Wayman, Irvin & McAuley, LLC
W I & M
Your Best Defense
Lawyers Solving Problems
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Message from the Editor

Welcome to the second quarterly edition of Your Best Defense.

The Fall 2002 sampling of articles discusses a variety of other subject areas in which our attorneys are very well-versed. Mark Gesk, our managing partner, recently received a defense verdict in a products liability case in federal court, and he reviews the rationale and approach successfully used in "A Little Knowledge Can Be A Dangerous Thing." Christine Seymour, defending a local fraternity in a hazing liability case, offers a look at the arguments used to secure summary judgment for her client in the very interesting "Hazing Liability - Need for Expert Testimony." John Bogut explores issues of workers' compensation liability in a look at the Scalise decision, where the Commonwealth Court upheld the allowance of a worker's testimony, as opposed to unequivocal medical evidence, to establish a connection between his decision to retire and a work injury. Issues of local agency immunity and emergency medical services immunity are analyzed in Richard McMillan's "Immunity for Some and Not for Others," involving an ambulance receiving faulty directions to an emergency medical situation. Finally, and perhaps of monumental interest to practitioners, James Creenan looks at the newly enacted statute which overhauls entirely the joint and several liability law of the Commonwealth.

Don't forget to take a look at Wayman Watch, where miscellaneous items of a more personal interest are highlighted. Also, the firm Web site outlines the background and practice areas of our two most recent lawyer hires, Jeffrey Kubay and David Pardini, and we invite you to look at Legal Highlights on the Web site to see a synopsis of recent decisions in diverse general liability and workers' compensation practice areas.

Finally, if anyone knows of someone not on our mailing list who might enjoy our newsletter or find it of use, please let us know. E-mail me at dforsythe@waymanlaw.com.

HAZING LIABILITY - NEED FOR EXPERT TESTIMONY

Christine M. Seymour Esq.

Recently, our office was involved in defending a claim against a national fraternity and various officers and personnel of the fraternity. Specifically, our office represented the president of the Pittsburgh Alumni Chapter of the fraternity. We were granted summary judgment, along with the national fraternity and the other individually named fraternity personnel by the trial court. This decision was affirmed, except as to one individual officer, by the Superior Court. No appeal to the Pennsylvania Supreme Court was filed.

Kenner v. Kappa Alpha Psi Fraternity, Inc., NO. 774, W.D.A. 2001 (Pa. Super. June 19, 2002), arose out of personal injuries that occurred out of alleged hazing activities. Santana Kenner entered the pledging process with the Kappa Alpha Psi fraternity at the University of Pittsburgh in February 1996. On or about the evening of March 29, 1996, the dean of the pledge class instructed Mr. Kenner as well as other fellow pledge brothers to attend "pledge-related activities" at a fraternity brother's apartment. At that time, Mr. Kenner claims that several of the individually named fraternity member defendants began hazing him by administering blows with a heavy wooden paddle to various parts of his body including, but not limited to, his buttocks. These activities allegedly took place from 11:30 p.m. to 3:00 a.m. during which time Mr. Kenner was allegedly struck with the paddle in excess of 250 times. As a result of the hazing activities, plaintiff claimed to suffer severe and serious injuries, including renal failure, hypertension and seizures.

In addressing the liability of the national fraternity and individual fraternity personnel for injuries sustained by a

Hazing Liability, continued on page 2

In This Issue:

Welcome 1
HazingLiability 1
A Little Knowledge Can Be Dangerous 2
Fair Share Act 3
Testimony of Worker 5
Immunity for Ambulances 5
Wayman Watch 6

Hazing Liability, continued from page 1

prospective member, or “pledge” from hazing taking place during the initiation process, the Pennsylvania Superior Court relied heavily on the factors enunciated in the case of Althaus ex rel. Althaus v. Cohen, 756 A.2d. 1166 (Pa. 2000) in determining whether the Defendants owed a duty of care in this case. Specifically, the factors weighed under this standard are: (1) the parties’ relationship; (2) the social utility of the defendant’s conduct; (3) the nature of the risk imposed and forseeability of the harm incurred; (4) the consequences of imposing a duty of care on the defendant; and (5) the public interest in the proposed solution.

Applying the Althaus factors, the Superior Court concluded that the national fraternity did owe a duty of care to the plaintiff. However, the court went on to conclude the fraternity did not breach its duty of care to Mr. Kenner because his expert’s testimony was purely subjective and without any basis in facts, testimony or empirical data. Because the plaintiff’s expert offered a statement of opinion without methodological support rather than a scientific analysis of a given set of facts, the court concluded that Mr. Kenner could not establish that the national fraternity breached its duty of care to him. Based upon similar rationale, the Superior Court also held that Mr. Kenner could not establish a breach of duty with respect to the various individual defendants except with regard to the chapter advisor. Because the plaintiff’s expert opined that had the chapter advisor been more engaged in the membership process, the hazing causing Mr. Kenner’s injuries would never occurred, a viable claim against to the chapter advisor could be established. The grant of summary judgment in favor of the remaining individually named fraternity officers and personnel was affirmed by the Superior Court.

Please call Chris or e-mail her at cseymour@waymanlaw.com with any questions on this article or related topics.

A LITTLE KNOWLEDGE CAN BE A DANGEROUS THING: KNOWLEDGE AND EXPERIENCE RISING TO THE LEVEL OF ASSUMING THE RISK IN A PRODUCT LIABILITY CASE

Mark J. Gesk Esq.

In July, our office obtained a defense verdict in a product liability trial in federal court. The plaintiff brought a failure to warn claim under section 402A of the Restatement (Second) of Torts. He alleged that a water pump was defective because the manufacturer did not adequately warn all users of the potential that the water in the pump was pressurized and that if the pump was not drained or pressure otherwise released, a sudden release of steam could occur.

Prior to removing all the nuts securing the top bonnet of the pump in order to perform maintenance, plaintiff noticed hot water flowing from the pump. He subsequently waited fifteen minutes to allow the water to discharge. After the fifteen minutes, the plaintiff removed the last nut and pushed the top back away from him. Steam was released directly into plaintiff’s face and arms, and he suffered severe burns.

Following a week long trial, the Court instructed the jury that the duty to adequately warn does not require a manufacturer to educate an amateur on the principles of the product. The Court relied upon Mackowick v. Westinghouse Electric Co., 373 Pa. Super. 434, 541 A.2d 749 (1988), where the Superior Court decided that a plaintiff’s experience, time on the job, training, and orders from superiors must be given due consideration by the jury in determining whether, based on the plaintiff’s subjective knowledge, he knew his actions could cause injury. Furthermore, the Court instructed that “Voluntary exposure to a dangerous situation does not bar recovery, where the danger known and recognized by the plaintiff caused his injures.” The plaintiff knew that the pump contained hot water. Although he waited fifteen minutes before proceeding with the opening of the pump, after noticing hot water was no longer leaking from the pump, plaintiff claimed he did not expect a steam release. The plaintiff, instead of opening the top so that any release was directed away from him, he opened the top so that his body was exposed. The jury, in a unanimous verdict, determined that no liability should be imposed against the manufacturer. The plaintiff had assumed the risk of his terrible injury.

[The plaintiffs in Mackowick appealed to the Supreme Court. Mackowick v. Westinghouse Electric Co., 525 Pa. 52, 575 A.2d 100 (1990). The Supreme Court took the matter one step further, holding that an assumption of risk defense, if demonstrated, is a matter of law requiring summary judgment].

Our case centered upon hot water, under pressure, being released as a gush of steam emanating from a pump. We analogized this to the simple situation of a large pot of water cooking in someone’s kitchen. As the water boils, pressure builds. If one suddenly removes the lid, steam is released and may burn exposed areas of skin. Most people understand this concept, and thus there are not warnings on pots or lids. The concept of the danger of a sudden steam release was readily appreciated by the jury. An inexperienced lay person or “amateur” who attempted to open the pump may not have understood this particular risk of a steam escape. However, when a mechanic with extensive knowledge of the operation of a pump and the proper safety procedures for repair still acts in a manner to place himself in danger, the law supports a finding of assumption of risk. The jury understood that the plaintiff knew or should have appreciated this risk.

Mark is available at mgesk@waymanlaw.com to discuss this article or other issues in product liability law. Please contact him if you believe he can be of further assistance to you.

Fair Share Act Requires New Approaches to Claims Defense

By James W. Creenan, Esq.

James W. Creenan, Jr. Esq.

On June 18, 2002, Governor Mark Schweiker signed into law the "Fair Share Act" - a tort reform measure intended to eliminate disproportionate liability in multi-defendant cases. While the Act strives to reduce litigation by reforming liability allocation "fairly" among multiple defendants, the unintended and short term consequence will be more litigation and higher claims and defense costs until the trial and appellate courts have resolved numerous questions not fully answered by the Act.

Under the former allocation system of joint and several liability, a minimally liable defendant could be required to pay an entire judgment even though another defendant had greater percentage of liability to the plaintiff. "Joint" liability means that each defendant, if found liable to the plaintiff, bears the risk of any other defendant's inability to satisfy the judgment. The Act attempts to limit a defendant's risk to the actual harm attributable to it by eliminating "joint" liability in most cases.

The Fair Share Act directly addresses this problem by abolishing "joint" liability, unless one of five exceptions applies. These exceptions are:

(1) Intentional misrepresentations;
(2) an intentional tort;
(3) where a defendant has been held liable for not less than 60% of the total liability apportioned to all parties;
(4) Claims arising from "releases" under the Hazardous Sites Cleanup Act; and
(5) Claims under Section 497 of the Liquor Code.

42 Pa. C.S.A. § 7102(B.1)(3). The primary exception, of course, is number (3), because joint and several liability in negligence and strict liability cases will only apply to that defendant found at least 60 percent liable to the plaintiff. The Act preserves a defendant's right of contribution against any party that has not paid its portion of the judgment. The Act also allows the jury to apportion liability to non-parties that have settled with the plaintiff.

Claims departments and defense counsel must be cognizant of the Act during every stage of any claim that has accrued after August 18, 2002 - the effective date of the Act.

Significantly, the Act requires new approaches to old problems and demands consideration of (1) (at least) a short term increase in claims investigation and defense costs and (2) the long term change in strategy, practice and procedure that will change the way claims are handled and cases are tried.

First, until the plaintiffs' bar and the courts fully digest the substance of the Fair Share Act, the courts will see an abundance of novel legal arguments intended to define the scope and limits of the Act. This will result in an increase in motions, responsive motions and appeals from each step of the litigation. A simple reading of the Act uncovers several problematic areas. For instance, the question of whether the Act applies at all will be raised in any cases where the plaintiff alleges intentional and non-intentional torts. One will question when a cause of action accrues and if the Act applies when a plaintiff attempts to toll a statute of limitations. The courts will grapple with how a plaintiff's failure to join known culpable parties affects liability allocation. And, of course, the mathematical problems of assessing liability against a defendant compared to the plaintiff, other defendants and settling non-parties will require close examination under the facts of each case.

In resolving these issues, claims professionals and defense counsel must be mindful of selecting appropriate test cases for the appellate courts, while fully defending the insured's and client's interests. The Statutory Construction Act and the legislative history will be used to determine the Act's meaning.

Second, plaintiffs will immediately begin to

change longstanding strategies in order to predict the avenue of greatest recovery. Plaintiffs may more readily pursue settlement with less culpable parties. Plaintiffs are more likely to name fewer defendants. Defendants are more likely to join other parties as additional defendants. Defendants will need to seek early investigation and discovery of potentially culpable parties.

Some have viewed the Act as a major barrier to settlement, as the plaintiffs' bar will be reluctant to resolve otherwise routine cases until the courts have ruled on the Act's application.

This approach is not without risks for the plaintiffs, as the plaintiffs' bar's expected practice of identifying only the "main" defendant (and relying on joinder of other parties by the main defendant) may subject plaintiffs to a greater percentage of assessed contributory negligence simply because the plaintiffs' negligence is measured only against the defendant against whom recovery is sought. In the past, each extra named defendant tended to reduce the contributory negligence percentage attributed to the plaintiffs.

The impact of these issues will carry over into already resolved or emerging areas of the law, such as uninsured and underinsured auto cases, insurer insolvency, etc.

Overall, the Act will acutely impact catastrophic injury cases, any multi-defendant case (e.g., construction and product liability), auto, and medical malpractice.

For your reference, here is a quick list of reminders:

- The Act must be considered at every stage of a claim or case.
- Claims investigation and defense costs will increase (at least in the short term).
- The date of loss/injury being on or after August 18, 2002, is critical
- Early investigation will be needed to identify ALL potential parties. Note that defense counsel generally have only 60 days to join additional parties as defendants.
- **Joinder**. If named as a Defendant, locate other entities with liability in order to reduce possibility of apportioned liability below 60 percent.
- **Settlement**. Consider the likelihood that another defendant will join a settling party.
- **Releases**. Current forms used for settlement of pre-litigation claims should be updated to account for the new apportionment rules.
- **Indemnity Contracts.** The Act preserves a defendant's ability to invoke contractual indemnity provisions, but businesses must re-examine whether current forms adequately address the new liability apportionment rules.
- **UM/UIM.** Consider whether an apportionment of liability in excess of a defendant's policy limits creates an underinsured situation.
- **Lawsuit abuse.** The Fair Share Act is not about lawsuit abuse or frivolous litigation. A new Rule of Civil Procedure (1023.1) attempts to apply federal court Rule 11 concepts as a curb to frivolous positions.

A copy of Senate Bill 1089, signed by Governor Schweiker, can be obtained at: < www.waymanlaw.com >.

Please call or e-mail Jim, or any of our attorneys, for further insight into this untested area of law. Jim can be reached at jcreenan@waymanlaw.com

Testimony of Worker, Not Expert, Can Establish Cause of Retirement in Comp Case

John C. Bogut, Jr. Esq.

In the Commonwealth Court decision in Scalise v. WCAB, 797 A.2d 399 (Pa. Cmwlth. 2002), a claimant's own testimony may be sufficient to prove that a work-related injury brought about retirement.

Salvatore Centra was injured on the job on July 19, 1995, when a large diameter pipe struck him in the right shoulder, neck and chest. Centra was off work for three weeks and then returned to work for approximately four to five months while experiencing pain in his back, neck and right shoulder.

The claimant saw a chiropractor approximately one month after his accident and was referred to a cardiovascular specialist because of a heart murmur believed to be related to a torn mitral valve. The employee's cardiologist diagnosed him on July 30, 1996 with severe mitral regurgitation, a progressive condition which would ultimately require mitral valve replacement or repair. The employee retired because of his physical condition on July 1, 1996. The employee was underwent an operation in February of 1997 for valve replacement. In March of 1997, Centra filed a claim petition alleging that his injury was the result of the work-related event. At the initial hearing, the employee testified that he "wasn't feeling right" and that he intended to continue working until the age of 65. There was medical testimony that the employee's heart condition was related to the work event.

The employer had denied benefits and challenged the employee's testimony on the basis that his problems were related to natural degeneration and not the work event and further that the employee had voluntarily retired, which should suspend disability benefits as of that date. The workers' compensation judge's decision, in favor of the employee, was based on the acceptance of the medical testimony and that of the employee himself. Employer argued that employee did not prove with unequivocal medical evidence that he was forced to retire.

The Commonwealth Court, in upholding the Board and judge, cited to U.S. Airways v. WCAB, 764 A.2d. 635 (Pa.Cmwlth. 2000). Therein, the court stated that "in order to continue to receive disability benefits following retirement or separation from employment ... the claimant must establish that he or she was forced into compulsory retirement or separation from employment due to the work-related injury". The Court ruled that while unequivocal medical evidence must be presented on behalf of a claimant that a work injury precludes continuation of employment, there is no authority to support a special requirement that a physician testify that he recommended disability to the claimant or that the disability caused the claimant to retire. Rather, the claimant may establish through his own testimony his motivation to retire. Testimony from employee that he could not perform the required duties of his job due to his physical injuries, which caused him to decide to retire, coupled with the testimony of his physicians relating his injuries to the accident was sufficient to support the judge's decision.

John, in our Workers Compensation Section, would be happy to assist you with any concerns with which you may be faced. E-mail him at jbogut@waymanlaw.com

IMMUNITY FOR SOME & NOT FOR OTHERS

Richard L. McMillan Esq.

The Pennsylvania Supreme Court recently revisited the subject of immunity as it applies to the interpretations given to two unrelated statutes. The statutes examined in the opinion authored by Justice Saylor in Register vs. County of Chester, 797 A2d 898 (2002), are the Political Subdivision Tort Claims Act ("PSTCA"), 42 Pa.C.S.A. Section 8541 et seq., and the Emergency Medical Services Act ("EMSA"), 35 P.S. Section 6921 et seq. at Section 6931.

The fact situation involved two separate ambulances responding to the same cardiac arrest emergency call over the emergency services radio. The operator provided accurate driving instructions to both the Longwood Fire Company, Inc. (which provided both volunteer fire protection and ambulance service in geographic area in which the plaintiff family resided) and the Southern Chester County Medical Center (a hospital which maintained a mobile critical care unit within the county emergency services system). Tragically, both sets of emergency services personnel responded to information from Longwood's station that the street in question was in a different location, and this misinformation resulted in both ambulances arriving too late to revive the patient.

The family of the decedent sued both of the emergency services, alleging that the dispatchers and providers failed to familiarize themselves with the area they served. Longwood asserted that it was immune under the PSTCA, which is applicable not only to local governments and school districts, but also to volunteer fire companies (so long as the volunteer fire company has been created pursuant to relevant law and is legally recognized as the official fire company serving the local municipality in question). The Medical Center, on the other hand, was not a volunteer fire company and could not plead immunity under the PSTCA. Instead, Medical Center sought immunity under the EMSA, 35 P.S. Section 6931(j)(2). The Court held that Longwood was immune under the PSTCA, but Medical Center was not entitled to immunity under the EMSA.

The Court's opinion examined the PSTCA in light of the Plaintiffs' contention that this case fell within one of the eight enumerated exceptions to immunity, specifically the motor vehicle exception to claims arising from "the operation of any motor vehicle in the possession or control of the local agency . . ." There have been numerous appellate decisions defining the

Immunity for Some, continued on page 6

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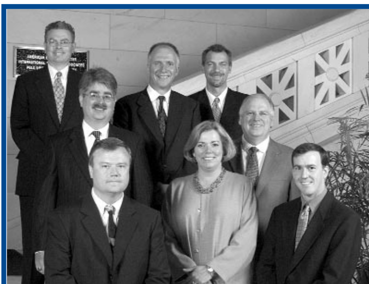

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Wayman Watch

- *Please welcome our two newest attorneys,* ***Jeffrey Kubay*** *and* ***David Pardini****. Read more about them at our Web site, www.waymanlaw.com.*
- *Congratulations to Dale, John, Max McTiernan and Bruce Harding on their impressive (and lucky) win at the Midwestern Claims Association Golf Outing in August.*
- *Congratulations also to John's daughter, Alexandra, on her team's winning the 2002 Cheerleaders of America Championship, Junior Pee Wee All Star division.*
- *Finally, congratulations to Dale and Noreen Forsythe on the birth of their third child, Shannon Mary, on October 3, 2002.*

Immunity for Some continued from page 5

scope of this particular exception, and the Court's opinion gives a good overview of some of these other decisions. While the Court recognized that the vehicle liability exception encompassed a wider range of activity than the actual driving of a car, it emphasized the oft repeated holding of prior decisions that the exceptions to immunity are to be "narrowly construed" in light of the legislature's stated intention to insulate political subdivisions and local agencies from tort liability. The stated activities would not fall within this exception.

Regarding the Medical Center's reliance on the immunity provision of the EMSA, the Court focused on the plain language of the statute in deciding that only the "personnel" providing the emergency services were immune under the EMSA and not the organization or entity for which they were acting. The court saw nothing in the operative provisions of the EMSA that conveyed any intention on the part of the legislature to extend immunity to institutional, corporate, or organizational entities; the applicable section unambiguously limited its immunity coverage to emergency medical technicians, EMT-paramedics, healthcare professionals, and certain supervised students. In reaching this conclusion, the Court noted that the legislature had expressly included organizations within other specific immunity provisions of the EMSA, such as the provision extending immunity for participating organizations involved in educational aspects of emergency care.

The Court was careful to limit its role to interpreting the laws passed by the legislature pursuant to long established rules of statutory interpretation and avoided taking on the role of a legislative body, regardless of the sympathies evoked by the tragic events and the public policy arguments urged by the Plaintiffs.

Mr. McMillan. who has extensive experience in local agency immunity law, will be happy to address any questions you may have in this area of practice. He can be reached at rmcmillan@waymanlaw.com