American Bar Association | Tort Trial & Insurance Practice Section

Plaintiffs Policy Task Force News

Summer 2012

Message From The Chair

By: Jim Wells

It is my great pleasure to share with you this newsletter published by the ABA TIPS Plaintiffs Policy Task Force. I have had the privilege of serving as Chair of the Task Force for the last two years. It has been an exciting time for our Task Force. We were recently renamed the Plaintiffs Policy Task Force in order to highlight the role we have traditionally served advancing the interests of the plaintiffs bar through TIPS. TIPS is unique in that it consists of and represents plaintiff lawyers, defense lawyers and insurance industry lawyers. TIPS-sponsored resolutions are presented to Council and debated. If approved by Council, resolutions are then presented to the ABA House of Delegates for possible adoption as official ABA policy. We serve an important role in this process, making sure that the interests of the plaintiffs bar and the clients we serve are taken into account. This has allowed us to have a voice in policy debates concerning important issues such as tort reform, federal preemption and the importance of contingency fees as a way to represent those in need of representation who otherwise cannot afford it.

As another example of TIPS' commitment to issues important to the plaintiff bar, a TIPS-sponsored resolution was adopted by the ABA in February 2011 that advocates for reform of the process for resolving Medicare subrogation claims. Plaintiff personal injury lawyers know all too well how the current process for settling Medicare liens and set asides can unnecessarily delay settlements. But the delays do not only affect plaintiff lawyers and their clients. Defense counsel and insurance companies are affected by the delays too. Courts are burdened by cases remaining on their dockets that could otherwise be closed. Even the federal government is adversely affected by the inability to capitalize on a significant source of revenue. TIPS led the way promoting the ABA's adoption of this important policy.

More recently, our Task Force took a look at the issue of pre-dispute waivers of jury trials and concluded that this is another important issue

in this issue

upcoming events

2012 TIPS Fall Leadership Meeting
October 11-15, 2012
La Quinta Resort and Club, La Quinta, CA

2013 ABA Midyear Meeting
February 6-12, 2013
Hilton Anatole, Dallas, TX

2013 TIPS Spring Leadership Meeting
April 23-28, 2013
J.W. Marriot, Washington, DC

2013 ABA Annual Meeting
August 8-13, 2013
San Francisco Marriott, San Francisco, CA

For information and registration, contact Felisha Stewart: (312) 988-5672

that should be addressed by the ABA. Consumers are being asked with increasing frequency to sign contracts waiving their right to a jury trial and instead requiring arbitration or a non-jury trial in the event of a contractual dispute. These waivers are required to be signed before a dispute even arises, which prevents consumers from making a considered decision before waiving this important right. Our Task Force developed a proposed resolution declaring that in such a circumstance, the waiver of the right to trial by jury cannot be knowing, intelligent and voluntary. Our proposed resolution further declares that such waivers should be deemed unenforceable in the absence of specific legislation setting forth appropriate circumstances when such a waiver may be enforced. I am pleased to tell you that when TIPS Council met in Charleston, it voted to approve our proposed resolution for consideration by the ABA House of Delegates.

In May 2012, our Task Force co-sponsored a CLE program for the ABA Young Lawyers Division. Drawing on his extensive experience as a trial lawyer in Miami, Florida, Task Force member David Deehl gave a well-received presentation on witness preparation and direct examination at the ABA Young Lawyers Division meeting held in Nashville, Tennessee. David's commitment and enthusiasm for the mission of our Task Force highlights the fact that the strength of our Task Force lies in the dedication of our members. Three of our members have contributed articles to this newsletter that I trust you will find informative and enjoyable. Kenan Kersten has authored an article with advice on how to address jury bias during voir dire. Michael Vercher has written an informative article on inverse condemnation. Finally, part one of an article authored by Joseph Kulesa concerning boating accident litigation is included in this newsletter.

It has been an enjoyable two years as Chair of this Task Force. I have had the privilege of working with truly talented individuals who are dedicated to advancing issues important to the plaintiffs bar and the clients we represent. I look forward to continuing to stay involved with the important work of this Task Force after handing the reins over to my good friend, Fletcher Handley.

Jim Wells *is a trial attorney with the firm of Haines & Associates, in Philadelphia. He primarily represents plaintiffs in personal injury cases.*

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Recreational Boating Collisions

By: Joseph Kulesa

Recreational boating is generally fun, hence the name. However, there are some frightening statistics regarding the number of boating-related injuries and deaths, particularly on vessels less than 21 feet in length and those operated by someone who has not gone through a boating safety course. U.S. Coast Guard, *Recreational Boating Statistics 2010,* http://www.uscgboating.org/statistics/accident_statistics.aspx. Based on the statistics, negligence and negligent entrustment due to inexperience or lack of education clearly contributed to the collisions, but the average plaintiff's attorney may not know how best to approach these claims.

Primer on Terminology

Generally, the term *vessel* "includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water," (1 U.S.C., § 3), "unless the context indicates otherwise." 1 U.S.C.S. § 1. A *blue water* vessel is one that is appropriate for travel in deep water, generally beyond the continental shelf.

A vessel does not have to be a manned ship – something as small as a *personal watercraft* (PWC), popularly referred to as a Jet Ski, Wave Runner, or Sea-Doo, easily falls under the definition. Even a simple floating platform, lacking any means of propulsion, can be a vessel, as discussed in *Stewart v. Dutra Constr. Co. ("Super Scoop")*, 543 U.S. 481 (2005). Watercraft that cannot be practicably used on water, either due to permanent removal from the water or semi-permanent connection to land, cease to be "vessels." For the purposes of this article, if it was floating or moving on the water while carrying people or cargo, it was probably a "vessel."

Vessels are unique entities in that they may be treated as people—and not just by their owners. Many causes of action are most properly filed against the vessel itself, and the vessel can be held responsible for judgments and liens. Vessels can even be "arrested."

There is a nuance to many maritime accident terms that accidents on land do not have. A *collision* means essentially the same thing for boats as it does for cars – a vessel violently striking one or more vessels or other moving objects. An *allision*, on the other hand, is when a vessel strikes a stationary object, such as a dock, bridge, or iceberg. A vessel that sinks has *foundered.*

A *charter* is an agreement, memorialized in a written *charter party*, to lease all or part of a vessel for a particular purpose. This can include several types of agreements. For example, a group of people may charter a boat, with a captain and any necessary crew onboard to handle the vessel; a "bareboat" charter, where only the vessel is leased, and no captain or crew are included; and a lease that provides transport of cargo on the vessel, which is operated by a captain and crew.

An evaluation of a vessel's condition by a qualified individual is a *marine survey*, which may be done prior to purchase, on a periodic basis, or after a collision or other harsh and unusual circumstances.

Although cargo issues do not normally matter much in a recreational boating collision, they come into play when evaluating damages in a collision with a commercial vessel. If a vessel chartered to transport cargo does not timely depart due to the charterer's failure to meet the time for loading and unloading provided by contract, that party may be required to pay *demurrage* for the delay. *Freight pending* is the amount that would be paid on delivery of the cargo on board a vessel. *Detention damages* or *delay damages* are compensation for the loss of use of a commercial vessel during the time it is unusable. Currently, it is perceived that these claims are generally barred for recreational vessels.

Unseaworthiness means two different things in maritime law, and the use of it may be confusing at first. In evaluating liability in an accident, it can mean that the vessel is inadequately maintained or equipped for the way in which it is being used, which may indicate that the owner or operator was negligent in some fashion. The term can also relate to a cause of action for maritime work injuries, where even a lack of an

appropriate cooking utensil may result in a claim for unseaworthiness, but this standard has no meaningful application to a recreational boating accident.

Investigating a Claim

While the specific circumstances and severity of the collision will dictate the wisdom of doing so, nothing beats laying eyes on the subject matter as soon as practicable. That is not to say that one should hop on the nearest launch and speed offshore to view the oily afterimage marking the unexpected conclusion of a bareboat charter. However, and this is especially true for collisions involving a commercial blue water vessel, the window of opportunity for first-hand investigation may close very quickly, and it may be difficult to obtain a marine surveyor within the time provided. Fortunately, there are some records that may have been gathered for you, courtesy of the United States Coast Guard or state reporting officials.

Pursuant to federal law, a casualty report must be promptly filed with the Coast Guard or, where applicable, the state reporting officials when a commercial vessel has been involved in various types of accidents enumerated in 46 CFR 4.05-1. Moreover, when the incident involves a recreational vessel, a report must be submitted when, as a result of an incident involving the vessel or its equipment:

(1) A person dies;

(2) A person is injured and requires medical treatment beyond first aid;

(3) Damage to vessels and other property totals $2,000 or more or there is a complete loss of any vessel;

(4) A person disappears from the vessel under circumstances that indicate death or injury.

33 CFR 173.55.

When the collision occurs inland, the report should usually be submitted to state regulatory officials. Most states accept the Coast Guard accident report form, but states may have different requirements, including lower property damage thresholds than those set forth by the federal law.

The time frame for submission of the report may also vary by state, but it is often within 10 days of the incident or, if there has been a death or injury requiring more than first aid, within 48 hours of the incident. Again, the property damage threshold may be less than $2,000, pursuant to local regulations. In many states, total property damage of at least $500 mandates submission of a report, and Montana's threshold is $100. Until recently, Alabama's threshold was only $50.

The Coast Guard or local law enforcement will conduct an investigation, similar to the way in which a police department may prepare a motor vehicle accident report. Drug and alcohol tests may be performed, statements taken, and the cause of the collision will be assessed. Following its investigation, the Coast Guard issues a report. While the report may be admissible in court, it is merely an investigative document, not proof of negligence. Nonetheless, much work has been done. Many records will have been preserved and should be requested.

Joseph Kulesa *is an attorney with the firm Fisher & Fisher Law Offices, in Mount Pocono, Pennsylvania. He focuses on maritime and land-based personal injury matters.*

This article is part one of a three part series.

We need more plaintiffs attorneys to help us carry out the important work of the Plaintiffs Policy Task Force. If you are a plaintiff's attorney and want to be involved in advancing issues important to you and the clients you represent, please join TIPS today.

For more information on our Plaintiffs Policy Task Force, please visit
http://apps.americanbar.org/dch/committee.cfm?com=IL404000

To join TIPS, please visit
http://www.americanbar.org/groups/tort_trial_insurance_practice/membership.html

Addressing Jury Bias In Voir Dire[1] With A Light Touch

By: Kenan J. Kersten

More often than you might realize, the pro-tort-reform, anti-lawsuit prospective juror, though meaning well, does not appreciate the unfairness of bias in decision-making. These jurors are conditioned by propaganda and anecdotal references to believe their attitudes are societally important and good and that people of their beliefs are needed as a protection against frivolous tort claims and the "windfall" psychology of claimants and their attorneys. They see themselves as adding balance and fairness to what they believe to be a runaway civil justice system. In short, biased jurors are righteous. Upon learning the case involves a personal injury claim, the biased juror will regard himself or herself as "just the right person for this case." In voir dire plaintiff's counsel will have little or no success in directly challenging the righteous juror's beliefs and attitudes. Neither attention span nor voir dire format allows a convincing rebuttal to the basis for tort reform or anti-plaintiff thinking.

The question is not "how does plaintiff's counsel convince prospective jurors that the basis for their attitudes is wrong and that lawsuits serve civil justice's proper function of providing a proper remedy for victims of negligence." Rather, the more practical question is "how does counsel get a prospective juror to appreciate the unfairness of decisions being made by closed-minded decision makers." In other words, how can counsel prompt such jurors to acknowledge, at least privately, the unfairness of their bias as a factor in the trial that is about to commence? A solution lies in demonstrating or describing situations, preferably not related to lawsuits, that they can consider from the outside and observe and thus appreciate the obvious unfairness in biased decision-making.

Particularly at the outset of trial, before rapport has been developed between counsel and the jury, somber lecturing will not be effective and will more likely be regarded as arrogant "talking down" to the jury. Rather, counsel should develop and use an approach that will be easy to listen to. Even humor may be helpful, but I believe making the point with a "light touch" is essential.

The following is an example of what I am talking about. It is an approach I adapted from ideas I had heard from other trial lawyers and used in a recent jury trial in Wisconsin. From discussions with jurors following the trial, it appears to have been effective:

> After some initial, standard voir dire questions, I told the jurors I wanted to get their reaction to something. I asked if any of them remembered that the first President George Bush, the father of George W. Bush, did not like broccoli, and simply didn't eat it. Several jurors, though with quizzical expressions, nodded, indicating they did remember this. I then asked the jurors to imagine President Bush as a guest at a state fair being asked to judge the vegetable-cooking contest at the fair. I then asked them to imagine President Bush telling the officials at the fair "look, I frankly can't stand broccoli and it just wouldn't be fair for me to be judging the taste of vegetables if one of the entries should be broccoli. Why don't you let me judge the pie-baking contest instead?" I then asked the jurors "how many of you think President Bush did the right thing by declining to judge the vegetable-cooking contest?" A number of jurors nodded in agreement.
>
> I then told the jurors that in this case the plaintiff was asserting that the defendant was negligent and was claiming money damages in compensation for his injuries caused by that negligence. I explained I was concerned that some of the jurors, based on things they had read or heard, might believe that accidents are just part of life and that it isn't right for people to come into court asking for money just because

1 Because voir dire, even if allowed at all, is so limited in federal court trials, the strategies suggested below are intended primarily for state court trials, although the ideas discussed may be useful during opening statement or argument in federal court.

of their injuries. I said this jury selection process is not an occasion to argue whether persons with such beliefs are right or wrong, any more than it would have been appropriate for the state fair officials to try to convince President Bush he should like broccoli. The point is, I said, that the plaintiff has followed legally proper procedures in coming to court to present his claim to a jury, and that fairness requires that the jurors selected to hear the case be able to approach the case with an open mind without holding it against the plaintiff or his attorney that this lawsuit was commenced. I did discern from their expressions that at least some jurors agreed, and I don't believe this was mere wishful thinking.

If counsel has sensed there was some acceptance of this approach during voir dire, it can be effectively referred to in closing argument with something like the following:

> Members of the jury, do you remember how at the beginning of the trial we talked about the unfairness of decisions being made on the basis of bias and closed minds? It is important that you take your recognition of that unfairness into the jury room with you as you begin your deliberations. If you have already made up your mind about this case, that's fine as long as you have based your decision on what the witnesses said and the other evidence received. It is not alright if your mind was made up from the beginning or your decision is based on feelings about lawsuits not related to the issues in this case. Fairness in the decision-making process can be important even in judging a vegetable contest at a state fair. It is seriously important where the rights of the parties to this lawsuit are involved.

There are appropriate occasions for making the case for the importance of preserving the civil justice system developed through common law and legislation. Voir dire is not such an occasion. It does, however, provide an opportunity to remind prospective jurors of the self-evident importance of fairness in the decision process.

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The Opposite of Condemnation – A Legal Remedy Called Inverse Condemnation

By: Michael A. Vercher

The idea that government should be designed to protect a citizen's right to own, dispose of and profit from land was a revolutionary idea that found a sympathetic audience in colonial America. The framers of the Constitution may have debated about the mechanics, but there was almost universal agreement that one of the primary objects of government must be to protect an individual's rights in property for the country to prosper.

Today, every lawyer is aware that government must compensate a landowner for taking his/her property for public use, and almost every state has a specific statutory scheme to guide a claim for that compensation. But what remedies are available when a government fails or refuses to pay a landowner for putting private property to public use? A Madison County, Alabama trial court and jury were presented with this question a little over a year ago and found that the actions of a town to shut down a nearby rock quarry constituted inverse condemnation. The jury awarded $2.75M in compensatory damages. Alabama courts are not alone. In fact, federal courts and most state courts have long recognized claims for inverse condemnation.

A claim of inverse condemnation recognizes that a taking may occur without formal condemnation proceedings. In the context of regulations placed on the use of property, "[i]t has been established at least since Justice Holmes' opinion for the Court in *Pennsylvania Coal Co. v. Mahon* [in 1922] that while property may

be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking." *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal*, 482 U.S. 304, 316 (1987).

It is often said that a landowner is entitled to bring an action for inverse condemnation in federal court as a result of the self-executing character of the Fifth Amendment with respect to compensation. Inverse condemnation claims are also routinely brought in federal courts in conjunction with Fourteenth Amendment and §1983 claims.

Most state constitutions have adopted provisions similar to the Fifth and Fourteenth Amendments to the U.S. Constitution. You should also check the eminent domain code or compilation in your state to determine if the claim has been codified. In many states, a claim of inverse condemnation allows the landowner to recover attorneys' fees if he/she prevails. Another potentially unique aspect of an inverse condemnation claim is that, depending on your jurisdiction, the jury determines both whether a taking occurred and the amount of compensation that is awarded to the landowner.

Lawsuits have been filed with varying degrees of success asserting claims of inverse condemnation for everything from the smells and rodent problems associated with landfills to neighborhoods complaining of the noise created by the operation of a nearby airport. At least two elements of a claim for inverse condemnation are fairly consistent from jurisdiction to jurisdiction. (1) The defendant is a governmental entity with the power to bring a condemnation proceeding. (2) That entity takes a property right away from a landowner without compensation.

In the Alabama case mentioned above, the town reached outside its city limits and involuntarily annexed property that the plaintiff spent time and money to develop into a rock quarry. Once inside the city limits, the town improperly denied a business license to the quarry and imposed a moratorium on issuing any future licenses on the property until it could zone the property in a manner that would never allow it to be used as a rock quarry. People generally have strong opinions about rock quarries, especially on the topic of location. The same is true about other items upon which modern civilization depends like landfills and airports.

All this, of course, may be beside the point. Then again, perhaps it is exactly the point of recognizing a cause of action for inverse condemnation. Governments are run by people. At the local level, even a small government can be vested with the power to take away a citizen's property. This was a concept familiar to the framers of a Constitution who may have personally recalled being subjected to the whims of a monarch. "The essence of Government is power; and power, lodged as it must be in human hands, will ever be liable to abuse." James Madison, Speech on the Virginia Constitutional Convention, 2 December 1829, *The Writings of James Madison: 1819-1836* (1910), ed. Galliard Hunt, p. 361. What more effective check on the potential for governmental abuse exists than granting a citizen the right to file a civil lawsuit against a governmental entity that a jury will ultimately decide?

Michael A. Vercher *is a Partner with the firm Christian & Small, in Birmingham Alabama. His practice focuses on litigation including insurance, multiparty, commercial and property disputes.*

PLAINTIFFS POLICY TASK FORCE

The purpose of this task force is to encourage the participation of plaintiff practitioners in this Section to assist the Divisions and General Committees in recruiting plaintiff lawyers to serve and participate in Section CLE programs. This task force allows plaintiff's lawyers to network and exchange information concerning the plaintiff's practice. The task force engages in research and keeps up with changes in emerging issues, considers and debates national policy issues in order to influence ABA policy. The task force sponsors the prestigious Pursuit of Justice Award, presented to distinguished lawyers who contribute to the furtherance of justice and help individuals get access to the courts. Through this task force, the lawyers communicate with a vast network of lawyers from diverse practice backgrounds who are at the forefront of national policy, vital to consumers and the plaintiff's bar. The lawyers in the task force generate national contacts and referrals with lawyers who litigate similar cases around the country.

PURSUIT OF JUSTICE AWARD RECAP

Two outstanding members of the Charleston legal community were presented with the Pursuit of Justice Award at the TIPS Spring Meeting. The Honorable Diane Schafer Goodstein was recognized as an outstanding trial court Judge with the South Carolina Circuit Court, First Judicial District. She has been recognized by members of the bar as fair and highly competent, and she is highly regarded for her unique ability to inform jurors of the importance of their role in the civil justice system. The award was presented to Judge Goodstein by South Carolina Supreme Court Justice Jean Hoefer Toal, who is a former recipient of the Pursuit of Justice Award.

Charleston attorney Gedney M. Howe, III was also presented with the Pursuit of Justice Award at the TIPS Spring Meeting. Mr. Howe is a leading personal injury attorney in the state of South Carolina. He has been successful in several noteworthy cases, including the state's largest ever personal injury verdict. He is known for his diligent work ethic, his attention to detail and his commitment to deliver individualized and personalized service to each and every client, all qualities he learned practicing with his father, Gedney M. Howe, Jr. The award was represented to Mr. Howe in the magnificent Calhoun Mansion, which was previously owned and renovated by Mr. Howe.

The Plaintiffs Policy Task Force recommends Pursuit of Justice Award recipients for approval by TIPS Council. The Award recognizes lawyers and judges who have shown outstanding merit and who excel in providing access to justice for all.

From left to right -
James Wells, Chair of Plaintiffs Policy Task Force; Award Recipient, Judge Diane Schafer Goodstein; Honorable Jean Toal, Chief Justice of the Supreme Court of South Carolina;Randy Aliment; Chair of TIPS; Laura Farber, Chair of GPSolo.

From left to right -
Randy Aliment, TIPS Chair; Award Recipient, Gedney M. Howe, III; Jim Wells, Chair of TIPS Plaintiffs Policy Task Force; Laura Farber, Chair of GPSolo.