State Bar of Michigan

Negligence Law Section Quarterly

The Official Newsletter of the State Bar of Michigan Negligence Law Section

Spring 2007

From the Chair

First of all, I've taken great liberties in my first two reports to say exactly what I think regarding our Supreme Court. I now make it a point to soothe those nervous souls on the Negligence Section council and others who are members of this section by stating that these are simply my opinions and may not necessarily be shared by everyone within this elite group of attorneys. In any event, I thought I would take some time to update the membership and give an overview of the work of the Negligence Section council during my tenure as chairman.

On the legislative front, we have been very busy. With the assistance of our legislative consultant, Todd Tennis of Capitol Services Inc., one of the premier lobbying firms in Lansing, we're doing yeoman's work. We are one of the few sections to employ a lobbyist, and over my year we have done quite a bit within the halls of the state House to promote the fair and just administration of negligence law. We have agreed to lend the State Bar support to House Bill No. 4301, commonly coined the "Kreiner" bill. If you get past the rhetoric of those who oppose the bill, it simply brings us back to that which the legislature intended when they passed laws on the subject back in 1995. It gives the right to a trial by jury, the cornerstone of this section, to every citizen who deserves one and does not lock those doors to anyone who does not suffer a catastrophic injury, whatever that might be in the mind of a particular trial or appellate judge. We sincerely hope that the Senate will allow a vote to be taken on this issue and others, and allow the democratic process to move forward. As their national leader, President George W. Bush has repeated over and over again (or at least when he had a Republican House and Senate), "All I want is an up or down vote."

The Negligence Section council has also told its lobbyist, after a vote, to move forward and give the State Bar's blessing to House Bill No. 4401, the bill that would eliminate drug immunity in the state of Michigan and bring it in line with that of 49 other states. Isn't it amazing how drug manufacturers have flocked to this state rather than set up shop in 49 others because of this law? In fact, I believe we can search our collective memories and learn that a large pharmaceutical company, despite its having absolute immunity from litigation, packed up its bags and left the state recently and therefore is exposed to having to be responsible for its mistakes. What a concept. I think it is one we all live by.

Barry Goodman
Goodman Acker PC

Finally, we have taken the bull by the horns and have created and sponsored a bill to amend the Affidavit of Merit, Notice of Intent, Affidavit of Meritorious Defense, and Expert Witness Rules to allow counsel for both plaintiffs and defendants the opportunity to deal with justice on the merits rather than on the pleadings. So look for *our* bill to come out of the Legislative Service Bureau any day now, get into the hands of the House, who we hope will look kindly at the meaning behind the words contained within, and start the ball rolling.

The Negligence Section council has also been busy assisting others in providing argument by way of the filing of amicus briefs. David Parker, retained by the Negligence Section council on the *Apsey* issue, did a brilliant job. In fact, *Apsey* was reversed by the Supreme Court in a 6-1 decision recently, and on Page 10, footnote 7, the Negligence Section's brief was highlighted.

We have also retained Mark Granzatto to file an amicus brief on behalf of the Negligence Section in the *Matthews v. Republic* case regarding the wrongful conduct rule. We believe that the matter is of import

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to all of those who might be entitled to benefits under the law regardless of fault. We are also looking into filing an amicus brief in regards to the certified questions in the 14th Court of Appeals District of Texas, No. 131517, which is reportedly an asbestos claim, but also concerns the rights of spouses or others exposed to asbestos outside the workplace to receive benefits if justly deserved. Other questions are being considered by the council regularly.

Those who attended the Negligence Section's spring seminar March 15–19 on the Celebrity Century cruise ship were able to partake in a highly educational and informative seminar led by council member Jerry Padilla on every aspect of presenting your case to a jury. In addition, the networking and bonding of both plaintiff and defense attorneys on a long weekend at sea was just as rewarding in raising the level of civility that sometimes seems to be nonexistent between counsel today practicing in this very stressful environment. Hopefully, many of you will join us at the spring seminar next year, which should be planned and advertised shortly. Please stay tuned. We will also be providing educational opportunities to all at a seminar at the State Bar Annual Meeting in Grand Rapids in September. We will provide the topic in the next quarterly.

Surprisingly, the *Michigan Bar Journal* is highlighting products liability in an issue to be published in the spring of 2008. They've asked the Negligence Section to contribute, and we are responding to that request by submitting articles that will be prepared from both plaintiff and defense perspectives. Hopefully, there is something to talk about.

One of my goals as chair was to bring back the Negligence Law Section scholarships. We have done so. We asked students from each of the law schools who are currently enrolled and had completed research and writing to submit a brief of 1,500 words maximum addressing the following question: "Critics say it is more difficult for Michigan citizens to get their day in court as a result of decisions by the current Michigan appellate courts. Do you agree or disagree, and why?" The scholarship program is important to us because it is consistent with our goals of furthering the education of lawyers and law students in negligence law and trial advocacy, and to assist law school students with financial needs. We believe that by promoting scholarships in our law schools in this ever-evolving area, better lawyers will hit the streets upon graduation. We are pleased to announce that four scholarships, each in the amount of $1,500, will be presented to the winning law students chosen from the many papers submitted, and the overall winner's dissertation will be published in the summer edition of this quarterly. It is my hope that this scholarship program will continue each year with more and more students participating. By doing so, I believe that more students will enter our field of law upon graduation and continue to promote the standards of excellence in the representation of individuals on either side of the aisle. Thank you for your continued membership so this important work can be promoted.

By the time this issue is published, Tom Peters, our vice chair, will have attended the State Bar Leadership Forum at Boyne Mountain on the weekend of May 4. Hopefully, he will bring back additional tools to promote our goals and move this section forward.

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Bryant v. Oakpointe Villa: Clear Parameters for an Ongoing Controversy

By Jules B. Olsman, Olsman Mueller, P.C.

In July 2004, the Michigan Supreme Court decided *Bryant v Oakpointe Villa Nursing Centre*, 471 Mich 411, 684 NW2d 864 (2004). The case attempts to provide a bright line standard to differentiate whether tortious conduct in a healthcare setting is medical malpractice or ordinary negligence. The difference between the two theories is a case that can proceed simply and unencumbered toward a verdict without parameters versus a case that is saddled down with multiple procedural requirements that is subject to a cap on non-economic loss damages.

Bryant arose out of the bed rail entrapment and strangulation death of Catherine Hunt in a nursing home. The day before the occurrence, two CENAs (aides) observed Mrs. Hunt in close proximity to the side rail in her bed but failed to follow up on her and failed to report their observations to a nurse supervisor. The court held that expert testimony was not necessary to establish that defendant's employees "should have taken some sort of corrective action to prevent future harm after learning of the hazard." *Bryant* at p. 875.

Bryant has been repeatedly discussed in the numerous court of appeals cases that have followed it. In *Harrier v Oakwood Skilled Nursing Center-Trenton*, an unpublished opinion issued on March 27, 2007, (Docket No. 273729), the Michigan Court of Appeals held that nursing home personnel who were aware that the plaintiff was at great risk of falling but failed to act were guilty of ordinary negligence. The court held:

> We find that no expert testimony is necessary to show that defendants acted negligently by failing to respond appropriately to the knowledge that Anne Harrier was prone to falling and that the aide was negligent by abandoning her patient in the face of that known danger. *Harrier* at p. 2.

On April 16, 2007, *Michigan Lawyers Weekly* reported a $3 million verdict in a claim against the University of Michigan Hospital arising out of the mislabeling of slides by a clerk in the pathology lab. *Karwoski v Barnabei and University of Michigan Hospital*, Washtenaw County Circuit Court, No. 05 1012 NH. As a result of the error, plaintiff underwent a partial mastectomy as well as lymph node mapping, dissection, and removal. The defendant in this case argued that the clerk's conduct was malpractice. Judge Timothy Connors rejected the argument and held that the conduct was ordinary negligence. He ruled as follows:

> Putting the wrong identification sticker on a sample is no different from putting a document in the wrong file, depositing a check in the wrong account, placing a letter in the wrong mailbox. It is simple human error which can be evaluated by jurors on the basis of their common knowledge and experience. (Decision of Judge Connors dated 3/12/07).

The *Bryant* Test

In *Bryant*, the court provided a two-pronged test for determining ordinary versus professional negligence. The test is:

1. Whether the claim pertains to an action that occurred within the course of a professional relationship; *and*

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Jules B. Olsman is president of Olsman Mueller, PC in Berkley, Michigan. He is the current secretary of the Negligence Law Section council. He and Mark Granzotto represented the plaintiff in *Bryant v Oakpointe Villa*.

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2. Whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience.

Both questions must be answered in the affirmative if the case is to be subject to the requirements and limitations of Michigan's medical malpractice law. Otherwise, it may proceed as a claim for ordinary negligence.

Bryant essentially affirmed the prior holding of the court in *Dorris v Detroit Osteopathic Hospital*, 460 Mich 26, 594 NW2d 455 (1999), and the decision of Judge Patrick Duggan in *McLeod v Plymouth Court Nursing Home*, 957 F Supp 113 (ED Mich 1997), which held that failing to lock the wheels on a wheelchair in a nursing home was ordinary negligence.

Brick and mortar do not commit medical malpractice

Defendants continue to argue that "because it happened in a hospital or nursing home," the conduct is, therefore, professional negligence. This argument was specifically rejected in *Cox v Flint Board of Hospital Managers*, 467 Mich 1, 651 NW2d 356 (2002). In *Cox*, the court held that the liability of a hospital could not be premised upon the negligence of a "unit." The court held that the negligence of people working within the unit would provide a basis for vicarious liability; however, the negligence of each and every agent involved had to be clearly identified and specifically pled. *Cox* at p. 362.

Therefore, where an occurrence takes place (i.e., in a medical setting) is relevant but not determinative of the type of cause of action.

"Delivery of medical services" does not render a claim to be malpractice

Occasionally, defendants will argue that any injury that arises during the course of the "delivery of medical services" constitutes medical malpractice. This argument is clearly erroneous and rejected by the *Bryant* analysis in which the first prong of the test is whether it arises out of a professional relationship. If it did not, we would not be having this debate. The actionable conduct must *also* arise out of the exercise of medical judgment or it is ordinary negligence and not malpractice.

Unlicensed healthcare providers cannot be sued for malpractice

MCLA 600.2169(1) states specifically:

> A person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a healthcare professional and in the same area of practice and holds the same license as the defendant being sued.

Both an expansive and textualist reading of MCLA 600.2169 clearly establishes that maintaining a professional license is a clear prerequisite to offering expert witness testimony and/or being the subject matter of it. As a consequence, it is inconceivable that any court would accept an Affidavit of Meritorious Defense filed on behalf of a CENA in a nursing home who is an unlicensed healthcare worker or, as in the case of *Karwoski v Barnabei and the University of Michigan Hospital,* a clerk in a pathology lab.

Despite the relative clarity of the Supreme Court's analysis in *Bryant* and the two-pronged test it enunciated, factual patterns continue to challenge the notion that ordinary negligence can be readily discerned. In attempting to determine whether tortious conduct is professional or ordinary negligence, practitioners are advised to make the following inquiries:

1. Is the actor a licensed healthcare professional? *and*
2. What is the nature of the action resulting in injury?

Terms such as "assess," "diagnose," "treatment," "supervision," and "staffing" tend to favor the argument that the conduct is professional in nature. One must look carefully at both the actor and the conduct involved.

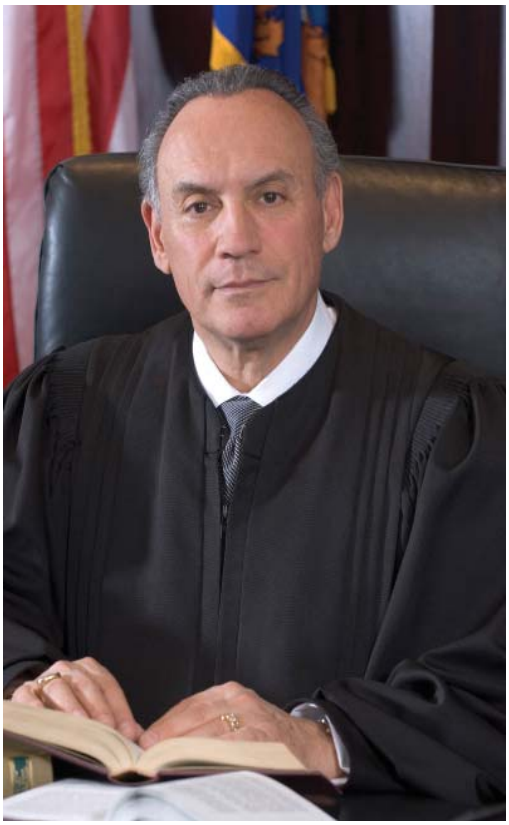
Almost three years after the decision, *Bryant* continues to provide both plaintiffs and defendants with reasonable guidance and a relatively clear standard for determining the nature of a claim. However, plaintiffs' practitioners are encouraged to follow Justice Markman's admonition in *Bryant*:

> However, in future cases of this nature, in which the line between ordinary negligence and medical malpractice is not easily distinguishable, plaintiffs are advised as a matter of prudence to file their claims alternatively in medical malpractice and ordinary negligence within the applicable period of limitations. *Bryant* at p. 876.

When in doubt, do both. Send a Notice of Intent pursuant to MCLA 600.2912 and also file an action alleging ordinary negligence. Plaintiff is well advised to file a motion for summary disposition and obtain a definitive court ruling on this issue as soon as possible. Neither plaintiff nor defense counsel should rely on his or her own opinion going forward in a case in which this issue is in controversy.

Fifth Annual Earl J. Cline Award for Excellence

This year we are pleased to present the *Fifth Annual Earl J. Cline Award for Excellence* to Honorable Pat M. Donofrio in recognition of his superb skills as a judge and practicing attorney in the field of negligence law and dispute resolution. The purpose of the Negligence Law Section is to promote the fair and just administration of negligence law, to advance professionalism and ethical standards on the part of negligence law, to preserve *and* promote trial advocacy skills in the practice of negligence law and to recognize by way of awards and scholarships excellence in tort law and outstanding contribution to the practice of the profession.



Honorable Pat M. Donofrio

The Honorable Pat Donofrio joins past honorees Hon. Michael Stacey (Retired), Samuel Garzia, Frank Brochert, and George Bedrosian.

Honorable Judge Donofrio was appointed to the court in 2002 and elected in 2004. He previously served as a Macomb County Circuit Court judge after appointment and election in 1997 and 1998 respectively. From 1998 until appointment to the Michigan Court of Appeals he served as the presiding judge of the civil/criminal division of the circuit court. He was a founding member of the law firm of Romain, Donofrio, Kuck & Egerer, P.C., now Romain, Kuck & Egerer, P.C., and served as its president at the time of entry into the judiciary. Judge Donofrio is a member of the Michigan Judges Association, American Judges Association, and the Michigan Supreme Court Committee on Model Civil Jury Instructions. Judge Donofrio serves as chairman of the Court of Appeals settlement committee and serves on the executive committee and delay reduction work group. He is a member of the State Bar of Michigan. He is a member of the Macomb County Bar Association, Oakland County Bar Association, and serves as secretary for the American Inns of Court, Oakland Division. He has served on the faculty at the Institute for Continuing Legal Education, the National Judicial College, and the Michigan Judicial Institute, and served on the Michigan Supreme Court Task Force on Trial Court Performance Standards. He has earned certificates of accomplishment from the National Judicial College and the National Drug Court Institute.

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Tom Peters is also, at my request, putting together a Northern Michigan Council meeting for the first time in my memory. In other words, rather than continue to meet in southeast Michigan, where the council members seem to be based at this time, we are taking our meeting on the road and opening it up as an information session. That meeting will take place on Monday, July 23 5:30 p.m.–7:30 p.m., at the Park Place Hotel in Traverse City. I invite everyone who has an interest in negligence law to come and meet with us so that we can update them on what the section does, have our legislative consultant, Todd Tennis, present to give them an update on the current status of happenings in the legislature (they should be on summer break at the time), and present to us issues of importance that we should consider as we begin a new year in the fall.

Several years ago, we began honoring individuals in recognition of his or her superb skills as a judge or attorney in the field of negligence law or dispute resolution. We have been presenting this award, known as the Earl J. Cline Award, since 2003. Past recipients have been the Hon. Michael L. Stacey, Samuel Garzia, Frank Brochert, and last year, George Bedrosian. This year, at our past chairpersons' dinner, to be held on Friday, June 1, we are presenting the Earl J. Cline Award to the Hon. Pat Donofrio.

I also want to thank council member Doug Shapiro, who recently testified on behalf of the Negligence Law Section before the Michigan Supreme Court. Doug's comments on confidentiality were among the most compelling and clearly concerned issues of importance to the section members.

This article is meant to provide those in the section who care to read these remarks with an overview (and simply a sampling) of what the council does for its section members over a given year. It is not meant to be comprehensive, but simply provides each of you an idea of what your $35 brings to the table. The bottom line is justice, and that's what this section stands for. Aristotle is credited with the statement, "All virtue is summed up in dealing justly." That's what we are all about. Currently, our courts have not listened to the great minds of the past. In 1664, Jean Racine stated, "Extreme justice is often unjust." In 1732, Thomas Fuller stated, "Rigid justice is the greatest

injustice." Another mind of the past once stated, "One can't be just if one is not human at the same time." When he addressed the Congress in 1862, Abraham Lincoln stated that, "The severest justice may not always be the best policy."

The Supreme Court majority believes in textualism. I invite them to look at the quote by Daniel Webster who stated in 1845, "Justice is the great interest of man on earth." Being a textualist, I look at the word "man" as an individual, not as an insurance company or a large corporation. After all, according to Potter Stewart, "Fairness is what justice really is." We need to think of that tenet rather than that quoted by the queen in Alice in Wonderland, which goes, "No, no! Sentence first—verdict afterwards." That's not the system of justice that I want to be involved in.

In any event, I hope that reading through these quarterlies will find each of you trying to figure out how you can serve the State Bar, and by so doing, more ably serve your client. Please get involved in the Negligence Section, the MDTC, the Michigan Association for Justice (formerly known as the MTLA), or other organizations, and give your heart and soul to them. You will find the work rewarding; you will find civility being restored; you will make new friends that hopefully will last forever; and you will take back to those you truly serve, your clients, a higher sense of purpose that will "serve" them well.

Legislative Update

Todd N. Tennis has been a lobbyist with Capitol Services, Inc., a multi-client lobbying firm that specializes in representing nonprofit organizations, since 1995. Before becoming a lobbyist, Todd earned a degree in political science from the University of Michigan and worked as a staff representative for former State Senator Fred Dillingham. He has represented the Negligence Law Section of the State Bar since 1999. Todd lives in Lansing with his wife, Cheryl, and son, Troy.

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State Budget Crisis Rules Lansing

As anyone who has picked up a newspaper recently can tell you, Lansing has become all budget, all the time. Although the legislature and governor are working on other issues, the state's fiscal crisis has taken center stage and does not seem likely to relinquish that position anytime soon. As this newsletter goes to print, the governor and legislature are still wrestling to find a solution, but the details are far from predictable.

One piece of the potential budget puzzle that would have a large impact on the legal community is the proposed two percent sales tax on services. Under the governor's proposal, legal fees would become taxable for the first time in Michigan. Conventional wisdom in Lansing states that this proposal will not make the final cut, and attorneys around the state have been breathing a collective sigh of relief. Still, it seems likely that some form of tax increase will be part of the final agreement.

While the main focus in Lansing has been on the budget crisis, the legislature has managed to do some work on other issues. Two items of particular interest to the Negligence Law Section have already passed the House this year. The first, House Bill 4044, sponsored by Representative Mike Simpson (D-Liberty Twp.), seeks to repeal Michigan's law granting manufacturers of FDA-approved drugs immunity from civil lawsuits. The second, House Bill 4301, sponsored by Representative Paul Condino (D-Southfield), addresses changes to the no-fault auto insurance law stemming from the Supreme Court ruling in *Kreiner v. Fischer*.

Passage of House Bill 4044 (and its companion bills, HB 4045 and 4046) fulfilled what had become a major campaign issue for House Democrats. The issue of barring Michigan citizens from the courtroom on issues of faulty drugs was credited with helping Democrats recapture control of the House in the 2006 elections. With victims of the drug Vioxx appearing in Democratic campaign commercials, House Democrats made repeal of the immunity law a top priority for the 2007 session. The bills passed the House on February 22, and are now awaiting action in the Senate Judiciary Committee. Senate Majority Leader Mike Bishop (R-Rochester) has stated that the Senate has no plans to address this issue until after the budget is completed.

House Bill 4301 is in an identical situation. Promoted by the Coalition to Protect Auto No-Fault (CPAN) – which includes organizations ranging from the Michigan State Medical Society to the Michigan Trial Lawyers Association – the bill won passage in the House on March 14. Known as the *Kreiner* bill, HB 4301 seeks to reverse the effect of the Supreme Court's ruling in *Kreiner v. Fischer* that substantially increased the threshold for what constitutes "serious impairment of bodily function." This bill was also referred to the Senate Judiciary Committee, and it may be some time before it receives a hearing.

For the record, the Negligence Law Section has taken formal positions in favor of both pieces of legislation. Michigan's drug immunity law goes against the section's standing legislative goal of keeping the doors to the courtroom open. The *Kreiner* decision, while not providing blanket immunity, had a similar effect by barring a broad range of victims from having their day in court. The section is working to help both sets of legislation win passage in the State Senate.

CELEBRATING THE 52ND YEAR OF THE NEGLIGENCE COUNCIL

WE SALUTE OUR PAST CHAIRPERSONS

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2001-2002	David R. Getto
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1971-1972	Richard B. Baxter
1970-1971	David V. Martin
1969-1970	Eugene D. Mossner
1968-1969	Richard A. Harvey
1967-1968	Saul M. Leach
1966-1967	Thompson Bennett
1965-1966	Charles R. MacLean
1964-1965	Robert E. Rutt
1963-1964	Hon. Cornelia G. Kennedy
1962-1963	Ivin E. Kerr
1961-1962	William J. Weinstein
1960-1961	Marcus L. Plant
1959-1960	A.D. Ruegsegger
1958-1959	Thomas W. Finucan
1957-1958	Kenneth J. Stommel
1956-1957	Carl Gussin
1955-1956	Leroy G. Vandeveer

Photos from the 2007 Spring Seminar

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