Negligence Law Section E-NEWS

Issue 5 Volume 2 **Winter 2013**

Message from the Chair

Steven Galbraith

Dark Money, Court of Claims, and Politicians

"The darkest places in hell are reserved for those who maintain their neutrality in times of moral crisis." Dante Alighieri

New Years greetings from your chair:

Your Council has been very busy this fall, spending significant time in Lansing trying to educate and reason with the Legislature on bills of great interest to the legal community. Mostly without success.

Since my first quarterly report, we have witnessed unbridled political power at its worst in Lansing.

COURT OF CLAIMS: In what has been described as the fastest bill to sail through Lansing, the Court of Claims bill, SB 652, came out of nowhere and was rushed into law with little input from citizens or the legal community. Gray wolf hunting was granted more hearing time than a massive reorganization of our court system. You can find this new court here.

Your Council attended multiple hearings and meetings on SB 652 and were instrumental in working on the trailer bill, HB 5156, in conjunction with other groups. We were able to influence this amendment intended to help preserve some jury trial rights. What will become of this new court remains to be seen. Stay tuned to our News Flash for breaking developments

Read Article Below

Insurance Coverage ADVISOR

Tort Law and Contract Law—Bridging the Gap

In This Issue

Hal O. Carroll

In the nature of things, insurance coverage issues, and indemnity issues, most often arise in the context of tort liability, and tort attorneys are often the first responders. So it's important to remember that these two areas of law start from different places. They are governed by different principles and—what may be more important—they have different attitudes. It may be too strong to say they have different philosophies, but it comes close.

Tort law is about what is "reasonable." By design, tort law is flexible, and even the boundaries of tort law are—again by design—vague. Tort law is designed to address problems that arise from the myriad of things people do to each other. Insurance and indemnity law are subspecies of contract law. Contract law is designed to enforce specific promises; its goal is to give effect to contractual acts between consenting adults.

Read Article Below

Hal Carroll is a founder and the first chair of the Insurance and Indemnity Law Section of the State Bar of Michigan. He represents insureds and policyholders in insurance coverage disputes. He is a chapter author of Michigan Insurance Law and Practice, published by ICLE, and has lectured and written many articles in the areas of insurance coverage and indemnity. His website is www.HalOCarrollEsq.com and he can be reached at HOC@HalOCarrollEsq.com or (734) 645-1404.

The **Michigan Association for Justice** in cooperation with The Michigan Defense Trial Counsel offer their membership and the public this first time opportunity to purchase: Motor Vehicle No-Fault Law in Michigan 2011 Edition

Michigan Lawyers Weekly wants to hear about your verdicts & settlements. Please submit recent civil cases (within the past six months) where you prevailed—whether in a jury verdict or a settlement—so they may publish them. Questions about Lawyers Weekly's Verdicts and Settlements policy may be directed to the editor at (800) 678-5297 or editor@mi.lawyersweekly.com

Legislative Update

Todd Tennis

The Michigan Legislature is halfway through the 2013-2014 session. On some fronts, issues remain in flux. No-Fault Auto Reform remains idling in the House, and efforts to grant virtual immunity to emergency room

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physicians is similarly stalled. In other areas, the Legislature took fast and sweeping action that made major changes to the Court of Claims and campaign finance laws. The Legislature also took steps to address the issue of accident victim solicitation at the behest of the Negligence Law Section.

Read Article Below

Well-Crafted Prose with a Twist: Cooney's Sketches on Legal Style

Chad Engelhardt
Goether Engelhardt, PLLC

A half-dozen legal writing books rest on the bookshelf in my office. All were written by nationally recognized scholars, from Garner to Wydick. A confession-- those books sit unread. Their spines are unbroken and their pages pristine. A number of judges, opposing counsel and my senior partner, having endured my writing over the years, will surely verify that fact. But, when I learned that Cooley Law School writing professor Mark Cooney had written a book, Sketches on Legal Style, I logged on to amazon.com without a moment's hesitation. Why? The first reason is simple. I admire Professor Cooney's work product. I don't just mean his many articles in the Michigan Bar Journal and Trial magazine. I mean his real work product, his students. I have found that the law students with the best writing skills are often Prof. Cooney's former advanced writing students. And the students are quick to credit Prof. Cooney with a dramatic improvement in their writing. The students tell me that Prof. Cooney teaches his courses with a definite practice-oriented bent. This is not surprising given that he practiced for a decade at one of Michigan's premiere professional liability defense firms, Collins Einhorn Farrell.

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Spring Meeting 2014
May 2–5
Las Vegas
Palms Hotel

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Annual Chair's Award

Chair Steve Galbraith presents outgoing Chair Tom Waun with a plaque recognizing him for his contributions to the Negligence Law Section and leadership of the Council.

2014 Outstanding Achievement Award

Peter L. Dunlap

The Negligence Law Section proudly confers this Outstanding Achievement Award upon Peter L. Dunlap for his distinguished service to the legal community.

Mr. Dunlap will be recognized on Thursday, August 14, 2014, at the Country Club of Lansing. Please contact us if you are interested in attending the reception to honor him.

Prior Recipients

2008—Justice Elizabeth Weaver
2009—Attorney, Dean Robb
2010—Judge Elizabeth Gleicher, Court of Appeals
2011—Justice Michael Cavanagh
2012—Willam D. Booth
2013—William F. Mills
2014—Peter L. Dunlap

Encourage Members of Your Firm and Colleagues to Join!

Jennifer Grieco

Would you spend $40 per year to protect the practice of negligence law in the State of Michigan?

By joining the State Bar of Michigan's Negligence Law Section, you will be doing just that: joining the Section's efforts to stop the onslaught of legislation intent on frustrating an individual's ability to bring a negligence claim.

If you have monitored what has been happening in Lansing over the past couple of years and especially this past legislative session, you are aware of the significant increase in legislation proposed to provide immunity to those individuals and companies who may negligently injure a citizen of our great state. This has been in addition to the notorious attempts by the legislature to change Michigan's no-fault auto system and to make significant "reforms" in the area of medical malpractice.

The State Bar of Michigan is prohibited by the United States Supreme Court decision of Keller v. State Bar of California, 496 U.S. 1 (1990), from using our mandatory bar dues to advocate against this onslaught of legislation which will significantly impact negligence law and the right to have these disputes litigated before a jury. However, voluntary sections of the State Bar are not prohibited from taking positions and in particular from advocating against these efforts when appropriate. As a Council representing both plaintiff and defense negligence practitioners, we advocate for fair and just administration of negligence law.

The Negligence Section has a lobbyist on retainer and through our lobbyist, the section is able to not only monitor but to advocate against and participate in the process to limit the damage to our profession by way of bills such as the Medical Malpractice Legislation proposed in 2013 and the proposed changes to the No-Fault system. In addition, we monitored, opposed, lobbied and even testified against the legislature's attempts to provide immunity to constituents with well-funded lobbying efforts in 2013.

However, we can expect more of the same with the make-up of the legislature in 2014. And, during his recent State of the State address, Governor Snyder announced his intention to

spearhead changes in our No-Fault system. After having survived a tumultuous 2013, negligence practitioners can look forward to more tort legislation.

We need your help and support!

Please act NOW by completing the attached form and sending in $40 to join the Negligence Section and increase our strength and ability to monitor, oppose and advocate against such legislation in 2014 and beyond.

Thank you.
Jennifer Grieco
Membership Chair

The Medical Malpractice Legislation: SB 1110 (ER Immunity); SB 1115 (household services as noneconomic damages); SB 1116 (judgment immunity rule); SB 1117 (expert witness testifying against health professionals) and SB 1118 (amending statute of limitations for wrongful death). With respect to auto claims, the Negligence Section has actively opposed HB 4936 (significant changes to current system of First Part (PIP) Benefits as well as other legislation that would exclude classes of insureds currently eligible to receive PIP benefits and HB 5864 (the "Kreiner" bill).

For example, we opposed immunity to propane dealers (HB 4859), social service agencies (HB 5153); pharmacies who donate unused prescription drugs (HB 5089); farm markets (HB 4866); equine immunity (BH 4867); and child social welfare programs (SB 1240).

DARK MONEY, COURT OF CLAIMS, and POLITICIANS

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DARK MONEY: We have reported on the SBM and SOS Johnson's efforts to bring transparency to elections, particularly judicial elections, where lobbying judges is certainly unwelcome. Unfortunately, despite offering live testimony, letters to the Legislature, and a written request to the Governor for a veto, SB 661 was signed into law. In a rather stunning reversal of his promise to help citizens be aware of who is trying to influence elections, Governor Snyder flip-flopped and signed the bill, characterizing it as "reform". Free Press writer Stephen Henderson appropriately named the bill the "Political Polluter Protection Act." It seems SOS Johnson's desire for transparency is not shared by her fellow Republicans.

ER IMMUNITY: Each year, this issue surfaces with a request to immunize a large segment of the medical community, especially for those entering the medical system through the Emergency Department or Obstetrical Unit of a hospital. Hearings were conducted in the House Judiciary Committee and your Council participated, providing testimony in opposition to HB 4354. Fortunately, and in a rare victory, the House Committee decided against voting the bill out, though it is still alive through the term, which ends in 2014.

"**AMBULANCE CHASING" BILLS:** After many hearings and amendments, HBs 4770 and 4771 finally made it to the Governors desk and have been signed into law. The Council worked hard on these bills, offering testimony and amendments. The intent of the statutes is to limit direct solicitation of clients/patients via police reports for 30 days after an MVA.

COUNCIL GUESTS: Justice Bridget McCormack joined the Council at our November meeting. We are participating in a potential pilot program regarding summary jury trials, and welcomed her leadership in this area. Meeting are scheduled this year to try to formulate a court rule to promote quick, efficient, jury trials for small exposure cases.

In December, we met with former Council member Judge Elizabeth L. Gleicher and discussed the Michigan Judges Association, as well as the new Court of Claims. As always, Judge Gleicher brings a refreshing and informative attitude to issues of interest to our community.

JOINT MEETING: We conducted a joint meeting with the Insurance Law Committee to discuss the new business courts. Doug Toering gave an informative presentation that shed light on how the business courts will work. We all have a lot to learn.

NEW MEMBERS: We are always on the look out for new members. The $40.00 membership fee is the best deal in town – just compare it to your MDTC or MAJ dues! For your money, you can help influence and understand new legislation, receive our News Flashes, and be kept abreast of legal developments. Please see Jennifer Grieco's article, below.

VEGAS BABY! Below you will find information regarding our Spring Meeting in Las Vegas at the Palms Hotel. This seminar will be held May 2 – 5, 2014. Barry Goodman advises that available rooms are running out and you are invited to make a reservation before being left here in the snow and cold.

INSURANCE COVERAGE ADVISOR

OCCURRENCES AND THE INTENTIONAL ACT EXCLUSION

By Hal O. Carroll

Liability insurance is intended to cover accidents, not intentional injuries, and the usual policy form contains, as its first exclusion, an exclusion for intentional acts. The usual language of the intentional act exclusion is: "'Bodily injury' or 'property damage' expected or intended from the standpoint of the insured." This is one of the ways that an insurer addresses the problem of "moral hazard." Moral hazard is the risk that an insured will more likely engage risky or even intentional misbehavior simply because insurance is there to pay the loss.

Obviously the boundary between intentional and unintentional injuries is often vague, as the litigation surrounding the exception to the Worker Disability Compensation Act's exclusive remedy provision where "an injury was certain to occur"[1] demonstrates.

Since limiting coverage for intentional injuries is so critical to an insurer's legitimate attempts to limit its exposure, you might expect to find many cases interpreting the exclusion. In fact though, the issue of intentional versus unintentional tends to be fought out on different ground: the policy definition of an "occurrence." In the policy's coverage agreement, it will typically begin by saying that the policy covers claims for bodily injury or property damage arising out of an "occurrence."

The policy then defines an occurrence as, essentially, an "accident." This is where the case law takes over and provides the necessary definitions. The general definition is:

> an accident is an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated and not naturally to be expected.[2]

This is fair enough as an introduction, but the details are where the action is. First, the policy language controls, but in the absence of a clear prescription to the contrary, the perspective is that of the insured, not the injured person. "Accidents are evaluated from the standpoint of the insured, not the injured party."[3] This makes sense from the standpoint of moral hazard, because the insurer has an interest in avoiding allowing someone to buy a policy in anticipation of committing some specific injury.

Because the point of reference is the insured, and because the test is the existence of intent, the test necessarily is largely subjective. The critical point is that "intent," here, as the factor that negates the existence of an insurable "accident," *i.e.*, occurrence, is not established by reference solely to the insured's actions. The insured must also, in some sense, intend to cause an injury. The act itself must be intentional and in addition, the consequences of the act must either have been intended or "reasonably should have been expected because of the direct risk of harm intentionally created by the insured's actions."[4]

The insured need not intend to cause **the** injury that in fact occurred, as long as the insured intended to cause **some** harm.

> When an insured acts intending to cause property damage or personal injury, liability coverage should be denied, irrespective of whether the resulting injury is different from the injury intended. Similarly, . . . when an insured's intentional actions create a direct risk of harm, there can be no liability coverage for *any* resulting damage or injury, despite the lack of an actual intent to damage or injure."[5]

In short, if the insured intended both the act *and* the consequences (or at least some adverse consequence) there is no "accident" and no covered occurrence. If the insured intended the act but did not intend to cause harm, there *is* coverage unless the act was such that it creates a "direct risk of harm" such that the insured should have foreseen that harm would follow. This test is obviously similar to the normal tort foreseeability test, but the phrase "direct risk of harm" suggests that the insurer must show that something more than mere forseeability was involved.

Note also that unlike the tort foreseeability test, the "direct risk of harm" test does not invoke the "reasonable person," but asks whether this insured can be held to have intended to cause harm.

> As to the perspective from which the analysis should be made, the question is not whether a *reasonable person* would have expected the consequences, but whether the *insured* reasonably should have expected the consequences. Accordingly, an objective foreseeability test should not be used in the present context. Rather, the analysis must be that, to avoid coverage, the consequence of the intended act, which created a direct risk of harm, reasonably should have been expected by the insured.[6]

The attorney seeking to establish coverage will want to emphasize the subjective nature of the test, as well as the fact that the perspective is that of the insured defendant, not the "reasonable person." The particular insured's own characteristics therefore become relevant components of the analysis.

From the perspective of an attorney who practices in this area, by the way, the moral is that a well crafted definition is often more powerful than an exclusion. A definition limits what events enter into the realm of covered acts, while an exclusion only ejects from coverage acts that would otherwise be covered. A definition shuts the door in the face of the insured seeking coverage, while an exclusion tries to evict the insured who has already entered.

Hal Carroll is a founder and the first chairperson of the Insurance and Indemnity Law Section of the State Bar of Michigan. He is a chapter author of Michigan Insurance Law and Practice, *published by ICLE, and has lectured and written many articles in the areas of insurance coverage and indemnity. He can be reached at hcarroll@VGpcLAW.com or hcarroll@chartermi.net, or (248) 312-2909.*

[1] MCL 418.131(1)
[2] *Allstate Insurance Company v McCarn*, 466 Mich 277, 281; 645 NW2d 20 (2002) (citations omitted).
[3] Id. at 282.
[4] Id. at 282.
[5] Id.
[66] Id. at 283 (italics in the original).

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Negligence Section Newsletter Column
December 12, 2013

The Michigan Legislature is halfway through the 2013-2014 session. On some fronts, issues remain in flux. No-Fault Auto Reform remains idling in the House, and efforts to grant virtual immunity to emergency room physicians is similarly stalled. In other areas, the Legislature took fast and sweeping action that made major changes to the Court of Claims and campaign finance laws. The Legislature also took steps to address the issue of accident victim solicitation at the behest of the Negligence Law Section.

Court of Claims

With surprising speed, the Michigan Legislature made sweeping changes to the structure of Michigan's Court of Claims. Students of judicial history may remember that, in the late 1970's, the Legislature transferred all Court of Claims litigation to the Ingham County Circuit Court. The rationale then was that it was a central location and would save the state money by alleviating the need to defend cases all over the state. It was also seen as a neutral court that would provide a fair hearing for both sides.

In early November, the Michigan Legislature completed a whirlwind process that completely reshaped the Michigan Court of Claims. With unprecedented speed, legislation was introduced and moved through the Senate and House that abolished the current Court of Claims housed in the Ingham County Circuit Court and replaced it with four judges chosen from the Michigan Court of Appeals. While proponents of this change claimed that they did it to allow more voters to have a say in who sits on the Court of Claims (as opposed to having them all elected by Ingham county residents), shifting all power over the Court of Claims to the Supreme Court was a highly controversial method of dealing with that problem.

Many observers felt that this legislation had a lot more to do with the recent rulings coming from the Ingham County judges than with the makeup of the electorate. The fact that the bill (Senate Bill 652) was pushed through in less than two weeks (an almost unheard of timeframe for legislative action)

indicated to some that this was more about reshaping the decision-making power of the Court of Claims than good government.

Perhaps in an effort to mitigate the perception that this was nothing more than a power grab, the Republican-controlled Michigan Supreme Court chose a bipartisan panel from the Court of Appeals to serve as the new Court of Claims. Of the four selected judges, two were appointed by Governor Granholm (Judges Amy Ronayne Krause and Deborah Servitto) and two were appointed by Governor Engler (Judges Michael Talbot and Pat Donofrio).
The bill was pushed through so fast, in fact, that a number of provisions within may very well have violated the Michigan Constitution. For example, there was no provision within the original bill to allow for a jury trial in the Court of Claims – something guaranteed in the Michigan Constitution. The bill as passed would also reassign all pending cases (including the ones on behalf of state workers regarding pension and health care costs) to the new Court of Claims. While this may not be unconstitutional on its face, it is certainly burdensome and could create problems for the court system.

Governor Snyder and Republican leaders were concerned enough about the problems within the new law that a "trailer bill" was quickly introduced and passed through the Legislature. House Bill 5156 clarified that nothing within the Court of Claims changes would eliminate a person's right to a jury trial. The State Bar of Michigan, in conjunction with the Negligence Law Section, asked for and received an additional amendment that further clarified that the right to a jury trial exists for cases against state employees.

Solicitation Reforms

Beginning late last year, the Negligence Section began working on an effort to make it more difficult for providers of legal, medical or other services to obtain police report data regarding accidents for the purposes of using them to solicit accident victims. We learned that Representatives Graves (R-Linden) and Cogen Lipton (D-Huntington Woods) were already considering such legislation. The Negligence Section, working through Past-Chair Tom Waun, helped Representatives Lipton and Graves develop a package of legislation aimed at tackling this issue.

House Bills 4770 and 4771 were introduced to restrict access to police reports and create a 30 day time period in which it would be illegal to solicit an accident victim for services. Originally, House Bill 4772, sponsored by Rep. Cotter (R-Mt. Pleasant), which amended the Criminal Code to create felony penalties for violation of the anti-solicitation bill, was also part of the package. However, it was dropped when the decision was made to limit the penalties in the legislation to misdemeanors.

Other changes to the bills were made as they went through the process, including narrowing the definition of accident victim to only victims of auto accidents, and changing the restrictions on access to accident reports to ensure that they would not interfere with journalistic efforts. While some maintained concerns with the bills through the end, the final versions received overwhelming votes in both the House and Senate.

Well-Crafted Prose with a Twist: *Cooney's Sketches on Legal Style*

A half-dozen legal writing books rest on the bookshelf in my office. All were written by nationally recognized scholars, from Garner to Wydick. A confession-- those books sit unread. Their spines are unbroken and their pages pristine. A number of judges, opposing counsel and my senior partner, having endured my writing over the years, will surely verify that fact.

But, when I learned that Cooley Law School writing professor Mark Cooney had written a book, *Sketches on Legal Style*, I logged on to amazon.com without a moment's hesitation. Why? The first reason is simple. I admire Professor Cooney's work product. I don't just mean his many articles in the *Michigan* Bar Journal and *Trial* magazine. I mean his real work product, his students. I have found that the law students with the best writing skills are often Prof. Cooney's former advanced writing students. And the students are quick to credit Prof. Cooney with a dramatic improvement in their writing. The students tell me that Prof. Cooney teaches his courses with a definite practice-oriented bent. This is not surprising given that he practiced for a decade at one of Michigan's premiere professional liability defense firms, Collins Einhorn Farrell.

The second reason is that Prof. Cooney is not the curmudgeonly grammarian some associate with legal writing scholars. Instead, Prof. Cooney has been engaging, even charming, when I have spoken with him at various professional functions. Talk to him about his work and you can see a deep passion lies just underneath his calm smile. I hoped that this would all carryover into his book. Spoiler alert, it does.

More surprising than me buying another book on legal writing is that I actually read it. The whole thing. In one sitting. Over the Thanksgiving Holiday weekend, the lovely ladies of my family were off enjoying some retail therapy. The manlier men of the family were absorbed with

the gridiron. Rather than rake the blanket leaves covering the backyard, I retreated to the back-room couch. A pot of french press coffee and a bag of purloined Chanukah gelt was within easy reach. I opened *Legal Sketches* and did not put it down until I had read the very last page.

Prof. Cooney's mantra-like theme is that clarity equals persuasion. He also readily demonstrates the converse; that inflated writing is distracting and easily put down. This lesson in precision should strike a chord with litigators of all flavors.

The tools Prof. Cooney advocates to achieve clarity are those of Garner, Kimble and other scholars of the "plain english" movement. A preference for short, declarative sentences and active verb tense. The need to avoid archaic legalese. What makes Prof. Cooney's book notable is his use of *story* to teach these points. As trial lawyers, we know that stories are compelling. Stories are absorbed and remembered. Stories are powerful. And Prof. Cooney is a master of the craft.

Sketches on Legal Style is comprised of fifteen chapters, short stories really. Each only a few attention grabbing pages long. From the Dickensesque "Legal Writing Carol" to "I was a teenage semicolon," Prof. Cooney manages to weave in humor and lexicography. The result is a book that is highly readable, yet informative. A fine holiday gift for any law student or lawyer.

Will Prof. Cooney's book improve my own writing? Only time will tell that tale.

About the Author: Chad Engelhardt is a partner at Goethel Engelhardt, PLLC in Ann Arbor. He and his senior partner Steve Goethel focus their practice on the prosecution of complex medical malpractice, catastrophic injury and wrongful death claims. In addition to his private practice, Engelhardt is an adjunct professor and clinical field supervisor at Cooley Law School's Ann Arbor campus. He teaches courses in litigation skills and medical malpractice. He also serves as the Michigan Association for Justice's Education Chair and is a regular CLE speaker on medical negligence and litigation issues.