing *Penn Central Transportation Co. v. Reddick,* 398 A.2d 27, 29 (D.C.1979)). If the employee's actions are only done to further his own interests, the employer will not be held responsible. *See id.* (citations omitted). However, if the employee acts in part to serve his employer's interest, the employer will be held liable for the intentional torts of his employee even if prompted partially by personal motives, such as revenge. *See id.* (citing *Jordan v. Medley,* 228 U.S.App.D.C. 425, 428, 711 F.2d 211, 214 (1983)) (other citation omitted).

[25] *25 In this case, there is evidence that the assault grew out of a job-related controversy. Johnson testified that the incident was precipitated by a discussion concerning some scraps of wood which he had obtained from another customer. The cashier informed Johnson that she was going to call a supervisor when he claimed that the wood had been given to him. According to Johnson's testimony, in response to the cashier's call, a man approached wearing a blue smock or shirt with "Hechinger" stitched on it and a name badge identifying himself as a Hechinger employee. [6] According to Johnson, the man acted like he was in charge. He asked the cashier what the problem was, and after she responded, he questioned Johnson and argued with him about paying for the scraps of wood. He told Johnson that Hechinger did not give away wood. The man then struck or pushed Johnson. It was reasonable for the jury to conclude that the man's actions were motivated by a desire to require Johnson to pay for the wood which he presumed to be the property of his employer, Hechinger. It was also reasonable for the jury to conclude that the employee acted on behalf of his employer to resolve a job-related dispute. Such evidence was adequate to support a finding that the man was responsible for handling disputes with customers and that he acted, at least partially, by a desire to serve Hechinger's interests. *See Johnson II,* 518 A.2d at 988. The evidence was sufficient for the jury to find Hechinger vicariously liable for its employee's actions. [7]

VI. *Denial of Motion for New Trial or Remittitur*

Hechinger argues that the trial court erred in denying its motion for a new trial, or in the alternative, to alter or amend the judgment. Hechinger contends that it is entitled to a new trial because the jury ignored the court's instructions in reaching a verdict of $2,000,000. It bases its argument upon the affidavit of one of its store managers, John A. Brown, who spoke with a juror after the jury returned its verdict. Although the trial court instructed the jury that there was no claim for future medical expenses and future lost wages or earning capacity, according to the affidavit, the juror told Brown that the jury considered these elements. Hechinger also contends that the jury misunderstood the court's proximate cause instructions and that the verdict is so excessive that it is beyond reason and shocks the conscience.

[26] [27] Generally, a juror may not impeach his or her verdict as to matters which inhere in the verdict itself, "as opposed to extraneous influences." *Sellars v. United States,* 401 A.2d 974, 981 (D.C.1979) (citations omitted). Under this standard, for example, jurors can challenge the verdict where they had learned of publicity unfavorable to the defendant. *See id.* (citing *Marshall v. United States,*

360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959)) (other citations omitted). There is a wide range of conduct, which inheres in the verdict, for which impeachment will not be allowed. *See id.* at 981–82. Thus, jurors cannot impeach their verdicts on grounds that "that they failed to follow instructions";[8] "that they had been confused";[9] or "that they did not understand their ***26** instructions."[10] The rationale underlying the rule is aimed at:

> (1) discouraging harassment of jurors by losing parties eager to have the verdict set aside; (2) encouraging free and open discussions among jurors; (3) reducing incentives for jury tampering; (4) promoting verdict finality; (5) maintaining the viability of the jury as a judicial decision-making body.
>
> *Id.* at 981 (citations omitted).

[28] Hechinger's arguments for jury impeachment relate to matters which inhere in the verdict. It contends that the jury ignored the court's instructions, based their award on conjecture and speculation, was confused, and misunderstood the court's instructions on proximate cause. Such conduct does not provide a valid basis for impeachment of the verdict. *See Sellars, supra,* 401 A.2d at 982 (citations omitted). While Hechinger argues that the jury considered evidence not properly admitted in evidence as relates to its alleged calculation of the future losses and medical costs, this is essentially an argument that the jury failed to follow the court's instructions with respect to damages. The Brown affidavit explains, according to the juror interviewed, the mental processes by which the jury arrived at its verdict. Such matters do not form an appropriate basis for jury impeachment.

[29] We find no error in the trial court's decision denying a remittitur or new trial because the verdict was excessive. Whether to grant a new trial based on excessiveness of a jury verdict is entrusted to the sound discretion of the trial court, and that decision will not be disturbed absent a showing of abuse of discretion. *See Finkelstein, supra,* 593 A.2d at 596. This standard requires close scrutiny in order to determine whether

> there is firm support in the record for a finding by the trial judge that the verdict is "so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate," given the respect accorded the judge's "unique opportunity to consider the evidence in the living courtroom context."

Johnson II, supra, 518 A.2d at 994 (quoting *Lacy v. District of Columbia,* 408 A.2d 985, 988–89 (D.C.1979)) (further citation omitted).

[30] Here, there is evidence that Johnson's injuries were severe and permanent. There was evidence that Johnson sustained significant brain damage, loss of intelligence, memory and psychological and physical problems as a result of his injuries. According to the evidence, because of his limitations, Johnson lost confidence in his ability to practice law again. He experienced seizures, incontinence, bizarre behavior and loss of self esteem, among other problems. We can not say that the trial court abused its discretion in concluding that the verdict was not so excessive as to warrant a remittitur.

For the foregoing reasons, the judgment appealed from hereby is

Affirmed.[11]

All Citations

761 A.2d 15

Footnotes

1 A subdural hematoma was described as an accumulation of blood between the surface of the brain and the membrane that covers it.

2 As long as the rule prohibiting a specified dollar amount argument obtains in this jurisdiction, parties seeking to walk a fine line between the permissible and the impermissible in argument place their verdicts at risk with the potential for costly retrials. Rather than continue these risks as skillful counsel continue to find new ways to suggest figures to the jury without violating the rule, the en banc court may have to consider the continued validity of the prohibition.

3 Rule 16(b)(2) provides in pertinent part:

> each party must file and serve a listing, by name and address, of all fact witnesses known to that party, including experts who participated in, and will testify about, pertinent events. No witness may be called at trial, except for

rebuttal or impeachment purposes, unless he or she was named on the list filed by one of the parties on or before [the due] date or the calling party can establish that it did not learn of the witness until after this date.

Also relevant to the discussion, Super. Ct. Civ. R. 16(e) provides that only witnesses whose names are listed may testify at trial, except for purposes of impeachment or rebuttal.

4 At issue in *Weiner* was whether to allow expert testimony improperly left out of a statement filed under Super. Ct. Civ. R. 26(b)(4). *Weiner, supra,* 557 A.2d at 1311. The following factors were identified as being relevant to this determination:

(1) whether allowing the evidence would incurably surprise or prejudice the opposite party;

(2) whether excluding the evidence would incurably prejudice the party seeking to introduce it;

(3) whether the party seeking to introduce the testimony failed to comply with the evidentiary rules inadvertently or willfully:

(4) the impact of allowing the proposed testimony on the orderliness and efficiency of the trial; and

(5) the impact of excluding the proposed testimony on the completeness of information before the court or jury.

Id. at 1311–12.

5 Conduct of an employee is considered generally to be within the scope of employment if:

(a) it is of the kind he is employed to perform;

(b) it occurs substantially within the authorized time and space limits;

(c) it is actuated, at least in part, by a purpose to serve the master, and

(d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

Johnson I, supra, 434 A.2d at 408 (quoting RESTATEMENT (SECOND) OF AGENCY , § 228 (1957)).

6 Johnson sought the identity of the employee through discovery, but Hechinger could not provide the information because the attendance records and possibly the incident report were destroyed by fire.

7 Hechinger seems to challenge the sufficiency of the evidence based upon Johnson's inability to identify the employee by name and job title. We are persuaded that reasonable jurors could find from the evidence, both direct and circumstantial, that the man who assaulted Johnson was a Hechinger employee in a supervisory position.

8 *See id.* at 982 (citing *Domeracki v. Humble Oil & Refining Co.,* 443 F.2d 1245, 1247–48 (3d Cir.), *cert. denied,* 404 U.S. 883, 92 S.Ct. 212, 30 L.Ed.2d 165 (1971)).

9 *Id.* at 982 (citing *Queen v. District of Columbia Transit System,* 364 A.2d 145, 148–49 (D.C.1976)).

10 *Id.* at 982 (citing *Smallwood v. Pearl Brewing Co.,* 489 F.2d 579, 602 n. 30 (5th Cir., *cert. denied*), 419 U.S. 873, 95 S.Ct. 134, 42 L.Ed.2d 113 (1974)) (other citations omitted).

11 We reject summarily Hechinger's claim that the trial court abused its discretion in denying its motion for a mistrial based on alleged judicial bias or misconduct. This argument is premised upon the claim that the trial court was biased because it precluded Hechinger from introducing into evidence an exhibit offered before the case was submitted to the jury, while it had allowed Johnson to introduce the testimony of Beims, even though he was not identified until shortly before trial. Adverse rulings which occur during trial, such as this one, are not the proper subject of bias claims. *See In re J.A.,* 601 A.2d 69, 75–79 (D.C.1991). Finally, in light of our disposition of the other issues in the case, we need not decide whether cumulative errors prejudiced Hechinger.

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468 A.2d 954
District of Columbia Court of Appeals.

DISTRICT OF COLUMBIA, et al., Appellants,
v.
Johnny H. COLSTON, Appellee.

No. 81–993.
|
Argued Sept. 22, 1982.
|
Decided Oct. 24, 1983.

District of Columbia and metropolitan police officer appealed from a judgment entered against them by the Superior Court, Fred L. McIntyre, J., on jury verdict in plaintiff's action for false arrest and assault and battery. The Court of Appeals, Newman, C.J., held that: (1) trial court's error in permitting introduction of evidence of disposition of criminal charges against plaintiff was harmless, and (2) closing argument of plaintiff's counsel was not improper.

Affirmed.

Attorneys and Law Firms

***954** William J. Earl, Asst. Corp. Counsel, Washington, D.C., with whom Judith W. Rogers, Corp. Counsel, Washington, D.C., at the time the brief was filed, and Charles L. Reischel, Deputy Corp. Counsel, Washington, D.C., were on brief, for appellants.

***955** J. Gordon Forester, Jr., Washington, D.C., for appellee.

Before NEWMAN, Chief Judge, KERN, Associate Judge, and GREENE, Associate Judge, Superior Court of the District of Columbia. *

Opinion

NEWMAN, Chief Judge:

The District of Columbia and Metropolitan Police Officer Charles Aldridge (Aldridge) appeal from a judgment against them on a jury verdict in appellee Johnny M. Colston's (appellee or Colston) action for false arrest and assault and battery. Appellee alleged that during the Farmers' March on Washington in February 1979, Aldridge improperly fired a chemical agent into the cab of Colston's tractor, causing permanent loss of the vision in his left eye. He also claimed that he was then arrested and imprisoned without probable cause on charges of assault on a police officer and of reckless driving. After a four day trial, the jury returned a verdict in favor of appellee, awarding him $400,000.

Following the verdict, the District of Columbia and Aldridge moved for a new trial. They alleged that the trial court erred in three particulars: (1) it failed to declare a mistrial after Colston's opening statement, in which the jury was advised of the disposition of the criminal charges on which Colston was allegedly falsely arrested; (2) it permitted Colston to present evidence of the disposition of those charges during his case; and (3) it permitted a closing argument by Colston's counsel allegedly replete with inflammatory and prejudicial comments regarding the injury to Colston's eye. The trial court denied the motion for a new trial. This appeal followed, raising the same issues as those presented in the new trial motion. We affirm.

On February 5, 1979, a sixteen-mile long procession of farm vehicles arrived in Washington, D.C. The farmers in this procession had come to present their grievances to their elected representatives in Congress. The tractorcade, led by District of Columbia police officers, proceeded east on Independence Avenue toward the Capitol. As it crossed Seventh Street, S.W. through the morning rush-hour traffic, the caravan completely blocked the street and prevented any further movement of traffic. In response, police officers directed the tractors to turn around and proceed north on Seventh Street.

Colston testified that he and other farmers turned around on Independence Avenue and headed west toward Seventh Street. The traffic, however, forced them to drive onto the sidewalk. Colston stated that as he moved along the sidewalk he saw police officers talking to the driver of the tractor stopped in front of him. Thinking that it was stalled, Colston stopped his tractor and waited. Colston testified that he observed police officers knock out a window of the tractor and "smoke" the driver out. He then heard the sound of shattering glass and saw pieces of his left cab window on the floor of his tractor. In response, he put his tractor in reverse. A police car was behind him, however, and he attempted to go forward. At

that moment he was struck in the face by a tear gas canister and almost knocked unconscious.

Aldridge testified that tractors were occupying all six lanes of traffic on Independence Avenue and part of the sidewalk. He stated that he observed Colston's tractor moving from the sidewalk toward the street into a crowd of farmers and police officers. According to Aldridge, Colston then used his tractor to interfere with a police crane that was removing another tractor from the intersection. Police officers directed Colston to stop but he continued his interference. Captain George McDonnell of the Police Department tried to get the cab door of the tractor open, but could not because of the erratic movement of the tractor. Aldridge further testified that this erratic movement caused two police officers, who were standing behind Colston's tractor, to jump to the hood of a nearby car to avoid ***956** injury. Captain McDonnell then ordered Aldridge to use tear gas to stop Colston. After Sergeant Ronald A. Poole broke the cab window with his baton, Aldridge inserted the muzzle of his riot gun into the cab and fired.

Colston shut off the engine and was assisted out of the tractor. The police arrested him and charged him with assault on a police officer, D.C.Code § 22–505(a) (1981) and reckless driving, D.C.Code § 40–712(b) (1981). Thereafter, he was taken to the George Washington University Hospital emergency room. After emergency treatment was administered, Colston was transferred to D.C. General Hospital and locked in a cell. There, he received no medical treatment, his prescriptions were not filled, and he was left on a metal-framed plywood bed. Later that night, Colston was transferred to the D.C. Jail. The following day he was returned to D.C. General Hospital and was released later that afternoon.

Colston remained in Washington from February 7 to February 14 to receive daily treatment from an ophthalmologist. He was unable to see out of his left eye and had only limited vision in his right eye. After returning to Georgia, Colston began seeing Dr. Roger Smith, an ophthalmologist, on a regular basis. Colston testified that his vision improved slightly until May 1979, when it began to fade rapidly. He described the effects the loss of vision had on his daily life, and stated that he has been virtually blind in his left eye since September 1979. Dr. Smith stated that because of the severity of the injuries, Colston's eye will probably have to be removed in the future.

Thomas Swearengen, an expert on tear gas ammunitions, testified that he was familiar with the type of riot gun used on Colston; he described the mechanical aspects of the gun's function and stated that the shell used was designed to disperse riotous crowds or mobs, but never to be used inside an enclosed space. He also stated that he had viewed the television tape of the incident and that, in his opinion, the gun was used improperly on Colston.

During his opening statement, Colston's counsel advised the jury that the assault charge had been dropped and that a jury had found Colston not guilty of reckless driving. Appellants' objection at the bench to these statements was overruled.

Later, during Colston's direct testimony, his attorney asked him to tell the jury of the disposition of the criminal charge of assault on a police officer. The court then took judicial notice that the prosecuting authorities had elected not to proceed with that charge. Colston also indicated that he was acquitted of the charge of reckless driving by a District of Columbia jury. Appellants' counsel again objected at the bench to the introduction of this evidence, but the court refused to declare a mistrial because, in its view, false arrest was not the significant claim in the case.

After all the evidence had been presented, appellee's counsel made the following remarks in his closing argument:

> Consider that loss of that eye as the major element of damages. How much is an eye worth? How much is a healthy eye worth? You cannot restore his vision but you can compensate him for the loss. Is an eye worth five hundred thousand? Eight hundred thousand? A million? That is for you to say. That is for you to decide. But, ask yourself this question. If Johnny Colston on February the fifth had been offered one million dollars for his healthy eye, you ask yourself if he would have accepted? You decide what that eye is worth.

> We can imagine what it is like to lose an eye. You can close one eye. Put your hand on it and walk around for a few minutes or few seconds. But, you think of doing that for all day for all week. Think of doing that for forty five and a half years for the rest of his life. (Tr. 341–42).

*957 Appellants made no objection to these comments at the time and the trial court did not take any action concerning them.

[1] [2] [3] Evidence of the dismissal of criminal charges is not admissible in a civil case for false arrest arising out of the same events as the criminal charges. *District of Columbia v. Gandy,* 458 A.2d 414 (D.C.1983). Moreover, evidence of acquittal of criminal charges is also inadmissible in such a civil action. *Accord Gandy, supra* (citing *Galbraith v. Hartford Fire Insurance Company,* 464 F.2d 225 (1972)). The trial court's failure to prevent evidence of the disposition of the charges against Colston from being placed before the jury was error.

In context, however, the error was harmless. *Gandy, supra* (citing *Kotteakos v. United States,* 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). The evidence of the disposition of criminal charges was placed before the jury twice and then only in the most perfunctory manner. Appellee's counsel mentioned the dismissal and acquittal during his opening statement in literally two sentences. He did not elaborate or suggest that the jury draw any inference therefrom. Colston also mentioned the disposition of the criminal charges during his direct testimony. When asked by his attorney what had happened as to each charge, Colston replied simply that one had been dismissed and that he was acquitted of the other. Moreover, no other testimony or evidence of any kind pertaining to these charges was presented by either party. Finally, counsel did not include in his closing argument any reference to Colston's testimony regarding the charges. Thus, we are satisfied that the trial court's error in permitting the introduction of this evidence was harmless.

[4] [5] [6] [7] Appellants also assert that appellee's counsel made improper remarks to the jury during his closing argument. We disagree.[1] In closing argument it is improper for counsel to use "golden rule" arguments in which he asks jurors to place themselves in the plaintiff's position or to "do unto others as you would have them do unto you" in assessing damages. *Klotz v. Sears, Roebuck & Co.,* 267 F.2d 53 (7th Cir.), *cert. denied,* 361 U.S. 877, 80 S.Ct. 141, 4 L.Ed.2d 114 (1959); *Delaware-Olds, Inc. v. Dixon,* 367 A.2d 178 (Del.1976). It is also improper for counsel to suggest to the jury that it award a specified dollar amount. *Purpura v. Public Service Electric and Gas Company,* 147 A.2d 591 (N.J.1959). Nevertheless, counsel must always be permitted to argue that his client's case is a serious one and to *958 stress those aspects of the case that contribute to its seriousness. *Borger v. Conner,* 210 A.2d 546 (D.C.1965). Furthermore, the fairness of counsel's argument must be assessed in the context of all other evidence and proceedings at trial. *Haigler v. Logan Motor Co.,* 86 A.2d 108, 109 (D.C.1952).

[8] In this case, counsel's argument was not improper. Although some of the *language* he used is similar to that condemned in *Delaware Olds, supra,* we find that it was not used in the *manner* condemned in *Delaware Olds.* In that case, counsel repeated the improper language throughout his summation and used it as a plea for sympathy. In contrast, appellee's counsel here did not make a plea for sympathy and he did not continually ask the jurors to place themselves in Colston's position. Moreover, appellee's counsel did not ask the jury to award a specific dollar amount; he asked only for a "substantial" amount. Neither did he ask the jurors to award the amount of money they would want if they had lost an eye. Indeed, he stressed that it was up to the jury to decide what the loss of an eye was worth. Finally, we note that the trial judge adequately instructed the jury that it was to avoid allowing passion, prejudice, or sympathy to influence its decision.

Thus, we affirm the trial court's judgment.

So ordered.

All Citations

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Footnotes

* Sitting by designation pursuant to D.C.Code § 11–707(a) (1973).

1 Counsel made the following argument:

> When you get down to it finally, the major element of damage [is] for the loss of his vision in his left eye, and you have seen that eye. He has told you he cannot see out of it. The doctor told you that he cannot see out of it. He has a

forty-five and a half year life expectancy because he was 27 years old when this occurred. Consider the loss of that eye as the major element of damages. How much is an eye worth? How much is a healthy eye worth? You cannot restore his vision but you can compensate him for the loss. Is an eye worth five hundred thousand? Eight hundred thousand? A million? That is for you to say. That is for you to decide. But, ask yourself this question. If Johnny Colston on February the fifth had been offered one million dollars for his healthy eye, you ask yourself if he would have accepted? You decide what that eye is worth. You heard his mother, Miss (sic) Colston come to testify about some of the little things that he cannot do. These are the little things, pouring peas and missing the plate, pouring tea and missing the glass, trying to hook a sweep up to a tractor and making a turn at the end of a furrow, trying to weld two pieces of metal together. When you put them all together, they are the daily things that Johnny Colston encounters because he has one blind side. These are the little things that affect his life. We can imagine what it is like to lose one eye. You can close one eye. Put your hand on it and walk around for a few minutes or a few seconds. But, you think of doing that for all day for all week. Think of doing that for forty-five and a half years for the rest of his life.... Ladies and gentlemen, we ask you to consider a substantial award for Johnny Colston. Vision is one of God's most precious gifts next to life itself. When Johnny Colston came here on the fifth of February, he had two good eyes. Until this police officer took one from him. This police officer acting in the scope of his authority took Johnny Colston's eye. I ask you to award Johnny Colston a substantial amount of compensation.

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DISTRICT OF COLUMBIA COURT OF APPEALS

No. 10-CV-474

HOWARD UNIVERSITY, APPELLANT,

v.

SYBIL J. ROBERTS-WILLIAMS, APPELLEE.

No. 10-CV-529

SYBIL J. ROBERTS-WILLIAMS, APPELLANT,

v.

HOWARD UNIVERSITY, APPELLEE.

Appeals from the Superior Court of the
District of Columbia
(CAB9196-06)

(Hon. Leonard Braman, Trial Judge)

(Argued September 21, 2011 Decided February 23, 2012)

Timothy F. McCormack, with whom *Michelle M. McGeogh* was on the brief, for appellant/cross-appellee.

Woodley B. Osborne, with whom *Robert B. Fitzpatrick* and *Daniel S. Kozma* were on the brief, for appellee/cross-appellant.

Before FISHER, *Associate Judge*, and STEADMAN and REID, *Senior Judges*.[*]

[*] Judge Reid was an Associate Judge, Retired, at the time of argument. Her status changed to Senior Judge on December 12, 2011.

REID, *Senior Judge*: Professor Sybil J. Roberts-Williams filed a lawsuit against her former employer, Howard University ("Howard"), after she was denied tenure as a faculty member in the Department of Theatre Arts. The jury returned a verdict in favor of Howard on three of the special verdict questions, but found that Howard had breached its contractual obligations to Professor Roberts-Williams "by failing to provide her with [1] written biennial evaluations . . . [and (2)] . . . a statement of the reasons for the initial negative recommendations and [by] fail[ing] to allow two weeks to request reconsideration of the negative decision." The jury also determined that these breaches were "foreseeable and a substantial factor in the denial of tenure." The jury awarded Professor Roberts-Williams $250,060 "for loss of past earnings and benefits (BackPay)" and "$332,340 for loss of future earnings and benefits (Front Pay)."

Howard filed a post-trial motion for judgment as a matter of law, seeking reversal of that part of the jury verdict finding that it had breached its contract with Professor Roberts-Williams. The trial court set aside the jury verdict finding that Howard had breached the reconsideration contractual provision and entered judgment for Howard on that claim as a matter of law, but otherwise denied Howard's post-trial motion with respect to liability and damages. Both Howard and Professor Roberts-Williams filed appeals.

We affirm the trial court's judgment with respect to Howard's appeal. Because our

decision does not alter the damages awarded to Professor Roberts-Williams, we need not reach the merits of her appeal.

FACTUAL SUMMARY

The record reveals that Howard hired Professor Roberts-Williams as a temporary lecturer in the Department of Theatre Arts in 1993. In 1998, she assumed the position of a tenure-track probationary instructor, and she became eligible to apply for tenure at any time during the following seven-year period.

The terms and conditions of her tenure track appointment were governed by Howard's faculty handbook. Sections 2 and 3 of the faculty handbook are incorporated into an employee's individual contract with Howard. Section 2.7.4 is devoted to tenure, and Section 2.7.4.6 sets forth the procedures for obtaining tenure approval at the department, school or college, and the university levels, as well as the timetable for tenure review. Section 2.7.6 includes the requirements for performance evaluations of faculty members.

Professor Roberts-Williams was promoted to assistant professor in 2001, but she did not apply for tenure at that point. On April 8, 2004, the Interim Chair of the Department of Theatre Arts, Professor Joe W. Selmon, sent a letter to her advising that she must apply for

tenure during the 2004-2005 academic year. She submitted her application for tenure to the Department on October 15, 2004.[1] The application was reviewed by the tenured faculty of the Department, and on November 3, 2004, the Chairperson of the Department's Appointment, Promotion, and Tenure Committee ("APT"), Professor Sherill Berryman-Johnson,[2] sent her a list of 46 changes to be made in her application. After she submitted a revised package to the Department's APT, Professor Berryman-Johnson sent her a letter on November 17, 2004, listing 7 changes to be made in her application package.

Professor Berryman-Johnson advised Professor Roberts-Williams on November 19, 2004, that the APT vote was "three votes yes and three votes no," but on November 22, Professor Berryman-Johnson sent "a corrected letter" indicating that there were "two votes yes, three votes no, and one abstention." In a letter dated that same day, Professor Selmon informed Professor Roberts-Williams that she could "submit a written request for reconsideration by November 26, 2004." Neither Professor Berryman-Johnson's nor Professor Selmon's letter explained the reasons for the denial of the tenure application, or why Professor Roberts-Williams was given only three or four days within which to file her

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[1] Professor Roberts-Williams experienced complications with her pregnancy on October 18, 2004, and was taken to the hospital where she gave birth to a daughter, by Cesarean Section. The infant succumbed after two days. The doctors informed Professor Roberts-Williams that she needed six to eight weeks to recuperate at home. She claimed that Howard required her to teach her courses on line during her recuperation period.

[2] The record is inconsistent as to whether Professor Berryman-Johnson has a hyphenated last name. For consistency in this opinion, we use "Berryman-Johnson."

request for reconsideration, or why she had to file for reconsideration before being told of the reasons for the denial of tenure. Professor Roberts-Williams sought reconsideration on November 29, 2004.

In response to her reconsideration request, Professor Berryman-Johnson wrote separate letters to Professor Roberts-Williams and Professor Selmon on December 1, 2004, stating the APT's unanimous recommendation that Professor Roberts-Williams be retained in the Assistant Professor position "for the academic year 2005-2006." The reason for this recommendation was to permit Professor Roberts-Williams to "receive active clarity and support from senior faculty members as well as additional time to thoroughly address the depth and quality of her work." In a letter dated December 16, 2004, Professor Selmon notified Professor Roberts-Williams that: "The Committee and the Chair recommend that you be granted a special appointment for the coming 2005-2006 academic year at the rank of Lecturer." The special appointment was to be her "final appointment."

Dr. Berryman-Johnson's December 20, 2004 letter to Professor Roberts-Williams explained the reasons for the negative tenure decision. Central to the negative decision was the quantity of Professor Roberts-Williams' publications; her main scholarly work was her *Mumia* Project[3] and the explanatory letter stated:

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[3] The *Mumia* Project was a body of work that examined the life of Mumia Abu-Jamal, (continued...)

> Although the *Mumia* Project is a good example of publication sources, the candidate does not seem to have many other major publications/articles during the time period other than for departmental production programs and articles related to *Mumia*. The weight of the publications are not with enough volume of material that would be commensurate for a promotion to Associate Professor.

While the evaluation of her teaching ranged from "average to excellent," the letter indicated that "some students reported confusion regarding [Professor Roberts-Williams'] methodology." One evaluator believed "that a doctorate is required." The letter praised Professor Roberts-Williams as a "dramaturg[e]" or playwright, but expressed concern about her "collegiality" due to her "limited support in attending departmental productions."[4]

Dean Tritobia Hayes-Benjamin, Associate Dean of the College of Arts and Sciences, Division of Fine Arts, supported the Department's recommendation that Professor Roberts-

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[3](...continued)
a man who was on death row, as well as the death penalty and the criminal justice system in general. As part of this project, Professor Roberts-Williams developed several plays and performance pieces, including "Hearing the Voice: Mumia Abu-Jamal," "A Liberating Prayer: A Love Song for Mumia," and "Discovering Mumia." She also contributed a scholarly article to "August Wilson and the Black Aesthetic," which explored African-American theater. Professor Roberts-Williams urged the committee to consider each piece of work related to the project as a separate item, even though the works could arguably be viewed as only one project.

[4] Professor Roberts-Williams wrote an extensive letter on January 3, 2005 (inadvertently, the year appearing on the actual letter was 2004), explaining the uniqueness of the *Mumia* Project, and defending herself against other criticisms.

Williams be retained as a Lecturer through May 15, 2006. However, Howard's Provost and Chief Academic Officer, Dr. Richard A. English, determined on May 23, 2005, that the faculty handbook precluded an additional year for Professor Roberts-Williams, and that she could only "permit her application for promotion and tenure to proceed or accept the 2004-05 academic year as her final one as a member of the faculty."

Dean Hayes-Benjamin also supported the recommendation of the Division of Fine Arts that Professor Roberts-Williams be allowed to withdraw her tenure application and to resubmit it in Fall 2005. Dr. English rejected this recommendation based upon the above interpretation of the faculty handbook.

Later, on December 2, 2005, Provost English recommended that the President, H. Patrick Swygert, not approve Professor Roberts-Williams for promotion with tenure. On January 4, 2006, Dean James Donaldson, Dean of the College of Arts and Sciences, notified Professor Roberts-Williams that the President did not approve her promotion with tenure.

Professor Roberts-Williams filed a four-count complaint against Howard on December 29, 2006. Counts I to III alleged violations of the District of Columbia Human Rights Act ("DCHRA"): gender discrimination, pregnancy discrimination, and discrimination on account of family responsibilities. Count IV asserted a breach of contract

claim for alleged violations of Howard's faculty handbook, including: (1) failure to provide the required biennial evaluations, counseling, and guidance ("biennial evaluations"); (2) failure to implement the proper reconsideration procedure after the Department's denial of the tenure application ("reconsideration"); and (3) failure to provide information about the criteria used to review the tenure application ("criteria").

The trial lasted approximately eight days. The witnesses generally provided testimony regarding Howard's tenure process and Professor Roberts-Williams' efforts to gain tenure, as recounted in this factual summary. There also was expert testimony regarding tenure procedures, as well as Professor Roberts-Williams' alleged damages. In addition to herself, Professor Roberts-Williams called as witnesses Dean Hayes-Benjamin, Professor Selmon, Dean Donaldson, and expert witnesses Richard Lurito and Caleen Jennings; Professor Berryman-Johnson's deposition was read into evidence. Howard also presented as its witnesses Dean Hayes-Benjamin and Professor Selmon, as well as Professor George Epting (a tenured professor in the Department of Theatre Arts and a member of the Department's APT); and Thomas Borzilleri, an economist and expert. The jury rejected Professor Roberts-Williams' DCHRA claims, but found Howard liable for two of the breach of contract claims (biennial evaluations and reconsideration), and awarded Professor Roberts-Williams damages. The trial court set aside the verdict as to one of the breach of contract claims (reconsideration), but that action did not affect the total amount of damages awarded by the

jury. Both Howard and Professor Roberts-Williams noted appeals.

Two provisions of the faculty handbook are at issue in these appeals: Section 2.7.6 governing biennial performance evaluations of faculty members, and Section 2.7.4.6.1 as it relates to reconsideration of a negative departmental tenure decision. The pertinent part of Section 2.7.6 provides that: "Each member of the faculty holding a temporary, probationary or tenured appointment, whether full or part-time, shall be evaluated at least every 2 years"; and further, that: "When a faculty member is being considered for . . . tenure, the evaluation file for the relevant time period shall be a primary source of data on which such decision [is] made." The reconsideration provision of Section 2.7.4.6.1 specifies, in part, that: "Any faculty member who is reviewed for and denied a positive recommendation for tenure may ask for reconsideration of that decision at the department level." The department must inform the candidate of the reconsideration "right and the procedures for exercising it when [the candidate] is first notified of a negative tenure decision." The reconsideration procedures are specific.[5] The jury found that Howard had breached both of these provisions.

[5] With respect to the details of the reconsideration provision, Section 2.7.4.6 provides:

> Within 2 academic weeks after being notified that the departmental decision is negative and prior to referral to the dean, the candidate will receive a written statement of the reasons for the negative decision, unless the candidate expressly relinquishes his/her right to receive the statement within 2 academic weeks of said notice. The statement shall respect the limits set by the need to preserve confidentiality. If the

(continued...)

The trial court denied Howard's post-verdict motion with respect to Section 2.7.6. The court also determined that the jury correctly found that Howard breached Section 2.7.4.6.1, but that Professor Roberts-Williams could not prevail on the reconsideration claim because even if Howard had followed the reconsideration procedure, she would not have had enough time to overcome the department's determination that her scholarly work was "quantitatively inadequate" for tenure.

ANALYSIS

Howard's Appeal

The Interim and Final Jury Instruction on Biennial Evaluations

Howard primarily contends that the trial court abused its discretion by giving an interim or special instruction pertaining to biennial evaluations, and also erred as a matter of

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[5](...continued)

> candidate wishes to have the department decision reconsidered, he/she shall respond to the chair in writing within 2 academic weeks of receipt of the department's statement of reasons. The candidate may address any issue in writing that he/she deems appropriate, and may present new information. The tenured faculty shall consider the candidate's response, and a second vote shall be taken. The final department decision and the reasons for it shall be provided in writing to the candidate within 3 academic weeks of receipt of the candidate's response.

law regarding the content of the biennial evaluation jury instruction. Professor Roberts-Williams supports the interim or special instruction, as well as the final jury instruction regarding biennial evaluations.

Factual Context for the Biennial Evaluation Instruction

One of Professor Roberts-Williams' breach of contract claims was that she did not receive the required biennial evaluations specified in the faculty handbook; her trial testimony during direct examination reiterated that claim. During her extensive cross-examination, Howard's counsel sought to show that she had indeed received evaluation of her performance at Howard. Using her deposition transcript, counsel established that he had asked whether Professor Roberts-Williams ever went to anyone to ask how she was doing. She responded at the deposition, in part: "I went to my colleagues and I talked quite a bit. Dr. Berryman-Johnson was always available for feedback . . . ." When questioned further at trial, Professor Roberts-Williams stated: "I would agree that she [Dr. Berryman-Johnson] was always available for feedback of a certain kind, yes." She also agreed that she had received feedback from another professor. Howard's counsel next focused on Professor Roberts-Williams' 2001 application for promotion to assistant professor and asked whether section 4 of that application did not contain an evaluation by the College APT in the areas of her teaching, research and publications, professional development, and service. Professor

Roberts-Williams agreed that section 4 and other sections of her 2001 application for promotion did contain evaluation material. Counsel for Professor Roberts-Williams raised an objection on the ground that Howard's counsel was "equating" the promotion application evaluation with the required handbook evaluations; that "the question implies they're the same thing, and they're not."

The record shows that the trial court first alerted counsel for Howard and Professor Roberts-Williams (at the beginning of the third day of Professor Roberts-Williams' testimony and before the continuation of her cross-examination by Howard's counsel), that it was "going to instruct the jury that as a matter of law, under the contract between the parties pursuant to the handbook, the university has an affirmative obligation . . . to conduct biennial evaluations." Howard's counsel objected. The trial court allowed the cross-examination of Professor Roberts-Williams to continue, and during the mid-morning recess, the court invited counsel for Howard to explain his objection. Counsel stated that the instruction "should be given at the end" of the case, that "it improperly takes certain matters out of the province of the jury," that it would "unduly influence the jury," and that the jury would "begin to believe that the [c]ourt is favoring the plaintiff in this case."

The trial judge responded, in part: "Right now, the jury may feel that the plaintiff . . . had the opportunity to seek evaluations from Dr. Berryman-Johnson and other members of

the faculty, and that . . . these evaluations were open to her and she didn't take advantage of [them]." However, the judge continued, "the handbook, which is a contract, states . . . that there shall be biennial evaluations, and that they should be shared with the faculty member, and that the faculty member should have access to the evaluation." Howard's counsel pressed the points that "[t]here is absolutely no evidence . . . that there is any confusion among the jurors"; and that Howard "substantially complied with the contract," that "[i]t is going to be extremely prejudicial to the university if the [c]ourt gives this instruction at this time." Cross-examination of Professor Roberts-Williams then resumed.

At the end of the cross-examination and redirect examination of Professor Roberts-Williams, the trial judge proceeded to instruct the jury, in part, as follows:

> Section 2.1 [of the faculty handbook] . . . states that Sections 2 and 3 are part of the contract between the university and the faculty member. . . .
>
> Now, Section 2.7.6 . . . [is] part of that contract . . . . And 2.7.6 has to do with performance evaluation of all faculty . . . .
>
> [T]he gist [of that provision] is that the university undertakes to give biennial evaluations, to evaluate the faculty member every two years, and it explicitly mentions tenure being benefitted by the biennial evaluations for those on the tenure track, as was the plaintiff. And it also requires that the chairperson of the department discuss the evaluation that's made with a [tenure] candidate. That is part of the contract that the plaintiff had with the defendant, Section 2.7.6.

> Now, you're further instructed . . . that although a candidate for tenure may have available, colleagues to reach out [to] for advice and counsel with respect to tenure and the applications for tenure, that doesn't relieve the university of its contractual duty to biennially evaluate the candidate . . . .

The trial court discussed proposed final instructions with the parties. While the court was prepared to give an instruction regarding Howard's substantial performance with respect to breach of contract as to "criteria and standards,"[6] the court declined to give a substantial performance instruction with respect to the biennial evaluations and the reconsideration breach of contract claims, because there was "no factual predicate as a matter of law for substantial performance" as to the biennial evaluations, and because there was "no dispute that the reasons for the denial [of tenure] were not presented to [Professor Roberts-Williams] before she was required to seek reconsideration." The trial court's final breach of contract jury instructions, given on September 25, 2009, generally reflected the handbook contractual language, and the biennial evaluation instruction mirrored the interim or special instruction in large measure.[7]

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[6] The trial court's substantial performance instruction with respect to providing notice to Professor Roberts-Williams concerning the criteria and standards to be used in evaluating her tenure application read as follows: "I instruct you that any document or documents placed in [Professor Roberts-Williams' mailbox at the department would constitute sufficient delivery to [her] of the information contained therein."

[7] The breach of contract final instruction declared, in part:

> It is undisputed . . . that the relevant provisions of the

(continued...)

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university's handbook constitute a contract. A contract is an agreement between two or more parties to do or not to do something. There is no dispute that plaintiff and defendant had an employment contract. . . . Under the law, if one party without legal excuse fails to fully perform a duty under the contract, then that party has breached the contract.

If you find that the defendant breached the contract, then the defendant is liable to the plaintiff for damages.

Now, Howard University's faculty handbook contains policies and practices which the university makes known to its faculty members and which govern their employment relationship. Each faculty member has a legitimate expectation that these policies and practices will be followed. If the university fails to follow the policies and practices contained in the faculty handbook, or if it violates its requirements, then it has violated its contract of employment with the faculty member, and it is liable to the faculty member for any damages resulting from the violation or violations.

. . . .

It is up to you to determine whether or not the evidence establishes these various breaches by a preponderance. And if so, whether the breaches constitute an unjustified failure to perform all or any part of what was promised in plaintiff's contract with the university.

. . . .

I want to repeat to you an instruction I gave you during the trial dealing with biennial evaluations. . . . The requirement of biennial evaluations . . . [is a] contractual requirement[]. The fact that the tenured faculty members may be available for the candidate to reach out to for advice or coun[se]l . . . does not relieve the university of its contractual duties . . . .

(continued...)

After having concluded his final instructions to the jury, the trial judge invited both counsel to the bench and inquired as to any objections. Counsel for Howard raised objections concerning instructions relating to the DCHRA claims, and counsel for Professor Roberts-Williams posed an objection to an aspect of the pregnancy discrimination instruction. Without further explanation, counsel for Professor Roberts-Williams asserted: "And our earlier objections are already noted." On September 24, 2009, during the discussion of proposed final instructions, counsel for Howard objected to an instruction which "combin[ed] the biennial evaluations and the criteria [for tenure]" as "confusing to the jury." He also renewed his objection to the interim or special instruction regarding biennial evaluations, which would be restated in the final instructions. Counsel's other objections were devoted to instructions pertaining to the DCHRA claims and to damages.

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[7](...continued)

> And now I will continue by explaining the last breach of contract claimed by the plaintiff. And that is whether the defendant complied with the provisions of Section 2.7.4.6.1 . . . of the faculty handbook, which provides that the tenure candidate is to be provided with a written statement of the reasons for the initial negative recommendation by the Department APT Committee and allow two weeks thereafter to request reconsideration of the negative decision and to present new information in support of her candidacy.
>
> If you determine that the defendant failed to adhere to its contract with the plaintiff in any of the respects that I have just outlined, you should find for the plaintiff on that breach and should then consider the issue of damages respecting that breach. . . .

Legal Principles Applicable to the Jury Instruction Issue

"A trial court has broad discretion in fashioning appropriate jury instructions, and its refusal to grant a request for a particular instruction is not a ground for reversal if the court's charge, considered as a whole, fairly and accurately states the applicable law." *Psychiatric Inst. of Wash. v. Allen*, 509 A.2d 619, 625 (D.C. 1986). Furthermore, the trial court's decision to issue or to refuse to issue instructions should result from "an informed choice among permissible alternatives, which is the essence of an appropriate exercise of discretion." *Nelson v. McCreary*, 694 A.2d 897, 901 (D.C. 1997) (citing *Johnson v. United States*, 398 A.2d 354, 364 (D.C. 1979)). A trial court abuses its discretion regarding jury instructions when the "stated reasons do not rest upon a [sufficient] factual predicate." *Id*. (alteration in original) (internal quotation marks omitted). In addition, a party is entitled to an instruction on his or her theory of the case as long as the requested instruction finds support in the evidence. *Id*. (citing *Nimetz v. Cappadona*, 596 A.2d 603, 605 (D.C. 1991)). In reviewing the trial court's denial of a requested instruction on a party's theory of the case, we view the evidence in "the light most favorable" to appellant. *Id*. (citing *Wilson v. United States*, 673 A.2d 670, 673 (D.C. 1996)).

With respect to contract issues relating to the jury instructions, we are mindful of the following principles. "'[C]ourts should not invade, and only rarely assume academic

oversight, except with the greatest caution and restraint, in such sensitive areas as faculty appointment, promotion, and tenure, especially in institutions of higher learning.'" *Allworth v. Howard Univ.*, 890 A.2d 194, 202 (D.C. 2006) (quoting *Brown v. George Washington Univ.*, 802 A.2d 382, 385 (D.C. 2002)). However, "'[t]he principle of academic freedom does not preclude [the court] from vindicating the contractual rights of a plaintiff who has been denied tenure in breach of an employment contract.'" *Id*. (second alteration in original). "[I]f the meaning of a contract is so clear that reasonable [persons] could reach but one conclusion or no extrinsic evidence is necessary to determine the contract's meaning, then contract interpretation is a matter for the court." *Howard Univ. v. Best*, 484 A.2d 958, 966-67 (D.C. 1984) (*Best I*). But, "[t]he objective view of contract interpretation adopted in this jurisdiction requires, in the context of University employment contracts, that the custom and practice of the University be taken into account in determining what were the reasonable expectations of persons in the position of the contracting parties." *Brown*, *supra*, 802 A.2d at 386 (internal quotation marks omitted). In that regard, university contracts "are to be read [] by reference to the norms of conduct and expectations founded upon them in a particular manner, unlike, to some degree, contracts made in the ordinary course of doing business." *Id*. (internal quotation marks omitted). "In order for a custom and practice to be binding on the parties to a transaction, it must be proved that the custom is definite, uniform, and well known, and it must be established by clear and satisfactory evidence." *Howard Univ. v. Best*, 547 A.2d 144, 151 (D.C. 1988) (*Best II*) (internal quotation marks omitted).

We now turn to an analysis of Howard's specific contentions pertaining to the trial court's biennial evaluations instructions. Howard maintains that the jury's finding that its "failure to provide [Professor] Roberts-Williams with written and signed biennial evaluations proximately caused [her] damages . . . is a direct result of the prejudicial instructions given by the trial court at the end of [Professor] Roberts-Williams' testimony and again at the close of the evidence." Howard claims that: "The [c]ourt's instruction alleviated [Professor] Roberts-Williams' burden of proving her case with respect to the alleged failure to evaluate her." In addition, Howard argues that: "[T]he trial court's special instruction deprived the University of an ability to establish that it had substantially complied with the Faculty Handbook by affording [Professor] Roberts-Williams other, alternative means of feedback and evaluation which were the equivalent of the biennial evaluations." Howard asserts that "the instruction was improper in light of the statute of limitations imposed on [Professor] Roberts-Williams' claim of breach of contract," that she can only make a claim for 2004, and that a 2004 evaluation would not have "changed the university's decision to deny tenure."

We disagree with Howard's assertion that the trial court's biennial evaluations instructions were "prejudicial." First, we conclude that the trial court did not abuse its broad discretion to give an interim or special instruction at the conclusion of Professor Roberts-Williams' testimony. Given Howard's cross-examination of the professor, which sought to show that she had received evaluations and had an opportunity to seek feedback from at least

two professors, the judge expressed the belief that the jury might draw the wrong conclusion and the judge stated reasons, based upon a factual predicate, for giving the interim or special instruction. *See Allen*, *supra*, 509 A.2d at 625; *Johnson*, *supra*, 398 A.2d at 364. Second, the trial court's interim or special instruction accurately reflected the fact that Howard's faculty handbook's provisions regarding tenure constituted part of an employee's contract. Those contractual provisions, as the trial court properly concluded, are not ambiguous, and the trial court's interim or special and final biennial evaluations instructions properly informed the jury as to their meaning. *See Best I*, *supra*, 484 A.2d at 966-67. Third, we cannot agree that the trial court's instructions lifted the burden from Professor Roberts-Williams to prove her case "with respect to the alleged failure to evaluate her." In its final instructions, the trial court carefully instructed the jury on the burden of proof, indicating that Professor Roberts-Williams had the burden of proving "every element of her claim by a preponderance of the evidence"; that the jury must "determine whether or not the evidence establishes the[] various breaches by a preponderance of the evidence, [a]nd if so, whether the breaches constitute an unjustified failure to perform all or any part of what was promised in [Professor Roberts-Williams'] contract with [Howard]"; and that "[t]he burden of proof is upon [Professor Roberts-Williams] to establish all of the elements of her damages by a preponderance of the evidence."

Fourth, the record does not support Howard's contention about the impact of the

special instruction on Howard's ability to establish substantial compliance with the contractual biennial evaluation requirement. The trial court clearly was familiar with this court's decision in *Allworth*, *supra*, which reiterated the caution against the court's involvement in university promotions and tenure, but which nevertheless recognized that the court could address "the contractual rights of a plaintiff who has been denied tenure in breach of an employment contract." *Id*. at 202. The trial court understood that Howard's proof, with respect to Professor Roberts-Williams' claim that it failed to provide information about the criteria used to review her tenure application, established a factual basis for making a substantial performance defense; and hence, the court exercised its discretion and gave instructions relating to that defense. In that regard, Howard did not offer proof of a factual basis for a substantial performance defense with regard to Professor Roberts-Williams' biennial evaluations claim. Our case law emphasizes that in construing and applying university contracts, the court must consider "the custom and practice" of the university, but "[i]n order for a custom and practice to be binding on the parties to a transaction, it must be proved that the custom is definite, uniform, and well known, and it must be established by clear and satisfactory evidence." *Best II*, *supra*, 547 A.2d at 151.

Even assuming, without deciding, that Howard properly preserved its substantial compliance contention, the record does not reflect "clear and satisfactory evidence" of Howard's custom and practice of accepting something short of an actual biennial evaluation

in satisfaction of Section 2.7.6 of the Faculty Handbook. The true issue is not whether Howard substantially complied with its obligation to provide biennial evaluations, but whether its failure to do so caused Professor Roberts-Williams more than nominal damages. The trial court's cogent analysis of the "sufficiency of causation evidence as to the evaluations" (in resolving Howard's post trial motion for a new trial or judgment as a matter of law), demonstrates that the jury's findings – that Howard breached the biennial evaluations provision of its contract with Professor Roberts-Williams, and that this breach was both "foreseeable and a substantial factor in the denial of tenure" – are supported by ample record evidence.[8]

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[8] We doubt that Howard has preserved its statute of limitations argument with respect to the biennial evaluations instructions, but even assuming that it has, we are satisfied that Howard could not prevail on this argument. Howard's appellate argument on the statute of limitations issue is contained in one relatively short paragraph of its main brief, and neither in its main brief nor in its reply brief does Howard address the trial court's specific analysis of the issue. The record shows that the trial court addressed the statute of limitations issue during arguments on Howard's directed verdict motion on September 22, 2009. The court concluded that "since there was a continuous duty [to provide the biennial evaluations], each violation refreshes those previous biennials that were not given." The trial court cited *Paul v. Howard Univ.*, 754 A.2d 297, 312 (D.C. 2000), for the "continuous duty." Howard takes no issue with the application of this doctrine to the instant case. Nor does Howard make any explicit argument that Professor Roberts-Williams had a duty to protest the absence of the biennial evaluation on its first non-occurrence, or affirmatively seek out substitute evaluations and prospects for tenure on her own. Nor did Howard establish that, perhaps by way of mitigation or defense, Professor Roberts-Williams had a duty by custom and practice or otherwise apart from the contract to protest the absence of the biennial evaluation on its first non-occurrence (section 2.8.4 of the handbook, pertaining to appeal of a negative decision regarding tenure, by its very terms was inapplicable), or affirmatively seek out substitute evaluations and prospects for tenure on her own beyond that shown in the record. Therefore, we express no views on the merits of these possible issues.

Professor Jennings' Expert Testimony

Howard contends that Caleen Jennings, a Professor of Theatre and Co-Chair of the Department of Performing Arts at The American University in the District of Columbia, and a member of American's Department of Performing Arts Rank and Tenure Committee since 1997, "was not qualified to testify as an expert on [Howard's] adherence to its rules, regulations and faculty handbook." Howard claims that Professor Jennings "was [] permitted to testify far beyond the scope permitted by [another judge] and the trial court's orders." Howard specifically objects to the trial court's allowing the professor to respond to the following question from Professor Roberts-Williams' counsel: "What [e]ffect will Howard University's denial of tenure to [P]rofessor [Roberts-]Williams have on her ability to obtain a tenure track position at . . . another institution of higher learning?"

Approximately one year prior to trial, on September 12, 2008, Professor Roberts-Williams sent Howard an amended Super. Ct. Civ. R. 12 (b)(4) statement in which she identified Professor Jennings as one of her expert witnesses. The amended statement indicated, in part, that Professor Jennings "will . . . offer her opinion on Howard University's established tenure process and procedures, and the importance of Howard University's failures to comply with its tenure procedures" and that "Professor Jennings will . . . give an opinion that Howard University's denial of tenure to Professor Roberts-Williams will have

a substantial and adverse effect on her ability to obtain a tenure track position in her field at another institution." Howard filed a motion *in limine* seeking to exclude testimony "challenging tenure denial." The Honorable Jeanette J. Clark issued an order on December 9, 2008, specifying that:

> Expert witnesses' testimony shall be allowed only to the extent that the testimony relates to the process and procedures regarding tenure and [Howard's] adherence or not to its rules, regulations, and faculty handbook. Expert[] witnesses may not testify as to the ultimate decision of tenure and whether Howard University should have promoted [Professor] Roberts-Williams.

Professor Jennings executed a sworn declaration on December 15, 2008, setting forth her background[9] and her opinions, including her opinion about the impact of Howard's denial of tenure on Professor Roberts-Williams' ability to find a tenure track position elsewhere.

Over the objection of Howard, the Honorable Leonard Braman, who presided over the trial in this case, qualified Professor Jennings as an expert in "the process and procedures

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[9] Professor Jennings had been a Professor of Theatre at American since 1989, and at the time of her declaration was Co-Chair of the Department of Performing Arts. She was granted tenure in 1997, and she became a member of the Department of Performing Arts Rank and Tenure Committee. She served as chairperson of that committee for four years. She had been designated as a pre-tenure or promotion external evaluator for theatre programs at various institutions, including U.C.L.A. and William and Mary. In addition to her work at American, she is a playwright, director and performer, and has received awards for her work.

regarding tenure." Judge Braman generally overruled Howard's objection that certain questions were beyond the scope of Judge Clark's ruling, but he precluded questions that required Professor Jennings to testify "as to the ultimate decision on tenure." Among the questions to which Howard raised an objection was the following:

> What [e]ffect will Howard University's denial of tenure to Professor Williams have on her ability to obtain a tenure track position at . . . another institution of higher learning?

Professor Jennings replied:

> It's a huge impact, it's devastating. Once you've been denied tenure someplace it's . . . extraordinarily hard to get a teaching job but to get a tenure track job, it's extraordinarily difficult.

We review a trial judge's decision to admit or exclude expert testimony for abuse of discretion. *See Benn v. United States*, 978 A.2d 1257, 1269 (D.C. 2009). "Whether a witness possesses the requisite qualifications to express an opinion on a particular subject is within the trial court's discretion, and its decision in that regard will only be reversed for an abuse." *Jung v. George Washington Univ.*, 875 A.2d 95, 105 (D.C.), (internal quotation marks omitted), *amended on reh'g*, 883 A.2d 104 (D.C. 2005). In light of Professor Jennings' background and substantial experience on American's Department of Performing Arts Rank

and Tenure Committee, as well as her experience as an outside evaluator for tenure and promotion candidates at other institutions, we see no abuse of discretion in Judge Braman's ruling that she was qualified as an expert on process and procedures regarding tenure, and that she could respond to questions about Howard's tenure process and procedures.

We also reject Howard's contention that the trial court improperly permitted Professor Jennings to testify beyond the scope permitted by Judge Clark's order. Generally, "[u]nder the 'law of the case' doctrine, a trial judge presiding over later phases of a proceeding is bound by an earlier final ruling by a judicial colleague, unless new facts have arisen in the interim." *In re Barlow*, 634 A.2d 1246, 1248 n.3 (D.C. 1993). However, "rulings on motions *in limine* normally are considered provisional, in the sense that the trial court may revisit its pre[-]trial evidentiary rulings in the context of the presentation of the evidence in the case." *Jung*, 875 A.2d at 103, (internal quotation marks omitted), *amended on reh'g*, 883 A.2d at 105. Here, as Judge Braman determined, Judge Clark's order was directed at the liability phase of the case, not damages; moreover, nothing precluded Professor Jennings from testifying about other matters within her expertise, so long as she did not attempt to offer an opinion about "the ultimate decision on tenure." Furthermore, Howard knew at least one year before trial that Professor Jennings would offer an opinion that Howard's denial of tenure to Professor Roberts-Williams would have "a substantial and adverse effect on her ability to obtain a tenure track position in her field at another institution." Therefore, Howard

could not have been surprised about Professor Jennings' testimony, and Howard could have designated its own expert to counter Professor Jennings' testimony relating to Professor Roberts-Williams' economic damages.

Professor Roberts-Williams' Duty to Mitigate Damages

Howard complains about the trial court's instruction to the jury concerning mitigation of damages. During final jury instructions, the trial court told the jury that Professor Roberts-Williams was required to "do all that is reasonably within [her] power to minimize her losses," but that she was not required to accept "lesser employment." Howard argues that this instruction, as applied to the breach of contracts claims, was improper. We disagree.

"A trial court generally has broad discretion in fashioning jury instructions, as long as the charge, considered as a whole, fairly and accurately states the applicable law." *Holloway v. United States*, 25 A.3d 898, 903 (D.C. 2011) (internal quotation marks omitted). Because the question here is legal, we review the instruction *de novo*. *Appleton v. United States*, 983 A.2d 970, 977 (D.C. 2009). An award of damages is subject to the defense of mitigation of damages. *District of Columbia v. Jones*, 442 A.2d 512, 524 (D.C. 1982). The burden is on the employer to show that the employee "has obtained a substitute job, or could obtain one by reasonable effort." *Id.* (internal quotation marks omitted); *see Kakeh v. United*

Planning Org., Inc., 587 F. Supp. 2d 125, 129 (D.D.C. 2008) ("the only issue . . . is whether an employee made responsible and diligent efforts to obtain a similar employment opportunity").

In *Best I*, *supra*, a case involving breach of contract and other claims by a professor, the trial judge refused to instruct the jury that the professor "had a duty to accept lesser employment after an extended period of unemployment." *Id*. at 976 n.18. We concluded that there was no error in that instruction. *Id*. (citing, *inter alia*, *Jones*, *supra*, 442 A.2d at 524). Howard argues in a footnote that "[t]his instruction was never adopted by *Best*." Even assuming, without deciding that Howard preserved this specific instructional issue, we are convinced that the trial court correctly instructed the jury both in *Best* and in this case.

Howard had the burden of asserting and proving its affirmative defense regarding mitigation of damages. It cites no persuasive case law for the proposition that the specified trial court instruction in this case constituted an error of law. Other jurisdictions have concluded that in a specialized field such as education, a plaintiff is not required to mitigate damages by accepting lesser employment, or employment outside of the educational field. In *Selland v. Fargo Pub. Sch. Dist. No. 1*, 302 N.W.2d 391, 393 (N.D. 1981), the court determined that: "In order to mitigate damages, a teacher is not required to seek employment in another line of service other than teaching," or "to go to a different locality." *Id*. (citations

omitted). *See also McDowell v. Napolitano*, 895 P.2d 218, 225 (N.M. 1995) (denial of tenure; general instruction on mitigation sufficient); *Frye v. Memphis State Univ.*, 806 S.W.2d 170, 173 (Tenn. 1991) (employee not required to accept just any job or to abandon his home, "but is only required to exercise reasonable diligence in seeking other employment of a similar or comparable nature"); *Kenaston v. School Admin. District #40*, 317 A.2d 7, 10 (Me. 1974) ("A teacher whose contract has been unjustifiably terminated is not required to accept employment which would be of an inferior or different kind . . . in order to mitigate damages."); *Zeller v. Prior Lake Pub. Schs.*, 108 N.W.2d 602, 606 (Minn. 1961) ("Ordinarily, a teacher under contract wrongfully discharged need not accept employment of a different or inferior kind or in a different locality in order to mitigate damages.).

Moreover, the court in *Higgins v. Lawrence*, 309 N.W.2d 194 (Mich. 1981), a case pertaining to an employment contract, declared that "[a] wrongfully discharged employee is obligated to mitigate damages by accepting employment of a 'like nature.'" *Id*. at 196. The court set forth as "criteria for determining 'like nature' the following: "the type of work, the hours of labor, the wages, tenure, working conditions, etc.," and asserted that: "Whether or not an employee is reasonable in not seeking or accepting particular employment is a question for the trier of fact." *Id*. at 196 (citing RESTATEMENT (SECOND) OF AGENCY, § 455, cmt. d at 373; RESTATEMENT OF CONTRACTS § 336 at 537; 11 WILLISTON ON CONTRACTS § 1359 at 306 (3d ed. 1959)); *see also Hussey v. Holloway*, 104 N.E. 471, 473 (Mass. 1914)

("[I]t has generally been held that where, as in this case, a plaintiff was employed in a special service, she is not obligated to engage in a business that is not of the same general character, in order to mitigate the defendant's damages."). Under these authorities, Howard's complaint that Professor Roberts-Williams "had not looked for employment other than as a professor or anywhere outside of the Washington Metropolitan area," is not a ground on which we can reverse the judgment of the trial court.[10] The "lesser employment" instruction was not an abuse of the trial court's discretion, and it was up to the jurors, as fact finders, to determine whether Professor Roberts-Williams exercised reasonable diligence in seeking other employment. In short, we see no instructional error.

Professor Roberts-Williams' "Colston Argument"

During closing argument, counsel for Professor Roberts-Williams asked the jury, "How much is her damaged career and professional reputation worth? Is it $300,000, $500,000, $800,000? That is for you to decide." Howard asserts that the argument, known as a "Colston argument," was improper.

In *Colston*, a case for false arrest and assault and battery where the appellee was

[10] Howard did not request an instruction concerning Professor Roberts-Williams' obligation to seek similar employment outside of the Washington Metropolitan area. Hence it has waived that issue.

blinded, appellee's counsel argued to the jury, "Is an eye worth five hundred thousand? Eight hundred thousand? A million? That is for you to say. That is for you to decide." *District of Columbia v. Colston*, 468 A.2d 954, 956 (D.C. 1983). We determined there was no *per se* error in the argument. *Id.* at 957-58. Although an attorney may not ask the jury to step into he victim's shoes or suggest a specific dollar amount to the jury, "counsel must always be permitted to argue that his client's case is a serious one and to stress those aspects of the case that contribute to its seriousness." *Id.*; *see also Hechinger Co. v. Johnson*, 761 A.2d 15, 21 (D.C. 2000).

In this case, the jury only awarded damages for breach of contract, and the court specifically instructed that "damages for pain and suffering, mental anguish, humiliation or embarrassment [could not] be awarded for any breach of contract claimed." The award of damages was based, rather, on calculations of back pay and front pay. There is no reason to think that the *Colston*-type argument affected the determination of damages in any way.

Furthermore, Professor Roberts-Williams' attorney did not suggest a specific amount. In fact, "[t]here is no material difference between the dollar figure argument sanctioned in *Colston* and the one that [Professor Roberts-Williams'] counsel made in this case." *Hechinger*, 761 A.2d at 22. Hence, we reject Howard's contention.

Howard's Motion for Judgment as a Matter of Law

Howard finally claims that the trial court erred by denying, in part, its motion for judgment as a matter of law or a new trial. This court reviews the trial court's decision to grant or deny a motion for judgment as a matter of law *de novo*. *NCRIC, Inc. v. Columbia Hosp. for Women Med. Ctr.*, 957 A.2d 890, 902 (D.C. 2008). "A trial court may grant a motion for judgment as a matter of law 'only if no reasonable juror, viewing the evidence in the light most favorable to the prevailing party, could have reached the verdict in that party's favor.'" *Id.* (quoting *Liu v. Allen*, 894 A.2d 453, 459 n.10 (D.C. 2006)). A judgment as a matter of law should be granted "only in extreme cases." *Lyons v. Barrazotto*, 667 A.2d 314, 320 (D.C. 1995). "If it is possible to derive conflicting inferences from the evidence, the trial judge should allow the case to go to the jury." *Majeska v. District of Columbia*, 812 A.2d 948, 950 (D.C. 2002) (quoting *Pazmino v. Washington Metro. Area Transit Auth.*, 638 A.2d 677, 678 (D.C.1994)) (internal quotation marks omitted).

Howard argues that the jury and the trial court failed to give proper academic deference to Howard's decision to deny tenure. As we said earlier, "courts generally give deference to the discretion exercised by university officials," but "[t]his is not to say that a court may never examine university promotion and tenure decisions." *Allworth*, *supra*, 890 A.2d at 202. We must avoid "substitut[ing] [our] judgment improperly for the academic

judgment of the school." *Id.* (internal quotation marks omitted). "[W]here a university or college has adopted tenure and promotion rules or contract provisions, a court may determine whether there has been substantial compliance with those rules." *Id.* Most importantly, "[t]he principle of academic freedom does not preclude [the court] from vindicating the contractual rights of a plaintiff who has been denied tenure in breach of an employment contract." *Id.* (alteration in original) (quoting *Craine v. Trinity Coll.*, 791 A.2d 518, 540 (Conn. 2002)) (internal quotation marks omitted).

According to Howard, there was no evidence that Professor Roberts-Williams would have been granted tenure but for its failure to provide a proper biennial evaluation.[11] But, this was not the question submitted to the jury. The jury properly was asked to determine whether a breach or breaches of the contract "were a substantial factor in causing the denial of tenure" and whether such a result was a reasonably foreseeable consequence of a breach. Howard cited Professor Roberts-Williams' emphasis on only one project, the *Mumia* Project, as insufficient scholarship. Because Professor Roberts-Williams did not receive a proper formal evaluation, no other faculty members ever advised her that such focus on a single work would impact her tenure application negatively. A reasonable jury could conclude that

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[11] Professor Roberts-Williams presented testimonial and documentary evidence concerning the award of tenure to Mark Jolin, another professor in the Department of Theatre Arts. Through this evidence, Professor Roberts-Williams sought to demonstrate that she had more qualitative and quantitative publications than Professor Jolin, and hence, that when compared to him, she should have received tenure.

Professor Roberts-Williams would have approached her scholarly work and her tenure application differently if she had known that the *Mumia* Project would be considered insufficient. In other words, a reasonable jury could conclude that the failure to give biennial evaluations was "a substantial factor in causing the denial of tenure."

Howard also maintains that in light of Judge Braman's decision to grant judgment as a matter of law with respect to the notification provision, the damages award must be lowered. Howard contends that the award was likely influenced by the jury's finding that Howard breached the contract with respect to both provisions. We are not persuaded. The jury's award consisted only of back pay and front pay. The jury did not award any punitive damages. Thus, the jury award was based on the amount of money Professor Roberts-Williams lost as a result of being denied tenure. The jury found, according to the special verdict sheet, that *each* breach of contract was a substantial factor in the denial of Professor Roberts-Williams' application for tenure. Thus, as the trial court determined in its cogent post-trial memorandum, Professor Roberts-Williams' damages remain the same regardless of whether Howard breached one or two provisions of the handbook.

Professor Roberts-Williams' Cross-Appeal

Because we do not disturb the jury's damages award, we need not reach the merits of

District of Columbia
Court of Appeals

No. 12-CV-1904

FRANCIS CHUCKER, M.D., *et al.*,

Appellants,

v. **2010 CAM 5095**

RONALD BERGER, *et al.*,

Appellees.

BEFORE: Fisher, Associate Judge, and Newman and King, Senior Judges.

JUDGMENT

On consideration of appellees' motion for summary affirmance, the opposition thereto, appellants' brief and appendix, appellees' brief, appellants' reply brief, and the record on appeal, it is

ORDERED that appellees' motion for summary affirmance is granted. *See Oliver T. Carr Mgmt., Inc. v. Nat'l Delicatessen, Inc.*, 397 A.2d 914, 915 (D.C. 1979). The trial court did not err in finding that appellants' rhetorical closing argument was proper pursuant to *District of Columbia v. Colston*, 468 A.2d 954 (D.C. 1983). *See Howard Univ. v. Roberts-Williams*, 37 A.3d 896, 912 (D.C. 2012); *Hechinger Co. v. Johnson*, 761 A.2d 15, 21 (D.C. 2000); *see also M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971) (holding that no division of this court can overrule a prior decision of this court; such result can only be accomplished by this court *en banc*). It is

FURTHER ORDERED and ADJUDGED that the judgment and order denying appellants' motion for new trial be and hereby are affirmed.

ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

No. 12-CV-1904

Copies to:

Honorable Gregory Jackson

Clerk, Superior Court

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75 A.3d 280
District of Columbia Court of Appeals.

PRESIDENT and DIRECTORS OF GEORGETOWN COLLEGE, et al., Appellants,
v.
Crystal WHEELER, Appellee.

Nos. 12–CV–671, 12–CV–672.
|
Argued May 7, 2013.
|
Decided Sept. 19, 2013.

Synopsis

Background: Patient brought medical-malpractice action against hospital and her former pediatrician in connection with their failure to discover a cleft cyst behind patient's left eye. Following jury trial, the Superior Court, District of Columbia, Judith Bartnoff, J., entered judgment of $2.5 million in favor of patient. Defendants appealed.

Holdings: The Court of Appeals, Belson, Senior Judge, held that:

[1] jury's verdict was not a "special verdict" involving only the determination of factual questions, such that defendants waived alleged inconsistency of verdict by failing to raise the issue before jury was discharged;

[2] patient was not required to show that her experts' opinions as to a causal link between cyst and patient's gastroparesis were generally accepted in the medical science community, but, rather, that experts' methodology was a generally accepted method for forming an opinion regarding medical causation; and

[3] there was no impropriety in comments by patient's counsel during closing argument regarding standard of care; but

[4] jury's award of an additional $19,450 in future medical costs beyond the $780,550 that patient's damages expert testified would fully compensate patient for such costs was not supported by the evidence, thus requiring a remittitur.

Affirmed in part; remanded with instructions in part.

West Headnotes (18)

[1] **Trial**
Necessity and sufficiency of general finding

A "general verdict" is a verdict by which the jury finds in favor of one party or the other, as opposed to resolving specific fact questions.

Cases that cite this headnote

[2] **Trial**
Necessity and sufficiency of general finding

When the jury returns a general verdict, the basis for its decision is usually not stated explicitly; the jury simply announces a decision for one side or the other.

Cases that cite this headnote

[3] **Trial**
Special verdict
Trial
Evidentiary and ultimate facts and conclusions of law in general

With a special verdict, the jury's sole function is to determine the facts; the jury needs no instruction on the law because the court applies the law to the facts as found by the jury. Civil Rule 49(a).

Cases that cite this headnote

[4] **Appeal and Error**
Necessity of timely objection

A party waives its objection to any alleged inconsistency in a general verdict, with or without interrogatories, if it fails to object before the jury's discharge. Civil Rule 49(b).

Cases that cite this headnote

[5] **Appeal and Error**
Necessity of timely objection

Jury verdict in medical-malpractice action, that health care providers' negligent failure to detect a cyst behind patient's was a proximate cause of patient's injuries but that patient's contributory negligence in failing to follow up on an MRI report on which the cyst appeared was not, was either a standard general verdict or a general verdict with interrogatories, as opposed to a "special verdict" involving only the determination of factual questions, such that providers waived alleged inconsistency of verdict by failing to raise the issue before jury was discharged. Civil Rule 49.

Cases that cite this headnote

[6] **Trial**
Evidentiary and ultimate facts and conclusions of law in general

Special verdicts do not require the jury to determine ultimate liability, or indeed reach any legal conclusions whatsoever. Civil Rule 49(a).

Cases that cite this headnote

[7] **Evidence**
Medical testimony

Patient was not required, in offering expert opinions in medical-malpractice action that there was a causal link between a cyst in her left eye that defendant health providers failed to discover and patient's subsequent diagnosis of gastroparesis, to show that such a causal relationship was generally accepted in the medical science community, but, rather, was required to show that the methodology employed by her experts, i.e., reliance on relevant medical literature and on case studies appearing in that literature, was a generally accepted method for forming an opinion regarding medical causation.

Cases that cite this headnote

[8] **Evidence**
Determination of question of competency

In general, the trial court has broad discretion to admit or exclude expert testimony.

Cases that cite this headnote

[9] **Evidence**
Matters involving scientific or other special knowledge in general
Evidence
Necessity of qualification

Before permitting expert testimony, the trial court must determine that the proffered testimony meets three threshold requirements: (1) the subject matter must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman; (2) the witness must have sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth; and (3) expert testimony is inadmissible if the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert.

Cases that cite this headnote

[10] **Evidence**
Necessity and sufficiency

Requirement for admissibility of expert testimony, that the state of the pertinent art or scientific knowledge permit a reasonable opinion to be asserted by an expert, focuses not on the acceptance of a particular conclusion derived from the methodology, but rather on the acceptance of the methodology itself.

1 Cases that cite this headnote

[11] **Trial**
Appeals to Sympathy or Prejudice

There was no impropriety in comments by patient's counsel, during closing argument in medical malpractice action involving a failure to discover a cyst behind patient's eye, that jury system existed to protect the community, that jury would decide what standards doctors must meet in the community when they provided care and treatment, and that such standards existed to protect patient safety and health and to provide a medical care system that above all prevented avoidable harm; counsel did not urge jury to penalize defendants based on irrelevant considerations or to return a verdict that would "send a message."

Cases that cite this headnote

[12] **Appeal and Error**
Arguments and Conduct of Counsel

The Court of Appeals will reverse on the basis of improper comments by counsel only when it is likely that the comments left the jurors with wrong or erroneous impressions, which were likely to mislead, improperly influence, or prejudice them to the disadvantage of the defendant.

Cases that cite this headnote

[13] **Appeal and Error**
Inferences from facts proved

Court of Appeals affords broad deference to the trial court's conclusions on whether allegedly improper comments by counsel were prejudicial, and will sustain trial court's ruling so long as it is rational.

Cases that cite this headnote

[14] **Health**
Amount
New Trial
Remission or Reduction of Excess of Recovery

Jury's award in medical-malpractice action of an additional $19,450 in future medical costs beyond the $780,550 that patient's damages expert testified would fully compensate patient for such costs was not supported by the evidence and was based on speculation, such that trial court should have granted a remittitur to accord with the evidence.

Cases that cite this headnote

[15] **Appeal and Error**
Weighing evidence as appellate function

It would not be proper for the Court of Appeals to usurp the jury's factfinding role by reweighing the evidence in a manner more to the appellants' liking.

Cases that cite this headnote

[16] **Trial**
Functions as judges of law and fact in general
Trial
Credibility of Witnesses

When the case turns on disputed factual issues and credibility determinations, the case is for the jury to decide.

Cases that cite this headnote

[17] **Damages**
Weight and Sufficiency

Plaintiffs are not required to prove their damages precisely or with mathematical certainty, but must provide some reasonable basis upon which to estimate damages.

Cases that cite this headnote

[18] **Damages**
Certainty as to amount or extent of damage

The jury may not award damages based solely on speculation.

Cases that cite this headnote

Attorneys and Law Firms

***283** James P. Gleason, Jr., with whom Joanna Jesperson, Washington, DC, was on the brief, for appellants, President and Directors of Georgetown College.

Steven A. Hamilton, with whom Karen S. Karlin and Matthew D. Banks, Bethesda, MD, were on the brief for appellant, Dr. Marilyn McPherson–Corder.

Melissa Rhea, with whom Sandra H. Robinson, Harlow R. Case, and Jack H. Olender, Washington, DC, were on the brief, for appellee.

Before WASHINGTON, Chief Judge, BLACKBURNE–RISGBY, Associate Judge, and BELSON, Senior Judge.

Opinion

BELSON, Senior Judge:

****1** This is an appeal by a hospital and a physician from a large judgment against them in a medical malpractice case. Appellee Crystal Wheeler suffered various medical complications as the result of a Rathke's cleft cyst behind her left eye, which went undetected for nearly ten years despite its appearance on a 1996 MRI report. Wheeler brought a medical-malpractice suit against the appellants, Marilyn McPherson–Corder, M.D., and the President and Directors of Georgetown College ("Georgetown"), claiming that their negligence caused the cyst to go undiscovered. Following a lengthy trial in Superior Court, a jury awarded Wheeler more than $2.5 million in damages. Dr. McPherson–Corder and Georgetown now appeal, making four arguments: (1) the jury's verdict was irreconcilably inconsistent, in that it found that the appellants' negligent failure to detect the cyst was a proximate cause of Wheeler's injuries, but also found that Wheeler's own failure to follow up on the 1996 MRI report, while negligent, was not a proximate cause; (2) the trial court erred by admitting Wheeler's proffered expert testimony, as her experts' conclusion that her cyst caused certain gastrointestinal problems has not been generally accepted in the medical scientific community; (3) Wheeler's counsel made improper and prejudicial statements during her closing argument; and (4) the jury's verdict was against the weight of the evidence.

We reject the appellants' first argument because they waived their objection to any alleged inconsistency by failing to raise the issue before the jury's dismissal. We find their second argument lacking, as it misstates our standard for the admission of expert testimony. We likewise find their third argument unpersuasive, as we see no impropriety in Wheeler's counsel's remarks. We do, however, find merit in one aspect of appellant's argument on the weight of the evidence, i.e., insofar as it relates to the jury's award of greater future medical costs than the evidence established. Because the jury awarded $19,450 ***284** more than the record supports, we remand with instructions that the trial court amend its order to reduce the award in that amount. In all other respects, we affirm.

I.

Wheeler has long suffered from a litany of health problems, including serious gastrointestinal difficulties. At several times in her youth, she was hospitalized due to

extreme nausea and vomiting. These problems persisted throughout her adolescence, and have lasted well into her adult life.

In 1996, Wheeler began attending college in southern Virginia. When she returned home to Washington, D.C., the following summer, she complained of severe headaches to her then-pediatrician, Dr. Marilyn McPherson–Corder. Accordingly, Dr. McPherson–Corder referred her to a Georgetown University Hospital pediatric neurologist, Dr. Yuval Shafrir.

Dr. Shafrir saw Wheeler twice that summer, once on July 8, and again on August 5. During the first visit, Wheeler was also experiencing leg and ear pain. Because of these other maladies, Dr. Shafrir was unable to fully diagnose her headaches. He prescribed medication for her ear pain, which he concluded was the result of an ear infection, and asked her to come back in a few weeks when her symptoms cleared. When she returned, Dr. Shafrir diagnosed her headaches as migraines. Accordingly, he instructed her on migraine management, prescribed medication, and asked her to keep a headache diary. He also noticed "a new complete blurring of [Wheeler's] right optic disk," which prompted him to give her a prescription and tell her to arrange an EKG and an MRI through her primary-care physician.

****2** The parties dispute exactly what Dr. Shafrir told Wheeler about these tests. At trial, Wheeler testified that Dr. Shafrir told her that both procedures were merely "precautionary," and that he would contact her if there were "any concerns with the MRI." Dr. Shafrir, however, testified that while he does not have any independent memory of Wheeler's visits, he "always" told patients to contact him within three days of having an MRI if they did not hear from him. He also testified that whenever he ordered an MRI he would instruct the patient to come back for a follow-up visit. He said that this system, which placed the onus on the patient to follow up on test results, had "never" failed him. He testified that it would be "impossible" for him to track down every result independently, in light of the system he used for having patients get an MRI.

After Wheeler's second visit, Dr. Shafrir wrote to Dr. McPherson–Corder, informing her that he asked Wheeler to undergo an MRI and EKG. Although he indicated that he had already received the EKG results, which came back "normal," he did not mention any MRI results. He also wrote that he would "like to see [Wheeler] again in my office during her next college vacation."

Wheeler obtained a referral for the MRI from Dr. McPherson–Corder's office. She then had the MRI performed at Georgetown Hospital on August 16. This MRI revealed a 3–5 mm supersellar cyst behind her left eye—likely a Rathke's pouch cyst. At the time, the cyst was not pressuring her pituitary gland, hypothalamus, or her optic chiasm. Neither Dr. McPherson–Corder nor Dr. Shafrir ever saw the results of this MRI during the time relevant to this proceeding.

Wheeler's gastrointestinal issues troubled her throughout college. She continued to struggle with nausea, vomiting, and low appetite. After her graduation in 2000, ***285** her symptoms only worsened. She began losing weight, required at least four gastric-emptying procedures, and on several occasions had to be hospitalized. Eventually, her condition deteriorated to the point that her doctors were forced to insert a feeding tube. In 2003, she was diagnosed with gastroparesis: a condition that makes it more difficult for the stomach to empty properly.

Wheeler's physical decline correlated with her deteriorating mental health. In 2002, she reported increasing depression and stress, which she attributed to her physical maladies. In 2003, her depression worsened, and she began to suffer from panic attacks. She was diagnosed with depressive disorder in 2004 and major depression in 2005. She was also diagnosed with a mood disorder.

Her medical problems came to a head when, in December 2005, she checked into George Washington University Hospital ("GWU") complaining of vertigo and double vision. At that time, GWU doctors ordered an MRI. Like the 1996 MRI, this new test showed a cyst-like mass behind Wheeler's left eye. The cyst had visibly grown, now measuring approximately 11 x 8.5 x 10 mm, and was causing "mass effects" on Wheeler's optic chiasm. Also at this time, GWU doctors diagnosed Wheeler with thyroid and adrenal deficiencies, as well as abnormally low levels of human growth hormone.

****3** After her discharge from GWU Hospital, Wheeler saw Dr. Walter Jean, a neurosurgeon at Georgetown University Hospital. Dr. Jean asked Wheeler to undergo another MRI. While examining the results of this MRI in March 2006, Dr. Jean discovered the 1996 MRI. Comparing the two MRIs, he noted that Wheeler's cyst had "progress[ed]" during the intervening decade, becoming "bigger." Dr. Jean then performed surgery to remove the cyst, without complication.

Wheeler brought suit against Georgetown[1] and Dr. McPherson–Corder on November 24, 2008. Over the course of a thirteen-day trial, both sides called several

competing medical experts. Through her experts, Wheeler sought to establish that the cyst caused or contributed to her hormone deficiencies, gastroparesis, and mental-health issues. Her experts testified that, had the cyst been detected and removed earlier, she would have avoided these problems. The appellants' experts vigorously disputed any such causal connection. The appellants also disputed Wheeler's claim that Drs. McPherson–Corder and Shafrir breached their respective duties of care, argued that the doctors' actions did not cause Wheeler's injuries, and contested the extent of her damages. In addition, they maintained that, because Wheeler failed to follow up on the MRI results herself, she was contributorily negligent.

The jury ultimately returned a verdict in Wheeler's favor. It found that the doctors breached their respective standards of care and that their breaches proximately caused Wheeler's injuries. It also found that Wheeler was "contributorily negligent" for not "following Dr. Shafrir's instructions to follow up with him after obtaining the MRI." However, it concluded that her negligence was not a proximate cause of her injuries. It awarded her $505,450.37 in past medical expenses, $800,000 in future medical expenses, and $1,200,000 in noneconomic damages, for a ***286** total of $2,505,450.37.[2]

Following trial, Georgetown and Dr. McPherson–Corder moved jointly for judgment notwithstanding the verdict, or in the alternative for a new trial. In support of this motion, they presented four arguments. First, they claimed that the jury could not rationally have concluded that the negligence of each of the physicians was a proximate cause of Wheeler's injuries, but that her own negligent failure to follow up with Dr. Shafrir was not. Therefore, they argued, the jury's verdict was irreconcilably inconsistent. Second, they asserted that there was no general acceptance in the medical scientific community of a causal connection between Rathke's cleft cysts and gastroparesis. Accordingly, Wheeler's expert testimony on that point had been inadmissible under *Dyas v. United States,* 376 A.2d 827 (D.C.1977), and *Frye v. United States,* 54 App.D.C. 46, 293 F. 1013 (1923). Third, they claimed that the jury's verdict was against the weight of the evidence. Fourth and finally, they argued that Wheelers' attorney improperly appealed to the jury's passions during her closing argument.

****4** The trial court denied their motion on April 27, 2012. This appeal followed.

II.

On appeal, Georgetown and Dr. McPherson–Corder reiterate the arguments they presented in their post-trial motion. We address these arguments in turn, beginning with their claim that the verdict was irreconcilably inconsistent.

(a)

Georgetown and Dr. McPherson–Corder's first argument on appeal is essentially the same one they made to the trial court: that the jury could not rationally have concluded that their negligent conduct was a proximate cause of Wheeler's injuries, but that the contributory negligence it found Wheeler had committed was not a proximate cause. The trial court rejected this argument, finding that the verdict was not irreconcilable. We now affirm, but on alternate grounds. We do not reach the question of whether the verdict was irreconcilably ***287** inconsistent. Rather, we conclude that the appellants waived their objection by failing to raise the issue before the jury's discharge.

[1] [2] In general, a civil jury will return one of three types of verdicts. In many cases, this will be a standard general verdict. A general verdict is " '[a] verdict by which the jury finds in favor of one party or the other, as opposed to resolving specific fact questions.' " *Wilbur v. Corr. Servs. Corp.,* 393 F.3d 1192, 1201 (11th Cir.2004) (quoting *Mason v. Ford Motor Co.,* 307 F.3d 1271, 1274 (11th Cir.2002)); *accord* BLACK'S LAW DICTIONARY 1696 (9th ed. 2009). The jury will also set damages, where appropriate. *See Mason, supra,* 307 F.3d at 1273. When the jury returns such a verdict, the basis for its decision is usually not stated explicitly; the jury simply announces a decision for one side or the other. *See Robinson v. Washington Internal Med. Assocs., P.C.,* 647 A.2d 1140, 1144 (D.C.1994) ("Because the jury returned a general verdict in favor of the defendants, we do not know whether the jury found that the defendants were not negligent (or that proximate causation was not proven) or that the plaintiff was contributorily negligent."); *see also Sinai v. Polinger Co.,* 498 A.2d 520, 523 n. 1 (D.C.1985).

[3] In addition, Superior Court Civil Rule 49[3] authorizes trial courts to use two alternate verdict types. First, subsection (a) permits the trial court to submit to the jury "a special verdict in the form of a special written finding upon each issue of fact." When returning such a "special verdict," the jury answers only the specific factual questions posed by the court. ***288** *Trull v. Volkswagen of Am., Inc.,* 320 F.3d 1, 4 (1st Cir.2002) (describing special verdicts under the corresponding Fed.R.Civ.P. 49(a) as

setting forth "written finding[s] upon each issue of fact"); *Portage II v. Bryant Petroleum Corp.,* 899 F.2d 1514, 1519 (6th Cir.1990) ("A special verdict is one in which the jury finds *all* the facts and then refers the case to the court for a decision on those facts." (citation omitted)). Indeed, "[w]ith a special verdict, the jury's sole function is to determine the facts; the jury needs no instruction on the law because the court applies the law to the facts as found by the jury." *Mason, supra,* 307 F.3d at 1274.

****5** Second, subsection (b) authorizes the court to "submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon [one] or more issues of fact the decision of which is necessary to a verdict." Verdicts submitted under this section are "hybrid[s]" between standard general verdicts and special verdicts. *Mason, supra,* 307 F.3d at 1274; *see also Portage II, supra,* 899 F.2d at 1520 ("The general verdict with interrogatories may be viewed as a middle ground between the special verdict and the general verdict...."). They "permit[ ] a jury to make written findings of fact and to enter a general verdict," *Lavoie v. Pacific Press & Shear Co.,* 975 F.2d 48, 53 (2d Cir.1992), and are useful when it is necessary to determine "specifically what the jury found." *Sinai, supra,* 498 A.2d at 533 (Nebeker, J., concurring).

[4] The distinction between these verdict types is crucial in this case, because a party waives its objection to any alleged inconsistency in a general verdict, with or without interrogatories, if it fails to object before the jury's discharge. *See District of Columbia Hous. Auth., v. Pinkney,* 970 A.2d 854, 868 (D.C.2009) ("DCHA did not raise an objection based on inconsistent verdicts before the jury was excused, [after returning general verdict with special interrogatory,] and it therefore has waived this argument."); *Estate of Underwood v. Nat'l Credit Union Admin.,* 665 A.2d 621, 645 (D.C.1995) (explaining that Rule 49, "particularly section (b), countenances a waiver of objections to inconsistencies in the verdict that are not pointed out before the jury is discharged").[4] That rule, however, may not apply to special verdicts. ***289** *See Mason, supra,* 307 F.3d at 1274 ("[I]f the jury rendered inconsistent general verdicts, failure to object timely waives that inconsistency as a basis for seeking retrial; inconsistent special verdicts, on the other hand, may support a motion for a new trial even if no objection was made before the jury was discharged.").[5]

In this case, the verdict form itself did not specify the type of verdict to be rendered. That form, labeled simply "Verdict," first directed the jurors to determine whether Dr. Shafrir or Dr. McPherson–Corder breached the applicable standards of care in his or her care of and treatment of Wheeler. If the jurors answered either question with a "yes," the form instructed them to determine whether the breach by either or both doctors was a proximate cause of injuries and damages to Wheeler. If the jurors answered "yes" again, the form instructed them to then determine whether Wheeler was "contributorily negligent in not following Dr. Shafrir's instructions to follow up with him after obtaining the MRI." Then, if the jurors found that she was, the form required them to determine whether Wheeler's "negligence [was] a proximate cause of her injuries and damages."[6] The form also called on the jurors to consider the appellants' assumption-of-the-risk defense. Finally, if the jurors ultimately found in Wheeler's favor, the form required them to award damages.

****6** The verdict form used in this case did not call for a general verdict of the most basic type. In the past, however, we have at times referred to similar verdicts as general. *See Nimetz v. Cappadona,* 596 A.2d 603, 606 (D.C.1991) (describing as "general" a verdict form that "require[ed] the jury to make separate findings only on ***290** negligence, proximate cause, and the award of damages for each plaintiff"). *Accord Portage II, supra,* 899 F.2d at 1518, 1522 (construing as "general" a verdict form that asked the jury whether the defendant was negligent and whether the plaintiff was contributorily negligent); *Pinkney, supra,* 970 A.2d at 868–69 (holding that appellant waived its objection to inconsistency in remarkably similar verdict by failing to raise it before jury's discharge). Nevertheless, this verdict does not comfortably fit the accepted definition of a "general" verdict, because it required the jurors to expressly resolve at least one discrete factual issue: whether Wheeler "follow[ed] Dr. Shafrir's instructions to follow up with him after obtaining the MRI." *See, e.g., Wilbur, supra,* 393 F.3d at 1201. Thus, although this verdict form was similar to others we have called "general," it was not a general verdict in its most basic form.

But it is likewise unclear that the form called for a Rule 49(b) general verdict with interrogatories. True, one portion of the form suggests such a verdict, because, as noted above, the jury answered at least one question regarding a discrete factual issue (i.e., whether Wheeler failed to follow Dr. Shafrir's instructions), while still deciding the ultimate issue of liability. *See Portage II, supra,* 899 F.2d at 1521 (holding that verdict form that asked jury several factual questions, but also required it to determine ultimate liability, called for a general verdict with interrogatories). But the trial court here did not indicate that it was exercising its authority under Rule 49(b). Rather, it used a form simply labeled "Verdict." And that form did not pose any purely factual questions.

Instead, each question required the jury to resolve both factual questions and legal issues. *But cf. Lavoie, supra,* 975 F.2d at 54 (finding verdict form was a general verdict with interrogatories despite the "unusual nature" of the form used).

[5] [6] The issues before us, however, do not require us to choose between labeling this verdict a general verdict or a Rule 49(b) general verdict with interrogatories, because we can clearly determine that it was not a special verdict—the only type of verdict to which a party might be permitted to raise an inconsistency objection after the jury's discharge. Special verdicts do not require the jury to determine ultimate liability, or indeed reach any legal conclusions whatsoever. *Mason, supra,* 307 F.3d at 1274 ("[A] Rule 49(a) special verdict is a verdict by which the jury finds the facts particularly, and then submits to the court the questions of law arising on them." (internal quotation marks omitted)). Indeed, when a trial court uses a special-verdict form, it generally will not instruct the jury on the law at all, because the jury will not be called upon to apply the law. *See Bills v. Aseltine,* 52 F.3d 596, 605 (6th Cir.1995) (holding that verdict was general where the jury instructions "discussed legal matters in detail"); *Portage II, supra,* 899 F.2d at 1521. In other words, when rendering a special verdict, the jury *only* finds specific facts. BLACK'S LAW DICTIONARY 1697 (9th ed. 2009) (defining "special verdict" as "[a] verdict in which the jury makes findings *only* on factual issues submitted to them by the judge" (emphasis added)).

****7** But here, the jury did much more. Not only did the jury determine ultimate liability, it explicitly resolved several mixed legal and factual issues along the way, including negligence, proximate cause, and assumption of the risk. *Cf. Jarvis v. Ford Motor Co.,* 283 F.3d 33, 56 (2d Cir.2002) (holding that Federal Rule 49(a), governing special verdicts, does not apply when "the jury is required to make determinations not only of issues of fact but of ***291** ultimate liability"). Recognizing that the jury would be applying law to facts, the trial court thoroughly instructed it on the applicable legal principles. *Cf. Portage II, supra,* 899 F.2d at 1521 ("If the written questions submitted to the jury were truly special verdicts, no instruction on the law, and certainly not one as detailed would have been given to the jury."). With these facts in mind, we can comfortably conclude that, whatever type of verdict this was, it was not a special verdict.

Accordingly, because the verdict was not special, it was either a standard general verdict or a Rule 49(b) general verdict with interrogatories. To preserve an objection to an alleged inconsistency in either of these types, a party must raise the argument before the jury is discharged. Here, appellants failed to do so. Accordingly, they waived their objection to any inconsistency in the verdict. *See, e.g., Underwood, supra,* 665 A.2d at 645; *Pinkney, supra,* 970 A.2d at 868.

III.

[7] The appellants next argue that the trial court erred by permitting Wheeler's expert witnesses to testify that there was a causal link between her Rathke's cleft cyst and her gastroparesis. They assert that Wheeler failed to demonstrate that such a causal relationship is generally accepted in the medical scientific community.

[8] [9] In general, "[t]he trial court has broad discretion to admit or exclude expert testimony." *Russell v. United States,* 17 A.3d 581, 585 (D.C.2011). But this discretion is not unlimited. Before permitting expert testimony, the trial court must determine that the proffered testimony meets three threshold requirements:

> (1) the subject matter must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman; (2) the witness must have sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth; and (3) expert testimony is inadmissible if the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert.

Id. at 586 (quoting *Dyas v. United States,* 376 A.2d 827, 832 (D.C.1977)) (original emphasis omitted) (internal quotation marks omitted). Here, appellants acknowledge that Wheeler's experts satisfied the first two requirements. They argue only that the experts' testimony failed to meet the third requirement: that the "state of the pertinent art or scientific knowledge" permits the expert to state "a reasonable opinion." Specifically, they claim that "Wheeler's experts were required to demonstrate that the medical community recognizes and supports their conclusion that there is a causal link between a Rathke's cleft cyst and gastroparesis or hormonal insufficiency and gastroparesis."

8 [10] This argument misstates our admissibility standard. The third *Dyas* requirement focuses not on " 'the acceptance of a particular ... conclusion derived from [the] methodology,' " but rather on "the acceptance of the methodology itself." *Minor v. United States,* 57 A.3d 406, 420–21 (D.C.2012) (quoting *United States v. Jenkins,* 887 A.2d 1013, 1022 (D.C.2005)). In other words, "satisfaction of the third *Dyas* criterion begins—and ends—with a determination of whether there is general acceptance of a particular scientific methodology, not an acceptance, beyond that, of particular study results based on that methodology." *Burgess v. United States,* 953 A.2d 1055, 1063 n. 12 (D.C.2008) (quoting ***292 *Ibn–Tamas v. United States,* 407 A.2d 626, 638 (D.C.1979)).

Here, the appellants challenge Wheeler's experts' "conclusion[s]," not their methodology. This challenge fails, because it "focuse[s] on the wrong question." *Minor, supra,* 57 A.3d at 420. At trial, Wheeler's experts testified that they based their conclusions on case studies and medical literature, which listed endocrine conditions like hypothyroidism as a cause of gastroparesis.[7] The appellants contested these conclusions during trial, and do so again on appeal. But they have offered no argument that reliance on relevant medical literature, which according to at least one expert dates back to the 1970s, as well as case studies appearing in that literature, is not a "generally accepted" method for forming an opinion regarding medical causation. Accordingly, we find the appellants' challenge unpersuasive.[8]

IV.

[11] [12] [13] Next, the appellants argue that the trial court should have ordered a new trial based on certain comments Wheeler's counsel made during closing arguments. Specifically, they point to counsel's statements regarding the applicable standard of care, which they characterize as an improper send-a-message argument:

> You know, the jury system in our country exists to protect the community. And in this medical malpractice case, you will decide what standards doctors must meet in the community when they provide care and treatment to patients. You will decide what standards doctors must meet to protect patient health and safety.... Remember, the standards ... in the medical community exist for a reason. They have been developed by doctors for doctors. They exist to promote patient safety. They exist to protect patient health. They're to provide a medical care system that above all prevents harm that's avoidable. And what these standards are in this community is what you will be deciding when you go back to the jury room.

This court will reverse on the basis of improper comments by counsel only when it is likely that the comments left " 'the jurors with wrong or erroneous impressions, which were likely to mislead, improperly influence, or prejudice them to the disadvantage of the [defendant].' " *Psychiatric Inst. of Wash. v. Allen,* 509 A.2d 619, 629 (D.C.1986) (quoting *Simpson v. Stein,* 52 App.D.C. 137, 139, 284 F. 731, 733 (1922)). Because it has the advantage of observing the arguments as they occurred, the trial court is in a better position than this court to determine whether counsel's statements were prejudicial. *Scott v. Crestar Fin. Corp.,* 928 A.2d 680, 690 (D.C.2007). Accordingly, we afford the trial court's conclusions on that count broad deference, and will sustain its ruling so long as it is "rational." *Id.*

9 Here, the trial court concluded that counsel's statements "related to the determination the jury was being asked to make regarding the standard of care," and found "no impropriety in the closing argument." ***293 Based on our own reading of counsel's comments, we conclude that the trial court's conclusion was "rational." *Id.* Counsel merely explained the jury's role in determining the applicable standard of care. She did not urge the jury to penalize the appellants based on irrelevant considerations or to return a verdict that would "send a message." Accordingly, we will defer to the trial court's judgment.

V.

[14] [15] [16] Finally, the appellants argue that the verdict was against the weight of the evidence. Although their argument is multi-faceted,[9] we focus in particular on their claim that the evidence did not support the jury's award of $800,000 in future medical costs. Specifically, the appellants argue that the jury awarded $19,450 more than Wheeler's damages expert testified was necessary, and that this additional award was based on pure speculation. We agree.

[17] [18] In general, we do not require plaintiffs to prove their damages " 'precisely' " or " 'with mathematical certainty.' " *District of Columbia v. Howell,* 607 A.2d 501, 506 (D.C.1992) (quoting *Garcia v. Llerena,* 599 A.2d 1138, 1142 (D.C.1991)). Nevertheless, plaintiffs must provide " 'some reasonable basis upon which to estimate damages.' " *Id.* The jury may not award damages based solely on speculation. *Zoerb v. Barton Protective Servs.,* 851 A.2d 465, 470 (D.C.2004). Specifically in the context of future-medical-expenses awards, we have held that where there is "no basis upon which the jury could have reasonably calculated or inferred the cost of [the plaintiff's] future medical expenses," the trial court may not "allow the jury to speculate in this area of damages." *Romer v. District of Columbia,* 449 A.2d 1097, 1100 (D.C.1982).

Here, Wheeler's damages expert, economist Dr. Richard Lurito, testified that a lump-sum payment of $780,550 would fully compensate Wheeler for her future medical costs. He reached this figure by looking at historical trends, projected treatment costs, and estimated inflation in the general economy. He testified that he used a 3.75% after-tax discount rate, which he described as "reasonable and conservative." He adopted this rate based on current market conditions, accounting for current returns on short-and long-term government bonds, and adjusting for relatively low present interest rates. Then, during closing arguments, Wheeler's counsel urged the jury to award Wheeler $780,550—the full amount Dr. Lurito recommended. But the jury was ultimately more generous, rounding Dr. Lurito's figure up and awarding Wheeler $800,000 for future medical expenses—a sum $19,450 in excess of the amount Dr. Lurito indicated was necessary.

Wheeler points us to no record evidence upon which the jury could have reasonably awarded this additional $19,450, nor can we discern any. Wheeler argues that the jury could have inferred that a larger sum would be necessary based on Dr. Lurito's ***294** description of his estimate as "conservative." But there was no basis in the evidence for the jury to make such an inference. Although Dr. Lurito described in detail the factors he considered in his calculations, he did not testify what a more pessimistic forecast would have entailed, nor did he indicate how much additional money would be necessary under less-favorable circumstances. Accordingly, the jury could only speculate that Wheeler might require an extra $19,450 to cover her medical costs. *Cf. Zoerb, supra,* 851 A.2d at 471 ("[E]ven if we were to conclude—which we do not—that generalizations such as 'the sooner the better,' without evidence as to how much sooner was how much better, were sufficient to preclude the direction of a verdict as to liability, the jury would face an impossible task in attempting to make a rational award of damages.").

****10** The jury is not permitted to award damages based on such speculation. *See Romer, supra,* 449 A.2d at 1100. Because the award of an additional $19,450 was not supported by the evidence, the trial court should have granted a remittitur in that amount. *See Duff v. Werner Enters., Inc.,* 489 F.3d 727, 730–31 (5th Cir.2007) (ordering trial court to grant remittitur where future-medical-costs award exceeded "the 'maximum amount calculable from the evidence' " (quoting *Carlton v. H.C. Price Co.,* 640 F.2d 573, 578 (5th Cir.1981))). Accordingly, we remand with instructions for the trial court to amend its order, reducing the future-medical-expenses award by $19,450 to accord with the evidence.

So ordered.

All Citations

75 A.3d 280, 2013 WL 5271567

Footnotes

1 Wheeler's claim against Georgetown was based on its *respondeat superior* liability for Dr. Shafrir's alleged negligence.

2 The verdict form's first three questions, and the jury's answers to them, read:

VERDICT FORM

1(a). Did Yuval Shafrir, M.D., as agent and employee of Georgetown University Hospital, breach the standard of care in his care and treatment of Crystal Wheeler? Yes *x;* No____.

1(b). Did Marilyn McPherson–Corder, M.D. breach the standard of care in her care and treatment of Crystal Wheeler? Yes *x;* No____.

If you answered "NO" to *BOTH* Questions # 1(a) and # 1(b), *STOP ANSWERING QUESTIONS HERE.* THE FOREPERSON SHOULD SIGN AND DATE THIS FORM, AND NOTIFY THE JUDGE.

If you answered "YES" to Question # 1(a), please answer Question # 2(a).
If you answered "YES" to Question # 1(b), please answer Question # 2(b).
2(a). Was the breach of the standard of care by Yuval Shafrir, M.D., as agent and employee of defendant Georgetown University Hospital, a proximate cause of injuries and damages to Crystal Wheeler? Yes *x;* No____.
2(b). Was the breach of the standard of care by Marilyn McPherson–Corder, M.D. a proximate cause of injuries and damages to Crystal Wheeler? Yes *x;* No____.
If you answered "NO" to Questions # 2(a) and # 2(b), *STOP ANSWERING QUESTIONS HERE.* THE FOREPERSON SHOULD SIGN AND DATE THIS FORM, AND NOTIFY THE JUDGE.
If you answered "YES" to Question # 2(a) or # 2(b), please proceed to Question # 3.
3(a). Was Crystal Wheeler contributorily negligent in not following Dr. Shafrir's instructions to follow up with him after obtaining the MRI? Yes *x;* No____.
* * * *
3(b). Was Crystal Wheeler's negligence a proximate cause of her injuries and damages? Yes____; No *x.*

3 In full, the rule states:

> **(a) Special Verdicts.** The Court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the Court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The Court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the Court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the Court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.
>
> **(b) General Verdict Accompanied by Answer to Interrogatories.** The Court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon 1 or more issues of fact the decision of which is necessary to a verdict. The Court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but 1 or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the Court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and 1 or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the Court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

Super. Ct. Civ. R. 49.

4 Federal courts widely follow the same practice under Federal Rule 49. *See, e.g., Heil Co. v. Evanston Ins. Co.,* 690 F.3d 722, 727 (6th Cir.2012) ("[A] party waives its objection to an inconsistent verdict under Civil Rule 49, when it does not object before the court discharges the jury." (citing *Radvansky v. City of Olmsted Falls,* 496 F.3d 609, 618–19 (6th Cir.2007))); *Walter Int'l Prods., Inc. v. Salinas,* 650 F.3d 1402, 1419 (11th Cir.2011) ("We have held that if the party challenging this type of verdict has failed to object before the jury is discharged, that party has waived the right to contest the verdicts on the basis of alleged inconsistency." (quotation marks omitted)); *Chem–Trend, Inc. v. Newport Indus., Inc.,* 279 F.3d 625, 629 (8th Cir.2002) (holding that the appellant "waived ... [its] challenge by failing to object before the district court discharged the jury"); *Babcock v. Gen. Motors Corp.,* 299 F.3d 60, 63 (1st Cir.2002) ("We have held that under Rule 49(b), objections to the inconsistency of verdicts must be made after the verdict is read and before the jury is discharged." (citing cases)); *Austin v. Paramount Parks, Inc.,* 195 F.3d 715, 726 (4th Cir.1999) ("[A] litigant's failure to raise an inconsistency before the jury is discharged renders Rule 49(b) inapplicable and thus precludes that litigant from relying upon the inconsistency to challenge an adverse disposition."); *Bonin v. Tour West, Inc.,* 896 F.2d 1260, 1263 (10th Cir.1990) ("If a party fails to object before the jury is discharged, he waives any future challenge to the inconsistency because his failure to make a timely objection deprives the court of the option of sending the jury back for further deliberations."). *Cf. Hundley v. District of Columbia,* 377 U.S.App.D.C. 451, 494 F.3d 1097, 1103 (2007) (holding that the plaintiff did not waive its inconsistency objection because it "repeatedly objected at trial to the proposed written interrogatory").

5 In *Mason,* the Eleventh Circuit noted an apparent "conflict" among the federal courts as to whether a party also waives its objection to inconsistent special verdicts by not raising the objection before the jury is discharged. *Supra,* 307 F.3d at 1274 n. 4. *Compare Fugitt v. Jones,* 549 F.2d 1001, 1005 (5th Cir.1977) (considering inconsistent-verdict argument despite party's failure to

object before the jury's discharge), *with Jacobs v. City of Philadelphia,* 212 Fed.Appx. 68, 71 (3d Cir.2006) (holding that appellant waived objection to inconsistent special verdict "because he raised no such objection before the jury was excused"), *and Lavoie, supra,* 975 F.2d at 54 (holding that party waived its objection to inconsistent special verdict by not raising it, even though it had "ample opportunity ... and the course of the trial proceedings put it on notice that an inconsistency might arise"), *and Golub v. J.W. Gant & Assocs.,* 863 F.2d 1516, 1521 (11th Cir.1989) ("Objections to the *form* of interrogatories in a special verdict must be raised before the jury is charged. Otherwise, they are waived." (emphasis added) (internal citations omitted)). But like the *Mason* court, we need not address that conflict, because we find *infra* that the verdict in this case was not a special verdict.

6 The appellants do not argue that the verdict form was facially inconsistent because it allowed the jury to reach different conclusions as to Wheeler's "contributory negligence," a concept which ordinarily encompasses negligence and proximate cause. Indeed, it is not clear they could do so, given that appellants' counsel took primary responsibility for drafting the verdict form. *See Preacher v. United States,* 934 A.2d 363, 368 (D.C.2007) ("Generally, the invited error doctrine precludes a party from asserting as error on appeal a course that he or she has induced the trial court to take.").

Appellants could have avoided any potential confusion on this point by simply phrasing the verdict form to ask only whether Wheeler had been negligent by failing to follow Dr. Shafrir's instructions (as opposed to *contributorily* negligent), and whether her negligence was a proximate cause of her injuries. Such phrasing would have tracked the language of the applicable Standardized Instructions. *See* Standardized Civil Jury Instructions for the District of Columbia, No. 5–15 (2013 rev. ed.) ("The defendant alleges that the plaintiff was negligent. The defendant is not liable for the plaintiff's injuries if the plaintiff's own negligence is a proximate cause of [his] [her] injuries.").

7 Specifically, Dr. Stuart Finkel testified that, based on his knowledge, education, experience, and familiarity with the medical literature on gastroparesis, roughly 20 percent of cases like Wheeler's are cause by endocrine disorders, such as hypothyroidism. Dr. Michael Cooperman testified that he based his own conclusions on two case studies, which he considered similar to Wheeler's case.

8 Even if it were appropriate for the appellants to challenge the general acceptance of Wheeler's experts' conclusions, the appellants would have difficulty doing so, given that their own experts admitted that hypothyroidism is a known cause of gastroparesis.

9 The appellants also make a broader weight-of-the-evidence argument, contending that the jury could not rationally have credited Wheeler's experts over their own. We do not think it necessary to restate the particulars of that argument here. We note only that it would not be proper for this court to usurp the jury's factfinding role by reweighing the evidence in a manner more to the appellants' liking. "When the case turns on disputed factual issues and credibility determinations, the case is for the jury to decide." *Durphy v. Kaiser Found. Health Plan of Mid–Atlantic States, Inc.,* 698 A.2d 459, 465 (D.C.1997); *see also Burke v. Scaggs,* 867 A.2d 213, 217 (D.C.2005) (holding that judgment as a matter of law is permissible "only if it is clear that the plaintiff has not established a *prima facie* case" (quoting *Haynesworth v. D.H. Stevens Co.,* 645 A.2d 1095, 1097 (D.C.1994))).

Professor Roberts-Williams' cross-appeal.

Accordingly, for the foregoing reasons, we affirm the judgment of the trial court.

So ordered.

Tab 8

103 A.3d 516
District of Columbia Court of Appeals.

DISTRICT OF COLUMBIA, et al., Appellants,
v.
Remi BAMIDELE, et al., Appellees.

Nos. 12–CV–28, 12–CV–33.
|
Argued April 2, 2013.
|
Decided Nov. 13, 2014.

Synopsis

Background: Restaurant patron and his wife brought action against off-duty police officers and their employer after officers allegedly assaulted and battered them. Following a jury trial, the Superior Court, Erik P. Christian, J., entered judgment in favor of patrons. Officers and employer appealed.

Holdings: The Court of Appeals, Fisher, J., held that:

[1] compensatory damage awards to patron and his wife of $60,000 and $10,000, respectively, were not excessive;

[2] officers' conduct in assaulting patron was sufficiently aggravated to support an inference that they intended to injure patron, as required to support award of punitive damages;

[3] officers' assaultive conduct against patron was not within the scope of their employment; and

[4] jury's findings that officers acted within the scope of their employment were not legally sufficient to make employer vicariously liable for punitive damages.

Affirmed in part, reversed in part, and remanded with instructions.

Reid, Senior Judge, concurred in part and dissented in part and filed opinion.

Attorneys and Law Firms

***518** James C. McKay, Jr., Senior Assistant Attorney General, with whom Irvin B. Nathan, Attorney General for the District of Columbia, Todd S. Kim, Solicitor General, and Donna M. Murasky, Deputy Solicitor General, were on the brief, for appellant District of Columbia.

James E. McCollum, Jr., College Park, MD, for appellants Michael Callahan, Hosam Nasr, and Kathleen Wiedefeld.

Gregory L. Lattimer, Washington, DC, for appellees.

Before FISHER and McLEESE, Associate Judges, and REID, Senior Judge.

Opinion

FISHER, Associate Judge:

This case concerns a lawsuit based on the tortious conduct of "off duty" police officers at a restaurant. The officers assaulted a patron, and they engaged in other harmful actions. Following trial in the Superior Court, a jury awarded appellees Remi and Veronda Bamidele a total of $203,000 in compensatory and punitive damages against multiple defendants, including appellants Michael Callahan, Hosam Nasr, and Kathleen Wiedefeld, Metropolitan Police Department ("MPD") officers. The jury also found that Officers Callahan, Nasr, and Wiedefeld acted within the scope of their employment with the District of Columbia.

The individual officers filed a timely appeal. They argue that (a) the evidence did not support the jury's award of punitive damages against them, and (b) the award of compensatory damages was excessive as a matter of law. The District also noticed an appeal, and now contends that (a) the Bamideles failed to give it adequate notice of their claims in accordance with D.C.Code § 12–309 (2001), (b) the evidence failed to show that the officers acted within the scope of their employment, and (c) it cannot be held liable for punitive damages.

We conclude that the trial court did not abuse its discretion by declining to reduce the compensatory damages award. Moreover, there was sufficient evidence to demonstrate that Officers Callahan, Nasr, and

Wiedefeld acted with malice and willful disregard of the safety and rights of others, thus justifying the jury's decision to award punitive damages against them. We note, however, that the trial court's order of judgment does not set forth the ***519** amount of punitive and compensatory damages that the jury awarded against each individual defendant. We agree with the District that, on the evidence presented, it cannot be held liable for compensatory or punitive damages.

Accordingly, we reverse the judgment against the District of Columbia. We affirm the judgments against the individual officers, but remand with instructions to amend and reenter the judgment order to fully reflect the jury's verdicts against them.

I. FACTUAL SUMMARY

The police officers disputed much of the factual summary which follows, but we are obliged to view the record in the light most favorable to Mr. and Mrs. Bamidele. *See, e.g., Giordano v. Sherwood,* 968 A.2d 494, 497 (D.C.2009); *Croley v. Republican Nat'l Comm.*, 759 A.2d 682, 690 (D.C.2000). Viewed in that light, the testimony and other evidence presented at trial revealed that on the evening and early morning hours of February 2–3, 2007, Officers Callahan, Nasr, and Wiedefeld, off-duty and not in uniform, went to Clyde's Restaurant for drinks. When Clyde's closed, the officers moved to the Szechuan Gallery restaurant, where they were able to obtain more alcohol after lawful serving hours ended. The Bamideles were already in the restaurant when the officers arrived. Officers Callahan and Nasr were carrying their service weapons, despite an MPD policy prohibiting the consumption of alcohol while carrying a weapon.

At some point after the officers arrived, a confrontation arose between them and a group of unidentified men. How this confrontation began was a matter of dispute at trial. According to the Bamideles, Officer Wiedefeld appeared to be flirting with the unidentified men, which evidently angered Officers Nasr and Callahan. The officers and the unidentified men began throwing food and other items between their tables. During this exchange, Officer Callahan threw a plate, which shattered against the wall behind Mrs. Bamidele's head, having almost struck her.

But according to the officers, the dispute began when one of the unidentified men sexually assaulted Officer Wiedefeld. They testified that, as she was walking from the bathroom to her table, one of the men grabbed her "rear." After she returned to the officers' table and told Officers Nasr and Callahan what had happened, the unidentified men began throwing food. Then, when a piece of broccoli struck Officer Callahan, he "lost his cool" and he approached the men, identifying himself and Officers Wiedefeld and Nasr as police officers. This precipitated a "shoving match" between Officer Callahan and one of the men, which quickly devolved into "wrestling." Officer Callahan and the man grappled with each other, knocking into and turning over tables in the crowded restaurant.

Observing the encounter, the Bamideles decided to leave the restaurant. As they made their way out, Mr. Bamidele stopped to complain to Officer Callahan about the plate that almost struck Mrs. Bamidele. Officer Callahan readily apologized. But, as Mr. Bamidele and Officer Callahan were speaking, someone[1] sitting at the ***520** officers' table stood up and punched Mr. Bamidele in the face.

According to the Bamideles, the officers then viciously assaulted Mr. Bamidele. Officer Nasr stood up from the table, called Mr. Bamidele an "[a]scidia moota"[2] and began beating him. When Mrs. Bamidele tried to intervene, the officers knocked her to the floor. They continued to batter Mr. Bamidele, knocking him to the floor and stomping on him. As Mr. Bamidele climbed back to his feet, the officers shoved him against a wall; Officer Wiedefeld "pinned down" Mr. Bamidele and the other officers continued to beat him. Mrs. Bamidele begged the officers to stop, crying out, "Don't do this. Don't do this. Stop it." Unable to interrupt the assault, she fled to the restaurant entrance, where she called out for help.

Officer Phillip Henderson responded to reports of an altercation within the restaurant. When he entered, he noticed that the restaurant was in disarray: tables had been overturned, food and plates littered the floor, and a "plate was stuck in the wall of the restaurant." He also saw an ongoing "physical dispute" or "assault." Officers Callahan and Wiedefeld were holding Mr. Bamidele against a wall. After Officer Henderson was unable to draw their attention by slapping his baton against a wooden banister, he physically intervened and pulled the

officers off Mr. Bamidele. Officer Henderson described Officer Callahan as "loud," "bouncy," "upset," and "uncontrollable" while he was being interviewed by Captain Brown, who had arrived at the scene. Sergeant Harpe, another officer who had responded, eventually arrested Officer Callahan for assault, a charge that was later dismissed.

Roughly one year after the assault, the Bamideles brought suit against the District of Columbia, alleging, among other things, assault and battery. They later amended their complaint to add the three officers and the Szechuan Gallery Restaurant as defendants. The lawsuit proceeded to trial, after which the jury returned a verdict in the Bamideles' favor. In total, the jury awarded them $203,000 in damages, including $70,000 in compensatory damages and $110,000 in punitive damages against the individual officers.[3] The jury also found that the officers acted in the scope of their employment.

Following trial, the District moved for judgment notwithstanding the verdict, or in the alternative for a new trial. It contended that the evidence failed to show that the individual officers acted in the scope of their employment. It also requested a remittitur, arguing that the compensatory damages were excessive. Finally, the District asserted that the award of punitive damages was improper as a matter of public policy, and that the officers did not act with malicious intent.

*521 The Superior Court denied the District's motion. Concluding that there was evidence to show the officers had been acting in the scope of their employment, the court cited "testimonial evidence in the trial record: that the officers intended—at least in part—to take official police action in response to an assault against one of them." As to the District's request for a remittitur, the court held that "[t]he compensatory damage verdict ... is well inside the 'maximum limit of a reasonable range' for a jury to award[,]" given "the harm suffered by [the Bamideles], including physical beating, humiliation, and emotional distress." The trial court rejected the District's arguments as to punitive damages, finding, among other things, that "the award here will tend to discourage the conduct demonstrated by the officers in this case, which will undoubtedly redound to the public benefit."

II. The Officers' Liability

The individual officers claim that the awards of compensatory damages are excessive and that the trial court should have granted a remittitur. They also maintain that there is no basis for the punitive damages awards, because the Bamideles offered no evidence to show that the officers acted with malice. We disagree.

A. Compensatory Damages

[1] [2] [3] Under our case law, if the trial court determines that a particular damages award is "beyond all reason, or ... is so great as to shock the conscience," it may require the plaintiff to accept a reduced award or face a new trial. *Scott v. Crestar Fin. Corp.*, 928 A.2d 680, 688 (D.C.2007) (quoting *Wingfield v. Peoples Drug Store,* 379 A.2d 685, 687 (D.C.1977)). In determining whether such a reduction is appropriate, the trial court should consider not only the size of the award, but also whether the decision of the jury was based on "passion, prejudice, mistake, or [the] consideration of improper factors...." *Scott,* 928 A.2d at 688. We "will not reverse the trial court's denial of a motion for ... remittitur unless the trial court has abused its discretion." *Daka, Inc. v. Breiner,* 711 A.2d 86, 100 (D.C.1998).

[4] Here, the trial court reasonably concluded that the jury's award was not so incongruous with the Bamideles' actual injuries as to "shock the conscience." Like the trial court, we are persuaded that the Bamideles presented evidence from which the jury could reasonably conclude that they suffered significant physical injuries, pain, and emotional distress. In particular, Mr. Bamidele testified that, in addition to sustaining a deep gash to his left shin and bruising about his body, he experienced backaches as well as "unbearable" headaches as a result of the officers banging his head "on the back of the wall." Moreover, he continued to suffer from headaches, backaches, and persistent neck stiffness more than three years after the attack. As a result of the attack, he still experiences "a lot of fear." Specifically, he "fear[s] the police now—the D.C. police. I don't come to D.C. at night any longer." He dwelled on the assault each time he came into the District, and the attack impacted his mental well-being to the point that it affected his relationship with his children. Mrs. Bamidele also described her physical injuries to the jury:

she suffered a scratch to her leg during the scuffle. [4] There was also evidence to suggest that Mrs. Bamidele suffered significant emotional distress traceable to the officers' *522 violent assault of her husband as she begged them to stop.

In sum, we are satisfied that there was sufficient evidence presented at trial to justify the jury's compensatory awards. And, on this record, we cannot say that the trial court abused its discretion by concluding that the jury's compensatory damages award was not "beyond all reason, or ... so great as to shock the conscience." *United Mine Workers of Am., Int'l Union v. Moore,* 717 A.2d 332, 341 (D.C.1998) (quoting *Wingfield,* 379 A.2d at 687).

B. Punitive Damages

Officers Callahan, Nasr, and Wiedefeld also argue that there was no basis for awarding punitive damages, because the Bamideles failed to present clear-and-convincing evidence that the officers acted with malice. In particular, they claim that, while there may have been sufficient evidence to establish the assault itself, assaultive conduct standing alone does not demonstrate malice.

[5] **[6]** **[7]** To recover punitive damages, the plaintiff must prove more than mere tortious conduct; plaintiff must also prove by clear-and-convincing evidence that the defendant's tortious acts were "accompanied by conduct and a state of mind evincing malice or its equivalent." *District of Columbia v. Jackson,* 810 A.2d 388, 396 (D.C.2002) (quoting *Jonathan Woodner Co. v. Breeden,* 665 A.2d 929, 938 (D.C.1995)). To establish "malice or its equivalent," the plaintiff must prove two things: (1) "the defendant acted with evil motive, actual malice, deliberate violence or oppression, or with intent to injure, or in willful disregard for the rights of the plaintiff"; and (2) "the defendant's conduct itself was outrageous, grossly fraudulent, or reckless toward the safety of the plaintiff." *District of Columbia v. Jackson,* 810 A.2d at 396 (quoting *Croley,* 759 A.2d at 695). In determining whether the plaintiffs carried this burden at trial, we view the evidence in the light most favorable to their cause, asking only "whether there was evidence from which a jury reasonably could find the required malicious intent or willful disregard of another's rights." *Tolson v. District of Columbia,* 860 A.2d 336, 345 (D.C.2004) (quoting *King v. Kirlin Enters.,* 626 A.2d 882, 884 (D.C.1993)).

[8] While "[p]unitive damages are not allowable in every case of assault and battery," they are permissible "where there is evidence of actual malice, wanton conduct, deliberate violence, or intent to injure." *King,* 626 A.2d at 884 (quoting *Wanis v. Zwennes,* 364 A.2d 1193, 1195 (D.C.1976)). In distinguishing between assaultive conduct that will justify punitive damages and that which will not, we have considered "all the facts and circumstances of the case," looking in particular to "the aggravated nature of the defendant's conduct (and, inferentially, [his or her] state of mind)...." *King,* 626 A.2d at 884.

[9] The record shows that the Bamideles sustained their burden to "prove, by a preponderance of the evidence, that [Officers Callahan, Nasr, and Wiedefeld] committed a tortious act, and by clear and convincing evidence that the act was accompanied by conduct and a state of mind evincing malice or its equivalent." *Croley,* 759 A.2d at 695. Therefore, we see no reason to disturb the trial court's post-trial ruling that "the record evidence and all inferences drawn therefrom support a finding of outrageous and reckless conduct sufficient to support the [punitive damages] award[s]" against the individual officers. The record permitted the jury to conclude that the officers' conduct was sufficiently aggravated to support an inference that they intended to injure Mr. Bamidele. The jury could have inferred this intent not merely from the sheer intensity *523 of the assault, but also from the officers' flagrant disregard for the safety of those around them.

In reaching this conclusion, we look to the contrast between our decisions in *King* and *Croley.* In *Croley,* two Republican National Committee security guards accosted the plaintiff as he was photographing a dumpster adjacent to an RNC office building. 759 A.2d at 686. When the plaintiff would not stop taking pictures, one of the guards pulled him to the ground and placed his foot on the plaintiff's chest. *Id.* at 686, 696. The plaintiff did not allege that the guards delivered other blows, engaged in any sustained assaultive conduct, or committed any acts placing him in physical danger prior to the assault. *See id.* at 686. Nor did the guards make any aggressive comments or gestures tending to reveal their malicious intent. *Id.* at 686, 696. This conduct, we held, was insufficient to justify the award of punitive damages, and we held that the trial court did not err in refusing to submit that issue to the jury. *Id.* at 696.

In *King,* by contrast, the defendant violently assaulted the plaintiff after the two men were involved in a traffic incident. 626 A.2d at 883. The defendant first angled his car into the plaintiff's lane, causing the plaintiff to pull his car to the side of the road. *Id.* As the plaintiff exited his car, the defendant rushed him, yelling racial epithets while throwing repeated punches to the plaintiff's head. *Id.* When the plaintiff warded the defendant off with a knife, the defendant briefly retreated. *Id.* But, when the plaintiff returned his weapon to his car, the defendant immediately resumed his attack. *Id.* Based on this evidence, we held that a jury could reasonably conclude that the defendant "harbored an 'evil motive' toward [the plaintiff] and engaged in 'deliberate violence' against him." *Id.* at 884.

The case at hand is more like *King* than *Croley.* As in *King,* the individual defendants in this case engaged in conduct prior to the assault which endangered the plaintiffs' safety: they threw objects across the restaurant, one of which almost struck Mrs. Bamidele. Furthermore, the assault in this case and the assault in *King* both came after essentially no provocation: Before the attack, Mr. Bamidele merely told Officer Callahan in a "quiet way" that the "next time you throw plates, be careful where it [sic] lands." *Cf. id.* at 884 ("[A] jury could find that [the defendant] initiated a second assault without any provocation."). Another factor likening this case to *King,* but distinguishing it from *Croley,* was Officer Nasr's abusive outburst. As Officer Nasr rose from the table, he called Mr. Bamidele words meaning "ass-hole" and "motherfucker." Such derogatory comments were absent in *Croley,* 759 A.2d at 696 ("[The plaintiff's] account is devoid of comments or mention of gestures by [the defendants] ...."), but were present in *King,* 626 A.2d at 883 (noting that the defendant shouted "racial epithets and obscenities"). Finally, both *King* and the case at hand involved sustained, violent attacks: Here, the three officers beat and kicked Mr. Bamidele, knocked him to the floor, stomped on him, then held him against a wall while they landed further blows. *Cf. id.* ("[The defendant] rushed from his car and began punching [the plaintiff] in the head and face....").

In contrast, *Croley* involved an assault that was much less extreme, sustained, and violent. In that case, the defendant did not batter or verbally abuse the plaintiff; he pulled the plaintiff to the ground and placed a foot on his chest. *Croley,* 759 A.2d at 686, 696. The officers' conduct in this case was much more extreme and prolonged. Indeed, Officers Callahan and Wiedefeld were so engaged in their attack ***524** that a uniformed police officer responding to the scene had to physically pull them off Mr. Bamidele. Thus, unlike the defendant's comparatively mild conduct in *Croley,* the intensity of the officers' attack here manifested an intent to injure Mr. Bamidele. *Cf. King,* 626 A.2d at 884 (holding that defendant's unprovoked assault demonstrated his intent to engage in "deliberate violence" against the plaintiff).

While the sheer violence involved in the assault on Mr. Bamidele would itself be enough to permit the jury to infer malice, the officers also displayed a reckless disregard for the safety and rights of those around them; by their own admission, the officers consumed alcohol after lawful hours, and two of them violated MPD policies against carrying a weapon while doing so. The officers were impaired to varying degrees; but Officer Callahan was so intoxicated that he could "barely even stand." Indeed, Officer Callahan's conduct reflected his impairment: He threw a plate that nearly struck Mrs. Bamidele; engaged in a "wrestling" match with an unidentified man in a crowded restaurant; and then, along with Officer Wiedefeld, refused to break off his assault on Mr. Bamidele, forcing Officer Henderson to physically pull him off Mr. Bamidele. In total, the officers' actions—consuming alcohol while armed in a crowded restaurant, then engaging in an uncontrolled brawl—evinced their "willful disregard" for the rights of those around them, *King,* 626 A.2d at 884, including the Bamideles.

In sum, we are satisfied that the evidence was sufficient to submit the Bamideles' punitive-damages claim to the jury. Moreover, we agree with the trial court that there is no basis for overturning the jury's award of punitive damages against Officers Callahan, Nasr, and Wiedefeld.

III. The District's Liability

The District contends that it is not liable for the damages awarded against the individual officers because (a) the evidence did not show that they acted within the scope of their employment and, in any event, (b) the District is not liable for punitive damages because it neither participated in nor ratified their assault. [5]

A. Compensatory Damages

[10] The District maintains that the evidence failed to establish that the officers were acting within the scope of their employment when they assaulted Mr. Bamidele. "As a general rule, whether an employee is acting within the scope of his employment is a question of fact for the jury. It becomes a question of law for the court, however, if there is not sufficient evidence from which a reasonable juror could conclude that the action was within the scope of the employment." *Brown v. Argenbright Sec.*, 782 A.2d 752, 757 (D.C.2001) (internal quotation marks omitted). We hold as a matter of law that the officers' assaultive conduct against the Bamideles was not within the scope of their employment. *See Great A & P Tea Co. v. Aveilhe,* 116 A.2d 162, 163–66 (D.C.1955) (reversing jury verdict on ground that there was insufficient evidence to permit conclusion that horseplay between two store employees that injured patron was within scope of employment).

*525 **[11]** **[12]** **[13]** To be within the scope of employment, the tortious activity "must be actuated, at least in part, by a purpose to further the master's business," and this "intent or purpose ... excludes from the scope of employment all actions committed solely for [the servant's] own purposes." *Weinberg v. Johnson,* 518 A.2d 985, 990 (D.C.1986) (internal quotation marks omitted) (alteration in original). "However, if the employee acts in part to serve his employer's interest, the employer will be held liable for the intentional torts of his employee even if prompted partially by personal motives, such as revenge." *Hechinger Co. v. Johnson,* 761 A.2d 15, 24 (D.C.2000). The tortious conduct must also be foreseeable to the employer, meaning that it is " 'a direct outgrowth of the employee's instructions or job assignments.' " *Herbin v. Hoeffel,* 886 A.2d 507, 509 (D.C.2005) (quoting *Penn Cent. Transp. Co. v. Reddick,* 398 A.2d 27, 32 (D.C.1979)).

[14] **[15]** In their trial testimony, all three officers asserted that, at least initially, they intended to take police action against the unidentified men in response to an assault on Officer Wiedefeld. This testimony may have revealed their motivation to further the District's interests as to the unidentified men, but it does not demonstrate the same intent vis-à-vis the Bamideles. "Conduct of a servant [that] is ... too little actuated by a purpose to serve the master" is not within the scope of employment. *Restatement (Second) of Agency* § 228(2) (1958). [6]

The Bamideles rely upon regulations which say that a police officer is always on duty. These same regulations were cited in *District of Columbia v. Coron,* 515 A.2d 435 (D.C.1986), where an off-duty police officer had beaten a pedestrian who (with ample justification) had kicked at his car. We did not "interpret such regulations as imposing liability on an employer for the intentional torts of its employee where the employee's conduct was motivated solely by personal reasons." *Id.* at 438. Relying in part on *Restatement* § 228(2), we overturned a jury verdict which held the District of Columbia liable based on the principles of *respondeat superior.*

We noted that the officer "was dressed in civilian clothing and driving his own automobile on a purely personal venture at the time of the incident." *Id.* at 438. On the other hand, during the beating he had asked, "who the hell do you think you are, kicking my car. I'm a policeman." *Id.* at 437. He and his companion displayed their police badges and the companion stated, "we both have guns and we know how to use them." *Id.* Nevertheless, we concluded that his "entire behavior during this incident reflected that of an individual bent on personal vengeance for a perceived personal affront." *Id.* at 438.

At least where intentional torts are concerned, it is not enough that an employee's tortious activity occurs while he is on duty, or even that those duties bear some causal relationship to the tort. For example, in *Boykin v. District of Columbia,* 484 A.2d 560 (D.C.1984), we considered "a sexual assault on a student by an employee of the District of Columbia public schools during the school day and in a school building." *Id.* at 561. The employee's duties required him to be in physical contact with the student. *Id.* at 562. Nevertheless, the sexual assault "arose out of [the employee's] assignment only in the sense that [his] walks with the student afforded him *526 the *opportunity* to pursue his personal adventure." *Id.* at 563. It "was in no degree committed to serve the school's interest, but rather appears to have been done solely for the accomplishment of [the employee's] independent, malicious, mischievous and selfish purposes." *Id.* at 562. We held that the evidence was "insufficient to make the District vicariously liable for [the employee's] act," *id.* at 563, and we upheld the trial court's decision granting summary judgment to the District of Columbia. *Id.* at 564.

In this case the officers were off-duty, they were not in uniform, and they were at the restaurant for purely personal reasons. They certainly were not acting within the scope of their employment when they were throwing food at the unidentified men who occupied a nearby table, or when Officer Callahan threw the plate that nearly struck Mrs. Bamidele. At some point they began to respond to an assault on Officer Wiedefeld, as was their duty. *See* D.C.Code § 5–115.03 (2008) (making it a misdemeanor for any officer to "neglect making any arrest for an offense ... committed in his presence"). But they did not intend to take police action against Mr. and Mrs. Bamidele, nor did the Bamideles become accidentally entangled in the officers' scuffle with the unidentified men. Rather, the assault seems to have been precipitated by Mr. Bamidele's comment to Officer Callahan, which prompted Officer Nasr to call him a pejorative name and to begin beating him. We therefore conclude, as a matter of law, that the officers were not acting within the scope of their employment and that the District of Columbia is not vicariously liable for the awards of compensatory damages.

B. Punitive Damages

[16] While we have concluded that the individual officers may be held liable for punitive damages, we reach a different conclusion as to the District. First, it appears that the Amended Complaint did not seek punitive damages against the District, and the jury was not asked to hold the District liable for punitive damages. When the court instructed on that issue, it made clear that the claim for punitive damages focused on the individual police officers. Although the verdict form differentiated between compensatory damages and punitive damages with respect to each plaintiff and each police officer, it did not ask the jury to assess any damages against the District of Columbia. Instead, the jury was asked to determine whether each individual officer "was acting within the scope of his [or her] employment with the District of Columbia in furtherance of the District of Columbia's purposes on February 3, 2007."

The District concedes that all parties anticipated that the District would be vicariously liable for the compensatory damages portion of the awards against the individual officers, given the jury's conclusion that they acted within the scope of their employment. But those findings were not legally sufficient to make the District vicariously liable for punitive damages. There was no evidence offered at trial to support a finding that the District authorized, participated in, or subsequently ratified the individual officers' tortious conduct. Without such evidence, the District could not be held liable for punitive damages. *See Snow v. Capitol Terrace, Inc.*, 602 A.2d 121, 127 (D.C.1992); *Woodard v. City Stores Co.*, 334 A.2d 189, 191 (D.C.1975); *Darrin v. Capital Transit Co.*, 90 A.2d 823, 825 (D.C.1952); *Restatement (Second) of Torts* § 909 (1979). Moreover, the jury was not instructed on these requirements, nor does its verdict reflect such findings. We therefore conclude that the District of Columbia is not liable for ***527** the awards of punitive damages. [7]

IV. Conclusion

For the foregoing reasons, we reverse the judgment against the District of Columbia. We affirm the judgments against the individual officers. But as we noted above, the trial court's judgment order does not fully reflect the jury's verdict. The order does not itemize the damages awarded against each individual officer, distinguishing between the compensatory damages and the punitive damages awarded against each individual officer. Thus, we remand the case with instructions to amend and reenter the order.

So ordered.

REID, Senior Judge, concurring in part and dissenting in part:

I fully join Part II of Judge Fisher's opinion relating to the officers' liability for compensatory and punitive damages. I also fully join Part III B of Judge Fisher's opinion concerning the District's non-liability for punitive damages. However, based on my review of the record and applicable legal principles, I am unable to agree with Part III A of Judge Fisher's opinion which rejects the jury's special verdict regarding whether the officers were acting within the scope of their employment, and instead, "conclude[s], as a matter of law, that the officers were not acting within the scope of their employment and that the District of Columbia is not vicariously liable for the award of compensatory damages." In my view, the trial court properly denied the District's motions for judgment as a matter of law with respect to the scope of employment

issue. I also would reject the District's main argument that the Bamideles did not provide proper notice of their claim under D.C.Code § 12–309. Hence I would affirm the jury finding "by a preponderance of the evidence," that Officers Callahan, Wiedefeld, and Nasr were "acting within the scope of [their] employment with the District of Columbia in furtherance of the District of Columbia's purposes on February 3, 2007."

I first address the District's motions for judgment as a matter of law as to the vicarious liability issue. In *Bean v. Gutierrez,* 980 A.2d 1090 (D.C.2009), we reiterated that,

> [j]udgment as a matter of law is appropriate only where no reasonable person viewing the evidence in the light most favorable to the prevailing party, could reach a verdict in favor of that party. (citations and internal quotation marks omitted). Moreover, when the case turns on disputed factual issues and credibility determinations, the case is for the jury to decide[;] [i]f reasonable persons might differ, the issue should be submitted to the jury. Furthermore, in reviewing a motion for [judgment as a matter of law] after a jury verdict, this court applies the same standard as the trial court.

Id. at 1093 (citing *Lively v. Flexible Packaging Ass'n,* 830 A.2d 874, 886 (D.C.2003) (en banc)).

The majority opinion recognizes that, "[a]s a general rule, whether an employee is acting 'within the scope of employment' is a question of fact for the jury; [i]t becomes a question of law for the court, however, if there is not sufficient evidence from which a reasonable juror could conclude ***528** that the action was within the scope of the employment." *Boykin v. District of Columbia,* 484 A.2d 560, 562 (D.C.1984) (citations omitted). I believe that the trial judge faithfully adhered to the applicable legal standard and principles in allowing the case to go forth to the jury and in declining to grant the District's post-verdict motion for judgment as a matter of law. The evidence in this case revealed significant differences in the factual accounts by witnesses, and hence, the factual context for determining what occurred at the Szechuan Gallery and whether the officers acted within the scope of their employment was in dispute. I believe that some of the evidence, if credited by the jury (as apparently it was) reveals that reasonable persons might differ as to whether Officers Callahan, Wiedefeld and Nasr were acting within the scope of their employment at the Szechuan, and that reasonable jurors could conclude that they were indeed acting within the scope of their employment.

The majority opinion essentially separates the factual testimony provided by witnesses into two scenarios—one relating to the assault on Officer Wiedefeld and the three unidentified men seated at a table adjacent to the table where the officers were seated, and the other scenario relating to the assault on Mr. Bamidele by the officers. In taking this approach the majority opinion acknowledges that the officers had an intent to carry out their duty as police officers by investigating the assault on Officer Wiedefeld but the opinion asserts that the officers "did not intend to take police action against Mr. and Mrs. Bamidele, nor did the Bamideles become accidentally entangled in the officers' scuffle with the unidentified men." Therefore, the opinion states, "as a matter of law, ... the officers were not acting within the scope of their employment and ... the District of Columbia is not vicariously liable for the awards of compensatory damages."

None of the witnesses provided clear times at which the events unfolded, from the throwing of the objects to the assaults on Officer Wiedefeld and Mr. Bamidele. However, viewed in the light most favorable to the Bamideles, there is testimony on which reasonable jurors could conclude that the incident involving the officers' investigation of the assault on Officer Wiedefeld and the assault on Mr. Bamidele, which his wife witnessed, actually were spliced together, and not sharply separated incidents, and that the actions by the officers against Mr. Bamidele took place in the midst of their investigation of the assault on Officer Wiedefeld.

Officer Nasr was called as a witness by counsel for the Bamideles. He testified that he was drinking at Clyde's restaurant but not at Szechuan, that he only ate at Szechuan, and that "shortly after" he "attempted to confront [the] individuals [at the adjacent table] concerning the sexual assault on Officer Wiedefeld," he "had to turn [his] attention to Mr. Bamidele who

approached in a hostile manner." Officer Nasr "was trying to calm him, let him know we were handling the situation." Officer Nasr was "approached with a secondary threat, ... Mr. Bamidele coming up with his fists balled. He [wa]s visibly angry." Mr. Bamidele indicated that "he was angry, felt like he was disrespected." Officer Nasr "tried to calm him down," saying, "listen, we're going to handle this." They were in "tight quarters" in the Szechuan and someone pushed Officer Nasr from behind toward Mr. Bamidele, whereupon Mr. Bamidele "lunge[d] to the bar and grab[bed] [a] wine glass," and [h]e swung that wine glass." At some point the glass broke and Officer Nasr felt that Mr. Bamidele had "an edged weapon," and that he (Officer Nasr) had been "trained to ***529** take action." As Officer Nasr put it, "when you have somebody pull a weapon, you have to react to that and ... I was able to get [ ]hold of Mr. Bamidele, stop him from causing any injury —further injury to anybody else—any other civilians that would have been in the restaurant until he dropped that glass." Officer Nasr asserted that he received a contusion to his forehead during the encounter with Mr. Bamidele.

Later during trial, Officer Nasr was called again and he testified on behalf of the defendant officers. Before repeating his description of Mr. Bamidele's approach, he testified that when Officer Wiedefeld returned to the officers' table from the bathroom and said she had just been grabbed, "she was pretty upset" and her face was "flush." She pointed out the men at the adjacent table. While the officers "were trying to figure out what had happened," the men at the adjacent table started to throw food in the direction of the officers. Officers Callahan, Wiedefeld, and Nasr "g[o]t up ... to ... confront [the men] [,] ... identify them and take police action." As Officer Nasr put it, "she was the victim and she was there, so we had to go identify the suspect and possibly place him under arrest." Officers Callahan and Wiedefeld were beside Officer Nasr. Upon seeing Mr. Bamidele, Officer Nasr turned to try to calm him and to "let him know this wasn't about him, that we would handle it." The men at the adjacent table were "cursing at [the officers and] yelling." Officer Nasr "notice[d] [that] Mr. Bamidele [was] visibly upset." He repeated his earlier testimony about his interaction with Mr. Bamidele.

Officer Callahan was called as a witness for the Bamideles. During cross-examination by the officers' defense counsel, he stated that while he "was talking to Officer Wiedefeld trying to figure out what happened, [he] g [o]t hit in the face with a piece of broccoli." That "shocked" him and he took the saucer from underneath his tea cup and "smashed it on the table out of frustration." "Immediately" after that he got up and approached the men at the table from which the broccoli was thrown. His intent was "to confront [the men] about the assault and to detain them." He identified himself and Officer Wiedefeld as police officers. One of the men pushed him in the chest and he in turn pushed the man and they got into "a little wrestling match." He did not see Mr. Bamidele at that time, and "maybe 20 minutes later" he saw Mr. Bamidele in the bathroom; Officer Callahan told him he was "sorry about what happened," referring to his (Officer Callahan's) altercation with the unidentified men. He never saw anyone punch Mr. Bamidele, and he did not strike Mr. Bamidele.

Mr. Bamidele testified that he and his wife sat at a table for two at the Szechuan, another table for two was next to their table, and a round table at which the officers (at that point he did not know they were officers) sat was behind him. He saw Officer Wiedefeld going back and forth between the table next to his and the round table. After the broccoli and plate were thrown near Mr. Bamidele and his wife, Mr. Bamidele asked for and paid his check, and he and his wife walked between the round table and the table next to the one at which they had been seated. Mr. Bamidele observed that Officer Callahan was drunk. Mr. Bamidele informed Officer Callahan that he almost hit his wife. Officer Callahan punched Mr. Bamidele in the face and Officer Nasr cursed and hit Mr. Bamidele. Officer Wiedefeld "used her elbow across [Mr. Bamidele's] neck [and] pressed [him] against the wall." According to Mr. Bamidele, Officer Anderson (sic) came into the Szechuan, saw what the officers were doing, and called the officers ***530** by name. Mr. Bamidele denied grabbing a wine glass. He saw Officer Callahan in the bathroom later while he (Mr. Bamidele) "was washing all the dust and ... all the scratches off [his] hands." Officer Callahan said he was sorry. Officer Phillip Henderson was on duty when a citizen informed him of an incident or dispute at the Szechuan. Upon entering the restaurant he saw Officers Callahan and Wiedefeld holding Mr. Bamidele against the wall. The restaurant "was a mess" with "tables turned over, ... plates of food on the floor," and "a plate ... stuck in the wall of the restaurant."

Reasonable jurors could make credibility determinations based on the aforementioned testimony. In addition, the

jurors could reasonably infer and conclude that Officers Callahan, Wiedefeld, and Nasr expressed an intent to take police action at the Szechuan relating to the assault against Officer Wiedefeld, and further, that at least Officer Nasr (with a reasonable inference that he was assisted by Officers Callahan and Wiedefeld) engaged in police action against Mr. Bamidele purportedly to assure him that he and the others could handle the sexual assault investigation, and to prevent injury to the officers or others at the Szechuan.

Given the cited testimony, I cannot agree with the majority opinion that Officers Callahan, Wiedefeld, and Nasr only engaged in a "purely personal venture," or were motivated "solely by personal reasons." *See District of Columbia v. Coron,* 515 A.2d 435, 438 (D.C.1986) (off duty officer who had been drinking almost hit a pedestrian twice and when the pedestrian kicked at his car, the officer and a fellow off duty officer jumped out of the car, knocked the pedestrian and repeatedly hit him in the face and stomach; as a matter of law the officers were not acting within the scope of their employment). As articulated in two of this court's early cases, by which this court is bound, to be outside the scope of employment, the employees' actions must be "entirely disconnected from the work of the master, or the actions could only be characterized as a "personal mischievous whim," or the actions were done "solely for the accomplishment of the independent ... mischievous purpose of the servant." *Great A & P Tea Co. v. Aveilhe,* 116 A.2d 162, 165–66 (D.C.1955) (jury could not reasonably infer that a "series of events consisting of two clerks conversing, laughing, and one pulling upon the other causing him to fall into a bystanding customer, could be of any benefit to their employer or in furtherance of the duties assigned to them"). Unlike the factual context in *Coron* and *Aveilhe,* reasonable jurors could infer and conclude that Officers Callahan, Wiedefeld and Nasr were not engaged in a "purely personal venture," or that their actions were not "entirely disconnected from the work of the [District]." *Id.* Rather, they were motivated "at least in part by an intent to further [MPD's] business" by investigating an alleged assault and precluding another patron of the Szechuan not only from interfering with the investigation but also from causing injury to the officers or others at the Szechuan; and hence, the injuries to the Bamideles were "the outgrowth of ... action undertaken in the employer's behalf." *Boykin, supra,* 484 A.2d at 563–64 (D.C.1984).

Because I believe that the officers acted at least in part in furtherance of MPD's business, I must reach the District's threshold and main argument that it is "entitled to judgment because plaintiffs failed to comply with the notice-of-claim requirements of D.C.Code § 12–309." The notice statute provides that "within six months after the injury or damage was sustained, the claimant, his agent or attorney" must "give[ ] notice in writing to the ***531** Mayor of the District of Columbia of the approximate time, place, cause, and circumstances of the injury or damage." D.C.Code § 12–309 (2012 Repl.); *see also Washington v. District of Columbia,* 429 A.2d 1362, 1365 (D.C.1981) (purpose of notice is to give the District an opportunity to ascertain the facts and to adjust the claim). The statute also specifies that: "A report in writing by the Metropolitan Police Department, in regular course of duty, is a sufficient notice under this section." D.C.Code § 12–309. However, police reports must contain the same information, with "the same degree of specificity," required for any other form of notice. *Pitts v. District of Columbia,* 391 A.2d 803, 808 (D.C.1978) (quoting *Jenkins v. District of Columbia,* 379 A.2d 1177, 1178 (D.C.1977)).

Nevertheless, "section 12–309 does not require 'precise exactness' with respect to the details of the police reports." *Doe by Fein v. District of Columbia,* 697 A.2d 23, 28 (D.C.1997) (internal quotation marks and citation omitted) (citing *Washington, supra,* 429 A.2d at 1365). Moreover, notice need not be in the form of a single, authoritative record; plaintiffs may piece together adequate notice using multiple documents. *See Enders v. District of Columbia,* 4 A.3d 457, 468 (D.C.2010); *Jones v. District of Columbia,* 879 F.Supp.2d 69, 78 (D.D.C.2012). Thus, a police report "provides sufficient notice of the 'cause' of an injury to satisfy the statutory requirement, if it recites facts from which it could be reasonably anticipated that a claim against the District might arise." *Pitts, supra,* 391 A.2d at 809 (citation omitted).

In essence, the notice question raised by the District requires focus on whether any of the three reports of the February 3, 2007, incident, compiled by MPD personnel, gave the District notice that it could reasonably anticipate a vicarious liability claim against the District by the Bamideles. I conclude that the February 3, 2007, police incident-based report, filed on the same day by MPD Officer Phillip Henderson, who responded to the scene, standing alone, did not provide adequate notice under

D.C.Code § 12–309, that the District might be vicariously liable for injury to the Bamideles due to actions of its employees while acting within the scope of their employment. The only person named in that report was Michael Callahan, but he was not identified as a police officer. While Ms. Bamidele declared in her accompanying statement that as many as five additional assailants were involved, she did not specify that any of these individuals were District employees.

Subsequently, however, MPD's Office of Internal Affairs ("OIA") produced two reports about the February 3 incident. In my view, the February 3 incident-based report, combined with the OIA reports, dated February 20 and April 25, 2007, provided adequate notice that the District might be vicariously liable for the assault on Mr. Bamidele by its employees (Officers Callahan, Wiedefeld, and Nasr) because by Officer Callahan's identification of himself and Officer Wiedefeld as police officers after the assault on Officer Wiedefeld and by all three officers expressing an intent to take police action, they were acting within the scope of their employment at the Szechuan. The OIA reports, unlike the incident-based report, unambiguously identified the individuals who assaulted Mr. Bamidele as MPD officers. Moreover, the April 25 report stated: "[Mr. Bamidele] alleged that Officer ... Callahan, ... assisted by Officers ... Nasr and ... Wiedefeld, assaulted him." The report also contains details suggesting that these officers were acting in the scope of their employment. Officer Callahan told the internal affairs investigator that he displayed his badge when he confronted the three unidentified men in the Szechuan ***532** restaurant after the alleged assault on Officer Wiedefeld. Officer Wiedefeld "stated that Officer Callahan spoke for the [officers and] advis[ed] [the unidentified men] that they were 'Cops.' " The accounts of all the officers reveal that they were responding to an assault on Officer Wiedefeld or acting to prevent injury by a restaurant patron to others in the restaurant, actions for which they had a legal duty to respond. *See* D.C.Code § 5–115.03 (2008) (making it a misdemeanor for any officer to "neglect making any arrest for an offense ... committed in his presence").

While these reports do not fully describe the Bamideles' injuries or explicitly indicate that they planned to bring claims against the District, § 12–309 does not require such exacting specificity. It is true that, because the statute abrogates the District's common-law tort immunity, we interpret it strictly. *Pitts, supra,* 391 A.2d at 807. But in regard to the "details" of a plaintiff's notice, we have taken a more forgiving approach, stating that "[p]recise exactness is not absolutely essential." *Id.* (quoting *Hurd v. District of Columbia,* 106 A.2d 702, 705 (D.C.1954)). To satisfy the statute, the combined MPD reports need not have "fully reflect[ed] every salient fact concerning the potential liability of the District with the same degree of clarity and specificity as a document drawn by an attorney." *Id.* at 809. Rather, they need only have "recit[ed] facts from which it could be reasonably anticipated that a claim against the District might arise." *Id.* I believe that these reports notified the District that it could be vicariously liable for the actions of the three police officers. [1]

I distinguish this case from *Doe by Fein,* in which we found that the plaintiff failed to notify the District of facts from which it could reasonably anticipate that its own liability might arise. *Doe by Fein, supra,* 697 A.3d at 31. Unlike the situation in that case, the OIA investigative reports in this case are police reports, and they were made "in regular course of duty," as § 12–309 requires. *Id.* Furthermore, the Bamideles did not assert any direct liability theory against the District; their sole theory was *respondeat superior.* In my view, *Gaskins v. District of Columbia Hous. Auth.,* 904 A.2d 360 (D.C.2006), also is distinguishable. Here, unlike *Gaskins,* the collective OIA and incident-based reports, all of which constitute police reports, not only specified the cause of the Bamideles injury—the assault by Officers Callahan, Nasr, and Wiedefeld—but they also recited facts that provided reasonable notice to the District that it could be vicariously liable because the officers may have caused the Bamideles' injuries while acting within the scope of their employment. Furthermore, contrary to the District's argument that the OIA reports do not qualify as police reports "in regular course of duty," and that only contemporaneous, incident-based reports fall within the statutory exception, the United States District Court for the District of Columbia, has ruled consistently, at least since 1986, that reports generated by MPD's Internal Affairs Division "are reports created in the regular course of duty." *Jones, supra,* 879 F.Supp.2d at 80 (citing *Shaw v. District of Columbia,* No. 5–CV–1284, 2006 WL 1274765, at *12 (D.D.C. May 8, 2006)). Here, MPD completed both of its OIA reports well before the expiration of the ***533** six month time frame set forth in § 12–309, and in my view, the February 3 incident-based report, combined with the OIA reports, provided sufficient notice

of "the approximate time, place, cause, and circumstances of the injury or damage." D.C.Code § 12–309. In short, the combined MPD reports constitute the type of "full detailed official report[s]," reflecting "an immediate and thorough investigation" of the incident, that we have said serve D.C.Code § 12–309's statutory purpose. *Pitts, supra,* 391 A.2d at 808 (quoting *Thomas v. Potomac Elec. Power Co.,* 266 F.Supp. 687, 694 (D.D.C.1967)).

In sum, I would deny the District's motions for judgment as a matter of law, as they related to the District's vicarious liability for the compensatory damages the jury awarded against the officers. I would also deny the motions because I believe the record reflects that the Bamideles met the notice requirements of D.C.Code § 12–309.

All Citations

103 A.3d 516

Footnotes

1 It is not clear from the record who threw this punch. At trial, Mr. Bamidele testified that the assailant was a taller man, approximately 6#3# in height. Mrs. Bamidele also declared that a taller man threw the first punch. But the officers asserted that there was no fourth person with them when the assault began. All three officers maintained that a fourth officer, Officer Morley, was with them when they first arrived at the restaurant. Officer Callahan described Officer Morley as being roughly 6# 4# tall. But he and Officer Wiedefeld both testified that Officer Morley left the restaurant sometime before the assault began.

2 Officer Nasr apparently made these comments in Arabic. Mr. Bamidele testified that Officer Nasr literally said, "[a]scidia moota," which he translated into "ass-hole, motherfucker." Mr. Bamidele stated that he learned Arabic in his "country of origin—Nigeria."

3 Specifically, the jury awarded Mr. Bamidele $25,000 in compensatory damages and $35,000 in punitive damages against Officer Callahan; $15,000 in compensatory damages and $30,000 in punitive damages against Officer Wiedefeld; and $20,000 in compensatory damages and $35,000 in punitive damages against Officer Nasr. The jury awarded Mrs. Bamidele $10,000 in compensatory damages and $10,000 in punitive damages against Officer Callahan, but made no award against Officers Wiedefeld and Nasr. The jury also awarded the Bamideles $23,000 against the Szechuan Gallery restaurant. The restaurant has not appealed from this judgment.

4 While this injury was less severe than the injuries Mr. Bamidele suffered, the jury appears to have taken this fact into account-awarding her a substantially lower sum ($10,000) than Mr. Bamidele received ($60,000).

5 Before trial, the District moved to dismiss the Bamideles' complaint for failure to comply with D.C.Code § 12–309, which requires plaintiffs who intend to sue the District to give the Mayor's office written notice of their claims within six months of their injury. The trial court denied the District's motion, and the District argues on appeal that this was error. In light of our conclusion that the District is not liable for either compensatory or punitive damages, we do not discuss the issue of notice.

6 We have long endorsed the Second Restatement's approach. *See, e.g., Murphy v. Army Distaff Found.,* 458 A.2d 61, 63 n. 2 (D.C.1983); *Johnson v. Weinberg,* 434 A.2d 404, 408 (D.C.1981).

7 We reject the Bamideles' assertion that it is too late for the District to question its liability for punitive damages because it did not challenge the form of the judgment. The judgment did not impose any liability on the District, ordering only that judgment be entered against Officers Callahan, Wiedefeld, and Nasr, and the Szechuan Gallery Restaurant in the total amount of $203,000.

1 The District argues that, even if the OIA reports provided notice of Mr. Bamidele's potential claim, they did not mention any injury to Ms. Bamidele. I disagree. Both the February 20 and April 25 reports indicate that Officer Callahan threw a plate, which almost struck Ms. Bamidele. Moreover, both reports clearly indicate that Ms. Bamidele was present during the assault and witnessed the officers beating her husband.

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665 A.2d 929
District of Columbia Court of Appeals.

JONATHAN WOODNER CO., et al., Appellants/Cross–Appellees,
v.
Francisca BREEDEN, et al., Appellees/Cross–Appellants.

Nos. 90–CV–362, 90–CV–541.
|
Argued March 9, 1995.
|
Decided Sept. 14, 1995.
|
As amended on Denial of Rehearing and Rehearing En Banc July 25, 1996. *

Tenants brought action against landlords, seeking damages for nuisance and intentional infliction of emotional distress in connection with alleged poor housing conditions and intimidation by landlords in attempting to convert premises from rental to condominium use. The Superior Court, Donald S. Smith, Robert M. Scott, Paul R. Webber, III, Peter H. Wolf, and Sylvia Bacon, JJ., entered judgment on jury verdicts in favor of tenants, awarding compensatory and punitive damages. Appeals were taken. The Court of Appeals, King, J., held that: (1) nuisance was not separate tort and tenants had already recovered full amount of such damages; (2) there was sufficient evidence of "extreme and outrageous" conduct to establish claim for intentional infliction of emotional distress; (3) to sustain punitive damages award, plaintiff must prove by clear and convincing evidence that tortious act was accompanied by conduct and state of mind evincing malice or its equivalent; (4) punitive damage award cannot be maintained against estate of deceased tort-feasor; (5) proof of defendant's current net worth is required where plaintiff seeks to recover punitive damages based on defendant's wealth; and (6) although evidence would support inference that landlords, at time of trial, had some resources available to them to support nominal punitive damage awards, there was no factual basis for sizeable punitive damage awards of 4.5 and 9 million dollars.

Affirmed in part and reversed in part.

Attorneys and Law Firms

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Gregory K. Wells, Landover, for appellant/cross-appellee Laufer.

Roy L. Pearson, Jr., Washington, DC, for appellees/cross-appellants.

Joseph B. Whitebread, Jr., Washington, DC, filed a brief on behalf of Shipley Corporation and the Estate of Ian Woodner as amici curiae in No. 90–CV–541.

Before STEADMAN, FARRELL and KING, Associate Judges.

Opinion

KING, Associate Judge:

This appeal arises out of an action seeking damages for nuisance and intentional infliction of emotional distress grounded in allegations of poor housing conditions and intimidation by the landlord in attempting to convert the premises from rental to condominium use at Park Tower, an apartment building in Washington, D.C., brought by former tenants ("tenants") against three defendants (all referred to collectively as "management" or "landlord"): the owner of Park Tower, the Jonathan Woodner Company ("Woodner Co."); the estate of the Vice–President of Woodner Co., Jonathan Woodner ("Estate"); ***932** [1] and Steven Z. Laufer ("Laufer"), who was a partner with Jonathan Woodner in Newpark Towers Associates ("Newpark"), which was formed in July 1979 for the purpose of converting Park Tower into condominiums. The principal dispositive questions presented in this appeal are: (1) whether entitlement to an award of punitive damages requires proof by clear and convincing evidence; (2) whether a punitive damage award can be maintained against the estate of a deceased tortfeasor; and (3) whether, when presenting evidence of an ability to pay punitive damages, proof of current net worth is required to sustain an award.

For the reasons set forth below, we adopt the clear and convincing evidence standard of proof for punitive damages. We also hold that: (1) punitive damages do not survive the death of a tortfeasor; and (2) where a plaintiff seeks to recover punitive damages based on the wealth of the defendant, proof of the defendant's current net worth is required. Finally, we conclude that the evidence was sufficient to support the tenants' claim of intentional infliction of emotional distress, but that the claim of nuisance must be dismissed. [2]

I.

The present action arises out of a dispute between a number of tenants and the management of the former Park Tower. In 1978, the nearly fifty-year-old Park Tower, located at 2440 Sixteenth Street, N.W. in the District of Columbia, was deteriorating and in need of repair due to its advanced age. Because of the building's condition, Jonathan Woodner and Woodner Co. ceased renting apartments in August 1978 as they became vacant. They also wrote to the remaining tenants acknowledging the deteriorating conditions and informing them of their intent to determine the best way to repair the building and address its numerous problems. In May 1979, a group of tenants formed the Park Tower Tenants' Association ("Tenants' Association") whose goals included "[t]he assurance of perman[en]cy for tenants of Park Tower ... the resumption of previously reduced and/or eliminated services ... [and] the correction of all housing code violations." To achieve these goals, the Association organized a rent strike in which sixteen tenants paid rent into an escrow account rather than to the Woodner Co. On July 26, 1979, Jonathan Woodner and Laufer formed Newpark Towers Associates for the purpose of renovating, developing, managing and marketing Park Tower as a condominium or co-op.

Over the next fourteen months, the Woodner Co. made various relocation offers which were rejected by the striking tenants. [3] The evidence, viewed in the light most favorable to the tenants, showed that, despite Woodner Co.'s assertions that it had done all it could to keep the building in repair during the attempted condominium conversion, management ***933** continued to allow unsafe and unsanitary conditions to exist, such as: exposed electrical wiring, darkened stairwells, boarded emergency exits, sporadic fires, open vacant apartments, uncapped radiator pipes and gas lines, unsecured entrance and exit doors, missing fire extinguishers, an inoperative fire alarm system, and the presence of urine and feces throughout the building. Also during this period, a group of men, called "workmen" or a "demolition crew" by management, moved into some of the vacant apartments and thereafter engaged in acts which threatened, intimidated, and harassed a number of the tenants. The tenants contend that this harassment was either instigated by management, or done with management's blessing or acquiescence.

On September 19, 1980, thirteen tenants [4] filed the instant action seeking emergency injunctive relief and compensatory and punitive damages for nuisance and intentional infliction of emotional distress. The complaint alleged that over a two-year period, the management interfered with the tenants' "use and enjoyment" of their homes by removing all services and security from the building, and permitting the "demolition crew" to intimidate the tenants. The tenants sought an immediate injunction to: halt the demolition work; repair unsecured open gas lines; bar the presence of non-tenant alcoholics and drug addicts living in the building; and to discontinue other "interference with the plaintiffs' property interests." The tenants claimed they suffered "actual physical damage to [themselves] and their property, a disturbance of [their] peace of mind and a serious threat of future injury, as well as humiliation, anxiety, and apprehension, all of which was foreseeable and intended by defendants."

Following various discovery delays, stays due to the pendency of related actions, and a mistrial following Jonathan Woodner's death, a four-week jury trial before Judge Sylvia Bacon began on February 22, 1989. The jury returned verdicts in favor of the nine remaining tenants for both nuisance and intentional infliction of emotional distress, awarding the tenants compensatory damages ranging from $15,000 to $50,000 for nuisance, and from $75,000 to $80,000 for intentional infliction of emotional distress, for a total compensatory award of $965,000. Following another week of trial on punitive damages, the jury awarded the tenants collectively a total of $15 million in punitive damages: $9 million against the Woodner Co.; $4.5 million against Laufer; and $1.5 million against the Estate of Jonathan Woodner. Approximately one year later, on March 23, 1990, the trial court denied all post-trial motions, and these appeals followed.

II.

Management seeks reversal of the jury's verdicts on three broad grounds. First, it contends that the "verdict is fatally tainted" by the tenants' use of race-based peremptory strikes during jury selection and "repeatedly and prejudicially appealing to racial bias before the resulting all-black jury." [5] Second, management maintains that the evidence is insufficient as a matter of law to support either the claim for nuisance or intentional infliction of emotional distress. Third, management challenges the punitive damage ***934** award on a number of grounds set forth below. The Estate also contends that the District of Columbia survival statute precludes a punitive damage award against the estate of a deceased defendant.

A. Nuisance

[1] **[2]** Management claims that the tenants' verdict on their nuisance claim must be reversed as a matter of law. We agree, based on this court's decision in *Bernstein v. Fernandez,* 649 A.2d 1064 (D.C.1991). [6]

In *Bernstein,* a tenant faced with leaking and falling ceilings, rodent and roach infestation, and numerous other necessary repairs which her landlord neglected to correct, sued her landlord for nuisance and intentional infliction of emotional distress. *Id.* at 1066–67. On appeal, this court held that the tenant's nuisance claim did not lie. *Id.* at 1072. First, we held that the condition of the premises (infestation, falling ceilings, etc.) might give rise to an action for breach of the settlement agreement or breach of the warranty of habitability, but "did not amount to nuisance ... in the legal sense." *Id.* Rather, we said that nuisance, at least in this context, "is not a separate tort in itself but a type of damage ... [and] the plaintiff must recover, if at all, on the theory of negligence [or some other tort]." *Id.* (citations omitted). Therefore, because nuisance is a type of damage and not a theory of recovery in and of itself, any element of intent in management's actions in this case must be addressed under the intentional infliction of emotional distress claim.

[3] Second, we held that, because "damages flowing from a nuisance are measured by the diminution of the property's value caused by the nuisance's interference with the enjoyment of the property," and because the tenant had already recovered her full rent as damages under a breach of warranty of habitability claim, her leasehold could not have been further devalued as a result of any "nuisance." *Bernstein,* 649 A.2d at 1073 (citation omitted). Consequently, *Bernstein* would govern the nuisance claim of the tenants in this case to the extent that they seek damages up to the property value. Because, however, the tenants sought and received rent recoupment in an earlier landlord-tenant action based on the same alleged defects underlying their nuisance claim, like the tenant in *Bernstein,* they have already been fully compensated for the diminished value of their leasehold, and "the so-called nuisance could not have further diminished [its] value." *Id.* at 1073. Accordingly, because nuisance here is not a separate tort and because the tenants have already recovered the full amount of such damages, the nuisance claim must be dismissed as a matter of law.

B. Intentional Infliction of Emotional Distress

[4] **[5]** **[6]** Management also maintains that there was insufficient evidence to establish the claim for intentional infliction of emotional distress. In reviewing the trial court's decision to submit that claim to the jury, "we must view the evidence in the light most favorable to [the tenants], giving [them] the benefit of every rational inference therefrom." *See King v. Kidd,* 640 A.2d 656, 667 (D.C.1993). To establish a claim for intentional infliction of emotional distress, a plaintiff ***935** must prove that the defendant engaged in: (1) extreme and outrageous conduct that (2) intentionally or recklessly caused (3) severe emotional distress to another. *Id.* at 668. In making this claim, management again relies on *Bernstein,* contending that "if the Bernstein landlord's conduct was not sufficiently 'extreme' or 'outrageous' to constitute intentional infliction of emotional distress, clearly the alleged conduct of these defendants cannot be either." Thus, management only challenges the sufficiency of the evidence of the first element of this tort ("extreme and outrageous conduct"). [7]

In *Bernstein,* we affirmed the dismissal of the tenant's intentional infliction of emotional distress claim, largely because the landlord's "failure to make effective repairs" was not "so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency." *Bernstein, supra,* 649 A.2d at 1075. Management maintains that the evidence in the instant case is no different from the facts of *Bernstein.* As described above,

in *Bernstein,* there were leaking ceilings, dead rats and mice, roaches, gas leaks and rotten bath tiles. In the instant case there were similar deficiencies (*see supra,* discussion at p. 932–933); in fact, the conditions on the premises in this case were arguably much worse than those present in *Bernstein.* Nonetheless, *Bernstein* holds that bad conditions alone are not sufficient to support a claim of intentional infliction of emotional distress. *Id.* at 1075.

However, what sets this case apart from *Bernstein* is the evidence, viewed in the light most favorable to appellees, which established that the tenants were subjected to far more than the deteriorating conditions at Park Tower in the form of management's employment of "workmen" to intimidate the tenants. For example, two witnesses testified that a "Floyd Davis, who was managed by Laufer," was sent by management to the tenants' apartments, with a gun that he repeatedly "accidentally" dropped, in an effort to persuade them to vacate. The evidence also showed that management hired a man named June Burton as the Park Tower "resident manager" to do the "heavy work," which management's agents acknowledged they "really had no choice but to do" to achieve their goals at Park Towers. As two tenants also testified to drug use and a pistol being brandished by this June Burton, the jury could readily infer that the "heavy work" included intimidation. Witnesses also testified to observing Woodner and Laufer personally handing out liquor to the "workmen" who had moved into Park Tower.

The foregoing conduct must be considered in "the specific context in which ... [it] took place, for in determining whether conduct is extreme or outrageous, it should not be considered in a sterile setting." *King, supra,* 640 A.2d at 668 (citation omitted). As this court held in *King,* where a woman brought claims against her supervisor for sexual harassment, and intentional infliction of emotional distress from that conduct, the extreme and outrageous nature of conduct may arise from the position of authority the actor maintains over the other person. *Id.* at 659. Further, the court in *King* held that "a defendant's conduct [is] carefully scrutinized where the defendant is in a peculiar position to harass the plaintiff and cause emotional distress." *Id.*

Management maintained a position of authority over the tenants by virtue of their status as owner and manager, their access to resources, and their ultimate control over the building in which the tenants lived. Consequently, the appellants were in a "peculiar position to harass the plaintiff[s]." *King,* 640 A.2d at 668. Considering management's position, the evidence, viewed in the light most favorable to the tenants, shows that at the very least, the management knew, or should have known, of Davis's and Burton's systematic efforts to harass and intimidate the tenants, and therefore the management could be held to have acquiesced in those activities. The evidence that: (1) Jonathan Woodner and Laufer personally gave liquor to the so-called "workmen"; (2) Jonathan Woodner ***936** and his father specifically sought out Laufer "because of his experience in dealing with this kind of problem"; and (3) that Laufer advised both Woodners that "one had really no choice but to do a certain amount of heavy work," and that June Burton was the man to do it, was sufficient to permit a jury to find that management actually condoned the harassment of the tenants.

Therefore, considering the context and nature of management's conduct and the prevailing norms of what is acceptable in society for property managers, by condoning or acquiescing in the activities of Burton and Davis, management engaged in what the jury could fairly determine to be "extreme and outrageous" behavior. *See King,* 640 A.2d at 668 (in determining whether conduct is outrageous, court should consider nature of activity, its context, and the prevailing norms of society); *Harris v. Jones,* 281 Md. 560, 380 A.2d 611, 614–15 (1977) (what is considered outrageous varies depending on the context; where "defendant is in a peculiar position to harass the plaintiff and cause emotional distress, his conduct will be carefully scrutinized by the courts"). Because the tenants presented prima facie evidence of management's extreme and outrageous conduct, and management does not challenge the sufficiency of the evidence of the remaining elements of the tort, we hold that the evidence was sufficient for the jury to find that management intentionally inflicted emotional distress upon the tenants. *Id.* 380 A.2d at 615 (jury to determine whether "the conduct has been sufficiently extreme and outrageous to result in liability").

C. Punitive Damages

[7] Management principally argues that the punitive damage awards must be reversed for the following reasons: (1) if either the nuisance or intentional infliction of emotional distress claim cannot be sustained, the entire punitive damage award must fail because the jury awarded

a single punitive damage award based on both claims; [8] (2) the jury should have been instructed that clear and convincing evidence was the proper evidentiary standard for determining punitive damages; (3) there is insufficient evidence of appellants' malice; [9] (4) in the case of Jonathan Woodner, a punitive damage award does not survive his death and (5) in the case of Woodner Co. and Laufer, the punitive damage award is unsupported by the evidence. [10]

1. Clear and Convincing Evidence

[8] In its motions for directed verdict, each defendant urged the trial court to apply a clear and convincing evidence standard to the determination whether punitive damages should be awarded. The tenants objected and the court denied the request, and instead applied the preponderance of evidence standard. Later Laufer presented a proposed jury instruction that included the clear and convincing evidence [11] standard but, over the ***937** tenants' objection, the court rejected that proposal and instructed the jury that the preponderance of the evidence standard applied to the determination of both entitlement to and the amount of punitive damages. In this court, management renews the request it made to the trial court, asking that we adopt the clear and convincing evidence standard.

Earlier this year in *Dyer v. Bergman & Assoc.*, 657 A.2d 1132 (D.C.1995), we observed:

> This court has never specifically determined whether the facts on which a plaintiff's claim for punitive damages is based must be proved by a preponderance of the evidence —the conventional civil standard— or by a more exacting measure of proof.... Because punitive damages are, at least from the defendant's perspective, generally in the nature of a fine, it may well be appropriate to require proof by clear and convincing evidence of the commission of the tort and of the outrageousness of the conduct.

Id. at 1139 (internal citations omitted). [12] We did not decide the issue in *Dyer* because it had not been preserved in the trial court. That is clearly not the case here. We are persuaded by the growing majority of jurisdictions deciding the issue that we should adopt the requirement that proof by clear and convincing evidence must be shown in order to receive an award of punitive damages.

We begin with the Supreme Court's recent observation that there is much to be said for requiring a clear and convincing, or even a reasonable doubt standard, [13] for the award of punitive damages. *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 23 n. 11, 111 S.Ct. 1032, 1046 n. 11, 113 L.Ed.2d 1 (1991). One year after *Haslip,* the Maryland Court of Appeals held that the "[u]se of a clear and convincing standard of proof will help insure that the punitive damages are properly awarded." *Owens–Illinois v. Zenobia,* 325 Md. 420, 601 A.2d 633, 657 (1992). The Maryland court reasoned that punitive damages are penal in nature and therefore a more exacting standard, such as one that Maryland imposes, as we do, [14] in fraud and attorney disciplinary cases, should be applied. *Id.* 601 A.2d at 656. In reaching that conclusion, the Maryland court found particular support in the decisions of the courts of Hawaii, Arizona, and Maine. *See Masaki v. General Motors Corp.,* 71 Haw. 1, 780 P.2d 566 (1989); *Tuttle v. Raymond,* 494 A.2d 1353 (Me.1985); *Linthicum v. Nationwide Life Ins. Co.,* 150 Ariz. 326, 723 P.2d 675 (1986).

For example, the Maryland court cited with approval the reasons given in *Masaki* for adopting the clear and convincing evidence standard. Specifically, the *Masaki* court observed:

> [P]unitive damages are a form of punishment and can stigmatize the defendant in much the same way as a criminal conviction. It is because of the penal character of punitive damages that a standard of proof more akin to that required in criminal trials is appropriate.... A more ***938** stringent standard of proof will assure that punitive damages are properly awarded.

Masaki, supra, 780 P.2d at 575.

Similarly, the Supreme Judicial Court of Maine, observing that "although punitive damages serve an important

function in our legal system, they can be onerous when loosely assessed," concluded:

> The potential consequences of a punitive damages claim warrant a requirement that the plaintiff present proof greater than a mere preponderance of the evidence. Therefore, we hold that a plaintiff may recover exemplary damages based on tortious conduct only if he can prove by clear and convincing evidence that the defendant acted with malice.

Tuttle, 494 A.2d at 1363. Finally, the Arizona court concluded:

> As this remedy is only to be awarded in the most egregious of cases, where there is reprehensible conduct combined with an evil motive over and above that required for the commission of a tort, we believe it appropriate to impose a more stringent standard of proof.

Linthicum, supra, 723 P.2d at 681. Other jurisdictions considering the issue have also required the clear and convincing standard for an award of punitive damages. *See, e.g., Chizmar v. Mackie,* 896 P.2d 196, 210 (Alaska 1995); *Boling v. Tennessee State Bank,* 890 S.W.2d 32, 33 (Tenn.1994); *Travelers Indem. Co. v. Armstrong,* 442 N.E.2d 349, 362–63 (Ind.1982); *Wangen v. Ford Motor Co.,* 97 Wis.2d 260, 294 N.W.2d 437, 458 (1980).

We have always recognized that punitive damages are a form of punishment, *Arthur Young & Co. v. Sutherland,* 631 A.2d 354, 372 (D.C.1993). We have also observed that "[p]unitive damages are warranted only when the defendant commits a tortious act accompanied with fraud, ill will, recklessness, wantonness, oppressiveness, wilful disregard of the plaintiff's right, or other circumstances tending to aggravate the injury." *Washington Medical Ctr. v. Holle,* 573 A.2d 1269, 1284 (D.C.1990) (citations and internal quotation omitted). Therefore, for these reasons and for the reasons expressed by the authorities cited above, we hold that in order to sustain an award of punitive damages, the plaintiff must prove, by a preponderance of the evidence, that the defendant committed a tortious act, and by clear and convincing evidence that the act was accompanied by conduct and a state of mind evincing malice or its equivalent. *Masaki, supra,* 780 P.2d at 575 ("plaintiff must prove by clear and convincing evidence that defendant has acted wantonly or oppressively or with ... malice...."); *Tuttle, supra,* 494 A.2d at 1363 ("plaintiff may recover exemplary damages based upon tortious conduct only if he has proven by clear and convincing evidence that the defendant acted with malice"); *Linthicum, supra,* 723 P.2d at 681 (same; following *Tuttle*). In short, the jury must be instructed that punitive damages may be awarded only if it is shown by clear and convincing evidence that the tort committed by the defendant was aggravated by egregious conduct and a state of mind that justifies punitive damages.

2. Estate of Woodner

[9] The Estate maintains that the trial court erred in permitting punitive damages to be awarded against the estate of Jonathan Woodner. While this is an issue of first impression for this court, the issue need not detain us long because we are persuaded by the overwhelming weight of authority, that punitive damages may not be awarded against the estate of a deceased defendant.

[10] We first look to the survival statute for guidance. At common law, all personal causes of action against a deceased person died with that person. *Greater Southeast Community Hosp. v. Williams,* 482 A.2d 394, 396–97 (D.C.1984). The District of Columbia modified this common law rule by enacting the "Survival Statute" codified as D.C.Code § 12–101 which provides:

> On the death of a person in whose favor or against whom a right of action has accrued for any cause prior to his death, the right of action, for all such cases, survives in favor of or against the legal representative of the deceased.

Although preserving certain causes of action after death, the statute says nothing about ***939** whether an award of punitive damages against the estate survives. We therefore must look for other evidence of legislative intent. An examination of the history of the survival statute and the amendments to it reveals that the imposition of punitive damages against the estate of a deceased defendant was never authorized or envisioned. [15] Rather, until the 1978

amendment, the survival statute only preserved various *causes of action* following one's death; damages, of course, are not a cause of action, but a form of relief and punishment. *See, e.g., Bernstein, supra,* 649 A.2d at 1072–73; *see also Gibbs v. Investigators of D.C. Inc.,* 105 Daily Wash.L.Rptr. 1, 3, (D.C.Super.Ct. January 3, 1977); *Goodacre v. Shulmier,* 64 App.D.C. 10, 73 F.2d 519 (1934). Finally, as a statute in derogation of the common law, the survival statute must be narrowly construed. *Saunders v. First Nat'l Realty Corp.,* 245 A.2d 836, 838 (D.C.1968).

In the District of Columbia, the "basic purposes" of punitive damages are punishment and deterrence. *Robinson v. Sarisky,* 535 A.2d 901, 907 (D.C.1988). In permitting the punitive damage award to stand against the estate, the trial court reasoned that the purpose of punitive damage awards in the District of Columbia is "punish the tortfeasor *and* to deter [the tortfeasor and] others from engaging in similar conduct" (emphasis in original). The Estate convincingly argues, however, that the primary purpose of punitive damages is to punish and deter the tortfeasor, and that deterrence of others is secondary. *See, e.g., id.* (identifying deterrence and punishment as purposes of punitive damages without mentioning deterrence of others as additional goal).

The theory of justice which punishes a wrongdoer for his or her acts while avoiding punishment of innocent parties has persuaded courts and legislatures in nearly every jurisdiction deciding the issue to disallow punitive damages against estates. [16] For example, in *Lohr v. Byrd,* 522 So.2d 845 (Fla.1988), the Supreme Court of Florida held that punitive damages may not be imposed upon the "innocent heirs or creditors of a decedent's estate" because to do so would unduly punish the decedent's widow and children and creditors. The court reasoned:

> If deterrence is justified in this instance, it would also be justified to require a decedent's family to pay a fine or be imprisoned for the decedent's criminal conduct. With the wrongdoer dead, there is no one to punish, and to punish the innocent ignores our basic philosophy of justice.

Id. at 847. In *Crooker v. United States* 325 F.2d 318, 321 (8th Cir.1963) the Eighth Circuit echoed similar public policy concerns when it noted that the purpose of criminal ***940** fines is to punish the defendant for his offense, but that "there is no justice in punishing his family for his offense." *Id.* Finally, the Supreme Court of Alaska elected to adhere to the judicial philosophy which seeks to punish the wrongdoer and not the innocent in determining to:

> follow the better reasoned decision and hold that an injured party may not recover punitive damages from the estate of a deceased tortfeasor ... [because t]he central purpose of punitive damages is to punish the wrongdoer and deter him from future misconduct.... Since the deceased tortfeasor cannot be punished, the general deterrent effect becomes speculative at best, and this, in our view, falls short of furnishing a justifiable ground for an award of punitive damages against the tortfeasor's estate.

Doe v. Colligan, 753 P.2d 144, 146. [17]

For all the foregoing reasons, we hold that our system of liability for wrongful acts is best served by not allowing awards of punitive damages against a tortfeasor's estate.

3. Sufficiency of Evidence for Punitive Damages Against Woodner Co. & Laufer

Woodner Co. and Laufer maintain that the punitive damage award is unsupported by the evidence because the tenants failed to prove Woodner Co.'s and Laufer's net worth, and therefore the punitive damage award must be set aside. We agree and therefore hold that a plaintiff seeking to recover punitive damages based upon the wealth of the defendant, as the tenants did here, must establish the defendant's net worth at the time of trial. We also hold that, while the tenants presented barely sufficient evidence to permit the jury to award some punitive damages based upon the defendants' ability to pay, that evidence fell gravely short of supporting the very sizeable punitive damage awards in this case. For these reasons, the issue of punitive damages must be retried. *Cf. Finkelstein v. District of Columbia,* 593 A.2d 591 (D.C.1991) (en banc). We will consider each holding in turn.

[11] First, management contends that punitive damages based on the wealth of the defendants requires proof of a

defendant's current net worth (*i.e.*, at the time of trial). The standard jury instructions in this jurisdiction, and the jury instructions given in this case, support that contention. [18] The trial court instructed the jury:

> [N]et worth ... is an indicia of the appropriate amount of punitive damages because it is a measure of the current wealth or the current financial situation of a defendant.... [N]et worth [is used] to measure current wealth because it gives an accurate measure of ability to pay. Earnings and/or assets alone as distinguished from net worth do not necessarily show ability to pay. You are also cautioned that earnings or assets in past years do not necessarily show ability to pay.... You consider all of the circumstances, consider net worth, assets, minus liability unless you find a concealment or a diversion which justifies consideration of the assets in determining what amount will punish, but not financially ruin the defendant....
>
> > However, in order to award punitive damages against any defendant, you must find that the defendant has a financial ability to pay an award of punitive damages. Evidence of this is in the form of net worth. That is assets which exceed liability. If you are unable to determine a defendant's net worth because of a lack of evidence presented by plaintiffs or if you are not able to otherwise determine financial ability to pay punitive damages without speculating or if you find that a defendant is unable to pay punitive damages because that defendant has a negative or a zero net worth, then the amount of punitive damages would be [zero].

***941** The trial judge also expressly instructed the jury that the burden of proving net worth was on the plaintiff. Consequently, in making its punitive damage award, the jury was clearly instructed to focus upon the net worth of the defendants.

[12] Because the purpose of punitive damages is to punish a tortfeasor and deter future conduct, the amount of such damages should be enough to inflict punishment, while not so great as to exceed the boundaries of punishment and lead to bankruptcy. *See Arthur Young & Co., supra,* 631 A.2d at 372 ("purpose of punitive damages is to punish a person for outrageous conduct") (internal citation omitted); *Robinson v. Sarisky,* 535 A.2d 901, 906 (D.C.1988) (same); *see also Wynn Oil Co. v. Purolator Chem. Corp.,* 403 F.Supp. 226, 232 (M.D.Fla.1974) ("purpose of punitive damages is to punish defendants and serve as a deterrent ... the award of punitive damages should only hurt but not bankrupt a defendant"). Therefore, since current net worth fairly depicts a tortfeasor's ability to pay punitive damages, the plaintiffs here were required to present sufficient proof of current net worth to support the punitive damages awarded by the jury. [19] *See, e.g., Snow v. Capitol Terrace, Inc.,* 602 A.2d 121, 127 n. 8 (D.C.1992) (question of punitive damages was not permitted to go to jury because, in addition to other reasons, "the [trial] judge found insufficient evidence of [defendant's] net worth"). *See also Dumas v. Stocker,* 213 Cal.App.3d 1262, 262 Cal.Rptr. 311, 315 (4th Dist.1989) ("We conclude that the absence of any evidence of [defendant's] net worth renders the amount of the award unsupported by the evidence"); *Welty v. Heggy,* 145 Wis.2d 828, 429 N.W.2d 546, 549 (Ct.App.1988) (any measure of net worth other than the difference between the value of the assets and liabilities of the defendants at a time reasonably close to the date of trial is "illusory").

[13] Second, the Woodner Co. and Laufer both contend [20] that the tenants failed to meet their burden of establishing their net worth, or at least sufficient net worth to support the verdicts reached by the jury. In the opening statement on punitive damages, tenants' counsel stated that the Woodner Co. was worth "in excess of a hundred million dollars" and that "the primary factor" for the jury to consider was evidence of "the assets of" the Company. Over objection, the tenants presented five exhibits: a draft of a loan application prepared by Woodner Co. three years prior to the trial; a real estate development proposal developed eight years prior to the trial; a 1979 projection of the potential value of Park Tower if the Company incurred ***942** the expense of successfully developing the building into condominiums; and two excerpts from the testimony of Jonathan Woodner in other proceedings two years earlier in which he identified the limited properties owned by the Company as of 1980. The Woodner Co. presented testimony that it owned only two properties at the time of trial, and that it managed but did not own most of the rental properties it had developed and maintained in the District.

The only evidence presented by the tenants to establish Laufer's net worth, which was admitted over Laufer's objection, were two of Laufer's financial statements, which were five and seven years old, to "prove his ability

to generate income." [21] Laufer testified that, although the two financial statements accurately reflected his financial circumstances in the two years reported, he had recently suffered substantial financial reverses such that his net worth at the time of trial was in the negative.

We agree with management's contention that none of the exhibits presented by the tenants established the net worth of the Woodner Co. at all, much less at the time of trial. Similarly, although the exhibits presented against Laufer showed net worth, the information was not current. *See, e.g., Welty, supra,* 429 N.W.2d at 549 (measure of net worth is difference between value of assets and liabilities at time close to trial); *Fopay v. Noveroske,* 31 Ill.App.3d 182, 334 N.E.2d 79, 94 (1975) (desired financial evidence to show tortfeasor's ability to pay is current net worth); *Dumas, supra,* 262 Cal.Rptr. at 316 (rejected requiring the defendant to "affirmatively ... prove its penurious financial condition as a precondition to any appellate challenge to the excessiveness of the award"). The most that can be said of the evidence presented was that it was not unreasonable for the jury to infer that at the time of trial, both Woodner Co. and Laufer had some resources available to them to support a nominal punitive damage award, but there was no factual basis for the sizable awards actually made.

As in *Dumas,* this record includes various kinds of financial information, none of which firmly established the Woodner Co.'s or Laufer's net worth at the time of trial. For example, in *Dumas,* the plaintiff introduced evidence of a net gain on the sale of the subject property; the fact that the defendant owned, in prior years, between two and fifteen apartment buildings, without any evidence of any equity interest; and evidence that defendant filed "fictitious" business name statements, without any evidence of his income or equity interest in these businesses. *Dumas,* 262 Cal.Rptr. at 315. Despite that evidence, the *Dumas* court held "there was no evidence of [the plaintiff's] net worth at the time of trial," which is the proper measure of net worth, and that "the absence of any evidence of net worth renders the amount of the [punitive damage] award unsupported by the evidence." *Id.* The case was remanded to the trial court for a "redetermination based on evidence of defendant's net worth...." *Id.* 262 Cal.Rptr. at 317. The evidence presented here is similar to that presented in *Dumas;* however, we conclude that the tenants' evidence was sufficient to show some current ability of Woodner Co. and Laufer to pay, but that the damages awarded were far in excess of any proof of current net worth. [22]

[14] Finally, we think that a ruling by the trial judge, shortly after the trial, convincingly shows that the punitive damage verdicts reached did not properly take into account the net worth of either the Woodner Co. or Laufer. After the punitive damage verdicts were entered the defendants promptly moved ***943** to stay the judgments pending the filing of post-trial motions. On May 15, 1989, in a written order, the trial judge granted the motions to stay, finding that if the Woodner Co. were required to pay the punitive damage award of $9 million and the $950,000 in compensatory damages for which it was jointly and severally liable, then the Company's "liability will far exceed its assets and it appears that the Company would proceed to bankruptcy." With respect to Laufer, the trial judge observed that satisfying the judgment "would require all of [Laufer's] assets and more. Attachment of his assets would deprive him of all his working capital." In short, the trial judge ruled, less than a month after the trial, that payment of the judgments [23] by Woodner Co. and Laufer would essentially bankrupt them. As the Maryland Court of Special Appeals recently observed: "when a punitive damage award consumes a defendant's total [net worth], it ceases to serve the societal goal of punishment" and cannot stand. *Fraidin v. Weitzman,* 93 Md.App. 168, 611 A.2d 1046, 1068 (1992). The same can be said with respect to the punitive damage awards made by the jury here.

III.

We therefore reverse the judgment entered on the nuisance claim, reverse all awards of punitive damages, and affirm the cross-appeal. The judgment for compensatory damages for intentional infliction of emotional distress is affirmed. We remand to the trial court for further proceedings consistent with this opinion.

Affirmed in part.

Reversed in part.

All Citations

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Footnotes

* Editor's Note: The July 25, 1996 order is published at 681 A.2d 1097.

1 Jonathan Woodner died in an airplane crash during the proceedings and the trial court accordingly substituted the Estate of Jonathan Woodner as a defendant.

2 In the cross-appeal, the tenants challenge five separate orders of the trial court, *viz:* (1) Judge Smith's denial of the tenant's motion to compel certain discovery; (2) an order by Judge Scott, reaffirmed by Judge Webber, continuing the trial court proceedings during the pendency of related matters before the Rental Housing Commission; (3) Judge Wolf's denial of the tenant's motion, made nearly six years after the action was commenced, to amend the complaint to include the Shipley Co. and Jonathan Woodner's father, Ian Woodner, as parties; and (4) & (5) two orders entered by Judge Wolf denying two separate subsequent motions to reconsider his order denying the motion to amend the complaint. Management contends, on various grounds, that none of the orders are properly before us. Those contentions present complicated questions which we need not decide because the cross-appeal can be resolved summarily. For example, the motion for continuance was not opposed by the tenants, and all of the challenged orders are reviewable for an abuse of discretion, which we do not find. *Rosenthal v. National Prods. Co.,* 573 A.2d 365, 374 (D.C.1990) (trial court's resolution of discovery problems "will not be disturbed on appeal unless ... discretion has been abused"); *Hairston v. Gennet,* 501 A.2d 1265, 1268 (D.C.1985) (grant or denial of motion for continuance is within trial court's discretion); *Gordon v. Raven Sys. & Research, Inc.,* 462 A.2d 10, 13 (D.C.1983) (the decision to grant or deny a motion for leave to amend the complaint is "entrusted to the sound discretion of the trial court"). Therefore, the cross-appeal must be affirmed.

3 Some of the members of the Tenant's Association accepted the management's relocation offers and moved to other apartment buildings.

4 Only nine of the original thirteen tenants remained in the case by time of trial. Two other tenants settled while this appeal was pending, leaving seven tenant-appellees in this appeal.

5 Judge Bacon rejected management's contentions, that the tenants used race-based peremptory strikes and impermissibly invoked racial bias before the jury, in her Order of March 23, 1990, denying management's motions for judgment notwithstanding the verdict, involuntary dismissal, mistrial or new trial. Because there is record support for the trial judge's findings that the tenants did not use peremptory challenges in a racially discriminatory manner, and that, while race was an issue, the case was presented to the jury in "a reasonable manner ... and race was not exploited improperly," we will not disturb those findings on this appeal. *See Batson v. Kentucky,* 476 U.S. 79, 100, 106 S.Ct. 1712, 1725, 90 L.Ed.2d 69 (1986) (trial court has discretion to decide if "facts establish, prima facie, purposeful discrimination" in use of peremptory strikes); *Purkett v. Elem,* 514 U.S. 765, ——, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995) (trial court must "determine[ ] whether the opponent of the strike has carried burden of proving purposeful discrimination"); *Johnson v. Fairfax Village Condo,* 641 A.2d 495, 501 (D.C.1994) (exercise of discretion will be reversed on appeal only upon clear showing of abuse).

6 *Bernstein* was decided by this court in March 1991, a year after the trial court ruled on the post-trial motions, and was thus not available for the trial court to consider in resolving those motions.

The tenants claim that *Bernstein* should not be retroactively applied to this case. In determining whether a new rule of law will be applied retroactively we examine the extent of the reliance by the parties on the old rule of law. *Mendes v. Johnson,* 389 A.2d 781 (D.C.1978) (en banc). In this case, the tenants point to no clear past precedent on which they have relied, and we are not aware of any authority in this jurisdiction which has upheld a nuisance action against a landlord. In short, this court has never recognized nuisance as a cause of action under these circumstances, and we merely stated so in *Bernstein. See Reese v. Wells,* 73 A.2d 899, 902 (D.C.1950) ("nuisance [is] a field of tort liability, and not a single type of tortious conduct") (internal quotation omitted); *see also District of Columbia v. Fowler,* 497 A.2d 456, 461–62 n. 8 (D.C.1985) ("nuisance ... is not a separate tort in itself"; moreover, "some 'tortious conduct' is a necessary component of virtually all nuisance claims"). Therefore, because there was no contrary rule of law on which the tenants could have relied, *Bernstein* merely recognizes the existing state of the law which regards nuisance in this context as a type of damage, not as a cause of action.

7 "It is possible to infer the existence of the second element of the tort—intent or recklessness—from the very outrageousness of a defendant's conduct." *King, supra,* 640 A.2d at 668 n. 14 (citing *Sere v. Group Hospitalization, Inc.,* 443 A.2d 33, 38 (D.C.), *cert. denied,* 459 U.S. 912, 103 S.Ct. 221, 74 L.Ed.2d 176 (1982)).

8 *See, e.g., Nimetz v. Cappadona,* 596 A.2d 603, 608 (D.C.1991) (party who opposed special verdict form, which would have clearly shown basis for jury's verdict, waives claim on appeal); *see also Franklin Inv. Co. v. Smith,* 383 A.2d 355,

358 (D.C.1978) (punitive damages may not be awarded where there is no basis for compensatory damages). We do not need to reach this issue because we hold, *infra,* the punitive damage awards cannot stand for other reasons.

9 Using the preponderance of evidence standard, this claim is resolved in the tenants' favor essentially for the reasons we relied upon in holding that the evidence was sufficient to sustain the claim of intentional infliction of emotional distress.

10 Because we hold that the appellees' punitive damage award must be reversed for the reasons stated, we do not need to consider management's contention that the punitive damage awards were so excessive so as to violate due process. Management also attacks the punitive damage awards on the ground that the tenants improperly presented evidence and argument regarding its own costs of litigation and the duration of the litigation, and that the trial court employed inadequate procedural safeguards to ensure the fairness of the award. Because we reverse the punitive damage awards, we will not consider those issues. On remand, the trial court is free to address them anew.

11 The proposed jury instructions included a "clear, convincing, and unequivocal" standard. The tenants argue that by including the term "unequivocal" management has not preserved the issue of its entitlement to a "clear and convincing" instruction in this court. We reject that argument because management unambiguously asserted the clear and convincing standard in its arguments for directed verdict and during the discussion of the jury instruction. It is clear that the trial court rejected any standard more exacting than preponderance of the evidence, and inclusion of "unequivocal" in the proposed jury instruction played no role in the trial court's reasoning.

12 In making this observation, the *Dyer* court cited two cases from this jurisdiction which generally discuss this issue, without firmly holding that a particular standard of care is required. *See Darrin v. Capital Transit Co.,* 90 A.2d 823, 825 (D.C.1952) (for an award of punitive damages, "something more than ordinary negligence [must be shown]; it must be reckless and of a criminal nature and clearly established"); *De Foe v. Potomac Elec. Power Co.,* 123 A.2d 920, 922 (D.C.1956) ("As a predicate for awarding exemplary damages against a corporation ... it must be found that the acts ... were unlawful, partaking somewhat of a criminal or wanton nature, and that they were characterized by willfulness, wantonness and malice and such conduct must be clearly established.")

13 By statute Colorado requires proof beyond a reasonable doubt. COLO.REV.STAT. § 13–25–127(2) (1989).

14 *See In re Lenoir,* 585 A.2d 771, 784 (D.C.1991) (in attorney disciplinary cases, "Bar Counsel is obliged to prove, by clear and convincing evidence, that a violation of a disciplinary rule has occurred"); *Park v. Sandwich Chef, Inc.,* 651 A.2d 798, 802 n. 3 (D.C.1994) (fraud must be proven by clear and convincing evidence).

15 *See, e.g.,* REPORT OF THE COUNCIL OF THE DISTRICT OF COLUMBIA'S COMMITTEE ON THE JUDICIARY, "BILL 2–52, THE DISTRICT OF COLUMBIA GENERAL SURVIVAL OF TORT ACTIONS ACT" (March 8, 1978) (summarizing history of legislative changes in our survival statute):

> The District of Columbia survival statute is the result of three successive Congressional enactments. The first District survival statute, section 235 of chapter 854 of the Act of March 3, 1901 (An Act to Establish a Code of Law for the District of Columbia, 31 Stat. 1227), removed the common law barrier to the survival of personal actions. The second, section 1 of chapter 508 of the Act of June 19th, 1948 (Public law 80–677, 62 Stat. 487) broadened the language of the survival statute to apply to "any cause of action" and excluded damages for pain and suffering from recovery in tort actions. The third statutory change, the Act of December 12, 1963 (Public Law 88–241, 77 Stat. 509), which recodified all of Title 12 of the District of Columbia Code, was aimed simply at clarifying the statutory language.

The 1978 amendment, which was accompanied by the above-cited report, reflected a legislative intent to permit recovery for pain and suffering in survival actions. *See Graves v. United States,* 517 F.Supp. 95 (D.D.C.1981).

16 Of the states that have ruled on the issue, twenty-eight follow the rule that punitive damages do not survive the death of the tortfeasor. Only four states have taken the contrary position and do so on grounds not applicable in the District of Columbia. *See Hofer v. Lavender,* 679 S.W.2d 470 (Tex.1984) (punitive damages also serve as reimbursement "for losses too remote to be considered as elements of strict compensation"); *Perry v. Melton,* 171 W.Va. 397, 299 S.E.2d 8, 13 (1982) (punitive damages serve added function of "providing additional compensation"); *Munson v. Raudonis,* 118 N.H. 474, 387 A.2d 1174, 1177 (1978) (same); *Ellis v. Zuck,* 546 F.2d 643 (5th Cir.1977) (in applying Alabama law, Court held because punitive damages are recoverable under Alabama Wrongful Death Act, such damages are also recoverable under the Survival Statute).

17 The restatement second of torts also takes the same position, stating that "the death of the tortfeasor terminates liability for punitive damages." RESTATEMENT (SECOND), TORTS § 926(b) (1979).

18 The tenants did not object to these instructions in the trial court, on any grounds applicable here, and do not challenge them in this appeal.

19 Neither party objected to the inclusion in the instructions of net worth as a relevant consideration in the circumstances here. Although, as we here hold, proof of net worth is required where a plaintiff invokes the defendant's wealth, net worth is

only one of several considerations relevant to a punitive damages determination. *See Bankers Multiple Ins. v. Farish,* 464 So.2d 530, 533 (Fla.1985) ("We did not intend to abandon the required relationship between the amount of punishment and the nature, extent, and enormity of the wrong and all of the circumstances in relation to the tort. The net worth of a defendant is one factor to be considered, but so are the circumstances and the degree of wantonness or culpability."); 87 A.L.R. 4th 141 § 2(a). "Punitive Damages: Relationship to Defendant's Wealth as Factor in Determining Propriety of Award" ("[W]ealth is certainly not the only factor or even the determinative factor in arriving at the correct amount. Awards which might otherwise be appropriate in relation to the defendant's wealth have been held inappropriately excessive in light of other circumstances ...").

The instruction here given without objection read in part:

> In the District of Columbia, there are four factors that we often discuss in determining the amount of punitive damages. These are described as the net worth of a defendant, the nature of the wrong committed, the state of mind of the defendant and attorneys fees that a plaintiff has incurred in the instant case. A jury may also consider the duration of the litigation and the profitability of a defendant's misconduct.

See also STANDARDIZED CIVIL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 16–3 (1981).

Nor have appellants challenged on appeal the trial judge's decision to simply bifurcate the compensatory and punitive damages portions of the trial.

20 The Estate of Jonathan Woodner also makes this argument; however, because we hold that the punitive damage award cannot be maintained against the Estate, we do not need to address the question of whether the tenants established the net worth of Jonathan Woodner's estate.

21 Laufer's 1982 and 1985 financial statements showed a net worth of $11.2 million and $19.8 million, respectively.

22 The only evidence in this record relating to Woodner Co.'s net worth shows that the punitive damage award was six times Woodner Co.'s net worth. Specifically, we note that after filing its notice of appeal, Woodner Co. requested a stay of the enforcement of the judgment pending appeal. The trial court appointed a Special Master to ascertain the net worth of the Woodner Co. to guide it in setting an appropriate bond. The finding of the Special Master, which was adopted by the trial court, was that the net worth of Woodner Co. as of May, 1990, one year after trial, was $1,500,000. In contrast, the punitive damage award against Woodner Co. was $9,000,000.

23 Over 90% of the total judgment against Woodner Co. was for punitive damages ($9 million in punitive damages and $965,000 for compensatory damages), and over 80% of the total judgment against Laufer was for punitive damages ($4.5 million in punitive damages and $965,000 in compensatory damages).

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383 A.2d 355
District of Columbia Court of Appeals.

FRANKLIN INVESTMENT CO., INC., Appellant,
v.
Vernon Lee SMITH, Appellee.

No. 11572.
|
Argued Sept. 20, 1977.
|
Decided Feb. 24, 1978.

Buyer of automobile sued assignee of installment sales contract for wrongful repossession and sale of the automobile. The Superior Court, District of Columbia, Harry T. Alexander, J., entered judgment on a jury verdict awarding compensatory and punitive damages of $5,000 and assignee appealed. The Court of Appeals, Nebeker, J., held that: (1) a checkbook stub introduced by the buyer was not admissible as demonstrative evidence, in that it demonstrated neither that a check was written nor that it was delivered, but merely demonstrated that the stub was completed; (2) the assignee's failure to afford the buyer statutory notice prior to sale of the automobile entitled the buyer to damages in the amount of his equity in the automobile, whether the repossession was lawful or not; (3) where the value of the buyer's equity in the automobile was the damages suffered either through wrongful sale or wrongful repossession, the buyer could not recover for both wrongful sale and wrongful repossession, and (4) evidence of malice and of corporate ratification of the assignee's action was sufficient to support a jury award of punitive damages.

Vacated and remanded.

Attorneys and Law Firms

***356** Bernard D. Lipton, Silver Spring, Md., for appellant.

Paris A. Artis, Washington, D.C., for appellee.

Before KELLY, NEBEKER and FERREN, Associate Judges.

Opinion

NEBEKER, Associate Judge:

Franklin Investment Co., Inc. (Franklin) appeals from a judgment entered upon a jury verdict awarding compensatory and punitive damages of $5,000 to appellee Vernon L. Smith. Franklin asserts that the trial court erred in its denial of Franklin's motions for judgment n. o. v. and for a new trial.

This case involved the repossession and sale, by Franklin, of an automobile purchased by Smith from G. B. Enterprises (also a defendant at trial) under an installment contract assigned to Franklin, whereby the creditor retained a security interest in the vehicle. It is undisputed that, if Smith were in default, Franklin was authorized to repossess. Smith, however, alleged that he was not in default when the automobile was repossessed and that, therefore, Franklin was liable to him for damages. Smith further alleged that Franklin failed to give him reasonable notice of the sale of the automobile as required by law[1] and that Franklin was liable to him for that failure. The jury returned a special verdict awarding Smith $2,000 for wrongful repossession, $1,000 for wrongful sale, and $2,000 as punitive damages, all against Franklin. (Defendant G. B. Enterprises was found not liable on all claims, presented on the theory that it had acted in concert with Franklin.)

I. Wrongful Repossession

Franklin's liability for wrongful repossession must rest in Smith's proof that he was current in his contractual payments. (Compliance with other terms of the conditional sales contract is not disputed on appeal; nor was the contract itself asserted to be void. See Vines v. Hodges, 422 F.Supp. 1292 (D.D.C.1976).) Smith testified that he was current in those payments when Franklin repossessed the automobile. Franklin introduced testimonial and documentary evidence that at least one payment had not been made. Smith was then permitted to reopen his case and to introduce, over objection, a checkbook stub which purported to show that Smith had made the disputed payment. The checkbook stub recites a date of March 9, 1973, and an amount of $139 to the order of Franklin Investment. There is an additional notation of "Replaced 3-16-71 with cash Deposit." The stub was removed from what was apparently a spiral-bound book

containing stubs for previously-written checks, and there was no entry on the stub indicating "balance forward." Smith testified that the stub was a part of the ledgers of "Cragers Associates," a firm in which Smith and one Heath were partners. He further testified that Heath delivered the check represented by the stub to Franklin. Smith's counsel specifically eschewed proffer of the stub on the theory that it was a business record, and no attempt was made to so qualify it. Rather, the stub was proffered and accepted, over objection, as demonstrative evidence.

[1] As demonstrative evidence, the checkbook stub demonstrates neither that a *357 check was written nor that it was delivered; it merely demonstrates that the stub was completed. In order to demonstrate that the check was written, the stub would first have to qualify as a business record of the transaction, Super.Ct.Civ.R. 43-I, or come within some other exception to the rule against hearsay. See Laas v. Scott, 26 App.D.C. 354 (1905); Nall v. Brennan, 324 Mo. 565, 23 S.W.2d 1053, 1057 (1930); Shea v. McKeon, 264 App.Div. 573, 35 N.Y.S.2d 962 (1942). Cf. Sabatino v. Curtiss National Bank, 415 F.2d 632 (5th Cir. 1969) (qualification of checkbook stub under the now-repealed Federal Business Records Act, 28 U.S.C. s 1732 (1970)); Fed.Rule of Evidence 803(6), (7). Since neither of these was shown, this case is similar to Nall v. Brennan, supra, in which "the checkstubs . . . were not shown to have been kept in the regular course of business" and did "not show intelligibly and with reasonable definiteness the facts sought to be established by them." 23 S.W.2d at 1057. Admission of the stub in this case, therefore, was error. And where, as here, the material fact sought to be established by the erroneously admitted evidence was the subject of direct evidentiary conflict, there must be a new trial. Moore v. Langdon, 2 Mackey 127, 47 Am.Rep. 262 (D.C.Sup.1882); Lipman Bros. v. Hartford Accident & Indemnity Co., 149 Me. 199, 100 A.2d 246, 254-55 (1953).

II. Wrongful Sale

[2] The jury also returned a verdict of $1,000 for the wrongful sale of Smith's automobile by Franklin. Franklin does not, on appeal, contest the sufficiency of the evidence to support the jury's conclusion that Smith was not afforded statutory notice prior to the sale. It does, however, contest the introduction of the checkbook stub as bearing upon this verdict. One element of Smith's damages was his equity in the automobile. The improperly admitted evidence tended to prove that Smith's debt was less than alleged by Franklin and that, therefore, Smith's equity was greater. The introduction of this evidence did not, however, prejudice Franklin with respect to the wrongful sale verdict. Excluding all evidence with respect to the payment assertedly demonstrated by the checkbook stub, Smith's evidence tended to show that he had made twenty-nine of the thirty-six payments of $139.41 that, in other words, $975.87 was unpaid. As Smith's counsel properly argued to the jury, Smith whether in default or not was entitled by reason of the wrongful sale to his equity in the automobile, i. e., its value less any debt owed upon it. D.C.Code 1973, s 28:9-507(1). See Neumeyer v. Union Bank, 43 Cal.App.3d 873, 118 Cal.Rptr. 116 (1974); Farmers State Bank v. Otten, 87 S.D. 161, 204 N.W.2d 178 (1973). The difference ($1,024.13) between the value of the automobile (testified by Smith to be $2,000)[2] and the value of seven payments ($975.87) fully supports the verdict of $1,000 for wrongful sale even if we assume that the full amount of each payment represented principal.[3]

*358 [3] [4] Franklin further argues that the verdict for wrongful sale cannot stand in conjunction with a verdict for wrongful repossession. In this case, we agree. The verdicts under each count were necessarily based upon the same evidence of damage, the value of Smith's equity in the automobile.[4] We need not consider, therefore, whether, in another case, liability for wrongful repossession might produce damages different from those for liability for wrongful sale with the result that the damages proved under each count would be complimentary rather than duplicative. It is elementary that damages for the same injury may be recovered only once, even though recoverable under two theories or for two wrongs, for a plaintiff is not entitled to be made more than whole unless punitive damages are warranted. Morrissette v. Boiseau, D.C.Mun.App., 91 A.2d 130, 131-32 (1952). See Robie v. Ofgant, 306 F.2d 656, 660 (1st Cir. 1962); Bartholomew v. Universe Tankships, Inc., 279 F.2d 911, 913 (2d Cir. 1960); Muise v. Abbott, 60 F.Supp. 561, 562 (D.Mass.1945), aff'd, 160 F.2d 590 (1st Cir. 1947) ("In the absence of circumstances warranting the allowance of exemplary damages, the court will not allow a plaintiff to recover more than one satisfaction in damages enough to put him in status quo."); Burke v. Burnham, 97 N.H. 203, 84 A.2d 918, 922 (1951); Industrial Supply Co. v. Goen, 58 N.M. 738, 276 P.2d

509, 513 (1954). Recovery of the equity for wrongful sale necessarily assumes that the same equity has not already been recovered under another count.

In this case we have held that there must be a new trial as to the wrongful repossession count. The verdict for wrongful repossession, therefore, does not now stand in duplication of the verdict for wrongful sale, and the latter verdict must be approved. Since, however, on retrial Smith might obtain a verdict on the wrongful repossession count, and since such a verdict would be inconsistent with the verdict now approved, Smith must, on remand, elect whether to accept the verdict on the wrongful sale count as his entire recovery or to retry both counts bearing in mind that he can recover his equity only once.

III. Punitive Damages

[5] The jury awarded $2,000 as punitive damages but did not specify upon which of the two counts the award was predicated. Because we reverse the judgment as to wrongful repossession for error in the assessment of liability, there is no basis for an award of punitive damages upon that count. For punitive damages may not be awarded where there is no basis for an award of compensatory damages. See Wardman-Justice Motors, Inc. v. Petrie, 59 App.D.C. 262, 266, 39 F.2d 512, 516 (1930). Because, however, there may be a new trial with respect to both counts, and because the punitive damages could have been predicated upon the wrongful sale count, we now consider the sufficiency of the evidence to support punitive damages on either count.

[6] **[7]** Punitive damages may properly be awarded "where the act of the defendant is accompanied with fraud, ill will, recklessness, wantonness, oppressiveness, willful disregard of the plaintiff's rights, or other circumstances tending to aggravate the injury." (Franklin Investment Co. v. Homburg, D.C.App., 252 A.2d 95, 98 (1969), quoting McClung-Logan Equipment Co. v. Thomas, 226 Md. 136, 172 A.2d 494, 500 (1961).)

When the defendant is a corporation, it must also appear that the act was authorized ***359** or ratified by the corporation rather than merely by an employee of the corporation. Wright v. Crown Co., D.C.App., 267 A.2d 347, 350 (1970). Proof of each of these elements need not be by direct evidence, but may appear from all the facts and circumstances of the case. See Franklin Investment Co. v. Homburg, supra at 98 (circumstantial evidence of intent); May Department Stores Co., Inc. v. Devercelli, D.C.App., 314 A.2d 767, 770 (1973), and General Motors Acceptance Corp. v. Froelich, 106 U.S.App.D.C. 357, 273 F.2d 92 (1959) (circumstantial evidence of corporate action).

[8] Franklin asserts that there was insufficient evidence of malice to support the jury verdict. With respect to the wrongful repossession count, the evidence tended to show that Smith was not in default when the automobile was repossessed and that the manager of Smith's account was not aware of any default at that time. With respect to the wrongful sale count, the evidence tended to show that Franklin did not send notice of the impending sale to Smith and that Franklin's records contained Smith's then-current address. Upon this evidence alone, there is no basis for the finding of malice. There is no evidence that Franklin repossessed Smith's automobile with full knowledge that there had been no default or in reckless disregard of reasonable procedures for determining whether there had been a default. Cf. General Motors Acceptance Corp. v. Froelich, supra (repossession based upon mere rumor). Nor is there evidence that Franklin had willfully disregarded actual notice of Smith's correct address when it failed to give lawful notice of the impending sale.

The jury, however, was entitled to consider Franklin's past and contemporaneous dealings with Smith as evidence of malice. Boyd v. Johnston, D.C.Mun.App., 52 A.2d 497 (1947). Smith's evidence tended to show four such instances. First, Smith testified that Franklin had repossessed his automobile within one month of the date of purchase by Smith. The basis for this repossession was Franklin's assertion that Smith did not have collision insurance as required by the security agreement. The security agreement recites, however, that Smith did have insurance, and it does not appear that Franklin made any attempt to verify its belief that Smith was without insurance prior to repossession. Smith testified that he did, in fact, have such insurance and that he reobtained possession of the automobile upon proof of that fact. The second and third incidents involved Smith's attempts to trade his automobile to another dealer. On both occasions, Smith testified, Franklin represented to the dealers that the balance of Smith's account was greater than the actual balance, thus preventing him from

obtaining favorable terms on the trade. Finally, Smith testified that the automobile, when repossessed, contained certain personal property upon which Franklin had no lien. Franklin's response to Smith's attempt to recover this property was the suggestion of one of Franklin's officers that Smith sue him.

Each of these circumstances was relevant to the issue of malice. In General Motors Acceptance Corp. v. Froelich, supra, the court held that a total failure of the finance company to verify information upon which it based its repossession was sufficient evidence to sustain punitive damages, a situation not unlike the prior repossession in this case. The refusal of Franklin to return Smith's personal property on demand is likewise indicative of a willful disregard for Smith's rights. And the misrepresentation of Smith's account balance on two occasions, while there is no indication of willfulness, is evidence the jury could well consider in finding that Franklin's conduct of its affairs was so grossly negligent as to evidence wantonness. We cannot say that this record, read in its entirety and in the light most favorable to Smith, lacks evidence of malice to support the jury verdict.

[9] Franklin asserts, however, that this malice cannot be imputed to the corporation since there was no showing that either the repossession or sale was approved by it or ratified with full knowledge of the facts. With respect to the sale, Franklin's own ***360** evidence showed that one of its officers approved the impending sale. On the day the automobile was repossessed, an officer signed a statement (which was to have been sent to Smith) that the automobile would be sold at auction. This was sufficient approval. As in Wardman-Justice Motors, Inc. v. Petrie, supra, prior approval of a wrongful act need not be accompanied by knowledge or notice that the act is wrongful.

[10] With respect to the repossession, there was no direct evidence of prior approval. Corporate approval of an action, however, may be shown by circumstantial evidence. "It is not essential in every case that an executive officer of high rank actively participate in corporate conduct, as in Wardman-Justice." General Motors Acceptance Corp. v. Froelich, supra, 106 U.S.App.D.C. at 359, 273 F.2d at 94. See also Jackson v. General Motors Acceptance Corp., D.C.Mun.App., 140 A.2d 699, 700-01 (1958). Here, there was evidence from which the jury could find that repossessions were part of Franklin's ordinary course of business. See General Motors Acceptance Corp. v. Froelich, supra, 106 U.S.App.D.C. at 359, 273 F.2d at 94. The instant case, therefore, is unlike either Woodard v. City Stores Co., D.C.App., 334 A.2d 189, 191 (1975), where the "only evidence (of corporate action) went to ratification," or Washington Garage Co. v. Klare, D.C.App., 248 A.2d 681 (1968), where there was no evidence that the act of an employee (delivery of a bailed automobile without receipt of the claim check), while not of itself wrongful, was in the usual course of the company's business. Rather, the jury could here, as in May Department Stores Co., Inc. v. Devercelli, supra (where store officials refused to apologize for their wrongful conduct), properly consider all the evidence before it (including the suggestion of Franklin's officer that Smith sue him) as indicative of corporate policy rather than individual whim.

IV. Conclusion

For the foregoing reasons, [5] the judgment entered in this case is vacated and the cause remanded. On remand, the trial court shall permit appellee to elect either to have judgment in the amount of $3,000 (compensatory damages of $1,000 and punitive damages of $2,000) or a new trial.

So ordered.

All Citations

383 A.2d 355

Footnotes

1 See D.C.Code 1973, s 28:9-504(3) (reasonable notification to debtor); id. s 40-902(e)(1)(vi), and 5AA D.C. Register s 5.2 (written notification within five days after repossession and at least 15 days before sale).

2 An owner of a chattel is generally competent to testify to its value. Vaughan v. Spurgeon, D.C.App., 308 A.2d 236 (1973); Shea v. Fridley, D.C.Mun.App., 123 A.2d 358 (1956); Glennon v. Travelers Indemnity Co., D.C.Mun.App., 91 A.2d 210 (1952); Brooks Transp. Co. v. McCutcheon, 80 U.S.App.D.C. 406, 154 F.2d 841 (1946).

3 Smith argues, for the first time on appeal, that he was entitled to a verdict of $1,788.76 instead of $1,000. His argument is based upon his assertion that he is entitled to an additional $788.76 under D.C.Code 1973, s 28:9-507(1), which provides in part:

If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus ten per cent of the cash price.

The record does not, however, reflect that this theory was ever advanced in the trial court. Nor was there any evidence that the automobile was a consumer good. The only evidence of the use of the automobile was Smith's testimony that he used it for business purposes and to drive his children to school. See D.C.Code 1973, s 28:9-109(1) (goods are consumer goods "if they are used or bought for use primarily for personal, family or household purposes" (emphasis added)). Smith did not, moreover, file a cross-appeal in this case. We need not, therefore, consider whether this recovery provision could have been applied to this case.

4 Smith introduced evidence that certain personal property was in the car when repossessed and that this property was not returned. Since, however, loss of this property was not pleaded, and no value was ever ascribed to it, we must assume that the jury considered this evidence as relevant to punitive damages only. See Part III, infra. Smith also testified that he used the car for business purposes, but did not testify to any business loss as a result of the repossession or sale.

5 Franklin has raised other claims of error which have been thoroughly reviewed and found to be without merit or, in view of our disposition, moot.

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Tab 9

Pannu v. Jacobson

District of Columbia Court of Appeals

September 27, 2005, Argued ; October 19, 2006, Decided

No. 04-CV-303

Reporter
909 A.2d 178 *; 2006 D.C. App. LEXIS 577 **

SARDUL S. PANNU and SURINDERJIT G. PANNU, APPELLANTS, v. JEFF JACOBSON, M.D., NEUROLOGICAL SURGERY GROUP, and WASHINGTON BRAIN AND SPINE INSTITUTE, P.C., APPELLEES.

Prior History: [**1] Appeal from the Superior Court of the District of Columbia. (CA-7485-01). (Hon. Melvin R. ***Wright***, Trial Judge).

Jacobson v. Pannu, 822 A.2d 1080, 2003 D.C. App. LEXIS 277 (D.C., 2003)

Core Terms

drill, standard of care, dura, surgery, ***jury instructions***, trial court, circumstances, neurosurgery, instructions, Appellees, neurosurgeon, nerves, increases, cottonoid, expert testimony, appellants', modified, cases, spine, requested instruction, similar circumstances, STANDARDIZED, lumbar, bone, theory of the case, parties, reasonable person, reasonable care, board-certified, requires

Case Summary

Procedural Posture
After a Superior Court of the District of Columbia jury trial in a ***medical malpractice*** matter involving lower back surgery and allegations of improper surgical technique, the jury ruled in favor of appellees, a doctor, a surgery group, and a professional corporation. Appellants, a patient and his wife, appealed, alleging that the trial court erred in declining to give a proposed modified version of a civil jury instruction.

Overview
Appellants claimed that the proposed instruction was a significant part of their theory of the case which was supported by evidence from expert witness testimony. The appeals court concluded that the trial court did not err by refusing to give the precise wording of the requested instruction, because it contained phrasing which could have confused the jury regarding the applicable law. First, the instruction, standing alone, could have confused the jury as to how it was to determine the national standard of care. If the trial court had adopted the proposed instruction, it could have confused the jurors as to whether they should credit or give more weight to appellants' or appellees' experts, or whether they were obligated to reject some of the testimony of appellees' expert witnesses. Nevertheless, it was incumbent upon the trial court to give the jury a fair and accurate statement of the law of negligence, in the context of a ***medical malpractice*** case involving neurological surgery. The court's failure to give an instruction consistent with the appropriate legal principles was an erroneous exercise of discretion. The error was not harmless and thus was an abuse of discretion.

Outcome
The judgment of the trial court was reversed and the case was remanded for a new trial.

LexisNexis® Headnotes

Evidence > ... > Testimony > Expert Witnesses > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers

Torts > ... > Proof > Custom > Medical Customs

Torts > ... > Standards of Care > Reasonable Care > General Overview

HN1[] In a ***medical malpractice*** action, there are

three elements a plaintiff must show to establish a prima facie case: (1) the applicable standard of care; (2) a deviation from that standard of care by the defendant; and (3) a causal relationship between that deviation and the plaintiff's injury. In view of the uniform standards of proficiency established by national board certification, the standard of care for board-certified physicians is to be measured by the national standard. Moreover, the use of expert testimony is required since the subject is not likely to be within the common knowledge of the average layman. Establishing the standard of care is essential to a prima facie case of negligence because physicians are not expected to be perfect; they are liable in negligence only when their behavior falls below that which would be undertaken by a reasonably prudent physician, and there is a causal relationship between that behavior and a plaintiff's injury. The duty of reasonable care requires that those with special training and experience adhere to a standard of conduct commensurate with such attributes. It is this notion of specialized knowledge and skill which animates the law of professional negligence.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Jury Trials > ***Jury Instructions*** > General Overview

Civil Procedure > ... > Jury Trials > ***Jury Instructions*** > Requests for Instructions

Civil Procedure > Appeals > Standards of Review > General Overview

HN2[] A party is entitled to a jury instruction upon the theory of the case if there is sufficient evidence to support it. However, a trial court has broad discretion in fashioning appropriate ***jury instructions***, and its refusal to grant a request for a particular instruction is not a ground for reversal if the court's charge, considered as a whole, fairly and accurately states the applicable law. In determining whether a proposed instruction on a party's theory of the case was properly denied, the appellate court reviews the record in the light most favorable to that party.

Civil Procedure > ... > Jury Trials > ***Jury Instructions*** > General Overview

HN3[] A specific jury instruction should be given when it is necessary to explain to the jury specialized legal doctrine that was not adequately described in the general instruction nor readily apparent to the jury.

Torts > Malpractice & Professional Liability > Healthcare Providers

Torts > ... > Proof > Custom > Medical Customs

Torts > ... > Standards of Care > Reasonable Care > General Overview

HN4[] The standard of care, which evaluates a defendant's conduct against that conduct which is reasonable under the circumstances, is applicable in the law of professional negligence. The law of negligence generally does not acknowledge differing standards of categories of care, but requires an adherence to a uniform standard of conduct: that of reasonable care under the circumstances. Thus, the context of a medical negligence action is critical to a determination of what constitutes "reasonable care under the circumstances."

Torts > Malpractice & Professional Liability > Healthcare Providers

Torts > ... > Proof > Custom > Medical Customs

HN5[] The standard of care in a medical negligence case focuses on the course of action that a reasonably prudent doctor with the defendant's specialty would have taken under the same or similar circumstances.

Torts > Malpractice & Professional Liability > Healthcare Providers

HN6[] At the outset of a ***medical malpractice*** case, the plaintiff must establish through expert testimony the course of action that a reasonably prudent doctor with the defendant's specialty would have taken under the same or similar circumstances.

Torts > ... > Standards of Care > Reasonable Care > General Overview

HN7[] In a negligence action there are no categories of care, i.e., the care required is always reasonable care. What is reasonable depends upon the

dangerousness of the activity involved. The greater the danger, the greater the care which must be exercised.

Torts > ... > Standards of Care > Reasonable Care > General Overview

HN8[] Reasonable care for a specialist depends upon his or her specialized knowledge or "superior qualities."

Torts > ... > Elements > Duty > General Overview

Torts > ... > Standards of Care > Reasonable Care > General Overview

HN9[] The word "care" in a negligence action denotes not only the attention which is necessary to perceive danger, but also the caution required to avert it once it is perceived. Yet, neither the duty to be adequately attentive, nor the duty to proceed with caution necessarily requires a person to change his conduct if he already is being sufficiently cautious.

Torts > ... > Standards of Care > Reasonable Care > Reasonable Person

HN10[] The standard of the reasonable man requires only a minimum of attention, perception, memory, knowledge, intelligence, and judgment in order to recognize the existence of the risk. If the actor has in fact more than the minimum of these qualities, he is required to exercise the superior qualities that he has in a manner reasonable under the circumstances. The standard becomes, in other words, that of a reasonable man with such superior attributes.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Evidence > ... > Expert Witnesses > Credibility of Witnesses > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers

Torts > ... > Proof > Custom > Medical Customs

HN11[] In any *medical malpractice* action, the applicable national standard of care comes from the testimony of expert witnesses, and it is up to the jury to determine credibility and which expert's testimony will be given the most weight, and to resolve conflicts in testimony.

Torts > ... > Elements > Duty > General Overview

HN12[] The duty to proceed with caution does not impose an absolute duty to change one's conduct if he already is being sufficiently cautious.

Civil Procedure > ... > Jury Trials > *Jury Instructions* > General Overview

HN13[] Even though a trial court is under no obligation to give any particular requested instruction, if the request directs the court's attention to a point upon which an instruction to the jury would be helpful, the court's error in failing to charge may not be excused by technical defects in the request. Likewise, the court must instruct the jury properly on the controlling issues in the case even though there has been no request for an instruction or the instructions are defective. The purpose of these rules is plain: it is incumbent on the trial court to properly instruct the jury on the law. Consequently, although it is not the duty of a trial judge to recast or modify an erroneous or misleading requested instruction, the trial court must give the jury an accurate and fair statement of the law. The court may hear requests and arguments from the litigants, but ultimately, it is the court which bears the burdens of deciding which law to convey to the jury, and of formulating a neutral and objective manner in which to phrase the instructions.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Appeals > Standards of Review > Reversible Errors

HN14[] If an error in a discretionary determination jeopardizes the fairness of the proceeding as a whole, or if the error has a possibly substantial impact upon the outcome, the case should be reversed.

Counsel: Marc Fiedler for appellants.

Brian J. Nash, with whom Leonard W. Dooren, was on the brief, for appellees.

Judges: Before REID and KRAMER, Associate Judges, and NEWMAN, Senior Judge. Opinion for the court by Associate Judge REID. Dissenting opinion by Associate Judge KRAMER at page 43.

Opinion by: Reid

Opinion

Reid, **[*180]** *Associate Judge*: After a jury trial in this ***medical malpractice*** matter, which involved lower back surgery and allegations of improper surgical technique, the jury rendered a verdict in favor of appellees, Dr. Jeff Jacobson, the Neurological Surgery Group, and the Washington Brain and Spine Institute, P.C. Appellants, Dr. Sardul S. Pannu and his wife, Surinderjit G. Pannu appealed, alleging that the trial court erred in declining to give the proposed modified version of STANDARDIZED CIVIL JURY INSTRUCTION FOR THE DISTRICT OF COLUMBIA, **[**2]** § 5.03 (rev. ed. 2005) (hereinafter Instruction 5-3), which the appellants had specifically requested. Appellants maintain that the proposed instruction - "a reasonable doctor under the standard of care changes [his] [her] conduct according to the circumstances or according to the danger [he] [she] knows, or should know, exists"; and that "as the danger increases, a reasonable doctor under the standard of care acts more carefully" - was a significant part of their theory of the case which was supported by evidence from expert witness testimony. We conclude that the trial court did not err by refusing to give the precise wording of the requested instruction, because it contained phrasing which could have confused the **[*181]** jury regarding the applicable law. Nevertheless, it was incumbent upon the trial court to give the jury a fair and accurate statement of the law of negligence, in the context of a ***medical malpractice*** case involving neurological surgery. And, the failure of the trial court to give an instruction consistent with the legal principles set forth in this opinion constituted an erroneous exercise of discretion. Furthermore, we hold that the error was not harmless and **[**3]** thus constituted an abuse of discretion. Consequently, we reverse the judgment of the trial court and remand this case for a new trial.

FACTUAL SUMMARY

The record on appeal shows that in April 2000, Dr. Pannu was a sixty-four-year-old chemistry professor with a history of lower back pain. Dr. Pannu consulted with Dr. Jacobson, who, after performing several diagnostic tests, recommended that Dr. Pannu undergo a decompressive lumbar laminectomy and a partial discectomy. Dr. Jacobson believed that Dr. Pannu was suffering from lumbar stenosis, a narrowing of the spinal channel, which compresses the nerves traveling through the lumbar spine to the legs. The surgery was intended to excise the posterior arch of the vertebrae, known as the lamina, and an intervertebral disc in order to relieve compression of the nerves of the spine. [1]

[4]** The surgery took place on June 9, 2000 at Suburban Hospital in Bethesda, Maryland. While working to remove the lamina from the lower portion of one of the lumbar vertebrae, known as L5, using manual bone-cutting instruments called rongeurs, Dr. Jacobson inadvertently nicked the dura, the tough fibrous membrane covering the spinal cord; and created a one millimeter tear in it, apparently a relatively common complication of such surgery. Through the hole in the dura Dr. Jacobson could see the arachnoid, a thin, delicate, cobweb-like membrane that lies beneath the dura and encloses the spinal cord; however, no cerebrospinal fluid was leaking out and no nerves had been damaged.

Dr. Jacobson then moved to the upper portion of L5 and attempted to continue using the rongeurs. However, the fact that Dr. Pannu's dura was thinner than normal and very nearly stuck to the underside of the lamina made it difficult to separate the dura adequately from the bone. Dr. Jacobson determined that a high-speed, turbine, hand-operated drill would be an equally effective way of thinning the lamina to a thickness that would allow him to pick away the remaining bone with special instruments. He fit the drill **[**5]** with a five-millimeter burr, tested it, and used a small piece of cotton, known as a cottonoid, to protect the already exposed dura. [2] Since he could not place the cottonoid between the dura and the bone due to the inadequate spatial conditions, Dr. Jacobson laid the cottonoid on the exposed dura next to the bone and proceeded to drill, with one hand operating the drill and one hand operating the suction

[1] All parties agree that this was an elective surgery and that Dr. Pannu was a proper candidate. Two of Dr. Pannu's three sons are neurosurgeons and he discussed the surgery with his family before deciding that it was the proper course of action for him.

[2] Dr. Jacobson maintained that he used a cottonoid to protect the dura, even though his post-operative notes made no mention of the cottonoid.

instrument.

As Dr. Jacobson continued to perform the surgery, his drill encountered a piece of bone of uneven consistency, which caused the drill to jump and land in the dural sac between the bone and the cottonoid near the area which had already been [*182] torn. The drill severed several of Dr. Pannu's nerves, specifically those responsible for bowel and bladder control. Dr. Jacobson removed the nerves from the drill, put them back in the dural sac, sutured it closed, placed [**6] fibrin glue over it, and continued on with the operation, the remainder of which was successful.

Dr. Pannu lost bladder and bowel function and has no hope of regaining them. [3] Consequently, Dr. Pannu's life revolves around the time and labor intensive processes that he must undergo in order to urinate and defecate. He must catheterize himself every four hours in sterile environments to guard against urinary tract infections; he wears a diaper due to his total inability to control his bowels, and often must manually disimpact himself.

Dr. Pannu's injuries have caused him to suffer episodes of depression. He retired from his position as a tenured professor of analytical chemistry at the University of the District of Columbia due to his embarrassment over his inability to control his bowels. His social life has deteriorated as well as his intimacy with his [**7] wife. Appellants filed a ***medical malpractice*** action against appellees. Dr. Pannu sought compensatory damages for the loss of his bowel and bladder functions, and Mrs. Pannu claimed damages due to loss of consortium. The jury returned a verdict in favor of defendants/appellees.

ANALYSIS

Dr. Pannu presents only one issue on appeal: whether the trial court erred in refusing to give a modified version of STANDARDIZED CIVIL JURY INSTRUCTION 5-3, which would have expressed appellants' theory of the case that, in a ***medical malpractice*** action, as the danger increases, a proportional change in conduct is required. Appellants contend that the trial court had no discretion as to whether or not to give the instruction because there was sufficient evidence in the record to establish a factual predicate for it. They cite testimony from medical experts from both parties, as well as the trial judge's conclusion that they had laid a factual predicate to substantiate their claim. They insist that no other instruction given by the trial judge adequately explained the legal principle that negligence is a relative concept and that consequently, the jury did not receive a complete and accurate set [**8] of instructions on the applicable law.

Appellees counter that the requested instruction was correctly refused because it is most appropriately given in general negligence cases, whereas it can be confusing to jurors in a ***medical malpractice*** suit. Appellees argue that in cases that do not involve expert witnesses, juries are expected to be able to draw upon their life experiences to determine what it means to "act more carefully" in a dangerous situation. However, they assert that juries are not expected, nor should an instruction tell them, to determine on their own what it might mean for a neurosurgeon to act more carefully during a surgery that involves working millimeters away from the spinal cord. Instead, they contend, juries are expected to listen to the expert testimony and conceptualize an understanding of the appropriate standard of care from what they believe was the most credible testimony. They assert that the jury was free to believe the appellants' expert testimony concerning what Dr. Jacobson needed to do to be more careful, but that an instruction telling the jury that Dr. Jacobson had to act more carefully would invite jury speculation. Moreover, they argue [*183] that judges [**9] retain some discretion in refusing requested ***jury instructions*** when it involves a legal, not factual, question. Finally, appellees contend that an overview of the complete set of ***jury instructions*** given by the trial judge reveals that he did provide a fair and accurate explanation of the law.

Before discussing the legal issue presented, and the arguments of the parties, we set forth pertinent background information. Then we articulate applicable legal principles.

The Expert Testimony

Most of the trial testimony involved medical experts who were presented by both parties to explain to the jury what the appropriate national standard of care was in 2000 for a board-certified neurosurgeon performing the type of lower back surgery Dr. Jacobson had conducted on Dr. Pannu. Each side called two independent medical experts, and Dr. Jacobson testified for the defense. The testimony covered acceptable surgical techniques, equipment, and personnel used for the procedure including: the drill versus manual bone

[3] All parties agree that Dr. Pannu's injuries occurred as a result of the surgery, and it is also uncontested that the injuries are extremely debilitating.

cutting instruments; the type of drill; the size of the drill bit; the direction and motion of the drill; various items which could protect the dura during surgery; the use **[**10]** or non-use of an assistant as an extra pair of hands to help protect the dura; and the use of two hands versus one hand while operating the drill.

Dr. George Gruner and Dr. Lawrence F. Marshall, the medical experts for the appellants, each testified that Dr. Jacobson should have been more careful during the operation. At the time of the trial, Dr. Gruner was a board-certified neurosurgeon who practiced in Virginia. [4] Prior to testifying, he reviewed Dr. Pannu's medical records, including Dr. Jacobson's operative report, and Dr. Jacobson's deposition transcript. Dr. Gruner stated that "the closer you get to the dura, the more careful you have to be and the more likely you are to have an injury. . . . The most important goal is, number one, . . . to prevent any type of injury to the nerve roots." When asked if it was his opinion that "the standard of care for a reasonably prudent Board Certified neurosurgeon require[s] him or her to take all necessary actions to protect against nerve injury," Dr. Gruner replied "Yes." (*Id.* at 229-30).

[11]** In Dr. Gruner's opinion, which was based on the operative report, Dr. Jacobson's deviation from the standard of care was demonstrated by his failure to use a cottonoid to adequately protect the dura. He testified that:

> The original operative report does not state anything about putting a cottonoid toward the dura, about using any type of measure to protect the dura the way one normally would. It's because of that I said this was below the standard of care. **[*184]** The dura in this situation, especially because it was thinned, needed to be adequately protected. [5]

Dr. Gruner believed that if the cottonoid had been used in "the appropriate manner . . . more likely than not [] it [would] have been effective." (*Id.* at 240). Dr. Gruner also discussed other possible methods of protecting the dura. While recognizing that the national standard of care is not based on his own practice, Dr. Gruner noted that his technique when drilling bone involved the "use [of] two hands. Some surgeons use one hand. Both are appropriate. With both methods you're trying to [maintain] control . . . whenever you use a drill there is a tendency for the drill to kick." (*Id.* at 233). When **[**12]** questioned about the drill specifically Dr. Gruner commented that neurosurgeons sometimes use "diamond drills. The advantage of a diamond drill is it doesn't drill as rapidly and it's finer. It takes much longer and you go just minutely. We use it around the brain stem. In this area most people will not use a diamond drill." [6] (*Id.* at 234). As for the burr size, Dr. Gruner testified, "[a]s a general rule you can state the larger the burr size the more likely it is to kick," and that the bit Dr. Jacobson used was "on the medium to large size." (*Id.* at 234-35). Dr. Gruner also mentioned that if a doctor didn't use a cottonoid to protect the dura, "one would use a piece of metal, if one could get that in there properly. Having the assistant control [the metal retractor] as well." (*Id.* at 241). Dr. Gruner testified that it was possible to use the rongeurs throughout such an operation and that "the advantage of the [rongeur], as opposed to the drill, is the fact that . . . your hand has total control of that instrument, [so] you can do it slowly."

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[4] After finishing Medical School at Northwestern University in 1964 and his internship, he served in the armed forces before spending four years at the Neurological Institute and receiving additional training in neurosurgery at Northwestern, and neuropathology at Loyola University. He entered practice in 1972, and became board-certified by the American Board of Neurological Surgery in 1975. He practiced in California for ten or eleven years before moving to Virginia in 1983. At the time of trial, he had performed six or seven thousand operations on the spine (between two thousand and twenty five hundred were lumbar), and over seven hundred laminectomies. He regularly reads journals in the field of neurosurgery, such as the Journal of Neurosurgery and the American Spine Journal, and attended national professional meetings, including those sponsored by the American Association of Neurological Surgery and the Congress of Neurological Surgeries. Dr. Gruner does not teach neurosurgery residents (there are none at the community hospital where he works), and has authored only one article (during his residency).

[5] Dr. Gruner was asked:

> Based upon your review of those records [the operative report and Dr. Jacobson's deposition] and given all of the experience you have with respect to the performance of these thousands of procedures that you have done, have you have been able to formulate an opinion as to whether or not the defendant acted within the standard of care?

He replied:

> It was my feeling based on reading the operative report, the records, that it was below the standard of care, what was done prior to the time that . . . the drill entered the dura.

[6] Dr. Jacobson did not use a diamond drill. He testified that "they remove bone very slowly. They generate a great deal of heat and they're generally used . . . in the brain . . . ."

[7] (*Id.*) Finally, as his direct testimony drew to a close, Dr. Gruner stated his opinion that Dr. Jacobson "deviated **[**13]** from the normal standard of care . . . [b]y not adequately protecting the dura at a time when it was most liable for injury."

[14]** On cross-examination, Dr. Gruner acknowledged that Dr. Jacobson did not list a number of items in his operative report that he actually used during Dr. Pannu's surgery. On redirect examination, Dr. Gruner was again asked how Dr. Jacobson deviated from the standard of care. He responded, in part:

> In reading the original operative report there is no mention . . . made of any type of protection that was offered to the dura at the time he was drilling. That's very important to a[n] incident like this. Anytime an untoward event occurs, a prudent neurosurgeon would dictate immediately their operative note, what happened, what they did, while it's still fresh in their mind . . . . The original operative report does not state anything about putting a cottonoid toward the **[*185]** dura, about using any type of measure to protect the dura the way one normally would. It's because of that instance that I said this was below the standard of care. The dura in this situation, especially because it was thinned, needed to be adequately protected. Now, how you protect it, there are various methods. I use one method. Dr. Jacobson may use one method. Other doctors may use another method. But you try **[**15]** to use every method humanly possible to protect that dura because the consequences of not protecting can be disastrous, as it was.

Dr. Marshall was the other board certified neurosurgeon presented by appellants. [8] **[**17]** He supported Dr. Gruner's views, testifying that "the issue is when you have the possibility or probability of direct dural contact with a drill, then every precaution has to be exercised." Dr. Marshall, testified that "the standard [of care] requires appropriate precautions be taken to protect the dura." He declared: "In a straight forward lumbar stenosis case . . . there is a relationship between the potential of operator error and increased nerve root injury." When asked if such precautions include using "some object, be it cotton, be it fiber, be it metal, be it plastic," to protect the dura, Dr. Marshall answered, "what you have enumerated, yes . . . I think some mechanism of protection of the dura, cotton, another instrument is generally required." (*Id.* at 467-70). He also asserted that "[i]f you have multiple injuries to a nerve root, to nerve roots using a drill you have violated the standard of care." (*Id.* at 371). Moreover, in Dr. Marshall's opinion, **[**16]** it is "highly unlikely" that Dr. Jacobson would have severed the specific nerves that he did if he had been drilling in the proper direction - from medial to lateral (inside out). [9] (*Id.* at 397).

However, when pressed by appellants' own counsel as to what "the standard of care specifically require[d] of Dr. Jacobson . . . to prevent against [Dr. Pannu's] injury," Dr. Marshall replied, "I think that's a complex question because [] one isn't there." (*Id.* at 401). Although he could not testify that there were specific requirements **[*186]** demanded by the standard of care, Dr. Marshall did offer alternate techniques that Dr.

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[7] Dr. Gruner later testified that while rongeurs could be used effectively to perform the surgery, "in this day and age I would say that of neurosurgeons . . . everyone uses [drills]."

[8] Dr. Marshall served as head of neurosurgery at the University of California at San Diego, a large teaching hospital complex. At the time of trial, there were ten neurosurgeons in the division headed by Dr. Marshall. In addition, Dr. Marshall was in charge of training residents in neurologic surgery. Previously, Dr. Marshall also was part of a joint program with the Chair of Orthopedics, who was then a "nationally known spine surgeon." The program was designed to train spine fellows, orthopedists, or "neurological surgeons in more complex techniques in spine surgery . . . ." Dr. Marshall authored a chapter in a textbook addressing complications from "lumbar spine" surgery, including complications from drilling. He also contributed "a couple of chapters" for a book entitled, THE SPINE. Part of his contribution discussed "precautions one can take with a drill to minimize the possibility of a mishap." Dr. Marshall estimated that he has authored between 250 and 300 publications. In addition, Dr. Marshall held editorial positions on two major professional journals - the Journal of Neurosurgery, and the Neurosurgery spine journal. He has lectured widely at various universities, including his "home institution," U.C.L.A., and for specialized entities such as NATO. Dr. Marshall had performed over two thousand surgeries on the lower back region. He estimated that he had used a high speed drill during lumbar surgery approximately 2000 times.

[9] Dr. Marshall was asked:

> Do you think it's possible that if Dr. Jacobson was drilling from medial to lateral, inside out, and the drill jumped or bumped[,] that he could go all the way over to the right side and take out all of those nerves to a reasonable degree of medical probability?

He answered:

> No, I think that is highly, highly unlikely. I don't - I could not imagine that.

Jacobson could have used to prevent Dr. Pannu's injuries, in large part echoing Dr. Gruner. He mentioned that a neurosurgeon could 1) use the suction device or bayoneted forceps as protective instruments to provide a barrier for the dura; 2) reduce the torque **[**18]** on the drill or the air pressure to reduce the drill speed; or 3) use bone cutting instruments. (*Id.* at 401-03). He stated that, at a minimum, the standard of care required that Dr. Jacobson maintain control of the drill "every second during the surgery," and in his opinion Dr. Jacobson did not control the drill within the standard of care because "the degree of movement of the drill . . . [was] inconsistent with adequate control of the drill." (*Id.* at 406-10). He acknowledged that in using a drill to remove bone, the surgeon may confront "different bone consistencies," which may cause the drill to kick or move. But, "that doesn't happen most of the time . . . . It happens . . . . But it's unusual . . . ."

Dr. Jacobson, and the experts testifying on his behalf, attempted to counter Dr. Gruner and Dr. Marshall's testimony by asserting that despite the increase in danger to the nerves that resulted from the first tear in the dura, there was nothing physically different that he could have done to provide more protection for the dura once it had been torn. [10] Dr. Jacobson testified that although Dr. Gruner was correct that he had not written in the original operative report **[**19]** that he had used a cottonoid to protect the dura, that was simply a mistake in his own dictation because it was his common practice to place a cottonoid in the area to protect the dura and he had done so during Dr. Pannu's surgery. He admitted that the standard of care required him to "protect and be cognizant of where the dura is," but maintained that there was no single correct way to do so. He pointed out that "[t]here are some surgeons who put absolutely nothing there [to protect the dura]. Their protection is the skill and environment in which they're working." (*Id.* at 199).

[20]** Dr. Jacobson further testified that he felt the safest and most comfortable when using one hand on the drill because he was taught "that it was safer . . . [to] use the suction with one hand and the drill with the other"; and that he avoided techniques that call for an additional pair of hands because "although there are four hands, there are really only two eyes . . . I can't control [an]other person's hand. . . . I don't like to trust, under those circumstances, the actions of another person that can't see what's going on." (*Id.* at 194-97). Dr. Jacobson insisted that his use of the drill was appropriate, that the size and substance of the drill bit met the standard of care, and that he tested the drill before the operation began and it had performed well. (*Id.* at 177-79). Essentially, he testified that he met the standard of care at all times and that there was nothing procedurally safer that he could have done to protect the dura.

The medical experts testifying on behalf of Dr. Jacobson corroborated his view. Dr. Mark Shaffrey, a board-certified neurologist **[*187]** at the time of the trial was the medical director of the University of Virginia's Neuroscience Service Center **[**21]** and professor of neurosurgery at the University of Virginia Hospital (through the University of Virginia School of Medicine). [11] Dr. Shaffrey reviewed record documents, including deposition transcripts and Dr. Jacobson's operative report. He was asked his opinion as to "whether or not the care and treatment during the course of the surgery on June 9, 2000, by Dr. [] Jacobson, and the surgery of Dr. Pannu met the applicable standard of care of reasonable conduct by a board certified neurosurgeon in the performance of that surgery?" He replied: "I

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[10] Dr. Jacobson received his Bachelor of Arts with distinction from the University of Rochester and went on to graduate from medical school at George Washington University (GWU) in 1977. He remained at GWU for the next six years, training a year in general surgery and then five years in neurosurgery. He began his practice of neurosurgery in 1983 and became Board Certified in either 1985 or 1986. At the time of the trial he had performed over 2,000 lumbar procedures and had experience with close to 1,000 cases of lumbar stenosis. In addition to operating on the spine, his practice also included brain surgery.

[11] As an undergraduate, Dr. Shaffrey attended Virginia Tech, and received degrees in biology and biochemistry in 1983. He completed his medical education at the University of Virginia Medical School in 1987, his internship in general surgery at the United States Air Force Medical Center in San Antonio, and his neurosurgical residency at the University of Virginia Hospital. After a tour of duty at the Kiesler United States Air Force Medical Center in Biloxi, Mississippi, he returned to the University of Virginia Hospital as an associate professor of neurosurgery, where he rose to the rank of professor of neurosurgery and vice chair of the Department of Neurosurgery. He has authored or co-authored approximately 50 articles, has reviewed papers to determine whether they should be published in the Journal of Neurosurgery, and has given lectures at other medical centers as well as at national professional meetings. In addition to teaching neurosurgery to medical students and residents, lecturing, and writing, Dr. Shaffrey has performed 2000 to 2500 spinal surgeries, including approximately one thousand surgeries in the lumbar region of the spine.

believe it met the standard of care." In explaining his response, he testified that "it would [not] be possible to say that there's any one technique in any situation that would embody the standard of care. Therefore, they're [sic] going to be many techniques to do the same job that basically are all acceptable." When asked whether Dr. Jacobson's use of a high-speed drill to remove or thin a thickened piece of lamina was "in accordance with the standard of care," Dr. Shaffrey replied in the affirmative. (*Id.* at 89). He testified that when "the dura is thinned . . . normally you can't use the punches and the Rongeurs without destroying **[**22]** the joints or compromising the stability of the spine. That's why we use the drill." (*Id.* at 133).

[23]** Dr. Shaffrey was asked about each of the techniques used by Dr. Jacobson and despite admitting that "for me, rough surfaces [on the bone] are areas where you have to pay a lot of attention," he did not indicate that there was anything more that Dr. Jacobson could have physically done to protect the dura. (*Id.* at 133). In fact, he testified that Dr. Jacobson was "not required" under the standard of care to use anything to "separate the drill from the [exposed dura]," because he had often seen other specialists perform the surgery successfully without using any barrier. (*Id.* at 104-05). Concerning the standard of care and "the direction that a physician drills the lamina in the spine during a lumbar stenosis at the L4/L5 level," Dr. Shaffrey stated: "I'm not aware of any standard for the direction that the drill should be used." He added, "you have to be prepared when you do an operation like this for the bone to be of various consistencies, thicknesses, hard, soft, all of those instances. And you're not sure . . . before you start what those are going to be. You have to go in and assess the situation as you go." He rejected the correlation between "the number of nerve **[**24]** roots that were injured" and the "control of the drill." Several nerve roots could be injured if the drill traveled only "a short distance" because "[a] lot of nerve roots in the thecal sac are tied together with little **[*188]** strands of something called arachnoid, which means spider web[, and] . . . . if you hit the arachnoidal membrane, you can automatically wrap up or lacerate several [nerve roots]." With regard to the use of the cottonoid to protect the dura, defense counsel asked Dr. Shaffrey: "[I]n the year 2000 in June of that year, did all board-certified neurosurgeons practicing acceptable care use cottonoids to protect the thecal sac or the dura and its contents when drilling on the lamina near the edge of the lamina?" He replied: "No." During "the course of operating with other competent neurosurgeons," Dr. Shaffrey "often" "observed [] other specialists using no barrier device when using a drill" with one hand.

Dr. Donlin Long was the other defense board-certified neurosurgeon. [12] **[**26]** He testified that the tragic result of Dr. Pannu's surgery was

> simply one of those unfortunate complications that you cannot completely avoid if you're going to do this kind of surgery **[**25]** . . . . I certainly wouldn't prescribe a way and say that's the only way it can be done . . . . [It d]epends on what you're comfortable with, how you've learned it, and how you think you do it best. . . . There are just many ways to use that drill.

(*Id.* at 159-62). Dr. Long further asserted that "there's nothing that anybody has ever worked out that's a sure protection. . . . [T]here is just no instrument made for that purpose. There's nothing you can do that will definitely prevent this from happening." (*Id.* at 165). [13] He noted that a dural tear of the sort Dr. Jacobson first made was not a violation of the standard of care; it happens in five to ten percent of surgeries. (*Id.* at 160-61).

In addition, Dr. Long commented that it was "perfectly

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[12] Dr. Long attended Jefferson Junior College in Missouri, followed by three years of undergraduate study at the University of Missouri. He entered the medical school at the University of Missouri without obtaining his undergraduate degree, and finished medical school in 1959. He served his internship in surgery at the University of Minnesota, where he also earned his Ph.D degree in neuroanatomy in 1964, during his residency in neurosurgery. He received specialized training in pediatric neurosurgery at Harvard and the Boston Children's Hospital, and then served as a clinical associate in the neuropathology laboratory at the National Institutes of Health from 1965 to 1967. Thereafter, he was appointed to the faculty at the University of Minnesota, worked as chief of neurosurgery at the Minneapolis VA Hospital for six years, and became board-certified in 1968. In 1973, he accepted the position of chief of neurosurgery at Johns Hopkins University and served in that capacity until August 2000. During his career, he trained approximately 150 to 160 neurosurgeons, lectured widely, wrote 239 professional articles and 85 chapters in books, and served as an editor in the field of neurosurgery. He has performed thousands of surgeries, including the removal of acoustic tumors, and over one thousand lumbar stenosis surgeries, and as of the date of trial, continued to perform neurosurgeries.

[13] Dr. Gruner, one of appellants' medical experts, also testified "[l]et me say a caveat is there is nothing that I can do that can guarantee a hundred percent. There is nothing [] that we do in neurosurgery that guarantees anything a hundred percent."

appropriate" for Dr. Jacobson to use the drill during the surgery, and that there was no single correct direction in which surgeons are required to move the drill under the standard of care. (*Id.* at 157). However, he did say that "the standard technique is to use one hand on the drill, one hand on the suction. That's the way I teach everybody to work. There are other ways to do it. Some people like to use two hands on the drill." [14] (*Id.* at **[*189]** 167). Dr. Long agreed with Dr. Shaffrey that a cottonoid was not required as part of the standard of care; in fact, he asserted that "[t]he cottonoid is no barrier to th[e] drill," and that when he used the drill he "almost never ha[s] protection in." (*Id.* at 164-65).

[27]** ***The Jury Instructions***

At trial, the judge made few comments as to why he ultimately chose not to grant appellants' request for Instruction 5-3; instead, he allowed both sides to make their arguments as to its inclusion or exclusion and then made a brief and summary decision. Thus, the arguments made by the two sides during the instruction selection process are instructive.

Initially, appellants requested that both Instruction 5-3 and STANDARDIZED CIVIL JURY INSTRUCTION FOR THE DISTRICT OF COLUMBIA, § 5.02 (rev. ed. 2005) (hereinafter Instruction 5-2) be given to the jury. These instructions are included in section five of the STANDARDIZED CIVIL ***JURY INSTRUCTIONS*** FOR THE DISTRICT OF COLUMBIA, relating to "Negligence." Instruction 5-2 reads:

> Negligence is the failure to exercise ordinary care. To exercise ordinary care means to use the same caution, attention or skill that a reasonable person would use under similar circumstances. It is negligent to do something that a person using ordinary care would not do. It is also negligent to fail to do something that a person using ordinary care would do.

Instruction 5-3 reads:

> Negligence is a relative concept. **[**28]** A reasonable person changes [his] [her] conduct according to the circumstances or according to the danger [he] [she] knows, or should know, exists. Therefore, as the danger increases, a reasonable person acts in accordance with those circumstances. Similarly, as the danger increases, a reasonable person acts more carefully.

Appellees objected to both instructions, arguing that they would lead the members of the jury to make their own determination of what reasonable care should be, rather than considering the views of experts who testified about the national standard of care in a case involving specialized medical training, and specialized surgery.

At first, the court agreed with appellees, stating that the general negligence standard was inapplicable in this case and that the proper ***jury instructions*** could be found in section nine of the STANDARDIZED CIVIL JURY INSTRUCTION FOR THE DISTRICT OF COLUMBIA, "***Medical Malpractice*** and Other Professional Negligence." Specifically, the court concluded that STANDARDIZED CIVIL JURY INSTRUCTION FOR THE DISTRICT OF COLUMBIA, § 9.07 (rev. ed. 2005) (hereinafter Instruction 9-7) was the appropriate explanation of the standard of **[**29]** care. Instruction 9-7 reads:

> [Defendant] is a nationally-certified specialist in [neurosurgery]. The standard of care for a nationally-certified specialist is to have and use the same degree of care, skill and learning that are ordinarily possessed and used by a nationally-certified specialist in [neurosurgery] acting in a reasonable and prudent manner in the same or similar circumstances.

However, appellants were able to persuade the court that Instruction 5-3 could be tailored to accommodate the concerns of the court and appellees. [15] Appellants **[*190]** were willing to modify Instruction 5-3 so that "reasonable person" would be replaced with "reasonable doctor under the standard of care." The modified version of Instruction 5-3 would have read:

> Negligence is a relative concept. A *reasonable doctor under the standard of care* changes [his] [her] conduct according to the circumstances or according to the danger [he] [she] knows, or should know, exists. Therefore, as the danger increases, a *reasonable doctor under the standard of care* acts in accordance with those circumstances. Similarly, as the danger increases, *a reasonable doctor under*

[14] Appellants attempted to impeach Dr. Long on this point by asking him about a different case in which he testified that two hands were necessary to operate a drill. On re-direct, Dr. Long testified, "in a circumstance where you think you have exceptional risk, then two hands on the drill is the rule." However, when doing "routine drilling . . . even in much more delicate areas than in the spine, which we weren't talking about, I use one hand routinely. It's standard technique."

[15] Appellants did not attempt to persuade the court that Instruction 5-2 should be given.

the **[**30]** *standard of care* acts more carefully. (emphasis added). Appellants contended that this proposal would alleviate any concerns that the instruction would lead jurors to make their own determinations of the standard of care.

The trial judge appeared to be persuaded by appellants' contention, noting "[w]e tailor instructions to particular cases all the time," but gave appellees the opportunity to object. (*Id.*). Appellees objected that the modified version of Instruction 5-3 would still be prejudicial because it amounted to the court defining the standard of care for the jury. Appellees argued that the crux of the case depended on whether or not the standard of care called for Dr. Jacobson to do more than he did at any time during the surgery. Appellees asserted that it was for the jury to decide whether the most credible expert testimony supported the appellants, who believed that Dr. Jacobson should have changed **[**31]** his conduct, or the appellees, who contended that Dr. Jacobson's conduct met the standard of care. Appellees continued: "[Instruction 5-3] accepts as a proposition that [Dr. Jacobson] should have done something differently in the handling of that drill which feeds directly into the plaintiffs' theory of the case . . . ." (*Id.* at 129).

Appellees' argument was momentarily convincing to the trial judge, despite the fact that the court agreed with appellants that there was evidence in the record that demonstrated that Dr. Jacobson needed to change his conduct. The trial court commented, "the question is the ***jury instructions***, they have to be statements of the law. The question is whether this is a statement of law or whether it's a statement of fact . . . ." (*Id.* at 132). Appellants reiterated that they believed the modified version of Instruction 5-3, which eliminated the reasonable person issue, was valid because "it is a truism in personal injury litigation that the duty of anyone rises or is heightened by the degree of danger. . . . That has to be a truism whether or not you are driving a car or whether you are doing brain surgery." (*Id.* at 133).

Again the trial judge **[**32]** was swayed by the appellants' arguments, and in fact, agreed at one point to give the instruction, saying "I am going to give it." (*Id.* at 134). However, upon further discussion, appellees were finally able to convince the trial court that Instruction 5-3 was prejudicial. As appellees made their argument the court noted, "[the plaintiffs'] theory of the case from their experts has been that if you are going to move toward the lamina, there needs to be some protection. . . . Your experts have said it is not necessary to do that." (*Id.* at 136-37). Appellees seized on this and replied:

> Which is why, Your Honor, if you give this instruction, you are giving my precise point. You are adopting the plaintiffs' theory as a legal precedent that the standard of care requires him to alter his conduct and to alter it from what? . . . . That's why this is not appropriate. [Opposing c]ounsel states to this Court that there is not adequate coverage **[*191]** in the 9 series? There most assuredly is. It is what the standard of care testimony is and how that is derived by expert testimony. His experts can say what they want. He can argue what he wants. If [the jury] accepts it, so be it. **[**33]** *But, for the court to tell the jury that he had to change his conduct, that is a different ball game.*

(*Id.* at 137) (emphasis added). Despite appellants' contention that "a party is entitled to an instruction in the case that correctly sets forth the law and that correctly sets forth the facts that [we] have introduced in the case," the trial court responded "I am going to deny it. You will be able to argue [your point]. . . . But, I won't give an instruction on it." (*Id.* at 138).

During the jury instruction phase of the trial, the judge kept true to his word and did not give an instruction similar to Instruction 5-3. Instead, his instructions were patterned after the series of instructions in section nine of the STANDARDIZED CIVIL ***JURY INSTRUCTIONS***:

> The plaintiff, Doctor Pannu, claims that the defendant, Doctor Jacobson, failed to treat him with the same degree of skill, care, or knowledge required of a doctor acting in the same or similar circumstances and that the defendant's failure was a proximate cause of injury to the plaintiff.
>
> Now, the plaintiffs' theory in this case is that the defendant was negligent in performing the surgery on Doctor **[**34]** Pannu by failing to maintain complete control of the drill while he was drilling near the already exposed and torn dura and by failing to use adequate precautions to prevent injury to the nerves in that area.
>
> The plaintiff contends that as a result, the drill tore through the dura causing bilateral nerve damage. In this case, there is no dispute that the result of this surgery is permanent incontinence. Therefore, if you find that the surgery was performed beneath the standard of care for a reasonably prudent board-certified neurosurgeon, then you are instructed to award damages.

A doctor is not negligent if he or she adheres to the standard of care in the field. You must decide whether the defendant was negligent by deciding whether the defendant failed to perform according to the professional standard of care. To make this decision, you must answer this question: Did the defendant do what a reasonably [sic] and prudent professional in his or her field would have done under similar circumstances?

To be entitled to your verdict, the plaintiff must prove by a preponderance of the evidence the following: 1) What is the standard of skill and care that reasonably competent **[**35]** professionals follow when acting under the same or similar circumstances? 2) That the defendant, Doctor Jacobson, did not follow that standard of skill and care.
A doctor is not negligent simply because his or her efforts are not successful. Unsatisfactory results from treatment or care alone do not determine whether the defendant, Doctor Jacobson, was negligent in treating the plaintiff, Doctor Pannu.
However, if the doctor's performance fell below the standard of care and thereby proximately caused the patient's injuries, then the doctor was negligent. In such circumstances, it is no defense to a charge of negligence that the doctor did the best that he could and that those efforts simply were not successful.

Doctor Jacobson is a nationally certified specialist in neurosurgery. The standard of care for a nationally certified neurosurgeon is to have and to use the **[*192]** same degree of care, skill and learning that are ordinarily possessed and used by a nationally certified specialist in neurosurgery acting in a reasonable and prudent manner in the same or similar circumstances.

You can only determine the professional standard of care required of the defendant from **[**36]** the testimony of the expert witnesses regarding the standard. You should consider each expert's opinion and weigh his or her qualifications and the reasons for each opinion.

Standard of Review

HN1[↑] "In a ***medical malpractice*** action, there are three elements a plaintiff must show to establish a prima facie case: '(1) the applicable standard of care; (2) a deviation from that standard of care by the defendant; and (3) a causal relationship between *that deviation* and the plaintiff's injury.'" *Burke v. Scaggs, 867 A.2d 213, 217 (D.C. 2005)* (emphasis in original) (quoting *Talley v. Varma, 689 A.2d 547, 552 (D.C. 1997)*). "[I]n view of the uniform standards of proficiency established by national board certification," the standard of care for board-certified physicians "is to be measured by the national standard." *Morrison v. MacNamara, 407 A.2d 555, 565 (D.C. 1979)*. Moreover, "the use of expert testimony is required since the subject is 'not likely to be within the common knowledge of the average layman.'" *Allen v. Hill, 626 A.2d 875, 877 (D.C. 1993)* (quoting *District of Columbia v. Barriteau, 399 A.2d 563, 569 (D.C. 1979))*. **[**37]** "Establishing the standard of care is essential to a prima facie case of negligence because physicians are not expected to be perfect . . .; they are liable in negligence only when their behavior falls below that which would be undertaken by a reasonably prudent physician," and there is a causal relationship between that behavior and a plaintiff's injury. *Burke, supra, 867 A.2d at 217*. "[T]he duty of reasonable care requires that those with special training and experience adhere to a standard of conduct commensurate with such attributes. It is this notion of specialized knowledge and skill which animates the law of professional negligence." *Morrison, supra, 407 A.2d at 560*; *see also* RESTATEMENT (SECOND) OF TORTS ("the Restatement") *§ 289, Comment m* (1965).

It is clear that ***HN2***[↑] "a party is entitled to a jury instruction upon the theory of the case if there is sufficient evidence to support it." *George Washington Univ. v. Waas, 648 A.2d 178, 183 (D.C. 1994)*. However, "[a] trial court has broad discretion in fashioning appropriate ***jury instructions***, and its refusal to grant a request for a particular **[**38]** instruction is not a ground for reversal if the court's charge, considered as a whole, fairly and accurately states the applicable law." *Nelson v. McCreary, 694 A.2d 897, 901 (D.C. 1997)* (internal quotation marks omitted) (quoting *Psychiatric Inst. of Washington v. Allen, 509 A.2d 619, 625 (D.C. 1986))*. "[I]n determining whether a proposed instruction on a party's theory of the case was properly denied, we review the record in the light most favorable to that party." *Nelson, 694 A.2d at 901*.

Legal Discussion of the Jury Instructions

This case presents a question concerning two different legal principles. Appellants claim that the classic case on jury instruction appeals is *Nelson, supra*, in which we noted that "[a] party is entitled to an instruction on his or her theory of the case if the instruction is supported by the evidence." *694 A.2d at 901* (internal quotation marks

omitted) (quoting Nimetz v. Cappadona, 596 A.2d 603, 605 (D.C. 1991)). Viewed in the light most favorable to appellants, **[*193]** there was sufficient evidence in the record upon which a jury could have decided **[**39]** that Dr. Jacobson needed to adjust his technique during the surgery once it was apparent that the dura had been torn. Dr. Jacobson himself admitted that he had a heightened duty to be more careful in light of the fact that the dura was thin, and other experts who testified agreed that a torn dura made the surgery more complex and fraught with peril than it normally would be. The trial judge even stated that "[he] agree[d] with [the plaintiffs] that the facts support [the instruction]." Therefore, appellants insist that under Nelson, supra, they were entitled to the modified version of Instruction 5-3.

Appellees discount the legal principle on which appellants rely, maintaining that *Nelson* can be distinguished from the present case because in *Nelson* the judge made a clear factual mistake by declining to instruct the jury on the plaintiff's theory of the case; he mistakenly believed that the plaintiff had not adduced any evidence to support the theory. As the transcript for that case revealed, however, the judge's memory was incorrect. Consequently, we held that the plaintiff's "expert testimony provided an evidentiary predicate for this aspect of plaintiff's **[**40]** theory of the case, and it was therefore error for the judge to refuse, upon request, to instruct the jury on that theory." Id. at 902.

Appellees emphasize Waas, supra, where we declared that a party cannot simply rely on "the proposition that a specific instruction must be given when there is evidence to support it. [Such] reliance is misplaced." 648 A.2d at 184. We based our conclusion in *Waas* on the legal principle that ***HN3***[↑] a specific jury instruction should be given when it is "necessary to explain to the jury specialized legal doctrine that was not adequately described in the general instruction nor readily apparent to the jury." *Id.* In discussing both *Waas* and *Nelson*, we noted two key questions regarding ***jury instructions*** presented by those cases: 1) was the trial court's assessment of the existence of a factual predicate for the requested instruction correct; and 2) was the trial court's instruction, considered as a whole, a fair and accurate statement of the applicable law? In Nelson, supra, we did not need to analyze the case beyond the first question because the trial court had made an incorrect **[**41]** factual determination. *See also* Gubbins v. Hurson, 885 A.2d 269, 280 n.4 (D.C. 2005) ("[T]he court's decision to issue or refuse to issue instructions should be the result of an informed choice among permissible alternatives, which is the essence of an appropriate exercise of discretion; thus, the decision must be based upon and drawn from a firm factual foundation.") (citations and internal quotation marks omitted); Westbrook v. Washington Gas & Light Co., 748 A.2d 437, 439-42 (D.C. 2000) (affirming the trial court's finding that there was no evidence in the record to support a last clear chance doctrine instruction). *Waas* focused primarily on the second question, the fairness and accuracy of the ***jury instructions*** given by the trial court. *See also* Crutchfield v. United States, 779 A.2d 307, 332-33 (D.C. 2001) ("[t]he ***jury instructions*** at appellant's trial explicitly set the appropriate standard of proof . . . ."); Hawthorne v. Canavan, 756 A.2d 397, 402 n.7 (D.C. 2000) ("the instructions as a whole were fair and accurate, and the judge did not abuse his discretion by refusing to give the specific instructions **[**42]** requested by plaintiff").

Here, the pivotal question, as in Waas, is the fairness and accuracy of the final instruction given to the jury, without appellants' proposed modified Instruction 5-3. The trial judge did not deny the instruction because of a lack of evidentiary support, but rather because he was concerned **[*194]** that it did not fairly and accurately express the law. In examining the trial judge's concern and the instruction given, the question we confront is whether STANDARDIZED CIVIL JURY INSTRUCTION 9-7, in combination with the other instructions given by the trial court, was a fair and accurate statement of the applicable law, or whether the modified version of STANDARDIZED CIVIL JURY INSTRUCTION 5-3 as proposed by the appellants was a "major legal principle[] that the jury needed to render a verdict." Waas, supra, 648 A.2d at 184. To answer these questions, we need to examine more closely our precedents in negligence cases, including matters pertaining to professional negligence.

In D.C. Transit Sys. Inc. v. Carney, 254 A.2d 402 (D.C. 1969), we discounted the notion that "a common carrier . . . [is] held to the "highest degree of care. **[**43]** " Id. at 403. Rather, we declared: "[T]here are no categories of care, i.e., the care required is always reasonable care. What is reasonable depends upon the dangerousness of the activity involved. The greater the danger, the greater the care which must be exercised." *Id.* (citing Becker v. Colonial Parking, Inc., 133 U.S. App. D.C. 213, 409 F.2d 1130 (1969)). We elaborated on these legal principles in Blumenthal v. Cairo Hotel Corp., 256 A.2d 400 (D.C. 1969), a case involving a tenant's negligence action against a landlord: "The parties to this appeal have argued at length over the degree of care which appellee owed appellant. This jurisdiction does

not recognize varying standards of care depending upon the relationship of the parties but always requires reasonable care to be exercised under all the circumstances." *Id. at 402* (citing *Carney, supra*) (other citation omitted); *see also Sandoe v. Lefta Assocs., 559 A.2d 732, 738 (D.C. 1988)* ("In the District of Columbia, the applicable standard for determining whether an owner or occupier of land has exercised the proper level of **[**44]** care to a person lawfully upon his premises is reasonable care under all the circumstances.") (citations omitted).

We made clear in *Morrison, supra*, that these basic but fundamental principles of negligence law also are applicable in professional negligence cases: *HN4*[↑] "[The] standard of care, which evaluates a defendant's conduct against that conduct which is reasonable under the circumstances, is also applicable in the law of professional negligence. The law of negligence generally does not acknowledge differing standards of categories of care, but requires an adherence to a uniform standard of conduct: that of reasonable care under the circumstances," *407 A.2d at 560* (citing *Blumenthal, supra, 256 A.2d at 402*; *Carney, supra, 254 A.2d at 403*). Thus, the context of a medical negligence action is critical to a determination of what constitutes "reasonable care under the circumstances." As we said in *Washington Metro. Transit Auth. v. Jeanty, 718 A.2d 172 (D.C. 1998)*, "the standard is always contextual, and [in a common carrier case], the carrier's relation to, and duties toward, its passengers constitute **[**45]** the critical context in which the carrier's conduct is evaluated." *Id. at 175*. So, too, the neurosurgeon's relation to and duties toward his patient constitute the critical context in which the neurosurgeon's conduct is evaluated. As we stressed in *Drevenak v. Abendschein, 773 A.2d 396 (D.C. 2001)*, ***HN5***[↑] "the standard of care focuses on 'the course of action that a reasonably prudent doctor with the defendant's specialty would have taken under the same or similar circumstances.'" *Id. at 416-17* (quoting *Meek v. Shepard, 484 A.2d 579, 581 (D.C. 1984)*). Here, what course of action a reasonably prudent doctor with Dr. Jacobson's specialty would have taken under the same or similar circumstances encountered by him during his surgery on Dr. Pannu **[*195]** depends upon expert testimony concerning the national standard of care. As we declared in *Strickland v. Pinder, 899 A.2d 770 (D.C. 2006)*: ***HN6***[↑] "At the outset of a ***medical malpractice*** case, the 'plaintiff must establish through expert testimony the course of action that a reasonably prudent doctor with the defendant's specialty would have taken under the same or similar circumstances. **[**46]** '" *Id. at 773* (quoting *Meek, supra, 484 A.2d at 581*) (citing *Morrison, supra, 407 A.2d at 560-65*). It is with these fundamental legal principles in mind that we examine appellant's proposed modified instruction which, as we have indicated above, reads as follows:

> Negligence is a relative concept. A *reasonable doctor under the standard of care changes [his] [her] conduct according to the circumstances or according to the danger [he] [she] knows, or should know, exists*. Therefore, as the danger increases, a reasonable doctor under the standard of care acts in accordance with those circumstances. *Similarly, as the danger increases, a reasonable doctor under the standard of care acts more carefully.* (Emphasis added.).

Our review of the record persuades us, for the following reasons, that the trial court did not abuse its discretion by refusing to give appellants' requested modified instruction, using the precise proposed language. First, the trial court correctly perceived that appellants' proposed wording of the charge, standing alone, may have confused the jury as to how it was to determine the national standard **[**47]** of care. Counsel for appellants requested that the court instruct the jury that the level of care required when using a drill to perform a laminectomy must increase as the danger to the exposed dura increases. Under most circumstances this concept regarding the "duty" element of negligence is undisputably true, because, as we have said, *HN7*[↑] "there are no categories of care, i.e., the care required is always reasonable care. What is reasonable depends upon the dangerousness of the activity involved. The greater the danger, the greater the care which must be exercised." *Carney, supra, 254 A.2d at 403*. However, under the virtually undisputed evidentiary facts presented here, the rule set forth in *Carney* would be inapplicable if, and only if, Dr. Jacobson had already been acting as carefully as required by the heightened danger even prior to the onset of that increased danger. If this were the case, then it would not have been necessary for Dr. Jacobson to act even *more* carefully following the initial tear of the dura, or to change his conduct. Consequently, appellants' proposed phrasing of the requested instruction might have incorrectly suggested to the jury that, **[**48]** regardless of how careful Dr. Jacobson had been in conducting the surgery prior to the first tear of the dura, he was obliged to affirmatively modify his actions subsequent to that incident.

In *Morrison* we looked to the *RESTATEMENT*

(SECOND) OF TORTS § 289 [16] Cmt. m (1965) in recognizing that HN8[↑] reasonable care for a specialist depends upon his or her specialized knowledge or "superior qualities." 407 A.2d at 560. Consistent with § 289 of the Restatement, our standardized **[*196]** Instruction 9-7, focuses on the "degree of care, skill and learning that are ordinarily possessed and used by a nationally-certified specialist [in neurosurgery] acting in a reasonable and prudent manner in the same or similar circumstances." As contemplated by § 298 Cmt. a, HN9[↑] "[t]he word 'care' denotes not only the attention which is necessary to perceive danger, but also the caution required to avert it once it is perceived." Yet, neither the duty to be adequately attentive, nor the duty to proceed with caution necessarily requires a person to change his conduct if he already is being sufficiently cautious. To demonstrate this point by analogy, we draw upon **[**49]** Allen v. Blanks, 384 So. 2d 63 (Miss. 1980), an automobile accident case in which the allegedly intoxicated driver of a car hit a motorcyclist as the latter was passing through an intersection. The motorcyclist lost his negligence case at trial and made several claims on appeal, one of which was that the trial court erred in refusing to give the following requested instruction: "The driver of a motor vehicle has a lawful duty to decrease his speed upon approaching an intersection." Id. at 65 (internal quotation marks omitted). The Supreme Court of Mississippi determined that under the statutory scheme, the duty of care of a driver approaching a caution light was to "proceed . . . only with caution." *Id.* (internal quotation marks omitted). The appellate court affirmed the trial court's refusal to give the requested instruction saying that "caution is a relative concept not necessarily entailing decrease in speed: The current speed may already be cautious speed." *Id.* Just as approaching an intersection created a more dangerous driving environment in *Allen*, the initial tear of the dura produced a more dangerous surgical environment in Dr. **[**50]** Pannu's case. In both cases, the surgeon and the driver had to proceed with caution. In both cases, there was a factual question as to whether the surgeon or driver needed to alter his/her conduct to satisfy the level of caution necessitated by the circumstances. Such a factual question is properly decided by the jury, in this case, aided with respect to the legal standard of care by the expert testimony of the board-certified neurosurgeons.

Thus, the trial court properly rejected the proposed language in **[**51]** the requested instruction directing the jury to find for appellants if Dr. Jacobson failed to "change" his conduct following the initial tear to the dura. Similarly, the final sentence of the proposed instruction - "as the danger increases, a reasonable doctor under the standard of care acts more carefully" - also may have wrongly implied that, under *any* circumstance, Dr. Jacobson had an affirmative duty to modify his behavior during the surgery.

There is a second consideration with respect to the proposed wording of the requested instruction. HN11[↑] In any ***medical malpractice*** action, the applicable national standard of care comes from the testimony of expert witnesses, *see* Pinder, supra, 899 A.2d at 773, and it is up to the jury to determine credibility and which expert's testimony will be given the most weight, and to resolve conflicts in testimony, Etheredge v. District of Columbia, 635 A.2d 908, 916 (D.C. 1993) (citation omitted); Streater v. United States, 478 A.2d 1055, 1058 n.4 (D.C. 1984). If the trial court in this case had adopted appellants' proposed wording of the requested instruction, it may have confused the jurors as **[**52]** to whether they should credit or give more weight to appellants' or appellees' experts, or whether they were obligated to reject some of the testimony of appellees' expert witnesses.

Doctors Gruner and Marshall who testified for the appellants, and Doctors Shaffrey and Long who were witnesses for the **[*197]** defense, all were board-certified, experienced neurosurgeons. Dr. Gruner testified that "the closer you get to the dura, the more careful you have to be and the more likely you are to have an injury . . . ." Dr. Marshall opined that the standard of care required Dr. Jacobson to maintain control of the drill "every second during the surgery," and that Dr. Jacobson did not do so because "the degree of movement of the drill . . . [was] inconsistent with adequate control of the drill." Doctors Gruner and Marshall focused upon steps that Dr. Jacobson should have taken to protect the dura after the initial tear. Dr. Gruner asserted that Dr. Jacobson should have used a

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[16] Section 289 Cmt. m of the Restatement states:

> HN10[↑] The standard of the reasonable man requires only a minimum of attention, perception, memory, knowledge, intelligence, and judgment in order to recognize the existence of the risk. If the actor has in fact more than the minimum of these qualities, he is required to exercise the superior qualities that he has in a manner reasonable under the circumstances. The standard becomes, in other words, that of a reasonable man with such superior attributes.

cottonoid or a piece of metal to protect the dura, or an assistant to help with the control of the drill. Dr. Marshall maintained that cotton, fiber, metal or plastic should be used to protect the dura. He also testified that **[**53]** the direction in which Dr. Jacobson drilled was inconsistent with the standard of care - that he should have drilled from medial to lateral (inside out). In contrast, appellees' experts (Drs. Shaffrey and Long) testified that Dr. Jacobson was not required by the standard of care to change his conduct or approach to the neurosurgery after the initial tear of the dura. Dr. Shaffrey stated that "You have to go in and assess the situation as you go," but that the standard of care did not require the use of any barrier to separate the drill from the dura and that he was "not aware of any standard for the direction that the drill should be used." Dr. Long stated that the initial tear of the dura "was not a violation of the standard of care," that "there was no single correct direction in which surgeons are required to move the drill under the standard of care," and that the use of a cottonoid was not required under the standard of care. Therefore, by stating that the national standard of care required Dr. Jacobson to "change his conduct according to the danger," the proposed instruction appeared to favor the plaintiffs' expert testimony presented by Drs. Gruner and Marshall as to the national **[**54]** standard of care for a neurosurgeon under the circumstances, and risked undercutting the expert testimony given by Drs. Shaffrey and Long for the defense. If the jury had credited only appellees' experts, then the *Carney* rule on which the trial court declined to instruct the jury - that as the danger increases, so does the care which must be exercised - would be inapplicable, because Dr. Jacobson would already have been acting with the requisite quantum of care. ***HN12***[↑] The duty to proceed with caution does not impose an absolute duty to change one's conduct if he already is being sufficiently cautious. *See* *RESTATEMENT (SECOND) OF TORTS § 298 Cmt. a* ("'care' denotes not only the attention which is necessary to perceive danger, but also the caution required to avert it once it is perceived"). Hence, the trial court was properly concerned that appellants' version of the instruction would have failed to fairly and accurately express the law. *Nelson, supra, 694 A.2d at 901*; *Waas, supra, 648 A.2d at 184*.

Nevertheless, the fact that the proposed modified Instruction 5.3 as requested by appellants may have contained confusing **[**55]** and improper wording given the conflicting expert testimony did not permit the trial court to reject its contents *in toto*, because if the jury had elected to credit appellants' experts, then it was entirely proper that the jury hear the *Carney* rule. ***HN13***[↑] "[E]ven though a trial court is under no obligation to give any particular requested instruction, 'if the request directs the court's attention to a point upon which an instruction to the jury would be helpful, the court's error in failing to charge may not be excused by technical defects in the request.'" *Wilson v. Maritime Overseas Corp., 150 F.3d 1, 10 (1st Cir. 1998)* (quoting **[*198]** 9A ***WRIGHT*** & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2552 at 395-97 (1995 ed.)). Likewise, "the court must instruct the jury properly on the controlling issues in the case even though there has been no request for an instruction or the instructions are defective." *Management Sys. Assocs., Inc. v. McDonnell Douglas Corp., 762 F.2d 1161, 1177 (4th Cir. 1985)* (quoting 9 ***WRIGHT*** & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2556, at 654-55 (1997 ed.)). [17] The purpose of these rules is plain: it is incumbent on the trial **[**56]** court to properly instruct the jury on the law. *Id.; see* *Waas, supra, 648 A.2d at 183*. Consequently, although "[i]t is not the duty of a trial judge to recast or modify an erroneous or misleading requested instruction," *Coleman v. Chudnow, 35 A.2d 925, 926 (D.C. 1944)* (citation omitted); *see also* *Thoma v. Kettler Bros., Inc., 632 A.2d 725, 732 n.2 (D.C. 1993)* (Sullivan, J., concurring) ("[T]he trial court was under no duty to recast, modify or otherwise correct the instruction."), the trial court must give the jury an accurate and fair statement of the law. The court may hear requests and arguments from the litigants, but ultimately, it is the court which bears the burdens of deciding which law to convey to the jury, and of formulating a neutral and objective manner in which to phrase the instructions. *See* *Waas, supra, 648 A.2d at 183*. Here, Dr. Pannu did not ask the trial court merely to "capture a kernel that may have some validity" ("a [trial] court is not required to rewrite an improper instruction to capture a kernel that may have some validity"), *McCann v. Wal-Mart Stores, Inc., 210 F.3d 51, 55 (1th Cir. 2000)* **[**57]** (citation omitted). Rather, part of the instruction he requested contained a fundamental legal principle to which this court has adhered at least since its 1969 decision in *Carney, supra* - "[t]he greater

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[17] These are well-established concepts already adopted by virtually every federal circuit court. *E.g.*, *Connecticut Mut. Life Ins. Co. v. Wyman, 718 F.2d 63, 65 (3d Cir. 1983)*; *Bueno v. Donna, 714 F.2d 484, 490 (5th Cir. 1983)*; *Webster v. Edward D. Jones & Co., 197 F.3d 815, 820 (6th Cir. 1999)*; *Davis v. Lane, 814 F.2d 397, 401 (7th Cir. 1987)*; *United States ex rel. Means v. Solem, 646 F.2d 322, 326 (8th Cir. 1980)*; *Chavez v. Sears, Roebuck & Co., 525 F.2d 827, 830 (10th Cir. 1975)*.

the danger, the greater the care which must be exercised." Id. at 403 (citation omitted). Significantly, Morrison, supra, also a ***medical malpractice*** case, cites both *Carney* and *Blumenthal, supra*. 407 A.2d at 560. [18]

[58]** We realize that the trial court was required to make a very difficult decision in the midst of this complex ***medical malpractice*** case by choosing one of several unattractive options: giving a possibly inaccurate and unfair instruction on the standard of care, giving no instruction at all on this important rule, or taking more time to figure out an accurate and fair instruction at the risk of frustrating jurors with additional and unwelcome waiting time while the judge and counsel conversed. [19] Nevertheless, the court bore the burden of tailoring the requested instruction (and the opposition thereto) to meet the demands of an accurate and fair statement of the law. **[*199]** We believe that a jury instruction along the following line would have adequately accounted for each party's legal theory of the case and would have ensured an accurate and fair statement of the law, contextualized all of the witnesses' testimonies, permitted the jury to make its own determinations of credibility, and allowed the jury to weigh the testimony:

> Negligence is a relative concept. A reasonable doctor under the standard of care conforms his conduct according to the danger he knows, or should know, exists. **[**59]** Therefore, as the danger increases, a reasonable doctor under the standard of care acts in accordance with those circumstances.

The failure to give an instruction to this effect was an erroneous exercise of discretion. *See* Johnson v. United States, 398 A.2d 354, 365 (D.C. 1979). We hold that the error was not harmless and thus constituted an abuse of discretion. That is, we are unable to say with "fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." Nelson, 694 A.2d at 902 (citing R. & G. Orthopedic Appliances and Prosthetics, Inc. v. Curtin, 596 A.2d 530, 539 (D.C. 1991) (quoting Kotteakos v. United States, 328 U.S. 750, 765, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)); *see* Johnson, supra, 398 A.2d at 366 (***HN14***[↑] "If the error in the discretionary determination jeopardized the fairness of the proceeding as a whole, or if the error had a possibly substantial impact upon the outcome, the case should be reversed.") (citations omitted).

[60]** The concept which should have been conveyed in the omitted instruction was not present in any portion of the instructions which were given. Moreover, the jury heard conflicting facts and opinions as to whether Dr. Jacobson was negligent in severing the sacral nerves while performing the laminectomy. The court never told the jury that it could find for the appellants if it determined that Dr. Jacobson should have exercised greater care in drilling the lamina the closer he came to the exposed dura and the greater the danger the drill might slip and damage the nerves in the dural sac. We cannot say with "fair assurance" that the trial court's failure to give the above instruction did not substantially sway the judgment. Nelson, supra, 694 A.2d at 902.

Accordingly, for the foregoing reasons, we reverse the judgment of the trial court and remand this case for a new trial.

So ordered.

Dissent by: KRAMER

Dissent

KRAMER, *Associate Judge,* dissenting: The majority reverses the verdict for Dr. Jacobson, concluding that Judge ***Wright*** erred by not modifying a particular instruction requested by Dr. Pannu and by not giving that instruction to the jury. Since I conclude that **[**61]** Judge ***Wright***'s decision was correct; that the majority's modification would not have eliminated the potential for prejudice to Dr. Jacobson that could have resulted from giving the instruction; that, in any event, Dr. Pannu suffered no harm from the failure to give the instruction; and that the instructions given "as a whole, fairly and accurately state[d] the applicable law," Nelson v. McCreary, 694 A.2d 897, 901 (D.C. 1997) (quoting

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[18] Smith v. Public Defender Serv. for the District of Columbia, 686 A.2d 210 (D.C. 1996), part of which involved a legal malpractice claim, contained a postscript written by the author of the opinion for the court which referenced both *Morrison* and *Blumenthal* with respect to the standard of care. Id. at 212-13.

[19] A pre-trial status conference devoted to proposed ***jury instructions*** would help to avoid the need to address such issues in the midst of trial. Of course, if an issue concerning ***jury instructions*** arises during trial, it must be addressed at that time. However, a late afternoon, early evening, or early morning conference, when the jury is not in the court, would obviate waiting time for jurors.

Psychiatric Inst. of Washington v. Allen, 509 A.2d 619, 625 (D.C. 1986)) (internal quotation marks omitted), I must dissent. I also dissent from the majority's sweeping statements with respect to the obligations of trial judges with respect to ***jury instructions***.

Dr. Pannu's argument for reversal of the judgment pertains solely to Judge ***Wright***'s decision not to give either Civil Jury Instruction 5-3 or a modified version **[*200]** of that instruction tailored to the facts of this case. An understanding of Instruction 5-3 is useful to an understanding of the issues confronting us on this appeal. Instruction 5-3 reads:

> Negligence is a relative concept. A reasonable person changes [his] [her] conduct according to the **[**62]** circumstances or according to the danger that [he] [she] knows or should know, exists. Therefore, as the danger increases, a reasonable person acts in accordance with those circumstances. Similarly, as the danger increases, a reasonable person acts more carefully.

This concept was first articulated by our court in the case of *D.C. Transit Sys., Inc. v. Carney, 254 A.2d 402 (D.C. 1969)*.

As counsel for Dr. Jacobson correctly and successfully argued to Judge ***Wright***, the *Carney* standard, incorporated into Instruction 5-3, is a "reasonable man" standard that the jurors are considered competent to determine for themselves, but it is inapposite in the context of ***medical malpractice*** where the performance of a doctor is evaluated by the jury based upon expert testimony from other doctors. Indeed, it is worth noting that the carefully crafted Standardized Civil ***Jury Instructions*** for ***medical malpractice*** cases do not include any instruction similar to Instruction 5-3. That instruction leaves completely unanswered how a jury should determine what heightened awareness should exist or what greater measures should be taken when "the danger increases" during neurosurgery **[**63]** and leaves the jury to speculate about those issues. As Judge ***Wright*** pointed out, the jury is to decide "based upon what a reasonable neurosurgeon would be doing; not a reasonable person." [1] Thus, Judge ***Wright*** ruled that he would not give Instruction 5-3, but invited counsel to submit a version of Instruction 5-3 that was modified for a malpractice case.

[64]** The modified version of the instruction thereafter submitted on behalf of Dr. Pannu read:

> Negligence is a relative concept. A reasonable doctor under the standard of care changes [his] [her] conduct according to the circumstances or according to the danger [he] [she] knows, or should know, exists. Therefore, as the danger increases, a reasonable doctor under the standard of care acts in accordance with those circumstances. Similarly, as the danger increases, a reasonable doctor under the standard of care acts more carefully.

The majority concludes, and I agree, that Judge ***Wright*** did not err in refusing to give this instruction. The majority bases its conclusion on the idea that if Dr. Jacobson "had already been acting as carefully as required by the heightened danger even prior to the onset of that increased danger . . . it would not be necessary for **[*201]** [him] to act even *more* carefully following the initial tear of the dura, or to change his conduct." Thus, the majority recognizes, the proposed instruction would have misled the jury to believe that Dr. Jacobson "was obliged to affirmatively modify his actions subsequent to that incident."

Nonetheless, despite **[**65]** agreeing that neither Instruction 5-3 nor the version modified by Dr. Pannu's counsel was appropriate, the majority concludes that yet a third version of this instruction, which it has now formulated, should have been given in order to include the *Carney* concept that -

> the care required is always reasonable care . . . [and] depends upon the dangerousness of the activity involved. The greater the danger, the

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[1] It is also worth noting that during this discussion, Dr. Pannu's counsel expressed concern that the 9-series pertaining to instructions addressing ***medical malpractice*** did not define negligence. He was mistaken. Judge ***Wright*** instructed the jury that -

> a doctor is not negligent if he or she adheres to the standard of care in the field. You must decide whether the defendant failed to perform according to the professional standard of care. To make this decision, you must answer this question: Did the defendant do what a reasonable and prudent professional in his or her field would have done under similar circumstances?

Judge ***Wright*** also gave Jury Instruction 9-6, which explains that if a "doctor's performance [fell] below the standard of care and thereby proximately caused the patient's injuries, then the doctor was negligent," and that "it is no defense to a charge of negligence that the doctor did the best that [he] could and that those efforts simply were unsuccessful."

> greater the care which must be exercised.

Carney, supra, 254 A.2d at 403. Thus, the majority holds that the instruction that should have been given, even though never requested by Dr. Pannu, was the following:

> Negligence is a relative concept. A reasonable doctor under the standard of care *conforms* his conduct according to the danger he knows, or should know, exists. Therefore, as the danger increases, a reasonable doctor under the standard of care acts in accordance with those circumstances.

Supra (emphasis added). In my view, this instruction was not only unnecessary, but imports into the ***medical malpractice*** area a concept that has not heretofore been included, so far as I can find, for any professional negligence **[**66]** case in this jurisdiction. Any reaction to increased danger is for the medical community, not this court, to define as reasonable within the standard of care.

In support of its conclusion that Judge ***Wright*** erred by not giving an instruction essentially like this, the majority relies upon *Morrison v. MacNamara, 407 A.2d 555 (D.C. 1979)*. There, the issue was whether the defendant, a nationally certified medical laboratory, should be held to a national or to a local standard of care. But *Morrison* includes no discussion of the *Carney* rule - no mention of "changing" or "conforming" conduct according to the circumstances or because of increased danger. Rather, in a section relied upon by the majority entitled "General Principles," *Morrison* simply states:

> The elements which govern ordinary negligence actions are also applicable in actions for professional negligence. The plaintiff bears the burden of presenting evidence "which establishes the applicable standard of care, demonstrates that this standard has been violated, and develops a causal relationship between the violation and the harm complained of." In negligence actions the standard of care by **[**67]** which the defendant's conduct is measured is often stated as "that degree of care which a reasonable prudent person would have exercised under the same or similar circumstances."

Supra, 407 A.2d at 560 (internal citations omitted).

Addressing ***medical malpractice*** specifically, *Morrison* noted that the "duty of care is generally formulated as that degree of reasonable care and skill expected of members of the medical profession under the same or similar circumstances." *407 A.2d at 561*. Thus, even in this context, there is no discussion of the concept that as the danger increases a reasonable doctor changes his conduct according to the circumstances or according to the danger that he knows or should know exists, nor of the concept that as the danger increases, a reasonable doctor acts more carefully. Indeed, a review of all of the cases citing *Carney* - and there are many - shows not one involving professional negligence of this type. Rather, the cases where increased danger has been discussed have **[*202]** been primarily those addressing the duty of care owed by common carriers to passengers [2] - cases in which jurors are generally deemed competent **[**68]** to decide whether there has been a deviation from the standard of care without the assistance of expert testimony.

Moreover, instructions that tell jurors that there is an increased duty of care when there is increased danger have been criticized even in the context of general negligence cases that utilize no experts. As one authority has written:

> In the general negligence case, the defendant's obligation is to use the care of a reasonable person under the circumstances. The standard does not change even if the situation is fraught with danger. The circumstances clause **[**69]** allows for infinite flexibility, but the standard itself, which takes all those circumstances into account, remains the same. Put differently, the standard remains the same in all cases, but the safety-seeking conduct required by the standard will vary with the circumstances.

See 1 DAN B. DOBBS, LAW OF TORTS 302 (West Group 2001).

In addition, with respect to ***jury instructions*** that emphasize danger, Dobbs points out that these instructions unfairly emphasize the defendant's side of the case. *Id.* at 308. I am aware that this unfair emphasis on the defendant's position was a

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[2] *See, e.g., Pazmino v. Washington Metro. Area Transit Auth., 638 A.2d 677, 679 (D.C. 1994)*; ***Sebastian v. District of Columbia, 636 A.2d 958, 962 (D.C. 1994)***. Indeed, many of those cases do not even mention the concept that "the greater the danger, the greater the care which must be exercised." *See, e.g., Washington Metro. Area Transit Auth. v. O'Neill, 633 A.2d 834, 841 n.13 (D.C. 1993)*.

consideration taken into account by the majority that led it to modify the language from "changes conduct" to "conforming conduct." In the end, however, both formulations suggest to the jury that Dr. Jacobson should have modified his conduct. While "conform" is a slightly softer word than "change," inherent in the concept of "conforming" is the idea of changing behavior. Thus, the unfair prejudice to Dr. Jacobson was not eliminated by the majority's formulation of this instruction. Indeed, the changes from Dr. Pannu's modified instruction to the instruction the majority finds acceptable seem *de* **[**70]** *minimus* and insufficient to support a conclusion that Judge ***Wright*** abused his discretion.

The theory of the case instruction that Judge ***Wright*** gave the jurors during the final instructions, to which there was no objection, set out precisely what the issues were that they needed to decide. Having completed the general instructions, he began the negligence portion of the instructions by informing them as follows with respect to Dr. Pannu's theory of the case:

> A lawsuit such as this for medical negligence is a claim against a doctor or other health care provider. The plaintiff, Doctor Pannu, claims that the defendant, Doctor Jacobson, failed to treat him with the same degree of skill, care or knowledge required of a doctor acting in the same or similar circumstances and that the defendant's failure was a proximate cause of injury to the plaintiff.
>
> Now, the plaintiff's *theory of this case* is that the defendant was negligent in performing the surgery on Doctor Pannu by failing to maintain complete control of the drill while he was drilling near the already exposed and torn dura and by failing to use adequate precautions to prevent injury to the nerves in that area.

[71]** (Emphasis added). These were precisely the issues before the jurors, and the jury's duty was to determine whose experts they **[*203]** believed. Dr. Jacobson presented two experts who testified that his procedures were squarely within the standard of care. Thus, based upon the testimony from the experts he presented, there would have been no need for him to "change" or "conform" his conduct.

On the other hand, if the jury had accepted the testimony of Dr. Pannu's experts that Dr. Jacobson was negligent by not maintaining complete control of the drill while he was drilling near the already exposed dura and by failing to use adequate precautions to prevent injury to the nerves in that area, there again would have been no need for any form of the *Carney* instruction, since that would have amounted to a finding of negligence that would have resulted in a verdict for the plaintiffs. Because I conclude that the version of the rule formulated by the majority does not dispel the prejudice of suggesting that Dr. Jacobson was negligent in not "changing" or "conforming" his conduct, and that the instructions "as a whole, fairly and accurately state[d] the applicable law," *Nelson, supra, 694 A.2d at 901*, **[**72]** I cannot conclude that Judge ***Wright*** erred.

In any event, given the clarity with which Judge ***Wright*** instructed the jury, including on Dr. Pannu's theory of the case, I must conclude, contrary to the majority, that even if there was error, which I firmly believe there was not, the "judgment was not substantially swayed" by that error. *See id. at 902*.

I must also register my disagreement with the majority's formulation of the obligation of the trial judges with respect to instructions. The majority cites to the Fourth Circuit case of *Management Sys. Assocs., Inc. v. McDonnell Douglas Corp., 762 F.2d 1161, 1177 (4th Cir. 1985)*, which quotes 9 ***WRIGHT*** & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2566, at 654-55 (1997 ed.), for the proposition that "the court must instruct the jury properly on the controlling issues in the case even though there has been no request for an instruction or the instructions are defective." I fear this citation gives a dangerous misimpression that could mislead attorneys into believing that they had lesser obligations than they in fact have with respect to the proper formulation of ***jury instructions***. Whatever may be the practice **[**73]** in the Fourth Circuit, the Superior Court Rules, particularly with respect to civil cases, make it crystal clear that attorneys neglect to focus on ***jury instructions*** at their peril. The obligations to assist the judge with civil ***jury instructions*** begins with the pretrial statement. Superior Court Civil Rule 16(e), unlike its federal counterpart, requires that the joint pretrial statement filed by the parties before the pretrial conference include a list of both the Standardized Civil ***Jury Instructions***, by number, and "the complete text of any jury instruction not found" in the Standardized instructions that the parties wish to have given. Moreover, Superior Court Civil Rule 51 gives the parties additional opportunities to file written requests with the court and bars a party from assigning error for the court's giving or failing to give an instruction unless that party objects before the jury retires to consider its

verdict. [3] Thus, the idea that the predominant burden for correct ***jury instructions*** lies heavily on the shoulders of judges and lightly on the shoulders of attorneys misconstrues the co-operative relationship anticipated by our civil rules.

[74]**

End of Document

[3] *See also* Super. Ct. Crim. R. 52 (b) (providing that the "plain error" standard applies to error or defects in the proceedings that have not been brought to the attention of the court, a provision with necessarily includes the instructions given to juries).

Tab 10

D.C. v. Jackson

District of Columbia Court of Appeals

September 24, 2002, Argued ; November 14, 2002, Decided

Nos. 99-CV-756, 99-CV-972

Reporter
810 A.2d 388 *; 2002 D.C. App. LEXIS 658 **

DISTRICT OF COLUMBIA, et al., APPELLANTS/CROSS-APPELLEES, v. FELICIA JACKSON, APPELLEE/CROSS-APPELLANT.

Subsequent History: Costs and fees proceeding at *D.C. v. Jackson, 2005 D.C. App. LEXIS 333 (D.C., June 30, 2005)*

Prior History: [**1] Appeals from the Superior Court of the District of Columbia. (CA-6505-95). (Hon. Joan ***Zeldon***, Trial Judge).

Disposition: Verdict on assault and battery upheld and award of compensatory damages remitted, and award of punitive damages reversed.

Core Terms

excessive force, shot, damages, compensatory damages, assault and battery, shooting, knife, qualified immunity, fired, trial judge, police officer, circumstances, award of punitive damages, jury instructions, punitive damages, citations, officer's, immunity, argues, counts, malice, remit, clear and convincing evidence, internal quotation marks, matter of law, trial court, new trial, requires, kill

Case Summary

Procedural Posture
Defendant, the District of Columbia (D.C.), sought review of a decision of the Superior Court of the District of Columbia, which entered a judgment against defendants, three D.C. ***police*** officers, for compensatory and punitive damages, after the jury returned a verdict against them. The trial court remitted the compensatory damages, and plaintiff, the representative of the deceased's estate, challenged the validity of the remittitur.

Overview
The three D.C. ***police*** officers were involved with others in a hostage situation, where the deceased allegedly held his mother at knifepoint. Another defendant ***police*** officer shot deceased twice to allegedly disable him, but the three D.C. ***police*** officers continued to shoot at deceased until he was fatally wounded. Plaintiff filed an action under *42 U.S.C.S. § 1983*, alleging assault and battery and negligence per se. The jury returned a verdict in favor of plaintiff. The court held that the evidence permitted the jury to find that the three officers committed an assault and battery against deceased by use of ***excessive force***. The court noted that the trial court erred when it submitted the qualified immunity issue to the jury, because the issue of qualified immunity under *42 U.S.C.S. § 1983* was clearly a matter of law, but the error did not preclude the judgment on a theory of unlawful assault and battery. The court found that there was no basis for punitive damages when there was no showing of malice or its equivalent on the part of the ***police*** officers. The court upheld the trial court's decision to remit the compensatory damages.

Outcome
The court upheld the verdict returned by the jury on the grounds that the three ***police*** officers committed an assault and battery, and it upheld the award of compensatory damages as remitted. The court reversed the award of punitive damages.

LexisNexis® Headnotes

Torts > Intentional Torts > General Overview

Torts > Intentional Torts > Assault & Battery > General Overview

HN1[] Although assault and battery are technically

distinct intentional torts, in certain cases they are often pled in conjunction as a single count. An assault is an intentional and unlawful attempt or threat, either by words or acts, to do physical harm to the plaintiff. A battery is an intentional act that causes a harmful or offensive bodily contact. In most cases involving intentional shootings by ***police*** officers the technical requirements of assault and battery are satisfied and the outcome of the case turns on the defense of privilege.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > ... > Jury Trials > Jury Instructions > Objections

Criminal Law & Procedure > ... > Crimes Against Persons > Assault & Battery > General Overview

Criminal Law & Procedure > ... > Assault & Battery > Simple Offenses > General Overview

Criminal Law & Procedure > ... > Assault & Battery > Simple Offenses > Elements

Criminal Law & Procedure > Trials > Jury Instructions > Objections

Torts > Intentional Torts > Defenses > Defense of Self & Others

HN2[] A ***police*** officer has a qualified privilege to use reasonable force to effect an arrest, provided that the means employed are not in excess of those which the actor reasonably believes to be necessary. Moreover, any person, including an officer, is justified in using reasonable force to repel an actual assault, or if he reasonably believes he is in danger of bodily harm. Use of deadly force, however, is lawful only if the user actually and reasonably believes, at the time such force is used, that he or she, or a third person, is in imminent peril of death or serious bodily harm.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Reasonable Force

HN3[] The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The calculus of reasonableness must embody allowance for the fact that ***police*** officers are often forced to make split-second judgments, in circumstances that are tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Customs & Policies

HN4[] Qualified immunity in an ***excessive force*** case, as in any other, is ultimately an issue of law for the court to decide. In general, qualified immunity presents a question of law, whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions. While disputed factual issues relevant to the qualified immunity issue are, as in any other case, submitted to the trier of fact, the purely legal issue on which the claim of immunity turns remains for the court to decide.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Customs & Policies

HN5[] The United States Supreme Court has rejected the notion that the reasonableness of force used by ***police*** in arresting a person is the same question as the reasonableness of their conduct for purposes of qualified immunity, hence making the latter question one for the jury to decide. Qualified immunity requires a two-fold inquiry by the trial court: (1) Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right; and (2) if so, whether the right was clearly established at the time of the conduct, the dispositive inquiry there being whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. The second inquiry is essential because an officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense. But both parts of the inquiry are questions for the court to answer.

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Civil Procedure > Remedies > Damages > General Overview

Torts > Intentional Torts > Assault & Battery > Remedies

HN6[] A plaintiff is entitled to a single amount that will fairly and reasonably compensate the plaintiff for injuries and damages. A cardinal principle of law is that a plaintiff can recover no more than the loss actually suffered; actual injury remains the touchstone.

Civil Procedure > Remedies > Damages > General Overview

Civil Procedure > Remedies > Damages > Punitive Damages

Civil Rights Law > ... > Section 1983 Actions > Elements > Causal Relationship

Torts > Remedies > Damages > General Overview

Torts > ... > Types of Damages > Compensatory Damages > General Overview

HN7[] The purpose of money damages recoverable for violation of constitutional or federal rights under 42 U.S.C.S. § 1983, like that of common law damages, is to provide compensation for the injury caused by the defendant's breach of duty, or intentional tort.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > ... > Jury Trials > Jury Instructions > Standard Instructions

Civil Procedure > Remedies > Damages > General Overview

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > Remedies > Damages > General Overview

Torts > ... > Types of Damages > Punitive Damages > General Overview

Torts > ... > Types of Damages > Punitive Damages > Aggravating Circumstances

HN8[] To sustain an award of punitive damages, a plaintiff must prove, by a preponderance of the evidence, that a defendant committed a tortious act, and by clear and convincing evidence that the act was accompanied by conduct and a state of mind evincing malice or its equivalent. Although the requisite state of mind may be inferred from all of the facts of the case, there is a dual nature of the plaintiff's burden on punitive damages as noted in the standard civil jury instruction: The jury may award punitive damages only if the plaintiff has proved with clear and convincing evidence: (1) that the defendant acted with evil motive, actual malice, deliberate violence or oppression, or with intent to injure, or in willful disregard for the rights of the plaintiff; and (2) that the defendant's conduct itself was outrageous, grossly fraudulent, or reckless toward the safety of the plaintiff.

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > General Overview

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > Remittiturs

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN9[] The trial court may grant a new trial subject to a remittitur if the verdict is so large that it is beyond all reason or is so great as to shock the conscience. As this standard implies, the court's own decisions, and hence the conduct of judges in the trial court reflect an unwillingness to interfere with the jury's calculation of damages unless there is firm support in the record for such action. Once the trial court has set a damage award aside and stated its reasons, however, the court will accord great deference to that decision.

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > General Overview

Civil Procedure > ... > Relief From Judgments > Additur & Remittitur > Remittiturs

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN10[] The court will reverse the grant of a new trial for excessive verdict only where the quantum of damages found by the jury was clearly within the maximum limit of a reasonable range. Every doubt on that score will be resolved in the trial court's favor. A trial court has "broad discretion" to order a new trial conditioned on refusal of a remittitur.

Counsel: James C. McKay, Jr., Senior Assistant Corporation Counsel, with whom Robert R. Rigsby, Corporation Counsel at the time, and Charles L. Reischel, Deputy Corporation Counsel, were on the brief, for appellants/cross-appellees.

Gregory L. Lattimer, for appellee/cross-appellant.

Judges: Before WAGNER, Chief Judge, and FARRELL and REID, Associate Judges.

Opinion by: FARRELL

Opinion

[*390] FARRELL, *Associate Judge*: Terrence Hicks was shot to death by ***police*** officers who had responded to the home of his mother and found him holding her hostage at knifepoint. In subsequent wrongful death and survival actions brought against the District of Columbia and individual ***police*** officers by the estates of Hicks and his mother (who died [**2] of natural causes before trial), [1] [**3] liability turned essentially on whether the officers had used ***excessive force*** to immobilize Hicks -- ultimately by killing him -- after they saw him wield the knife as though about to stab his mother in the chest. The jury found in favor of Hicks's estate as to the District, acting through three ***police*** officers, on each of three counts: violation of Hicks's Fourth Amendment rights under *42 U.S.C. § 1983*, assault and battery, and negligence *per se*. [2] The jury awarded the plaintiff $ 2,149,998 in compensatory damages and $ 3,999,000 in punitive damages, both apportioned equally among the three officer-defendants. On a post-trial motion by the District, the trial judge remitted the compensatory damages to a total of $ 180,000, [3] but otherwise left the jury verdicts intact. On appeal, the District assigns error with respect to each count on liability and contests any award of punitive damages in this case. On cross-appeal, the plaintiff challenges the decision to remit the compensatory damages.

We hold that the evidence fairly permitted the jury to find, over the officers' defense of qualified privilege, that they committed assault and battery against Hicks by engaging in the use of ***excessive force***. That being so, we find it unnecessary to resolve the District's claims challenging the separate verdicts for the *§ 1983* violation and negligence because the jury returned a single award of compensatory damages, and because we further hold that no award of punitive damages was legally permissible in the circumstances of this case. Finally, we sustain as a proper exercise of discretion the trial judge's decision to remit the compensatory damages.

I.

On August 16, 1994, Metropolitan ***Police*** officers were alerted to the fact that Terrence Hicks was at the home of his mother, Mary Haley, threatening to kill her with a knife unless his former girlfriend, Kimberly Johnson, was brought to see him. [4] The ***police*** went to Haley's residence [**4] in an apartment building and, standing outside the door, held repeated conversations with Hicks in which he refused to open the door and threatened to kill his mother. Hicks had told the ***police*** he [*391] would "shoot" his mother. When they spoke with Mrs. Haley, she stated that he did not have a gun but had a knife and was restraining her physically. Negotiations continued for more than an hour during which Hicks gave differing "time lines" as to when he would kill Mrs. Haley with the knife unless Johnson was brought to see him. To the ***police*** he sounded "angry, almost irrational." Eventually a decision was made for the Emergency Response Team (ERT) to force entry into the apartment.

The plan was for the ERT, consisting of Sergeant Jackson (in charge), Lieutenant Durham, and Officers DeSantis, Henderson, Stewart, and Powell to enter the apartment and rescue Mrs. Haley without causing loss of life if possible. At a point [**5] when Hicks had effectively "broken off all negotiations," the team members forced the apartment door open and entered, each armed. According to their uniform testimony, they saw Mrs. Haley seated and appellant crouching behind her with his left arm around her neck and a knife in his right hand. They ordered him several times to drop the knife. But when Hicks rubbed the knife across Mrs. Haley's chest and then raised it as if to stab her there, DeSantis fired a shot which cut off two of her fingers, grazed her ear, and struck Hicks on the chin or left side of his face, though not fatally. DeSantis fired a second shot as Hicks "was spinning down to the ground." Officers testified that Hicks "immediately came back up" or "jumped back up," and three officers began firing their weapons at him. As Durham and DeSantis pulled Mrs. Haley all the way or partly into the adjoining kitchen, Henderson, Stewart and Powell fired a total of some

[1] The plaintiff was Felicia Jackson, the sister of Hicks and the daughter of his mother, Mary Haley.

[2] The jury found against the estate of the mother on all counts.

[3] The plaintiff received the option of a new trial on damages, which she declined.

[4] The ***police*** received information that Hicks had earlier kidnapped and sexually assaulted Johnson.

twenty-one shots at Hicks from a distance of nine feet or closer. Thirteen bullets struck Hicks, approximately seven of them in the back; two shots, including one to the left back of the head, were "very likely" fatal, and others were possibly so.

At trial, **[**6]** the plaintiff's theory in substantial part was that Hicks had never threatened his mother with a knife -- in effect that the ***police*** had fabricated the claim of an immediate threat to her safety or their own. [5] **[**7]** The jury rejected this theory by exonerating Officer DeSantis on all counts, implicitly finding that the two shots he fired were necessary to eliminate the threat Hicks posed to his mother's safety. Alternatively, however, the plaintiff contended that Officers Henderson, Powell, and Stewart used ***excessive force*** when they repeatedly shot and finally killed Hicks after DeSantis had effectively disabled him as a threat to anyone's safety. The jury apparently accepted this theory over the testimony of the officers that they began firing and continued to do so -- for a period of no more than eight seconds -- because Hicks still held the knife in his hand or was reaching toward it on the ground while trying to regain his feet. [6]

II.

The District contends, for different reasons, that the damage award cannot be sustained as to any of the three counts. It argues that as a matter of law: the officers were entitled to immunity on the ***excessive*** **[*392]** ***force*** (*§ 1983*) claim; the force they used was privileged with respect to the claim of assault and battery; and the plaintiff failed to prove negligence *per se* by presenting no expert testimony on the standard of care or deviation from it. [7] We consider first the challenge to the verdict on assault and battery because, as will appear in part II.B., *infra*, resolution of that challenge moots the District's other two attacks on the compensatory damage award.

[8] A.**

In *Holder v. District of Columbia, 700 A.2d 738 (D.C. 1997)*, the court stated:

HN1[↑] Although assault and battery are technically distinct intentional torts, in cases like this one they are often pled in conjunction as a single count. An assault is an intentional and unlawful attempt or threat, either by words or acts, to do physical harm to the plaintiff. A battery is an intentional act that causes a harmful or offensive bodily contact. In most cases involving intentional shootings by ***police*** officers the technical requirements of assault and battery are satisfied and the outcome of the case turns on the defense of privilege.

HN2[↑] A ***police*** officer has a qualified privilege to use reasonable force to effect an arrest, provided that the means employed are not in excess of those which the actor reasonably believes to be necessary. Moreover, any person, including an officer, is justified in using reasonable force to repel an actual assault, or if he reasonably believes he is in danger of bodily harm. Use of deadly force, however, is lawful only if the user actually and reasonably believes, at the time such force is used, that he or she (or a third person) is in imminent **[**9]** peril of death or serious bodily harm.

Id. at 741 (citations and internal quotation marks omitted). Without objection, the trial judge instructed the jury here in accordance with these principles. [8]

The District argues, nonetheless, that as a matter of law

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[5] Various witnesses for the plaintiff testified, for instance, that they had never seen the alleged hostage knife in Mrs. Haley's apartment. None had witnessed the actual encounter.

[6] The jury found Sergeant Jackson to have been negligent but rejected liability as to him on the other two counts. The award of one dollar in compensatory damages as to him is not at issue on appeal. No claim of liability as to Lieutenant Durham was submitted to the jury.

[7] The District also asserts two trial errors, neither of which requires extended discussion. First, the trial judge had a fully adequate basis on which to conclude that the District's own proffered expert on the use of reasonable force was unqualified to testify regarding the national standard of care -- an issue of admissibility, as the District concedes, committed to the trial court's discretion. *See, e.g., In re Melton, 597 A.2d 892, 897 (D.C. 1991)* (en banc). Second, the District was not prejudiced in the circumstances by the opinion of the plaintiff's witness Glen Murphy, who was permitted to testify only on an issue of fact, but who volunteered a quasi-expert opinion that the ***police*** faced no "threat" from Hicks when they continued shooting at him.

[8] The District now argues that the force used must be "*clearly* excessive" (emphasis added) for a ***police*** officer to forfeit the privilege, relying on *Jackson v. District of Columbia, 412 A.2d 948 (D.C. 1980)*. Beyond the fact that it did not seek to have this intensifier incorporated in the instructions given, however, *Jackson* adopts the standard of "clearly excessive" as distinct from "***excessive" force*** with respect to the "*threatened* use of force," *id. at 956* (emphasis in original), in contrast to the actual application of force -- a battery -- that took place in this case. *See also id. at 956 n.17*.

the actions of Officers Henderson, Powell, and Stewart -- shooting at Hicks **[**10]** until he was dead -- did not exceed the force reasonably necessary to prevent serious bodily harm to Mrs. Haley or themselves. The issue is an acutely difficult one because, as the Supreme Court has said in oft-quoted language:

HN3[↑] The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of **[*393]** reasonableness must embody allowance for the fact that ***police*** officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation.

Graham v. Connor, 490 U.S. 386, 396-97, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989) (citations omitted). At the same time, however, the judge instructed the jury on these considerations, [9] and this court may not set aside the jury's determination of whether an unlawful battery was proved unless, viewing the evidence most favorably to the plaintiff, no "impartial juror [could] find that [the officers] used ***excessive force*** and failed to act with reasonable prudence when [they] shot [Hicks]. **[**11]** " *Etheredge v. District of Columbia, 635 A.2d 908, 918 (D.C. 1993)*.

Applying these standards, we uphold the jury's verdict. The District argues that, beyond the inherent danger and need for split-second judgments in this hostage situation involving a knife, the uniform testimony of officers who were able to estimate the time was that at most six to eight seconds elapsed between the first and last shots fired by Henderson, Powell, and Stewart. [10] But the jury also heard testimony from Lieutenant Durham that pauses occurred between successive rounds of shots, and from Mrs. Haley that as the shooting continued she heard one officer say to the others, "why don't you stop shooting . . . why [do] you keep on shooting or whatever?" Testimony further permitted the inference that Officer DeSantis had moved Mrs. **[**12]** Haley well out of Hicks's reach after the first two shots, and that the danger to the officers as they kept firing was from a man who was now on all fours, had dropped the knife, and was two to three feet away from it, as Henderson testified. (Jackson and Stewart stated that Hicks had never let go of it.) [11] Although Hicks was "scrambling" toward the knife, according to Henderson, the jury could still infer a lack of reasonable restraint by the ***police*** from the evidence just recited and from the fact that the officers shot Hicks as many as seven times in the back, including a fatal shot to the back of the head. All told, we cannot say that a jury applying the preponderance of the evidence standard to these facts could reach only one conclusion on the issue of ***excessive force***.

[13] B.**

With respect to the *§ 1983* count based on a Fourth Amendment violation (***excessive force***), the District argues that in the circumstances of this case the officers were entitled to qualified immunity. It contends first, however, that the trial judge erred in submitting that issue to the jury when case law makes clear that it is an issue of law for the court. We agree, particularly in light of *Saucier v. Katz, 533 U.S. 194, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001)*, decided after the trial of this case, that ***HN4***[↑] qualified immunity in an ***excessive force*** case -- as in any other -- is ultimately an issue of law for the court to decide. In *Sabir v. District of Columbia, 755 A.2d 449 (D.C. 2000)*, also partly a *§ 1983* action **[*394]** based on the claimed use of ***excessive force***, this court recognized that in general qualified immunity presents "a question of law -- 'whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions.'" *Id. at 455* (quoting *Mitchell v. Forsyth, 472 U.S. 511, 528, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985)*). Earlier still, in *Fulwood v. Porter, 639 A.2d 594 (D.C. 1994)*, **[**14]** we explained that while "disputed factual issues relevant to the [qualified] immunity issue are, as in any other case, submitted to the trier of fact, . . . 'the purely legal issue on which [the] claim of immunity turns' remains for the court to decide." *Id. at 598-99 n.8* (quoting *Mitchell, 472 U.S. at 530*).

Any doubt that the issue is one of law, even in ***excessive force*** cases, was settled by *Saucier* in which *HN5*[↑] the Supreme Court rejected the notion that the reasonableness of force used by ***police*** in arresting a

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[9] She explained that "the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer at the scene rather than with the 20-20 vision of hindsight."

[10] Other than the officers only Mrs. Haley testified -- by deposition -- as an eyewitness. Although she stated that the shooting seemed "forever" -- "it was a long time, [those] bullets were just going off" -- she could not estimate the number of seconds.

[11] Powell was not called as a witness.

person is the same question as the reasonableness of their conduct for purposes of qualified immunity -- hence (as the lower court had ruled) making the latter question one for the jury to decide. Qualified immunity, the Court explained, requires a two-fold inquiry by the trial court: (1) "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" 533 U.S. at 201; and (2), if so, "whether the right was clearly established" at the time of the conduct, the "dispositive inquiry" there being "whether it would be clear to a reasonable officer **[**15]** that his conduct was unlawful in the situation he confronted." Id. at 201-02. The second inquiry is essential because "an officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense." Id. at 205. But both parts of the inquiry are questions for the court to answer. *See* id. at 197, 200, 206, 207. [12]

[16]** In this case, the trial judge submitted the question of immunity entirely to the jury, telling it among other things to decide "by a preponderance of the evidence" whether the officers "knew []or should have known that their actions violated federal law." [13] As the District **[*395]** points out, *Saucier* now forecloses that course of action. But the District is not in a position to complain of this error, because it did not object to the jury instruction on immunity; indeed, not until its post-verdict motion for judgment as a matter of law did it argue that the issue should be decided in its favor as one of law. As in Sabir, supra, therefore, we would be within our right to conclude that the claims of instructional error and entitlement to immunity as a matter of law come too late. *See* 755 A.2d at 455-56 (where "the government did not assert its immunity defense until the close of the case when the judge was preparing his [jury] instructions," this court would not "disturb the trial court's ruling" that the officers acted beyond the reach of qualified immunity protection).

[17]** It is unnecessary, however, for us to assess the effect of any error in the judge's treatment of the qualified immunity issue, and we likewise can ignore the District's claim that the plaintiff's proof of negligence *per se* failed for lack of an expert on the standard of care and deviation from it. The reason is that we have sustained the officers' liability for assault and battery, and the jury returned a single verdict of compensatory damages (apportioned equally among the officers) reflecting the principle that -- as the trial judge told the jury -- ***HN6***[↑] a plaintiff is entitled to a single "amount [that] will fairly and reasonably compensate the plaintiff for injuries and damages." *See* Woodward & Lothrop v. Hillary, 598 A.2d 1142, 1146-47 (D.C. 1991) ("[A] cardinal principle of law is that . . . a plaintiff can recover no more than the loss actually suffered"; "actual injury remains the touchstone." (citations and internal quotation marks omitted)). The plaintiff's entitlement to be made whole, in other words, did not depend on how many different (and overlapping) theories of liability were submitted to the jury. *See, e.g.,* id. at 1147 ***HN7***[↑] ("The **[**18]** purpose of money damages recoverable for violation of constitutional or federal rights under § 1983, like that of common law damages, is to provide compensation for the injury caused by the defendant's breach of duty (or intentional tort)."). [14] Because the

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[12] Although *Saucier* makes clear that the qualified immunity inquiry is ultimately for the court to make, its analysis does not appear to affect our observation in *Fulwood* and later *Sabir* that issues of historical fact may need to be submitted to the jury, perhaps on special interrogatories. *See also* District of Columbia v. Evans, 644 A.2d 1008, 1014-15 n.4 (D.C. 1994). *Saucier*'s "analytical framework," one court of appeals has observed, "does not appear at all inconsistent" with the principle that "disputed, historical facts material to the objective reasonableness of the officer's conduct will give rise to a jury issue." Curley v. Klem, 298 F.3d 271, 278 (3d Cir. 2002).

[13] The "federal law" the judge described to the jury, however, was merely that "at the time of the incident giving rise to the lawsuit it was clearly established that the ***Fourth Amendment to the United States Constitution*** protects persons from being subject to ***excessive force*** while being arrested." That "general proposition," the Supreme Court reiterated in *Saucier*, "is not enough" to resolve the immunity question; instead "the right the official is alleged to have violated must have been clearly established in a more particularized and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." 533 U.S. at 201-02 (quoting Anderson v. Creighton, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987) (internal quotation marks omitted)). Developing the contours of the right "with greater degrees of specificity" is the task of the courts from case to case. 533 U. S. at 207.

[14] The jury was accordingly told that, without proof of actual damages, it could award the plaintiff separate damages for a ***§ 1983*** violation only "in some nominal amount not to exceed the sum of $ 1.00."

finding of liability for assault and battery is sufficient to support the unitary award of compensatory damages (as remitted by the judge, see part IV, *infra*), and because we strike the award of punitive damages, see part III, *infra*, the District's challenges to the verdicts on negligence and the § 1983 count are moot. [15]

[19]**

[*396] III.

We have held that the jury could fairly find by a preponderance of the evidence that the three officers used ***excessive force*** in shooting Hicks to death, and thus could properly award compensatory damages to his estate. The award of punitive damages, however, presents a different issue. The District argues, as it did below, that no reasonable jury could find by clear and convincing evidence -- as it was required to -- that a ***police*** shooting which spanned at most eight seconds and evolved from a hostage-taking in which the victim was about to be stabbed when the shooting began presents "circumstances of extreme aggravation," *Sere v. Group Hospitalization, Inc., 443 A.2d 33, 37 (D.C. 1982)*, sufficient to justify punitive damages. We agree.

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[15] The District asserts that the plaintiff's failure to present an expert on standard of care and deviation from it undermined her proof not only of negligence but of assault and battery as well, since in this context each tort "fundamentally involves an inquiry into the reasonableness of the ***police*** officer[s'] actions." *Holder, 700 A.2d at 742*. We decline to consider this argument, which has not been briefed by either party and was raised in this court only at oral argument in response to a question from the bench. Whether proof of assault and battery -- an intentional tort -- based on ***excessive force*** requires the *plaintiff* to present expert testimony on the reasonableness of ***police*** conduct is a subtle issue, the answer to which might depend, for example, on whether in asserting the "lack of ***excessive force*** as a *defense* to assault and battery," *id. at 744* (emphasis added), the defendant itself has come forward with admissible expert testimony on the point, something the District failed to do in this case. See note 7, *supra*. We leave the issue for a case in which it has been adequately presented.

We likewise have no occasion to consider here the issue raised by the District in another case pending before the court, of whether it is even proper to submit a case of alleged use of ***excessive force*** by the ***police*** to the jury on counts both of negligence and of assault and battery -- whether, that is, "negligence" and the intentional tort are not inherently contradictory in this context. The issue has not been raised in this case at any point.

HN8[↑] To sustain an award of punitive damages, the plaintiff must prove, by a preponderance of the evidence, that the defendant committed a tortious act, and by clear and convincing evidence that the act was accompanied by conduct and a state of mind evincing malice or its equivalent.

Jonathan Woodner Co. v. Breeden, 665 A.2d 929, 938 (D.C. 1995). Although "the requisite state of mind . . . may be inferred **[**20]** from all of the facts . . . of the case," *King v. Kirlin Enters., Inc., 626 A.2d 882, 884 (D.C. 1993)* (citation and quotation omitted), we recently emphasized the dual nature of the plaintiff's burden on punitive damages by quoting with approval the standard civil jury instruction, as follows:

You may award punitive damages only if the plaintiff has proved with clear and convincing evidence:

(1) that the defendant acted with evil motive, actual malice, deliberate violence or oppression, or with intent to injure, or in willful disregard for the rights of the plaintiff;

AND

(2) that the defendant's conduct itself was outrageous, grossly fraudulent, or reckless toward the safety of the plaintiff.

Croley v. Republican Nat'l Comm., 759 A.2d 682, 695 (D.C. 2000) (quoting Standardized Civil Jury Instructions for the District of Columbia, No. 16-1 (1998 ed.)); *see also United Mine Workers of Am., Int'l v. Moore, 717 A.2d 332, 341 (D.C. 1998)* (to prove punitive damages, "[a] showing of evil motive or actual malice is . . . required") (citation omitted).

Viewing the evidence in the light most favorable to the plaintiff, *Croley, 759 A.2d at 695*, **[**21]** no reasonable juror could have found by the "more stringent" proof requirement of clear and convincing evidence, *id. at 696*, that the officers shot Hicks with an evil motive or actual malice. As the District points out, there was no evidence that the officers knew Hicks or had ever had any contact with him before they entered his mother's apartment. Thus, any inference that they acted maliciously must derive from the events of the shooting itself. More particularly, since neither the manner of entry by the ERT members nor the initial shots fired by Officer DeSantis support such an inference (the jury found DeSantis's actions to be justified), the malice would have to be inferred from the failure of the ***police*** to restrict their use of force during a period the judge

herself -- in denying the District's **[*397]** post-trial motion -- agreed was no more than eight seconds. [16] And it would have to be inferable despite the intense provocation the officers had experienced in confronting a man who was "almost irrational" and an instant before had tried to stab his mother in the chest. As a matter of law, the lack of restraint which the jury could properly find in holding the officers **[**22]** liable for unlawful battery does not support a finding of malice by clear and convincing evidence.

IV.

Lastly, we consider the cross-appeal and the propriety of the remittitur ordered by the trial judge which reduced the compensatory damages to a total of $ 180,000, apportioned equally among the three officers. We summarized the governing law on this subject in *George Washington Univ. v. Lawson, 745 A.2d 323, 331 (D.C. 2000)*:

HN9[↑] The trial court may grant a new trial subject to a remittitur if the verdict "is so large that 'it is beyond all reason or is so great as to shock the conscience.'" *Sigal Construction Corp. v. Stanbury, 586 A.2d 1204, 1220 (D.C. 1991)*. As this standard implies, "our own decisions, and hence the conduct of judges in the Superior Court, reflect[] an . . . unwillingness to **[**23]** interfere with the jury's calculation of damages" unless there is "firm support in the record" for such action. *Finkelstein v. District of Columbia, 593 A.2d 591, 595, 596 (D.C. 1991)* (en banc) (citations and internal quotation marks omitted). Once the trial court has set a damage award aside and stated its reasons, however, this court will "accord great deference" to that decision. *Id.* (citations and internal quotation marks omitted).

Given both the traditional self-restraint exercised by trial courts in this area and the trial judge's unique opportunity to consider the evidence in the living courtroom context, we have followed the rule -- and we do so today -- ***HN10***[↑] that we will reverse the grant of a new trial for excessive verdict only where the quantum of damages found by the jury was *clearly* within the maximum limit of a reasonable range. Every doubt on that score will be resolved in the trial court's favor.

Id. (emphasis in original; citations, quotation marks, and footnotes omitted).

See also *Safeway Stores, Inc. v. Kelly, 448 A.2d 856, 864 (D.C. 1982)* (trial court has "broad discretion" to order a new trial conditioned on refusal **[**24]** of a remittitur).

The trial judge explained her decision to remit as follows:

The jury awarded the Estate of Terrence Hicks (whose beneficiary is his daughter Ladoska Leftwich) [17] compensatory damages against the District of Columbia acting through defendants Powell, Henderson and Stewart totaling $ 2,149,998. (The jury apportioned $ 716,666 to each officer).

* * * *

The undisputed evidence in this case is that the decedent was shot and rendered unconscious during a brief period of several seconds and died a short time later. There is no evidence in the record that he was employed or that he had contributed financial support to Ms. Leftwich or that she had lived with him for any extended time in the years immediately **[*398]** prior to his death. Ms. Leftwich testified specifically that she did not live with him while he was living with the girlfriend with whom he had been involved at the time of his death. On the other hand, according to Ms. **[**25]** Leftwich, he washed and braided her hair, helped her with homework, went on school field trips, took her to school and picked her up from school. According to Plaintiff Felicia Jackson (the decedent's sister), Ms. Leftwich had a "beautiful" relationship with her father, who, with his mother, Mary Haley, had helped to raise her.

On these facts, the judge concluded that the verdict of $ 2,149,998 in compensatory damages "clearly exceeds the 'maximum limit of a reasonable range' justified by the evidence" (quoting *Finkelstein, 593 A.2d at 596*).

"Resolving in favor of that [conclusion] any doubt [this court] might have on whether 'the quantum of damages was *clearly* within the maximum limit' of reasonableness," *Lawson, 745 A.2d at 331* (citation omitted), we find no abuse of discretion by the judge. As she went on to explain, "the award of compensatory damages totaling $ 2,149,998 is out of proportion to decedent's very brief (but real) pain and suffering and [to] the loss of services and care, education, training,

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[16] Plaintiff has cited no decision of this court or of any other sustaining an award of punitive damages for ***excessive force*** spanning so short a time in a hostage situation.

[17] Ms. Leftwich was thirteen years old at the time of the shooting.

guidance and parental advice this particular decedent, based on the record, could have been expected to give Ms. Leftwich for **[**26]** five years until she turned eighteen." The plaintiff presented no evidence of lost future earnings by Hicks or of medical or funeral expenses or other special damages; and, as the judge pointed out, there was no evidence that the daughter had lived with him or received any financial support from him. Thus, beyond the limited proof of services, care, guidance and training Hicks had given her, the only damages supported by the evidence were his pain and suffering during the period of up to eight seconds before he lost consciousness. [18] In these circumstances, the judge was within her proper bounds in concluding that the jury's calculation of damages "resulted from passion, prejudice, mistake, oversight, or consideration of improper elements," *Finkelstein, 593 A.2d at 596* (quoting *Louison v. Crockett, 546 A.2d 400, 403 (D.C. 1988)*), and so required either a new trial on damages or a remittitur.

[27] V.**

For the reasons stated, we uphold the verdict on assault and battery and the award of compensatory damages as remitted, and reverse the award of punitive damages.

So ordered.

End of Document

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[18] The plaintiff's contention that the ***§ 1983*** violation resulted in separate actual, compensable damages is erroneous for the reason stated in part II.B., *supra*.

Tab 11

IN THE CIRCUIT COURT FOR FREDERICK COUNTY, MARYLAND

JOAO M. BARBOSA, et ux.	*	
Plaintiffs,	*	
vs.	*	CASE NUMBER: 10-C-14-001287
TANISHA M. OSBOURNE, M.D.	*	
Defendant	*	

* * * * * * * * * * * * *

VERDICT SHEET

1. Do you find by a preponderance of the evidence that Defendant, Tanisha M. Osbourne, M.D., deviated from the accepted standard of care in her treatment of Joao M. Barbosa?

YES_____ NO_____ (check one)

If you answered "YES" to Question 1, please proceed to Question 2.
If you answered "NO" to Question 1, please STOP and notify the court that you have reached a verdict.

2. Do you find by a preponderance of the evidence that the deviation from the accepted standard of care by the Defendant, Tanisha M. Osbourne, M.D., was a cause of injury to Joao M. Barbosa?

YES_____ NO_____ (check one)

If you answered, "YES" TO Question 2, please proceed to Question 3.
If you answered, "NO" to Question 2, please STOP and notify the court that you have reached a verdict.

3. Do you find that Plaintiff Joao M. Barbosa's own negligence in caring for himself caused or contributed to his injuries?

YES_____ NO_____ (check one)

If you answered, "YES" TO Question 3, please STOP and notify the court that you have reached a verdict.
If you answered, "NO" to Question 3, please proceed to Question 4.

4. In what amount do you award damages to Joao M. Barbosa for:

PAST MEDICAL EXPENSES $_____

NON-ECONOMIC DAMAGES $_____
Physical Pain and Suffering,
Inconvenience, Disfigurement,
Humiliation, Mental Anguish,
Injury to Marital Relationship

Tab 12

IN THE CIRCUIT COURT FOR FREDERICK COUNTY, MARYLAND

JOAO M. BARBOSA, et ux.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No.: 10-C-14-001287**
	)	
TANISHA M. OSBOURNE, M.D., et al.	)	
	)	
Defendants.	)	
	)	

TANISHA M. OSBOURNE, M.D.'S
FIRST SET OF INTERROGATORIES TO PLAINTIFF, ANGELA BARBOSA

TO: Angela Barbosa, Plaintiff
c/o Louis G. Close, III, Esquire
Christopher T. Casciano, Esquire
403 Central Avenue
Towson, Maryland 21204

FROM: Tanisha M. Osbourne, M.D., Defendant
c/o Crystal S. Deese, Esq.
Robert D. Anderson, Esq.
Gleason, Flynn, Emig & Fogleman, Chartered
11 North Washington Street, Suite 400
Rockville, Maryland 20850

INSTRUCTIONS

Pursuant to the Rules of this Court, you are requested to answer within thirty (30) days the following interrogatories.

(a) Your response shall set forth the interrogatory, and its answer, and "shall answer separately and fully in writing, or shall state fully the grounds for refusal to answer any interrogatory." The response shall be signed by you.

(b) Your answers shall include all information available to you or through your agents, representatives or attorneys.

(c) These interrogatories are continuing in character, so as to require you to promptly amend or supplement your answers if you obtain further material information.

(d) If you elect to specify and produce your business records in answer to any interrogatory, then in accordance with the Rules of the Court, your specification shall be sufficiently detailed to permit the interrogating party to locate and identify, as readily as you can, the record from which the answer may be ascertained.

(e) If in answering these interrogatories you encounter any ambiguities construing a question, an instruction, or a definition, set forth the matter deemed ambiguous and the construction you used in answering.

DEFINITIONS

As used in these Interrogatories, the following terms are to be interpreted in accordance with these definitions:

(a) The term "person" or "persons" includes any individual, joint stock company, unincorporated association or society, municipal or other corporation, the State, its agencies or political subdivision, any court, or any other governmental entity.

(b) The pronoun "you" and "yours" refers to the person(s) to whom these interrogatories are addressed and all person's agents, representatives or attorneys.

(c) The terms "document" or "documents" includes all writings, drawings, graphs, charts, photographs, recordings, and other data compilations from which information can be obtained, translated, if necessary, by you through detection devices into reasonably usable form.

(d) The terms "identify," "identity," or "identification," when used in reference to a

document requires you to state the date, the author (or, if different, require you to state the signor or signors), the addressee, and the type of document (*e.g.* letter, memoranda, telegram, chart, etc.). If any such document is no longer in your possession, custody, or control, state when the document was most recently in your possession, custody, or control, the disposition made of the document, and the identity of the person presently in possession, custody, or control of the document. If the document has been destroyed, state the reason for its destruction and the identity of the person who directed that the document be destroyed. In lieu of so identifying a document, at your option you may attach an accurate copy of it to your answers to these interrogatories appropriately labeled to correspond to the interrogatory in response to which it is being produced.

(e) The term "identify," "identification," or "identity" when used in reference to a natural person, requires you to state that person's name and present or last-known home and business address (including street number), home and business telephone numbers and present business affiliation. When used in reference to a person other than a natural person, describe the nature of such person (that is, whether it is a corporation, partnership, etc. under the definition of "person" above), and to state that person's last known address, telephone number, and principal place of business. Once any person has been identified properly, it shall be sufficient thereafter when identifying that same person to state the name only.

(f) The term "healthcare practitioner" refers to any physician, osteopath, surgeon, chiropractor, physician's assistant, paramedic, nurse, dentist, dental technician, physical therapist, social worker, therapist, hospital, clinic, ambulatory center, surgery-center, walk-in medical facility or any other person or facility offering treatment or examination of a physical or emotional ailment, weakness or infirmity.

(g) The term "occurrence" means the incident which occurred.

INTERROGATORIES

1. State your full name, address (present and former addresses for the past ten (10) years), date of birth, social security number, marital status (including dates of marriage and spouse's name) and levels of educational attainment. If you have ever used any other names, please list them.

2. Were you ever married prior to your marriage to Mr. Joao Barbosa? If so, state the date and place of each marriage, the name of each spouse involved, the date, place and manner of termination of each marriage, if applicable, and the current address and telephone number, if known, of each ex-spouse.

3. Have you ever asserted a claim for damages for loss of consortium aside from the claim in the present case?

4. If the Answer to the preceding Interrogatory is in the affirmative, state when and where such claim(s) were made, the case and/or claim number, against whom such claim or claims were made, the nature and grounds for such claim(s), the court and/or jurisdiction where each claim was filed and the result of each claim and state the nature of the damage to your marital relation, including which damages were permanent.

5. Describe in your own words how the alleged negligence has affected your marital relationship.

6. Describe how the alleged negligence has affected your husband regarding your marital relationship.

7. For how long have you been married to Mr. Joao Barbosa, including date and location of ceremony?

8. Have you, at any time within the past ten (10) years, maintained a place of residence different than that of Mr. Joao Barbosa for any period of time? If so, for each such residence, state:

(a) the address;
(b) the date it was established;
(c) the date it was terminated;
(d) the nature of your occupancy; and
(e) the name and current address of all individuals with whom you resided, if applicable.

9. State the name, address, telephone number, occupation and relationship to you, of every person, aside from your husband, who has personal knowledge of facts material or relevant to your claim that, as a result of the occurrence in question, you were caused to suffer the loss of your husband's consortium, society and companionship.

10. State whether any experts have been retained by or on your behalf to testify about your claim that, as a result of the occurrence in question, you were caused to suffer the loss of your husband's consortium, society and companionship.

11. If your Answer to the proceeding Interrogatory is in the affirmative, state:

(a) the name, address, occupation/specialty, title and business address of each such expert;
(b) whether a written report was submitted and if so, the date of each said report;
(c) the amount of compensation paid to each expert for his services;
(d) the name and address of all persons having possession of each said report;
(e) the substance of the findings and the opinions expected to be testified to by the expert(s); and

(f) a summary of the grounds for each opinion.
(g) Attach copies of any expert's report and curriculum vitae.

12. Describe in detail all facts of your marital relationship, whether physical, mental, or emotional, that have allegedly been temporarily or permanently injured, altered, diminished, and/or damaged as a result of the alleged negligence described in the Complaint.

13. State whether there is anything which you claim you cannot now do as a couple as a result of the alleged negligence, and whether there are activities your spouse formerly but no longer performs and if so, state specifically each and every one of such things or activities and how your husband's alleged injuries impacted you or your spouse's ability to do these activities.

14. Have you ever made a claim or filed a lawsuit against anyone arising out of any personal injury to yourself or to any member of your family before or after the occurrence in question?

15. If your Answer to the preceding Interrogatory is in the affirmative, list all parties to such claim or lawsuit, the date and place thereof, name and location of Court, the case caption and case/claim number, and the amount of money you received in satisfaction of such claim, if any.

16. State how long you have lived at your present address and, if you did not live at your present address continuously during the past ten years, state the years you lived at this address, and where you lived when you were not at this address.

17. State the name, address and profession of any psychologist, medical practitioner, counselor or other mental health care practitioner you consulted as a patient since the date you were married to Mr. Joao Barbosa to the present for any mental or physical condition, stating the nature of the condition for which treatment was sought and the date of each said treatment.

18. Prior to the date of the alleged malpractice had you suffered from any chronic condition, illness, permanent injury or disease including, but not limited to, high or low blood pressure, diabetes, tuberculosis, psychiatric illness, epilepsy, fainting spells, blackouts or any condition affecting the hearing, nerves or nervous system, and/or loss of sexual function and if so, state the name of each said condition, identify each health care provider and the effective dates of treatment, and state whether you are still suffering from the condition, illness or disease.

19. Do you claim any interference with intimate marital relations as a result of the incident? If so, state the exact extent to which your sexual relationship has been interfered with, stating the nature of your relationship beforehand (frequency, etc.), the nature afterwards, what has been lost from that relationship, and how you allege that the interference was caused by the occurrence in the Complaint.

20. Identify all of those individuals who have personal knowledge of your claim of interference with intimate relations.

21. Please state the name, address, telephone number, occupation, and relationship to you of every individual, aside from your husband and those persons identified in answers to previous Interrogatories, with whom you have spoken, conversed, or exchanged written correspondence regarding your loss of consortium allegation set forth in the Complaint.

22. Have you ever been convicted of any criminal offense in any jurisdiction at any time? Is so, state the offense for which you were convicted, plead guilty, entered plea of *nolo contendre*, the jurisdiction of incarceration and/or probation imposed as a sentence and whether time was served and/or probation terms satisfied.

23. Describe in as much detail as you can recall your conversation(s) with any healthcare providers relating to your husband's care in June 2013, and thereafter, and for each such conversation, state the dates and times of those conversations, identify all witnesses who were present to participate in or hear each conversation.

Respectfully submitted,

GLEASON, FLYNN, EMIG & FOGLEMAN, CHARTERED

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 14th day of October, 2014, a copy of the foregoing was served by email only to:

Louis G. Close, III, Esquire
Christopher T. Casciano, Esquire
403 Central Avenue
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tclose@lgclaw.net

Michael Olszewski, Esq.
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molszewski@hdjn.com

Robert D. Anderson, Esq.

IN THE CIRCUIT COURT FOR FREDERICK COUNTY, MARYLAND

JOAO M. BARBOSA, et ux.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No.: 10-C-14-001287**
	)	
TANISHA M. OSBOURNE, M.D., et al.	)	
	)	
Defendants.	)	
	)	

TANISHA M. OSBOURNE, M.D.'S
FIRST SET OF INTERROGATORIES TO PLAINTIFF, JOAO BARBOSA

TO: Joao M. Barbosa, Plaintiff
c/o Louis G. Close, III, Esquire
Christopher T. Casciano, Esquire
403 Central Avenue
Towson, Maryland 21204

FROM: Tanisha M. Osbourne, M.D., Defendant
c/o Crystal S. Deese, Esq.
Robert D. Anderson, Esq.
Gleason, Flynn, Emig & Fogleman, Chartered
11 North Washington Street, Suite 400
Rockville, Maryland 20850

INSTRUCTIONS

Pursuant to the Rules of this Court, you are requested to answer within thirty (30) days the following interrogatories.

(a) Your response shall set forth the interrogatory, and its answer, and "shall answer separately and fully in writing, or shall state fully the grounds for refusal to answer any interrogatory." The response shall be signed by you.

(b) Your answers shall include all information available to you or through your agents, representatives or attorneys.

(c) These interrogatories are continuing in character, so as to require you to promptly

amend or supplement your answers if you obtain further material information.

(d) If you elect to specify and produce your business records in answer to any interrogatory, then in accordance with the Rules of the Court, your specification shall be sufficiently detailed to permit the interrogating party to locate and identify, as readily as you can, the record from which the answer may be ascertained.

(e) If in answering these interrogatories you encounter any ambiguities construing a question, an instruction, or a definition, set forth the matter deemed ambiguous and the construction you used in answering.

DEFINITIONS

As used in these Interrogatories, the following terms are to be interpreted in accordance with these definitions:

(a) The term "person" or "persons" includes any individual, joint stock company, unincorporated association or society, municipal or other corporation, the State, its agencies or political subdivision, any court, or any other governmental entity.

(b) The pronoun "you" and "yours" refers to the person(s) to whom these interrogatories are addressed and all person's agents, representatives or attorneys.

(c) The terms "document" or "documents" includes all writings, drawings, graphs, charts, photographs, recordings, and other data compilations from which information can be obtained, translated, if necessary, by you through detection devices into reasonably usable form.

(d) The terms "identify," "identity," or "identification," when used in reference to a document requires you to state the date, the author (or, if different, require you to state the signor or signors), the addressee, and the type of document (*e.g.* letter, memoranda, telegram, chart, etc.). If any such document is no longer in your possession, custody, or control, state when the

document was most recently in your possession, custody, or control, the disposition made of the document, and the identity of the person presently in possession, custody, or control of the document. If the document has been destroyed, state the reason for its destruction and the identity of the person who directed that the document be destroyed. In lieu of so identifying a document, at your option you may attach an accurate copy of it to your answers to these interrogatories appropriately labeled to correspond to the interrogatory in response to which it is being produced.

(e) The term "identify," "identification," or "identity" when used in reference to a natural person, requires you to state that person's name and present or last-known home and business address (including street number), home and business telephone numbers and present business affiliation. When used in reference to a person other than a natural person, describe the nature of such person (that is, whether it is a corporation, partnership, etc. under the definition of "person" above), and to state that person's last known address, telephone number, and principal place of business. Once any person has been identified properly, it shall be sufficient thereafter when identifying that same person to state the name only.

(f) The term "healthcare practitioner" refers to any physician, osteopath, surgeon, chiropractor, physician's assistant, paramedic, nurse, dentist, dental technician, physical therapist, social worker, therapist, hospital, clinic, ambulatory center, surgery-center, walk-in medical facility or any other person or facility offering treatment or examination of a physical or emotional ailment, weakness or infirmity.

(g) The term "occurrence" means the incident which occurred.

INTERROGATORIES

1. State your full name, address (present and former addresses for the past ten (10) years), date of birth, social security number, marital status (including dates of marriage and spouse's name) and levels of educational attainment. If you have ever used any other names, please list them.

2. Please chronologically list all of your employers from 2003 through the present. For each employer state the following:

(a) name of employer;
(b) all dates of employment;
(c) your position and duties;
(d) your salary and wages;
(e) the reason that you left each employment; and
(f) if you applied for or received any short or long term disability benefits, and/or missed work for more than two weeks at any point, state when and why.

3. State whether you claim any prior lost earnings or impairment of future earning capacity as an element of damage herein, and if so state the amounts claimed and describe your method of computation.

4. Give an itemized statement of all losses or damages claimed herein, of whatever nature, and not otherwise described herein.

5. With particular reference to the care and treatment rendered to you by this defendant, or anyone you understand to be or have been an agent servant or employee of this defendant, describe separately and in complete factual detail the exact nature of each act, error, or omission which you contend was performed negligently, was negligently omitted, or which deviated from the standard of care. As to each such act, error or omission, state the facts you rely upon in support of your contention that such act or omission constituted negligence or otherwise tortious conduct on the part of this defendant.

6. In connection with your medical history for the 10-year period before this occurrence (i.e. January 1, 2003), please state whether you received any medical or mental health care or treatment regardless of whether you contend it was related to this occurrence or the injuries that you are claiming herein. And for each incident of care or treatment identify:

(a) each time that you were examined or treated by a physician or other medical practitioner, or sought or received any advice, care or treatment that related to any aspect of his physical or mental condition;
(b) the reason for and a description of the service;
(c) the name and address of the place where each service was rendered; and
(d) the name, address and area of specialization of the person rendering each service.

7. Set forth in narrative form and in chronological order the content of each conversation that you have had with this defendant, or any person you understood to be an agent, servant, or employee of this defendant, in connection with the allegations contained in the Complaint. In answering this Interrogatory, please state the dates and locations of the conversations and give the name and address of any other person who was present for all or any portion of each such conversation.

8. If any person has criticized any procedure, method, action or omission used by this defendant, or any person you understood to be an agent, servant, employee of this defendant, or any of its representatives in treating you, please state for each such criticism:

(a) the name, address, profession, and relationship to you, if any, of the person who made the criticism;
(b) the substance of the criticism; and
(c) the date of the criticism.

9. State the names and addresses of all persons known to you to have knowledge of facts regarding any injury you allege or the damages you claim, and give a summary of the facts that you believe to be known by any such person.

10. State the name, address and telephone number of each person whom you expect to call as an expert witness and/or treating physician at the trial of this action, and as to each such witness, please state:

(a) the subject matter upon which the witness will testify;
(b) a summary of the facts and opinions to which the witness is expected to testify;
(c) a summary of the grounds for each opinion; and
(d) a summary of the witness' professional qualifications.

11. If you know of the existence of any photographs, x-ray films, diagrams, documents or other real evidence relevant to this action or lawsuit, state the nature, subject matter, date taken or prepared, by whom taken or prepared, and the name and address of the present custodian of each.

12. State whether you contend that the applicable standards of care and treatment and any other issues pertinent to this matter are established by any article, treatise, textbook or other publication in the medical field. If so, give the title of such publication; the journal, magazine or series wherein each was published and the names of the author of such publication.

13. Have you or has your attorney received any written or oral communications from an expert, whom you expect to provide testimony at trial, in connection with the subject matter of this case? If so, as to each, please state:

(a) the name and address of the expert from whom such communication was received;
(b) the date on which the communication was received;
(c) the nature of such communication; and
(d) the present location of such communication or copies thereof.

14. State whether you contend that the negligence of any person, other than the named defendants, or any person you understood to be an agent, servant, employee of these defendants, contributed to cause the occurrences alleged in the Complaint. If so, identify every

such person and state the manner in which that person contributed to cause each occurrence.

15. Have you ever filed any type of claim or lawsuit seeking monetary damages for injuries received? Please include in your answer claims for workers' compensation benefits. This Interrogatory includes claims that did not actually result in the filing of lawsuits. If your answer is in the affirmative, please provide:

(a) the name of the person, or persons against whom the claim was brought;
(b) the date such a claim was made;
(c) the disposition of the claim; and
(d) the nature of the occurrence from which the claim arose.

16. Please state whether you have entered into any release, settlement or any other agreement, formal or informal, whether reduced to writing or not, pursuant to which the liability of any person or party to this case has been limited, reduced or released in any manner.

17. Please state whether you received any financial benefits through Medicare or Medicaid or any other source. If your answer is in the affirmative, please state with specificity the amount of any lien(s) each entity is entitled to claim and how you arose at the figure(s). Please attach to your answer any documentation evidencing the amount of the lien.

18. Do you contend that any medical record in this case is incorrect or inaccurate, or that it has been modified, altered or falsified in any manner? If so please set forth in detail the basis for your contention as to each and any such medical record.

19. Identify all pharmacies where you have had prescriptions filled since January 1, 2003 to the present.

20. Have you or anyone you know kept a diary, journal, calendar, blogged or otherwise memorialized any information related to your complaints, losses, or damages herein? If so, please identify the item and describe its contents, location, and custodian.

21. Please describe any and all conversations you had with any of your health care providers regarding your surgery of June 23, 2013. Be sure to describe whom you spoke with, when you spoke with said person(s), and the details of the conversation(s).

22. Have you and your wife ever attended or participated in marital counseling and/or contemplated separating? If so, please describe where and when you attended counseling and/or when you contemplated separating. If you did separate for a period of time, please state the time period and when and/or if you reconciled.

23. For each of the medical bills you are claiming are recoverable herein, please state:

a) the total charges;
b) the amount Blue Cross Blue Shield Carefirst and/or any other insurance company paid;
c) the amount Blue Cross Blue Shield Carefirst and/or any insurance company wrote off or did not pay; and
d) describe (or attach copies of) all documents of whatever nature you consulted to answer this interrogatory.

24. Have you ever been convicted of a crime, other than juvenile adjudication, which under the law in which you were convicted carried the death penalty or imprisonment in excess of one (1) years, or involved dishonesty or false statement regardless of punishment?

25. Describe in detail the basis for your contention in paragraph 12 of the Complaint, that "Defendant Osbourne breached the standard of care during the initial course of the laparascopic cholesystectomy by utilizing electocautery to manage dense adhesions which were predictably present," and identify which particular technique should have been utilized in the performance of the cholesystecomy.

26. Describe in detail the basis for your contention in paragraph 12 of the Complaint, that "Defendant Osbourne breached the standards of care by failing to convert to an open procedure, or obtain an intraoperative cholangiogram, because of the difficulty in visualizing the

anatomy," by identifying which particular technique should have been utilized in the performance of the cholesystecomy, setting forth in detail how the open procedure or cholangiogram would have improved the visualization of the anatomy or otherwise improved the outcome of the June 23, 2013 laparascopic cholesystectomy and identifying the authority or basis for such contention.

27. Describe in detail the basis for your contention in paragraph 12 of the Complaint, that "Defendant Osbourne violated the standard of care negligently clipping and cutting the common bile duct and the common hepatic duct at the level of the hilum."

Respectfully submitted,

GLEASON, FLYNN, EMIG & FOGLEMAN, CHARTERED

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Attorneys for Defendant Tanisha M. Osbourne, M.D.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 14th day of October, 2014, a copy of the foregoing was sent by email only upon:

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_____
Robert D. Anderson, Esq.

Tab 13

CHAPTER 12

DAMAGES—GENERAL

§ 12.01 DAMAGES—JURY TO AWARD

[1] Instruction 12-1

If you find for the plaintiff, then you must award the plaintiff a sum of money that will fairly and reasonably compensate [him] [her] for all the injuries, harms, and losses that [he] [she] experienced that you find were proximately caused by the defendant.

[When you hear the term *damages* or *monetary damages* in these instructions, that term refers to the sums of money for compensation as I have described].

[As I instruct you about damages or monetary damages, I do not mean to suggest that you should decide for or against any party on any issue].

Predecessor: Civil Jury Instruction No. 12-1 (1981).

Statutes: (None.)

Cases: *Haymon v. Wilkerson,* 535 A.2d 880, 885 (D.C. 1987); *accord, Bernard v. Calkins,* 624 A.2d 1217, 1220 (D.C. 1993).

[2] Comment

The cited cases support this Instruction [*see Ninth Circuit Manual of Model Jury Instructions*—Civil No. 5.1 (2007) (damages instruction does not suggest finding for any party)].

Tort law provides damages for the harm proximately caused by a wrong; contract law provides damages based on the parties' expectations [*see and cf.* Restatement (Second) of Torts § 901 (1965) (tort damages) *to* Restatement (Second) of Contracts (1981) § 346 (expectation interest) and § 349 (reliance interest)]. This Instruction provides for tort damages only.

Counsel should research the damage elements available in all causes of action pleaded in an individual case.

The Court of Appeals has formally adopted the "economic loss doctrine," which "prohibits claims of negligence where a claimant seeks to recover purely economic losses sustained as a result of an interruption in commerce caused by a third party"

[*Aguilar v. RP MRP Wash. Harbour, LLC*, 98 A.3d 979, 980, 983, 985–986 (D.C. 2014)]. That doctrine "bars recovery of purely economic losses in negligence, subject to only one limited exception where a special relationship exists" [*Aguilar v. RP MRP Wash. Harbour, LLC*, 98 A.3d 979, 985–986 (D.C. 2014)]. Accordingly, it would be inappropriate to instruct a jury on negligence liability and damages in a case where no special relationship existed and the plaintiff's claimed damages were for economic losses only, such as for "lost wages, standing alone absent any other injury" [*Aguilar v. RP MRP Wash. Harbour, LLC*, 98 A.3d 979, 985–986 (D.C. 2014)].

The plaintiff may recover emotional distress damages that are a natural and proximate result of the defendant's intentional misrepresentation. No such recovery is allowed for negligent misrepresentation, however [*Osbourne v. Capital City Mortgage Corp.*, 667 A.2d 1321, 1328–1329 (D.C. 1995)].

The D.C. Court of Appeals, in *Ivey v. District of Columbia*, 46 A.3d 1101, 1108–1109 (D.C. 2012), observed the potential ambiguity and equivocation that can occur with the use of the terms "damage" and "damages." The term *damage*, used as a noun, commonly operates as a synonym for "injury" or "harm," whether to person, property, business or reputation [*see Black's Law Dictionary* 204 (abridg. 5th ed. 1983)]. The term *damages*, used in law as a noun, refers generally to the character of or amounts of money that would compensate for injury or harm suffered or to be suffered [*Black's Law Dictionary* 204–205 (abridg. 5th ed. 1983)].

It is important to tailor standardized jury instructions to suit the specifics of the case at trial [*Speed v. United States*, 562 A.2d 124, 128 (D.C. 1989) (even when they correctly state the principles, "standardized instructions need amendment to reflect the application of the law"), *quoted in Ivey v. District of Columbia*, 46 A.3d 1101, 1109 n.5 (D.C. 2012)]. To help distinguish the meanings of the two terms as they appear in the jury instructions in Chapters 12 and 13 of this book, the instructions now offer language options [in brackets] for the bench and trial counsel to use when appropriate. For the term "damage," options include "injury," "detriment," "loss," or "harm." For the term "damages," the options may include "monetary compensation" or "monetary damages." In Jury Instruction 12-1, optional language allows the trial judge also to instruct the jury about the meaning of the term "damages" globally in this context.

Other References: *Maryland Civil Pattern Jury Instructions* 10:1 (4th ed. 2009). *See* § 11.31 (Jury Instruction 11-31, breach of contract damages); § 11.33 (Jury Instruction 11-33, quantum meruit damages); *Modern Federal Jury Instructions* Instr. 77-1 (LexisNexis 2007).

Other relevant cases: *Chesapeake & Potomac Tel. Co. v. Clay*, 194 F.2d 888, 890, 90 U.S. App. D.C. 206 (1952); *Morrissette v. Boiseau*, 91 A.2d 130, 131 (D.C. 1952).

§ 12.02 EXTENT OF DAMAGES—PROXIMATE CAUSE

[1] Instruction 12-2

The plaintiff is entitled to [compensation] [monetary] [damages] for any [detriment] [injuries] [harms] [losses] that the defendant's negligent or wrongful conduct proximately caused. The defendant is liable to pay monetary damages only for the [detriment] [injuries][harms] [losses] that [his] [her] conduct caused. If you find that defendant's conduct caused only part of the plaintiff's [detriment] [injuries][harms] [losses], then the defendant is liable to pay compensation only for that part.

Predecessor: Civil Jury Instruction No. 12-2 (1981).

Statutes: (None.)

Cases: *Shomaker v. George Washington University,* 669 A.2d 1291, 1295–1296 (D.C. 1995) (damages not proximately caused are not recoverable); *Cooper v. Berzin,* 621 A.2d 395, 400 (D.C. 1993) (approving the predecessor Instruction as simple and clear in the context of apportioning damages).

[2] Comment

The cited cases support this Instruction in the tort context [*see* § 5.12 (Jury Instruction 5-12, proximate cause)].

For contract actions, see § 11.31 (Jury Instruction 11-31, breach of contract damages) and § 12.07 (Jury Instruction 12-7, mitigation).

See Comment to Jury Instruction 12-1 concerning changes suggested or now incorporated to lessen the potential ambiguity between the terms "damage" and "damages" [*see* § 12.01[2]].

Other References: *Modern Federal Jury Instructions* Instr. 77-3 (LexisNexis 2007).

§ 12.03 BURDEN OF PROOF—SPECULATIVE DAMAGES

[1] Instruction 12-3

The burden of proof is upon the plaintiff to establish all elements of [his] [her] [its] [monetary] damages by a preponderance of the evidence. The plaintiff must prove [his] [her] [its] [monetary] damages with reasonable certainty. You may only award the plaintiff [monetary] damages for past, present or future [detriment] [harm] [injury] [expenses] that [is] [are] not speculative. Speculative [damages] [harms] are those that might be possible but are remote or based on guesswork.

The plaintiff does not have to prove [his] [her] exact [monetary] damages. However, you may award the plaintiff [monetary] damages that are based on a just and reasonable estimate derived from relevant evidence. Similarly, the plaintiff does not need to show that there is an absolute certainty that the injury or loss will continue into the future. You may award [monetary] damages to compensate the plaintiff for injuries and losses that probably will continue.

Predecessor: Civil Jury Instruction No. 12-3 (1981).

Statutes: (None.)

Cases: *Estate of Underwood v. Nat'l Credit Union Admin.*, 665 A.2d 621, 642 (D.C. 1995); *Romer v. District of Columbia*, 449 A.2d 1097, 1100 (D.C. 1982) (burden of proof; future damages; no speculation; no mathematical certainty required); *Edmund J. Flynn Co. v. La Vay*, 431 A.2d 543, 549–550 (D.C. 1981) (damages proved only with reasonable certainty, a just and reasonable estimate, not based on speculation or guesswork); *District Concrete Co. v. Bernstein Concrete Corp.*, 418 A.2d 1030, 1038 (D.C. 1980) (damage award need not be absolutely exact).

[2] Comment

The cases cited above support this Instruction.

This Instruction adds language which accords more fully with prevailing case law than did the predecessor Instruction 12-3 [*see, e.g., Edmund J. Flynn Co. v. Lavay*, 431 A.2d 543, 549–550 (D.C. 1981) ("A plaintiff need prove damages only with reasonable certainty . . . . While an award may not be based on speculation or guesswork, it may be a just and reasonable estimate based on relevant data."); *District Concrete Co. v. Bernstein Concrete Corp.*, 418 A.2d 1030, 1038 (D.C. 1980) ("The damage award need not be absolutely exact; a reasonable estimate based on relevant data is sufficient to support an award.")].

See Comment to Jury Instruction 12-1 concerning changes suggested or now incorporated to lessen the potential ambiguity between the terms "damage" and "damages" [*see* § 12.01[2]].

Other References: *Modern Federal Jury Instructions* Instr. 77-3 (LexisNexis 2007). *Abraham v. Gendlin*, 172 F.2d 881, 84 U.S. App. D.C. 307 (1949); *Karrick v. Rosslyn Steel & Cement Co.*, 25 F.2d 216, 58 App. D.C. 89 (1928); *Eureka*

Invest. Corp. v. Chicago Title Ins. Co., 743 F.2d 932, 939, 240 U.S. App. D.C. 88 (1984); *Tatum v. Morton*, 386 F. Supp. 1308, 1313 (D.D.C. 1974); *Designers of Georgetown, Inc. v. E.C. Keys & Sons*, 436 A.2d 1280, 1281 (D.C. 1981); *Hartford Accident and Indem. Co. v. Dikomey Mfg. Jewelers, Inc.*, 409 A.2d 1076, 1082 (D.C. 1979); *Spar v. Obwoya*, 369 A.2d 173, 180 (D.C. 1977); *Burka v. Crestview Corp.*, 321 A.2d 853, 855 (D.C. 1974); *Dravillas v. Vega*, 294 A.2d 363, 365 (D.C. 1972); *Fowler v. A&A Co.*, 262 A.2d 344, 349 (D.C. 1970); *Construction Servs. v. Marty's Floor Covering Co.*, 259 A.2d 833, 835 (D.C. 1969); *R.S. Willard Co. v. Columbia Van Lines Moving & Storage Co.*, 253 A.2d 454, 456 (D.C. 1969); *Courtney v. Giant Food, Inc.*, 221 A.2d 92, 94 (D.C. 1966); *Guthrie v. Greenfield*, 109 A.2d 783 (D.C. 1954); *District News Co. v. Goldberg*, 107 A.2d 375, 377 (D.C. 1954); *Brandon v. Capital Transit Co.*, 71 A.2d 621, 622 (D.C. 1950)..

§ 12.04 MULTIPLE DEFENDANTS—SIZE OF VERDICT

[1] Instruction 12-4

The number of defendants that you may find liable to the plaintiff should not influence the amount of your verdict. You must determine what amount will fairly and reasonably compensate the plaintiff for [his] [her] [injuries] [and] [or] [losses]. You should then return a verdict in that amount against the responsible defendants.

Predecessor: Civil Jury Instruction No. 12-4 (1981).

Statutes: (None.)

Cases: *See Pickering v. Owens-Corning Fiberglas Corp.*, 638 N.E.2d 1127, 1131–1132 (Ill. App. 1994) (properly instructed jury can accurately and fairly determine liability among several defendants); *DiGiorgio Corp. v. Valley Labor Citizen*, 67 Cal. Rptr. 82, 89 (Cal. App. 1968) (jury must award amount to compensate plaintiff, regardless of the number of defendants); *State ex re. Allen v. Yeaman*, 440 S.W.2d 138, 142–144 (Mo. App. 1969) (rationale for consolidating multiple defendants in same jury trial in spite of possible jury confusion); *Shenk v. Gaudet*, 83 A.2d 672, 676 (D.C. 1951) (joint and several liability of multiple defendants where jury awarded single sum to plaintiff).

[2] Comment

The cited cases generally support this Instruction. This Instruction tracks Jury Instruction 4-3 [*see* § 4.03; *see also* 1 Kevin F. O'Malley, et al. *Federal Jury Practice and Instructions* §§ 103.10, 103.14 (6th ed. 2006); *cf. United States v. Doerr*, 886 F.2d 944, 972–973 (7th Cir. 1989) (Instruction to consider each criminal defendant's case separately was sufficient where possibility of spill-over guilt arose)].

See Comment to Jury Instruction 12-1 concerning changes suggested or now incorporated to lessen the potential ambiguity between the terms "damage" and "damages" [*see* § 12.01[2]].

§ 12.05 DAMAGE VERDICT—MULTIPLE DEFENDANTS

[1] Instruction 12-5

If you find that the plaintiff is entitled to receive [monetary] [compensation] [damages] from more than one defendant, then you must award such [monetary] [compensation] [damages] in a single amount against all defendants whom you find to be liable.

Predecessor: Civil Jury Instruction No. 12-5 (1981).

Statutes: (None.)

Cases: *Woodward & Lothrop v. Hillary,* 598 A.2d 1142, 1148 (D.C. 1991); *Estate of Underwood v. Nat'l Credit Union Admin.,* 665 A.2d 621, 647 n. 41 (D.C. 1995); *Faison v. Nationwide Mortg. Corp.,* 839 F.2d 680, 688, 268 U.S. App. D.C. 1 (1987).

[2] Comment

The cited cases generally support this Instruction.

The D.C. Court of Appeals recommends against the submission of separate verdict forms on damages for different legal theories. Rather, "the trial judge should make explicit by instructions that the plaintiff may receive only those damages which, in the aggregate, fairly compensate for the injuries actually suffered" [*Woodward & Lothrop v. Hillary,* 598 A.2d 1142, 1148 (D.C. 1991)].

D.C. courts have also advised against using special verdict forms where there are multiple defendants facing joint and several liability [*Estate of Underwood v. Nat'l Credit Union Admin.,* 665 A.2d 621, 647 n. 41 (D.C. 1995), *citing with approval Faison v. Nationwide Mortg. Corp.,* 839 F.2d 680, 688, 268 U.S. App. D.C. 1 (1987)].

See Comment to Jury Instruction 12-1 concerning changes suggested or now incorporated to lessen the potential ambiguity between the terms "damage" and "damages" [*see* § 12.01[2]].

§ 12.06 ADMITTED LIABILITY

[1] Instruction 12-6

[The defendant] has admitted that [he] [she] is responsible for any [injury] [loss] [detriment] [damage] [the plaintiff] may have suffered that proximately resulted from [the incident in question]. The only decisions you must make now involve [the plaintiff's] [monetary] damages. You must decide which of [the plaintiff's] [injuries] [harms] [losses], if any, were proximately caused by [the defendant's] conduct. If any of [the plaintiff's] [injuries] [harms] [losses] were caused by [the defendant's] conduct, then you must decide the amount of [monetary] damages to award for them.

The fact that [the defendant] admitted responsibility must not influence the amount of [monetary] damages, if any, that you award to [the plaintiff].

Predecessor: Civil Jury Instruction No. 12-6 (1981).

Statutes: (None.)

Cases: *Jefferson v. Ourisman Chevrolet Co.*, 615 A.2d 582, 584 (D.C. 1992) (apparently approving the substance of this Instruction); *see, generally*, *Haughton v. Byers*, 398 A.2d 18, 20 (D.C. 1979) (fault admitted; jury decides damages only); *Wisdom v. Armstrong*, 196 A.2d 88, 89 (D.C. 1963) (same).

[2] Comment

This Instruction states D.C. law and general law consistent with standardized jury instructions in other jurisdictions [*see* 1 Kevin F. O'Malley, et al. *Federal Jury Practice and Instructions* § 120.04 (6th ed. 2006);]

To enhance jury comprehension, the court or counsel should tailor this instruction to replace the bracketed options with party names and a specific description of the incident as appropriate. See Comment to Jury Instruction 12-1 concerning changes suggested or now incorporated to lessen the potential ambiguity between the terms "damage" and "damages" [*see* § 12.01[2]].

When the defendant admits liability, the court may exclude evidence of the defendant's negligence [*Curry v. Giant Food Co.*, 522 A.2d 1283, 1289–1290 (D.C. 1987)]. Typically, the jury issues that remain are (1) whether the defendant's conduct proximately caused each of the claimed injuries, and (2) the amount of compensation for the caused injuries [*see* 1 Kevin F. O'Malley, et al. *Federal Jury Practice and Instructions* § 120.04 (6th ed. 2006).]

§ 12.07 DUTY TO MITIGATE DAMAGES

[1] Instruction 12-7

When a person suffers personal injury, breach of contract, or property damage, that person has a duty to do all that is reasonably within his or her power to minimize the [monetary damages] [harm suffered].

In this case [the defendant] claims that [the plaintiff] failed to reasonably minimize [his] [her] [its] [monetary damages] [harm suffered].

[The defendant] has the burden of proving that [the plaintiff] has failed to take reasonable action to lessen the damages. If [the defendant] has proved by a preponderance of the evidence that [the plaintiff] has not acted as an ordinarily prudent person could or should have acted to avoid or lessen the [monetary] damages, then [the plaintiff] may not receive those [monetary] damages that could or should have been lessened or avoided.

Predecessor: (None.)

Statutes: (None.)

Cases: *Trs. of the Univ. of the Dist. of Columbia v. Vossoughi*, 963 A.2d 1162, 1178 (D.C. 2009) (stating the rule); *Obelisk Corp. v. Riggs Nat. Bank of Washington, D.C.*, 668 A.2d 847, 856 (D.C. 1995) (similar jury instruction); *Edward M. Crough, Inc. v. Dept. of Gen. Services*, 572 A.2d 457, 466–467 (D.C. 1990) (duty to mitigate and burden of proof); *Gamble v. Smith*, 386 A.2d 692, 695 (D.C. 1978) (duty to mitigate loss of use damages); *Hill v. Liner*, 336 A.2d 533, 535 (D.C. 1975) (general rule); *Parking Management, Inc. v. Jacobson*, 257 A.2d 479, 480–481 (D.C. 1969) (personal property); *W. B. Moses & Sons v. Lockwood*, 295 F. 936, 941, 54 App. D.C. 115 (1924) (general rule).

[2] Comment

The cases cited above support this Instruction. The Court of Appeals cited this Instruction favorably in *Foster v. George Washington University Medical Center*, 738 A.2d 791, 794 (D.C. 1999). The court and counsel may substitute actual party names in place of party designations [in brackets] to enhance jury comprehension. See Comment to Jury Instruction 12-1 concerning changes suggested or now incorporated to lessen the potential ambiguity between the terms "damage" and "damages" [*see* § 12.01[2]].

"The doctrine of avoidable consequences, also known as the duty to mitigate damages, bars recovery for losses suffered by a non-breaching party that could have been avoided by reasonable effort and without risk of substantial loss or injury" [*Edward M. Crough Inc. v. Dept. of Gen. Services*, 572 A.2d 457, 466 (D.C. 1990)]. The plaintiff must avoid damages which the plaintiff "should have foreseen and could have avoided by reasonable effort without undue risk, expense, or humiliation" [*Edward M. Crough Inc. v. Dept. of Gen. Services*, 572 A.2d 457, 466–467 (D.C. 1990) (quotation and citation omitted)]. The efforts that the plaintiff undertakes to mitigate damages "need not be successful, so long as they are reasonable" [*Edward M. Crough*

Inc. v. Dept. of Gen. Services, 572 A.2d 457, 467 (D.C. 1990)].

Generally there is no duty to mitigate damages when the contract does not require the personal services of a contracting party [*Obelisk Corp. v. Riggs Nat. Bank,* 668 A.2d 847, 856 (D.C. 1995) (citation omitted)].

In a breach of contract case, the duty to mitigate does not obtain so long as the breaching party "has not definitely repudiated the contract and continues to assure that plaintiff that performance will take place." Similarly, the duty does not apply where the defendant itself has prevented the plaintiff from taking steps to avoid or reduce losses. [*Edward M. Crough Inc. v. Dept. of Gen. Services,* 572 A.2d 457, 467 (D.C. 1990) (citation omitted)]. Also, the duty to mitigate damages does not apply where "the party whose duty it is primarily to perform a contract has equal opportunity for performance and equal knowledge of the consequences of nonperformance" [*Edward M. Crough Inc. v. Dept. of Gen. Services,* 572 A.2d 457, 467 (D.C. 1990) (citation omitted)].

Other References: *Maryland Civil Pattern Jury Instructions* 10:6 (4th ed. 2009); Rosalyn B. Bell, *Maryland Civil Jury Instructions and Commentary* § 18.16 pp. 429–432 (1993) (mitigation of damages); *Modern Federal Jury Instructions* Instr. 77-7 (LexisNexis 2007).

CHAPTER 13

PERSONAL INJURY DAMAGES

§ 13.01 DAMAGES—ELEMENTS

[1] Instruction 13-1

If you find in favor of [the plaintiff], then you should consider whether [he] [she] is entitled to any [compensation] [monetary] damages. You may award [monetary] damages for any of the following items that you find the defendant's [negligence] [conduct] [action] proximately caused:

1. **the extent and duration of any physical injuries sustained by the plaintiff;**
2. **the effects that any physical injuries have on the overall physical and emotional well-being of the plaintiff;**
3. **any physical pain and emotional distress that the plaintiff has suffered in the past;**
4. **any physical pain and emotional distress that the plaintiff may suffer in the future;**
5. **any disfigurement or deformity suffered by the plaintiff, as well as any humiliation or embarrassment associated with the disfigurement or deformity;**
6. **any inconvenience the plaintiff has experienced;**
7. **any inconvenience the plaintiff may experience in the future;**
8. **any medical expenses incurred by the plaintiff;**
9. **any medical expenses that the plaintiff may incur in the future;**
10. **any loss of earnings incurred by the plaintiff;**
11. **any loss of earnings or earning capacity that the plaintiff may incur in the future; and**
12. **any damage or loss to plaintiff's personal property.**

Any [monetary] damages you might award for physical injury or physical sickness may not be taxable. Any monetary damages that you might award for emotional distress and for all other types of harm may be taxable.

Predecessor: Civil Jury Instruction No. 13-1 (1981).

Statutes: 26 U.S.C. § 104(a) (damages subject to federal taxation).

Cases: *Woodward & Lothrop v. Hillary,* 598 A.2d 1142, 1147–1148 (D.C. 1991) (approving nearly identical predecessor instruction); *Ceco Corp. v. Coleman,* 441 A.2d 940, 949–950 & n.10–12 (D.C. 1982) (citing and approving a nearly identical predecessor Instruction).

[2] Comment

This Instruction states the general law of personal injury damages [*see* Rosalyn B. Bell, *Maryland Civil Jury Instructions* § 18.04 pp. 401–406 (1993); K.F. O'Malley, et al., *Federal Jury Practice and Instructions* §§ 128.01–128.23 (5th ed. 2000)]. Language appropriate for emotional distress arising from personal injury or from violation of anti-discrimination laws appears in Jury Instruction 13-9 [§ 13.01[1]].

In *Psychiatric Institute of Washington v. Allen,* 509 A.2d 619, 627 (D.C. 1986), the Court of Appeals held that "in any case in which trial begins on or after the date of this opinion, the trial court should, upon request, instruct the jury that any damage award will not be subject to income taxation" [*see Schleier v. Kaiser Foundation Health Plan,* 876 F.2d 174, 180, 277 U.S. App. D.C. 415 (1989) (followed in federal courts)].

Individual elements of damages are treated in more detail in other Jury Instructions in this chapter. Of course, a jury instruction should not be given if there is no evidence to support it [*Vector Realty Group, Inc. v. 711 Fourteenth Street, Inc.,* 659 A.2d 230, 233 (D.C. 1994)]. The compensatory damages instruction would need to be tailored to the elements of damages for which there is evidence presented at trial [*Wingfield v. Peoples Drug Store, Inc.*, 379 A.2d 685, 688 (D.C. 1977) (a party is entitled to an instruction on any theory of damages supported by the evidence)].

The use of the word "any" to modify the elements in this damages instruction is sufficient to dispel the implication that the judge believed the element had been established by the preponderance of the evidence [*Ceco Corp. v. Coleman,* 441 A.2d 940, 950 (D.C. 1982)].

The "collateral source" rule applies in D.C. "[A]n injured person may usually recover in full from a wrongdoer regardless of anything he may get from a 'collateral source' unconnected with the wrongdoer" [*Hudson v. Lazarus,* 217 F.2d 344, 346, 95 U.S. App. D.C. 16 (1954) (footnote omitted); *accord, Jacobs v. H. L. Rust Co.,* 353 A.2d 6, 7 (D.C. 1976); *District of Columbia v. Jackson,* 451 A.2d 867, 870 (D.C. 1982)].

Plaintiffs can seek damages for personal injury under the Consumer Protection Procedures Act, for claims arising after October 2000, the date on which the statute was amended to permit personal injury damages recovery. Damages for personal injury were not previously available under the statute and the amendment was not made retroactive, therefore there can be no recovery of personal injury damages for claims arising before October 2000 [*Parker v. Martin*, 905 A.2d 756, 764 (D.C. 2006); *Caulfield v. Stark*, 893 A.2d 970, 977 (D.C. 2006)].

See Comment to Jury Instruction 12-1 concerning changes suggested or now

incorporated to lessen the potential ambiguity between the terms "damage" and "damages" [*see* § 12.01[2]].

Other References: *Maryland Civil Pattern Jury Instructions* 10:1, 10:2 (4th ed. 2009).

§ 13.02 PERMANENT INJURY ABSENT MEDICAL TESTIMONY

[1] Instruction 13-2

[The plaintiff] has offered evidence that [the defendant's] negligence [intentional conduct] caused [the plaintiff] to suffer personal injury, and that the effects of that injury still exist today, more than _____ months [years] after the incident. Although no physician or other expert testified about how long the effects of the injury might last, you may still conclude from the facts and circumstances of the case and from the nature and duration of the injury, that [the plaintiff] has suffered a permanent injury and award any [monetary] [compensation] [damages] accordingly.

Predecessor: Civil Jury Instruction No. 13-2 (1981).

Statutes: (None.)

Cases: *International Sec. Corp. v. McQueen,* 497 A.2d 1076, 1079 (D.C. 1985); *American Marietta Co. v. Griffin,* 203 A.2d 710, 712 (D.C. 1964); *see Estate of Underwood v. National Credit Union Administration,* 665 A.2d 621, 643 (D.C. 1995) (lay testimony supporting future pain and suffering).

[2] Comment

The cited cases support this Instruction. This Instruction is appropriate only when the court deems that the evidence of the case satisfies the exceptions to the general rule requiring expert testimony.

See Comment to Jury Instruction 12-1 concerning changes suggested or now incorporated to lessen the potential ambiguity between the terms "damage" and "damages" [*see* § 12.01[2]].

Expert testimony is generally required to prove a causal connection between an accident and an injury. However, there are three exceptions to the general rule: (1) when the injury develops within a reasonable time after the accident, (2) when causation is clearly apparent, or (3) when the cause of the injury relates to matter of common experience, knowledge, or observation of lay persons. The court decides in each case whether any of these three exceptions apply [*Lewis v. Washington Metropolitan Area Transit Authority,* 19 F.3d 677, 679, 305 U.S. App. D.C. 238 (1994)].

Establishing permanency of an injury generally requires expert testimony to establish both the permanent nature of the injury and causation. As several D.C. courts have noted, "such permanency in the aggravation setting, especially where the natural progression of the preexisting condition must be taken into account, will ordinarily not be obvious, thus requiring the testimony of medical witnesses to establish both the fact of a permanent aggravation and causation attributable to the defendant" [*Williams v. Lucy Webb Hayes Nat'l Training Sch. For Deaconesses and Missionaries,* 924 A.2d 1000, 1004–1005 (D.C. 2007) (*quoting* M. Minzer, Et Al., *Damages in Tort Actions,* Vol. 2 § 15.33[1], at 15-80); *see also Williams v. Patterson,* 681 A.2d 1147 (D.C. 1996)].

If there is evidence that plaintiff has suffered the "bad effects of an injury" for years after the injury, and there is no expert medical testimony that the plaintiff's injuries are temporary, then the jury may infer that the plaintiff is entitled to damages for future pain and suffering [*Estate of Underwood v. National Credit Union Administration,* 665 A.2d 621, 643 (D.C. 1995)]. On the other hand, if physicians testify without contradiction that an injury is temporary, reasonable laymen are in no position to say that the injury is permanent [*American Marietta Co. v. Griffin,* 203 A.2d 710, 712 (D.C. 1964)].

The lack of medical testimony may be called to the attention of the jury; "the weight of the evidence and the credibility of the witnesses are matters for the jury and not for the court" [*Garner v. Sam S. Bevard & Sons,* 342 A.2d 52, 54 (D.C. 1975)].

Absent medical testimony that injuries are temporary, a plaintiff's testimony concerning continuing pain and suffering will be sufficient to send the issue of permanency to the jury [*Davis v. Abbuhl,* 461 A.2d 473, 476 n.5 (D.C. 1983)].

Where there are complicated medical questions, such as the interplay of pre-existing conditions, however, medical expert testimony is required [*Gray Line, Inc. v. Keaton,* 428 A.2d 360, 362 (D.C. 1981); *Baltimore v. B.F. Goodrich Co.,* 545 A.2d 1228, 1231 (D.C. 1988)].

A trier of fact may infer the permanency of injury from the duration of the effects of the injury [*Alamo v. Del Rosario,* 98 F.2d 328, 69 App. D.C. 47 (1938)].

Determination of the causes of emotional disturbance is particularly complex: "[t]o allow a jury of laymen, unskilled in medical science to answer such a question, would permit the rankest kind of guesswork, speculation, and conjecture" [*Baltimore v. B.F. Goodrich Co.,* 545 A.2d 1228, 1231 (D.C. 1988) (citation omitted)].

When an injured party's own physician does not corroborate a claim of permanence, the jury may not infer permanence of the injury [*Green v. LaFoon,* 173 A.2d 212, 213–214 (D.C. 1961)].

§ 13.03 MEDICAL TREATMENT—PAST AND PRESENT

[1] Instruction 13-3

If you determine that [the plaintiff] is entitled to a [monetary] damages award for medical expenses incurred, then you should consider the reasonable value of all medical services given to the plaintiff. These medical services can include examinations, tests, and care by physicians and surgeons, services of nurses and attendants, hospital accommodations and care, ambulance services, medications, and any other services which were actually given and reasonably required for [the plaintiff's] treatment.

Predecessor: Civil Jury Instruction No. 13-3 (1981).

Statutes: (None.)

Cases: *Green v. United States Postal Serv.*, 589 F. Supp. 2d 58, 68 (D.D.C. 2008) (citing and quoting this Instruction); *Albano v. Yee,* 219 A.2d 567, 568 (D.C. 1966); *Giant Food Stores v. Bowling,* 202 A.2d 783, 784 (D.C. 1964). *Hudson v. Lazarus,* 217 F.2d 344, 346–347, 95 U.S. App. D.C. 16 (1954); *Nunan v. Timberlake,* 85 F.2d 407, 410, 66 App. D.C. 150 (1936).

[2] Comment

The cited cases generally support this Instruction. See Comment to Jury Instruction 12-1 concerning changes suggested or now incorporated to lessen the potential ambiguity between the terms "damage" and "damages" [*see* § 12.01[2]].

§ 13.04 LOST EARNINGS—PAST AND PRESENT

[1] Instruction 13-4

To determine the reasonable value of the time lost by [the plaintiff] from [his] [her] work because of the injury, you should consider any evidence of [the plaintiff's] actual earnings and the manner in which [he] [she] normally occupied [his] [her] work time before the injury. You should then determine the amount that [the plaintiff] was reasonably certain to have earned during the time lost from work because of the injury.

Predecessor: Civil Jury Instruction No. 13-4 (1981).

Statutes: (None.)

Cases: *Zuckerman v. Vane*, 812 A.2d 942 (D.C. 2002); *Bernard v. Calkins*, 624 A.2d 1217, 1220 (D.C. 1993); *Geffen v. Winer*, 244 F.2d 375, 376, 100 U.S. App. D.C. 286 (1957).

[2] Comment

The jury must award compensation to an injured plaintiff in the amount that would fairly and reasonably compensate for all damages that the defendant proximately caused [*Bernard v. Calkins*, 624 A.2d 1217, 1220 (D.C. 1993)].

A plaintiff is entitled to an instruction that lost wages are recoverable, notwithstanding the existence of compensation from a collateral source [*Bryant v. Mathis*, 278 F.2d 19, 20, 107 U.S. App. D.C. 339 (1960); *see* 1 Kevin F. O'Malley, et al. *Federal Jury Practice and Instructions* §§ 128.20–128.23 (6th ed. 2006)].

§ 13.05 LOST EARNINGS—FUTURE

[1] Instruction 13-5

You may award [the plaintiff] an amount that will reasonably and adequately compensate [him] [her] for any loss of earnings which [he] [she] is reasonably certain to suffer in the future. In determining this amount, you are allowed to consider several factors:

(1) [the plaintiff's] age, sex, health, physical and/or mental ability and earning capacity before the injury;

(2) [the plaintiff's] likely future earnings for the remaining working life, if the injury had not occurred, reduced to present value;

(3) [the plaintiff's] decreased earning capacity as a result of the injury;

(4) [the plaintiff's] likely future earnings for the remaining working life, taking into account the injury and how long it may affect both earnings and working life, reduced to present value; and

(5) the effects of inflation when estimating [the plaintiff's] future earnings.

Predecessor: Civil Jury Instruction No. 13-5 (1981).

Statutes: (None.)

Cases: *Croley v. Republican Nat'l Committee,* 759 A.2d 682, 689–694 (D.C. 2000); *Otis Elevator Co. v. Tuerr,* 616 A.2d 1254, 1260–1261 (D.C. 1992); *District of Columbia v. Barriteau,* 399 A.2d 563, 566–568 (D.C. 1979); *Spar v. Obwoya,* 369 A.2d 173, 179 (D.C. 1977); *Hudson v. Lazarus,* 217 F.2d 344, 348, 95 U.S. App. D.C. 16 (1954).

[2] Comment

Loss of future earnings is a distinct item of damages. "Loss of future earning capacity" measures the amount the injured party would have earned but for the injury [*District of Columbia v. Barriteau,* 399 A.2d 563, 567 (D.C. 1979)]. To establish this loss, the evidence must show: (1) plaintiff's demonstrated earning capacity prior to the injury, projected over his remaining working life, accounting for expected future earning increases, reduced to present value; and (2) plaintiff's actual earning capacity as a result of any diminished capacity caused by the injury, projected over his remaining working life, reduced to present value. The difference between these two values is the loss of future earnings [*District of Columbia v. Barriteau,* 399 A.2d 563, 567 n.6 (D.C. 1979)].

To arrive at a reasonable figure the jury must have evidence of the plaintiff's age, sex, occupational class, and probable wage increases over the remainder of the working life [*District of Columbia v. Barriteau,* 399 A.2d 563, 568 (D.C. 1979)].

Where there is a sufficient foundation of evidence, juries are allowed to consider the rate of inflation when calculating the plaintiff's loss of future earnings [*District of Columbia v. Barriteau,* 399 A.2d 563, 568 (D.C. 1979)]. Accordingly, juries can

consider evidence of future wage increases equivalent to the inflationary trend. Juries may not consider inflation by simply *not* reducing the projected future earnings to present value, however [*District of Columbia v. Barriteau,* 399 A.2d 563, 568 (D.C. 1979)].

Damages for the future consequences of injuries caused by tortious conduct are compensable only if the damages are "reasonably certain" [*Otis Elevator Co. v. Tuerr,* 616 A.2d 1254, 1260–1261 (D.C. 1992)].

The calculation of loss of future earnings may require expert testimony [*Otis Elevator Co. v. Tuerr,* 616 A.2d 1254, 1260–1261 (D.C. 1992); *accord, Hughes v. Pender,* 391 A.2d 259, 262–263 (D.C. 1978); *see Schleier v. Kaiser Foundation Health Plan,* 876 F.2d 174, 179, 277 U.S. App. D.C. 415 (1989) (expert required to discount future earnings to present value)].

Where the injured party is a juvenile lacking a definitive career history or potential, other factors may play a role in predicting loss of future earnings [*see Washington Metropolitan Area Transit Authority v. Davis,* 606 A.2d 165, 175 (D.C. 1992); *Hamilton v. District of Columbia,* 152 F.R.D. 426, 427 (D.D.C. 1994) (use of juvenile's records); *Hughes v. Pender,* 391 A.2d 259, 263 (D.C. 1978) (juvenile's arrest record); *see also District of Columbia v. Cooper,* 483 A.2d 317, 322 (D.C. 1984) (weighing probative value of juvenile arrest record against confidentiality claim)].

Other References: 1 Kevin F. O'Malley, et al. *Federal Jury Practice and Instructions* §§ 128.20–128.23 (6th ed. 2006).

§ 13.06 LOSS OF CONSORTIUM

[1] Instruction 13-6

In addition to other damages that you may consider in this case, [the plaintiff (husband or wife)] is seeking [monetary] damages for loss of consortium. *Consortium* means not only the injured spouse's material services, but also includes love, affection, companionship, sexual relations and other matters generally associated with a marital relationship. A husband or wife is entitled to the other spouse's services, society and companionship.

If you find that [the injured spouse] sustained personal injuries that had an adverse effect upon [the plaintiff's] rights to consortium, then you may award [monetary] damages to [the plaintiff] from the person whose negligence caused the injuries.

To estimate the amount that would fairly and reasonably compensate [the plaintiff] for loss of consortium, you should consider the facts of this case in the light of your own experiences.

The services and companionship that a spouse provides may be, and often are, of such character that no witness can say precisely what they are worth. Often, consortium, that is, services and companionship, will have no market value equivalent. Nevertheless, a husband or wife is entitled to receive [monetary] damages for loss of consortium even if there is no specific testimony about the precise value of an injured spouse's services and companionship.

Predecessor: Civil Jury Instruction Nos. 13-6 & 13-7 (1981).

Statutes: (None.)

Cases: *Stutsman v. Kaiser Found. Health Plan,* 546 A.2d 367, 372 (D.C. 1988) (general rule); *Curry v. Giant Food Co.,* 522 A.2d 1283, 1293–1294 (D.C. 1987) (elements of damages); *Stager v. Schneider,* 494 A.2d 1307, 1315–1316 (D.C. 1985) (applies to married persons only); *Hitaffer v. Argonne Co.,* 183 F.2d 811, 813–814, 87 U.S. App. D.C. 57 *cert. denied,* 340 U.S. 852 (1950), *overruled on other grounds, Smither & Co. v. Coles,* 242 F.2d 220, 221, 100 U.S. App. D.C. 68 (1957); *MacCubbin v. Wallace,* 400 A.2d 461, 463 (Md. App. 1979) (jury has wide latitude in valuing consortium, particularly sexual aspect).

[2] Comment

The cases cited above support this Instruction. Maryland's standardized jury instruction is far shorter but otherwise generally supports this Instruction [*see* Rosalyn B. Bell, *Maryland Civil Jury Instructions and Commentary* § 18.11 pp. 414–415 (1993)].

D.C. law does not recognize a loss of parent-child consortium claim [*District of Columbia v. Howell,* 607 A.2d 501, 506 (D.C. 1992)].

The D.C. Court of Appeals held that a claim for loss of consortium would not be barred for failure to give statutorily required notice of the claim, when notice was

provided as to the underlying claim of personal injury, as required by the statute. Because the loss of consortium claim is collateral to and dependent on the personal injury claim, formal notice of the loss on consortium claim would not provide any additional information to the defendant and was therefore not required [*Chidel v. Hubbard*, 840 A.2d 689, 696 (D.C. 2004)].

See Comment to Jury Instruction 12-1 concerning changes suggested or now incorporated to lessen the potential ambiguity between the terms "damage" and "damages" [*see* § 12.01[2]].

Other References: *Maryland Civil Pattern Jury Instructions* 10:9 (4th ed. 2009).

§ 13.07 AGGRAVATION OF PREEXISTING CONDITION

[1] Instruction 13-7

[The plaintiff] claims that [the defendant's] [conduct] aggravated [the plaintiff's] prior injury or other health condition. To "aggravate" a prior condition is to make it worse by increasing it or intensifying it.

If [the defendant's] negligence proximately caused the aggravation of [the plaintiff's] prior injury or other health condition, then [the plaintiff] is entitled to receive [monetary] damages to the extent that the prior condition has been aggravated.

[The plaintiff] is not entitled to receive [monetary] damages for the prior condition itself].

Predecessor: Civil Jury Instruction No. 13-8 (1981).

Statutes: (None.)

Cases: Structural Pres. Sys. v. Petty, 927 A.2d 1069, 1075–1078 (D.C. 2007); *Borger v. Conner*, 210 A.2d 546, 548 (D.C. 1965) (general rule); *see Charles H. Tompkins Co. v. Girolami*, 566 A.2d 1074, 1075 (D.C. 1989); *ITT Continental Baking Co. v. Ellison*, 370 A.2d 1353, 1357–1358 (D.C. 1977) (lay testimony competent to establish pre-existing health problems).

[2] Comment

The cases cited above support this Instruction [*see* Rosalyn B. Bell, *Maryland Civil Jury Instructions and Commentary* § 18.18 pp. 410–412 (1993) (aggravation of prior condition); Restatement (Second) of Torts § 433A cmt. e (1965)].

Aggravation of pre-existing condition may constitute a compensable injury under the Workers Compensation Act, D.C. Code §§ 32-1501 *et seq* [*Ferreira v. District of Columbia Dept. of Employment Services*, 667 A.2d 310, 312 (D.C. 1995)].

See Comment to Jury Instruction 12-1 concerning changes suggested or now incorporated to lessen the potential ambiguity between the terms "damage" and "damages" [*see* § 12.01[2]].

Other References: R & G Orthopedic Appliances and Prosthetics, Inc. v. Curtin, 596 A.2d 530 (D.C. 1991) (equitable indemnity among tortfeasors in aggravation of pre-existing condition); *Maryland Civil Pattern Jury Instructions* 10:4 (4th ed. 2009); 1 Kevin F. O'Malley, et al. *Federal Jury Practice and Instructions* § 128.03 (6th ed. 2006); W. Keeton, D. Dobbs, R. Keeton, D. Owen, *Prosser and Keeton on the Law of Torts* § 43 at 290–292 (5th ed. 1984).

§ 13.08 SPECIAL SUSCEPTIBILITY

[1] Instruction 13-8

If the plaintiff, because of a prior injury, disability or other condition, was more likely to suffer injury because of the defendant's negligence than a normal person would, then the defendant is responsible for that injury. A defendant may not avoid responsibility for his or her negligent actions by showing that the injury would have been less serious if it had happened to someone else.

Predecessor: Civil Jury Instruction No. 13-9 (1981).

Statutes: (None.)

Cases: *Providence Hosp., Inc. v. Willis*, 103 A.3d 533, 536 (D.C. 2014) (quoting and approving the language of this Instruction); *Bourne v. Washburn*, 441 F.2d 1022, 1026, 142 U.S. App. D.C. 332 (1971); *John Hancock Mut. Life Ins. Co. v. Serio*, 176 A.2d 874, 876 (D.C. 1962); *Clark v. Associated Retail Credit Men of Washington*, D.C., 105 F.2d 62, 66, 70 App. D.C. 183 (1939).

[2] Comment

The cited cases support this Instruction.

A defendant's liability for injuries to a specially susceptible plaintiff applies to all tortious conduct [Restatement (Second) of Torts § 461 & cmt. b (1965)]; *see Gubbins v. Hurson*, 987 A.2d 466, 469 n.6 (D.C. 2010) (quoting and citing the Instruction with approval).

Conduct not generally considered extreme and outrageous could be characterized as such to support a claim of intentional infliction of emotional distress if the tortfeasor knows the victim of the conduct is peculiarly susceptible to emotional distress [*Anderson v. Prease*, 445 A.2d 612, 613 (D.C. 1982)].

Other References: *Maryland Civil Pattern Jury Instructions* 10:3 (4th ed. 2009); W. Keeton, et al., *Prosser and Keeton on the Law of Torts* § 43 at 290–292 (5th ed. 1984).

§ 13.09 RECOVERY FOR EMOTIONAL DISTRESS

[1] Instruction 13-9

[The plaintiff] is seeking [monetary] damages for emotional distress. If you find [the defendant's] [conduct] [action] [negligence] caused [the plaintiff] emotional distress, then you may award [monetary] damages in an amount to fairly compensate [the plaintiff] [for the emotional distress].

[Elements to consider when deciding a [monetary] damage award include: any mental pain and suffering, fear, inconvenience, nervousness, indignity, insult, humiliation, or embarrassment that [the plaintiff] proves [he][she] suffered directly because of [the defendant's] [conduct] [action] [negligence].]

[If you find that [the defendant] has violated [the D.C. Human Rights Act] [or] [Title VII] [or] [federal anti-discrimination laws], then you may award [the plaintiff] compensatory damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other [non-pecuniary][non-monetary] losses including loss of reputation.]

Predecessor: Civil Jury Instruction No. 13-10 (1981); Civil Jury Instruction No. 13-9 (Lexis-Nexis rev. ed. 2002).

Statutes: (None.)

Cases: *Ivey v. District of Columbia*, 46 A.3d 1101, 1106, 1109 n.5 (D.C. 2012) (quoting with approval instructions actually given and suggested); *see Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 801, 810–811 (D.C. 2011) (en banc); *Williams v. Baker*, 572 A.2d 1062, 1067–1068, 1073 (D.C. 1990) (en banc).

[2] Comment

This instruction's language referring to physical injury and fear would not be suitable for use in cases where the plaintiff seeks "damages for mental distress as compensation for injury caused by unlawful discrimination under Title VII [of the Civil Rights Act of 1964, 42 USCS § 12101 *et seq.*] or the [District of Columbia Human Rights Act, D.C. Code § 2-1401.01 *et seq.*]." [*Ivey v. District of Columbia*, 46 A.3d 1101, 1105 n.2 (D.C. 2012)]. In discrimination cases, the alternative language would be more suitable.

To aid the jury's comprehension, actual names can be substituted for the party designations in this Instruction.

The language of this Instruction previously stated:

> [The plaintiff] is seeking damages for emotional distress. You may award damages for emotional distress if:
>
> (1) the defendant's negligence caused a physical injury to the plaintiff, or
>
> (2) the plaintiff was in the zone of danger and the defendant's negligence caused the plaintiff to fear for [his] [her] own safety, or
>
> (3) the defendant's negligence endangered the plaintiff.
>
> If the plaintiff suffered no physical injury, then you may award the plaintiff damages

for emotional distress only if the emotional distress is serious and verifiable.

That previous language referred to the plaintiff's "physical injury," the "zone of danger," and whether the plaintiff was "endangered." Those concepts, however properly form part of the trial court judge's determination of whether the plaintiff's claim for negligent infliction of emotional distress ("NIED") is actionable and can withstand a motion for summary judgment.

In *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789 (D.C. 2011) (en banc), the Court of Appeals declared an expanded scope of the NIED theory in the District of Columbia. The *Hedgepeth* Court examined the "physical injury" and "zone of danger" concepts as the underpinnings of previously-declared "limits" to NIED [*Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 798–799 (D.C. 2011) (en banc) (analyzing cases where the D.C. courts "permitted" some claims but "rejected" others based upon the presence or absence of the "zone of danger" element)]. The *Hedgepeth* Court expanded NIED by augmenting the "zone of physical danger test" previously declared in by *Williams v. Baker*, 572 A.2d 1062 (D.C. 1990) (en banc), with a relationship-likely risk test, all in the context of determining the categories of situations in which defendants owe a legal duty of care to plaintiffs who suffer emotional distress as the sole injury resulting from defendants' actions [*Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 801, 810–811 (D.C. 2011) (en banc) (noting, e.g., the drafters of Restatement (Third of Torts) § 46 & cmt b (Tentative Draft No. 5, 2007) recognized a special relationship or a special obligation basis "for establishing a duty" of care)]. The *Hedgepeth* Court further observed:

> Indeed, a number of courts around the country have held that a defendant has a *duty* to avoid causing emotional distress to a plaintiff if the defendant has undertaken an obligation to benefit the plaintiff and if that undertaking, by its nature, creates not only a foreseeable, but an especially likely, risk that the defendant's negligent performance of the obligation will cause serious emotional distress. This means that not every existing relationship or undertaking will suffice to create a *duty* to avoid the negligent infliction of emotional distress. Thus, courts consider the nature of the relationship between the parties and the likelihood that emotional distress will be caused by negligent performance of a recognized obligation before permitting stand-alone claims for emotional distress.

[*Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 801, 810–811 (D.C. 2011) (en banc) (emphasis added)].

In each case, the issue of the existence of a tort duty in the NIED context presents a question of law. The "zone of danger" basis for NIED, and the requirement that plaintiff have evidence to establish "serious and verifiable" emotional distress (both set forth in *Williams v. Baker*, 572 A.2d 1062, 1066 (D.C. 1990) (en banc)), as well as the relationship-likely harm basis declared in *Hedgepeth*, are all issues of "duty," which is "an issue of law to be determined by the court as a necessary precondition to the viability of a cause of action for negligence [*Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 811 (D.C. 2011) (en banc)]. The "question of whether a defendant owes a duty to a plaintiff under a particular set of circumstances is entirely a question of law that must be determined only by the court" [*Hedgepeth v. Whitman Walker Clinic*, 22

A.3d 789, 811 (D.C. 2011) (en banc), *citing Tolu v. Ayodeji*, 945 A.2d 596, 601 (D.C. 2008) (quotations and citations omitted)].

Where a plaintiff presents an NIED cause of action, the defendant may challenge the claim via a dispositive motion, and the decision-making procedure then follows:

> It is for the court to consider the relevant evidence and make a decision on the pleadings, on summary judgment, or, where necessary, after a hearing. Once the court determines the existence of a duty to avoid inflicting emotional distress, the other elements of the cause of action—standard of care, breach, causation and damages—must be proven to the finder of fact by a preponderance of the evidence [], and the defendant may present defenses, such as the plaintiff's contributory negligence. But if the court determines there is no duty as a matter of law, the litigation comes to an end, and that decision is a final order of the trial court.

[*Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 811 (D.C. 2011) (en banc) (internal citations omitted)].

The *Hedgepeth* Court confirmed the *Williams v. Baker* formulation for NIED liability remains available [*Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 792 (D.C. 2011) (en banc) ("the rule in Williams continues to be generally applicable to claims of [NIED] . . .")]. Under that rule, a plaintiff can recover for negligent infliction of emotional distress if (1) the distress results from a direct physical injury, (2) if the plaintiff was in the zone of physical danger and the defendant's negligence caused the plaintiff to fear for his or her own safety, or (3) if the defendant's negligence physically endangered the plaintiff [*District of Columbia v. McNeill*, 613 A.2d 940, 943 (D.C. 1992) (citations and quotations omitted)]. The plaintiff's physical injury need not be substantial to support the emotional distress claim. In the absence of physical injury, however, the emotional injury must be "serious and verifiable" [*District of Columbia v. McNeill*, 613 A.2d 940, 943 (D.C. 1992) (citations omitted)].

The *Hedgepeth* Court adopted a rule "that supplements the zone of physical danger test" [*Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 792 (D.C. 2011) (en banc)]. That rule is:

> [A] plaintiff may recover for negligent infliction of emotional distress if the plaintiff can show that (1) the defendant has a relationship with the plaintiff, or has undertaken an obligation to the plaintiff, of a nature that necessarily implicates the plaintiff's emotional well-being, (2) there is an especially likely risk that the defendant's negligence would cause serious emotional distress to the plaintiff, and (3) negligent actions or omissions of the defendant in breach of that obligation have, in fact, caused serious emotional distress to the plaintiff. Whether the defendant breached her obligations is to be determined by reference to the specific terms of the undertaking agreed upon by the parties or, otherwise, by an objective standard of reasonableness applicable to the underlying relationship or undertaking, e.g., in medical malpractice cases, the national standard of care. The likelihood that the plaintiff would suffer serious emotional distress is measured against an objective standard: what a "reasonable person" in the defendant's position would have foreseen under the circumstances in light of the nature of the relationship or undertaking. In addition, the plaintiff must establish that she actually suffered "serious and verifiable" emotional distress.

[*Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 810–811 (D.C. 2011) (en banc) (citation and footnote omitted)].

Note that this quoted language states a judicial definition of the NIED tort cause of action. This definition may include elements decided by the court as a matter of law and thus is likely unsuitable for use as a jury instruction on either liability or damages.

The *Hedgepeth* precedent suggests that if the plaintiff offers sufficient evidence supporting the NIED tort theory, then the plaintiff is entitled to have a jury decide whether the defendant's negligence caused the plaintiff to experience emotional distress, and if so, to award compensatory damages. In such a case, if the emotional distress occurred in connection with actual physical injury, then the plaintiff is entitled to the emotional distress instruction. Alternatively, if the plaintiff did not suffer physical injury, but was in the "zone of physical danger" or satisfied the *Hedgepeth* criteria for NIED and suffered "serious and verifiable emotional distress," then the plaintiff is entitled to the emotional distress instruction [*see Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 811 (D.C. 2011) (en banc) (emphasis added)].

See Comment to Jury Instruction 12-1 concerning changes suggested or now incorporated to lessen the potential ambiguity between the terms "damage" and "damages" [*see* § 12.01[2]].

Other References: *Maryland Civil Pattern Jury Instructions* 10:7 (4th ed. 2009) (compensatory damages for tort without bodily harm); *Fifth Circuit Pattern Jury Instructions*—Civil 4.8 (2006); *Model Civil Jury Instructions For The District Courts Of The Third Circuit* 5.4.1 (2011) (damages in discrimination cases).

§ 13.10 LIFE EXPECTANCY

[1] Instruction 13-10

According to the _____ Table of Mortality, the life expectancy of a person aged _____ years is _____ years. This statistical life expectancy, however, does not by itself conclusively prove [the plaintiff's] actual life expectancy. To determine [the plaintiff's] actual life expectancy, you should consider this life expectancy estimate along with any other evidence relating to the [the plaintiff's] health, habits and activity.

Predecessor: Civil Jury Instruction No. 13-11 (1981).

Statutes: (None.)

Cases: *Charles H. Tompkins Co. v. Girolami,* 566 A.2d 1074, 1076 (D.C. 1989); *Spar v. Obwoya,* 369 A.2d 173, 180 (D.C. 1977); *Kanelos v. Kettler,* 406 F.2d 951, 956, 132 U.S. App. D.C. 133 (1968); *City-Wide Trucking Corp. v. Ford,* 306 F.2d 805, 810, 113 U.S. App. D.C. 198 (1962); *Flythe v. District of Columbia,* 4 F. Supp. 3d 222, 237 (D.D.C. 2014) (employing this Instruction).

[2] Comment

The cited cases support this Instruction. Mortality tables are evidence of life expectancy but are not conclusive [*Kanelos v. Kettler,* 406 F.2d 951, 956, 132 U.S. App. D.C. 133 (1968)]. Other factors must be taken into account to determine life expectancy [*City-Wide Trucking Corp. v. Ford,* 306 F.2d 805, 810, 113 U.S. App. D.C. 198 (1962)].

A court may take judicial notice of mortality tables [31A C.J.S. *Evidence* § 113 (1996); 29 Am. Jur. 2d *Evidence* § 103 (1994); *see City of Lincoln v. Power,* 151 U.S. 436, 441–442, 14 S.Ct. 387, 389 (1894) (mortality tables admissible and properly before the jury)].

This Instruction tracks the substance of the equivalent Maryland Jury Instruction [*see* Rosalyn B. Bell, *Maryland Civil Jury Instructions and Commentary* § 18.09 pp. 412–413 (1993)].

Other References: *Maryland Civil Pattern Jury Instructions* 10:27 (4th ed. 2009); 1 Kevin F. O'Malley, et al. *Federal Jury Practice and Instructions* § 128.21 (6th ed. 2006).

§ 13.11 PARENTS' RIGHTS

[1] Instruction 13-11

If a minor child was injured through the defendant's negligence and the child is entitled to receive [monetary] damages from the defendant, then the child's parents also are entitled to receive [monetary] damages for their past and future expenses in connection with the child's injuries until the child reaches legal age.

Thus, the child's parents are entitled to receive [monetary] damages to cover their hospital and other medical expenses, as well as other incidental expenses involved in caring for the child's injuries.

Predecessor: Civil Jury Instruction No. 13-12 (1981).

Statutes: D.C. Code § 46-101 (age of majority).

Cases: *Wheeler Tarpeh-Doe v. United States,* 771 F. Supp. 427, 456–457 (D.D.C.), *reversed on other grounds,* 28 F.3d 120, 307 U.S. App. D.C. 253 (1994) (D.C. law); *Garay v. Overholtzer,* 631 A.2d 429, 432 (Md. 1993); *Lester v. Dunn,* 475 F.2d 983, 985, 154 U.S. App. D.C. 399 (1973) (Md. law); *Lasley v. Georgetown University,* 842 F. Supp. 593, 595 (D.D.C. 1994) (D.C. law) (no claim for adult son's care).

[2] Comment

The cited cases generally support the substance of this Instruction.

The age of majority in the District of Columbia is 18 [D.C. Code § 46-101].

The law of the District of Columbia does not permit recover for loss of services of a minor child [*Parker v. Martin,* 905 A.2d 756, 764 (D.C. 2006) ("the law of the District of Columbia squarely prohibits any cause of action for loss of 'services' of a minor child")]. Maryland permits claims for loss of services of a minor child [*Monias v. Endal,* 623 A.2d 656, 662 (Md. 1993)].

See Comment to Jury Instruction 12-1 concerning changes suggested or now incorporated to lessen the potential ambiguity between the terms "damage" and "damages" [*see* § 12.01[2]].

Other References: *Maryland Civil Pattern Jury Instructions* 10:23 (4th ed. 2009); 1 Kevin F. O'Malley, et al. *Federal Jury Practice and Instructions* § 128.11 (6th ed. 2006).

§ 13.12 PUNITIVE DAMAGES NOT AUTHORIZED WHERE ONLY ORDINARY NEGLIGENCE IS SHOWN

[1] Instruction 13-12

The only question before you about [monetary] damages is what amount will fairly and reasonably compensate plaintiff for the injuries [he] [she] sustained as a proximate result of the defendant's negligence. You may not add any amount to the [monetary] damages to punish the defendant or to make an example of [him] [her]. The law does not authorize such additional [monetary] damages in this case.

Predecessor: Civil Jury Instruction No. 13-13 (1981).

Statutes: (None.)

Cases: *Chesapeake & Potomac Tel. Co. v. Clay,* 194 F.2d 888, 891, 90 U.S. App. D.C. 206 (1952); *Minick v. Associates Invest. Co.,* 110 F.2d 267, 268, 71 App. D.C. 367 (1940); *cf. Jonathan Woodner Co. v. Breeden,* 665 A.2d 929, 936–937 n.12 (D.C. 1995).

[2] Comment

The cited cases support this Instruction. This Instruction would be appropriate in cases where plaintiff cannot recover punitive damages. For jury instructions on punitive damages, see Chapter 16, *Punitive Damages.*

As a general rule, punitive damages are not favored under D.C. law [*Price v. Griffin,* 359 A.2d 582, 589 (D.C. 1976)]. To recover punitive damages, the plaintiff must prove by clear and convincing evidence that the defendant committed a tort by egregious conduct [*Jonathan Woodner Co. v. Breeden,* 665 A.2d 929, 936–937 n.12 (D.C. 1995)].

See Comment to Jury Instruction 12-1 concerning changes suggested or now incorporated to lessen the potential ambiguity between the terms "damage" and "damages" [*see* § 12.01[2]].

§ 14.05 WRONGFUL DEATH ACT DAMAGES

[1] Instruction 14-5

The amount to be awarded under the Wrongful Death Act is the financial loss suffered by the spouse and next of kin of [the deceased] who are the beneficiaries under this Act. The spouse of [the deceased] is [name]. The next of kin of the deceased are [names].

The Wrongful Death Act does not permit you to, and you must not, award the beneficiaries any amount for the sorrow, mental distress or grief, or for the loss of love and affection that they may have suffered because of [the deceased's] death.

The amount you do award to the beneficiaries should be more than mere nominal damages. In deciding upon any damages which will reasonably and adequately compensate the beneficiaries for the death of [the deceased], you should first consider the financial loss each beneficiary has suffered. Consider the financial support [the deceased] furnished or could have been expected to provide to each beneficiary. Consider, also, any gifts and other contributions which [the deceased] could have reasonably been expected to provide to each beneficiary had [the deceased] not died. In determining the amount each of the beneficiaries could have been expected to receive, you may consider the earnings and earning capacity of [the deceased] and the probable joint life expectancy of [the deceased] with each of the beneficiaries. Joint life expectancy means the time during which [the deceased] and each of the beneficiaries would both have been alive. You may also consider the age, health, occupation, station of life of the parties and any other fact which may guide you.

You should also set a dollar amount on the reasonable value of any services that the deceased would have provided to each beneficiary over their joint life expectancies.

[Insert Optional Paragraph 1 and/or 2 here.]

With regard to all of these losses, you must consider the effect of inflation on living expenses and wage earnings.

The amount that you calculate as the net financial loss must then be discounted to present cash value. This means that you must determine a lump sum payment which could compensate each beneficiary for his or her future financial losses suffered as a result of [the deceased]'s death.

Here is how you make that calculation. For each beneficiary, you must figure the amount, which if invested at a particular rate of interest today over the number of years [the decedent] would have been expected to live, would return an amount equal to the net financial loss to that beneficiary.

To any lump sum payment for a beneficiary, you should also add the actual amounts which that beneficiary paid towards the expenses of the decedent's last illness. These expenses would include any medical, nursing and hospital bills and

funeral expenses, and any other expenses of [the deceased].

Any award you make under the Wrongful Death Act should be apportioned among each of the beneficiaries; that is, your verdict should state the amount each beneficiary is to receive.

{[*Optional Paragraph 1: Insert this paragraph when [the deceased] is a minor.*]

In this case, [the minor deceased] died while a minor, that is, before reaching age 18. The earnings of a minor during [his] [her] minority belong to [his] [her] parents. You must, therefore, consider any amounts [the minor deceased] might have reasonably been expected to earn during [his] [her] minority. You must also consider the possibility that [he] [she] might have made contributions toward the support of [his] [her] parents and next of kin even after [he] [she] turned 18 years old.

After you have decided the amounts of [the decedent's] likely future earnings and contributions to support the parents, you must then subtract the costs that [his] [her] parents [or guardians] would have expended in raising [him] [her] to age 18.}

{[*Optional Paragraph 2: When the deceased is a parent of one or more of the next-of-kin beneficiaries, then this section should be included.*]

In making your award, you must also consider the loss of care, education, training, guidance and parental advice that [the deceased parent] would have been expected to give to [the decedent's next of kin beneficiaries].}

Predecessor: Civil Jury Instruction No. 14-5 (1981).

Statutes: D.C. Code §§ 16-2701, 16-2702, 16-2703.

Cases: *Doe v. Binker,* 492 A.2d 857, 860–861 (D.C. 1985); *Cole, Raywid & Braverman v. Quadrangle Dev. Corp.,* 444 A.2d 969, 971–972 (D.C. 1982); *Semler v. Psychiatric Institute of Washington, D.C.,* 575 F.2d 922, 924–925, 188 U.S. App. D.C. 41 (1978); *Elliott v. Michael James, Inc.,* 559 F.2d 759, 763–767, 182 U.S. App. D.C. 138 (1977); *Runyon v. District of Columbia,* 463 F.2d 1319, 1321–1323, 150 U.S. App. D.C. 228 (1972); *Rankin v. Shayne Brothers, Inc.,* 234 F.2d 35, 39–40, 98 U.S. App. D.C. 214 (1956); *Hughes v. Pender,* 391 A.2d 259, 261–263 (D.C. 1978).

[2] Comment

The cited statutes and cases support this Instruction. This Instruction was cited with approval in *District of Columbia v. Hawkins,* 782 A.2d 293, 303 (D.C. 2001), and expressly adopted in *Flythe v. District of Columbia,* 4 F. Supp. 3d 222, 235, 237 (D.D.C. 2014).

Especially in these potentially confusing Wrongful Death and Survival instructions, the actual party names should be substituted for the party designations, to enhance jury comprehension.

The Wrongful Death Act does not provide for the recovery of damages for loss of

consortium [*Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 564–565, 303 U.S. App. D.C. 1 (1993)].

A viable fetus negligently injured *en ventre sa mere* is a "person" for whom a wrongful death action may be brought under this statute [*Greater Southeast Community Hosp. v. Williams*, 482 A.2d 394, 395–398 (1984)]. There is no wrongful death action on behalf of a non-viable fetus, however [*Ferguson v. District of Columbia*, 629 A.2d 15, 17 (D.C. 1993)].

Evidence of obstetrician's negligence resulting in stillbirth is sufficient for recovery of damages [*see Crooks v. Williams*, 508 A.2d 912, 914–915 (D.C. 1986)].

The decedent's contributory negligence may preclude recovery under this statute [*District of Columbia v. Brown*, 589 A.2d 384, 388 (D.C. 1991)].

Projecting future earnings involves economics and statistics, and thus is a task well-suited to expert testimony [*Hughes v. Pender*, 391 A.2d 259, 261–263 (D.C. 1978)].

Punitive damages are available under this statute in appropriate cases [*In re Air Crash Disaster near Saigon*, 476 F. Supp. 521, 527 n.13 (D.D.C. 1979)].

On whether the jury should receive instruction referring to adjustments for inflation, see *District of Columbia v. Barriteau*, 399 A.2d 563, 568 (D.C. 1979) (loss of future earnings) [*see also* § 13.05 (Jury Instruction 13-5)].

CHAPTER 15

PROPERTY DAMAGE

§ 15.01 MEASURE OF PROPERTY DAMAGES

[1] Instruction 15-1

[*Injury to Personal Property*]: You may award an amount that you feel will reasonably compensate the plaintiff for injury to [his] [her] property. If the property can reasonably be repaired, you should award the plaintiff the reasonable costs to repair it. If, however, the cost of repair is greater than the property's [loss of] [diminution in] value due to the injury, then you should award plaintiff only an amount equal to the difference between the fair market value of the property immediately before the damage and its fair market value in its damaged condition.

[*Injury to Real Property*]: You may award an amount that you feel will reasonably compensate the plaintiff for injury to [his] [her] property. If it is possible to restore the property to its condition before the injury, and the cost of doing so does not greatly exceed the severity of the actual injury, then you should award the plaintiff the reasonable costs to repair it.

If, however, it is impractical to restore the property to its pre-injury condition, then you should award the difference between the fair market value of the property before the injury and its fair market value after the injury.

Predecessor: Civil Jury Instruction No. 15-1 (1981).

Statutes: (None.)

Cases: *Withers v. Wilson*, 989 A.2d 1117, 1120–1121 (D.C. 2010) (stating the principles); *Am. Serv. Ctr. Assocs. v. Helton*, 867 A.2d 235, 237, 239–40 (D.C. 2005); *Gamble v. Smith*, 386 A.2d 692, 694 (D.C. 1978) (per curiam); *Smith v. Brooks*, 337 A.2d 493, 494 (D.C. 1975) (per curiam); *Vaughan v. Spurgeon*, 308 A.2d 236, 237 (D.C. 1973) (per curiam); *Brewer v. Drain*, 192 A.2d 532, 533 (D.C. 1963); *Solomon v. Easterly*, 160 A.2d 621, 623 (D.C. 1960); *Knox v. Akowskey*, 116 A.2d 406, 407 (D.C. 1955); *Wentworth v. Air Line Pilots Ass'n.*, 336 A.2d 542, 543–544 (D.C. 1975); *Daskalea v. Wash. Humane Soc'y*, 480 F. Supp. 2d 16, 36 (D.D.C 2007) (quoting Comment).

[2] Comment

This Instruction states the general rule for recovery of property damage. To assure preparation of a complete instruction on damages, counsel should research all of the elements of damages available for each cause of action presented to the jury.

There are two basic standards for determining the measure of damages for injury to personal property. First, there is "the reasonable cost of repairs to restore the damaged property to its former condition" [*Gamble v. Smith,* 386 A.2d 692, 694 (D.C. 1978) (per curiam), *citing Smith v. Brooks,* 337 A.2d 493, 494 (D.C. 1975)]. The cost of repair measure applies to things that can reasonably be repaired [*Brewer v. Drain,* 192 A.2d 532, 533 (D.C. 1963); *Knox v. Akowskey,* 116 A.2d 406, 408 (D.C. 1955)].

The second standard is the diminution in value of the property immediately before and after injury [*Gamble v. Smith,* 386 A.2d 692, 694 (D.C. 1978) (per curiam), *citing Smith v. Brooks,* 337 A.2d 493, 494 (D.C. 1975)]. If the cost of repairs approaches or exceeds the value of the property before the injury, the plaintiff is entitled to no more than the diminution in value or the value of the property before the injury [*Gamble v. Smith,* 386 A.2d 692, 694 (D.C. 1978) (per curiam), *citing Smith v. Brooks,* 337 A.2d 493, 494 (D.C. 1975), *citing Knox v. Akowskey,* 116 A.2d 406, 408 (D.C. 1955)].

Although *Gamble* refers to the two measures, (1) "diminution in value" and (2) "value of the property before the injury" as alternative limits on damages, there is no practical difference between them. If the value of an injured chattel is $0, then its diminution in value equals its pre-injury value. If the value of the injured chattel is greater than $0, then the diminution in value measure yields a figure less than the pre-injury value, and would be the actual measure of damages. For this reason, only the diminution in value language appears in this Instruction [*cf.* Jury Instruction 15-2 (*see* § 15.02)].

Thus, to compute damages for partial destruction or injury to a chattel, calculate the difference in the chattel's value immediately before and after the injury. Alternatively, ascertain the reasonable cost of repairs necessary to restore the chattel to its former condition [*Withers v. Wilson,* 989 A.2d 1117, 1119–1120 (D.C. 2010)].

The plaintiff can also recover damages for diminution of value even if the property has been fully repaired, if the repair alone does not return the property to its full pre-injury value [*Am. Serv. Ctr. Assocs. v. Helton,* 867 A.2d 235, 239–40 (D.C. 2005)].

The plaintiff can also recover costs incurred while deprived of the use of the property [*Gamble v. Smith,* 386 A.2d 692, 694–695 (D.C. 1978) (per curiam); *see* § 15.04 (Jury Instruction 15-4)].

If a jury finds that the plaintiff has a personal reason for restoring property to pre-injury condition, then the jury may award the plaintiff more than the diminution in market value to fully compensate for the injury [*Regal Constr. Co. v. West Lanham Hills Citizens' Ass'n, Inc.,* 260 A.2d 82, 84 (Md. 1970); *Samson Constr. Co., Inc. v. Brusowankin,* 147 A.2d 430, 435–436 (Md. 1958); *cf.* Restatement (Second) of Torts § 927 cmt. c (1965)].

The general rule for the measure of damages for injuries to real property is: "where

the damaged property can be restored to the condition it was in prior to the injury, without cost disproportionate to the actual injury, the cost of such restoration is the measure of damages; but where that is impracticable, then the difference between the value of the property before and after the injury is the correct measure" [*Wentworth v. Air Line Pilots Ass'n.*, 336 A.2d 542, 543–544 (D.C. 1975), *quoting and citing Sainato v. Potter,* 159 A.2d 632, 636 (Md. 1960); *see* Restatement (Second) of Torts § 929(1) & cmt. b (1965)]. The courts have flexibility to fashion a remedy, and the measure of damages "may often depend on the facts of a given case" [*Wentworth v. Air Line Pilots Ass'n.*, 336 A.2d 542, 544 n.2 (D.C. 1975)]. Diminution in value is the correct measure of damages where the plaintiff has already sold the property [*Wentworth v. Air Line Pilots Ass'n.*, 336 A.2d 542, 544–545 (D.C. 1975); *see* § 15.07 (Jury Instruction 15-7)].

"For purposes of awarding adequate compensation for the destruction of property, value means exchange value or the value to the owner if this is greater than the exchange value. In general, therefore, a person tortiously deprived of property is entitled to damages based upon its special value to him if that is greater than its market value. Where the lost property in such cases is replaceable, it is appropriate to measure damages for its loss by the cost of replacement." [*Trs. of the Univ. of the Dist. of Columbia v. Vossoughi*, 963 A.2d 1162, 1175–1176 (D.C. 2009) (internal quotations and footnotes omitted)]. The taking or destruction of intellectual property, such as university course materials, unpublished research, and fabricated devices that are items difficult to assign a fair market value, can be compensated by a jury verdict based upon trial evidence [*Trs. of the Univ. of the Dist. of Columbia v. Vossoughi*, 963 A.2d 1162, 1176 (D.C. 2009)]. *See* § 15.06[2] (Comment to Jury Instruction 15-6, quoting instruction language to use when analyzing elements when fair market value does not provide just compensation).

Other References: *Maryland Civil Pattern Jury Instructions* 10:7 (4th ed. 2009); Rosalyn B. Bell, *Maryland Civil Jury Instructions and Commentary* § 18.13 pp. 416–418 (1993) (compensatory damages for injury to property).

§ 15.02 PROPERTY BEYOND REPAIR

[1] Instruction 15-2

If you find that the plaintiff's property was damaged beyond repair but that it did have a market value after the accident in its damaged condition, then you should award the plaintiff an amount equal to the difference between the fair market value of the property immediately before the damage and its fair market value in its damaged condition. If, however, you find that the plaintiff's property was damaged beyond repair and had no market value after the accident, then you should award the plaintiff an amount equal to the fair market value of the property immediately before the accident, minus any salvage or scrap value.

Predecessor: Civil Jury Instruction No. 15-2 (1981).

Statutes: (None.)

Cases: *Glorious Food v. Georgetown Prospect Place Assocs.*, 648 A.2d 946, 948 (D.C. 1994); *Sawyer v. Monarch Cab Co.*, 164 A.2d 340, 341 (D.C. 1960); *Trinity Universal Ins. Co. v. Moore*, 134 A.2d 333, 335 (D.C. 1957); *Royer v. Deihl*, 55 A.2d 722, 724 (D.C. 1947); *see also Wentworth v. Air Line Pilots Ass'n*, 336 A.2d 542, 543–545 (D.C. 1975).

[2] Comment

This Instruction is supported by the cited cases and states general D.C. law applicable primarily to personal property damaged beyond repair. To that extent the substance duplicates Jury Instruction 15-1 [*see* § 15.01].

§ 15.03 PROPERTY LOST OR CONVERTED

[1] Instruction 15-3

You may award an amount that will reasonably compensate the plaintiff for property lost because of an accident or taking. That amount is equal to the fair market value of the property at the time it was lost or taken, [plus interest].

Predecessor: Civil Jury Instruction No. 15-3 (1981).

Statutes: *See* D.C. Code § 28:7-204 (warehouseman's or bailee's limitation of liability).

Cases: *Maalouf v. Butt*, 817 A.2d 189, 191 (D.C. 2003); *Bowler v. Joyner*, 562 A.2d 1210, 1213 (D.C. 1989); *Duggan v. Keto*, 554 A.2d 1126, 1140 (D.C. 1989); *Saah v. Mussolino*, 144 A.2d 541, 542 (D.C. 1958).

[2] Comment

This Instruction is supported by the cited cases and states general D.C. law. Damages for conversion of property can include both the value of the property plus interest [*Duggan v. Keto*, 554 A.2d 1126, 1140 (D.C. 1989)].

For an instruction and comment addressing the loss of household goods and wearing apparel, *see* § 15.05 (Jury Instruction 15-5) [*see also Jacobson v. Pennsylvania R.R. Co.*, 54 A.2d 575 (D.C. 1947) (relating to statutory limit for common carriers)].

The owner's testimony about the value of his or her property before the loss or taking is admissible and sufficient to prove its value [*Hartford Accident & Indem. Co. v. Dikomey Mfg. Jewelers, Inc.*, 409 A.2d 1076, 1078 (D.C. 1979); *see* § 22.10 (Jury Instruction 22-10, owner's opinion of value)].

Other References: Restatement (Second) of Torts § 927 (damages for lost or converted property); § 927 cmt. n (interest) (1965).

§ 15.04 LOSS OF USE

[1] Instruction 15-4

You may award the plaintiff an amount to compensate [him] [her] for loss of use of the damaged property. You must limit the award to the reasonable time that the plaintiff was kept from using the property as a proximate and natural result of damage to the property.

Predecessor: Civil Jury Instruction No. 15-4 (1981).

Statutes: (None.)

Cases: *Gamble v. Smith*, 386 A.2d 692, 694–695 (D.C. 1978) (per curiam); *Brandon v. Capital Transit Co.*, 71 A.2d 621, 622 (D.C. 1950).

[2] Comment

This Instruction is supported by the cited cases and states D.C. law.

In *Brandon v. Capital Transit Co.*, 71 A.2d 621, 622 (D.C. 1950), the Court stated the general rule but limited what is considered a "natural and proximate result" of the damage:

> In our opinion recovery for loss of use must be limited to the reasonable time the owner is deprived of the use as the proximate and natural result of the damage to the vehicle. Loss of use during the time reasonably required for repairs is as much a proximate result of defendant's negligence as is the cost of repairs, but we think it cannot in reason be said that loss of use due to the owner's financial inability to pay for the repairs is a proximate result of such negligence.

See Restatement (Second) of Torts § 927(2)(b–d) (damages for lost or converted property include loss of use and interest), § 927 cmt. o (limitations on loss of use damages), § 928(b) (loss of use for damaged property) (1965).

§ 15.05 LOSS OF USED HOUSEHOLD GOODS OR WEARING APPAREL

[1] Instruction 15-5

The measure of a defendant's liability for the loss of used household goods or wearing apparel is not their fair market value, but their actual value to the owner. This does not mean a fanciful value which the owner might place upon them, but such reasonable value as they had to the owner when considering the nature and condition of the goods and the purpose to which they were adopted and used.

Predecessor: (None.)

Statutes: (None.)

Cases: *Fowler v. A & A Co.*, 262 A.2d 344, 349 (D.C. 1970); *Greyvan Lines Inc. v. Nesmith*, 50 A.2d 434, 439 (D.C. 1946); *Barrett v. Freed*, 35 A.2d 180, 182 (D.C. 1943); *Smith's Transfer & Storage Co. v. Batigne*, 34 A.2d 705, 709 (D.C. 1943); *see Bowler v. Joyner*, 562 A.2d 1210, 1213 (D.C. 1989) (reciting the rule with approval).

[2] Comment

The cited cases support this Instruction.

The owner's testimony about the value of his or her property before the loss or taking is admissible and sufficient to prove its value [*Hartford Accident & Indem. Co. v. Dikomey Mfg. Jewelers, Inc.*, 409 A.2d 1076, 1078 (D.C. 1979); *Fowler v. A & A Co.*, 262 A.2d 344, 349 (D.C. 1970)].

Other References: *Shea v. Fridley*, 123 A.2d 358, 362 (D.C. 1956); *Manning v. Lamb*, 89 A.2d 882, 884–885 (D.C. 1952); *Yonan Rug Service v. United Services Auto Ass'n*, 69 A.2d 62, 64 (D.C. 1949).

§ 15.06 FAIR MARKET VALUE

[1] Instruction 15-6

The "Fair Market Value" of [an item of] property is the price that would result from a fair negotiation between an owner desiring, but not obligated, to sell and a buyer desiring, but not obligated, to buy, and taking into consideration all the uses to which the property has been and might reasonably be applied.

To determine the fair market value of [an item of] property, you may consider its purchase price, its age, its condition, and any depreciation.

Predecessor: (None.)

Statutes: (None.)

Cases: *Withers v. Wilson*, 989 A.2d 1117, 1120 (D.C. 2010) (basic definition); *Mark Keshishian & Sons, Inc. v. Washington Square, Inc.*, 414 A.2d 834, 841 (D.C. 1980) (fair market value of lease); *Nichols v. United States*, 343 A.2d 336, 341 (D.C. 1975) (criminal case); *Wentworth v. Air Lines Pilots Ass'n*, 336 A.2d 542, 543 n.1 (D.C. 1975) (recites rule); *Sawyer v. Monarch Cab Co.*, 164 A.2d 340, 341 (D.C. 1960) (applies rule); *Royer v. Deihl*, 55 A.2d 722, 724 (D.C. 1947) (applies rule).

[2] Comment

The cited cases support this Instruction. The phrase inside the brackets of this Instruction applies in the personal property context.

Fair market value is defined as the price that would result from fair negotiations between an owner willing to sell and a purchaser desiring to buy [*Withers v. Wilson*, 989 A.2d 1117, 1120 (D.C. 2010)]. Compare § 22.02 (Jury Instruction 22-2, fair market value in eminent domain context).

Failure to instruct jury to account for depreciation when determining fair market value is reversible error [*Sawyer v. Monarch Cab Co.*, 164 A.2d 340, 341 (D.C. 1960)].

The concept of fair market value applies directly when the property has been entirely destroyed. Application of the fair market value concept is more difficult in cases involving less than total destruction of the property [*Nichols v. United States*, 343 A.2d 336, 341 (D.C. 1975) (to invoke appropriate criminal statute, must consider fair market value of stolen property)].

In a case where the fair market value calculation would not provide just compensation, the Court of Appeals approved a superior court's instruction language:

> If you find that the fair market value of the destroyed property cannot be determined or would be inadequate, such as when there is no demand for the property and no ability to sell it, or when the property was unique or possessed special qualities which could only be appreciated by its owner, you may consider the following factors in determining the actual value of the property. One, the age of the property; two, the degree to which the property was used by the owner; three, the condition of the property just before and after it was damaged; four, the uniqueness of the property; five, the reasonableness of recreating or creating the property; six, the cost of

recreating or replacing the property; seven, the degree to which the property wore out with age; and, eight, the opinion of the owner as to its value.

[*Trs. of the Univ. of the Dist. of Columbia v. Vossoughi*, 963 A.2d 1162, 1172–1173 n.7 (D.C. 2009) (applying the Instruction to evaluate unique intellectual property, such as a university professor's course materials, academic research, and specialized devices)].

§ 15.07 SUBSEQUENT SALE OF DAMAGED PROPERTY BY OWNER

[1] Instruction 15-7

If an owner sells damaged property before having it repaired or restored, then you can only award damages on the basis of how much the value of such property decreased and not on the basis of what any cost of repairs or restoration might have been.

Predecessor: (None.)

Statutes: (None.)

Cases: *Wentworth v. Air Line Pilots Ass'n,* 336 A.2d 542, 544–545 (D.C. 1975).

[2] Comment

The cited case supports this Instruction [*see generally*, § 15.01 (Jury Instruction 15-1 and Comment)].

1 Punitive Damages: Law and Prac. 2d § 11:52 (2016 ed.)

Punitive Damages: Law and Practice, Second Edition
June 2016 Update

John J. Kircher and Christine M. Wiseman

Chapter 11. Jury Instructions *

§ 11:52. Introduction—District of Columbia *

References

Standardized Civil Jury Instructions for the District of Columbia [1]

§ 16.01

Punitive Damages (Defendant Not A Corporation)

In addition to compensatory damages, the plaintiff also seeks an award of punitive damages against the defendant. Punitive damages are damages above and beyond the amount of compensatory [or nominal] damages you may award. Punitive damages are awarded to punish the defendant for his or her conduct and to serve as an example to prevent others from acting in a similar way.

You may award punitive damages only if the plaintiff has proved with clear and convincing evidence:

(1) that the defendant acted with evil motive, actual malice, deliberate violence or oppression, or with intent to injure, or in willful disregard for the rights of the plaintiff;

AND

(2) that the defendant's conduct itself was outrageous, grossly fraudulent, or reckless toward the safety of the plaintiff.

You may conclude that the defendant acted with a state of mind justifying punitive damages based on direct evidence or based on circumstantial evidence from the facts of the case.

§ 16.02

Punitive Damages Against A Corporation (Wrongful Conduct Of Employee)

The plaintiff is [also] requesting that the jury award punitive damages against the defendant corporation.

You may award punitive damages against the defendant corporation only if you draw two conclusions. First, you must conclude that the employee defendant's act was the sort that deserves punitive damages under the rule I just gave you.

Second, you must conclude from clear and convincing evidence that the officers, directors or managing agents of the corporation participated in the act, authorized the act, or approved [ratified] the act before or after it was done.

§ 16.03

Computation Of Punitive Damage Award

If you find that the plaintiff is entitled to an award of punitive damages, then you must decide the amount of the award. To determine the amount of the award you may consider the [net worth] relative wealth of the defendant at the time of trial, the nature of the wrong committed, the state of mind of the defendant when the wrong was committed, the cost and duration of the litigation, and any attorney's fees that the plaintiff has incurred in this case. Your award should be sufficient to punish the defendant for his or her conduct and to serve as an example to prevent others from acting in a similar way.

Footnotes

* Authors' Note: The authors wish to express their thanks to Debra Hatzialexiou of the Marquette University Law School class of 2005 for her significant contributions to the 2004 revision of this chapter.

* See § 5:1, supra.

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§ 17.13 COMPENSATORY DAMAGES

[1] Instruction 17-13

If the plaintiff has demonstrated that [he] [she] sustained actual injury as a direct result of the publication of a defamatory statement, then you should award the plaintiff compensatory damages.

You should award a sum of money that compensates (1) for any injury to the plaintiff's good name and reputation, (2) for any mental anguish, distress, and humiliation, and (3) for any economic or monetary loss that the plaintiff suffered as a result.

You are not to return a separate sum for each element that I have mentioned. Rather, you should consider all of these elements to arrive at a single amount of compensatory damages.

Predecessor: Civil Jury Instruction No. 17-16 (1985).

Statutes: (None.)

Cases: *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Moss v. Stockard*, 580 A.2d 1011, 1023 (D.C. 1990); *Ingber v. Ross*, 479 A.2d 1256, 1265 (D.C. 1984); *Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649, 659, 125 U.S. App. D.C. 70 (1966); *Washington Times Co. v. Bonner*, 86 F.2d 836, 843–845, 66 App. D.C. 280 (1936).

[2] Comment

The cited cases generally support this Instruction.

"[The jury] may take into account the seriousness of the defamatory charge, the extent of distribution of the defamation, the extent to which the communication was actually believed, and plaintiff's prominence and professional standing in the community" [*Ingber v. Ross*, 479 A.2d 1256, 1265 (D.C. 1984), *quoting* R. Sack, *Libel, Slander, and Related Problems* 354–355 (1980); *accord*, *Moss v. Stockard*, 580 A.2d 1011, 1023 (D.C. 1990)].

It is an open question under D.C. law whether a plaintiff may recover damages for mental anguish without proof of injury to reputation. See the discussion in 50 Am. Jur. 2d *Libel and Slander* §§ 368–369 (2006), and Annotation, *Proof of Injury to Reputation As Prerequisite to Recovery of Damages in Defamation Action—Post Gertz Cases*, 36 A.L.R.4th 807 (1985 & Supp. 1997).

Other References: *Maryland Civil Pattern Jury Instructions* 12:6, 12:7 (4th ed. 2009).

§ 17.14 PUNITIVE DAMAGES

[1] Instruction 17-14

The plaintiff is seeking punitive damages for [defamation] [slander] [libel] in this case. Punitive damages are not intended to compensate an injured plaintiff. Rather, the law permits a jury in a civil case to assess punitive damages against a defendant as a punishment for outrageous conduct, and to deter others from engaging in that kind of conduct.

You may award punitive damages against the defendant in this case only if the plaintiff has proved by clear and convincing evidence that both of these two conditions are true:

(1) The defendant published a defamatory statement with knowledge that the statement was false, or with reckless disregard of whether it was false or not; and

(2) The defendant's conduct in publishing a defamatory statement showed maliciousness, spite, ill will, vengeance or deliberate intent to harm the plaintiff.

If you find both of these conditions are true, then you have the option of assessing punitive damages against the defendant. The law does not require you to assess punitive damages. If you decide to assess punitive damages, the amount of such damages is left to your good judgment.

Predecessor: Civil Jury Instruction Nos. 17-17 & 17-18 (1985).

Statutes: (None.)

Cases: *Columbia First Bank v. Ferguson,* 665 A.2d 650, 657–658 (D.C. 1995); *Phillips v. Evening Star Newspaper Co.,* 424 A.2d 78, 86 (D.C. 1980); *Riggs National Bank v. Price,* 359 A.2d 25, 26 (D.C. 1976); *Gertz v. Robert Welch,* 418 U.S. 323 (1974).

[2] Comment

The cited cases support this Instruction.

"Regardless of whether plaintiff is a public or private figure, punitive or presumed damages can be recovered only if reckless or knowing falsehood is proved" [*Phillips v. Evening Star Newspaper Co.,* 424 A.2d 78, 86 (D.C. 1980) (adopting trial court opinion)].

The D.C. Court of Appeals held in *Jonathan Woodner Co. v. Breeden,* 665 A.2d 929, 938 (D.C. 1995) that "the jury must be instructed that punitive damages may be awarded only if it is shown by clear and convincing evidence that the tort committed by the defendant was aggravated by egregious conduct and a state of mind that justifies punitive damages." This formulation of the rule appears to require proof of (1) an egregious act *and* (2) an evil or reckless state of mind.

Previous case law, not expressly distinguished or overruled by *Breeden*, held that

"[i]n general, punitive damages may be awarded for tortious acts aggravated by evil motive, actual malice, deliberate violence or oppression, *or* for outrageous conduct . . . in willful disregard for another's rights" [*see King v. Kirlin Enterprises, Inc.*, 626 A.2d 882, 884 (D.C. 1993) (emphasis added), *citing Robinson v. Sarisky*, 535 A.2d 901, 906 (D.C. 1988)]. This earlier formulation set forth a subjective and an objective test as alternatives. *Breeden* indicated that punitive damages must be established by "clear and convincing evidence" of both the subjective and objective elements. This Instruction implicitly incorporates the *Breeden* holding because the jury in effect considers the same elements when finding defamation and common law malice and constitutional "actual malice" [*see* 50 Am. Jur. 2d *Libel and Slander* § 364 (2006) (many states require proof of "actual malice" to allow punitive damages)].

The "malice" required to overcome a conditional or qualified privilege, without more, is insufficient to support an award for punitive damages in defamation [*Columbia First Bank v. Ferguson*, 665 A.2d 650, 657–658 (D.C. 1995)]. Common law "malice" supports a punitive damages claim [*see* Rodney A. Smolla, *Law of Defamation* § 9:44 (2d ed. 2002)]. Common law malice includes elements of ill will, spite, vengeance, and bad motive [*see H.E. Crawford Co. v. Dun & Bradstreet, Inc.*, 241 F.2d 387, 395 (4th Cir. 1957); *Lubore v. Pittsburgh Courier Pub. Co.*, 101 F. Supp. 234, 236 (D.D.C. 1951), *aff'd* 200 F.2d 355, 91 U.S. App. D.C. 311 (1952); *Black's Law Dictionary* 492 (5th ed. abridg. 1983)].

For further discussion on punitive damages, see § 16.01 (Jury Instruction 16-1, punitive damages).

Other References: *Maryland Civil Pattern Jury Instructions* 12:8 (4th ed. 2009).

§ 18.06 DAMAGES FOR FALSE ARREST

[1] Instruction 18-6

If you find that [the plaintiff] was falsely arrested, then [he] [she] is entitled to an award of enough money to compensate [him] [her] for any physical suffering and mental anguish, including fright, shame, and mortification from the indignity and disgrace, that resulted from the false arrest.

[The plaintiff] is also entitled to recover any reasonable and necessary expenses that [he] [she] has proved [he] [she] has incurred due to the false arrest, including loss of earnings while arrested or detained, and attorney's fees for services in securing [his] [her] release from the false arrest.

If [he] [she] was falsely arrested, then at a minimum, [the plaintiff] is entitled to an award of nominal damages, that is, a minimal sum such as one dollar, even if you find that [he] [she] suffered no injury or damages.

You may consider [the plaintiff's] loss of liberty alone as a basis for an award of damages. You may consider the length of time that [the plaintiff] was arrested or detained as a factor in deciding damages.

Predecessor: Civil Jury Instruction No. 18-6 (1981).

Statutes: (None.)

Cases: *District of Columbia v. Murphy,* 635 A.2d 929, 931 (D.C. 1993), *affirming on rehearing* 631 A.2d 34 (1993) (trial court's instruction unchallenged on appeal); *Phillips v. District of Columbia,* 458 A.2d 722, 725 (D.C. 1983); *Barnes v. District of Columbia,* 452 A.2d 1198, 1999–1200 (D.C. 1982) (per curiam); *District of Columbia v. Gandy,* 450 A.2d 896, 901 (D.C. 1982), *reinstated in pertinent part on rehearing* 458 A.2d 414 (1983); *Marshall v. District of Columbia,* 391 A.2d 1374, 1380 (D.C. 1978).

[2] Comment

"The tort of false arrest, in both its common law and constitutional variants, protects and vindicates the individual's interest in freedom from unwarranted interference with his personal liberty" [*Phillips v. District of Columbia,* 458 A.2d 722, 725 (D.C. 1983)].

Several of the elements of damages peculiar to intentional torts such as false arrest and battery do not require proof as special damages [*see* 32 Am. Jur. 2d *False Imprisonment* §§ 137, 140, 145–146 (1995)]. A jury in a false arrest case may consider loss of liberty by itself as a basis for the award of compensatory damages [*Phillips v. District of Columbia,* 458 A.2d 722, 725 (D.C. 1983) (cited with approval in *Speed v. United States,* 562 A.2d 124, 128 (D.C. 1989))]. The jury may also consider the length of confinement as a factor [*Phillips v. District of Columbia,* 458 A.2d 722, 726 (D.C. 1983)].

A punitive damages instruction may also be appropriate in certain circumstances [*Safeway Stores Inc. v. Gibson,* 118 A.2d 386, 389 (D.C. 1955), *affirmed* 237 F.2d 592, 99 U.S. App. D.C. 111 (1956) (per curiam); *Dart Drug, Inc. v. Linthicum,* 300 A.2d 442, 444 (D.C. 1973)].

The Instructions in this chapter focus on the common law tort of false arrest. In related cases involving deprivation of First Amendment rights to assembly, the jury must be instructed that compensation must be proportional to the harm actually suffered and to focus on such harm in fixing compensatory damages [*Phillips v. District of Columbia*, 458 A.2d 722, 726 (D.C. 1983) (citing *Dellums v. Powell*, 566 F.2d 167, 195, 184 U.S. App. D.C. 275 (1977), *cert. denied*, 438 U.S. 916 (1978)]. The Instruction here does not address compensation for First Amendment claims.

To enhance jury comprehension, the court and counsel should replace the party designations in brackets in this Instruction with the parties' actual names.

Tab 14

Tort Damages in the District of Columbia 2020

About the Speakers

Crystal S. Deese is a Director with Jackson and Campbell PC. Ms. Deese, Chair of the Firm's Health Law Practice Group, specializes in defending health care providers at their most vulnerable. She handles medical malpractice cases and credentialing issues within institutions and before the various licensing boards. Crystal defends lawsuits related to all aspects of health care and privacy in the District of Columbia, Maryland, and Virginia. Crystal concentrates her practice on Health Insurance Portability and Accountability Act investigations and manages breaches of all sizes.

Crystal has first-chaired the defense of significant medical malpractice trials on behalf of the region's largest health system and its providers. She has a proven record of accomplishment of success and is widely regarded for her courtroom advocacy skills and professionalism. Crystal's skills and natural leadership ability, combined with her knowledge of health care, have led to her invitation to serve as a guest speaker and presenter at regional programs on health care risk management and related issues. She formerly served on the Continuing Legal Education Committee for The District of Columbia Bar, and regularly teaches courses there.

Crystal is a member of the District of Columbia, Maryland, and Virginia Bars. She received her J.D., *cum laude* from American University Washington College of Law, and a B.A., *magna cum laude,* from Winthrop University.

Denis C. Mitchell is a partner with Stein Mitchell Beato & Missner LLP. Mr. Mitchel is an experienced trial attorney and focuses his practice on representing individuals and families who have suffered life-altering injuries or who have lost loved ones. He has obtained many multi-million-dollar verdicts and recoveries for his clients, including the largest verdict in a medical negligence case in Anne Arundel County, Maryland. He has handled cases before multiple state and federal courts. Mr. Mitchell's fellow lawyers recognized him as D.C.'s Trial Lawyer of the Year in 2014, and he was selected as one of *Washingtonian Magazine's Top Lawyers* in 2017. He has also been consistently recognized by *Best Lawyers*® and *Super Lawyers*® as a leading practitioner in medical malpractice since 2011.

Mr. Mitchell has held leadership positions in several organizations, including President of the Trial Lawyers Association of Metropolitan Washington, D.C., and

Chair of the D.C. Bar Tort Law Community. He writes quarterly publications and makes presentations on important cases handed down by state and federal courts in the District of Columbia. He is also an adjunct professor in Trial Advocacy at the Georgetown University Law Center.

Mr. Mitchell is fluent in Spanish, having spent a year teaching and studying in the Economics Department at the University of Navarre in Pamplona, Spain. He is also an active volunteer at his parish, coordinating service projects and coaching youth sports.

Hon. Joan Zeldon is a Senior Judge of the Superior Court of the District of Columbia. She is presently on Senior status. Judge Zeldon was appointed to the Superior Court in 1990 by President George H.W. Bush. Judge Zeldon currently serves as a mediator in tort and a wide variety of other civil cases for the McCammongroup (www.McCammongroup.com).

Judge Zeldon, daughter of Bess Cahn and J. Louis Zeldon, was raised in the District of Columbia and graduated from Ben Murch Elementary School, Alice Deal Junior High, and Woodrow Wilson High School. She earned a B.A., *magna cum laude*, in political science from Smith College. She was elected to *Phi Beta Kappa* during her junior year, and won the Dawes Prize for outstanding work at the end of her senior year. After attending graduate school at Harvard University for one semester, Judge Zeldon attended George Washington University Law School, where she served on the law review. She received her law degree, however, from New York University Law School.

Upon graduating from New York University Law School, Judge Zeldon worked for the Columbia University Legislative Drafting Research Fund where she helped draft a Housing Maintenance Code for New York City. Next, she worked as an Assistant Corporation Counsel for the City of New York, where she handled a wide variety of municipal issues, with particular emphasis on litigation and labor law.

Judge Zeldon also was a member of the Labor Department of Proskauer, Rose, Goetz & Mendelsohn, first in New York City and later in Washington D.C. At Proskauer, she handled numerous cases, including *Schumacher v. Aldridge*, 665 F. Supp. 41 (D.D.C. 1988), which ordered the United States government to grant veteran's status to American Merchant Seamen who served this Nation in World War II. As a result of this case, over 70,000 merchant seamen received honorable military discharges.

Judge Zeldon has received numerous awards, including honorary status as a United States Merchant Marine Veteran (awarded by the Federal Maritime Administration); a Certificate of Appreciation from the New York Society of Marine Port Engineers; an award from the American Merchant Marine Veterans, headquartered in Florida; a Friendship award for outstanding and unselfish service from the Edna Gladney

Center in Ft. Worth, Texas; and an award for making an outstanding contribution to society from the National Committee For Adoption. She has also been recognized as a Fellow of the ABA.

She has published numerous articles on a wide variety of subjects, including attorneys' fees in civil rights litigation, substance abuse in the workplace, public sector collective bargaining and the Americans With Disabilities Act. Her articles have appeared in the *Columbia Law Review*, the *New York Law Journal*, and other publications that are widely circulated.