JUSTLAW

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"Will this accident affect my insurance rates?"

By Jeffrey A. Adelman

One of the most frequent questions new personal injury clients ask me is, "How will this accident affect my insurance rates?" The insurance companies have done a wonderful job of scaring customers from using their insurance benefits, even though the insurance company cannot legally punish them for doing so by taking actions such as raising rates. It is illegal for an insurance company to raise a customer's rates based on a not-at-fault accident.

Florida Statute 626.9541(o)3.a. specifically states: (o)Illegal dealings in premiums; excess or reduced charges for insurance.— 3.a.Imposing or requesting an additional premium for a policy of motor vehicle liability, personal injury protection, medical payment, or collision insurance or any combination thereof or refusing to renew the policy solely because the insured was involved in a motor vehicle accident unless the insurer's file contains information from which the insurer in good faith determines that the insured was substantially at fault in the accident.

Have this statute handy for the next time a client poses this question (and they will). If an insurance company conducts business in this fashion, it can be subject to attorney's fees and costs pursuant to Florida Statute 625.155 upon the filing of a Civil Remedy Notice. A Civil Remedy Notice can be filed online using https://apps.fldfs.com/CivilRemedy/. This would be a first party action against the client's insurance company, and this would allow the client's attorney to seek attorney's fees and costs.

The key number here is three. Also, insurance companies consider all sorts of benefits as claims. I had this situation happen to my client and, in response to my Civil Remedy Notice, State Farm included multiple claims for roadside assistance as making a claim. It would not even occur to most that this would be a claim, but apparently, it is.

Familiarize yourself with Florida Statute 626.9541. This is an opportunity to potentially get another crack at the insurance company, even on cases where the value of the injury claim is low. We cannot allow the insurance companies to take advantage of Florida citizens any more than they already do. All of us need to be aware of this issue and not let the insurance companies punish our clients for using the coverage they pay thousands of dollars in premiums for each year. Protect your clients' rights and do not allow them to be intimidated into buying into the urban legend that insurance companies have a right to raise rates even when your client is an innocent victim.

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STLA Executive Board Members

President's Message

Earl Lamar Denham

Looking back over this year, I can take a lot of pride in our joint efforts to promote the causes of trial lawyers, to continue our fine tradition of providing outstanding legal education, and to enjoy fellowship with one another in the Southern tradition at the same time.

We had a wonderful turnout at our Fall Retreat on the Mississippi Gulf Coast at the incredible White House Hotel and after a great welcome by Ocean Springs mayor Connie Moran, we spent our time sailing on Old Biloxi Schooners, dining in the Walter Anderson Museum among the artist's greatest works, shopping in Ocean Springs, exploring the numerous casinos, deep sea fishing, and breaking bread with members of the Vancleave Live Oak Choctaw Tribe, to whom we have made the $20,000 presidential donation this year for the education of tribal children. We had a superb CLE featuring two justices from Appellate courts, including the Mississippi Supreme Court and two judges from trial courts. I think we ate seafood every way it could be eaten, especially the special presentations created by the great Creole Cook, Joicelyn Mayfield. As usual, Jody Campbell was on top of everything. A special thanks to Jody.

I am really looking forward to our annual conclave during Mardi Gras in New Orleans, where our theme will involve Magic, the magic that we trial lawyers spontaneously perform in difficult courtroom situations to win for our clients: those magnificent, spontaneous acts which not only bring victory but raise the level of our personal craft to that of art. A great deal of work has gone into making this CLE event one of the finest in memory, geared to perfecting the courtroom practice we all so enjoy.

I look forward to seeing old and new friends, to greeting the War Horses, and to immersing myself again in that wealth of knowledge, experience, and Magic that characterizes Southern Trial Lawyers. I look forward to personally greeting each of you and welcoming you to my second Home, The Big Easy, New Orleans. Laissez les bon temps rouler!

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STLA News, Updates & Events

2015 Fall Retreat

Each year, the president of STLA gets to decide when and where the Fall Retreat will be held. The 2015 Southern Trial Lawyers Fall Retreat was held October 1-4 in Biloxi, Mississippi at the newly renovated Whitehouse Hotel. We had around 60 members and guests in attendance. The event kicked off Thursday evening with a reception on a terrace overlooking the Gulf of Mexico. Friday morning began with a breakfast and CLE. President, Earl Denham, arranged for a two hour ethics CLE featuring speakers: Judge Christopher Schmidt, Judge Neil Harris Jr., Justice James Warren Kitchens and Judge David M Ishee. It was a very informative program which was followed by an STLA board meeting. That afternoon was spent sailing around the bay on the Biloxi Schooners, while enjoying outstanding food prepared by Jocelyn Mayfield. That evening everyone enjoyed a delicious meal at the hotel. Saturday, everyone was on their own to enjoy Biloxi. That evening, Jodie and Jeff Kidd with Collision Specialists, Inc. of Gainesville Georgia provided a bus that picked everyone up at the hotel and took us to Ocean Springs and the Ocean Springs Community Center, where everyone enjoyed more delicious food prepared by Jocelyn Mayfield and her staff. After dinner, Earl and Hema Denham gave everyone a tour of the Community Center and Walter Anderson Museum. Thanks to Earl and his staff for putting on an outstanding retreat which all in attendance enjoyed very much. If ever in Biloxi, be sure to check out the impressive Whitehouse Hotel.

2016 Mardi Gras Conference

The 2016 Mardi Gras Conference will kick off on the evening of February 3rd with a reception sponsored by the JW Marriott. The theme of this years' conference is Magic: Lessons Learned in the Courtroom. CLE Chairs for this year are Tommy Malone, Kenneth Suggs, Mattie Taylor, Gary Gober, Robert Phillips and Eric Romano. With these outstanding attorneys running the program, you know it will be another outstanding CLE. We will end each afternoon around 1:30 so that you will have the afternoon to enjoy New Orleans and its many fabulous restaurants. Plans are in the works for a Thursday evening reception on Bourbon Street. The War Horse Banquet will be held at the Windsor Court Hotel, which is a short walk from the JW Marriott. This event will begin with a reception at 6:45, followed by the banquet at 8. There will be a board meeting Saturday morning at 8 a.m. and, at 10 a.m., a bus will pick up those folks riding on the Krewe of Tucks and take them to the parade grounds. Saturday afternoon, MediVisuals, Alliance Meds and The Centers will sponsor what has become a big hit at the conference, a New Orleans-style Crawfish Boil. The conference will conclude with the balcony on Bourbon Street. The theme this year will be The Wild, Wild, West, with costumes optional. Beads will again be provided by our friends at Robson Forensic.

This a great time to network with fellow attorneys, make new friends, learn a lot at the CLE and experience the craziness of New Orleans during Mardi Gras. I look forward to seeing many of you there.

Jody Campbell, STLA Executive Director

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Modern Spinal Surgery Options

By Bernard F. Walsh & Elisabeth A. DeWitt

Attorneys who practice in the area of personal injury must have, at least, a basic understanding of medicine. This helps you to understand your client's pain and also can help you to advise your client to make an informed decision regarding their medical care. This is especially true when it comes to innovations in spine surgery. Many clients are reluctant to have surgery, but especially reluctant with regards to their spine. As their attorney, it is your job to be knowledgeable about the doctors in your area who specialize in the different surgical procedures available. You should also have some understanding of diagnostic test results such as MRI, CT, contrast studies, NCV and EMG testing. There are several surgical options available to your client. The days of five to seven inch incisions with a lengthy hospital stay and months of rehabilitation are gone.

One of the available procedures is called a facet rhizotomy. This calls for a needle size incision where the surgeon locates the painful nerve and essentially deadens it. The pros to this procedure are that it is outpatient and there is very little down time after the procedure is performed. The patient usually gets immediate relief from this procedure. Some drawbacks to this procedure are that the nerve can regenerate and the symptoms may return.

Another procedure available is endoscopic spine surgery. In this procedure, a small incision is made and the portion of the patient's disc that is pressing on nerve is removed. If necessary, a fusion with instrumentation can be done. The advantages to this procedure are numerous. The procedure can be done outpatient or with an overnight stay in the hospital, if necessary. There is less rehabilitation involved, which means less time missed from work. This procedure has been around for many years now and has been proven to be effective in patients with spinal instability and/or protruding discs which are causing nerve impingement (pinched nerve). The small incision means less damage to muscles and tissue compared to the larger, open procedure. A small fusion with instrumentation can be done through the same small incision.

Robotic spine surgery is the newest approach. This procedure is also minimally invasive with less muscle and tissue damage. It is also beneficial because placement of the internal fixation is very precise and this increases what can be corrected in a less invasive surgical approach. This approach also provides for less rehabilitation and healing time which means less time missed from work. The downside to this new approach is finding a surgeon in your area who is trained to do this procedure. Also, there are fewer long-term, follow-up studies on post-surgical patients at this point because of the novelty of the procedure.

Attorneys must understand what options are available when spine surgery is recommended for your client.

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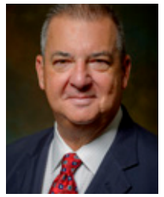
You must be prepared to educate your clients on the available options and approaches to surgical care so that your client can do their own research and speak to their treating surgeons more effectively. You should also be familiar with which surgeons perform which procedures in your area.

For a more detailed explanation on the above procedures go to YouTube link, https://www.youtube.com/watch?v=HjrrIrhqnOs, which includes visual examples of each procedure.

> ***Many clients are reluctant to have surgery, but especially reluctant with regards to their spine. As their attorney, it is your job to be knowledgeable about the doctors in your area who specialize in the different surgical procedures available.***

When an Airplane is a Vessel, Look Out for Removal!



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By Richard M. Martin, Jr.

On July 8, 2015, the U.S. Court of Appeals for the Seventh Circuit in *Le Junhong, et al. v. The Boeing Company*, ____ F.3d_____(7th Cir. 2015), held that international airliners are essentially "vessels," and permitted removal based on federal admiralty jurisdiction pursuant 28 U.S.C. § 1333(1) under authority of the 2011 amendment to 28 U.S.C. § 1441(b).

This litigation arose out of the July 6, 2013, crash of a Boeing 777 into the seawall that separates the ocean from the end of a runway at San Francisco International Airport. 49 persons sustained serious injuries, and three of the passengers died. The flight, operated by Asiana Airlines, had crossed the Pacific Ocean from Seoul, Korea. The National Transportation Safety Board concluded that the principal cause of the accident was pilot error.[1]

Some passengers filed suit against Boeing in state courts of Illinois, and Boeing removed these suits to federal court, asserting two sources of jurisdiction: admiralty, plus federal officials' right to have claims against them resolved by federal courts. 28 U.S.C. §§ 1333, 1442. The federal district court in Illinois remanded them for lack of subject-matter jurisdiction, concluding that Boeing did not act as a "federal officer" for the purpose of §1442, and that the tort occurred on land, when the plane hit the seawall, rather than over navigable water.[2] Boeing appealed, arguing removal under §1442 is reviewable, and the Seventh Circuit stayed the remand order.

After the Seventh Circuit held Boeing was not a "federal officer," it explored admiralty jurisdiction. Plaintiffs made three arguments: (1) that aviation accidents are outside the admiralty jurisdiction, (2) when the injury occurs on land there cannot be admiralty jurisdiction, and (3) in any event a defendant cannot remove under the admiralty jurisdiction. Boeing argued that admiralty jurisdiction is available *when a cause occurred while the plane was over navigable waters.*

Both the district judge's opinion and his order denying reconsideration were issued before the NTSB released its report, which concluded that by 10 seconds before impact a collision was certain;[3] because a Boeing 777 aircraft lacks the ability to accelerate and climb fast enough, no matter what the pilots did in the final 10 seconds. This means that, while the plane was over San Francisco Bay (part of the Pacific Ocean), an accident became inevitable. Given the NTSB's findings, it was now possible for Boeing to show that the accident was caused by, or became inevitable because of, events that occurred over navigable water. But, asked the Seventh Circuit, was that sufficient?

In *Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995), the Supreme Court held that admiralty jurisdiction is available when an "injury suffered on land was caused by a vessel on navigable water," if the cause bears a "substantial relationship to traditional maritime activity." Asiana's plane had crossed the Pacific Ocean, a traditional maritime activity, and the cause of the accident likely occurred over the water. But, an airplane is not a "vessel" and it flew "over" rather than sailed "on" the water. The Seventh Circuit asked whether that made a difference.

It answered this question "no," because it found no *functional difference.* It reasoned that an airplane, like an ocean-going vessel, moves passengers from one continent to another, crossing the high seas outside of any nation's territory, and seas adjacent to the United States but outside any state's territory. Thus Asiana 214, a trans-ocean flight, was a substitute for an ocean-going vessel, and within the scope of *Executive Jet's* observation that this situation "might be thought to bear a significant relationship to a traditional maritime activity." *Id.* at 271. Admiralty jurisdiction was thus available.

But what about the propriety of the removal? Plaintiffs argued that even if the events came within §1333(1), Boeing still was not allowed to remove the suits under 28 U.S.C. §1441(a). However, regardless of case precedent to the contrary,[4] and the plain language of the "savings to suitors" clause,[5] the Seventh Circuit said that §1441(a) permits removal of any suit over which a district court would have original jurisdiction, and because these suits were within the district court's original admiralty jurisdiction, that condition was satisfied.

This ruling seems to run headlong into *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), where the Supreme Court held that an admiralty claim under §1333 is not a federal-question claim under §1331.[6] But, the Seventh Circuit had hung its jurisdictional hat elsewhere. When the Supreme Court decided *Romero*, 28 U.S.C. §1441(b) said this:

> *"Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.* ***Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."*** *(Emphasis added)*

As the Seventh Circuit noted, it mattered to the Supreme Court whether *Romero* arose as a "federal question" under §1331, or as an "other" action within federal jurisdiction arising under §1333(1). The Court held in Romero that it was an "other" action. If the language of §1441(b) had remained unchanged, removal in *Le Junhong* would have been improper because Boeing's headquarters is in Illinois. But, in 2011, Congress amended §1441(b).[7] It now reads:

> *(b) REMOVAL BASED ON DIVERSITY OF CITIZENSHIP.—(1) In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded. (2)* ***A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a)*** *of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought. (Emphasis added).*

Having found that plaintiffs could have filed their suits directly in federal court pursuant to §1333(1), which supplies admiralty jurisdiction, the Seventh Circuit held that original subject-matter jurisdiction existed for removal purposes. In other words, because §1441(b) only limits removal based upon "diversity jurisdiction" under §1332, and admiralty jurisdiction is based on §1333(1), Boeing was free to remove the case. If the "saving to suitors" clause allowed plaintiffs to stay in state court even after the 2011 amendment, they were free to waive or forfeit that right.[8]

What have the district courts in the various federal circuits done regarding removal of admiralty cases since the 2011 amendment to §1441(b)? You can find a nationwide chart which is part of *A Survey of Recent Jurisprudence on the Removal of Maritime Claims from State to Federal Court* by Ms. Caitlin Baroni in the Tulane Maritime Law Journal.[9]

1. *This was the incident where local San Francisco television station KTVU, the victim of a tasteless prank, identified the pilots of the aircraft as "Sum Ting Wong," "Wi Tu Lo," "Ho Li Fuk," and "Bang Ding Ow." See https://www.youtube.com/watch?v=L1JYHNX8pdo*
2. *The district court held that admiralty jurisdiction is available only when an accident becomes inevitable while the plane is over water.*
3. *More accurately, applying maritime terminology, this was an allision.*
4. *See Oklahoma ex rel. Edmondson v. Magnolia Marine Transp. Co., 359 F. 3d 1237, 1241 (10th Cir. 2004) (no removal of admiralty actions in the absence of independent basis for removal); Morris v. TE Marine Corp., 344 F. 3d 439, 444 (5th Cir. 2003) (same); In re Chimenti, 79 F. 3d 534, 537 (6th Cir. 1996) (same); Servis v. Hiller Sys. Inc., 54 F.3d 203, 207 (4th Cir. 1995) (same).*
5. *§ 1333 states: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."*
6. *Federal questions (i.e., 28 U.S.C. § 1331) have always have been removable without regard to the defendant's citizenship or residence, and the potential presence of non-diverse defendants.*
7. *See Federal Courts Jurisdiction and Venue Clarification Act of 2011, §103, Pub. L. No. 112-63, 125 Stat. 759.*
8. *Plaintiffs on appeal did not invoke Romero or the "saving to suitors" clause.*
9. *http://www.tulanemaritimejournal.org/recent-developments-removal-maritime-claims-state-federal-court*

Randy Hall and Mattie Taylor Sponsor Faith House for Men Suffering from Addictions

The Pulaski House is one of fourteen houses that is operated by John 316 Ministries in Charlotte, Arkansas. John 316 Ministries is a self-described "spiritual boot camp for men with addictions." The Pulaski House and its sister houses are aptly named after the county in Arkansas where its donors reside. The Pulaski House has room for 16 men and is currently full. The ministry is self-sufficient but also relies upon donations for growth. Residents complete the year-long program and are taught skills such as catering, body shop work, screen printing and parking lot striping. Each of the profits from these ministries is returned to the growth of the ministry.

Top 10 iPad Apps for Lawyers

By Tad Thomas

I think every lawyer has attended a CLE or two where back-to-back speakers have expressed two very different opinions on the same issue. Sometimes a single speaker will even adopt two different opinions between the beginning of the hour and the end. Things are no different when it comes to technology and using an iPad in your law practice. There are a wide variety of opinions on what apps are best for trial presentation, reviewing deposition transcripts, taking notes, and just about anything else. I can't say that I've seen every iPad app that is available, since my bank account will only allow me to buy so many new toys, but I've seen a lot and these are my favorites. This is not to say there aren't other great ones that have very similar functions, but in my experience, this list of apps represents the most popular and well-developed apps available to the iPad carrying attorney.

Mr. Thomas is a nationally recognized speaker on the use of technology for attorneys. Follow Tad on Twitter @tadthomaslaw or @thomaslegaltech.

iAnnotate—PDF Editor

This has been my most used app since I bought my first iPad four years ago and is a must-have for attorneys trying to maintain a paperless office. When documents come into my office they are scanned, OCR'd, and loaded into case specific electronic folders in DropBox. Then, when it is time to for me review medical records, discovery responses or other documents, iAnnotate allows me to download PDF's from DropBox, review and markup the documents, and then sync edited files back to DropBox so that all of my files are up-to-date. iAnnotate has a multitude of colored highlighters, pens, stamps and other tools to accomplish the task. The app is similar to Adobe Acrobat Professional's functionality and works either independently, or in conjunction with the desktop version of Adobe Pro.

TranscriptPad—Deposition Transcript Summaries

iAnnotate was once my go-to app for reviewing deposition transcripts and still can serve that function quite nicely. But now, a more specialized program, TranscriptPad, is my choice for highlighting, underlining and note taking on transcripts. TranscriptPad works much like Summation does on a PC. Transcripts can be downloaded from DropBox, from iTunes, or opened from email and categorized within the app by case file. Then, by simply selecting line numbers, a dialog box will pop up giving you options like highlighting in different colors, underlining, or flagging key text. If a user flags a selection, they will be able to associate customized notes with that section of the transcript.

My favorite function of TranscriptPad is its ability to create issue codes. Once you select text and the dialog box is opened, the app will give you the opportunity to create a particular issue code, say "damages." Other lines from the deposition can then be associated with that same issue. Later, you can search for all selections associated with that issue, either within a single deposition or within all of the depositions in a particular case. TranscriptPad will also allow you to generate a report containing all of those selections.

Finally, users can also search for key terms, either within a particular deposition or those transcripts for an entire case. Users can also email specific selections directly from a transcript or print the entire transcript with or without annotations.

PDF Expert—PDF Editor

So far, PDF Expert is the only app I've found that will allow a user to fill in PDF forms. You will want to download this app if you utilize fillable PDF forms issued by the court system in your jurisdiction.

Noteshelf

Since I run a paperless office, I also use the iPad for note taking. Noteshelf is my go-to app for making handwritten notes in client meetings, hearings, depositions etc. One of the key features that make Noteshelf attractive is the ability to directly upload a document to DropBox or Evernote, another program I use frequently.

There are more note taking apps available than I can count and many are very good, including Notability which allows you to record audio of a meeting while taking notes. Other popular note taking apps include, Penultimate, Note Taker HD and NotesPlus.

Microsoft Office Suite—Word Processing

You can now get Microsoft Word, Excel and Powerpoint for your iPad. They are space hogs and take a lot of memory, but if you're a Microsoft Office, you'll want these apps. With the advent of the new iPad Pro and the functionality of the Microsoft Office Suite, I now leave my laptop at home on many trips.

AirSketch

This is a great app for use in depositions or at trial. First, it can act as an electronic whiteboard allowing an attorney or witness to write directly on the iPad, which can then be mirrored to a TV or projector. AirSketch will also allow you to load photographs into the app from your iPad photo roll and mark them up with colored pens or highlighters. This is a useful tool if you want to have a witness annotate photographs of accident scenes or medical images. The annotated photos can then be emailed from the app as a PDF or image file.

ExhibitView or TrialPad

If you have used Trial Director or Sanction and like them, you will love these much easier to use trial presentation apps. I have found that both will do 90% of what Sanction and Trial Director will do at a fraction of the price. Both will allow you to display images of photographs, documents or video to TV or projector as well as highlight, annotate or magnified exhibits on the fly. With an Apple TV all of this can be done wirelessly. One thing they don't do yet is to synch video with the transcripts. You'll need to use Trial Director for that or InData's iPad app, DepoView.

KeyNote

Ever since converting to the Mac from the Windows based PCs, I have also converted from PowerPoint to KeyNote. I have found that it is easier to use and it has more features. However, the iPad Keynote app is missing some of the features of the full-version including many of the fonts and slide transitions.

Evernote

While Evernote isn't solely an iPad app, in many of the seminars I teach I let people know that it is probably the most useful program I have. Evernote allows users to save and organize just about any kind of electronic file including those saved it Word, PDF or audio files. Each note can then be "tagged" with key terms to allow for quick retrieval and sorted into user created directories.

I use Evernote to maintain a database of expert witnesses, including their CV's, rate sheets, and list cases in which they have been involved. I also use it as a legal research file, a medicine and science file, to keep track of travel documents, such as confirmations and itineraries, and for research on individual cases.

Because Evernote's databases are synced to the Cloud users are able to access files from all of their of devices. Evernote has desktop applications for both PC and Mac as well as apps for the iPhone, iPad, and Droid platforms.

Essential Anatomy 5

I love high quality, customized, medical illustrations as demonstrative evidence. However, some cases simply don't justify the cost. For depositions and trials of smaller cases I like using the Essential Anatomy app. This gives me a low cost, but high quality and engaging demonstrative. Doctors love to use this app when describing medical procedures and conditions. There are a whole host of apps from 3D4Medical, the company that created Essential Anatomy. It is well worth the cost of downloading all of them.

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How the Settlement Solutions National Pooled Trust Protects Your Client's Eligibility for Medicaid/SSI

By Jason D. Lazarus, J.D., LL.M, MSCC

Clients who receive needs based benefits such as Medicaid and SSI require special planning to protect eligibility for those public benefits. More and more frequently, a pooled special needs trust is being utilized to preserve eligibility given the ease with which one can be set up and the relatively low cost. A pooled special needs trust is established by a non-profit trustee pursuant to 42 U.S.C. 1396p (d)(4)(C). Under that provision of the United States Code, there are four requirements for creation of a pooled trust. First, it must be established by a non-profit who acts as trustee. Second, the trustee must maintain a separate account for each beneficiary but funds may be pooled for investment purposes (hence the name of pooled trust). Third, each sub-account must be established solely for someone disabled under the Social Security definition. Lastly, any funds that remain at death may either be retained by the non-profit for charitable purposes or used to reimburse the applicable state Medicaid agency or agencies.

Pooled trusts are different from "stand-alone" SNTs under 42 U.S.C. 1396p (d)(4)(A) in three ways. First, the pooled trust can be established by the injury victim themselves, whereas a stand-alone trust can only be established by a parent, grandparent, guardian or court order. This is a big advantage in the context of a personal injury settlement as many times there is no parent or grandparent to establish it. Therefore, a court order becomes necessary which involves an extra step. Second, there is no age restriction for use of the pooled trust, whereas with a stand-alone SNT, there is an age limitation of sixty five. If you are over sixty five, you can only create a pooled trust. With the pooled trust, the beneficiary joins an already established master trust, so there is no need for a customized trust document like a stand-alone SNT or the expenses that come with it.

When evaluating pooled special needs trust options for an injury victim, it is very important to look at the intent behind the creation of that pooled trust. Many pooled trusts are created to serve the elderly looking to qualify for Medicaid coverage to pay for nursing home care. The purpose of a pooled trust is to assist injury victims to remain eligible for needs-based public assistance benefits. When evaluating pooled trust options, you should look for a pooled trust that understands the special needs of injury victims and caters to those needs. You should also look to find a pooled trust that treats every trust beneficiary with the dignity and respect they deserve.

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What sets pooled trusts apart?

To determine what sets a pooled trust apart from others, you have to know the right questions to ask. You should ask first, is the non-profit trustee for the pooled trust one that understands personal injury settlements. Second, you should ask how the trust is administered. Many are administered by the non-profit, whereas a select few employ a national trust company to provide administration services to trust beneficiaries. A national trust company administrator can often provide years of experience and sophisticated, on-line platforms which many non-profit trustees simply can't provide. In addition, a trust company administrator may be able to provide services such as a debit card for routine monthly purchases and an employment solution for family members who are acting as caregivers. For family members providing care, an employment solution can provide employee based benefits and withholdings to protect the family caregiver. Investigating and making sure those kinds of services are available is highly important in the selection process.

Third, you should ask what kind of fee/cost structure the pooled trust has. Many pooled trusts have a high one-time enrollment fee and annual fees approaching 2%, whereas others charge significantly less. Fourth, you should ask what the pooled trust's policy on retained funds is. Pooled trusts are allowed to retain funds at death, and many do retain 100%. However, other pooled trusts will distribute all monies at death to the heirs, less a small retained amount and less the amount due to Medicaid pursuant to their payback rights. Lastly, you should ask how the non-profit trustee uses the funds it does retain. This can vary greatly from pooled trust to pooled trust. You should consider a trust that gives back to the civil justice system from the funds retained by the non-profit in situations where the amount due to Medicaid exceeds the balance left in the trust. For example, you might ask the trustee if the trust gives back to the civil justice system through contributions to other non-profits and charities that protect the civil justice system, as well as our civil rights.

One last question to ask is the availability of a solution for those who are dual eligible. A select few national pooled trusts have a unique option which is a Medicare Set Aside (MSA) sub-trust for clients whom are dual eligible. Unfortunately, an often ignored issue is the fact that MSAs are an available resource for Medicaid beneficiaries. So if an MSA is established for someone who is dual eligible, but it isn't held inside an SNT, then that client will lose Medicaid coverage. The pooled trust sub-account can be set up to hold the MSA, thus making it non-countable for purposes of qualifying for Medicaid and/or SSI. This option provides a complete solution for those who are dual eligible with separate sub-accounts for the non-MSA and MSA funds. The MSA funds are administered using a professional MSA administrator which does charge an additional fee beyond the annual trustee fee charged by the trustee. All fees come from the non-MSA subaccount, as Medicare regulations don't allow the MSA to pay administration costs out of the funds set aside.

Conclusion

In summary, the right pooled trust can provide a cutting-edge solution to an injury victim on needs-based benefits and those that are dual eligible. They are typically a low-cost trust option which provides a tremendous amount of service to its beneficiaries. You should find one that caters to the personal injury marketplace and has a national network of attorneys available to prepare the necessary legal documents for joining the trust as well as providing proper notices to the government agencies. This makes for a seamless solution for both trial counsel and injury victims.

> ***The purpose of a pooled trust is to assist injury victims to remain eligible for needs-based public assistance benefits.***

Taking Your Case Outside of the Courtroom: Fighting to Make it Right

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As attorneys, we spend our days and nights working to resolve our clients' cases. But is it not also our job to right the wrong? To fight for change so that future tragedies are prevented? When we see the pain and suffering our clients have gone through after catastrophic accidents, we are determined not only to win each case, but to fix the problem so another family doesn't have to suffer.

The most recent figures from CPSC's NEISS system show that an estimated 1,600 injuries associated with residential elevators and lifts were seen in emergency departments from 2011 through 2012. In addition, death and serious injury incidents continue to occur nationwide affecting a wide age-range of children.

After three-year-old Jacob Helvey was horribly injured in an elevator accident in his Georgia home on Christmas Eve of 2010, his parents had two wishes – to have the funds to care for their brain damaged son and to ensure that this type of tragedy would never happen to another child. After litigating and ultimately resolving their clients' case, STLA members Andy Cash and Dave Krugler traveled to Washington, D.C. to present the issue of child entrapment associated with home elevators to the U.S. Consumer Product Safety Commission (CPSC). Their goal was simple: to have the CPSC recall all defective home elevators. As they filed a formal petition with the CPSC seeking a recall and asking the government to set mandatory standards, another child was unfortunately severely injured in a home elevator accident.

During the Thanksgiving holiday in 2013, ten-year-old Jordan Nelson suffered devastating traumatic brain and spinal cord injuries as a result of becoming entrapped by a vacation home elevator in South Carolina. Because of a hazard with residential elevators that has existed for decades, the Nelsons' lives have been changed forever. Unfortunately, Jordan's injuries are permanent and he will require around the clock care for the remainder of his life.

After extensive litigation against multiple defendants responsible for Jordan's injuries, the case settled. Although this settlement was a wonderful result for the family, it is bittersweet because this accident should have never happened. Andy and Dave have made it their firm's mission to make elevator manufacturers, installers and maintenance providers act to design, install and maintain these elevators so that accidents like this one never happen again. They are hoping that the CPSC will act on their petition and force the elevator industry to behave more responsibly.

To make their efforts even stronger, the Cash Krugler Fredericks firm has partnered with The Safety Institute, a 501(c)(3) non-profit organization that emphasizes injury prevention and product safety. "This petition dovetails perfectly with the mission of The Safety Institute – to address hazards and defects that are under-served," said Sean Kane, founder and president of the board of directors of The Safety Institute. "We are hoping that the CPSC will initiate rulemaking to close this longstanding safety gap."

The elevator industry has known about these hazards for more than 80 years. Following the resolution of the Helvey and Nelson cases, and due in part to the efforts of Andy and Dave and their firm, much of the elevator industry has responded by changing the designs of home elevators by tightening the spacing requirements between the outside door and the accordion door in home elevators, as well as adding important safety features, such as infrared light curtains. However, the industry continues in its refusal to retroactively address the potentially hundreds of thousands of defective home elevators on the market, despite knowledge of literally dozens of catastrophic injuries and deaths. We cannot just accept the voluntary standards process because it has not reduced the harm no addressed the defect. A mandatory standard must be implemented. The petition that Andy and Dave filed on behalf of the Helveys demands a recall to require a retrofit repair that would detect a presence in the door path and prevent elevator operation. Another proposed solution is to physically fill the gap to prevent children and small adults from becoming entrapped.

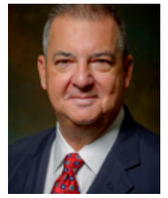
We cannot just accept the voluntary standards process because it has not reduced the harm no addressed the defect. A mandatory standard must be implemented.

The efforts of Andy and Dave and their clients are making a difference, resulting in significant regulatory change in the state of Georgia. Expedited changes were made to the state elevator code, now limiting the space between the hoistway door and elevator door or gate. This mandate is saving lives. Although the code changes in Georgia are significant, there are still thousands of unsafe and hazardous elevators in Georgia and across the country. Until the problem is completely fixed, Andy and Dave are committed to continuing to pressure the elevator industry to make their existing and new elevators safe so that no family has to suffer like the Helvey and Nelson families.

In addition to partnering with The Safety Institute, the Cash Krugler Fredericks firm has teamed up with the media to get the warning out. They have worked with local and national TV networks to expose the hazards of the elevators and to inform families. This media push is critical in high volume travel times – holidays and vacation – when families are going to exciting and unfamiliar locations with residential elevators that may be unsafe. In addition, the media awareness helps push legislators to recognize the wrong and take action to change the regulations. The media helps hold the legislators accountable, as well as continue to keep the spotlight this important safety campaign. As Andy and Dave shared in a "CBS This Morning" interview, "If we wait any longer, there's going to be another Jordan Nelson – there is. And it's going to happen and it's going to happen soon." They truly hope it doesn't happen again, but they know the only way to guarantee that is to keep fighting for a change, not just a settlement.

When they were hired by the Helvey and Nelson families, Andy and Dave made a commitment not only to get the best result possible for them, but to take whatever steps were necessary to prevent future tragedies. They continue in their fight and will not stop until the problem is fixed.

The Jones Act, Unseaworthiness, and Jury Trials



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By Richard M. Martin, Jr.

Despite there being navigable water bodies everywhere in the state, many Louisiana trial lawyers never represent a maritime client. That is why they may be unfamiliar with Jones Act negligence claims and General Maritime Law unseaworthiness claims, and when you do or do not get a jury.

A. JONES ACT CLAIMS

The Jones Act, 46 U.S.C. § 30104 *et seq.*, is a federal statute originally passed in 1920 that extended the Federal Employer's Liability Act (FELA) to seamen. It is a *statutory* remedy, whereas claims for unseaworthiness arise under the General Maritime Law. 46 U.S.C. § 30104 and provides:

> *"A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section."*

Under the Jones Act, a seaman has a cause of action *if an employer's negligence played any part, even the slightest, in producing an injury. Gavagan v. U.S.*, 955 F.2d 1016, 1018 (5th Cir. 1992). A Jones Act employer has a duty to provide a reasonably safe place to work. *Daigle v. L & L Marine Trans. Co.*, 322 F.Supp.2d 717, 725 (E.D. La. 2004). However, liability does not attach to a Jones Act employer for injuries suffered by its employees, absent proof that the injury occurred during the course of employment, that there was negligence on the part of the employer, and that such negligence was the cause, in whole or in part, of the seaman's injury. *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 338 (5th Cir. 1997) (en banc). Any failure of defendant to warn plaintiff of conditions of which he was, or should have been, aware is not negligence on the part of the defendant, and a seaman is obligated under the Jones Act to act with ordinary prudence under the circumstances. *Gautreaux*, 107 F.3d at 339.

In order to prevail on his Jones Act claim, cases such as *Robinson v. Zapata Corp.*, 664 F.2d 45 (5th Cir. 1981) and *Chisholm v. Sabine Towing & Transp., Inc.*, 679 F.2d 60 (5th Cir. 1982) teach that a plaintiff must establish each of the following elements by a preponderance of the evidence:

(1) At the time of the injury, Plaintiff was acting in the course and scope of his employment as a member of the crew of a vessel in navigation;

(2) The defendant was negligent as claimed; and

(3) Such negligence was the legal cause of Plaintiff's damages.

B. UNSEAWORTHINESS CLAIMS

Unseaworthiness is not negligent conduct, it is a *condition*; there must be a showing that the vessel, her equipment, or crew is defective in some way. *Usner v. Luckenback Overseas Corp.*, 400 U.S. 494 (1971). The duty includes supplying an adequate and competent crew for the task at hand. *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724 (1967). An unsafe method of work can render a vessel unseaworthy. *Rogers v. Eagle Offshore Drilling Services, Inc.*, 764 F.2d 300, 303 (5th Cir. 1985)(citing *Luneau v. Penrod Drilling Co.*, 720 F.2d 625 (5th Cir. 1983)).

A ship owner has an absolute duty to provide a seaworthy vessel. *Baker v. Raymond International, Inc.*, 656 F.2d 173 (5th Cir. 1981), *cert. denied*, 456 U.S. 983 (1982). Although the duty is absolute, it is a duty only to furnish a vessel and appurtenances *reasonably fit* for their intended use. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960). The owner is not obligated to furnish an accident-free ship. *Id.*

In an action for unseaworthiness, plaintiff's burden to establish causation is more stringent than under the Jones Act.[1] Plaintiff must show:

(1) The condition played a *substantial* part in bringing about or actually causing the injury; and

(2) Proximate cause, that is, that the injury was either a direct result or a reasonably probable consequence of the act or omission.

C. DO I GET A JURY?

Fed.R.Civ.P. 38 (a) provides that "The right of trial by jury, as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate." However, Fed.R.Civ.P. 38 (e) carves out an exception, providing: "These rules do not create a right to a jury trial on issues in a claim that is an admiralty or maritime claim under Rule 9(h)."[2]

If a plaintiff brings a Jones Act claim in federal court and does not designate it as one "in admiralty," he is entitled to trial by jury.[3] A plaintiff asserting a Jones Act claim in state court also has the right to trial by jury. *See*, 46 U.S.C. § 30104. Trial by jury of "savings to suitors" claims in state court turns upon state law. *See, Linton v. Great Lakes Dredge and Dock Co.*, 964 F.2d 1480 (5th Cir. 1992) and *Lavergne v. Western Co. of N. Am.*, 371 So.2d 807 (La. 1979). La. C.C.P. art. 1732(6) formerly provided "savings to suitors" plaintiffs with the option of a jury trial or a bench trial such as plaintiff would enjoy in federal court, but it was repealed in 1999. *See*, Act 1363 of 1999.

If federal jurisdiction is founded *solely* upon 28 U.S.C. § 1333 (admiralty and maritime claim jurisdiction), the parties are not entitled to trial by jury. This includes the general maritime law claims for unseaworthiness and for failure to pay maintenance and cure. However, when a Jones Act claim is asserted on the "law" side of federal court and is joined with an unseaworthiness claim or a maintenance and cure claim, as to which there is no independent " law" side jurisdiction, all of the claims may be tried together to a jury. *See, Fitzgerald v. United States Lines*, 374 U.S. 16(1963).

If a plaintiff brings a Jones Act claim in federal court and does not designate it as one "in admiralty," he is entitled to trial by jury.[3]

1. *A seaman's burden of proving causation in a Jones Act negligence claim has been deemed "slight," as a seaman must only show that "his employer's negligence is the cause, in whole or in part, of his injury."* Gautreaux, *107 F.3d at 335;* Comeaux v. T.L. James & Co., *702 F.2d 1023 (5th Cir. 1983).*
2. *Fed.R.Civ.P. 9 (h(1) provides: " If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated."*
3. *However, the Jones Act defendant does not have a right to a jury trial.* See, Rachal v. Ingram Corp., *795 F.2d 1210 (5th Cir. 1986).*

Family Advocates to Prevent Tragic Drownings

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By Christopher L. Marlowe

It was the day after Thanksgiving. Two year-old Soleila Estien was taking a nap with her father in the family's apartment in Hollywood, Florida. Her mother, Vahnessa, was at work, and Grandma had just dozed off with a book. Everything about this beautiful Friday afternoon was warm and pleasant.

Dad was startled awake not long after he and Soleila lay down on the couch together. She was gone. As parents usually do when searching for their toddler, dad looked behind couches, in closets and other such places where little ones amuse themselves with hide and seek. After a diligent search while calling her name, dad had not having found Soleila, and so he woke Grandmom, and the two began looking with greater urgency and rising concern.

They searched the parking lot, behind trees, under cars, throughout the apartment complex, including around the complex's pool. Their calls turned to cries and desperate screams for Soleila. Then they saw something that made their stomachs drop. On the edge of the pool sat Soleila's little flip flops. The outline of her little body was now apparent at the bottom of the pool.

The apartment complex where young Soleila died was an aquatic safety disgrace. The gates to the pool were neither self-closing nor self-latching. The laundry facilities were located within the pool deck area, prompting residents to leave the gate open so they could carry clothes baskets back and forth without bothering with the lock. When Grabiel pulled his unconscious little girl from the water, there was no telephone on the deck to dial 911. Against time and fate, he tried CPR while carrying her back to the apartment, but she was dead.

Drowning is the leading cause of injury-related death for children one to four years of age. In Florida, drowning is the leading cause of all deaths for this age category, and Florida has the highest drowning death rate for children under the age of five. For obvious good reason, federal, state and local laws have addressed these preventable accidents by attempting to regulate the safe operation of residential pool facilities.

In Soleila's case, for example, The City of Hollywood Code of Ordinances, § 158.04 reads, in pertinent part:

> *"Every outdoor private swimming pool shall be completely surrounded by a fence, wall, or enclosure in accordance with the 2007 Florida Building Code, and 2009 Supplement. Such fence, wall, or enclosure shall remain in place at all times and shall not be readily removable….All gates or doors opening through such enclosure shall be equipped with a self-closing and self-latching device for keeping the gate or door securely closed at all times when not in actual use."*

The Florida Department of Health regulation 64E-9.006(2)(h) requires that:

> *"All public pools shall be surrounded by a minimum 48 inch high fence or other substantial barrier approved by the department. The fence shall be continuous around the perimeter of the pool area that is not otherwise blocked or obstructed by adjacent buildings or structures and shall adjoin with itself or abut to the adjacent members. Access through the barrier or fence from dwelling units such as homes, apartments, motel rooms, and hotel rooms, shall be through self-closing self-latching lockable gates of 48 inch minimal height from the floor or ground with the latch located a minimum of 54 inches from the bottom of the gate or at least 3 inches below the top of the gate on the pool side."*

Florida Statute 515.27 and 515.29 read in pertinent part, respectively:

> *"All doors providing direct access from the home to the pool must be equipped with a self-closing, self-latching device with a release mechanism placed no lower than 54 inches above the floor."*
>
> *"Gates that provide access to swimming pools must open outward away from the pool and be self-closing and equipped with a self-latching locking device, the release mechanism of which must be located on the pool side of the gate and so placed that it cannot be reached by a young child over the top or through any opening or gap."*

While these laws were written with the deaths of so many innocent children in mind, too many communities either ignore them or are unaware of their existence. Acutely aware of this reality, Vahnessa and Grabiel Estien have shaped their personal tragedy into a motivating force for change and education. Since that most awful day, they have managed the toughest feat that parents often have after losing a child – staying together. And together, they have put one foot in front of the other, as one, and, as a result, their newly inspired lives are making swimming pools everywhere safer.

Fast forward six years from the death of their beloved daughter, and the Estien family has been blessed with the births of two sons. Teaching them to swim and enjoy the water was a sacred priority for both Vahnessa and Grabiel. They did not want their boys to fear the water. But they were determined to ensure that their children respected it and that the adults responsible for aquatic facilities did their part to responsibly operate their pools.

After the civil matter relating directly to Soleila was resolved, the family started the Soleila G. Estien Memorial Swim Strong Scholarship. The family persuaded local businesses to fund donations for families who could not independently afford swimming lessons for their children. One of the most effective awareness tools for these businesses was the book Vahnessa Estien wrote in honor of her daughter, entitled "The Boy Who Could Swim." It is a children's book, written with as much heart, positive messaging and hope as any story borne of tragedy possibly could be. Parents can enjoy reading to their children a positive and enjoyable story of hope, courage and safety thanks to Vahnessa's courage in writing this book.

Vahnessa and Grabiel searched their souls after their daughter's death. Somehow they managed, for the sake of their marriage and their sons, to find the will and power to harness their grief toward a positive goal. I am certainly proud of the work we did for the family and the outcome that was achieved. However, I am mostly thankful to the Estiens who, through their own grief process, are a constant reminder to me that what we do as advocates has the ability to contribute, even a little, to the manner in which our clients live the remainder of their lives after tragedies most of us would fear to even imagine. Certainly, doing what we do every day would be much more difficult, if not impossible, were it not for clients such as these, who, through their efforts, are making the next tragedy less likely than those which came before.

New **STLA** Members

Membership in the Southern Trial Lawyers Association is by invitation only. If there is someone you would like to invite to join, please send me an email with their name and mailing address, and I will put an application in the mail to them. For the current list of the Executive Board, Board of Directors, past presidents and previous War Horse recipients, or if you would like to see a complete list of members, visit our website: www.southerntriallawyers.com.

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WHAT HAPPENS HERE, STAYS HERE...UNLESS IT SHOULDN'T

Friday morning CLE at the Whitehouse Hotel.

Earl Denham explains meaning behind pictures on the wall at the Ocean Springs Community Center.

Maria Glorioso, Nick Maguire, Patricia Green, Ron Anderson and others enjoying an afternoon on one of the two Biloxi Schooners.

Saturday night dinner at Ocean Springs Community Center