STATE BAR OF MICHIGAN Summer 2000

NEGLIGENCE LAW SECTION QUARTERLY

The Official Newsletter of the State Bar of Michigan Negligence Law Section
Timothy J. Donovan, Chair

Contents

FROM THE CHAIR


Timothy J. Donovan

Time to Go

This is my last letter From the Chair. At our Annual Meeting on September 22, 2000 new officers eager to take on the leadership of the Negligence Law Section will be elected.

When first elected to the Negligence Council seven years ago, I had little idea what the job entailed or how long it would last. As I approach my own personal mid-century mark, I have, however, come to the realization that time has a way of slipping away from us all at an ever accelerating rate. Over the past seven years, I have had the pleasure to serve on the Negligence Council with some of Michigan's finest lawyers. During that time, monumental changes have occurred to the practice of negligence law in this State. Despite differences and disagreements among those who practice from the plaintiff and defense perspective, I have been impressed always with the extent to which we have issues in common, and the professional way in which we are able to resolve differences. It has been a pleasure to serve.

Annual Meeting and Seminar

As most of you know, the Annual Meeting of the State Bar occurs this year over the days of September 20th through September 22, 2000 at Cobo Center in Detroit.

The Negligence Law Section will conduct its Annual Business Meeting commencing at 9:30 a.m., on Friday morning, September 22, 2000 in the Cobo Center, Room 02 (35-36), Level 2.

Immediately following our business meeting, the Negligence Law Section will present its Annual Meeting Seminar Program. The topic is "Recent Trends in Personal Injury Litigation and Appellate Law." The moderator for the program is Thomas Hay. Our speakers include Steven Gursten, with a "Threshold Update" in the area of Auto No-Fault. Additionally, Robert Logeman will discuss first party case law, including nurse care managers. We will also have an appellate update from John P. Jacobs discussing many of the important cases that have been decided in the area of negligence law in the past year. Finally, Brian Herrington will give an interesting look at the topic of discovery of "Technical/ Electronic" information. This promises to be an excellent seminar and I encourage your attendance.

State of the Law

In recent years, the Negligence Law Section has lapsed in its participation in the "State of the Law" publication. With renewed effort and the assistance of attorneys Steven Hicks and Barbara Goldman, we have once again become active in this area. Steven and Barbara have prepared a comprehensive review of the "State of Negligence Law in Michigan" to be made a part of the overall State of the Law publication which will be available at the State Bar Annual Convention. So many important cases have been decided in the past year, the State of Negligence Law is "must reading" for anyone who practices in this area. Thank you to Steve and Barbara for their excellent efforts in producing this fine product.

Recent Council Meetings

At our most recent meetings, the Negligence Council has been exploring ways to collaborate with the Institute for Continuing Legal Education on Future Seminars. In years past, our efforts in the area of educational seminars have consisted primarily of our Annual Spring Seminar and the Annual Meeting Seminar. We have begun discus-

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FROM THE CHAIR

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sions with ICLE to explore ways to collaborate with the Institute on additional educational programs and seminars throughout the course of the year. This is something that we will be continuing to discuss at our upcoming meetings, and we invite your comments and ideas.

Additionally, we have continued to monitor legislative activity. With the legislature currently in summer recess and with elections in the fall, we have been blessed with few proposals in the legislative arena affecting negligence law. However, we continue to monitor and take active interest in the general topics of immunity legislation of any type, as well as so-called "loser pays" legislation in any of its forms. One particular "draft" item of legislation has gone so far as to propose that if a court finds a civil action was "frivolous" the court may award in that action costs and fees incurred by the prevailing party against the non-prevailing party and "that party's attorney." It is the view of the Negligence Council that proposals such as these do nothing to further the fair administration of a civil justice system, and should be opposed.

Point/Counter Point

The Point/Counter Point articles in this issue of the Negligence Law Section Quarterly address yet another timely topic — the adoption of "textualism" as a form of legal analysis by the conservative majority of our Supreme Court. For the Point contribution, Richard Steinberg, a Detroit attorney specializing in personal injury and criminal law, describes the roots of textualism and its flaws. In response, Michael Gadola, Assistant House Majority Counsel, defends the use of a "textualist" approach by the Supreme Court majority in interpreting legislation and resolving disputes.

Once again, my thanks to the council and officers for their hard work over the past year. I encourage all Negligence Section members to actively participate in the endeavors of this section.

The opinions expressed in the Negligence Law Quarterly are those of the authors. Send correspondence and material for publication to:

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Recent Developments in Negligence Law

MICHIGAN SUPREME COURT

ROBINSON V CITY OF DETROIT
613 NW2d 307 (2000)

The Supreme Court has ruled that police officers owe a duty while pursuing fleeing vehicles to innocent passengers but not passengers who are wrongdoers. Further, the Court held that a police officer's decision to pursue a fleeing vehicle does not constitute the negligent operation of a motor vehicle for purposes of the motor vehicle exception to governmental immunity, thus overruling its earlier opinions in Fiser v City of Ann Arbor, 417 Mich 461, 339 NW2d 413 (1983) and Rogers v City of Detroit, 457 Mich 125, 579 NW2d 840 (1998). The Court also concluded that the term "proximate cause" as used in employee provision of governmental immunity act means "the" proximate cause and not "a" proximate cause. In so ruling, the Court overturned its prior ruling in Dedes v Asch, 446 Mich 99, 521 NW2d 840 (1998).

NAWROCKI V MACOMB CO ROAD COMM
2000 WL 1045322 (MICH, JULY 28, 2000)

The Supreme Court has held that the state or county road commissions's duty, under the highway exception does not extend to the installation, maintenance, repair or improvement of traffic control devices, including traffic signs, but rather is limited exclusively to the dangerous or defective conditions within the improved portion of the highway designed for vehicular travel, that is, the actual roadbed, paved or unpaved, designed for vehicular travel. In so doing, the Supreme Court overturned its prior ruling in Pick v Szymczak, 451 Mich 607, 548 NW2d 603 (1996) because it failed to narrowly construe the highway exception to governmental immunity.

Massey v Mandell
2000 WL (MICH 2000)

The Supreme Court has affirmed that under Section 1629(1)(a) of the Revised Judicature Act (RJA) when there are multiple defendants in a tort action the fact that a defendant resides within the county where the original injury occurred will not mandate that venue be in that county unless all the defendants reside or conduct business there. In other words, venue in a tort action will be proper in a county where a defendant – any defendant – resides or conducts business even if it is not the county where the original injury occurred. In a concurring opinion, three justices reached the same result on the grounds that the joinder of claims against more than one defendant constituted a joinder of more than one cause of action under Section 1641 of the RJA, which permits the plaintiff who is joining the claims to bring a lawsuit in a county where venue was proper for one of the tort claims.

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State Bar of Michigan

Annual Meeting

Mark Your Calendar!

September 20–22, 2000

Cobo Conference/Exhibition Center
Detroit, Michigan

3 DAYS OF PRACTICAL SEMINARS & PROGRAMS

- Wednesday
  CORPORATE/BUSINESS
- Thursday
  ACCESS TO JUSTICE
- Friday
  LITIGATION/PROBATE

NEGLIGENCE LAW SECTION SEMINAR

FRIDAY SEPTEMBER 22ND 9:30 TO 11:30 a.m.

(Following the business meeting and election)

Learn about the dramatic changes in negligence law and what to expect in the future!

Steven Gursten, Gursten & Koltownow, P.C.
Auto-No-Fault—Threshold Update

Robert E. Logeman, Logeman, Iafrate, Januszewski & Pollard, P.C.
First Party Update (Nurse Care Managers)

Brian D. Herrington, Fraser, Trebilcock, Davis and Foster, P.C.
Discovery of Technical/Electronic Info

John P. Jacobs, O'Leary, O'Leary, Jacobs & Matson, P.C.
Appellate Update

STATE OF THE LAW
FREE TO ALL ATTENDEES

ACCESS TO JUSTICE Development Campaign
Supporting access to justice for all.

TEXTUALISM: The Supreme Court and its Method of Interpretation

The 5-2 conservative majority on the Supreme Court—has reshaped negligence law in our state in a very short period of time. In so doing, the majority has adopted a judicial approach to interpretion which it refers to as "textualism." It has applied "textualism" to overturn existing precedents involving issues of government immunity, medical malpractice and insurance coverage. In November, three of the most outspoken advocates of textualism—Justices Taylor, Young and Markman—face a general election. While the term "textualism" will not be heard as part of the campaign this fall, it will remain the touchstone for interpretating legislative meaning if two of the three incumbent justices are re-elected. Accordingly, we thought it appropriate to ask the question: what is "textualism?" And even more importantly, to ask whether "textualism" is the correct method of interpretation for our state's highest court?

Point

By Richard L. Steinberg

The word" textualism" describes a judicial philosophy which has been championed by Justice Anton Scalia, and which was made the subject by him of the Tanner Lectures at the Princeton University Center For Human Values in 1996, and later, together with commentary by Amy Gutman, Gordon S. Wood, Laurence H. Tribe, Mary Ann Glendon, and Ronald Dworkin, and a rejoinder by Justice Scalia, was published as A Matter of Interpretation: Federal Courts and The Law (1997). The main point of "textualism" is that, because almost all of what unelected, life-tenured Federal judges do is interpret Constitutional provisions, Congressionally-enacted statutes, and agency administrative regulations, fundamental principles of democracy require that the judges so engaged apply the literal text, as adopted by others (with a few common sense exceptions). The philosophy of "textualism" properly counts elected State court judges among its adherents because most "new law" (such as "tort reform") is statutory.[1] The philosophy of "textualism" is to be distinguished from "strict constructionism," [2] which Justice Scalia describes as "a degraded form of textualism."[3] With three members of the current Michigan Supreme Court publicly describing themselves as "textualists," an inquiry into the nature and limitations of "textualism" is warranted.

It is respectfully submitted that "textualism" is an imperfect judicial philosophy which ill serves the proper interpretation and application of the law for a number of reasons. First, the limitations presented by the nature of language itself counsels against applying the literal "meaning" of the written word to facts, where the outcome defeats fundamental justice or defies logic. Second, the construct of "textualism" does not apply at all to the development of the common law, and in fact, may actually retard it. Third, "textualists" who defer to the Legislature or to agency regulations made by the Executive are, in effect, surrendering the coequal Constitutional authority of the Judiciary to political influence, where an independent Judiciary is required. In addition, such deference undermines the Constitutional imperative placed upon the Judiciary to review such provisions for Constitutional infirmity. However, and by way of introduction, it must be recognized that this debate is one which is not very new.

Textualism: An Historical Perspective

Actually, those to whom society has entrusted with juridical office have been wrestling with the issues presented by "textualism" since the advent of the written law. Those "textualists" who interpret Biblical law are recognized as "religious fundamentalists," regardless of their particular denomination or profession of faith. One of the more famous examples of the limita-

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tions of language which confront believers in Creationism was Clarence Darrow's cross-examination of William Jennings Bryan in the Scopes' "monkey trial" on the origin of Cain's wife.[4] As all Sunday-schoolers know, God created Adam,[5] and from Adam's seventh rib, God created Eve.[6] Adam and Eve had two children, Cain and Abel.[7] Thereafter, Cain murdered Abel.[8] In consequence, God banished Cain, but placed a mark upon him so that he would not fall victim to retribution by man or beast.[9] Next, Cain takes a wife, who gives birth to Enoch.[10] So, where did Cain's wife come from?

And, since judges have been interpreting wills, trusts, contracts, and other written instruments for hundreds of years before they reached statutory interpretation, they have been dealing with similar connundra, in order to mete out substantial justice to the parties before them. One famous example is Cheyney's Case,[11] which discusses the problem framed by the following facts: a testator has an eldest son named John, whom he dearly loves. Thereafter, John goes abroad to make his fortune, and is believed by the testator to be dead, and to have been lost at sea. Thereafter, the testator has a second son whom he also names John, and he devises his estate "to my son John." When the testator dies, and the younger John offers the will to be admitted in probate, the older John returns to claim his inheritance. Should the law of primogeniture trump the intent of the testator? Should the older John be allowed to return from the dead? Should the younger John be allowed to go beyond the four corners of the text, and offer extrinsic evidence of his father's belief in the death of the older John, and his father's intent that he should take all, since a literal interpretation of the text of the will does not lead to a just result? What if the will was executed before the younger John was born? The "text" of the will does not definitively lead to a just answer to any of these questions.

These two examples illustrate the force of Glanville Williams' contention: "that language is perhaps the greatest of man's inventions. But it is an invention that he is a poor hand at improving. Language shows a most remarkable maldistribution of words, a great unevenness of density; for some ideas are expressible in a dozen different words and others have to be lumped together under one. The result is much false reasoning."[12] One might add that some ideas can be expressed in one language, but in others, imperfectly, or not at all.[13] Many of the reasons for the limitations of language are explored at length in the important work by C.K. Ogden and L.A. Richards, The Meaning of Meaning (1994 ed), reasons which are largely ignored by textualists.

For example, in the primitive mind, words had magical powers. While the scientific mind purportedly rejects such superstition, blasphemy,[14] and the use of any indecent, immoral, obscene, vulgar or insulting language in the presence or hearing of a woman or child[15] remain criminal offenses in Michigan[16], as is the offense of teaching that polygamy is "a correct form of family life… ."[17] And, after all, the crime of bigamy is only the exchange of matrimonial vows (words) with more than one person, before the first marriage is legally dissolved.[18] In consequence, habitual attitudes toward words, and lingering, even ancient, assumptions towards words, based upon theories no longer openly held, are still allowed to guide public practice and continue to distort meaning.

With respect to the concept of "meaning," Ogden and Richards postulate sixteen (16) separate definitions.[19] The complexity of the subject of language, and the number of its dimensions, readily demonstrate the futility of attempting to ascribe a single, unimpeachable "meaning" to a given passage of text.[20]

Textualism and "Judicial Activism"

Next, textualists assert that a philosophy of literalism is necessary to rein in that most despised of human creatures, "the judicial activist." Justice Scalia recounts the historiography of the "codification movement" in the early 19th Century.[21] And, although he asserts that he has no quarrel with the common law as such,[22] only with the attitude of the common law judge,[23] it is clear that many present day adherents of "textualism" and of "tort reform" are in attack mode against both. The limitations inherent in "textualism" and particularly "textualism as tort reform" were eloquently set forth by Justice Oliver Wendell Homes, Jr. many years ago: statutory law is so cumbersome that it cannot possibly keep up with the needs of a developing society which relies upon, instead, a developing common law.[24] As Holmes pointed out: "[a] well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest is to resist it at every step. These are advantages the want of which cannot be supplied by any faculty of generalization, however brilliant… ." Besides, "[n]ew cases will arise which will elude the most carefully constructed [statutory] formula."[25]

More recently, Geoffrey Hazard, the noted authority on legal ethics, and the Sterling Professor of Law at Yale University delivered the Owen J. Roberts Memorial Lecture at the University of Pennsylvania Law School.[26] In his address, Professor Hazard made this point:

> [a]rgument for rigid conformity to precedent undermines the common law system itself. Common law decision-making proceeds by reasoning from a past authoritative concrete decision to an outcome in a present concrete situation over a bridge of improvised generalization. The decisions themselves are law, but the bridging generalization becomes law only if and to the extent it is later reaffirmed. Establishing a precedent requires at least three decisions: an original decision, which constitutes potential precedent; a second decision, which uses the first as precedent; and a third decision which holds that the second decision correctly considered the first decision a proper precedent. This retrospective and aggregative appraisal of precedent is the essence of common law and constitutional adjudication… .[27]

This entire process is undermined when a common law court announces a common law decision, and then utilizes its political rulemaking power to institutionalize its common law decision before the validity of the holding can be tested either for its legitimacy as proper precedent or in the laboratory of experience. In short, the Court uses its raw political power to circumvent the three step process necessary to establish a rule of law as a legal precedent, and as described by Professor Hazard.

Here, we find the intersection of "textualism" and "tort reform." Maiden v. Rozwood,[28] exemplifies the current Court's failure to follow Professor Hazard's syllogism. In this case, Justice Corrigan, writing for the majority suddenly "discovers" that the adoption of the Michigan Court Rules in 1985 overruled Rizzo v. Kretchmer,[29] and its progeny, sub silentio, making it substantially easier for a defendant to obtain summary disposition. However, before the validity of this conclusion can be tested in the laboratory of time and experience, a majority of the Court proposes to institutionalize the majority opinion in Maiden v. Rozwood, supra, by amend-

ing the applicable Court Rule.[30] Thereafter, the "textualists" on the Court will be required to apply the "text" of the amended rule, circumventing the common law decisionmaking process described by Professor Hazard. And, adherents of "textualism" are dutibound to apply the text whether it makes any practical sense or not.[31]

Finally, textualism requires undue deference to the Legislature and to the Executive. As a practical matter, this translates into a presumption of the constitutionality and of the validity to statutory enactment and agency rulemaking, over and above those restraints which are self-imposed by judicial decisionmaking when such questions are presented. Such a philosophy necessarily undermines the Judiciary as a coequal branch of Government and it compromises the independent role of the Judiciary in determining whether particular provisions, whether they be statutory enactments or administrative regulations, pass constitutional muster, on their face, or as applied.

To properly understand the role of the Judiciary, it is important to understand not only what the Framers created, but what they rejected as well. "The tradition from which the Framers broke was that of Parliamentary sovereignty—the notion that Parliament's actions embodied the constitution, and so could not be restrained by it."[32] Under English Constitutional theory, society was comprised of three distinct estates: the crown, the nobility, and the common people; and, these estates corresponded to three forms of government: monarchy, aristocracy, and democracy.[33] Because each of these estates was represented in Parliament, the acts of Parliament were considered to be those of society at large, and, therefore, sovereign and unreviewable.[34] The conclusion that the "body that framed new statutes was the ultimate authority in Common Law… "[35] was partly based upon the fact that all of the members of the Judiciary in that period of history served at the pleasure of the King, and that Parliament was the only check upon the power of the King, and partly upon the fact that the greater part of their income was based upon statutory fees.[36]

In contrast, the Founding Framers who devised American Constitutional theory deliberately rejected the notion of Parliamentary sovereignty, or Legislative supremacy, and assigned the Judiciary the role of seeing to it that the elected representatives of the people do no fundamental wrong. Under our system of government,

> constitutions are of paramount authority to laws or acts of government, or any of its departments; so that, when the latter come in conflict with the former, they are null and void, and of no binding effect whatever. From this fact it results, that, when a case come before the courts of the United States, in which a question of conflict between the acts of Congress or any department may arise, the judges are bound, from the necessity of the case, to determine whether, in fact, there is any conflict or not; and if, in their opinion, there be such conflict, to decide in favor of the constitution; and thereby, virtually, to annul or veto the act, as far as it relates to the suit or controversy. This, with the provisions to secure their independence, gives, not only means of self-protection, but a weight and dignity to the judicial department never before possessed by the judges in any other government of which we have any certain knowledge. [emphasis added][37]

In short, the rights of the people are "sovereign."

Textualism at Work in Michigan

Given the limitations of "textualism" as a judicial philosophy, a critical examination of how that philosophy is applied to concrete controversies by some of the "textualists" who comprise the current Michigan Supreme Court is both necessary and desirable. While an exhaustive survey of the Court's opinions is beyond the scope of this article, a few examples of "textualism at work" illustrate the main points being made here, and must suffice.[38]

In Horace v. City of Pontiac,[39] the Court was presented with the question of "whether the public building exception to governmental immunity applies to slip and fall injuries arising from a dangerous or defective condition existing in an area adjacent to an entrance or exit, but nevertheless still not part of a public building."[40] Justice Taylor, one of our avowed "textualists" wrote the opinion for the majority, holding that it does not. After a somewhat exhaustive review of the cases in this area, Justice Taylor was frank to concede that: "this Court and the Court of Appeals have made inconsistent statements regarding whether an injury from a slip and fall in an area immediately adjacent to an entrance or exit of a public building comes within the building exception."[41] In Justice Taylor's opinion, the outcome of the issue depended upon what the meaning of "of" is. Concededly, in Reardon v. Department of Mental Health,[42] "this Court cited the definition for the word 'of' from Black's Law Dictionary (5th ed)."[43] However, the Court of Appeals use of the definition of the word "of" from Black's Law Dictionary in order to conclude that a governmental entity can be liable for harm occasioned by the parts of a public building which are intimately connected or associated with the building itself was erroneous, and the Court of Appeals use of Black's Law Dictionary was erroneous. Justice Taylor then went on to admonish that "[o]ne does not need a legal dictionary to understand the meaning of a nonlegal term such as 'of.' Thus, when considering a nonlegal word or phrase that is not defined within a statute, resort to a layman's dictionary such as Webster's is appropriate."[44] Most revealing, Justice Taylor goes on to write: "Review of Webster's Collegiate Dictionary shows that the word 'of' can have many different meanings, depending on the context."[45] Justice Taylor then selects the "most obvious definition applicable here… ."[46] The necessary conclusion is that the word "of" in the governmental immunity statute, in and of itself, has no meaning; rather, the meaning of the word depends upon which dictionary is used and which definition from that dictionary will appear to be "most obvious." Text thus depends upon context, and the context here is that governmental immunity is broad, the exceptions narrow, and governmental agencies are not accountable as other, like tortfeasors are.

In Henderson v. State Farm Fire & Casualty Co,[47] neither Black's Law Dictionary nor Webster's was sufficient to save the Court of Appeals from reversal. In that case, the question presented was whether the phrase "in the care of" in a homeowner's insurance policy was or was not ambiguous. The plaintiff was stabbed during an altercation in front of a private residence insured by the defendant. The residence was occupied by the homeowner, the homeowner's son, and the homeowner's son's teenaged girlfriend. The plaintiff alleged that the girlfriend had negligently provoked the confrontation which occasioned his injuries. The defendant denied coverage and the case turned upon the question of whether the girlfriend was "in the care of" the named

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insured.

The Court of Appeals noted that no prior reported case in Michigan defined that phrase as used in insurance contracts and that the policy itself did not define the language.[48] In consequence, the Court of Appeals first looked to two, different dictionary definitions of the word "care," and reviewed cases from three other jurisdictions to reach the conclusion that the language was ambiguous; and, in consequence, that it should be construed against the casualty carrier in order to afford coverage. Again, Justice Taylor writes the opinion for the Court. In this case, no dictionary will suffice because "we do not ascribe ambiguity to words simply because dictionary publishers are obliged to define words differently to avoid possible plagiarism."[49] Indeed, the Court of Appeals' fundamental error was attempting to parse the phrase word by word, instead of recognizing that it "is a colloquial and idiomatic phrase that is peculiar to itself and readily understood as a phrase by speakers and readers of our language."[50] Thus, "[t]he major flaw in the Court of Appeals approach… was failing to deal with the disputed phrase as a phrase."[51] Justice Taylor cites the existence of the "plain English movement" to support the conclusion that the move to the use of "plain English" in insurance policies "requires courts to utilize less rigid methods of interpretation than the old densely written policies demand… . [because] any attempt to define each element, or word, of the phrase, as the Court of Appeals did, will almost invariably result in an inaccurate understanding of the phrase."[52]

Here, again, Justice Taylor revealingly concludes that this new, less rigid, more flexible approach, "requires a court to give contextual meaning to the phrase to determine what the phrase conveys to those familiar with our language and its contemporary usage."[53] And, once again, it is not text, but context, which proves decisive. Abjuring the propriety of any dictionary definition, and denying the existence of the spiraling ambiguity of the phrase as used by the defendant (which becomes increasingly evident during a reading of the opinion), the Court goes on to establish its own list of eight "nonexclusive common sense factors,"[54] for determining whether a person occupying a household is "in the care of" a named insured or not. After a consideration of the record evidence, Justice Taylor concludes that there is evidence which supports the conclusion that the person in question was "in care of" the named insured, and evidence that she was not; in consequence, a jury trial is required to resolve this "factual dispute."

This case is remarkable for several reasons. It not only illustrates the inherent limitations of "textualism," it abandons the very precepts of "textualism" for a "common sense approach." The opinion fails to analyze or distinguish any of the cases upon which the Court of Appeals or the dissenting opinion relies, dismissively referring to them in a footnote as "unpersuasive."[55] The irony that the defendant, State Farm, had utilized the very same arguments which the plaintiff in Henderson employed, involving nearly identical policy language in an earlier case,[56] in order to defeat coverage seems entirely lost upon the Court. And, finally, the upshot of the Court's conclusion is that the policy language utilized by State Farm has no legal import; rather, it has a "common sense meaning" which must be determined by a jury. Here, the context (and, perhaps subtext is a better term) is that "texualist" judges uphold "family values" and an insurance company will not be required to pay for the risks created by people who enter into living arrangements which are not reflective of the nuclear family, the intended object of the protection offered by homeowners' insurance.

In Henderson, context has entirely swallowed text. In this vein, one is reminded of the candid, frank, and compelling observation of Justice James Ryan in Tebo v. Havlik,[57] in which he wrote:

> In the course of construing and interpreting countless statutes, this state's appellate courts have repeatedly held that legislative [or contractual] language does not always mean what it seems to plainly say. Every judge and practicing lawyer of any experience knows that our courts have often told the bench and bar that the language of a legislative enactment means what the appellate courts say it means and not necessarily what the words in the statute seem to mean.

A critical examination of the inherent limitations of "textualism" ineluctably leads to the conclusion that the literal reading of text does not guarantee either a just result or that the better rule of law will be applied. Indeed, it practically guarantees the converse: an unjust result and an inferior rule of law. A better judicial philosophy would be one which blends a common sense reading of text, with a concern for whether the outcome of a given concrete controversy reflects justice and mercy in light of the sovereign rights of the people of the State of Michigan, as well as a commitment to common law decision making undeterred by the limitations of language.

Richard L. Steinberg *graduated from the University of Toledo College of Law in 1972. He has practiced law in Detroit for the last 25 years. He is a member of the Executive Board of the Michigan Trial Lawyers Association, and is the current President of the Detroit Trial Lawyers Association.*

Endnotes

[1] Id., p.13.

[2] Nearly 50 years ago, Professor Arthur Corbin wrote that, as between the concepts of "strict construction" and "liberal construction," "the choice that the court is making may be a choice, not between interpretations, but a choice between legal effects." A. Corbin, Corbin on Contracts (One vol ed 1952), §533, p 490, n 2. Another author has been more frank: "Strict and liberal as applied to persons interpreting written instruments are not much more than epithets provoked in the heat of controversy." Kales, Art of Interpreting Writings, 28 Yale L J 32, 49 (1918). Both Corbin and Scalia may have been influenced by the fact that the most prominent advocate of "strict construction" and "original intent" in modern socio-economic history and political economy was Justice Pierce Butler. Justice Butler was, of course, the "poster boy" for the kind of reactionary judicial review which led to Roosevelt's "court-packing plan."

[3] Id., p. 23: "Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute. I am not a strict constructionist, and no one ought be— though better that, I suppose, than a nontextualist. A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means." My opposing commentator indicts my analysis as suggesting that "textualism" is "wooden and mechanical." Actually, my point is that "textualism" is insular and parochial. Mr. Gadola cites the publication, U.S. Department of Justice, Office of Legal Policy, Report to the Attorney General, Original Meaning Jurisprudence: A Sourcbook (March 12, 1987). He neglects to point out that the

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Counterpoint

By Michael Gadola

In Richard Steinberg's article we have, at long last, a principled criticism of the judicial philosophy of the current Michigan Supreme Court majority. Hooray for that. But while I commend Mr. Steinberg for placing principle above politics in his criticism of the court and its judicial philosophy, I must take issue with his critique in many respects.

To begin with, Mr. Steinberg offers what is at best a minimalist definition of the philosophy he criticizes at great length. He says that the textualist believes that "fundamental principles of democracy require that … judges apply the literal text, as adopted by others …." While there is a grain of truth in that description, it does not go nearly far enough. Textualism, or original meaning jurisprudence (the term often used to describe this philosophy in the context of constitutional adjudication), requires that judges attempt to determine the original meaning of the text before them, whether it be statutory or constitutional, and then apply that meaning to the facts of the case at hand. To say that the textualist merely "applies the literal text" actually describes the degraded form of textualism known as "strict constructionism," which Justice Scalia properly criticizes. Steinberg's description is really a charicature of textualism, which he extends by lumping the textualist in with the religious fundamentalist, whose varied modes of biblical interpretation should not be so dismissively characterized either.

Textualism involves much more than the rote application of the "literal text" to a given set of facts. It is the effort to determine the original meaning of a legal text, which is to be determined primarily from a fair and reasonable reading of the text itself. As the US Justice Department's Office of Legal Policy once described this philosophy in the context of constitutional adjudication: "Under this approach, a court determines the most plausible meaning of the constitutional provision at issue to the society that ratified it. This original meaning—discerned from the words, structure, and history of the Constitution—is then applied to the specific circumstances or issues before the court."[1] The textualist relies primarily upon the text itself to determine its meaning.

Ascertaining what the words of a legal text meant to those who adopted it is not the wooden, mechanical task that Steinberg's description of textualism suggests. It involves first looking to the words of the text, taken as a whole, to determine its meaning. But when the text itself is not clear the textualist judge may look to legislative history for the limited purpose of determining what the words meant at the time they were adopted (but not for the purpose of determining the subjective intent of the legislators, which should be irrelevant). In constitutional adjudication the state court judge could review the Official Record of the Constitutional Convention, speeches given by the drafters prior to the adoption of the constitution, and even newspaper reports and editorials of the time to gain some sense of what the words meant to the people who ratified our state constitution.

Textualism is, therefore, a much more creative and challenging philosophy to apply than Steinberg's description allows. This is evidenced by the fact that textualist judges sometimes disagree on the meaning of text even when applying textualist principles. But as Justice Scalia has said, "the originalist at least knows what he is looking for: the original meaning of the text."[2] This is in contrast to the non-textualist judge, who often believes that the text means whatever he thinks it should mean or whatever is necessary to "do justice" in a particular case.

Beyond this definitional issue, Steinberg seems to have confused textualism with modes of common law adjudication. His citation to Cheyney's Case and quotations from Justice Holmes and Geoffrey Hazard, as well as his critique of Henderson v. State Farm Fire & Casualty Co,[3] are misplaced in a discussion of textualism, which involves construing enacted law (i.e., constitutions, statutes and administrative regulations). Indeed, Justice Scalia offers no criticism of the historical method of common law adjudication taught in our nation's law schools. Rather, as Steinberg points out, he is critical of applying the mind-set of the common law judge to textual interpretation because it tends to result in departing from the meaning of the text in order to reach a just result in a particular case.

My fundamental disagreement with Steinberg's thesis, however, rests in what appears to be his belief that words, even when grouped together in a legal text, can have no ascertainable meaning. He says that "[t]he complexity of the subject of language, and the number of its dimensions, readily demonstrate the futility of attempting to ascribe a single, unimpeachable 'meaning' to a given passage of text." Steinberg uses his premise that words can have no readily identifiable meaning as an entrée to his thesis that judges must be permitted to infuse the text with meaning in order to reach a "just" result. "[T]he limitations presented by the nature of language itself counsels against applying the literal 'meaning' of the written word to facts, where the outcome defeats fundamental justice or defies logic."

If, as Steinberg seems to assert, words are mere symbols, the meaning of which resides in each one of us, then we are not a government of laws, but of men. Steinberg's nihilistic approach would replace text-based meaning with … what? Apparently with the predilections and inherent biases of the individual judge, who is free under this theory to infuse the text with those biases because of the "limitations of language." But for the enterprise of law to have any legitimacy we must assume that laws do have an ascertainable meaning. As Justice Scalia has said, "while the good textualist is not a literalist, neither is he a nihilist. Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible."[4] Judge Robert Bork tells us that in those very few cases when the meaning of a legal text cannot be determined the judge must step aside. "No judge is entitled to interpret an ink blot on the ground that there must be something under it."[5] The judge who does so acts illegitimately by assuming the role of legislator, which under the separation of powers he may not constitutionally do.

I must wonder whether Steinberg has thought through all the implications of his premise that words lack a fixed meaning. The

Continued on next page

concept of judicial review, held in such high esteem by most liberal legal thinkers and jurists and embedded in our constitutional system, can have legitimacy only when the courts adhere strictly to the text of the constitution. For if the words of both texts evade meaning, on what basis is a judge to declare that an act of the legislature violates the constitution? As Judge Bork has said, "The question non-interpretivism can never answer is what legitimate authority a judge possesses to rule society when he has no law to apply…. What entitles a judge to tell an electorate that disagrees that they must be governed by that philosophy?"[6] Certainly James Madison was of the view that legal text has a definite meaning. He also understood the dangers of assuming that it does not:

> I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for the consistent and stable, more than for a faithful, exercise of its powers. If the meaning of the text be sought in the changeable meaning of the words composing it, it is evident that the shape and attributes of the government must partake of the changes to which the words and phrases of all living languages are constantly subject. What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense![7]

In order to function as lawyers and judges we must presume that words have an identifiable meaning. To assume otherwise sacrifices democracy and subjects us to the whims of individual judges. Steinberg speaks of the "futility of attempting to ascribe a single, unimpeachable 'meaning' to a given passage of text." But this is the very essence of judging. The real question is how one is to go about the task—by infusing the text with meaning in order to do justice (judicial fiat), as Steinberg prefers, or by remaining faithful to the original meaning of the written text. I assert that the latter method is not only attainable, but necessary if we are to maintain the constitutional separation of powers and leave policy-making in the hands of the policy-making branches of government.

In his discussion of judicial review Steinberg asserts that the constitution "assigned the Judiciary the role of seeing to it that the elected representatives of the people do no fundamental wrong." Of course it did nothing of the sort. The power of the judiciary is not to prevent the policy-making branches from doing something wrong, but to prevent them from doing something that is unconstitutional. Whether a policy decision is right or wrong must be left entirely to the elected representatives of the people.[8] Steinberg concludes his discussion of judicial review by quoting approvingly from John Calhoun to the effect that when a conflict arises between the language of a statute and the constitution, the judge must decide in favor of the constitution. Yet he doesn't tell us how the judge is to determine that a conflict exists in a world where the words of a legal text can have whatever meaning the judge assigns to them. In truth the judge can determine the existence of a conflict only by ascertaining the meaning of both the statute and the constitution through adherence to the text of each.[9]

Steinberg further argues that a textualist approach accords "undue deference to the Legislature and to the Executive" and that it "translates into a presumption of the constitutionality and of the validity of statutory enactments and agency rulemaking …." He concludes that this "undermines the Judiciary as a coequal branch of Government …." Since when did presuming the constitutionality of acts of the legislature become "undue deference?" Courts have always been obliged to presume that acts of the legislature are constitutional, with the burden of proof resting upon those who assert otherwise. That Steinberg describes this fundamental presumption as "undue deference" indicates how far he would permit judges to go in ascribing their own meaning to legal text in order to declare a statute unconstitutional.

Steinberg's discussion of Cheyney's Case is illuminating for what it tells us about both textualist and non-textualist review. As noted earlier, the case involves common law decision-making and perhaps for that reason is not appropriate to a discussion of textualism. But it demonstrates the limitations of non-textualism in a way that other cases might not. For the textualist judge it seems to me this is a rather easy case to decide, but with a difficult result. I believe a judge who believes in original meaning jurisprudence would look to the intent of the testator at the time he drafted the will. What did the words mean at the time they were written? That intent was to leave his estate to his second son named John. The reappearance of the first John should not give a judge the ability to upset that intent after the death of the testator.

That result may not be "fair" or "just" in the eyes of some, but is it any less so than if the judge were to unilaterally change the testator's intent in favor of the first son but at the expense of the second? Steinberg doesn't offer his resolution of the case. But under his "doing justice" philosophy it is hard to say what the "right" result would be. The non-textualist judge would presumably determine that result based on his internal sense of what the best or fairest result is.[10] The result I have proposed is probably no more or less "just" than the other, but at least it is based in principled decision-making that looks both to the text of the document, its meaning at the time it was written and the subjective intent of the testator. Again, even though textualists may not always agree on the outcome, at least their decision-making is guided by firm and well-known principles, which involve striving to determine the original meaning of the text. As Judge Bork has said, "lawyers and judges should seek in the Constitution what they seek in other legal texts: the original meaning of the words."[11]

I will conclude with a brief response to Steinberg's discussion of textualism at work in Michigan. In Horace v. City of Pontiac,[12] the Supreme Court did nothing more than announce that courts should not resort to the use of Black's Law Dictionary in determining the meaning of nonlegal words such as "of."[13] This is hardly a revolutionary holding, especially in light of the statutory admonition in MCL 8.3a that, "All words and phrases shall be construed and understood according to the common and approved usage of the language …." The court found that Webster's offers several definitions of the word "of," but that in the context it is used in the governmental immunity statute it is most obviously used to indicate possession, leading to the conclusion that the defect or condition must be "of the building itself" in order to overcome immunity.[14] As the court pointed out, this result is consistent with the traditionally narrow reading of the exceptions to governmental immunity.

Horace is an unremarkable case that reiterates a basic rule of statutory construction. It should have been unnecessary for the Court of Appeals to resort to the third definition of the word "of" in Black's Law Dictionary (5th ed) to determine the meaning of the word in the context of the statute and in light of its historical interpretation. Not even President Clinton would need to go that far to determine the meaning of the word "of."

Henderson v. State Farm Fire & Casualty Co[15] involved construing the phrase "in the care of" in a homeowners insurance policy. Here the court reached the rather unremarkable conclusion that this phrase "is a colloquial or idiomatic phrase that is peculiar to itself and readily understood as a phrase by speakers and readers of our language."[16] The court went on to state that the proper method for interpreting the phrase "is to read the phrase as a whole, giving the phrase its commonly used meaning."[17] Steinberg finds self-indicting the court's statement that applying the commonly used meaning of the phrase "requires a court to give contextual meaning to the phrase to determine what the phrase conveys to those familiar with our language and its contemporary usage."[18] Applying this fundamental rule of construction to a legal text is most unremarkable and not at all inconsistent with textualism. The textualist looks to the text as a whole to determine the meaning of its words and applies simple common sense in arriving at an interpretation. I am glad to see Steinberg concede that this approach is not rigid but flexible, but reading the words of a legal document in context is certainly nothing new to textualism. In fact, it is fundamental to textualist review.[19]

I submit, as others have before me, that textualism is the only method of interpretation that is consistent with the separation of powers and majority rule. As Justice Scalia has said, "It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that … judges decide what that is."[20] Determining the original meaning of the text is the only way to prevent judges from assuming legislative or executive powers by "writing" their own text. "The philosophy of original understanding is … a necessary inference from the structure of government apparent on the face of the Constitution."[21] If we assume, as we must, that words have an ascertainable meaning, then textualism is the only method of interpretation that allows the judiciary to maintain its legitimacy in our democratic system. The alternative is a world in which we are ruled by judicial "philosopher kings" who are free to impose their values upon the rest of us. As much as I like our current Supreme Court majority, I am not willing to surrender my rights to them.

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Endnotes

1 "Report to the Attorney General, Original Meaning Jurisprudence: A Sourcebook," March 12, 1987, at 2.
2 Scalia, A Matter of Interpretation: Federal Courts and the Law, Princeton University Press, 1997, at 45.
3 460 Mich 348 (1999).
4 Scalia, supra n. 2, at 24.
5 Bork, The Tempting of America: The Political Seduction of the Law, The Free Press, 1990, at 166.
6 Bork, Foreword to G. McDowell, The Constitution and Contemporary Constitutional Theory, at viii (1985).
7 Letter from J. Madison to H. Lee (June 25, 1824), reprinted in 3 Letters and Other Writings of James Madison 441-42 (1865) (emphasis added).
8 "The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the law-making power …." T. Cooley, A Treatise on the Constitutional Limitations, (8th ed), vol 1, pp 345-46 (quoted in Hagerman v. Gencorp Automotive, 457 Mich 720 (1998) at 765 (Taylor, J. dissenting).
9 In support of his theory that the function of judicial review is to permit the judiciary to overturn unwise acts of the legislative and executive branches, Steinberg asserts that we must understand not only what the Framers created but also what they rejected. While the constitution itself is silent on the question of judicial review, what the Framers expressly rejected is the form of review that Steinberg asserts they are entitled to exercise. On four separate occasions the delegates to the constitutional convention rejected the Virginia Plan, which would have made all acts of the legislature subject to a veto power to be exercised by a council of revision consisting of the executive and members of the judiciary. Hagerman, supra n. 8, at 765-66 (Taylor, J. dissenting). This is clear evidence that the Framers never intended that the judiciary have the power to overturn unwise, as opposed to unconstitutional, legislative actions.
10 I submit that Cheyney's Case is difficult for the non-textualist precisely because he tries to "do justice" rather than simply determine the meaning of the text and apply it to the facts. I agonized over the decision very little, in fact. Steinberg asserts in his endnotes that the Deadman's rule creates a dilemma in determining the intent of the testator that the textualist cannot overcome. Not so. The testator knew of only one son named John (the second) at the time he executed the will. A judge would have no need to resort to verbal expressions of the testator's intent to determine that the second son is the one he intended to inherit at the time he signed the will.
11 Bork, supra n. 5, at 145.
12 456 Mich 744 (1998)
13 Id. At 756.
14 Id.
15 460 Mich 348 (1999).
16 Id. at 355
17 Id. at 356 (citing Group Ins Co. of Michigan v. Czopek, 440 Mich 590 (1992).
18 Id.
19 Steinberg's assertion that the subtext of Henderson is that textualist judges uphold "family values" cannot be taken seriously. What the case really means is that insurance companies will only be held to account for persons and risks that are actually covered by the terms of their policies. It should be noted that the Supreme Court held that the language of the policy was not ambiguous and remanded for a trial on the issue of whether the 18-year-old girlfriend was "in the care of" the named insured. The court made no moral judgments—it just made an honest effort to interpret the terms of the policy.
20 Scalia, supra n. 2, at 22.
21 Bork, supra n. 5, at 155.

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[9] Genesis 4:12-15
[10] Genesis 4:17
[11] 5 Coke's Rpts 68 (1601). My opposing commentator "believe[s] a judge who believes in original meaning jurisprudence would look to the intent of the testator at the time he drafted the will." Therein lies precisely the delemma. In 1601, the Deadman's rule prohibited witnesses from testifying to experssions of intent made by the testator prior to his death. In consequence, the "textualist" is bound by the words of the will, unless, of course, an exception is made.
[12] G. Williams, Language And The Law, 61 L Q Rev 71, 179 (1945)
[13] The idea described in French as audition colorée, although its literal translation into English is "the color of sound," has no real meaning in English at all.
[14] MCL 750.102-103; MSA 28.297-28.298
[15] MCL 750.337; MSA 28.434
[16] e.g., the "Cussing Canoeist" Case
[17] MCL 750.441; MSA 28.696
[18] Williams, Language and The Law, supra, 61 LQ Rev at 74-78. Williams concludes: "To sum up the crime of bigamy as it now stands (having regard to the severity with which it is or can be punished) does not make sense except on the supposition that the marriage ceremony is a magic form of words that has to be protected from profanation at almost any cost in human suffering."
[19] C.K. Ogden and L.A. Richards, The Meaning of Meaning, supra, pp. 293-294
[20] While there is much which is off-putting about Ogden and Richards' book it is difficult to obtain, it is almost prohibitively expensive, and it is an extremely difficult read, and it is considered to be a seminal contribution to the science of semantics, not law; nonetheless, it is remarkable how frequently it is cited by legal authorities undertaking a serious examination of the task of the interpretation of text, and how valuable it is in understanding the complexity of that task.
[21] A. Scalia, A Matter of Interpretation: Federal Courts and The Law, supra, pp. 9-14.
[22] Id., pp. 12-13
[23] Id., p. 13
[24] O.W. Holmes, Jr., Codes, And The Arrangement Of The Law, 5 Am. L. Rev. 1 (1870), reprinted as, The Early Writings of O.W. Holmes, Jr., 44 Harv. L. Rev. 725 (1933)
[25] Id., 44 Harv. L. Rev. at 726.
[26] G. Hazard, Owen J. Roberts Memorial Lecture: Rising Above Principle, 135 U Penn L Rev 153 (1986).
[27] 135 U Penn L Rev at 166 [Emphasis added; footnote omitted]. My discussion of "textualism" in conjunction with common law decisionmaking is not the product of confusion, as Mr. Gadola states, but rather prediction. The "textualist" is willing to acquiesce in what Professor MacDougall has called "substandard tort doctrine," MacDougall, The Real Legacy of Babcock v Jackson: Lex Fori Instead of Lex Loci Delicti And Now It's Time For a Real Choice-of-law Revolution, 56 Alb L Rev 795, 803-804 (1993), particularly, if it has been the product of legislative enactment as "tort reform." Mr. Gadola would be wise to read, and take seriously, the difficulties described by Michael A. Bamberger in his book, Reckless Legislation: How Lawmakers Ignore the Constitution (2000).
[28] 461 Mich 109; 597 NW2d 817 (1999)
[29] 389 Mich 363; 207 NW2d 316 (1973)
[30] Administrative Order No. 99-47 (March 22, 2000).
[31] See, People v. Hormiz, —Mich—; —NW2d— (2000)(opinion of Taylor, J., for reversal)
[32] W. Brennan, Reason, Passion, And "The Progress of the Law," 18 Trial L Q 7, 15 (1987). (emphasis in the original text).
[33] Id.
[34] Id.
[35] J.P. Kenyon, The Stuart Constitution: Documents and History (1966), p. 92 (footnote omitted).
[36] Id., pp.90-93.
[37] J. Calhoun, A Disquisition on Government (1851), p 221
[38] The author recognizes that the selection of only a few examples opens up the criticism of "selective analysis," but space limitations, and editorial supervision, prohibit more. In any event, the purpose of this article is to foster dialogue with respect to the issue, and the author accepts that criticism is an essential part of this kind of dialogue.
[39] 456 Mich 722; 575 NW2d 744 (1998).
[40] 456 Mich at 746 (footnote omitted).
[41] 456 Mich at 753-754.
[42] 430 Mich 398; 424 NW2d 248 (1988).
[43] 456 Mich at 755.
[44] 456 Mich at 756.
[45] Id. (emphasis added).
[46] Id.
[47] 460 Mich 348; 596 NW2d 190 (1999).
[48] 225 Mich App 703, 710; 572 NW2d 216 (1997) (per curiam).
[49] 460 Mich at 354 (citation omitted).
[50] 460 Mich at 355 (footnote omitted).
[51] 460 Mich at 355, n 4.
[52] 460 Mich at 356 (footnote omitted; emphasis added).
[53] 460 Mich at 356.
[54] 460 Mich at 358.
[55] 460 Mich at 361, n 16.
[56] State Farm Fire & Casualty Co v. Odom, 799 F.2d 247 (6th Cir. 1986).
[57] 418 Mich 350, 369; 343 NW2d 181 (1984)(Ryan, J., concurring.

Recent Developments in Negligence Law

Stitt v Holland Abundant Life Fellowship
2000 WL 987152 (Mich, July 18, 2000)

The Supreme Court has held that a plaintiff in a premises liability case must show that the premises were held open for a commercial purpose in order to be considered an invitee. The plaintiff, who tripped over a concrete bumper block in a parking lot while on her way to a bible study class at the defendant church, was not an invitee but rather a licensee. Although some earlier cases had found persons on church property to be "invitees," the Court noted that those individuals had all been present for some commercial purpose. While § 332 of the Restatement recognizes "public invitees" ("a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public"), the Court did not adopt it. "The owner's reason for inviting persons on the premises is the primary consideration when determining the visitor's status: In order to establish invitee status, a plaintiff must show that the premises were held open for a commercial purpose." The Court acknowledged that this is a minority position in other jurisdictions, but stated, "We believe that Michigan is better served by recognizing that invitee status must be founded on a commercial purpose . . ."

Case v Consumers Power Co
2000 WL 103622 (Mich, July 26, 2000)

The Supreme Court has ruled that the proper standard of care for providers of electricity in stray voltage cases is the general standard of care (i.e. reasonable care). Consequently, the trial erred when it instructed the jury that electricity is inherently dangerous and the defendant was required to inspect and repair its electrical lines.

Continued on next page

Recent Developments in Negligence Law

COURT OF APPEALS

Doyle v Hutzel Hosp

2000 WL 664863 (Mich App May 19, 2000)

The plaintiff filed a medical malpractice complaint against the defendants, alleging that foreign material had been left in her hip after surgery. After the statute of limitations had run, the defendants moved for summary disposition. The plaintiff moved to amend the complaint, alleging negligent acts before and after the surgery. The trial court held that the proposed amendment would not relate back to the original complaint, because the new claims were not "associated with the surgery itself," and refused to allow it. The Court of Appeals reversed, holding that "[i]t is well-settled that the amended pleading can introduce new facts, new theories, or even a different cause of action so long as the amendment arises from the same transactional setting that was set forth in the original pleading." The trial court's "focus and reliance on the temporal differences between the theories alleged in the amended and original complaints is unduly restrictive. . . ." "The temporal setting of the allegations is not, in and of itself, the determinative or paramount factor . . ."

Wickens v Oakwood Hosp

____ Mich App ____ (2000)

Plaintiffs in medical malpractice actions who seek recovery for loss of opportunity to survive or an opportunity to achieve a better result are required by statute to prove that there was a greater than 50 percent chance of survival or a better result if the defendants had not been negligent. The trial court granted a directed verdict for defendants on the grounds that plaintiffs failed to meet the statute's requirements because the lost opportunity to survive was not greater than 50 percent if measured as the difference between the opportunity if no negligence had occurred and the opportunity after the negligence occurred. On appeal, plaintiffs argued that the statute permits recovery when the initial opportunity to survive prior to the alleged negligence is greater than 50 percent. The Court of Appeals agreed and reversed the trial court's ruling in favor of defendant because plaintiffs had properly submitted evidence that there would have had a greater than 50 percent chance of survival if there been no negligence by defendants.

Taylor v Laban

2000 WL 772207 (Mich App Jun 16, 2000)

The plaintiff was injured in a series of altercations between himself and other guests while he was at the defendant's home for a party. He argued that the defendant had a duty to control the conduct of the other guests to prevent them from harming him. The court held that the plaintiff was a licensee, rather than an invitee, and that there was no "special relationship" between him and the homeowner. Following out-of-state precedent, the court held "a social host is under no duty to make a premises safe for a guest other than to warn the guest of concealed defects that are known to the owner and to refrain from willful and wanton misconduct that injures the guest." The host's duty to control guests extends only to "refrain[ing] from willful and wanton misconduct that results in one guest injuring another guest." In the present case, the evidence did not show that the defendant "had the ability and 'means at hand' to avoid the resulting harm' to the plaintiff. "This Court does not readily view omissions to act as willful and wanton misconduct."

Clark v K-Mart Corp

WL 2000 WL 1114329 (Mich App, August 4, 2000)

The plaintiff was injured when she slipped and fell on loose grapes scattered on the floor of defendant store. Her husband testified both that the grapes were smashed before her fall and there were footprints leading away from the grapes. Defendant argued that plaintiff failed to establish actual or constructive notice of the hazard and moved for a directed verdict. The trial court denied the motion and the jury rendered a verdict in favor of the plaintiff. The Court of Appeals reversed the trial court's ruling because it agreed with the defendant that the plaintiff had "failed to prove that the grapes were on the floor long enough to place defendant on constructive notice of the hazardous condition." n

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