

PATLA TORTS SEMINAR ANNUAL UPDATE 2008

PRESENTED BY:
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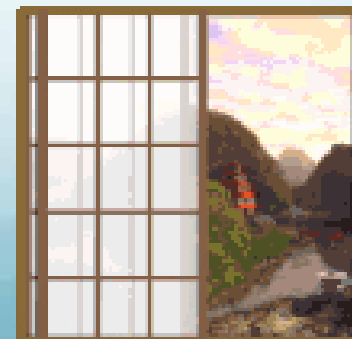


Negligence Issues

Houdeshell ex rel. Bordas v. Rice

(Pa. Super. 2007)

- Guest, in case against property owner who was injured by sliding glass door which shattered, should have been able to show that homeowners were aware that the door contained dangerous plate glass and that safety glass was an available alternative.
- Laypeople, after being apprised of the differing traits of plate versus safety glass, could have resolved ultimate issue and expert was properly precluded from so doing.



Damages

Casselli v. Powlen

(Pa. Super. 2007)

- Verdict awarding zero damages was against the weight of the evidence and new trial should have been granted on issue of damages where opposing counsel did not dispute the fact that a broken bone in plaintiff's foot as a result of the fall had occurred and that it was reasonable for the plaintiff to go to the emergency room of Hahnemann Hospital and to a foot doctor for treatment of the same.

Slip and Fall Landowners' Liability

Jones v. Levin

(Pa. Super. 2007)

- In fall on ice case outside of store, there are a number of exceptions to the rule of non-liability of a landlord out of possession.
- Landlord may be liable if reserved control over defective portion of the leased premises or over a portion of the leased premises which is necessary to the safe use of the property.



Medical Malpractice

Mumma v. BTPW

(Pa. Super. 2007)

- Petition to open/strike judgment of non pros for failure to file timely COM is appealable as a matter of right pursuant to [Pa. R.A.P. 311\(a\)\(1\)](#).
- Judgments of non pros based on plaintiff's failure to file timely COM not officially recorded on docket is facially defective under Pa. R.C.P. 236. Pursuant to Pa. R.A.P. 108, trial court's order is not entered until that order has been entered by the prothonotary on the docket and notice of the order's entry has been given to the parties by the prothonotary.

Smith v. Friends Hosp.

(Pa. Super. 2007)

- No Certificate of Merit required where injuries are sustained during a hospitalization where sexual assault occurred.

Wexler v. Hecht

(Pa. 2007)

- Under the Medical Care Availability and Reduction of Error Act, a podiatrist is not competent to testify as an expert witness concerning the applicable standard of care in a medical malpractice action advanced against an orthopedic surgeon.



Carroll v. Avallone

(Pa. 2007)

- Verdict was 50% negligence, 50% comparative negligence awarding \$29,207.00 in wrongful death and no damages in survival action. After verdict reduced 50%, plaintiff was awarded \$14,603.50. Pursuant to Pennsylvania Property and Insurance Guaranty Association non-duplication of recovery provision, the court reduced the award to zero since plaintiff received \$21,981.00 in health insurance benefits.
- Ordering new trial was reversed because damages were controverted. Defendant's failure to present independent evidence on damages does not represent acquiescence to plaintiff's expert testimony. There was cross examination.

Abuse of Process and Related Cases

Morris v. DiPaolo

(Pa. Super. 2007)

- In a malicious prosecution claim by one attorney against another, so long as an attorney believes there is a slight chance that his client's claim will be successful, it is not the attorney's duty to prejudge the case.
- Statement by attorney that his case was "attenuated," while sufficient to allow an inference of improper motive, is not sufficient to support a finding of improper motive as a matter of law.

Sovereign Immunity

Matarazzo v. Millers Mut. Group, Inc.

(Pa. Commw. 2007)

- *En Banc* decision granting preliminary objections to claim under Political Subdivision Tort Claims Act that authority failed to shut off water, causing freezing problems.
- The claim sounds in tort, and hence immunity applies.



Fagan v. Dep't of Transp. Of Commw. (Pa. Commw. 2008)

- Both occupants killed when their vehicle left pavement, ramped a turned-down guardrail terminal, and became airborne.
- PennDOT not liable when plaintiff is unable to establish causation for vehicle leaving pavement, where all passengers fatally injured and none of the parties knew what caused vehicle to leave pavement.

Confidentiality of Records

Burger v. Blair Medical Associates, Inc.

(Pa. Super. 2007)

- Cause of action for breach of physician-patient confidentiality is cognizable by the laws of the Commonwealth and is governed by two-year statutory period.
- The tort of breach of physician-patient confidentiality can be distinguished from the various theories of tort liability for invasion of privacy and are therefore governed by different statutory periods.

Insurance

Millers Cap. Ins. Co. v. Gambone Bros. Dev.

(Pa. Super. 2007)

- Court found a complaint alleging faulty workmanship by insured cannot constitute an occurrence or accident for purposes of requiring commercial general liability insurer to indemnify or defend insured.
- “Occurrence” refers to “accidental” phenomena – no claim permitted predicated on allegations of faulty workmanship.

Geise v. Nationwide Life of America

(Pa. Super. 2007)

- Partner insured by partnership died August 24, 2002. On September 19, 2001, Provident was mailed reinstatement application and check, which Provident accepted and deposited.
- Insurance company tried to take advantage of mailbox rule, claiming that it should be presumed the insured receive their notices.
- Mailbox rule

Toy v. Metropolitan Life Ins. Co.

(Pa. 2007)



- In Cappy opinion involving annuity with life insurance contract, it was held that insurer violation of UIPA does not necessarily mean that there has been a bad faith claim under § 8371.
- Accordingly, Met Life granted summary judgment on § 8371 claim as a matter of law.
- We conclude that Toy was under no duty to read the policy and the fact that she did not do so does not preclude her from establishing justifiable reliance on insurance company's behavior.

Employment Retirement Income Security Act (ERISA)

LaRue v. DeWolff, Boberg & Assoc., Inc.

(U.S. 2008)

- § 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2), authorizes a participant in a defined contribution pension plan to sue a fiduciary whose alleged misconduct impaired the value of plan assets in the participant's individual account.



Negligence Against Public Utilities

Met-Ed v. Reading Area Water Authority

(Pa. Commw. 2007)

- Summary judgment properly granted to water authority in case against utility on basis of governmental immunity.
- The utility service facilities exception to governmental immunity did not apply to claim of failure to exercise due care and take reasonable steps to avoid damaging utility's property while excavating with a boring machine.

Contribution/Indemnity

Donegal Mut. Ins. Co. v. Baumhammers

(Pa. 2007)

- Multiple shootings by Richard Baumhammers qualified as an accident sufficient to invoke insurance coverage for parents of the murderer but not as multiple occurrences.
- Allegations were of negligence in that intentional conduct of third party was enabled by negligence of the insured.
- Test of whether injury is a result of an accident is to be determined from the viewpoint of the insured and not the viewpoint of the one that committed the act causing the injury.
- We agree with the Superior Court that Donegal must defend parents against plaintiff's claims of negligence even where the alleged negligence may lead to intentional acts of a third party.
- "Accident" means unexpected and undesirable event occurring unintentionally. Plaintiff's injuries caused by an event were so unexpected and fortuitous as to qualify as accidental.
- The multiple deaths constitute one "occurrence" based upon the "cause" theory. See footnote 9.

MIIX Insurance Co. v. Epstein, DO

(Pa. Super. 2007)

- In indemnification contribution action, because there was no judicial determination of doctor's liability resulting from underlying malpractice action upon which the suit is based, appellate insurance company was required to produce expert reports necessary for a determination of whether there was a negligence.

Workers' Compensation Immunity

Bell v. Kater

(Pa. Super. 2008)

- Employee brought a personal injury action for negligence and loss of consortium against co-employee after co-employee struck employee with her car in the employee parking lot.
- Both employees were not in the performance of their duties as employees because the co-employee was only at her place of employment to retrieve her vehicle and her shift had already ended.



Unfair Trade and Consumer Protection Law

Beyers v. Richmond

(Pa. 2007)

- Court held the UTPCPL does not apply to an attorney's conduct in collecting and distributing settlement proceeds because application of the UTPCPL would encroach upon this Court's exclusive power to regulate the practice of law in this Commonwealth.

Juries

Rule 220.1 – Voir Dire

(Effective June 1, 2008)

- Voir dire shall be conducted to provide the opportunity to obtain at a minimum a full description of the following information, where relevant, concerning the prospective jurors and their households:
- (16) Such other pertinent information as may be appropriate to the particular case to achieve a competent, fair and impartial jury.
- Note: For example, under presently prevailing law as established by the Superior Court, voir dire should have been allowed with respect to the effect of pre-trial publicity on prospective jurors' attitudes regarding medical malpractice and tort reform.
Capoferriv. Children's Hosp. of Phila, 893 A.2d 133 (Pa. Super. 2006) (en banc).



Bostanic v. Barker-Barto

(Pa. Super. 2007)

- Finding that negligence of driver was not a factual cause was against the weight of the evidence.
- All medical experts agreed that the driver suffered an injury as a result of the accident.
- Subjectivity of complaints is of no moment.
- Injuries may be insignificant to a point that they were not compensable, but jury verdict form reflects they did not consider the question.

Bad Faith

Zappile v. Amex Assur. Co.

(Pa. Super. 2007)

- The court reversed finding of bad faith which arose from “dance” between plaintiffs and defendants in attempting to settle a dispute concerning UIM claim.
- UIM coverage is to be seen as adversarial in nature, but that does not mean that there is some form of heightened duty.
- No duty to make partial payments. Was never demand for partial payment.
- Trial court may consider claims manual in bad faith. It cannot be the reasonable expectation of an insured who has no copy of the claims manual that his or her policy requires a partial payment.



Product Liability

Gregg v. V-J Auto Parts, Inc.

(Pa. 2007)

- Court held that courts should, at the summary judgment stage, make a reasoned assessment concerning whether, in light of the evidence concerning frequency, regularity, and proximity of a plaintiff's /decedent's asserted exposure, a jury would be entitled to make the necessary inference of a sufficient causal connection between defendant's product and the asserted injury.



Abrams v. Pneumo Abex Corp.

(Pa. Super. 2007)

- Whether a party who was compensated for increased risk and fear of developing asbestos-related cancer in a prior action can sue a new defendant many years later based upon a recent diagnosis of cancer.
- Previous actions were premised on the assertion that they would contract cancer in the future as a result of occupational exposure to asbestos.
- Therefore, workers could not now assert such claims.

Miscellaneous and Other Issues

Colacicco v. Apotex Inc.

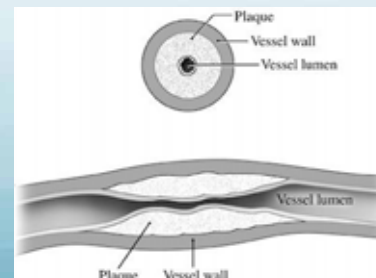
(3d Cir. 2007)

- Court found the FDA had approved the labeling of the SSRI's without the warning sought by products liability plaintiffs, and had consistently refused to require such a warning.
- Court concluded plaintiffs' state-law failure-to-warn claims were in conflict with, and therefore preempted by, the FDA's regulatory actions.

Riegel v. Medtronic, Inc.

(U.S. 2008)

- State law claims preempted by § 360k by virtue of the preemption clause in the Medical Device Amendments (MDA) of 1976, 21 U.S.C., barring common-law claims challenging the safety and effectiveness of a medical device given premarket approval by the FDA.
- Cardiac patient sued manufacturer of balloon catheter used in his angioplasty, asserting state-law claims including strict liability, breach of implied warranty, and negligence.



Preston v. Ferrer

(U.S. 2008)

- When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative.

Moscatiello v. Hilliard

(Pa. 2007)

- Pennsylvania's 30-day time limit for challenging arbitration awards is not preempted by the three-month FAA time limit in 9 U.S.C. § 12.
- The FAA does not preempt the procedural rules governing arbitration in state courts, as that is beyond its reach.

Novitski v. Rusak

(Pa. Super. 2008)

- A vocational expert is qualified to opine about the degree to which injuries affect an individual's ability to work.
- A physician is not required to explicitly state that accident-related injuries restrict an individual's ability to work, because it is within a vocational expert's expertise to establish the extent to which injuries prevent an individual from working.

Loyle v. Hertz Corp.

(Pa. Super. 2007)

- Whether Hertz is liable for the torts of Hertz Canada under an ostensible agency, “agency by estoppel” or “apparent authority” theory.
- A genuine issue of material fact for a jury’s determination existed because a reasonable person could find apparent authority, given Hertz’s advertising and reservation systems.

C.C.H. v. Philadelphia Phillies, Inc.

(Pa. 2008)

- The issue is whether the defense of consent is available in civil cases stemming from sexual contact with a minor under the age of 13 where the Legislature has precluded such defense by statute in criminal proceedings.
- Court held consent is not an available defense in civil proceedings arising from sexual contact with a minor under 13 years of age and, therefore, evidence of such is not admissible as evidence.

Valora v. Pennsylvania Employees Benefit Trust Fund

(Pa. 2007)

- Court found administrator did not exercise reasonable diligence in asserting its subrogation claim more than five years after subscriber's son's death, more than three years after the medical malpractice action was filed, more than a year after trial, ten months after the matter settled, and nearly six months after the trial court approved the medical malpractice settlement.

Rule 1042.6

- (a) Except as provided by subdivision (b), a defendant seeking to enter a judgment of non pros under Rule 1042.7(a) shall file a written notice of intention to file the praecipe and serve it on the party's attorney of record or on the party if unrepresented, no sooner than the thirty-first day after the filing of the complaint.
- (b) A judgment of non pros may be entered as provided by Rule 1042.7(a) without notice if
- (1) the court has granted a motion to extend the time to file the certificate and the plaintiff has failed to file it within the extended time, or
 - (2) the court has denied the [motion](#) to extend the time.
- [Caption](#)
 - [Rule 1042.1](#)