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Tort Trends

The newsletter of the Illinois State Bar Association's Section on Tort Law

Editor's Note

BY JOHN L. NISIVACO

The first article in this edition of *Tort Trends* is written by Mike Alkaraki and examines how in today's information-based society, there is a fine line between the court's proper deference to the jury and its obligation to ensure that verdicts are supported by the evidence. Implicit in the trial judge's role in this regard, inasmuch as expert witnesses are concerned, is a balancing of the values of common sense and specialized knowledge, recognizing that both are often necessary to arrive at the truth and a judgment that does substantial justice. The author concludes that trial lawyers need to be mindful that general sentiments of distrust or even hostility towards experts seen in the broader culture may be carried into the courtroom and jury pool. The author advises the use of thoughtful voir dire, effective use of peremptory and cause-based challenges and a compelling story with themes emphasizing the facts can

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Expert Testimony in the Age of Disinformation

BY MICHAEL ALKARAKI

The Information Age, ushered in by personal computers, the internet, and mobile technology, has granted broad access to data and specialized knowledge on an unprecedented scale. Democratization of information may be something approximating a miracle, but data and knowledge are distinct, and conflating the two can be foolish, if not dangerous, especially in light of widespread concerns that content is being adulterated by and through media channel providers.

This is particularly so in terms of social media networks which, in the course of replacing traditional news sources,[1] have come under intense scrutiny for the ways in which they collect, disseminate and allegedly manipulate information. Criticisms run the gamut, from partisan censorship, to algorithms that trap users in ideological echo chambers, to enabling the spread of all varieties of propaganda.[2]

In popular socio-political discourse, the concept of "truth," including its inherent value and utility, has taken hits amidst the barrage and subterfuge of marketing, branding, rhetoric, trolls, bots, conspiracy theories, propaganda and claims of "fake news." Where facts, evidence and expertise were integral to compelling narratives, they have at times been relegated to secondary or even trivial status in favor of catchphrases, buzzwords and slogans.

Courts, Experts, & Collective Wisdom

The courts, and trials in particular, remain dedicated to conflict resolution through the search for truth and delivery

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Editor's Note

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increase the likelihood of a verdict based on the evidence.

The second article of this edition is authored by Greg Patricoski and analyzes how damages are awarded in "plaintiff as bystander" cases where the plaintiff did not incur severe physical injury but, instead, falls within the radius of risk from negligent physical contact and, as a result, suffers an emotional disturbance. The author proffers that courts are often willing to grant higher awards for emotional distress in plaintiff as bystander cases but that plaintiff must prove the following elements, as outlined in this memorandum: (1) Close physical proximity to the accident; (2) sensory and contemporaneous perception of the event (i.e., not just seeing the aftermath); (3) close relationship between plaintiff and the physically-injured person; and (4) serious emotional distress. Jurisdictions vary in their assessment of these factors. This research explores these jurisdictional differences, with particular emphasis on Illinois law.

Thank you to all the contributors. The articles are excellent and we hope you find the material helpful.■

Expert Testimony in the Age of Disinformation

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of justice. "Verdict," a legal finding of fact, derives of course from the Latin "verdictum," which means "to speak the truth." In jury trials, this entails the application of community wisdom, guided by law, to evidence which often includes some array of expert testimony. The trial judge, serving as a gatekeeper who bars unreliable evidence, must ensure that the jury's verdict has a basis in fact rather than pure speculation. While the jury's verdict is entitled to great deference and will not be disturbed absent a finding that it is against the manifest weight of the evidence, the court must intervene when it is clear that the jury ignored compelling expert testimony.[3]

Many types of cases simply cannot be pursued without experts due to statutory prescriptions or subject matter that is scientific, technical or specialized in nature. Expert testimony is necessary to establish matters of fact that are "beyond the ken of the average juror."[4] It is admissible, subject to Illinois Rule of Evidence 702 (codifying the *Frye* "general acceptance" test), if it will "assist the trier of fact to understand the evidence or determine a fact in issue."[5]

Juries are instructed that they may "use [their] common sense gained from [their] experiences in life, in evaluating what [they] see and hear during trial."[6] As to experts, juries are instructed as follows:

You have heard a witness give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way you judge the testimony from any other witness. The fact that such person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness's qualifications, and all of the other evidence in the case.[7]

These instructions can, in some circumstances, be misleading. Just as the plaintiff may be required as a matter of law to proffer expert testimony to establish prima facie elements of his or her case (standard of care in some professional liability matters, complex medical causation issues, certain product defects or failure modes, etc.), so must the jury not only consider, but in rare cases accept those expert opinions in reaching its verdict. "If the testimony of [an expert] is not contradicted by direct adverse testimony or by circumstances nor inherently improbable and the [expert] has not been impeached, the testimony cannot be disregarded by the jury."[8] In other words, and as is reflected in the above-referenced Cautionary Instructions 101(A) and (C) given prior

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to opening statements and after closing arguments, "[The] verdict must not be based upon speculation[.]"[9]

It is well established that "while a jury is free to disregard an expert's opinion or conclusion of fact on the basis of credibility considerations, it cannot disregard expert testimony when the testimony pertains to medical issues beyond the understanding of a layperson."[10] Likewise, in the absence of some legitimate reason, "[T]he jury cannot reasonably come to a conclusion different than that of the expert, thereby ignoring the expert's conclusion and instead employing its own interpretation of the evidence to reach an ultimate conclusion on [an] issue."[11]

In *Anderson v. Zamir,* the plaintiff filed suit for personal injuries resulting from a car crash.[12] The defendant admitted liability and the case was tried on damages. On the day of the crash, the plaintiff received treatment in the emergency department for a headache and neck soreness. She was prescribed pain medication and a neck brace.[13] She followed up at a student medical clinic for back and neck pain and was prescribed more pain medication, physical therapy and a home exercise program. Approximately nine months after the occurrence, the plaintiff returned to the medical clinic with complaints of left shoulder pain and was referred to an orthopedist. An MRI showed a tear in the labrum of her left shoulder and, approximately fourteen months after the occurrence, the plaintiff underwent surgery to repair the tear.[14]

At trial, the defendant essentially conceded liability for the spine injury but denied that the occurrence proximately caused the shoulder injury.[15] The only medical evidence offered at trial was presented by the plaintiff and consisted of two physicians from the school medical clinic.[16] The defendant presented no medical evidence and merely cross-examined the plaintiff's physicians.[17] The plaintiff entered into evidence medical bills totaling $28,804.[18] After a two day trial, the jury awarded a total of $12,500 in damages, including only $5,000 for medical bills. The court denied the plaintiff's motion for a new trial.[19]

The appellate court reversed the trial court's denial of the plaintiff's motion for new trial, reasoning as follows:

[A]ll the medical testimony introduced at trial supported the theory that the shoulder injury was causally connected to the motor vehicle accident. No evidence contradicting this connection was introduced. The witnesses were not impeached, and they stood by their opinions on causation. Upon reviewing the testimony, we do not conclude that this medical testimony is inherently improbable.[20]

The court concluded as follows:

We find the jury's verdict here simply bears no reasonable relationship to the injuries established by the [the plaintiff] at trial, and accordingly the damages award must be reversed. Furthermore, we conclude that the trial court abused its discretion in upholding this damages award in light of the only medical evidence introduced at trial.[21]

Anderson highlights a fine line between the court's proper deference to the jury and its obligation to ensure that verdicts are supported by the evidence. Implicit in the trial judge's role in this regard, inasmuch as expert witnesses are concerned, is a balancing of the values of common sense and specialized knowledge, recognizing that both are often necessary to arrive at the truth and a judgment that does substantial justice.

Conclusion/A Note on Jury Selection

Jury trials are, in significant part, exercises in learning. In the years leading up to trial, the parties engage in discovery. Lawyers develop theories which they modify, refine and ultimately test before finders of fact. Trial lawyers, especially prosecutors and plaintiff lawyers who have the burden of proof, must be prepared to teach and, therefore, must select (or, more accurately, through "de-selection," arrive at) a jury that is prepared to learn.

An industry of data-driven jury consultants and focus group administrators has blossomed, ready to advise lawyers and litigants about how prospective jurors' attitudes, beliefs and biases may affect trial outcomes in virtually any type of matter. The value of these resources in the right case can hardly be overstated, though plenty of elite trial lawyers endorse giving their gut final say in jury selection and case presentation.

Any lawyer who tries cases regularly has learned, perhaps fortuitously, perhaps the hard way, that some jurors can be all too eager to embrace familiar narratives that align with their own preconceptions in lieu of carefully considering the evidence with a curious mind. Confirmation bias can be particularly concerning as some general sentiments of distrust or even hostility towards experts and expertise seen in the broader culture are carried into the courtroom and jury pool. Through thoughtful voir dire, effective use of peremptory and cause-based challenges, and a compelling story with themes emphasizing the facts, the importance of expert testimony and the law, lawyers can increase the likelihood of a verdict rooted firmly in the evidence. On those unusual occasions when a verdict plainly flows from some speculative or otherwise improper source, the law is there to help.■

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12. *Anderson v. Zamir*, 402 Ill.App.3d 362, 931 N.E.2d 697 (5th Dist. 2010).
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18. *Id.* at 364, 699.
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20. *Anderson*, 402 Ill.App.3d at 368, 931 N.E.2d at 702, citing *Baker v. Hutson*, 33 Ill.App.3d 486, 775 N.E. 2d 631 (2002).
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Illinois Plaintiff as Bystander Cases

BY GREG PATRICOSKI & JENNIE CHRISTENSEN

Overview

Courts are often willing to grant higher awards for emotional distress in "plaintiff as bystander" (hereinafter "PAB") cases where the plaintiff did not incur severe physical injury but, instead, falls "within the radius of risk from negligent physical contact and, as a result, suffers an emotional disturbance."[1]

While courts in a majority of jurisdictions allow for recovery for emotional damages in PAB cases, there are substantial jurisdictional differences. For instance, some courts have only allowed damages when the physically injured person (hereinafter "PIP") is an immediate family member to the plaintiff, whereas others have taken a more expansive approach, allowing for recovery in cases involving injury or death to distant, non-blood relatives. Further, most jurisdictions require that the plaintiff witnessed the accident firsthand, whereas some, more lenient jurisdictions allow for recovery when the plaintiff merely sees the aftermath of the accident. These are just some of the differences that a lawyer might experience when handling a PAB case.

This memo begins with a brief historical overview of PAB case law, with particular focus on the landmark case *Dillon v. Legg*. Following a study of *Dillon*, the memo provides a detailed analysis of the burden of proof for obtaining damages for emotional distress in PAB cases, including an overview of varying state approaches.

Jurisdictional Variations: The Foreseeability Rule, Impact Rule, and Zone of Danger Rule

The first case to recognize bystander recovery was *Dillon v. Legg* (1968),[2] outlined below. Importantly, the *Dillon* court set forth the original approach for assessing PAB cases; an approach which is, today, known as the "Foreseeability Rule." Since this landmark decision, bystander recovery has been widely recognized in many jurisdictions, with some courts continuing to apply the Foreseeability Rule while others opt for more limited or expansive approaches. Respectively, these varied approaches are known as the Impact Rule and the Zone of Danger Rule.

Dillon & the Foreseeability Rule

The first landmark case to recognize bystander recovery was *Dillon*.[3] There, in a case before the Supreme Court of California, the plaintiff mother appealed from a judgment of the Superior Court of Sacramento County (California), dismissing her action to recover damages for emotional trauma and physical injury caused by witnessing the death of her child, who was struck and killed by a car negligently driven by defendant motorist.[4] The plaintiff had neither received a physical injury nor was she within the zone of physical danger wherein injury occurred. Nevertheless, the court held that the trial court had improperly restricted the zone of danger to those exposed to bodily injury and that, instead, the zone of danger must encompass the area to "those exposed to emotional injury."[5]

Dillon effectively recognizes "two rights as being of fundamental importance to injured bystanders: (1) the right to be free of mental distress, and (2) the right to a meaningful and responsive remedy for violations of the right to be protected."[6] Under *Dillon*, a bystander must fulfill three factors for the risk to be considered "foreseeable" and, more generally, for a PAB claim to be upheld:

- (1) The plaintiff must be located near the scene of the accident, as contrasted with one who was a distance away from it;
- (2) The shock must have resulted from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence; and
- (3) The plaintiff and the victim must be closely related, as compared with the absence of any relationship or the existence of merely a distant relationship.[7]

Despite articulating this standard, however, the *Dillon* court nevertheless recognized that many gaps were underlying the holding. Writing for the dissent, J. Traynor queried:

> How "close" must the relationship be between the plaintiff and the third person? … Next, how "near" must the plaintiff have been to the scene of the accident? … No answers to these questions are to be found in today's majority opinion.[8]

The *Dillon* court set forth the original approach, known as the "Foreseeability Rule." Since this landmark decision, bystander recovery has been widely recognized in many jurisdictions, often modeled after *Dillon*, but with notable expansions or limitations. While many jurisdictions continue to apply the Dillon approach, two other theories, the "impact rule" and the "zone of physical danger rule," both applied initially to cases for negligent infliction of emotional distress involving direct victims of tortious conduct, have also been applied to cases involving bystanders. Although a few jurisdictions deny bystander recovery, the trend is clearly in the direction of recognizing a bystander's cause of action, with PAB law generally falling into one of these three camps.

The Impact Rule

The Impact Rule "denies recovery for negligent infliction of emotional distress *unless the plaintiff suffered a physical impact or injury*" (emphasis added).[9] Thus, in states which adhere to this rule, a bystander "who does not himself sustain injury or impact, is necessarily precluded from recovery for negligent infliction of emotional *distress*."[10]

This rule has lost popularity in recent years. Today, only seven, mostly conservative jurisdictions are known to favor this approach.[11] In fact, in recognition

of overwhelming evidence over the past decades highlighting the profound impacts of intense emotional distress on an individual, at least 34 states,[12] have opted for the Zone of Danger or Foreseeability Rules, both of which are less restrictive than the Impact Rule in terms of awarding damages to emotionally-injured plaintiffs in PAB cases.

The Zone of Danger Rule

In "zone of danger" jurisdictions, a bystander "who is sufficiently close to the peril causing injury to the victim and who reasonably fears for his safety, can seek recovery for negligent infliction of emotional distress without actually sustaining an injury or impact."[13]

Illinois and approximately a dozen other, mostly left-leaning states, including California, the District of Columbia, and New York, prefer the "zone of danger" rule.[14] In California, for instance, following *Dillon*, the California Supreme Court chose, in *Thing v. La Chusa*, to "pronounce definite elements for recovery" in PAB cases.[15] The *Thing* court held that recovery was permissible only under the following conditions:

- (1) Close physical proximity to the accident;
- (2) Sensory and contemporaneous perception of the event (i.e., not just seeing the aftermath);
- (3) A close relationship between Plaintiff and PIP; and
- (4) Serious emotional distress.[16]

In Illinois, the leading Zone of Danger case is *Cochran v. Securitas* (2017).[17] There, in a case involving a mother's claim for tortious interference with the right to possess a corpse, the Illinois Supreme Court abandoned the "impact rule" in favor of the Zone of Danger rule for cases involving bystanders.[18] Given Illinois' preference for a Zone of Danger approach, this research proceeds with an analysis of the rule's four elements.

Looking first at proximity, cases following *Thing* require that the bystander be "in close physical proximity to the scene of the accident underlying the claim for [PAB] recovery, at the time of its occurrence."[19] This issue is ordinarily resolved on a case-by-case basis, though there are some notable trends.[20] Bystanders who are just a few feet away from the accident are generally eligible for recovery in most states, assuming the other criteria is met. In addition to such instances, recovery has also been allowed in the following cases:

- Where bystander was in her home watching the accident from approximately 50 feet away;[21]
- Where bystander was near the front door of her home, and the accident occurred on the road in front of her house;[22] and
- Where a child witnessed her infant sister drown in a pool adjacent to her play area.

Next, most courts also require that plaintiff have the sensory perception of the event at the time of the accident (i.e., see it in real-time), rather than just seeing the aftermath. While some courts have expanded the *Dillon* reading to include situations in which the plaintiff "did not actually observe the 'injury-inducing accident,"[23] the majority approach is to only allow for recovery only in instances where the plaintiff had the sensory perception of the accident at the time of the accident.

Third, many courts have recognized that "the relationship-to-victim criterion is the most important of those designed to circumscribe liability."[24] Despite the apparent importance of this factor, Zone of Danger jurisdictions have struggled to define what degree of relational closeness between plaintiff and PIP is required to uphold damages in PAB cases.

Most of the case law permitting recovery for negligent infliction of emotional distress involves the nuclear family: for example, a "parents' claims for emotional distress suffered as a result of witnessing injuries to their children or vice versa."[25] Yet, PAB recovery has also been allowed in scenarios involving far more distant relatives. For example, bystander recovery has been extended to full siblings,[26] husband and wife,[27] and grandparent and grandchild,[28] but with a higher burden for proving relational/ emotional closeness.[29] This expansion of recovery appears to be "an acknowledgment by some courts of the nature of the extended family in particular subcultures within the United States."[30]

Amongst jurisdictions employing a Zone of Danger approach, New York is the most stringent in defining the relationship between plaintiff and PIP. In 1993, the New York Court of Appeals in *Trombetta v. Conkling* required that to be eligible for damages under a PAB claim the plaintiff must be part of the PIP's "immediate family."[31] There, the court refused to extend the zone of danger rule to aunts, uncles, and other persons sharing a strong emotional bond with the victim and limited foreseeability to members of the victim's nuclear family.[32]

Finally, most states applying a Zone of Danger analysis allow for recovery only where bystander's emotional distress is serious[33] and manifested by objective symptoms such as "chronic depression, sleeplessness … and headaches."[34] Generally, this distress must be the result of fearing for one's safety during the accident. Some jurisdictions have modified the traditional rule, finding that a bystander's emotional distress need not be caused by fear for his safety and may, instead, result from fear for the safety of the third party or victim.[35] It is unclear which method an Illinois court would opt for between these two variations.

Takeaways

Given jurisdictional variances in PAB cases, it will be necessary for any attorney, acting on behalf of emotionally-injured plaintiff, to highlight the following ideas throughout their narrative: (1) the intense emotional distress resulting from plaintiff witnessing event; (2) any physical injuries suffered by plaintiff during the event; and (3) that plaintiff was included in the sphere of the attack, physically threatened, and physically injured (if true). Lastly as a matter of framing, avoid referring to the physically injured entity as the "victim," "injured party," or any term of a similar nature, given that you likely will want to highlight the fact that both PIP and plaintiff were injured in the attack, with the injuries simply having different manifestations: one primarily physical, one primarily emotional.

Case law will frequently refer to the physically injured person as the "victim," so this is an easy trap.

In conclusion, despite widespread jurisdictional differences in PAB cases, an attorney should seek greater damages in instances where he can make a strong case that plaintiff is deserving of an award for higher damages based on the criteria outlined in this memorandum.■

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2. *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 9.
7. *Dillon v. Legg*, 441 P.2d 912, 920 (Cal. 1968).
8. *Id.* at 926.
9. *Id.* at 3.
10. *Id. See e.g.*, *Gideon v. Norfolk S. Corp.*, 633 So. 2d 453 (Ala. 1994); *See also Wilhoite v. Cobb*, 761 S.W.2d 625 (Ky. Ct. App. 1988).
11. *See generally* Lexis Advance, *supra* note 10, at 17.
12. *Id.*
13. Lexis Advance, *supra* note 10, at 17 (2019), *citing Kapoulas v. Williams Ins. Agency*, 11 F. 3d 1380 (7th Cir. 1993), applying Illinois state law. *See also Keck v. Jackson*, 593 P.2d 668 (Ariz. 1979); *Rickey v. Chicago Transit Authority*, 457 N.E.2d (Ill. 1983); *Iacona v. Schrupp*, 521 N.W.2d 70 (Minn. Ct. App. 1994); *Hass v. Manhattan & Bronx Surface Transit Operating Auth.*, 612 N.Y.S.2d 134 (N.Y. App. Div. 1994);
14. *Id.*
15. Lexis Advance, *supra* note 10, *citing Thing v. La Chusa*, 771 P.2d 814 (Cal. 1989).
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18. *Id.*
19. Lexis Advance, *1 Damages in Tort Actions § 5.03*, at 10 (2019), *citing Lareau v. Page*, 39 F.3d 384 (1st Cir. 1994); *Moore v. Kroger Co.*, 800 F. Supp. 429 (N.D. Miss. 1992); *Hoover v. Recreation Equipment Corp.*, 792 F. Supp. 1484 (N.D. Ohio 1991); *Barnhill v. Davis*, 300 N.W.2d 104 (Iowa 1981); *Brindza v. Mobil Oil Corp.*, 802 S. W.2d 706 (Tex. App. 1991).
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21. *Id., citing Corso v. Merrill*, 406 A.2d 300 (N.H. 1979).
22. *Id., citing Sinn v. Burd.* 486, A.2d 672 (Pa. 1979).
23. *Id.* at 11.
24. *James v. Lieb*, 375 N.W.2d 109 (Neb. 1985).
25. Lexis Advance, *supra* note 10, at 12.
26. Lexis Advance, *supra* note 10, at 12, *citing Dillon v. Legg*, 441 P.2d 912 (Cal. 1968); *James v. Lieb*, 375 N.W.2d 109 (Neb. 1985);
27. Lexis Advance, *supra* note 10, at 12, *citing Ramirez v. Armstrong*, 673 P.2d 822 (N.M. 1983); *Heldreth v. Marrs*, 425 S.E.2d 157 (W. Va. 1992); *Bowen v. Lumbermens Mut. Casualty Co.*, 517 N.W.2d 432 (Wis. 1994).
28. *See Leong v. Takasaki, 520 P.2d 758 (Haw. 1974)* where plaintiff sought damages for nervous shock, and psychic injuries suffered without accompanying physical impact or resulting in physical consequences or manifestations thereof when he witnessed his step-grandmother being struck and killed by driver's car. Despite the lack of blood relationship between the plaintiff and victim, the court noted that Hawaiian and Asian families "have long maintained strong ties among members of the same extended family group,"
29. Lexis Advance, *supra* note 10, at 12, *citing Leong v. Takasaki*, 520 P.2d 758 (Haw. 1974). *See also James v. Lieb*, 375 N.W.2d 109 (Neb. 1985).
30. Lexis Advance, *supra* note 10, at 12.
31. *Trombetta v. Conkling*, 626 N.E.2d 653, 653 (N.Y. 1993)
32. *Id.*
33. Prosser and Keeton, Law of Torts, §54 (5th ed. 1984).
34. *See, e.g., Aurora v. Burlington*, 31 F.3d 724 (8th Cir. 1994); *Lindsev v. Visitec, Inc.*, 804 F. Supp. 1340 (W.D. Wash. 1992); *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968); *Toms v. McConnell*, 207 N.W.2d 140 (Mich. 1973); *Armstrong v. Paoli Memorial Hosp.*, 633 A.2d 605 (Pa. 1993); *D'Ambra V. United States*, 338 A.2d 524 (R.I. 1975).
35. *Id., citing Nielson v. AT&T Corp*, 597 N.W.2d 434 (SD 1999).