



IN THIS ISSUE:

- MA SJC Recognizes “Loss Of Chance” In Medical Malpractice Cases 1
- Plaintiff Who Alleges Legal Malpractice In Criminal Defense Must Prove Actual Innocence 1
- Section 7a Prima Facie Evidence Rule Does Not Apply To Claim For Serious And Wilful Misconduct Under WCA 2
- RI Supreme Court Rejects Social Host Liability 2
- RI Supreme Court Rejects Bad Faith Claim Where Insurer’s Denial Of Coverage Was Fairly Debatable 3



- CT Appellate Court Enforces Assault And Battery Exclusions In Liability Policies 4
- MP&S News 4

MASSACHUSETTS SUPREME JUDICIAL COURT RECOGNIZES “LOSS OF CHANCE” IN MEDICAL MALPRACTICE CASES

In a pair of decisions that expand the potential reach of medical malpractice claims, the Massachusetts SJC has adopted the “loss of chance” doctrine for claims brought under the wrongful death statute, M.G.L. c. 229, §§ 2 and 6. The court held in *Matsuyama v. Birnbaum*, 452 Mass. 1 (2008), that an estate may recover damages by proving that a physician’s negligence reduced or eliminated the decedent’s chances of survival, even if the physician’s negligence was not the proximate cause of the decedent’s death. The court noted that the prior “all or nothing” rule unfairly precluded liability any time there was less than a 50-percent chance of survival.

In noting that a substantial number of states have adopted similar loss of chance doctrines, the court reasoned that “... progress in medical science now makes it possible, at least with regard to certain medical conditions, to estimate a patient's probability of survival to a reasonable degree of medical certainty.” In *Matsuyama*, the court set out the specific formula for calculation

of damages: 1) Calculate the full amount of damages caused by the death; 2) Calculate the patient’s chance of survival just before the malpractice; 3) Calculate the chance of survival that resulted from the malpractice; 4) Subtract amount in Step 3 from Step 2; and 5) Multiply Step 1 by the percentage in Step 4. The court indicated that expert testimony would be required in order to ascertain what measure of a more favorable outcome was medically appropriate and to determine what statistical rates of survival applied in each circumstance.

In the companion case, *Renzi v. Paredes*, 452 Mass. 38 (2008), the SJC held that loss of chance damages are recoverable where the defendant’s negligence reduced chances of survival from greater than 50% to less than 50% (as compared to the plaintiff in *Matsuyama*, where the chance of survival started at less than 50%). The SJC also clarified that a jury may award damages based on whether a defendant is liable either for wrongful death or for causing a loss of a chance to survive, but not both.

MA SJC: PLAINTIFF WHO ALLEGES LEGAL MALPRACTICE IN CRIMINAL DEFENSE MUST PROVE ACTUAL INNOCENCE

The Supreme Judicial Court has ruled that a plaintiff who alleges that lawyers were negligent in representing him in a criminal case must prove that he was actually innocent in order to recover from the lawyers in the legal malpractice action. See *Correia v. Fagan*, 452 Mass. 77 (2008).

In this case, two criminal defense lawyers represented the plaintiff, Correia, in a federal criminal case in which the government alleged that Correia intentionally

burned down a commercial building. Initially, Correia was convicted, but the federal criminal trial judge granted a motion for a new trial.

The judge ruled that Correia’s criminal defense counsel, Fagan and Brown, had provided ineffective assistance of counsel by failing to establish that Correia did not have a fire alarm on the premises,

continued on page 2...

## OUR LAWYERS

RICHARD J. SHEA  
 ROBERT P. POWERS  
 JOHN F. ROONEY, III  
 WILLIAM D. CHAPMAN  
 MICHAEL J. MAZURCZAK  
 ROBERT T. TREAT  
 WILLIAM L. KEVILLE, JR.  
 ANDRE A. SANSOUCY  
 ROBERT R. HAMEL, JR.  
 JENNIFER B. HARDY  
 DONNA M. MARCIN  
 VINCENT P. DUNN  
 MAUREEN E. LANE  
 ADAM M. GUTTIN  
 T. DOS URBANSKI  
 MEGAN E. KURES  
 JESSICA M. FARRELLY  
 MATTHEW GRYGORCEWICZ  
 DEBRA I. LERNER  
 ALEXANDRA POWER  
 ERIN J.M. ALARCON  
 J. PAUL VANCE  
 ERIN K. DESMARAIS  
 NICOLE L. COOK  
 RAYMOND L. TOMLINSON  
 JOHN A. CALETRI  
 CINDY PEAN  
 SHANNON M. MCQUEENEY  
 PATRICK D. BANFIELD  
 SEEMA A. LYNCH  
 JULIE T. FISHER  
 W. PRESCOTT GOLDING, JR.  
 KATHRYN M. AUGER  
 ROBERT S. LUDLUM  
 DOUGLAS F. HARTMAN  
 LISA WICHTER  
 MICHAEL G. WINTERS

## OF COUNSEL

THOMAS W. PORTER, JR.  
 JOHN J. REARDON

## MA SJC: PLAINTIFF WHO ALLEGES LEGAL MALPRACTICE IN CRIMINAL DEFENSE MUST PROVE ACTUAL INNOCENCE

*continued from page 1...*

by not mounting an effective attack on the government's evidence regarding the cause of the fire, by failing to introduce favorable evidence regarding an insurance company investigation of the fire, and by failing to rebut misleading evidence from the prosecution regarding Correia's finances.

At the second trial, Correia was acquitted. He then brought a legal malpractice

action against Fagan and Brown. The SJC explained that, in order to prevail, Correia had to prove, by a preponderance of the evidence, both that Fagan and Brown's negligence caused him to be convicted, and also that he was actually innocent of the charges against him. In this case, Fagan and Brown were not entitled to summary judgment because there was a question of fact whether Correia was actually innocent.

## MA SJC RULES THAT SECTION 7A PRIMA FACIE EVIDENCE RULE DOES NOT APPLY TO CLAIM FOR SERIOUS AND WILFUL MISCONDUCT UNDER WORKERS' COMPENSATION ACT

Section 7A of the Massachusetts Workers' Compensation Act states that if "the employee has been killed or found dead at his place of employment or, in the absence of death, is physically or mentally unable to testify, and such testimonial incapacity is causally related to the injury," it shall be prima facie evidence that the claim comes within the provisions of the Act. In *Moss's Case*, 451 Mass. 704 (2008), the Supreme Judicial Court held that the prima facie rule created by section 7A does not apply to the element of serious and willful misconduct needed to support a claim for double compensation under section 28.

Section 28 provides for double compensation if the employer or a supervisor engaged in serious or willful misconduct. In this case, the employee was riding as a passenger in a motor vehicle owned by his employer when it was involved in an accident. The employee was ejected from the vehicle and died at the scene. His widow sought double compensation under section 28, ar-

guing that the latch mechanism of the door was defective, that the employee was ejected because the door opened during the accident and that the employer engaged in serious and willful misconduct by not correcting the defect.

She also argued that since the employee died at the scene, section 7A created prima facie evidence that the employer engaged in serious and willful misconduct. Rejecting this argument, the Supreme Judicial Court held that the prima facie effect of section 7A only applied to the elements of a claim for regular compensation; it did not apply to the element of serious and willful misconduct required to support a claim for double compensation under section 28. The court went on to uphold factual findings that the employer had not engaged in serious and willful misconduct, that the door was not defective, that the door remained closed during the accident and that the employee was ejected through an open window of the vehicle.

## RI SUPREME COURT REJECTS SOCIAL HOST LIABILITY

In *Elizabeth Willis v. Maurice Omar, et al.*, C.A. No. 03-5649, Appeal No. 2007-164, the Rhode Island Supreme Court turned down an explicit appeal that it extend social host liability to "protect a person from injury result-

ing from alcohol consumption by either a guest or a drunk driver that leaves a party and is involved in an accident that causes death or injury."

*continued on page 3...*

PRACTICE AREAS:

§§

APPELLATE

§

CONSTRUCTION

§

EMPLOYMENT

§

GENERAL LIABILITY

§

INSURANCE COVERAGE

§

MEDICAL MALPRACTICE & HEALTH CARE

§

PRODUCT LIABILITY

§

PROFESSIONAL LIABILITY

§

RECREATIONAL LITIGATION

§

TOXIC TORT LITIGATION

§

TRANSPORTATION

§

WORKERS' COMPENSATION

§§

RI SUPREME COURT REJECTS SOCIAL HOST LIABILITY

*continued from page 2...*

The plaintiff, bringing suit individually and on behalf of her daughter Brianna Serapiglia, alleged that Mr. Omar and others accompanied Ms. Serapiglia and a friend on an evening which concluded with Ms. Serapiglia and her friend leaving the Omar home in a highly intoxicated condition. The intoxicated friend was driving and Ms. Serapiglia suffered severe injuries, including the amputation of her left leg, in the auto accident that followed. The plaintiff brought an action against Mr. Omar. However, Mr. Omar was successful in obtaining summary judgment on the grounds that Rhode Island had never recognized social host liability absent a special relationship. See *Ferreira v. Stack*, 652 A.2d 965, 967 (R.I. 1995). The plaintiff appealed from this grant of summary judgment.

The Court noted that Rhode Island had consistently refused to find a duty owed by a social host to their intoxicated guests with exceptions strictly limited to cases in which alco-

hol was illegally provided to minors. See *Martin v. Marciano*, 871 A.2d 911 (R.I. 1995). Even if this special relationship is met, the uses of the illegally obtained alcohol must be foreseeable before liability can attach to the social host. *Selwyn v. Ward*, 879 A.2d 882 (R.I. 2005). Since the plaintiff in this case was not a minor, the Court found that the defendants owed her no duty despite providing her numerous intoxicating beverages and actively encouraging her to drink more. The Court quickly dealt with the plaintiff's additional theories of liability stating that the defendants did not aid or abet a crime as they did not have the requisite intent to commit one, nor were Rhode Island Liquor Liability statutes applicable as they referred only to licensed entities or those that should have a license.

The Court conceded that the plaintiff had significant public policy arguments. However, in light of the consistent precedent developed in these cases, it remained for the legislature to consider revising Rhode Island law in this area.

RI SUPREME COURT REJECTS BAD FAITH CLAIM WHERE INSURER'S DENIAL OF COVERAGE WAS FAIRLY DEBATABLE

In *Imperial Casualty and Indemnity Co., v. Bellini*, 947 A.2d 886 (R.I. 2008), the R.I. Supreme Court held that: (1) Imperial's conduct in disputing whether an insurance policy covered a judgment against its insured did not rise to level of bad faith; and (2) post judgment interest was to be calculated as simple interest, not compound interest.

Michael DeSantis was a postal worker who was injured while delivering mail to property owned by Norbell Realty Corporation ("Norbell"). Approximately five months prior to the loss, Amitie Bellini had owned the property and conveyed it to Norbell. Prior to the loss, Imperial issued an insurance policy to Bellini which covered the property but did not list Norbell as an insured. Imperial then issued an endorsement to the policy which added Norbell as an insured with respect to another property but not the property at issue. Approximately five years after DeSantis filed suit against Norbell, Imperial demanded that Bellini pay a \$250 deductible for the policy, which she paid.

DeSantis was successful in his personal injury suit against Norbell. Imperial filed a declaratory judgment action to deny coverage. DeSantis then sued Imperial to collect the judgment and for bad faith. A Superior Court judge found in favor of Imperial and ruled that coverage did not exist. In a prior appeal, the R.I. Supreme Court reversed and held that Imperial Casualty had waived its right to deny coverage by demanding and accepting a deductible from its insured.

In this appeal, the R.I. Supreme Court found that Imperial had not engaged in bad faith when it contested coverage because the issue of whether coverage was available was "fairly debatable" in light of the facts above. The Court also held that RI Gen. Laws Sec. 9-1-10 does not provide for compound interest, so Imperial was only liable for simple interest on the judgment in the underlying case.

**ABOUT MELICK, PORTER & SHEA, LLP**  
**BOSTON AND PLYMOUTH, MA • PROVIDENCE, RI • WATERBURY, CT • MANCHESTER, NH**

Melick, Porter & Shea, LLP, is a firm of trial attorneys that, from its inception in 1983, has acted as defense counsel for insurance companies, self-insured corporations, hospitals, universities, and individuals. We provide premium legal services at reasonable cost. Our clients choose us because they need experienced trial counsel on their team of claims professionals; counsel who can and will try their difficult cases.

Massachusetts:Boston Office

28 State Street,  
22nd Floor  
Boston, MA 02109  
P - (617) 523-6200  
F - (617) 523-8130

Plymouth Office

4 Court Street,  
2nd Floor  
Plymouth, MA 02360  
P - (508) 746-2282  
F - (877) MPS-1322

Rhode Island:Providence Office

49 Weybosset Street,  
2nd Floor  
Providence, RI 02903  
P - (401) 941-0909  
F - (401) 941-6269

Connecticut:Waterbury Office

65 Bank Street,  
2nd Floor  
Waterbury, CT 06703  
P - (203) 596-0500  
F - (203) 596-0040

New Hampshire:Manchester Office

1087 Elm Street,  
Suite 302  
Manchester, NH 03010  
P - (603) 627-4278  
F - (877) MPS-1322

### CT APPELLATE COURT ENFORCES ASSAULT AND BATTERY EXCLUSIONS IN LIABILITY POLICIES

In *Cinch v. Gewnerali-U.S. Branch*, 110 Conn. App. 29 (2008), the Appellate Court of Connecticut held that assault and battery exclusions in two policies issued to a restaurant precluded coverage. In the underlying case, the plaintiff alleged that he was injured at the insured's restaurant when he was struck by a man who was under the influence of alcohol. The insurer issued two policies to the restaurant, a general liability policy and a liquor liability policy. The general liability policy had the following exclusion:

In consideration of the reduced premium charged, it is understood that this insurance does not apply to bodily injury, personal injury or property damage arising out of assault or battery or out of any act or omission in connection with the prevention or suppression of such acts, whether caused by or at the instigation or direction of

the insured, his employees, patrons or any other person.

Furthermore, there is no coverage for assault and/ or battery claim against the insured if the claim is based on the alleged failure of the insured to protect individuals whether or not patrons, or involves the negligent selection, training, employment, supervision or control of any individual.

The liquor liability policy had a similar exclusion.

The court held that the exclusions negated coverage for the plaintiff's claims. All of the plaintiff's claims were based on an assault and battery. The court also rejected the plaintiff's contention that assault and battery is limited to intentional misconduct. Finally, it rejected the plaintiff's argument that the exclusion was ambiguous.

### MP&S NEWS

We are pleased to welcome Douglas Hartman, Lisa Wichter and Michael Winters to our Boston office as associates. Doug focuses his practice on a wide variety of insurance defense matters, primarily concentrating in general casualty, property, construction and product liability. Lisa concentrates her practice on the defense of medical malpractice and employment matters. Michael will continue to concentrate his practice on a wide variety of civil defense matters.

This newsletter has been prepared by MP&S for informational purposes only and is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon it without seeking professional counsel.

For further information on this newsletter, please email [marketing@melicklaw.com](mailto:marketing@melicklaw.com) or visit our web site, [melicklaw.com](http://melicklaw.com).

© 2008 Melick, Porter & Shea, LLP All rights reserved.

0908/aas/bo/kk